CHAPTER 9 : ADMINISTRATION OF THE SYSTEM AND MISCELLANEOUS MATTERS

Term of reference 1: Whether any changes to the law and practice governing the conduct of Parliamentary elections are necessary or desirable.

Term of reference 9: Any other question relating to the electoral system which you may see fit to inquire into, investigate, and report upon.

Introduction

9.1 Under these headings we consider some important aspects of the electoral system which are not specifically covered in our other terms of reference. In doing so, we have borne in mind the close and careful supervision of the administration of elections exercised by the Select Committee on the Electoral Law.

9.2 This chapter deals with:

(a) the right to vote and to be a candidate (paras. 9.3 to 9.29);
(b) the registration of electors (paras. 9.30 to 9.65);
(c) voting procedures (paras. 9.66 to 9.90);
(d) the calling of general elections and by-elections (paras. 9.91 to 9.96);
(e) the registration of political parties (paras. 9.97 to 9.107);
(f) the administration of the electoral system (paras. 9.108 to 9.137);
(g) the settlement of disputes under the Electoral Act and its enforcement (paras. 9.138 to 9.148);
(h) an Upper House or Second Chamber (paras. 9.149 to 9.156);
(i) the role of the Speaker (para. 9.157);
(j) local government (para. 9.158);
(k) opinion polls (paras. 9.159 to 9.169);
(l) the cost of implementing our recommendations (paras. 9.170 to 9.173);
(m) entrenchment (paras. 9.174 to 9.188);
(n) the ongoing review of the electoral system (paras. 9.189 to 9.190).

THE RIGHT TO VOTE AND TO BE A CANDIDATE

9.3 The democratic principle of universal suffrage or "one person one vote" means that everyone shall share in choosing their representatives in Parliament and Government to make decisions affecting them. Universal adult suffrage has existed in New Zealand for almost a century. The 1852 Constitution Act conferred voting rights on adult males with certain property holdings. However, the property qualification was abolished in 1879 and women were enfranchised in 1893. For adults, voting ceased to be a privilege extended only to those who were thought to deserve it, and became a right, open to all members of the community unless there was good reason to restrict it.

New Zealand's public commitment to the right to vote was confirmed in 1978 when the Government ratified the International Covenant on Civil and Political Rights. Article 25 of the Covenant states that "Every citizen shall have the right and the opportunity ... without unreasonable restrictions ... to vote and be elected at genuine periodic elections ...".

9.4 As a general principle, we accept that the qualifications for candidates should be the same as those for voters. Anyone who qualifies as a voter should also be able to stand as a candidate. Conversely, no one who fails to qualify as a voter should have the right to stand as a candidate. Before discussing these issues, we draw attention to the unsatisfactory way in which voting qualifications are set out in the present Electoral Act (cf. para. 9.135). The question of general eligibility to register is combined, confusingly, with the subsidiary question of eligibility to register in a particular electoral district. Qualifications and disqualifications are dealt with in 2 different sections separated by over 3 pages on the Maori option and other matters. One of the most important criteria, age, is not mentioned in these sections but is set out in the preliminary definitions (under "Adult").

9.5 **Citizens and permanent residents.** Voting is open in New Zealand both to citizens and permanent residents (the latter being defined in s.38 of the Act as those who reside in New Zealand and are neither prohibited immigrants nor obliged to leave New Zealand immediately or within a specified time). Extension of voting rights to permanent residents who are not citizens is unusual. In most countries, citizenship is a necessary prerequisite for voting. This is an extension of the earlier rights given exclusively to British subjects, that is Commonwealth citizens, who were not New Zealand citizens. These rights were replaced in 1975 by the present, undifferentiated right to all permanent residents. It may be questioned whether voting rights should be extended to those who have not become full citizens. It could be argued that their commitment to New Zealand is less than wholehearted and that they should be denied a right which is elsewhere restricted to full citizens. On the other hand, permanent residents have been granted permission to live and work in New Zealand and usually make a full contribution to the community and its future. In this sense, they can be said to have earned full membership of the community and to be entitled to vote. Although the extension of voting rights to permanent residents is unusual, we are disinclined to suggest the removal of rights which have long been enjoyed and which may help integrate new members into our community.

9.6 In the case of permanent residents, the Electoral Act makes an exception to the principle that the right to vote implies the right to stand as a candidate. Section 25 states that any registered elector who is a New Zealand citizen or was registered as a voter before 22 August 1975 may stand. That is, those who qualify for the vote as permanent residents rather than as citizens may stand for Parliament only if they were registered before 22 August 1975, i.e., if they qualified under the former provision for British subjects. It is time this anomaly based

essentially on time was removed and the right of candidacy either extended to all qualified voters or restricted to citizens only. Though we see some force in the argument that no one should become an MP who has not formally become a New Zealand citizen, the Act does not in fact accept that opinion, and we incline to the view that the same considerations which led us to accept the right of permanent residents to vote also support their right to stand for Parliament. This has the advantage of placing all those eligible to vote in the same position.

9.7 **Residence.** To be qualified to be enrolled as an elector, one must have at some time resided in New Zealand continuously for not less than 1 year. In addition, continuous absence from the country, for more than 3 years (citizens) or more than 1 year (permanent residents) leads to disqualification, except for public servants, overseas for official purposes, and their families. Some requirement of residence in the country for the government of which a person is voting is entirely justified. There should be some connection between the voter and the country additional to citizenship or permanent residence alone. The present provisions are generous, and it may be that the significance of 1 year's residence is somewhat attenuated if it can be met by a person who has spent a year in the country many years previously, perhaps as an infant. However, to require that this period of residence should occur either immediately before an election or within a number of years before an election could be unduly restrictive, given the frequency with which New Zealanders travel overseas, especially in their early adult years when they become eligible to vote, and given New Zealand's comparatively liberal attitude to the voting rights of permanent residents. We do not propose any change to the residential requirements for voting.

9.8 **Voting age.** Voting is restricted to "adult persons" who are defined (s.2) as persons of or over the age of 18 on the day of the election. In the 19th century, when voting rights were linked with property rights, the voting age was naturally identified with the age of majority, the age at which people could make wills, enter into enforceable contracts and marry without parental consent. The age of majority was fixed at 21 in the late Middle Ages. The previous age in English law had been 15 but it was raised to 21 as the earliest age at which a man could wear a full set of armour and wield a sword or lance.[1] The voting age in New Zealand was 21 until 1969 when it was lowered to 20, a move followed by a parallel lowering of the age of legal majority to 20 in 1970. In 1974, the voting age was lowered again, to 18, first for local body elections and then for general elections. The age of legal majority, however, has remained at 20, though its significance has been steadily reduced as certain rights previously associated with it have been extended to minors. For example, 16-year-olds may now make a will with the permission of the Public Trustee or District Court, and 18-year-olds may make contracts which are enforceable unless a Judge rules otherwise. Eighteen is now the voting age most favoured by

[1] *Report of Latey Commission on the Age of Majority* (1967), Cmnd 3342, p.38.

modern democracies. It is the age used, for example, in Australia, Canada, France, West Germany, the United States and the United Kingdom. Some countries still use higher ages but none, as yet, has an age lower than 18.

9.9 Any stipulated age is, to a certain extent, arbitrary, but should be broadly justifiable in the generality of cases. Arguments on the voting age usually rely on comparison with the various ages at which, for instance, young people can be liable for military service, licensed to drive a car, free to leave school, get married, or buy alcoholic drinks. Though such comparisons are significant, some attempt should be made to justify the voting age in terms of independent principle. We begin from the premise that all residents of New Zealand of whatever age are equally members of the community with rights and interests which should be protected by the community and its government. This assumption, in our discussion of the Representation Commission, provided the rationale for preferring total rather than adult population as the basis on which electoral populations should be calculated (para. 5.24).

9.10 If children are to be included as part of the community, the only justification for excluding them from voting must be lack of competence. Though members of the community, they must be thought not to be capable of deciding for themselves who should represent them and form their government. It might be argued, for example, that they have not developed sufficient rational ability and psychological maturity to plan their lives in advance and see the consequences of their decisions. They cannot judge where their interests lie and therefore cannot make a responsible assessment of the various authorities placed over them. In addition to this general lack of responsibility, children are also said to have a particular political incompetence specifically relevant to the question of voting. They are ignorant of the political system and how it works, and are therefore incompetent to make an informed decision at an election, or even to understand the significance of the act of voting.

9.11 These arguments of incompetence have obvious force when applied to infants and young children, who are still in the care and under the close supervision of their parents, teachers and other responsible and concerned adults, and who are largely unaware of Government and its significance. In the case of adolescents, however, the claims both of political incompetence and of general lack of responsibility are less compelling. Basic knowledge of the political system is acquired gradually and informally during the school-age years, particularly in the home environment. Information about the Government, elections, and how they work is formally incorporated into the school social studies syllabus, particularly the 3rd form section on "social control". Research in a number of western societies has shown that the most rapid increase in understanding of politics occurs between the ages of 11 and 13. By the age of 15 or 16, most young people have acquired a view of the social and political world that is not very different from the

perceptions and understanding of mature adults.[2] Thus, in terms of purely political competence, 15 or 16 might be a better general qualifying age than 18.

9.12 General responsibility is certainly less developed in 14 and 15 year olds than in 18 year olds. But it is at least arguable that if people may leave school, own and drive a car and pay income tax at 15, and may marry, consent to medical operations on themselves, and hold a firearms licence at 16, they should be treated as sufficiently responsible to vote for the political party that most meets their interests as they see them. Indeed, enfranchising young people may help to encourage a sense of citizenship and social responsibility, particularly in those, such as the unemployed, who feel alienated from adult society and hostile to its institutions of legal and political authority. If, as is generally accepted, young people are continuing to mature earlier, the qualifying ages for the various rights which require a degree of personal maturity, including the right to vote, should be subject to regular review. A recent House of Lords decision[3] is evidence of changing attitudes in relation to the legal capacity of minors and the rights of parents to act on their behalf. We see no reason why the process of gradually lowering the voting age, which started in the late sixties, should stop permanently at the present point.

9.13 If the voting age were lowered to 16, not all 16 and 17 year olds would actually have the opportunity to vote, because elections are held only every 3 years. Indeed one of the main effects of lowering the age to 16 would be that more people than at present would have voted before reaching 19 or 20. Though we see such a change as potentially of benefit to young people, its effect on the total political system should not be exaggerated. Sixteen and 17 year olds would be only just over 5% of the total eligible voters and there would be little likelihood of political policies being overwhelmed by the impact of the new voters.

9.14 The Commission believes that a strong case can be made for lowering the voting age to 16. However, given that the voting age is one of the entrenched provisions of the Electoral Act, any change would require broad political and public support. The voting age was the subject of only one submission to us and there appears to be, at present, little public pressure for lowering the age. The attitude of most New Zealanders, we suspect, is that 16 and 17 year olds are not sufficiently mature to cast a responsible vote. However, we are aware that social practices and attitudes in such matters are not static. In the course of history, groups who were previously thought of as naturally excluded from the rights of citizenship have later, just as naturally, been taken for granted as being full citizens. This has been the case with women and may, in time, be true of 16 and 17 year olds. While we believe that public opinion is not yet ready for a change in the voting age, we are conscious that children's rights are not often the subject of

[2]R.E. Dawson, K. Prewitt, K.S. Dawson, *Political Socialisation*, Boston, 1977, pp 55-9; cf. B. Stacey, *Political Socialisation in Western Society*, London, 1978, p.29.
[3]*Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] 1 A.C. 112.

public attention and must therefore be a particular concern of Governments and the law. We would like there to be public discussion on this issue with a view to enabling Parliament to judge when and if the public is ready to accept a change. We therefore recommend that Parliament should keep the voting age under review.

9.15 There are a number of other restrictions or disqualifications resulting from actions or behaviour thought inconsistent with the exercise of voting rights. The matters we now discuss are not of great practical significance in terms of the numbers of people involved. However, they do raise questions of principle that are resolved at the moment by the application of a rule of law. An alternative possibility is to confer a power of decision in the individual case.

9.16 **Persons on the Corrupt Practices List.** Persons who have been found guilty of a corrupt practice relating to an election, i.e., exceeding maximum expenditure, personation, bribery, treating or undue influence (ss.139-143) have their names included on the Corrupt Practices List for the next 3 years. Such people are disqualified from voting while their names remain on the list, that is, in effect, normally till after the next election. People who have seriously abused their own and others' voting rights are appropriately penalised in this way by a temporary suspension of their rights. We agree with the general principle underlying this provision. We think there is a case, that should be addressed in the proposed review of the Act, for the extension of this provision to some or all of the offences under ss. 130 and 132 relating to the secrecy and integrity of the ballot.

9.17 **Prisoners.** The Electoral Act also disqualifies those who are "detained in any penal institution pursuant to a conviction" (s.42 (1)(d)). This provision was repealed in 1975 and reinstated in 1977. A similar disqualification of prisoners is found in many other electoral systems. Its origins lie in the view that voting is a privilege rather than a right, to be extended only to people of substance and standing in the community. Even when voting became a right belonging to all adult members of the community, imprisonment could still be looked on as the temporary exclusion of a person from the community; in this case, a prisoner could be considered to lose, if only temporarily, the rights associated with membership, including the right to vote. It has also been held as illogical to disqualify someone convicted of a corrupt electoral practice and not also to disenfranchise someone convicted of a much more serious crime, such as murder. Practical and administrative difficulties have also been raised. Giving prisoners the vote, it has been argued, could entail allowing other rights, such as freedom of discussion and association, including visits from candidates and canvassers, which could pose administrative difficulties within the prison. Registering voters in prison would publicise their names and addresses and thus threaten the traditional anonymity of prisoners. There is also the question of which electorate prisoners should vote in—the one where they lived before imprisonment or the one where the prison is sited.

9.18 On the other hand, contemporary penal theory is generally opposed to the view that imprisonment entails a general suspension of the rights of citizenship. According to the 1981 Report of the Penal Policy Review Committee, the fundamental principle relating to prisoners' rights "must be that a prisoner retains the ordinary rights of a citizen, insofar as they are consistent with his loss of liberty and the requirements necessary for his proper containment and management in the institution". Thus, prisoners should have access to the courts and the right to be married. The majority view of the Penal Policy Review Committee was that the voting disqualification should be removed. This view has also been urged with some success in Canadian courts by reference to the guarantee there of the right of all citizens to vote under the Canadian Charter of Rights and Freedoms.

9.19 The argument that voting implies a degree of freedom of association incompatible with prison discipline may be overstated. Admittedly, prisoners cannot attend meetings or be canvassed in the normal way, but neither, for instance, can hospital patients. Most prisoners have access to sufficient information through the news media, without personal contact from outside, to enable them to cast a reasonably informed vote. The administrative or practical difficulties in allowing prisoners to vote are not decisive. At present, those on remand without conviction are allowed to vote in general elections and all prisoners may vote in local elections. The objection to their enfranchisement, that they might need to be enrolled in the electorate where their penal institution is sited, has little force. They may be considered as still being members of their former community whose interests should therefore properly be represented by the MP of their former constituency, not the MP in whose electorate they are confined. They could be registered at their former address and their anonymity preserved.

9.20 The argument that if corrupt electoral practices entail disqualification, offences involving imprisonment should also entail disqualification, is not compelling. Though a corrupt practice is clearly a less serious offence than, say, murder, it is an offence specifically directed against the integrity of the electoral system and is therefore appropriately penalised by disqualification. Moreover, imprisonment may not in itself be an adequate criterion of the seriousness of a crime when there are other alternative sentences or penalties which may be imposed. Why, it may be asked, should a convicted prisoner be disqualified when someone fined for the same offence retains the vote? The sanction is also random in its timing, penalising only those who happen to be in prison at the time of the election and not those who are not.

9.21 Nonetheless, we have some sympathy with the view, which we think is widely held, that punishment for a serious crime against the community may properly involve a further forfeiture of some rights such as the right to vote. We therefore recommend that the disqualification should be retained for those who have been sentenced to a long period

of imprisonment. Long-term prisoners can be viewed in the same way as citizens absent overseas who lose their right to vote if they are away for more than a certain length of time. We therefore recommend that the disqualification should be limited to prisoners serving a sentence of imprisonment equal to or greater than the maximum period of continuous absence overseas consistent with retaining the right to vote, namely 3 years.

9.22 **Mental patients.** The Electoral Act, s.42(1)(c), also disqualifies from voting those who are detained in a mental hospital under the Mental Health Act either directly as a result of criminal offences, or while already serving a prison sentence or in connection with drug or alcohol addiction. Since 1975, there has been no general disqualification of civilly committed patients. The main rationale for the existing disqualification is therefore not any supposed lack of mental competence or responsibility indicated by general committal to a mental hospital but the need to treat criminally convicted mental patients in the same way as other prisoners, though its effects are wider than that. We note the recommendation of the 1983 Legal Information Service/Mental Health Foundation task force report *Towards Mental Health Law Reform* that this disqualification be removed altogether. However, if disqualification of other prisoners is retained for those who have been sentenced to 3 or more years' imprisonment, then a similar disqualification should remain for those who, following criminal proceedings, have in fact been detained under the relevant sections of the Mental Health Act for a period of 3 or more years.

9.23 **Prisoners and mental patients as candidates.** The various disqualifications we have discussed, quite properly, imply ineligibility to stand as a candidate. Conversely, removal of a disqualification implies conferring the right to stand. It might be argued that short-term prisoners and mental patients, even if they have the right to vote, should not be allowed to stand as candidates. However, the chances that either would be elected are extremely remote and, if one was elected and was unable to attend a whole session of Parliament, he or she would be required, in the absence of leave being given by the House, to vacate his or her seat under s.32 of the Electoral Act. Using this provision of the Act, or tightening it up if necessary, is a better way of dealing with this difficulty than introducing an exception to the principle that voting rights and candidacy rights are coterminous.

Candidate selection

9.24 The selection of candidates by political parties has traditionally been left entirely in the hands of the individual party organisations and is not in any way regulated by electoral law. The Electoral Act treats candidates as individuals standing for election in their own right and makes virtually no reference to the fact that, in most cases, they are standing as members of particular political parties. However, as most voters are expressing a preference for a party rather than an individual candidate, it is the parties' prior selection of candidates which,

especially in safe seats, effectively determines who is to become the electorate's representative. In the same way, political parties also determine which groups in the community will be represented in Parliament and in what number. It can be argued that the voters' power of choice is seriously curtailed by this process and that they should all be allowed a say in the party selection. The Electoral Act could require that party candidates be selected according to certain procedures which would guarantee a degree of public involvement or accountability in the manner of selection, e.g., by a meeting which all registered party members or their representatives could attend. Thus, West Germany requires that party candidates be selected by a meeting of constituency party members or by a meeting of representatives themselves chosen by a meeting of constituency party members.

9.25 We recognise the critical role that parties play in the electoral process. Under the existing electoral system, we see no grounds, subject to one important qualification, for serious disquiet. Though their practices differ in detail and emphasis, the major parties have liberal membership rules and give a significant role to their rank and file members in candidate selection. While the existing incentives and sanctions in general encourage parties to be open and responsible when selecting candidates, the numbers of women and Maori in Parliament and the total absence from it of members of other ethnic minorities do provide grounds for disquiet.

9.26 **Women and ethnic minorities.** Political parties clearly have a responsibility to ensure that Parliament reflects the diversity in society and that women and ethnic minorities, in particular, are adequately represented. But the parties' function in this respect is likely to be impaired unless women and minority groups can be encouraged in sufficient numbers to take positions of responsibility within the parties' organisation. A survey carried out in 1985 of the political systems of those countries represented in the European Parliament found that the number of women holding important party posts had a very strong bearing on the numbers of women selected as candidates and eventually elected. This finding is confirmed by New Zealand experience and it is only recently that political parties in this country have begun to pay attention to the need to provide more women and minority candidates. In the case of women this has resulted in some improvement in that women currently form 12.6% of the total membership of Parliament. There is still, however, no representation of non-European ethnic groups, other than Maori, in our Parliament. All the evidence leads us to conclude that 2 measures are essential if women's and minority groups' chances of candidacy are to be enhanced. In the first place, parties must actively recruit members from these groups and, having secured their membership, encourage them into taking party posts. This may require changing rules and certainly requires changed attitudes which make allowance for the different needs of women and minority members. Even such small matters as holding meetings at appropriate times for women with children can be

important. In the second place, women and minorities must themselves see the value of active party membership and strive for the political experience which positions of responsibility within their party's organisation can give them.

9.27 There is, of course, another way in which women and ethnic minorities can be assured of candidacy. This involves the adoption of special electoral arrangements similar to the present system of Maori seats, which guarantee the representation of specific groups. One or 2 of the submissions we received from women and the Pacific Islands community did suggest this approach. In the case of women, dual candidacy was suggested, one of the candidates being female and the other male. The Pacific Island community's proposal, on the other hand, involved the creation of special seats. As far as women are concerned, separate seats are difficult to justify when women are slightly in excess of 50% of the population and, therefore, theoretically have the numbers to compel appropriate representation. As far as Pacific Island people are concerned, their numbers are small, but they come from many diverse societies and it would accordingly be very difficult to arrange for appropriate representation for them. In any event, as indicated in Chapter 3, the Commission sees great disadvantages in separate electoral representation for any group. On the basis of the Maori people's experience, we believe such arrangements would only serve to promote separation and division over issues that are of vital concern to women and to the Pacific Island community. The better course is to ensure that political parties recognise their responsibility to facilitate the adequate representation of women and minorities. Our proposals in Chapters 2 and 3 will give them a far greater incentive to do that.

9.28 **Party selection rules.** If the Mixed Member Proportional system (MMP) is introduced the parties will have responsibility for placing candidates in order of priority on a nationwide party list. In that event there is in our view a need to ensure that the existing democratic procedures for selection of candidates are safeguarded. The parties will then be determining through the list, and without decisions by the voters in particular constituencies, who half the members of Parliament are to be. We therefore recommend that if our recommendation for MMP is accepted, the law should specifically require that anyone who stands as a candidate for a particular political party should be selected according to procedures which allow any member of the party, either directly or through representatives themselves elected by members of the party, to participate in the selection of candidates for whom they are eligible to vote, such procedures to be adopted by an Annual General Meeting of the party. The rules setting out the procedures would be subject to challenge by a member of the party, with the Electoral Commission (which we later propose; para. 9.131) having responsibility to determine whether the rules are appropriate. The decisions of the Electoral Commission would be subject to appeal to the High Court. A precedent is to be found in the German Party Law. An important element in the drafting and operation of such legislation would be the

balance between the regular members of the party and central party officials. In the 2 main New Zealand parties, the central party organisations have some (possibly more in the case of Labour than National) influence in candidate selection. This can have a beneficial effect on the overall quality and representativeness of the parliamentary teams and could be even more significant with the introduction of party lists. We would not wish to prevent such procedures, provided they are acceptable to the party as a whole and provided party officials are themselves chosen by all party members or their representatives. Because the regulation of candidate selection is a new development, we recommend that whatever legal requirements are introduced be reviewed by Parliament on the advice of the Electoral Commission after they have been in place for 2 elections.

9.29 **Primaries.** An alternative means of guaranteeing wide public participation in candidate selection would be to require a form of "primary" election, as occurs in the United States, whereby candidates for particular parties are chosen at a prior election open to all voters or all party members. However, we are not in favour of such primary elections. Though superficially attractive, they tend to place a premium on campaign organisation and expenditure by individuals and thus penalise potential candidates who have no personal access to professional expertise or campaign funds. They could also tend to weaken the cohesiveness of political parties if they led to excessive intra-party competition.

Recommendations:

- **41.** The voting age should be reviewed by Parliament from time to time taking account of public opinion (para. 9.14).
- **42.** Prisoners who following conviction have been sentenced to a term of 3 years or more should not be allowed to vote (para. 9.21).
- **43.** Patients in mental hospitals who have, following criminal proceedings, been detained for 3 years or more under the relevant provisions of the Mental Health Act should not be allowed to vote (para. 9.22).
- **44.** If the recommendation concerning the Mixed Member Proportional system is adopted, the Electoral Act should require that candidates standing for a political party should be selected according to procedures which allow any member of the party, either directly or through representatives themselves elected by members of the party, to participate in the selection of candidates for whom they are eligible to vote. These procedures should be adopted by an Annual General Meeting of the party and be subject to challenge before the Electoral Commission. The above requirement should be reviewed (after it has been in operation for 2 elections) by Parliament on the advice of the Electoral Commission (para. 9.28).

REGISTRATION OF ELECTORS

9.30 This chapter has so far been concerned with who may exercise the right to vote or to stand as a candidate at an election. We now consider, and make recommendations on, the 2 procedures that give effect to that right: the registration on electoral rolls of those who are qualified to vote, and the ways in which votes may be cast. Registration procedures and potential improvements to them are discussed in paras. 9.31 to 9.65. Voting procedures are examined in paras. 9.66 to 9.90.

The present registration system

9.31 The following is a description of the main features of the present method of registering electors: under the present law, the process is under the formal control of the Chief Registrar of Electors who is the Director-General of the Post Office and who is charged with the duty of registering electors. In each constituency there is a Registrar of Electors who is an employee of the Post Office and who is responsible for compiling and keeping the electoral roll for that constituency. Computerised rolls for the whole country are compiled and maintained at the Electoral Roll Control Centre in Wellington, principally on the basis of information sent to this Centre by the individual Registrars, or gained from a general revision of rolls.

9.32 **Registration details.** The printed rolls contain, in alphabetical order of name and on numbered lines, the full name, place of residence and occupation (if any) of each registered elector. There is 1 such roll for each General constituency and 1 for each of the 4 Maori constituencies. Registration is compulsory. Any person who possesses the qualifications of an elector set out in s.39 of the Electoral Act and who is not disqualified under the provisions of s.42 of the Act must, on reaching the age of 18, make an application for registration to the appropriate Registrar of Electors. Applications are checked locally and the details of an accepted application are forwarded to the Electoral Roll Control Centre. A person who is not of Maori descent may only apply to be put on a General roll. A person who is of Maori descent has, on first enrolling, the option of applying to be put either on the appropriate General roll or on the appropriate Maori roll. Following each 5-yearly census, this option can be altered or renewed in the course of a special exercise of the Maori option organised by the Electoral Roll Control Centre.

9.33 **Revision of the rolls.** Following a boundary revision, the Chief Registrar uses the number of the meshblock in which a registered elector lives to determine the constituency, Maori or General, in which the elector now resides. Electors are sent cards indicating the constituency they are now in. Rolls are continually maintained through notifications of change of address, death or marriage. At times determined by the Minister of Justice, but at least in every election year, there is a general revision of the rolls, possibly coincident, as in 1986, with the exercise of the Maori option. For a general revision, cards calling for any corrections to the detail of a roll entry are posted to those

on the roll. At the same time there is extensive advertising aimed both at obtaining the return of the cards with any amendments and at inducing qualified but unregistered persons to register. Electors for whom no card is returned, or for whom a card is returned marked "gone no address", are removed from the roll and placed on a "dormant" file, the names on which remain until the time of the next general revision.

9.34 **Publication of rolls.** The main rolls for each constituency must be published at least annually. The dormant file, hitherto unpublished, is also to be published from time to time. Rolls printed in non-election years give the public and political parties an opportunity to check them for accuracy. Another form in which electoral information is published is the "habitation index" in which the names of electors are listed in accordance with their residential address. The habitation index is of considerable help to political parties in canvassing. Copies of it and of the roll for each constituency may be purchased by anyone, and political parties and local authorities may in addition obtain computer tapes or computer lists containing the names, addresses and occupations of electors.

9.35 **Use of rolls in elections.** The principal use of registration is in elections. Any person whose name is on a General roll or a Maori roll at writ day may vote in the election. (The right to vote is also accorded to anyone who became qualified not earlier than 1 month before writ day and not later than the day before polling day, and who has applied for registration as an elector between writ day and polling day.) The rolls are used on polling day to check if an intending voter is entitled to vote in the district in which the polling booth is situated, to provide a check on double voting and, together with the dormant file, as a means of checking the validity of "special votes" (those cast by certain categories of qualified voters who are unable to cast an ordinary vote; see para. 9.77). The rolls used in all the polling places in a constituency become the basis of the "master roll" which, by showing all who voted in the constituency, provides an effective check against double voting.

Matters needing examination

9.36 The registration system described requires examination both for its adherence to principle and in respect of its administrative detail. The following topics are discussed:

(a) the need for registration (paras. 9.37 to 9.40);
(b) the completeness of the registration process (paras. 9.41 to 9.43);
(c) different approaches to registration (paras. 9.44 to 9.49);
(d) possible changes to New Zealand's system (paras. 9.50 to 9.64); and
(e) registration under MMP (para. 9.65).

9.37 **Is registration necessary?** The dominant principle of this part of the chapter is that, with rare exceptions, citizens and all permanent residents of New Zealand of 18 years of age or more have the right to vote. This principle provides the present justification for registration in that although electoral rolls are used for local authority elections, for the

provision of jury lists, by political parties, and in the boundary setting process, the principal use of registration is in the exercise of the right to vote. Registration is intended to simplify and regulate the process of voting.

9.38 The present usefulness of registration notwithstanding, it is natural to ask if the complicated procedures of registration and revision could be circumvented by combining registration and voting so that they become one act. In its simplest form this would entail voters, before voting, signing a declaration that they are qualified to vote. Name, address, gender, age, and possibly occupation would need to be recorded to help establish entitlement to vote and as a protection against double voting. Apart from this, voting could proceed much as usual.

9.39 There are, however, a number of reasons why we do not regard as satisfactory the combination of voting and the recording of registration information for checking purposes.

(a) The present rolls of electors are of great value to the political parties. They provide a basis for canvassing and the subsequent documentation of the location of a party's support.

(b) The present register is used not only for parliamentary elections but for providing lists of jurors, and, from now on, as a basis for elections for local authorities. To cope with these extra requirements the information contained in voters' declarations would need to be kept in a form that effectively amounted to a register. If this information were so kept there would be a public demand for it to be used in making voting easily checked at the next election in much the same way as the rolls are used at present.

(c) If there were no rolls the exercise of combining registration and voting would lead to protracted delays for voters. Large numbers of temporary staff would be needed and the frequency of error would undoubtedly increase.

(d) People who are not qualified to be voters could register and vote in polling booths where they would be unlikely to be recognised. Their votes would count unless the information they provide in their declaration was sufficient to enable effective scrutiny by the parties or by officials before the official count.

(e) Qualified voters could register and vote in several places using different names and addresses. At present some multiple registration is detected by the use of the habitation index and at the time of a roll revision when some of the cards corresponding to these registrations are not able to be delivered.

In both these last 2 cases there is at present a partial check of the kind of abuse discussed because there have been printed rolls subject *before the election* both to public and party inspection and to the checking operations of the Electoral Roll Control Centre.

9.40 For the reasons given, we think prior registration of electors is a requirement in a voting system if parties are to be able properly to reach

voters, and if voting is to be simply understood, simply operated and simply checked. We think that, for reasons of efficiency and confidence in our system, prior registration should continue, and should continue to be compulsory. However, the existence of a penalty for failure to register may deter those not registered from coming forward to register. To encourage registration we recommend that there be no penalty following late registration.

Recommendation:

- **45.** Following registration a voter should no longer be subject to prosecution for earlier failure to register.

9.41 **The completeness of the registration process.** We have recommended that those who are qualified to vote should continue to be registered. We now consider the evidence on the standard of New Zealand's registration and on the levels of accuracy of registration in other countries as an indication of the scope for improvement.

9.42 The most important measure of the success of registration is the percentage of eligible voters who are on the roll at the time of an election. For the 1984 election an estimate of this percentage was 94%, representing 2,111,651 voters. The gap between this and 100% is naturally of some concern. For comparison there are estimates by officials of 98% for Canada, 96% for the United Kingdom, 96.5% for Australia, and 97% for the Republic of Ireland. It is possible that these estimates are on the high side. However, they provide some guidance as to what can be achieved. Any assessment of a target for the percentage figure must first take into account the fact that the percentage depends on the accuracy of the estimate of the number of eligible voters. Any estimate which is made 2 or 3 years after a census will by itself introduce an error of 1% or 2% in the required percentage figure. In addition, it is the experience of authorities who attempt to record the names and addresses of individuals on lists subject to public scrutiny and consequent loss of anonymity that there is a core of people who simply do not want to be placed on any such list. They ensure they are not so placed by not responding to visits or by not returning official cards when asked to do so. There are also itinerants and others who are hard to contact by house visits. Taking these factors into account, we believe that it is unrealistic to talk of 99% or 100% registration. In our view, a realistic target for the percentage of eligible voters who should be registered is in the region of 97% to 98%.

9.43 Because the act of registration intervenes between achieving the qualification to vote and actually voting, its performance as a potential barrier to casting a valid vote should be assessed. In the 1984 election, 97.5% of all votes were valid. Of the 2.5% which were not valid, 1.9%, or 37,565, were not accepted because the voters were not on the rolls they said they were on. That is to say, of those who tried to cast a vote, 1.9% failed because either they or the registration system were at fault. This represents a good performance on the part of the registration scheme even if it were wholly responsible for the 1.9%. The remaining

0.6% were not valid for reasons associated with voting procedures, to be discussed later.

Different approaches to registration

9.44 Since every qualified person has the right to vote, and since the State requires such persons to be registered as a condition for the exercise of this right, it can be argued that a considerable onus of registration should be on the State. In practice the ability of the State to register voters depends on the information available to it. We consider a number of registration methods using different sources of information.

9.45 **Unique numbering system.** The most favourable circumstance under which a State can register electors is when each individual in the State has a unique number acquired either at birth or, in the case of immigrants, when citizenship or some other qualifying status is attained. Accurate registers based on unique personal numbers have uses in many administrative areas. Some countries, such as Norway, Sweden, Denmark and West Germany, are able to use such registers to form electoral rolls. For countries such as these, where there is an element of territorial representation, rolls of voters need a degree of maintenance comparable to that in New Zealand because of the failure of some voters immediately to notify a change of address. In fact, rolls may be significantly in error from time to time. Despite this problem, the personal numbering system does offer the possibility of rolls of very high quality. We recognise, however, that the introduction of such a system in New Zealand would meet privacy objections. We do not think the problem of the quality of the registration of voters in New Zealand is sufficiently serious for us to recommend consideration of the introduction of a personal numbering system.

9.46 **The use of a population census.** A nationwide but less thorough approach to automatic registration of voters is through the use of a population census. Applied to New Zealand this would mean that the names, occupations, and addresses of individuals of qualifying age would be entered directly on to the rolls after the census is taken. There would thus be an important extension to the addresses to which revision cards could be sent. Revisions would still need to be done because the high mobility of New Zealanders would normally ensure that a significant proportion of census addresses would be in error within a year.

9.47 Moreover, the Department of Statistics argued strongly in its submission that the Census of Population and Dwellings is not, and should not be, part of any official act such as registration. This census seeks personal information from every person in New Zealand. Contact with respondents over many years has led census officials to the belief that census information is freely given to the department because of the explicit understanding that this information will be used only in impersonal statistical analyses. It is generally accepted that the information will *not* be used as part of a process legally identifying or affecting an individual in any way. The attitude of census officials

worldwide is summed up in the 1979 UN paper "Principles and Recommendations for the 1980 Population Censuses". This states in part: "Some countries have taken advantage of the enumeration of a population census to collect, at the same time, information needed for the establishment of electoral rolls. This procedure is not generally advisable because of the deleterious effect the secondary purpose might have on the quality of the census results". The general public, too, has in some countries demonstrated a suspicion that personal information given in the census may be misused. An extreme form of this reaction resulted in the recent postponement of the census in West Germany. We are persuaded by the argument against the use of census material and do not recommend any form of registration that uses census data.

9.48 **Registration based on door-to-door canvassing.** Several countries, such as Canada, the United Kingdom, Australia and the Republic of Ireland, which neither have a personal numbering scheme nor register their voters through use of their censuses, make intensive use of local resources in their registration processes. Approximate estimates of the completeness of registration in these 4 countries have already been given in para. 9.42. These figures provide a relevant comparison for New Zealand since the registration processes of these countries, as in New Zealand, both use local information and demand some action from the voter in addition to that taken directly by the state. It is worth examining a well-organised system such as that used in Canada as a prelude to considering if New Zealand should alter its own system. In Canada door-to-door visits in urban areas by representatives nominated by the political parties are made over a specified part of the 50-day election campaign to discover who is eligible to vote. Registration forms are left to be filled in and returned. The rolls compiled from them are revised prior to the election. Rolls are locally made and locally kept and are used just for the one election. In rural areas, door-to-door visits are not common but extensive use is made of local knowledge. There are problems in obtaining adequate registration of native peoples and in choosing the appropriate level of door-to-door visits in developing areas outside towns. A consequence of the local nature of the system and its relevance for a single election is that there may be difficulty in providing new rolls for a snap election, and there are no rolls available for local government elections, or for the use of parties in early canvassing.

9.49 Each system of registration has imperfections. We think that the nationally supervised system in New Zealand has much to offer. At any time it provides a roll of reasonable quality that can be rapidly improved in the event of local or national elections, it provides roll information that is very useful to political parties in their canvassing, and, by allowing voters to vote even when not in their home constituency, it helps to ensure a strong adherence to the principle that anyone who is qualified to vote should be able to vote.

Possible changes to New Zealand's system

9.50 Despite these virtues the level of registration in New Zealand is slightly less than the estimates of the registration level made by officials in the countries mentioned in para. 9.42. The natural question to ask is if there would be any advantage to New Zealand's registration system in the use of methods similar to those used in these countries. At one extreme, door-to-door methods could be the principal element in a complete replacement of the present registration system. Less drastically, they could be used as a substitute for, or a supplement to, existing procedures. Any discussion of their place depends in the main on the relative costs of door-to-door and existing methods and on the likely success of door-to-door methods in New Zealand. We consider cost first.

9.51 **Costs of registration.** The cost of a full door-to-door canvass of all areas of New Zealand was estimated by the Chief Registrar in mid-1986 as about $16 million. Of this, urban constituencies account for about $5m (for 52% of the population) and rural constituencies for about $11m (for 48% of the population). The cost of the 1986 General roll revision and Maori option was about $6m. The comparable annual cost of the maintenance of rolls is about $7m.

9.52 These costs, and especially the different costs for rural and urban areas, suggest a range of registration methods needs investigation.

(a) At one extreme the registration system could consist of local door-to-door canvassing just before a general election, with no provision for interchange of rolls between constituencies, no rolls provided for local authorities, and with each voter being required to vote at a specified polling place. The cost of this basic system for a 3-year election cycle would be about $16m in mid-1986 terms.

(b) Suppose next, the roll information collected in (a) were to be co-ordinated to allow the present range of special voting facilities with its accompanying checks and to provide the nucleus of rolls for local authorities. There would then need to be a degree of national organisation and computerisation that would increase the 3-year cost of registration substantially, but not necessarily by as much as the $7m a year currently spent on the maintenance of rolls.

(c) Finally, the present system of nationally based rolls could be continued but with some door-to-door methods introduced to replace the present revision methods. This would cost up to $37m over a 3-year cycle. However, some less costly modification of door-to-door methods might prove useful. For instance the marked difference between rural and urban costs in a door-to-door canvass (see para. 9.51) suggests that a combination of door-to-door methods in urban areas and other methods in rural areas might be worth exploring.

9.53 Although the cost comparisons above are necessarily incomplete, they indicate that there are potential advantages in the use

of some form of door-to-door method. However, more information on the likely success of such methods is needed, together with more information on potential improvements to present methods before the place of door-to-door canvassing in the registration system can be properly assessed. We consider ways of gathering information to throw light on door-to-door methods and also discuss proposals designed to increase the level of registration in the present system. In our opinion it would be premature to introduce door-to-door methods while there is still some uncertainty as to the success of changes to the present system.

9.54 **Use of existing register information.** The 1986 roll revision and Maori option is a fruitful source of information on the levels of registration for different categories of voters. An approximate analysis of the 1984 roll revision data obtained at the time of the 1984 election indicated that there was under-registration amongst those of Maori descent, those in the younger age-groups, those in some rural areas, those who because of their occupation change address frequently, and those of low socio-economic status. The under-registration exhibited by some of those groups can be large. Two examples illustrate this. The first is that after the 1984 revision 86% of those in the 18-20 age group and 90% of those in the 21-24 age group were enrolled compared with the average of 94% for all ages. The second is that the level of Maori registration is low. A statistical estimate placed the number of unregistered but qualified people of Maori descent as between 40,000 and 60,000 at the time of the 1984 election. Professionally designed statistical analysis of factors influencing under-registration, using the 1986 revision data, could provide information that would assist the planning of advertising for roll revisions. It could also indicate the relative effort required in the different phases of a door-to-door canvass, and in particular throw light on the possibility of modifying door-to-door methods in rural areas.

9.55 **Partial canvassing.** Another possibility which we consider should be explored is experimental door-to-door canvassing in selected constituencies that concentrates on addresses for which there are no registrations. Such a canvass would bypass all other addresses where there could well be some unregistered people. It would therefore be incomplete. But, by concentrating on addresses with no registrations, contact could be made with some people who have not so far been reached either by anyone directly employed to register them, or by an enrolment or revision card sent by the Chief Registrar. There can be no assurance of success. We believe, however, that a limited experiment of this kind will give a clear indication of the likely improvement in registration that would follow a full door-to-door canvass. We therefore propose that the Chief Registrar design and cost such an experiment taking into account the results of the analysis suggested in para. 9.54.

Recommendation:

- **46.** (a) A statistical analysis should be made of the sources and extent of under-registration in the 1986 roll revision.
  (b) A limited experiment in door-to-door canvassing should be undertaken on the basis of the analysis of the 1986 roll revision.
  (c) No door-to-door registration system should be introduced, but this conclusion should be reviewed in the light of the level of registration achieved at the time of the 1987 election, and of the results of the proposed analysis and experiment.

9.56 There are 2 other ways in which the current level of registration might be expected to improve in response to initiatives by the Electoral Roll Control Centre. They both depend on more complete use of existing information. The first is a response to the use of parliamentary rolls by local authorities in their own elections. These authorities now have an interest in the completeness of the parliamentary rolls, and there has already been a feedback of new enrolments from them to these rolls. The second is the use of the many lists of people held by various authorities. For instance, electricity connections to households, housing lists, or tribal trust lists may contain names that are not on the parliamentary rolls. The possibility of using lists such as these is currently being explored, bearing in mind considerations of privacy and the principle that information provided for one purpose should not in general be used for another. The impact of all these potential improvements to the registration system cannot be gauged at the moment. We consider that a useful guide to their worth will be possible following the 1987 election. It is quite possible in our view that the level of registration achieved by the time of the 1987 election will have risen significantly above the 94% achieved at the 1984 election. A further rise in this level might follow from the implementation of 2 proposals which we now make.

9.57 **Registration during the election campaign.** While we are in favour of the continuation of compulsory registration as a prerequisite to voting, we are also concerned that as many as possible of those who are qualified to vote should be able to do so. Any further steps that can be taken to increase this number are welcome. We note that recent amending legislation is moving in this direction. For instance, those voters who qualify in an electoral district on any day from a month before writ day to the date before polling day may now cast a special vote. The details of their enrolment have to be confirmed by post within 9 days after polling day if their votes are to count. We recommend that the same possibility be available for all qualified persons up to the day before polling day using the same procedures. We realise that this proposal is to some extent at variance with our earlier proposal that registration prior to an election be compulsory. However, we believe that the basic right to vote, if qualified to do so, should be the dominant consideration in any discussion of registration. We realise too that there

would be some concern amongst registration authorities that if our proposal is acted on there would be some disincentive to register at the normal time. We think that this is not likely to be so in practice. The current revisions of the rolls are made easy for enrolled electors by their being posted a card. The only act required of them is to complete their card and return it. Under our proposal unregistered voters would have to visit a Post Office before election day, fill in a card, and later reply to a card asking for confirmation of their enrolment details if their votes are to count. In addition, the act of making a special vote is at present more time-consuming than that of making an ordinary vote. Because of these factors, we believe the overwhelming majority of eligible voters would continue to follow the normal registration procedures.

Recommendation:

- **47.** All qualified but unregistered voters should be able to register between writ day and the day before polling day in the manner set out in s.50 of the Electoral Act 1956 and a special vote should be able to be cast at the election by anyone so registered.

9.58 **Provisional registration.** When the rolls closed for the 1984 election, there was a significantly lower than average registration of young people (para. 9.54). Another way of expressing this under-representation is that 33% of all unregistered people of voting age were under 25, whereas only 18% of all people of voting age were under 25. Whatever the reasons for this under-registration, the actual numbers involved are sufficiently large to justify a special effort to achieve a higher rate of registration. In Australia (Commonwealth Electoral Act, s.100), there is a system of provisional registration intended to make registration easier for young people. Under this system, a person who will become eligible to vote at the age of 18 is able to register provisionally at the age of 17, the provisional registration becoming a full registration when the person turns 18. We see some advantage to New Zealand of such a system. We think there could be an added advantage if the age were reduced to 16 since many who reach 16 are still at school and so are more easily contacted by registration officers.

Recommendation:

- **48.** A person of age 16, who would qualify for enrolment at age 18, should be able to apply for provisional registration which becomes full registration when the person turns 18.

9.59 **The clarity of language in registration and voting.** Voters may have to read and fill in quite a large number of electoral forms. Most people should complete an application to register as an elector, respond to revision cards and perhaps give change of address information. At election time they have to indicate their vote on a ballot paper and on occasion make written application for, and later fill in, a special voting form. In polling places, signs give instructions that are to be followed.

9.60 All these forms or instructions can pose serious problems to those with a poor command of English or those who find any official form intimidating. For all voters there may be confusion if the language used is complex, if the sequence of questions or instructions is hard to follow or if the layout is jumbled. Achieving a clear, accurate form or notice may not be easy because it requires a knowledge of what is needed electorally, skill in the use of language that is simple while losing none of the meaning, and expertise in making a form or instruction attractive to the eye. There is increasing recognition of the need to bring a variety of talents to this task, and as a result the design of forms is steadily being improved.

9.61 The ballot paper, discussed in para. 9.71, illustrates the importance of layout. The suggested design is intended to draw the voter's eye more readilly to the space where a mark has to be made. The special voting paper, discussed in para. 9.82, highlights the need for clarity of language and the difficulty there may be with the language of the Act. In this form, categories of those who may apply for a special vote need to be few in number and simply described, so that voters may readily see to which category they belong. However, if category descriptions are simplified they may no longer match the definitions of the Act.

9.62 The need for total accuracy of definition in the Act leads to unwieldy sentences. If these sentences then have to be incorporated in electoral forms, they prove to be a stumbling-block in the search for simplicity. We think that the guiding principle in voting and registration ought to be that if an action is required of a voter it should be described in the simplest words that convey the correct meaning. If that means a change in the wording of the Electoral Act, then so be it.

9.63 A test of a new form or instruction will often be necessary. Those who design surveys normally pre-test them for clarity amongst a selected range of people to whom the questions apply. Then, after any necessary re-design, they carry out a pilot test of a size and design sufficient to detect the level of understanding of the questions and to reveal any omissions or misunderstanding of instructions. We think such tests should be used to detect weaknesses in language, in the sequence of questions and instructions and in the layout, wherever a new form or instruction is introduced or an old one substantially altered.

Recommendation:

- **49.** Forms and instructions used in registration and voting should use the simplest words and layout to convey the intended meaning. New forms and instructions in registration and voting, and any that are substantially altered, should be pre-tested and pilot-tested.

9.64 **Technological advances in registration and voting.** Technological change may prove very useful both for registration and voting. For instance, if all polling places were connected to a computer network, special votes now made by people voting outside their own

constituency would be able to be checked through the registration system almost as easily as ordinary votes are now checked. We have no specific proposals of our own that involve electronic or other developments. We are, however, of the opinion that all convenient and financially satisfactory technical tools should be employed in the registration and voting processes subject only to the principle that the rights of individuals are not infringed or made more open to abuse.

9.65 **Registration under MMP.** The problems of registration under MMP will have the same general character as under plurality. However, the significance of the list vote in determining the level of party representation in the House is likely to be reflected in improved registration for 2 reasons. First, all political parties will be keen to have all their supporters registered so that they may be fully represented in the House. Second, voters in what are now safe seats need no longer think their votes are of little significance.

VOTING PROCEDURES

9.66 The guiding principle of elections is that all voters should be treated fairly. There should be no unreasonable pressures on voters on polling day. Procedures at polling places should be simple and not forbidding. Voting should be almost as easy for those who are effectively housebound, those who are away from home, those on the Maori roll, and those who are ill at ease with English or with official forms as it is for those who can vote near where they live and who are familiar with the process. No one should be able to deduce how another voter voted, and no one should vote more than once.

9.67 Not all of these conditions can be met within the bounds of an administratively simple process. The present voting arrangements are the result of modifications aimed at making improvements in respect of these sometimes conflicting considerations. We examine some of the detail of the voting process, but first indicate its present quality as a necessary yardstick against which to measure progress.

9.68 At the 1984 election about 6% of those eligible to vote were not on the rolls and about 6% of those on the rolls did not vote. The registration deficit has been discussed earlier in paras. 9.42 and 9.43. The turnout deficit is larger than is desirable but is small by international standards. The highest turnouts at democratic elections in recent years were in Belgium (94.6%) and Australia (94.5%), countries in which voting is compulsory. New Zealand's best result was in the 1984 election (94%). In some earlier elections there were turnouts of below 90%. However, while it appears that New Zealand is currently doing well in comparison with most other countries, there should still be an attempt to encourage more people to come to the polls and to cast votes that count.

9.69 The international figures suggest that we may be nearing the limit in the first of these respects. A pointer to the potential improvement in turnout is provided by the relationship between turnout and the majority for the winning candidate in the 1984 election. Although this

relationship is not statistically strong, it does imply that in general about 4% to 5% of registered voters are unwilling to vote even in closely fought constituencies and despite heavy media and party pressure. In comparison with the 6% voting deficit, this suggests that it will be very hard to achieve improvements in turnout of over 2%. But a gain even of this amount, which corresponds to about 60,000 voters, is worth striving for. Some of those who do not now vote may refrain because they are not aware of the facilities offered to those who are unable to vote in the normal way. Some may be unwilling to risk embarrassment in a polling place because of their lack of knowledge of procedures. Both of these classes of people will be helped by any simplification that can be made without impairing the integrity of the voting process. There could also be a further gain from a reduction in the proportion of votes that are counted as informal. This gain will be relatively slight as the percentage of such cases was only 0.6% on average over 10 elections, a figure that places New Zealand behind only the Scandinavian countries, Canada and the United Kingdom. Achieving the potential gains requires an examination not only of the content and simplicity of some of the voting procedures but also the organisation and atmosphere of the polling booths and the publicity that accompanies elections. We start our examination with a basic question.

9.70 **Compulsory voting.** Should voting, as well as registration, be made compulsory? Though voting is voluntary in most countries, there are some in which the citizen is legally obliged to vote. From New Zealand's point of view, the most noteworthy example is Australia where compulsory voting is well-established and widely accepted. The main argument for making voting compulsory is that voting is a civic duty, like compulsory jury service, which citizens ought to perform. Moreover, compulsory voting may make elections a more accurate reflection of public opinion and contribute to the health of our democratic institutions, which depend on citizen participation for their lifeblood. On the other hand, it can be argued that in a free society, the exercise of fundamental political rights, such as the right to vote, should be a matter of individual choice and not compelled by law. There are also certain practical disadvantages associated with compulsory voting. The percentage of votes that are informal may rise because those who do not wish to vote may protest by casting an invalid vote. This factor may account for the percentage of informal votes being higher in Australia (2.8%) than in New Zealand (0.6%) in recent elections. Moreover, experience in Australia has shown that political parties can rely on the law rather than their own volunteer canvassing to get the voters to the polls; there is therefore less incentive for parties to develop large, broad-based constituency organisations and the degree of political participation in the community is correspondingly reduced. We recognise that high levels of voter turnout are necessary for effective democracy and concede that there might be a case for compulsory voting if turnout figures were to fall as low as they do in some other countries. However, while voluntary turnout remains at its present level,

there is insufficient potential benefit to outweigh the various disadvantages which would result from compulsion.

9.71 **The method of casting a vote.** The method prescribed in the Electoral Act s.106 is that a voter is to strike out the name of every candidate except the one for whom he or she wishes to vote. This method has been the object of prolonged inquiry in recent years. The ballot paper poses 2 important issues: the action required of the voter, and the Returning Officer's assessment of the voter's intention when there is some irregularity in the way the voting paper has been completed. On this latter point the Court of Appeal in *Wybrow* v. *Chief Electoral Officer* [1980] NZLR 147 concluded that the provisions of the Electoral Act require that the clear intention of the voter should prevail. We consider that this is plainly desirable. We also consider that this can be given best effect by a voting system that asks voters positively to identify the candidates they choose rather than, as at present, to draw lines through the names of candidates they do not choose. In this we are supported by a large number of those who made submissions to us as well as by the Report of the Committee of Inquiry into the Administration of the Electoral Act (the Wicks Committee (1979), p.156). We further believe that there will be fewer irregularities in voting if a suitable choice of contrasting colours is used in the design of the ballot paper so that the voter may more easily see what has to be done. The Canadian ballot paper is attractive in this respect and a version of it is included here (Figure 9.1) as an illustration of the kind of ballot paper we have in mind. The names of the candidates and the order in which they are placed in the illustration are of no special significance. The detail of a New Zealand ballot paper that follows our recommendation is properly a matter for the Select Committee on the Electoral Law.

Recommendations:

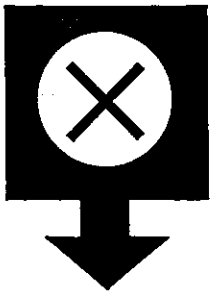
- **50.** The name of each candidate should be set out on one line on the ballot paper with the voter being instructed to mark a designated space at the end of the line corresponding to the chosen candidate.
- **51.** The test to be applied in deciding whether to count a vote should continue to be the clear intention of the voter.

9.72 **Party affiliation.** The basic purpose of an election is the selection by voters of the party or parties that will form the Government. We believe that this reality should be recognised by the party affiliation of a candidate being shown on the ballot paper under the name of the candidate. It has been put to us that there would be a risk of greater informality because voters might mark the party rather than the space following the candidate's name. However, we think that our proposed visual improvement of the ballot paper will minimise this risk and in general make informality less likely. We note too that the practice of putting both the name and the party affiliation of a candidate on the ballot paper has been followed in many overseas countries with little evidence of a growth in informal voting.

Suggested Form of Ballot Paper

Adaptation of Canadian Ballot Paper

Vote for 1 candidate by marking the circle next to the name of the candidate you choose.



Vote Here

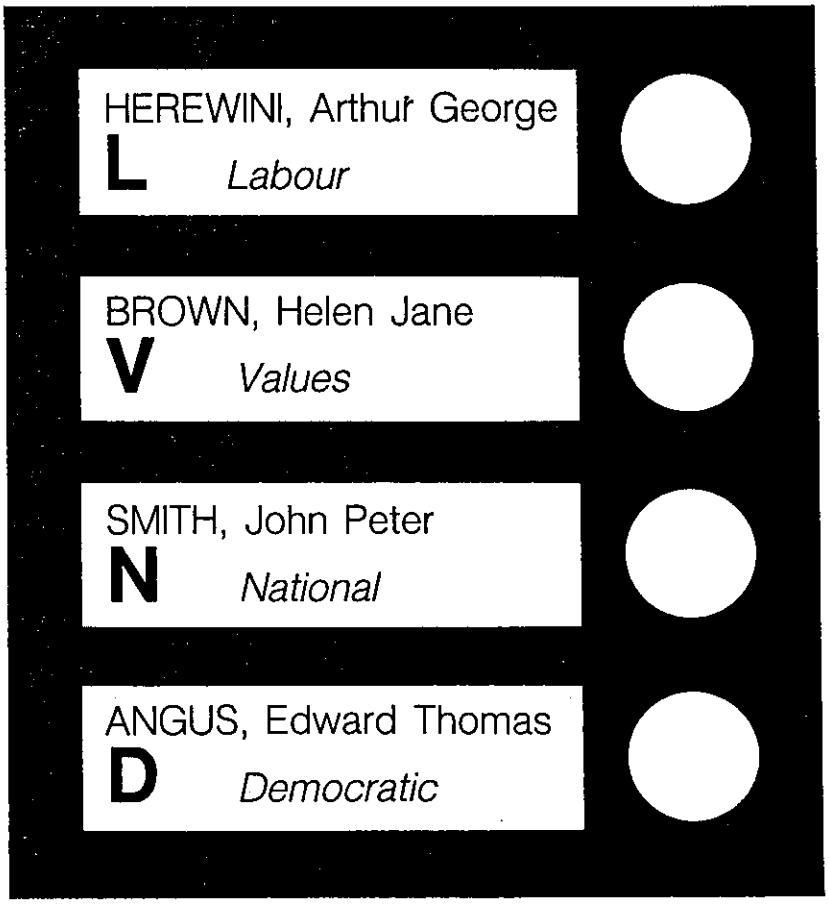


Figure 9.1

Recommendation:

- **52.** The party affiliation, if any, of each candidate should be printed under the name of the candidate on the ballot paper.

9.73 **Double voting and the secrecy of the vote.** When a voter's name is found on the roll in a polling place, a ballot paper is issued. It contains a number 1 higher than the number on the last issued ballot paper. The same number is on the butt of the ballot paper, on which are written the line and page numbers of the voter's name on the roll. The number on the ballot paper is covered by a black sticker. The line and page number, but not the ballot paper number, are conveyed orally to the scrutineers who represent the candidates.

9.74 When the rolls are scrutinised by the Returning Officer after voting has ceased, a name may be found to have been crossed out at more than 1 polling place. Enquiries are then made to discover if this has been the result of an administrative error. If it is decided that there has been, or could have been, a double vote, the 2 voting papers are located and neither is allowed to count. The candidate supported by the double voter then in effect loses 1 vote. If, however, there were no matching numbers on the ballot paper and butt, both the votes of a double voter would have to be counted because the votes could not be retrieved. In fact, for each vote a person cast in addition to his or her legitimate vote there would be a gain of 1 for the candidate supported by those votes. The numbering system thus provides an assurance to the public that multiple voting cannot be used with profit. We think this assurance is an important factor in the confidence the public has in the fairness of the voting process and we therefore consider that the numbering system should remain.

9.75 There is, however, a worry, reflected in some of the submissions made to us, that voting is not secret because the numbering system allows the vote of an individual to be discovered by those associated with the voting process. It is true that there is a small risk that certain election officials may come to know how a person voted. These officials have made a declaration not to divulge knowledge of this kind. We believe the general public can be confident that election officials have fulfilled the conditions of their declaration. The concern is not so much with them as with the scrutineers. They too have sworn not to divulge any information that they may acquire during the election. However, as representatives of candidates or political parties they may not have the degree of independence possessed by election officials.

9.76 The scrutineers may frequently be aware of the sequence of ballot paper numbers used in a polling place during voting. They are later present at the preliminary count in the polling place. Because the numbers on the ballot papers are sometimes capable of being read through the ballot paper itself, there is a possibility that a scrutineer, who knew the ballot paper number of an individual voter at the time of the preliminary count, could discover the vote made by that voter. The chance of this happening is slight and we have no evidence that any deductions of this sort have been made. However, in a matter involving

public confidence in election procedures it is better to be sure. Accordingly we propose that suitable adjustments to procedures inside polling places be made to ensure that there is a negligible risk that anyone other than an election official can know or deduce the number on a ballot paper given to a voter. One such adjustment is for the ballot paper to be properly opaque, and for the numbers on both the butt and the voting paper to be covered by a black sticker throughout polling. Only the Deputy Returning Officer would then know the number for the first vote in a polling place. The number needed for a check on the number of ballot papers issued could be deduced from the first unissued ballot paper. While we do not have the expertise to suggest an ideal solution, we think that a change in present procedures as modest as the one suggested will ensure that the public can be confident that the functions of ensuring that double voting cannot lead to political gain, and that voting is effectively secret, are both being discharged in a completely satisfactory manner.

Recommendation:

- **53.** Administrative procedures in polling places should be such as to ensure that no one except polling staff is aware of the number assigned to a particular ballot paper.

Special voting

9.77 The New Zealand electoral system offers better facilities than do the systems of most other countries to those who find it difficult to vote in the normal manner on polling day. The categories of qualified voters for whom a special rather than an ordinary vote is permitted are set out in the Electoral Act s.100. These voters are:

(a) those whose names are not found on the roll;
(b) those who will not be within 3 kilometres of a polling place in their own constituency;
(c) those who will be travelling and will be unable to get to any polling place in their own constituency;
(d) those who will be out of their constituency;
(e) those who find it physically difficult to go to a polling place to vote;
(f) those who have a religious objection to voting on the day of the week on which polling day falls;
(g) those on the Maori roll who attend to vote at a General polling place in their Maori constituency; and
(h) those who can otherwise satisfy the Returning Officer that they would suffer hardship or be seriously inconvenienced if they had to vote in the usual way.

The act of making a special vote is distinguished from the act of making an ordinary vote chiefly by the requirement in most cases that a signed and witnessed declaration of the grounds for seeking a special vote has to be made by the voter and accepted by the Returning Officer.

9.78 Special votes may be disallowed for one or more of a variety of reasons. The most common reason has been that the voter's name has not been found on the appropriate roll. Out of a total of 1,978,798 votes in the 1984 election there were 204,977 special votes of which 42,032 were disallowed. Of these, 89.4% were disallowed because the voter's name was not found on the roll. Those that were disallowed because they were not signed, or were improperly witnessed, or gave no grounds, constituted 8.3% of all disallowed special votes, 1.7% of all special votes and 0.2% of all votes. Thus while it is useful to make improvements in the various special voting procedures, it should be remembered that the greatest potential for increasing the number of valid votes will come from changes to the registration system. However, an important, though unmeasurable, gain will come from the greater attractiveness of a simpler special vote system to those who currently are unable to vote in the usual manner and who are deterred by the complexity of special vote procedures. We now consider some possibilities.

9.79 **The need for a declaration.** The legal requirement for a special voter to make a declaration is set out in the Electoral Regulations, 1981. The need for such a declaration has been called in question. It has been argued that a sufficient reason for voters being allowed special votes is that they are on the roll. While this contention has a superficial attraction it ignores both practical problems and the symbolism of voting. The act of voting is a public affirmation of an elector's participation in the formation of a Government. As such, it has, and should in our view continue to have, a significance greater than that of lesser acts such as renewing the registration of a car. The organisation of elections and the accompanying publicity are all a recognition of the importance of voting by attending a polling booth on election day. It is, however, clear that not everyone will be able to vote in the normal way on polling day. The special vote categories defined in s.100 of the Electoral Act identify such people. Of the groups so defined and described in para. 9.77, two—(a) and (g)—do not represent any unnecessary diminution of the significance of voting on election day since those voters have actually gone to a polling booth to vote. For the first of these 2 groups, special vote information is rightly collected at the polling booth. For the second of these 2 groups, new arrangements are being introduced. They are discussed in para. 9.85. All of those in the other groups set out in para. 9.77 are unable to go to a polling place in the usual manner for what seem to us sufficient reasons. We consider that they should continue to be able to cast a special vote and that, in recognition of the fact that they are unable to join the great majority of New Zealanders in the symbolic and significant act of publicly voting for a Government, they should continue to provide a signed and attested declaration of their reasons. We note as a practical point that if no declaration were required there could be an increase in the number of those seeking a special vote. This would add to the workload of Returning Officers and Deputy Returning Officers because of the more

time consuming processing of special votes even when no declaration is made.

9.80 **Simplifying special vote procedures.** A voter who casts a special vote in a polling place outside his or her constituency should not have to do more than give a name and address and home constituency name (if it is known), since the reason for the special vote is clear from the fact that the constituency in which registration is claimed is not the constituency in which the vote is being made. Because the vote is cast in the presence of a Deputy Returning Officer, no signed declaration is needed.

9.81 When an application for a special vote in a voter's own constituency is made by signed letter or by the completion of a special form, the reason for the application is given. The form for the special vote sent back to the voter need not then, as is the case at present, contain a declaration section requiring the voter to confirm a choice already made. The form could be a simple one containing essentially only the ballot paper. The reason for asking for a special vote could be recognised by the envelope containing the ballot paper being of special colour or design corresponding to the reason already given. The voter would then place name and address and a witnessed signature on the outside of the envelope in which the completed ballot paper would be placed and the envelope sealed. This system is used in Australia as a simplification of the declaration part of special voting. The argument against it in New Zealand's experience is that there is too close a physical connection between the name of the voter and the way the voter has voted so that when the envelope containing the completed ballot paper is returned a Deputy Returning Officer or Returning Officer could make this connection much more easily than for an ordinary vote. We believe, however, that the simplification is so worthwhile that the method should be introduced.

9.82 The wording and design of the declaration form have received attention recently. The different grounds for seeking a special vote have been grouped into fewer categories. A confusion over which address is to be given by a voter who has recently moved from one constituency to another has been resolved. Different parts of the declaration have been given different colours. These are considerable improvements. Perhaps more can be done. The wording of s.100 of the Electoral Act has so far been a constraint on the language that can be used in the declaration. We believe it may be possible to further simplify the declaration form by grouping the categories under very broad but largely self-explanatory headings. Any such set of headings would need to be incorporated into the Act. It would be preferable for the Select Committee on the Electoral Law to define the appropriate wording in conjunction with Parliamentary Counsel. Our point is not to settle the detail but to recommend a continuing search for simplicity of wording.

Recommendations:

- **54.** A person casting a special vote because of being outside his or her constituency should need to supply only name, address, and home constituency (if known) (para. 9.80).
- **55.** Envelopes for the return of special voting forms of a design peculiar to each ground under which a special vote is being requested should be introduced (para.9.81).
- **56.** Section 100 of the Electoral Act should be amended so that the grounds for seeking a special vote are set out under a limited number of self-explanatory general headings (para. 9.82).

9.83 **Early voting.** It is currently possible for voters who satisfy one or more of the conditions for a special vote, and who are able to contact the Returning Officer in person, to vote early in their own constituency using an ordinary voting paper rather than a special voting paper. This means that the Returning Officers need not fill out the names of the candidates on the special voting form. A declaration of the grounds for seeking an early vote is, however, signed as for a special vote. The question of an extension of the early voting facility to those who are on the roll, regardless of whether they qualify for a special vote, has been raised from time to time. For instance the Wicks Committee (see para. 9.71) favoured this extension as a means of reducing the pressure on polling day, principally through a reduction in the number of time-consuming special votes (pp. 133-5). They also saw an advantage to the elderly and to ethnic groups who can be easily confused by the bustle of election day. There are, however, some disadvantages. Political parties will have a harder task. They will find it more difficult to keep track of who has voted. More importantly their publicity campaigns are based on there being a single election day. They would have a much more complex problem in putting their case properly to all voters if there were a significant increase in the numbers of early voters. Perhaps the most telling disadvantage is that too much early voting would lessen the importance of voting itself in the eyes of many voters. We believe that casting a vote on election day should be the norm and we do not consider that departures from this practice, without adequate reason, should be encouraged. We do not therefore recommend any extension to the facilities for early voting.

9.84 **Postal voting.** It was suggested in some submissions that the posting of ballot papers to voters and the subsequent return of completed papers would increase the number of those who vote. We accept the success of postal voting in raising the turnout of voters in local body elections. However, we point out that the problem in local body elections is to raise turnout from a very low level to one that means that electoral decisions are at least made by a substantial majority of voters. Most of those who do *not* vote in local body elections *do* vote in national elections. The problem at national level is the much smaller one of persuading the last few percent of voters to come to the polls. We believe that these people are more likely to be reached if voting

procedures are made simpler and more attractive. Moreover, we see some danger of abuse in that postal votes may be cast by people not entitled to them, and voters may be subject to undue influence. For these reasons we do not recommend the introduction of postal voting.

9.85 **Maori voting.** Many submissions to us pointed out that it is harder for a voter on the Maori roll to get to a designated Maori polling place than it is for a General voter to get to a General polling place because the latter are much closer together. Maori voters wishing to vote at a General polling place within their Maori constituencies have at present to make a special vote. The Tangata Whenua vote is being introduced to make the task of such a voter easier. All that this vote requires of the voter is a name and address which are then entered on the back of a special voting form, the declaration part of which is not completed. The information required of the voter is thus the same as that required of the General voter in the same polling place.

9.86 There would appear to be no further gain to the Maori voter if all General polling places were to receive and count Maori votes in the same way as they do General votes. In fact, without special prohibition on the publication of results, the secrecy of a Maori vote could be compromised at the time of the preliminary count in General polling places where few Maori vote. In addition, the subsequent task of scrutinising a very great number of Maori rolls would be a significant burden for the Returning Officer of the Maori electorate, even if electronic means of doing this were to be introduced. We conclude that the Tangata Whenua vote represents the better way to proceed, especially as the action it requires of the Maori voter is virtually the same as the action required of the General voter.

9.87 **The planning and conduct of elections.** It was argued in para. 9.69 that simpler and better known procedures may prove an inducement to those who have been registered but who have not yet voted at any election. In this regard the elements of an election which could be of significance in addition to those considered so far, are the layout of polling places, the instructions given to officials, the instructions given to voters, the attitude of officials and the prior publicity about what a voter has to do to cast a valid vote. If these factors are handled in a routine manner without sufficient thought for the sensibilities and ignorance of procedures of those voters who think of themselves as on the fringes of the majority culture, voter turnout is likely to suffer. An example of potential benefit from change that is more than administrative was submitted to us by members of the Pacific Island community. They stated that a greater sense of occasion on election day would contribute to their community's readiness to vote. The general need for administrative processes to be sensitive to the range of cultures in New Zealand is discussed in para. 9.132. The need for special assistance to different types of voters has long been recognised. Instructions in several languages are now displayed as a matter of course in polling places. Publicity prior to the election involves contact with representatives of ethnic, religious and other groups. More

extensive training is being given to Returning Officers and their staff. These changes are all in the right direction. It is not for us to make detailed recommendations. However, we suggest that the design of procedures takes into account not only efficiency and the simplicity of any acts required of a voter but also the necessity for a welcoming atmosphere in every polling place.

9.88 **The return of a candidate's deposit.** Under s.81 of the Electoral Act, if the total number of votes an unsuccessful candidate receives is less than one-fourth of the total number of votes received by the successful candidate, the deposit of the unsuccessful candidate is forfeited. We think that the rule governing forfeiture of deposit should be stated in terms of the percentage a candidate's vote is of the total valid vote in the constituency. An appropriate level for this percentage is the threshold level of 4% set for MMP.

Recommendation:

- **57.** If the percentage of valid votes received by any candidate in a constituency is less than 4%, the deposit of this candidate should be forfeited.

9.89 **Voting under MMP.** A voter under MMP has to select a party and a constituency candidate. This task is almost as simple as now since these 2 acts are each of the same kind as the act of voting under plurality. We therefore expect very few more informal votes than there are at present, especially if the recommendation of para. 9.71 is implemented (with appropriate changes being made for the list vote). See Addendum 2.2 for a sample MMP ballot paper.

9.90 We have already suggested in para. 9.67 that the level of registration may rise under MMP because those who have thought their vote did not count under plurality, and have therefore not bothered to register, would be more willing to register since every vote is seen to count. For the same reason we expect a higher turnout of voters under MMP.

THE CALLING OF GENERAL ELECTIONS AND BY-ELECTIONS

9.91 The New Zealand Constitution Act 1852 and the Electoral Act 1956 establish a rather complicated process for the calling of general elections. We give a brief description. First, the Governor-General dissolves the Parliament (or General Assembly) or in rare cases it expires at the end of its 3-year term. Second, within 7 days of that event the Governor-General, with the advice of the Minister of Justice, directs the Clerk of the Writs to issue writs for the election of members of Parliament for all electoral districts. It is the next step, the third, that we are mainly concerned with. The Clerk of the Writs within 3 days issues writs to each Returning Officer requiring that Officer to proceed to an election of a member in the district; the writ sets out the nomination day, the polling day, and the latest day for the return of the writ (which is to be the 50th day after its issue). The Returning Officer then gives public notice of the nomination and polling days.

9.92 The Electoral Act requires the Governor-General to "appoint some fit person to be Clerk of the Writs". The legislation does not expressly place the Clerk in any relationship to any Minister. This, as we shall see in para. 9.112, is in contrast to the positions of the Chief Electoral Officer and the Chief Registrar of Electors, both of whom are under the direction of the Minister of Justice.

9.93 The Clerk of the House of Representatives and the Department of Internal Affairs confirmed our view that these provisions are both incomplete and unnecessarily complicated. Thus it is for the Clerk of the Writs to determine the date of the election. This must be a matter which Ministers (especially the Prime Minister) determine and for which they are responsible. The legislation should make that clear. A second gap in the provisions relates to the situation where following a dissolution or the expiry of a Parliament the Governor-General is not given any advice by Ministers on the issue of the writ. What happens if the period is running and it appears that the obligation to issue the writ within the prescribed period is not going to be complied with? We do not think that the law should have to anticipate such grossly unconstitutional behaviour and attempt to regulate it.

9.94 The Australian and Canadian statutes provide more complete and straightforward models which we use in the following recommendation. They do not, in particular, include an officer comparable to the Clerk of the Writs.

Recommendation:

- **58.** (a) Within 7 days of the dissolution of Parliament or its expiry, the Governor-General, on the advice of the Prime Minister, should issue or require the issue of writs for the election in each district. The writs or the requirement should fix the dates for nomination, the election, and the return of the writ. The writs should be issued through the Chief Electoral Officer (or the Electoral Commissioner) to the Returning Officers.

  (b) After the election and before the return date, each Returning Officer should return the writ duly completed to the Chief Electoral Officer (or the Electoral Commissioner) who would then publish the results in the Gazette.

  (c) The Chief Electoral Officer (or the Electoral Commissioner) should provide the relevant information to the Clerk of the House; the Returning Officers should also officially inform the candidates of the result.

The office of the Clerk of the Writs would no longer be required.

9.95 While the calling of a general election to establish a new House of Representatives is a matter for the Government, a by-election called to fill a vacancy in an existing Parliament is to be seen differently. In that case the House is taking action to provide for the filling of a vacancy in its membership and the Speaker should accordingly act on its behalf. The present provisions of the Electoral Act regulating that matter are

confusing and incomplete in some respects. Again, both the Department of Internal Affairs and the Clerk of the House propose that they be altered. Under the present law the Speaker must in general direct the Clerk of the Writs "to issue a writ to supply the vacancy" in the House. The Governor-General acts only if there is no Speaker or the Speaker is out of New Zealand. That provision appears no longer to be required, given, first, that the Constitution Bill will require a new Parliament to meet within 6 weeks of the date for the return of the writs with the immediate task of electing its Speaker, and, second, that there is an Acting Speaker if the Speaker is abroad.

9.96 The Speaker should, of course, act in accordance with a decision of the House (as s.72(4) of the Electoral Act in part suggests) which will be constrained, as with a general election, by time limits (these need not however be as stringent as those applicable in a general election). In accordance with our earlier recommendation, the Speaker would issue or direct the issue of the writ and would, in accordance with that House ruling, determine the dates for the close of nomination, the election, and the return of the writ.

Recommendation:

- **59.** In the case of a vacancy in the House of Representatives, the Speaker, in accordance with a resolution of the House, should issue or direct the issue of the writ for a by-election and determine the dates for nomination, the election, and the return of the writ.

THE REGISTRATION OF POLITICAL PARTIES

9.97 At present our electoral legislation largely ignores the existence of political parties. It proceeds on the basis that candidates will be nominated as individuals, that they will campaign as individuals and, on that basis, they will or will not be elected. Those central elements of the political process, as set out in the Act, make no reference to political parties. Similarly, the nomination is simply by any 2 electors and not by the party that in fact selects the candidates. Individuals lodge and, as appropriate, recover the deposits. The scrutineers are named by the candidates and not by the party. Applications for recounts and electoral petitions are filed by the candidates and not by their party. And the limitations on the amount of expenditure relate to individual candidates in their own constituency and not to nationwide parties. The electoral legislation does not provide for the registration of the parties (although they can, at their discretion, register under the Incorporated Societies Act). In these important ways the legislation does not recognise the central place, stressed throughout this Report, of political parties in our electoral system.

9.98 The claim that the legislation ignores parties can, however, be overstated. The Act has increasingly recognised the role of the parties. The provisions relating to the bodies administering the legislation and relating to polling provide examples. On the first, the Act requires that

certain of the officials charged with administering it are not to hold any official position in any political organisation. The unofficial members of the Representation Commission "represent" the "Government" and the "Opposition". While it might be said that that provision does not necessarily refer to parties (for "Governments" and "Oppositions" can exist without them), the 1956 change in the method of appointment of the unofficial members was clearly based on party considerations; and a 1981 amendment makes the reference explicit by entitling parliamentary parties not represented on the Commission to make submissions to it.

9.99 The provisions about polling also give some emphasis to the party affiliation of the candidates. Each Returning Officer notifies the Chief Electoral Officer of the names of the candidates and their party affiliations, and that information is supplied in turn to *all* Returning Officers (for the purposes of the administration of special voting). Each Returning Officer must publish the names and their party affiliations in a newspaper in such a manner as is most likely to give full publicity. Between 1975 and 1980 the Act allowed the party designation, if any, to be included on the ballot paper. The Returning Officer continues to be obliged to provide in each voting compartment a card in a prominent position showing the names of candidates with their party designations. And the Deputy Returning Officers and Poll Clerks, in assisting voters, may in particular inform them of the names of the candidates, again with their party designations.

9.100 Political parties would become more prominent in the electoral legislation and in its operation if, in addition, as we propose:

(a) the voting system includes voting directly for political parties as in our MMP proposal (Chapter 2);
(b) each party represented in the House has its own unofficial member on the Representation Commission (Chapter 5);
(c) the law provides direct state funding for political parties or limits their expenditure in election campaigns (Chapter 8); and
(d) legal controls are introduced, as a consequence of (a), over the method of selecting candidates through the supervision of the rules adopted by the parties for that process (para. 9.28).

Legislation might also regulate the allocation of broadcasting time to political parties.

9.101 It is in these contexts—the present and proposed—that we need to consider whether registration of parties should be provided for. Even at present, difficulties could arise from the lack of a registration system—for instance, in respect of party designations at polling booths or appearances before the Representation Commission. We think that provision for registration is desirable now.

9.102 As to the future, a system for the formal recognition of parties would, without any doubt, be needed if votes were to be cast for parties as proposed in Chapter 2 or if direct state funding and limits on party spending were to be introduced in accordance with the kind of scheme we propose in Chapter 8. Only parties recognised in some formal way

would be entitled to have party lists of candidates included on the ballot paper, or to apply for state funding distributed to parties. The Australian and Canadian electoral legislation provide for the registration of parties.

9.103 The argument against registration of the parties would stress the essentially voluntary, even private, character of political parties. We think that there are 2 answers to that argument. First, such a view of their character is very difficult to square with their actual position in our constitutional and political system, and their vital role in presenting to voters the choices which they make at the election. They have a critical public function.

9.104 Secondly, registration does not deny the essentially voluntary character of the political parties. Registration requirements are simply concerned to ensure that in particular aspects of their public role—for instance, in endorsing candidates or seeking broadcasting time or spending and seeking funds for elections—parties have a clearly and officially recognised existence. The registration is for those limited purposes only. It is comparable to the official recognition by registration of other legal persons, such as companies or incorporated societies. Registration of this kind does not threaten the essentially voluntary character of those bodies.

9.105 The Australian and Canadian law and practice suggest that the process for registration of parties is in general straightforward. Australian statutes suggest a convenient definition of a political party—an organisation an object or activity of which is the promotion of the election to Parliament of a candidate or candidates endorsed by it. A party which has a member already in Parliament or 500 members is entitled to registration. The Canadian provision is dependent on the party endorsing 50 candidates in the forthcoming election. In both, registration is to be refused if the proposed name of the party is likely to be confused with the names of recognised parties or if it uses the word "independent". Provision is also made for deregistration. The Australian Act provides for the giving of notice of the applications and for the possibility of objections.

9.106 Taking account of these provisions and of the position of political parties in New Zealand, we propose that the qualification for registration of a party be 200 members, and that the registration be cancelled if the party no longer meets that qualification or has not endorsed at least 3 candidates at the most recent general election. We have considered whether one of the possible sanctions for failing to comply with the proposed election expense provisions we propose be cancellation of the registration. That, we think, would be impracticable, and too draconian a measure.

9.107 The powers of those making the registration decisions, like the powers of other registrars of legal persons, should be subject to appeal to the High Court. That right of appeal would also apply to decisions of the Electoral Commission relating to the rules of the party for the selection of candidates (para. 9.28).

Recommendation:

● **60.** (a) A system for the registration of political parties should be introduced.

(b) A party should be entitled to be registered if it has 200 members.

(c) Registration should be cancelled if the membership falls below 200 or the party has not endorsed at least 3 candidates at the most recent general election.

(d) The Electoral Commission should make the decisions relating to registration, subject to a right of appeal to the High Court.

THE ADMINISTRATION OF THE ELECTORAL SYSTEM

9.108 This Report has identified and discussed several essential and possible tasks for an electoral administration. We now discuss the principles involved, and make proposals about the bodies to carry them out and to resolve disputes about them.

9.109 The basic tasks are the operation of the registration and voting systems and the revision of the electoral boundaries. Those tasks must be supported by funding and appropriate administrative arrangements. Our proposals would add the control of and direct state support for political finance, and the registration of parties. We shall mention some other particular tasks in the course of the discussion. One further important aspect of electoral administration has become more prominent recently—the continuing review of the law and its administration by the Parliamentary Select Committee on the Electoral Law and the related Officials Committee. We return to that matter at the end of the chapter.

9.110 We have to consider who should have those tasks and what rights there should be to challenge administrative decisions.

The relevant principles

9.111 The various powers should be exercised lawfully and properly. The system should operate efficiently and economically. And it should be fair and the public should have confidence in its fairness. What does fairness require? There are 2 competing principles. On the one hand it is the responsibility of the State (in a practical sense through those who are elected to parliamentary office and who have the responsibility of Government) to ensure that the various administrative institutions and procedures are in place and are properly funded, and that the legislation is reviewed and adapted as required from time to time. On the other hand, the various administrative steps and decisions which make up the election should not be improperly influenced by party political considerations. The system must work, and be seen to work, independently of party consideration. That principle is supported, for instance, by the Electoral Act's prohibition on Returning Officers and Registrars holding official positions in political organisations.

9.112 The tension between the principles of responsibility and independence is to be seen right at the outset of the Act. The 2 principal officers, the Chief Electoral Officer and the Chief Registrar of Electors, are, according to its express terms under the direction of the Minister of Justice in carrying out their duties. They in turn, the Act says, direct and control their subordinate officers, including the Returning Officers and the Registrars of Electors for each district. This chain of command and responsibility and power is of course that of the departments of State. The Minister as political head has the legal power and the responsibility in respect of all matters happening within the department. There is no evidence that the powers, say to enrol particular individuals, to draw boundaries in particular ways, to provide for certain advertising, to make voting facilities available in particular places, or to count votes, have been abused for party political purpose. But the existence of the unlimited ministerial power of direction is contrary to principle.

The present division of function

9.113 The Electoral Act essentially divides the administrative and related advisory functions between 3 groups of people:

(a) the Government (through the person of the Governor-General, the Minister of Justice and the Clerk of the Writs);
(b) the Chief Electoral Officer (under the direction of the Secretary for Justice and with the support of a Deputy, Returning Officers for each electoral district, and other officers); and
(c) the Chief Registrar of Electors (with the support of a Deputy, Registrars of Electors in each district, and other officers).

9.114 Until 1980, the Chief Electoral Officer, under the direction of the Minister of Justice and the Secretary for Justice, was charged with the duty of carrying the whole Act into effect. That provision was first enacted in 1905. The power of direction has been held at various times by the Colonial Secretary, the Minister of Internal Affairs, and the Minister having charge of the Electoral Department.

9.115 In 1980 the responsibility of the office was divided. The Chief Registrar of Electors (the Director-General of the Post Office) was charged with the duty of carrying out the Part of the Act concerned with registration under the direction of the Minister of Justice, and the Chief Electoral Officer's role was reduced accordingly. The statutory role of the Post Office had been increasing since 1956 when the Chief Electoral Officer was, with the approval of the Director-General of the Post and Telegraph Department, empowered to appoint departmental employees to be Returning Officers and Registrars and other officers. In 1975 the Director-General was given direct power to appoint Electorate Officers in each electorate with responsibility for the rolls. The 1980 change followed the recommendations of the Wicks Committee (see para. 9.71).

The future division of function

9.116 The functions are to be divided in the first place between the Government and independent officers. What should each do? The present arrangement also divides the independent functions, essentially between the Justice Department and the Post Office. Our need to consider that arrangement is made the more pressing by the proposed division of the Post Office into 3 state-owned companies, in large degree outside ministerial power.

9.117 **The functions and responsibilities of Ministers.** One function and responsibility of Ministers is essential and inescapable: Ministers must have responsibility for the electoral law and its general administration. They must ensure that the legislation is kept in a satisfactory state and that in a broad sense the administration is in order. In that they will or could be assisted by advice from officials. That advice can come from departmental officers, or (as it does in Australia and Canada) from a body which has in part an independent status and function, or from both. In New Zealand a ministerial advisory role associated with a general independence of status and function is not uncommon.

9.118 An integral part of Government support for the general administration of the system is its funding. We are not persuaded that we need to go as far as the Canadian legislation does in having no ministerial responsibility for the Electoral Office, including no direct Government hand in the prior authorisation of spending for elections. (The legislation does not require specific parliamentary appropriation of the fees and expenses of elections.) We think that Parliament should continue to make annual appropriations in the ordinary way for electoral purposes. That brings with it opportunities for the House to exercise a general supervisory role in respect of elections. The House will, of course, also have a critical role in considering legislative proposals; and we later stress the importance of its Select Committee on the Electoral Law. We have already recognised that the Government will continue in general to determine the dates for elections.

9.119 **The independent function.** At the moment the Chief Electoral Officer and the Chief Registrar of Electors divide the independent electoral tasks. Both are under the direction of the Minister of Justice. Until 1980 the Chief Electoral Officer had the general function and responsibility indicated by the title of the office. That generality of function exists as well in Australia and Canada.

9.120 Should the legal division of function continue? The proposed restructuring of the Post Office means, according to the State-Owned Enterprises Bill, that the functions of the Postal Service and the Post Office Savings Bank, the bodies most closely involved with the compilation of the electoral rolls, will be carried out by private companies, the shares of which will be held by Ministers.

9.121 We begin with the presumption that the registration of electors should be a function of the electoral administration. No doubt enrolling voters and counting their votes are in a practical sense

different functions and can be divided, but they are essentially related functions: the rolls are established only because we have people voting and their votes being counted. We think that the 1980 decision to give the registration responsibility to the Post Office was an important practical step to deal with a major problem. We do not see it, however, as being required by any principle of the electoral system or administration.

9.122 The question about the division of functions can be put in more concrete terms by considering the present references to the Post Office in the Electoral Act. In practical terms, for at least the foreseeable future, the proposed New Zealand Post will in fact continue to maintain the rolls. How should that be achieved as a matter of law? There are 2 possible answers. First, New Zealand Post or its officers could be placed under a statutory obligation to provide those services (either on their own responsibility or under the direction of the Chief Electoral Officer). Second, the Chief Electoral Officer, with full responsibility for the administration of the Act being restored, should simply be empowered to appoint Registrars of Electors. It would be understood that in practice that would, for some time anyway, be done in terms of a contract between the Chief Electoral Officer (or the Department of Justice) and New Zealand Post.

9.123 We think that the second answer is the better one. We acknowledge the critical importance of the responsibility to maintain the rolls. That responsibility can be carried out by the Chief Electoral Officer, as it has for most of this century, by that officer appointing Registrars of Electors in the same way Returning Officers and other officials are appointed, under statutory power and by contract. A company, even if state-owned, cannot properly have direct and prime statutory responsibility for the important constitutional function of the registration of the voters. Furthermore, we see the force of the argument that it would not be consistent with the principles of the state-owned enterprises legislation to impose statutory obligations of the type suggested directly on New Zealand Post. We do, of course, agree that the contract between the electoral administration and New Zealand Post would have to be written in terms that provide as much certainty as possible that the service would be ensured. Thus a lengthy period of notice of termination would be required.

9.124 Accordingly we conclude that the legislation should simply empower the Chief Electoral Officer (and later the Electoral Commission) to appoint Returning Officers and Registrars of Electors.

Electoral Commission

9.125 There are a number of legislative ways of ensuring that public functions are exercised independently of the Government. First, the legislation can state that specified functions are to be exercised by the officer or body in an independent way and without direction by the Minister to whom the officer or body is responsible. Legislation relating to such bodies and officers as the State Services Commission, the

Social Security Commission and the Government Statistician provide examples. Second, the position of the officer or body can be enhanced. The appointment might be on the nomination of the House of Representatives, thereby emphasising the independence of the office from the Government and indicating a responsibility to Parliament. This is to be seen, for instance, in the Canadian federal electoral legislation and the New Zealand Ombudsmen Act. The same emphasis can appear in tenure provisions. That legislation and that relating to the Controller and Auditor-General and High Court Judges provide that the various office holders can be dismissed only for cause and only on a resolution of the House of Representatives. And the independence from particular annual scrutiny by the legislature could be marked by a permanent appropriation of the salary of the officer. We have already noted that the Canadian legislation, emphasising more than others the independence of the office of Chief Electoral Officer, goes further by not requiring specific parliamentary appropriation of the fees and expenses of elections. Third, the body might be a multi-member one and include people from outside the public service and officials of independent status. The composition of the Representation Commission in New Zealand has long recognised that such multi-member bodies have an obvious value in dealing with more complex and contentious matters. Such a body, while having a critical role, need not have a large one. It can be empowered to delegate the bulk of its functions to a full-time member.

9.126 The Electoral Commission in Australia consists of 3 members, with the Electoral Commissioner being the only full-time member and having much of the power of the Commission by delegation. The Commissioner can, however, when appropriate take action with the other 2 members and is associated with additional people for the purpose of boundary determinations. Another model is provided by the Ontario electoral expenses law which is administered by a body which includes members named by the major political parties.

9.127 We think that the Australian legislation provides a valuable model on which to build. It centres on an independent body. In practice that body meets only to deal with matters of central importance. Its chief executive officer, the Electoral Commissioner, is a permanent head with the regular administrative responsibilities arising from that, and also has some of the regular advisory and administrative relations with Ministers. The Commission also advises Parliament. But, for the most part, whether alone or associated with others in the Commission or the Boundary Committees, the Commissioner operates independently of the Government. The body has, so far as we could judge, the status and capacity to meet its important responsibilities. It certainly holds the respect of the major political parties for its independence and efficiency. That, we observed, is also plainly the case with the Chief Electoral Officer in Canada. The personal qualities of the senior officers in those bodies are clearly also of great importance to their success.

9.128 We already have in place much of what would be needed to establish such a body and to provide it with the necessary support. At the core is the responsibility for establishing and maintaining the electoral rolls, running the elections, and keeping an oversight over the relevant law and administrative arrangements. Important functions might also be added. The oversight role involves advising those responsible—Ministers and the relevant Parliamentary Select Committee—about the reform of the legislation and the funding of the system. Members of the existing Electoral Office within the Department of Justice could no doubt continue to provide the core of the new body we propose. Their functions would be widened to take responsibility, as before 1980, for registration of voters. That would be done, we envisage, under contract by New Zealand Post which would in fact continue to provide the service of compiling and maintaining the rolls of registered voters. In that practical sense too, there, will be no change. Similarly, the position in respect of the running of elections and advising on the electoral law would not be greatly different: the proposed Commission would still be responsible for the former and would continue to give advice to the Minister (and, now under express legislative direction, to Parliament as well) on the latter. The involvement of members of the Commission with the 5-yearly work of the Representation Commission would continue much as at present.

9.129 The Australian model also provides a basis for our proposals about the membership of the proposed Commission. The Governor-General would appoint 2 of its 4 members: the President and the Electoral Commissioner. The others would be the Secretary for Maori Affairs and the Secretary for Justice. The President would be appointed from a list of 3 judicial officers nominated by the Chief Justice, and would in addition chair the Representation Commission; the Electoral Commissioner would also be a member of that Commission. The Electoral Commission would have wide powers of delegation to the Commissioner who would be the permanent head for the purposes of the State Services Act 1962. The role of the other 3 members of the Commission—already paid by the State—while important would not be time-consuming. The Electoral Commissioner could be dismissed from office only for cause on a resolution of the House of Representatives.

9.130 We propose that a Judge should preside over the body to enhance the fact and the perception of its independence and status. The Secretary for Maori Affairs should be included to ensure that the very important interests of the Maori people in the general administration of the electoral system are properly considered. We have noted at various points in this chapter and in Chapters 3 and 5 real problems in this area. We propose that the Secretary for Justice be a member for 4 reasons: the experience of that department with electoral and related administrative matters, the particular professional assistance (e.g., on electoral law) the department can provide, the general administrative and personnel assistance it can provide (e.g., in terms of Returning Officers and electoral officials), and its continuing

responsibility to advise its Minister on electoral matters. We would not see that involvement of the Department of Justice as infringing the independence of the Commission. Rather it would assist it to carry out its functions more effectively, and would help keep the staff of the Commission few in number.

9.131 We have already made the point that the existing resources in the Justice Department and Post Office (the latter under contract) would be at the core of the new body. Any increase in functions of the kinds proposed could of course have staffing and other resource consequences. That should, however, be kept in perspective. The relevant bodies in Ottawa, Toronto, Canberra and Sydney are not large. The registration function, although important, involves little extra work. The extent of election finance staffing would depend largely on the complexity and self-enforcing character of the legislation. Overall, our proposals aim to strengthen the independence of the electoral administration by reorganising present resources and altering its legal status. That in itself involves no extra financial cost.

Recommendations:

- **61.** Ministers (and in particular the Minister of Justice) should continue to have responsibility for the review of electoral legislation, for the general administration of the electoral system, and for its funding.
- **62.** (a) A single independent body, the Electoral Commission, should be charged with the duty of carrying into effect the electoral law, in particular those parts concerned with the enrolment of voters and the conduct of elections; it should also keep the whole system under review, reporting annually to Parliament, and, as appropriate, advising the relevant Parliamentary Select Committee and the Minister.
  (b) The Electoral Commission should consist of a President appointed by the Governor-General from a list of 3 judicial officers nominated by the Chief Justice, the Electoral Commissioner appointed by the Governor-General, the Secretary for Maori Affairs, and the Secretary for Justice.
  (c) The Electoral Commissioner should be the permanent head of the Commission and should be subject to dismissal only for cause on a resolution of the House of Representatives; the Commission should have broad powers of delegation to the Commissioner.

We return later to the relationship between the Commission and the Parliamentary Select Committee.

9.132 There is another general characteristic of the electoral administration that we would stress. The administration must be sensitive and responsive to the cultures and needs of the various communities it serves. We have already mentioned some of the ways in which it does this and have proposed that further steps can be taken in the election period (para. 9.87). Tribal trust lists might be helpful in

preparing the electoral rolls (para. 9.56). We have proposed that the Secretary for Maori Affairs be a member of the Electoral Commission, and that body would in the course of the consultations necessary to its effective operation confer with appropriate representatives of the Maori people.

9.133 **Information role.** There is one further function which we strongly recommend for an independent Commission. We think that the electorate is reasonably well informed on political matters such as the differences between the various parties and their policies—although we urge the increased flow of information. We have, however, been struck by the limited public knowledge of our electoral and parliamentary systems. The proper participation of the electorate in that system and in the choice of their Government and Parliament would be helped by greater knowledge. The Australian Act, in a provision passed to give effect to the proposals made by a Select Committee in 1983, states as one of the functions of the Commission the promotion of "public awareness of electoral and parliamentary matters by means of the conduct of education and information programmes and by other means" (s. 7 (1) (c)). The Canadian office also carries out such functions. We think the proposed Electoral Commission should have a similar function.

Recommendation:

- **63.** One of the functions of the Electoral Commission should be the promotion of public knowledge of electoral and parliamentary matters.

The language and structure of the Electoral Act

9.134 Another matter which requires attention is the electoral legislation. Like other users of the Electoral Act 1956, we found it cumbersome, and not at all easy to use. As examples, we refer to 2 essential matters—the plurality system itself, and the right to vote and to be a candidate. On the first, s.11 provides that there is to be 1 member for each electoral district, s.86 provides for a poll if more than 1 candidate is nominated, s.106 requires each voter to strike out the name of every candidate except the one for whom the voter wishes to vote, the Returning Officer counts the votes under s.115, and, having ascertained the number of votes received by each candidate, declares the result of the poll by giving public notice in a scheduled form (s.116 and form 10). That form provides for the listing of the votes cast for each candidate and ends with a declaration of result. An equality of votes between candidates who with 1 more vote would be entitled to be declared elected is to be the subject of a judicial recount, and if not resolved in that way is to be determined by lot (s.116(2) and (3)). That the candidate with the largest total of votes in a district is elected is no more than implicit in these provisions.

9.135 On the second matter, the right to vote and to be a candidate, the provision which according to its marginal note appears to be about

the critical matter of the qualification of electors is not reached until p.33 of the current reprint of the Act (s.39). That provision is in fact not about the right to vote but rather about the prior matter of the qualification to register as a voter. It is s.99—fully 40 pages later—which indicates who it is who can vote. It is to that provision that the very important s.25, about the right to be a candidate for membership of the House, makes, from p.24 of the reprint, a long non-specific forward reference. Part way between those provisions is s.42 which sets out certain disqualifications for registration.

9.136 Even if these provisions are clear in their effect (and that is not always the case), the fact remains that they are difficult to use. Moreover, their complexity and arrangement may in practice prevent the proper consideration of the issues they give rise to. That can have serious consequences as appears in the events leading to the judgment of the Court of Appeal (mentioned in para. 9.71) about the marking of the ballot paper.

9.137 We indicate at various stages in this Report other matters which should be addressed in a revision of the statute.

Recommendation:

- **64.** The Electoral Act should be redrafted with the aim of making it as comprehensible and accessible as possible.

THE SETTLEMENT OF DISPUTES UNDER THE ELECTORAL ACT AND ITS ENFORCEMENT

9.138 Those exercising independent statutory powers are not, in general, a law unto themselves. Their decisions can be challenged in a variety of ways, although one way that is available in the usual course of administration (a complaint to the Minister) would not be available here. The Electoral Act expressly provides for court proceedings in respect of actions taken by Registrars and Returning Officers in the following ways:

(a) objections by the Registrar or an elector to a person being enrolled are dealt with by the District Court;

(b) requests for recounts following the declaration by the Returning Officer of the result of the election are decided by a District Court Judge; and

(c) election petitions challenging an election or return as unlawful and seeking a different result or a new election are heard by the High Court consisting of 3 Judges.

The ordinary right of appeal from a District Court appears to be available in the first case. The judicial recount in the second case can in effect be challenged in a petition to the High Court. The Act provides expressly that the decision on such a petition is final and not subject to appeal.

9.139 The Courts are also given statutory roles in the application and enforcement of the Act by the large number of provisions setting out offences (including corrupt and illegal practices). The general law

relating to criminal proceedings (including rights to a jury trial and to appeal) applies to those offences.

9.140 The Courts also have relevant common law powers to ensure compliance with the law. So the High Court, as we saw in Chapter 5, can, at the request of an aggrieved party, review a decision of the Representation Commission on the ground that the Commission has exceeded or abused its powers. The Court also has power, in appropriate proceedings, to interpret provisions of the legislation the legal effect of which is disputed. *Wybrow* v *Chief Electoral Officer,* referred to earlier in this chapter (para. 9.71) is an example.

9.141 The Australian legislation points to a possible gap in the courts' powers to ensure compliance with the law. Statutory powers operate after the event—by way of petition or criminal prosecution once the deeds have been done, and after the election (certainly in the former case and almost certainly in the latter). Yet there may well be situations in which rapid action, say, to prevent gross campaign overspending in breach of statutory limits, is called for. It may be that the courts would be willing under their inherent powers, say at the suit of the Attorney-General or a candidate claiming prejudice, to issue an injunction in such a case. The Australian Act does not leave the matter uncertain. It expressly authorises the grant of such injunctions on the application of the candidate or the Electoral Commission. We propose that our legislation also include such a power.

Recommendation:

- **65.** The High Court should have statutory power to issue injunctions to prevent offences against the Electoral Act.

9.142 The purpose of these procedures and remedies is to ensure that the law is complied with. The qualified individual has a right to be enrolled, to vote, and to have that vote fairly counted. The candidates, parties, and others affected have the right to see the relevant law complied with, and to have disputes about these matters decided fairly by independent bodies—in this case the courts. A practical limit on the possible operation of that principle arises from the need for finality in the process—especially on petitions—in the interests of the expeditious confirmation of the election of members so that, especially in close elections, a Government can be formed.

9.143 On these issues, the Democratic Party made the major relevant proposal. That was for an election and polls court. The court would deal with petitions (including local government ones), general determinations under their proposed elections and polls Act (no indication is given of what these might be), and appeals from boundary decisions. It would consist of a High Court Judge (and possibly additional Judges to allow the court to sit in divisions) and 2 other expert members selected from a panel approved by a committee of the House of Representatives. The Democratic Party also recommended that there be a right of appeal in petition cases to the Court of Appeal.

9.144 The Commission is not persuaded by the arguments for a special court or for expert members. Petitions are rare—there have been only 6 relating to elections in the last 40 years and the Magistrates and District Court Reports include only a handful of relevant local government cases in the last 12 years. Prosecutions are also uncommon and in any event will not necessarily raise issues specifically related to elections. The issues tend to be the familiar ones of finding facts, for instance, about corrupt practices or the intention of the voter, and the interpretation and application of legislation. And for the reasons already given (para. 5.21), boundary issues should not be subject to a statutory right of appeal to the courts.

9.145 As noted, there is no right of appeal in petitions cases. That is a departure from the usual principle that parties in court proceedings have a right of appeal. No doubt the main reason for the departure is the need for early finality. Another historical reason might be that the court's role in electoral matters was a specific limited concession by the House of Representatives which traditionally itself determined disputes about its membership. The latter point is now to be seen differently given the emphasis the law places on the rights of voters and candidates rather than on the privileges of the House. The Court of Appeal has also shown that it can move very quickly when that is required by the needs of parties to litigation. (That need can be indicated in the legislation. Attention might also be given to the time limits on the filing of the petition.) The Commission does not think that there is now any good reason to depart from the usual rule that litigants have a right of appeal. At the moment, the High Court is required to have 3 members when it hears the petition. That might put in doubt the argument for an appeal: more than one judge has already addressed the issues. There are 2 alternative answers to that argument. The first is that appeals are valuable not simply in terms of the number of judges considering the matter but also because of the advantages for counsel and the appeal court of the focussing of the issues and the sharpening of the argument facilitated by the judgment already given. The second is to suggest that if an appeal is provided for the High Court could sit with 1 Judge (although in some cases the importance of the issues might call for a 3-Judge court).

Recommendation:

- **66.** There should be a right of appeal from the decision of the High Court on an election petition to the Court of Appeal, the decision of which should be final.

Recounts and petitions

9.146 The provisions in the Electoral Act relating to recounts and petitions raise many issues which would be addressed in the rewriting of the Act which we propose. Since the submissions and our own deliberations have not reviewed the issues in any systematic way, we do no more here than deal with 2 matters that were raised with us. The

first relates to the right to seek a recount. Following the declaration of the result of the poll, unsuccessful candidates can seek a recount by a District Court Judge. Section 117(1) is as follows:

> Where any candidate *has reason to believe* that the public declaration by the Returning Officer of the number of votes received by each candidate is incorrect, and that on a recount thereof the first-mentioned candidate might be found to be elected, he may within 3 days after the public declaration apply to a District Court Judge for a recount of the votes. (our emphasis)

The provision then goes on to regulate the process for deciding the application. Parallel provisions are included in local government legislation. Magistrates have disagreed on the question whether the candidate is entitled to a recount as of right or whether the candidate must as a preliminary satisfy the Magistrate (now the District Court Judge) that there are facts supporting the belief that the declaration is wrong, and that the candidate might, on the recount, be elected. The latter view was adopted in *Re An Application by Hoskin* (1974) 14 MCD 238. That interpretation does give significance to the words "has reason to believe"; and in the context of the Electoral Act it is supported by the absence of any such words of limitation in the provision which entitles any voter or candidate to take the next step of filing an election petition (s.156(1)). But should there be such a restraint on the right to seek a recount? We do not think so. As noted, no such limit is placed on the more important matter of filing an election petition. Usually no such restraint is placed on the initiation of legal process. The requirement might provide an improper incentive to seek information in breach of the secrecy and other provisions of the Act. As between the major parties one can anticipate that the power to seek a recount will not be abused. Finally, the judge at the end of the recount has wide power to make an appropriate order for costs. Accordingly, we recommend that the legislation be amended to make it clear that candidates have full power to seek a recount. The provision about costs would of course be retained. The amount of the deposit (still at its 1956 level of $40) might also be reviewed.

Recommendation:

- **67.** Unsuccessful candidates should have full power to seek a recount following the declaration of the results of the poll.

9.147 The second matter relates to petitions. The petition process might present a very difficult balance to the court for judgment—the balance between the substantial merits and justice of the case on the one side, and the technical requirements of the legislation on the other; for example in the *Hunua* case, the court was required to weigh the clear indication of the intention of the voter against the precise rule for the marking of the ballot paper. That balance should also be earlier addressed by those responsible for the preparation of the legislation.

Indeed, the 1956 Act already does that in the wider context of ss.166 and 167. The former reads:

> *Real justice to be observed*—On the trial of any election petition—
>
> (a) The Court shall be guided by the substantial merits and justice of the case without regard to legal forms and technicalities:
>
> (b) The Court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the High Court.

One submission suggested to us that this provision was read too narrowly in the *Hunua* case, [1979] 1 NZLR 251, 303. In that case the court held that all that that provision does "is to enable the Court to relax the ordinary Rules of Court at the hearing of an election petition to enable it to get to the real truth of the matter. Indeed, such a Court is permitted by this section to receive evidence which otherwise would not be admissible". The court did not see the provision, and in particular para. (a) of the provision, as giving it broad powers to go to the substantial merits of the case insofar as those merits might require some departure from the detailed application of the rules in the Act.

9.148 We note that similar provisions in Australia which go back to the early part of the 19th century have been read somewhat more broadly. Thus Electoral Courts there have asked themselves whether, looking at the evidence, the majority will had been defeated by the declared result. This matter should be considered in the review of the legislation we propose. Our preference is that the Australian understanding be adopted.

A SECOND CHAMBER

9.149 The New Zealand Parliament has been a single-chamber or unicameral Parliament since the abolition of the appointed Legislative Council in 1950. Though the question of a Second Chamber was not specifically included in our terms of reference, it is related to questions asked of us concerning the term and number of members of Parliament and to the wider issue of the relationship between the Government and the people which is a recurring theme in our inquiries. Moreover, a number of submissions suggested the re-establishment of a Second Chamber and we are aware that this view is supported by some who wish to see additional constitutional safeguards. The question of a Second Chamber should not, therefore, be passed over without mention.

9.150 The main reasons given for a Second Chamber in a unitary state like New Zealand are that it would place a curb on and prevent the abuse of the otherwise extensive power of the First Chamber and that it would assist the First Chamber in the execution of its duties. Moreover, a Second Chamber may provide an additional means of representation.

In federal states, for example, Australia and the United States, the Second Chamber also has the basic function of representing the states within the federation.

9.151 It is claimed that a First Chamber in which a Government has a disciplined majority enables the Government to pass any legislation as quickly as it wishes. A Second Chamber, by opening up the possibility that the Government may be defeated or be prevented from acting precipitately, may therefore help reduce the extent of executive power or at least improve the quality of the legislation enacted. This argument, however, requires careful scrutiny. Few would now support giving a Second Chamber an unfettered power to reject legislation passed by a First Chamber in a unitary state. If the Second Chamber is not directly elected, it does not, and should not, have the authority to overrule the resolutions of a democratically elected House. If it *is* elected, it may have democratic authority but great constitutional difficulties may arise under a system of parliamentary democracy if the Second Chamber is in conflict with the First Chamber which provides the Government. Moreover, given the reality of party government, a Second Chamber will be under the control either of the governing party or parties, in which case it cannot be expected to block the Government, or of the Opposition, in which case its use of the power to block would be seen as democratically illegitimate, an attempt of the minority to overrule the majority. (Under a system of separation of powers with a separately elected executive, as in the United States, conflict between the 2 houses of the legislature is less damaging than under parliamentary government, because the authority of the executive is not thereby threatened.)

9.152 Most supporters of a Second Chamber would now accept that in the New Zealand parliamentary situation a power of veto is illegitimate, and that a Second Chamber should at most have the power to delay legislation and assist the First Chamber to carry out its functions properly. Submissions to us placed particular emphasis on the value of a delaying power in helping to prevent hasty or ill-considered legislation and we received a number of thoughtful suggestions about the way in which a Second Chamber could be organised to achieve this. It was usually suggested that the Second Chamber could be either appointed or indirectly elected.

9.153 It is certainly true that if legislation must be passed by 2 chambers there should be a greater opportunity for debate and public criticism. Nonetheless, any delaying power would not be great and a determined Government would still be able to force its legislation through quickly, as is shown by the history of the Legislative Council. Further, it would be very difficult to achieve satisfactory membership of the Second Chamber, whether appointed or indirectly elected. This again is shown by the experience of other countries where Second Chambers have failed to fulfil the expectations held of them. One interesting compromise is made in Norway where the First Chamber elects one-quarter of its members to form a Second Chamber which has

a reviewing function. In the New Zealand context we consider that select committees made up of elected parliamentarians, which now scrutinise almost all legislation with the assistance of public submissions, provide an effective opportunity for detailed consideration and improvement of legislation. In general, we consider that the constitutional developments in the last generation, not only the improved select committee system, but also other developments such as the Official Information Act, increasing review of administrative actions by the Courts, the Waitangi Tribunal, the Ombudsmen and the Human Rights Commission in many respects compensate for the lack of a Second Chamber in terms of scrutinising, and in some instances restraining, the power of the executive. We have referred to these and other possible measures designed to increase restraints and accountability in Chapter 4 (para. 4.22 et seq.) and Chapter 6 (paras. 6.29 and 6.31).

9.154 A Second Chamber might also be of advantage in providing an additional source of parliamentarians available to serve as Ministers or on committees. We certainly accept that there is a need for more parliamentarians (Chapter 4). However, we would prefer an enlargement of the House of Representatives for this purpose rather than the reintroduction of a Second Chamber. Moreover, if members of the Second Chamber were nominated rather than elected, they would lack the status and public accountability of elected MPs (cf. para. 4.15).

9.155 A Second Chamber can have a further function in providing an alternative basis of representation, supplementing the territorial and one-person one-vote basis normal for First Chamber constituencies. In federal systems, for instance, Second Chambers regularly give equal representation to states regardless of population size. In a unitary system such as New Zealand, it would be possible to provide for better representation of women and greater representation of minorities than is at present achieved in the House of Representatives. It would also be possible to give the South Island greater representation and thereby to address to some extent the problems caused by the drift of population to the North. However, the dilemma of having either an elected chamber which is too powerful or a nominated chamber which is too weak would still hold. The Commission considers that the best way to make Parliament responsive to the needs and interests of minorities is to reform the First Chamber by making it more proportional in its representation.

9.156 In conclusion, though we respect and share many of the concerns of those who support a Second Chamber, we believe that the reintroduction of a satisfactory Second Chamber would be very difficult to achieve. In our view better progress is likely to be made through the other channels we have indicated, and in particular through the establishment of an enlarged House of Representatives with members elected by the Mixed Member Proportional system (MMP).

THE OFFICE OF SPEAKER

9.157 Some submissions related to the Speaker of the House of Representatives. Our term of reference about the numbers of members of the House perhaps justifies an examination of proposals for a special constituency for the Speaker or for a non-member to be brought into the House to be Speaker. These proposals arise from a constitutional concern for the Speaker being—and being seen to be—fair and impartial, and able to override the partisan wishes of the Government in the interests of the proper conduct of parliamentary business. We think, however, that they can be properly considered only in the course of a broader examination of the Office of Speaker which would look as well to other proposals (assuming, of course, that there is a need for any change). Other proposals might include, for instance, the appointment of a Deputy Speaker from the Opposition. These issues lie outside our terms of reference and we do not consider that we are able to embark upon them.

LOCAL GOVERNMENT

9.158 A number of submissions proposed the devolution of power to regional and local government. The proposals were sometimes made in the context of a re-organisation of our whole system of government and in that respect, as we indicate in the Introduction, they fall outside our terms of reference. We point out, however, that nothing that we propose is inconsistent with stronger local government. Indeed there is, in any event and largely independent of formal constitutional arrangements, some evidence of a growth in power away from central government. If that is a process which New Zealand people wish to see continue it will not be inhibited by anything we have recommended in this Report. We are also aware that the Local Government Commission has suggested a regular review of the functions of central and local government. There is again nothing in our Report to hinder this.

OPINION POLLS

9.159 In its submissions to the Commission, the Democratic Party proposed the banning of the publication of the results of political opinion polls in the period from writ day to the close of election day. In our view, a ban cannot be justified. We consider, however, that the increasing significance of opinion polls makes it desirable that they be subject to some kind of quality control.

9.160 The prime reason advanced to us for a ban on opinion polls was that they have a disruptive effect on voters before an election. The strength of the impact of polls on voters is clearly crucial to any consideration of a ban. Our research indicates that psephologists who have studied the impact of this sort of poll, and of political polls in general, on voting behaviour appear to agree that "there is no good evidence on how, if at all, polls influence voting behaviour".[4] We accept

[4]D. Kavanagh, "Public Opinion Polls", in *Democracy at the Polls*, ed. David Butler, Howard R. Penniman, and Arthur R. Ranney, Washington, 1981, p.211.

this judgment and consider that if there is no such evidence, there are no good grounds at present for the prohibition of the publication of the results of a political poll. We note too that even if grounds for a prohibition could be established, there would be severe difficulties in devising legislation that could not be circumvented.

9.161 Although we cannot recommend a ban on polls, we are aware of their increasing prominence in the electoral system and the consequent need to ensure, as far as is practicable, that their results can be used with confidence. We first note the use that parties make of polls and then consider their place in the decisions made by voters.

9.162 Parties use the results of public polls commissioned by the media and of private polls they have commissioned themselves to assess the reactions of voters to various national, social and economic issues. Polls are used as well to gauge voters' perceptions of leading political personalities. These assessments are reflected in the formulation of policies, in the choice of leaders, and in the design of electoral campaigns that best present those policies and political leaders to the public. An example of the sometimes critical significance of opinion polls to political parties is provided by their use in West Germany. The coalition partners of the Free Democrats are naturally anxious that the Free Democrat vote should reach the 5% threshold that entitles that party to seats in the *Bundestag*. In consequence, when planning their approach to their traditional supporters they have an intense interest in reliable pre-election public and private polls on the strength of party support. We believe that the effective use of polls by political parties is an aid to democratic responsiveness and we make no further comment on this use.

9.163 Many ways in which opinion polls may affect voters have been identified. For instance it has been suggested that people may tend to vote for the party that is leading in a poll (the "bandwagon" effect), or to support the apparent loser (the "boomerang" effect), regardless of the policies of the respective parties. It is not profitable to speculate further on these and other effects in the absence of reliable evidence on their magnitude. It is more helpful to consider the various kinds of information available to voters and the use they make of them.

9.164 Voters are influenced not only by statistical and policy material presented by the parties, but by debates and interviews on television, by the selection of items in the news, by the views of prominent people and newspaper editors, by the views of friends and neighbours and indeed by a host of other factors. Some of the information received in these many ways will be argument, some will be fact, and some will be unsubstantiated opinion. We think that the use of all varieties of information, including poll results, in coming to a voting decision is natural and generally healthy. We also think it would be improper for anyone to indicate which selection of information voters should use in making up their minds.

9.165 We do, however, have a concern for the quality of information presented to a voter. It would be preferable for all allegedly factual

statements on matters pertaining to party policies or elections, whether they come from polls or from other sources, to be accompanied by an implicit or explicit guarantee of their quality. Some figures, such as those put out by Government agencies, can usually be accepted as accurate because of the integrity and reputation of the bodies that produce them. Other figures, such as the results of ad hoc polls taken without professional advice, may be suspect. Bad polls and selective or false information from any source should not have the same apparent credibility as good polls and good information. We see no acceptable or enforceable way of implementing such a desirable but very general principle through legal bans. However, we think that anything which helps to ensure good information is valuable. In particular we believe that public confidence in the results of political polls may be enhanced through the use of a voluntary grading scheme.

9.166 Specifically we recommend that groups planning to conduct polls and publish their results in the election campaign, should be able to refer the design of their polls to an expert body for an assessment of the accuracy that can be achieved and the kinds of interpretation that can legitimately be made from the poll's results. In making an assessment this body would need to consider such features of the design as the population to which it is intended that the results of the poll should apply, the relationship of the sample of interviewees to this population, the mode of selecting a sample, the procedures to be followed if someone refuses to be interviewed, the characteristics of the achieved sample in relation to those of the population from which they were drawn, the time span of interviews, the wording of the questions, the time of release of the survey results, and the legitimate inferences from the poll and the accuracy with which they can be drawn. A sponsor whose poll was considered of a reasonable standard should be able to publicise this fact when announcing the results. We believe a voluntary scheme of this kind could provide protection both for the genuine polling organisations and for the voters.

9.167 The skills needed by the expert body exist in many professional bodies and polling organisations as well as in some university and Government departments. In particular, the New Zealand Statistical Association's Committee on Survey Appraisal and Public Questions already examines the quality of some published poll results. We recommend that suitable arrangements for the prior assessment of political poll design be established with this Committee in consultation with other appropriate bodies and individuals.

9.168 An illustration provides support for the proposal of para. 9.166. Suppose a poll affirms that 68% of adults are in favour of a means test for universal superannuation. The reader of such a result is entitled to believe that the poll was so designed that the result applies to all the people of New Zealand and not, say, only to the urban population. The reader should also be entitled to assume that while the figure 68% will not be entirely accurate, the true figure for all New Zealand is close to 68%. It may, for instance, lie in the range 65% to 71%. Few voters will

have the experience or knowledge to realise when even these obvious interpretations (let alone the less obvious interpretations) may not be valid for technical reasons such as an inadequate sample size, a poor sampling procedure or poorly posed questions. Our proposed assessment in such an example would indicate the kinds of interpretation that could be made with confidence.

9.169 A slightly different approach to that of para. 9.166 has been taken by others who have considered the possibility of imposing some constraint on the publication of poll information. Suggestions have been made that the results of any poll should be accompanied by the publication of material that bears on the quality of the poll. For instance, a recommendation in the Canadian White Paper on Election Law Reform (June 1986) is that the published information should include the name of the organisation sponsoring the poll, the polling organisation, the population sampled, the sample size, the dates of the first and last interviews, the percentage of completed interviews, a description of the procedure used to account for under- or over-representation of any strata of the population in the sample, and the exact wording of the questions used. Much of this material is of relevance only to a practising statistician, and it would not of itself provide a guarantee of quality to the ordinary voter. We can, however, see some virtue in demanding publication of some of the material as a matter of course. Polling organisations would then need to be careful of their methods in the face of potential expert criticism. For commercial polling organisations, the publication of most of this material is part of their established code of practice. The requirement for publication is thus of greatest relevance for organisations which on occasion design and conduct polls without full professional assistance.

Recommendations:

- **68.** Sponsors of a political poll, the results of which are intended to be published during an election campaign, should be able in advance of publication, to refer the design of the poll for assessment to an expert body, the membership of which should be determined in consultation with the New Zealand Statistical Association and other appropriate organisations and individuals.
- **69.** The media should be encouraged to include at least the following items of design information when publishing the results of a political poll during any election campaign:

  (a) the name of the organisation sponsoring the poll;

  (b) the polling organisation;

  (c) the population sampled;

  (d) the sample size; and

  (e) the dates on which the interviews were conducted.

THE COST OF IMPLEMENTING OUR RECOMMENDATIONS

9.170 A factor limiting the changes that may be made in any area is that of cost. In the course of our enquiries we have been conscious of the need to avoid recommendations entailing unnecessary costs. Only 2 of our proposals involve significant new spending on an ongoing basis. These are the recommendations for an increase in the number of MPs to 120, and for direct financial assistance to political parties and independent candidates receiving over 4% of the vote. We estimate the likely extra cost of each new MP would be around $142,000 per year or $3.3 million for an increase to 120 members (para. 4.31). Our proposal for direct funding would involve approximately an extra $500,000 per year (para. 8.168). Other recommendations in Chapter 8 entailing greater State scrutiny and control of political finances could be expected to add to these costs.

9.171 Our remaining recommendations are unlikely to require significant additional ongoing costs to Government. Indeed, in 2 areas, Maori representation and the term of Parliament, changes might lead to substantially lower costs than at present. In the area of Maori representation, a move to a common roll under MMP should result in considerable savings in that the relatively costly procedures associated with the Maori option would no longer be necessary. If adopted in the referendum we have proposed, an increase in the term of Parliament to 4 years would also lead to substantial savings by reducing the frequency of elections and associated registration and administration costs.

9.172 We have little basis for predicting the initial administrative, publicity and education costs of *introducing* major changes to our electoral system. Changes such as a move from plurality to MMP, the creation of an Electoral Commission, and the implementation of new administrative processes will certainly involve setting-up costs. However, they will not be likely to require greatly increased costs of an ongoing kind.

9.173 Finally, any increases in cost must be measured against the advantages for our country that we see arising from our major recommendations. These advantages are less tangible and predictable than are the costs we have identified. We are confident, however, that they are substantial.

ENTRENCHMENT OF BASIC PROVISIONS OF THE ELECTORAL ACT

9.174 Electoral legislation is frequently under review and is subject to much amendment. But should the whole of the electoral system be subject to alteration by simple majority in the House of Representatives, that is effectively by the political party in power? Or should there be some restraint on that ordinary process?

9.175 The New Zealand Parliament has long taken the view that some critical aspects of the electoral process should not be subject to that ordinary process. Thus last century it directed that disputes about

elections be resolved by judges and not by the House, and it established an independent Representation Commission to take over the task, which it had previously exercised, of determining the electoral boundaries. Most notably in the present context, Parliament in 1956 in s.189 of the Electoral Act provided that certain basic provisions of the electoral law ("reserved provisions") could be repealed or amended only if 75% of all the members of the House of Representatives, or a majority of the voters in a referendum, support the change. The Minister of Justice presented this provision to the House as "a genuine ... attempt to place the structure of law above and beyond the influence of Government and party".[5] Looking back over 30 years we can say that that attempt has succeeded in fact. Whatever the legal force of the provision (a matter we come back to), its force as a convention of the constitution appears to be clearly established. First, the principle of the provision is clear. As stated by the Minister, certain matters should be beyond purely partisan decision. Second, the intention that the provision should have effect was also clearly stated in 1956 by the leading parliamentarians when the provision was unanimously enacted. According to the Minister:

> to the extent that these provisions are unanimously supported by both sides of the House, and to the extent that they will be universally accepted by the people, they acquire a force which subsequent Parliaments ... will attempt to repeal or amend at their peril against the will of the people.[6]

And third, the provision has in fact been complied with. All the changes that have been recognised as amending the reserved provisions since 1956 have in fact been made by agreement between the major parties in the House (which is what in practical terms the 75% requirement amounts to and what its principle probably requires). Other proposed changes have not been taken further because the Opposition has not agreed. And as already recounted, the question of extending the term of Parliament was put, in accordance with the provision, to the people who answered "no", and was taken no further. With the proposed transfer of the provision relating to the term of Parliament from the Electoral Act to the Constitution Bill, Parliament is being asked to restate the principle of entrenchment.

9.176 We propose that the protection should continue. The constitution should continue to protect central features of our electoral law from simple majority amendment by the House.

9.177 The next questions follow from that conclusion: What are the central provisions? And how should they be protected? Section 189 protects provisions relating to:

(a) the qualification of electors (at least so far as age is concerned);

(b) the method of voting;

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[5]J.R. Marshall, New Zealand Parliamentary Debates, v.310, p. 2839.
[6]Ibid, p. 2852.

(c) the method for the determination of the number of seats and their boundaries including the provisions for the constitution and functioning of the Representation Commission; and
(d) the 3-year term of each Parliament

(This is a summary listing. The actual provisions are complex and not always clear in their effect as indicated later.)

9.178 Should these provisions be retained? Should they be supplemented? Should they be defined differently? It seems to us that, subject to certain important questions of definition, the 4 sets of provisions listed above are critical and should be retained. The only additions that we have seriously considered are Maori representation, the right to be a candidate and the tenure of the Electoral Commissioner. Given the proposals we make relating to Maori representation, the question of entrenchment does not arise for us at this time. Because of the close connection between the right to vote and the right to be a candidate, the present distinction can be questioned. (That comment assumes, contrary to parliamentary practice, that not only the voting age but also the right to vote is entrenched by the present provisions; the effect of the wording of s.189 is not clear.) We also think, given the importance of the office to the independent operation of the electoral law, that provisions of the legislation protecting the tenure of the Electoral Commissioner should be entrenched as well.

9.179 Defining the matters which are to be protected is difficult. That can be demonstrated by the present provisions, some of which are both over-inclusive and under-inclusive. Thus, those relating to the Representation Commission include much relatively unimportant administrative detail about the members, the method of appointment, and their payment, but, as we noted in Chapter 5 (para. 5.50), they do not include the provision which gives the report of the Commission its legal effect. The definitional difficulty is not just about what *should* and should not be included; it is also about what *is*, as a matter of interpretation, included at the moment. Consider the protection of s.105 relating to the method of voting. How far does that protection go? Does it point only to the relatively mechanical, but still important, aspects of the secrecy of the ballot; or does it go further, as the architect of the entrenchment provision has since written, to the plurality system and exclude proportional, preferential, or any other new system of voting?[7] We propose that rather than the present method of listing the sections in the legislation, the entrenching provision should identify the essential matter that is reserved. We realise that that is a very difficult task and that it will produce some uncertainty (as indeed does the present provision) but it would allow both Parliament and, should it come to it, the courts to go to the pith and substance of the matter. That is to say, if possible, the protection should not be determined simply by the formal scope of particular provisions of the statute.

[7]John Marshall, *Memoirs, Volume 1: 1912 to 1960*, Auckland, 1983, p.247.

9.180 Finally, how should the provision be protected? At the moment, to repeat, proposals for repeal or amendment have to be supported by 75% of all the members of the House or a simple majority of the people at a referendum. We should note a number of features of the provision.

9.181 First, the provision does not protect itself. That is to say, it could be repealed by legislation passed in the regular way—by a Bill passed by a simple majority in the House and assented to by the Governor-General. Once such an Act had been passed, the reserved provisions would no longer be reserved and they could be repealed or amended in the usual way.

9.182 Second, it is not clear whether legislation passed in breach of the entrenching provision would be held invalid or not. The view widely adopted in 1956 by Ministers and others was that the provision was ineffective in law (and that indeed appears to be the main reason the provision was not itself protected against simple repeal). But that was not thought significant. The more important matter was to establish a moral or conventional rule, as appears to have happened. In addition, legal opinion has altered in the last 30 years. More would now support the view that Parliament can place effective controls on the way it makes law.

9.183 The third point is that the provision does not necessarily exhaust the principle which lies under it. Thus some situations not caught by the technical terms of the list should nevertheless be changed only by broad agreement. The provision about the legal effect of the reports of the Representation Commission again provides a good example.

9.184 The fourth feature is similar to the third. The provision does not indicate which method—agreement in the House or a referendum—is to be used in any particular case. That matter again must be seen to be subject to wider considerations.

Conclusion

9.185 Those features indicate the first of our conclusions. It is that the protection of core elements of the constitution to be found in the electoral law is to be accorded not just by the precise legal requirements but also by the broader spirit. The constitution consists of the law strictly so-called and the conventions of the constitution. The law in the narrower technical sense has a necessary but not a sufficient role.

9.186 What should that necesary role be? The 1956 Act again provides the model. The 2 methods it suggests appear to us to be the right ones: they involve either the agreement of the principal parliamentary parties or an appeal to the people. The 2 further questions which arise are, first, whether in some circumstances a referendum should be required, and, second, whether the entrenching provision should itself be protected. A referendum should be required, it could be argued, when a major constitutional change is being introduced. More

specifically the people should be asked to consent if the change means that parliamentarians are either enhancing their power or reducing the rights of the electorate. Sometimes those 2 circumstances will overlap as with an increase in the term of Parliament. An example of the first alone (at least so far as the major parties are concerned) would be the replacement of a proportional representation system by a plurality one. An example of the second alone would be a reduction of the rights of suffrage, for example by increasing the voting age. We have recommended earlier in this Report that the introduction of the basic proportional system we propose should be only by way of referendum. To repeat, the question here is whether that requirement should as appropriate be imposed by law, enforced by the courts or left to convention which operates in the political and public arenas.

9.187 The argument for enhanced protection being required by law is that these matters are the most important of those in the electoral system and that they should be given the greatest protection on the face of the statute. The legislation can also mark out a very important limit on majoritarian power. It can give symbolic and actual significance to the principle of the protection of minority rights. On the other hand, it could be difficult to draw the line between those matters which should be subject to this more complicated and more expensive process, and those which can be dealt with through the process of agreement between the major parties in the House. Consider, for instance, the operation in a national emergency of a referendum requirement for the extension of the parliamentary term. We consider that certain matters should stay with the good sense and good judgment of the political leaders and the importance of conventional restraints in our constitutional system should be emphasised. On balance, we conclude that this aspect of the matter should be left for political judgment.

9.188 Whether the entrenching provision should itself be entrenched depends first on whether such measures are effective. As indicated, legal opinion on that matter has evolved in recent years. Many would now say that such restraints can be effective if they have been introduced with broad agreement and if they impose a procedural restraint on the exercise of legislative power rather than place a substantive block in its way. If that view is correct, or is likely to be correct, the second question arises: *should* the provision itself be entrenched, or should the matter be left entirely to convention and the good sense of the political parties? Further entrenchment would emphasise the importance given to the protected provisions. The contrast with the full entrenchment proposed for the draft Bill of Rights, were the further entrenchment not included, might put that importance in doubt. The changing legal opinion might also have that effect: after all a major reason for the 1956 decision not to fully entrench the provision appears to be that full entrenchment could not be effective. Accordingly, we recommend that the reserved provisions be fully entrenched. We should say that we do not see this matter as crucial. The convention, which can as well have a wider application than the

rule, is well established. We add, if it is necessary to do so, that we would see the central provisions in question as being adopted by the House only in the special way provided, that is with the agreement of the major political parties represented there or by referendum.

Recommendation:

- **70.** The provisions of the Electoral Act which state:
  (a) the elements of the right to vote and to be a candidate;
  (b) the elements of the method of voting;
  (c) the method for the determination of the number of seats and their boundaries, including the provisions for the constitution and functioning of the Representation Commission;
  (d) the term of Parliament; and
  (e) the tenure of the Electoral Commissioner
  should be protected from the ordinary legislative process. They should be subject to repeal or amendment only if the legislation recites that it is repealing or amending a reserved provision and is supported by three-quarters of all members of the House or by the electorate in a referendum. The protecting provision should itself be protected in the same way, and the relevant provisions should be enacted in the first place only in that way.

THE ONGOING REVIEW OF THE ELECTORAL SYSTEM

9.189 The work of administrative and parliamentary committees over the past few years shows the need for methods for the regular review of the electoral system. At the administrative level that is at present in part provided by the Officials Committee on Electoral Matters consisting of the Secretary for Justice and the permanent heads or their deputies of the Post Office, the Government Computing Service, Internal Affairs, Lands and Survey, and Statistics. Other relevant agencies are represented as appropriate. Under our proposals, review at the administrative level would be provided through the Electoral Commission. The Commission would as appropriate involve other relevant departments and agencies in that review work.

9.190 At the parliamentary level, the important recent development is the establishment of the Parliamentary Select Committee on the Electoral Law. The Justice Department History describes the work of that Committee,[8] which is paralleled in Australia and Canada. The experience of those countries, like ours, shows that there are great advantages in parliamentarians with intimate knowledge of the electoral system having a central hand, very often on a non-partisan basis, in the ongoing review of the electoral law and its administration. We would see that Committee not only as continuing this important task but also as having a heavier workload as our or related proposals are being

[8] *The Electoral Law of New Zealand. A Brief History*, Appendix A to this Report, paras. 8.42 to 8.54.

considered. We have also proposed a number of particular review tasks for the Parliamentary Committee (for instance in respect of party selection rules and the state funding scheme). The Electoral Commission would be the principal adviser to the Committee. Good working relationships between the Commission and the Committee would be essential. The role of the Parliamentary Committee may also need further definition. At one extreme, some matters would be for the expertise of the independent officials of the Commission and, at the other, some matters are of central importance to our political and constitutional system and should be reviewed relatively rarely. They are matters of principle and include those protected from ordinary amendment in the way just discussed.

Recommendation:

- **71.** Ongoing review of our system should continue to be undertaken as appropriate by the Select Committee on the Electoral Law, with the Electoral Commission as its principal adviser.

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We conclude this Report by returning to the themes of our Introduction. First, we are conscious that we are working in a field where value judgments are often required and we have therefore tried fairly to state any arguments contrary to our views so that those who consider the Report can assess for themselves the validity of our conclusions. Second, throughout our Report we have tried to adopt an approach which recognises both principle and practical reality. To adapt the words of a distinguished American jurist, we have endeavoured to strike a balance between rules for the passing hour, which may require regular review, and principles for an expanding future, which must be of a more enduring nature. In so doing our recommendations reflect an assessment of the ways in which our society may best put into practice the ideals of fairness, equality, representation and democracy and an awareness of the ever-changing contexts in which it does so. We have tried to make proposals for good government and for a better democracy.