Electoral law: marking of ballot papers

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The method by which a voter is required to mark his ballot paper in order to have his vote recorded became a contentious issue following the 1978 General Elections. While the stated aim of the Attorney-General[1] *in sponsoring the current Act may have been to ensure that all those qualified to vote and wanting to vote would be able to cast a valid vote, it appeared that a large number of voters had been denied this opportunity in 1978. In this article Kirk Stephenson examines aspects of voting at New Zealand parliamentary elections. The provisions of the Electoral Act 1956 and the current case law are considered, and the adequacy of the present system in relation to its stated objectives is discussed. The New Zealand system of marking ballot papers in particular is compared with those of other countries.*

I. THE ELECTORAL ACT 1956

The required method of marking ballot papers at a parliamentary election has remained the same in New Zealand since 1870.[2] It is set out in the following terms in s.106(1) of the Act:

> The voter, having received a ballot paper, shall immediately retire into one of the inner compartments provided for the purpose, and shall there alone and secretly exercise his vote by marking his ballot paper by striking out the name of every candidate except the one for whom he wishes to vote.

Section 87 of the Act prescribes the form the ballot paper presented to the voter is to take;[3] this paper includes the following instruction to the voter: "Strike out the name of every candidate except the one for whom you wish to vote." The

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1 Introduction of the Electoral Bill 1956, N.Z. Parliamentary debates Vol. 310, 1956: 2842 —

> The principles which we have tried to apply in the drafting of this Bill are worthy of mention. The first is that no qualified person should be deprived of the opportunity to register or to vote. In other words, everybody who is entitled to vote should be able to vote . . . .

2 Report of the *Committee of Inquiry into the Administration of the Electoral Act* (Government Printer, Wellington, 1979) (referred to as the Wicks Committee) 153.

3 Form 8 of the First Schedule of the Act.

ballot paper contains an alphabetical listing of the surnames of the candidates offering themselves for election,[4] and the voter must therefore decide which candidates he will vote for and then strike out the names of all the others.

While the instruction to the voter may seem sufficiently clear and unequivocal, the Act anticipates that some voters will not comply exactly with section 106(1). In section 115(2)(a)(ii) it is provided that the Returning Officer shall reject as informal "Any ballot paper that does not clearly indicate the candidate for whom the voter desired to vote."

But a proviso is added —

> . . . that no ballot paper shall be rejected as informal by reason only of some informality in the manner in which it has been dealt with by the voter if it is otherwise regular, and if, in the opinion of the Returning Officer, the intention of the voter is clearly indicated.

The width of this discretion on the part of the Returning Officer to allow votes which do not comply strictly with the instructions issued to the voter, has recently been the subject of considerable debate and litigation.[5] The question concerns the extent to which a voter can depart from the method of voting prescribed in section 106(1) and still have his vote counted as valid.

The Electoral Act 1956 also recognises the fact that some voters may have difficulty in actually exercising their votes, and assistance is therefore made available. A voter who is wholly or partially blind may nominate another person to accompany him into one of the inner compartments of the polling booth and assist him in marking his ballot paper or mark it for him as he instructs.[6] Also, a person who is unable to read or write, has severe difficulty reading or writing, or is unfamiliar with the English language may request the Deputy Returning Officer at the polling place to similarly assist him in exercising his vote.[7] Interpreters may be appointed by the Returning Officer, to assist officials in giving general directions to voters before they enter one of the inner compartments.[8] It is to be noted that it is up to the disabled voter to seek assistance for himself, and that no official will assist unless requested to do so. Thus, a voter may have to cast aside his pride and ask for help, in order to ensure that he votes validly and as he intends.

II. HUNUA ELECTION PETITION

The issue of the validity of votes marked otherwise than in strict accordance with section 106(1) arose in *Re Hunua Election Petition*[9] following the 1978

4 Party affiliations did not appear on 1981 ballot papers as they did in 1978, s.87(2A) of the Act having been repealed by s.31(1) of the Electoral Amendment Act 1980.
5 *Re Hunua Election Petition* [1979] 1 N.Z.L.R. 251, and *Wybrow* v. *Chief Electoral Officer* [1980] 1 N.Z.L.R. 147.
6 Section 108(2).
7 Section 108(3).
8 Section 93(1) and 103.
9 [1979] 1 N.Z.L.R. 251.

General Election. The Hunua Returning Officer had allowed a considerable number of votes in cases such as where a tick or a cross had been used by the voter to indicate his preference, or the party affiliations rather than the names of the non-preferred candidates had been struck out.[10] These votes clearly did not comply with section 106(1), but the issue was whether they should be saved by the Returning Officer's discretion in the proviso to section 115(2)(a)(ii).

The Supreme Court (now the High Court) adopted a narrow interpretation of section 115(2)(a)(ii) and held that not only did the intention of the voter have to be clearly indicated, but the paper had to be otherwise regular in its marking by the voter.[11] The type of informality which the proviso in section 115(2)(a)(ii) would save was where a voter had mistakenly struck out the names of all candidates, and had then printed in the name of the candidate he wished to vote for, instead of applying for a fresh ballot paper and starting again.[12] The argument of the first respondent that the words "otherwise regular" referred to regularity on the part of official at the polling place, was rejected by the court.[13] The result was that the Returning Officer had a very limited discretion when dealing with votes which did not comply with section 106(1), and large numbers of irregularly marked ballot papers were disallowed as informal despite the fact that the intention of these voters was quite clear.

The judgment of the court in the *Hunua* case was greeted with considerable hostility in certain quarters.[14] It was criticised on a legal basis for its reasoning, and on policy grounds for rejecting the idea that if a voter's intention is clear, his vote should count. In the event, the New Zealand Labour Party sought a declaratory judgment from the Court of Appeal on the 'ticks and crosses' issue, and that court in effect overturned the *Hunua* judgment in this regard.[15]

III. COURT OF APPEAL DECLARATORY JUDGMENT

In section 168 of the Electoral Act 1956, it is provided that decisions of the High Court relating to election petitions shall be "final, conclusive and without appeal, and shall not be questioned in any way". This is obviously to ensure a speedy resolution of electoral controversies, and meant that the judgment in the *Hunua* case could not be challenged. However, the Court of Appeal held that it was competent for it to make a declaratory judgment on an electoral matter, as an assistance to Returning Officers and to the High Court in dealing with such a question in the future.[16]

10 The latter confusion will no longer arise — see supra n.4.
11 Supra n.9, 298.
12 Idem.
13 Ibid. 299
14 See for example, Downs, L.J. *Failing Democracy: The 1978 General Election* (V.U.W. legal writing requirement) 1979; Findlay, M. "Hunua: A Backward Step" *N.Z. Listener,* Wellington, 23 June 1979.
15 *Wybrow* v. *Chief Electoral Officer* [1980] 1 N.Z.L.R. 147.
16 Ibid. 150.

The declaration made by the court was:[17]

> That on the true construction of the Electoral Act 1956 a Returning Officer must not reject a ballot paper as informal under s.115(2)(a)(ii) of that Act unless the paper does not clearly indicate the candidate for whom the voter desired to vote.

Section 106(1) of the Act was therefore held to be directive rather than mandatory, in setting out how the voter should mark his ballot paper to ensure that it will be counted, rather than how he must mark it. The section is of practical importance, but it is not essential that it be complied with.[18] As long as the ballot paper is "otherwise regular" (there are no mistakes on the part of the officials), the sole test of the validity of the vote is whether the intention of the voter is clearly indicated.

The Court of Appeal said that the ultimate object of the democratic system embodied in the Electoral Act 1956 is that the wishes of the electors should determine the results of elections. Exact compliance with the prescribed voting method is not an end in itself therefore, and the court felt that Parliament would have intended that all votes which exhibited a clear intention on the part of the voter should count.[19]

The practical result of the Court of Appeal declaratory judgment is that Returning Officers in future elections will have a firm instruction that they are to accept as valid all votes which clearly show the intention of the voter, although not marked in accordance with section 106(1). While such a ruling could well have changed the 1978 General Election result in Hunua[20] and Kapiti,[21] the judgment could have no retrospective effect. In the future, however, ballot papers marked, for example, with a single tick or cross against the name of one candidate, or with crosses against all but one name, or with a ring around one name, will count as valid, the intention of the voter being clear. Thus the only votes which will now be regarded as informal will be those where no one candidate is clearly indicated — for example, where more than one name is not struck out, more than one is ticked, or no name is or all names are struck out.

IV. PRESCRIBING A METHOD OF VOTING

The Court of Appeal emphasised the practical need for a voter to comply with the directions issued to him. The counting of votes is greatly simplified if most of them are marked in the prescribed manner, as these votes will automatically

17 Ibid. 162.
18 Ibid. 153.
19 Ibid. 154.
20 After the *Hunua* judgment, Winston Peters was declared elected with a majority of 192 votes. There were 560 informal votes, most of which appeared to favour his opponent. Some 70 votes of the 'ticks and crosses' variety would now be valid, as indicating a clear intention. Some 381 votes where one party had been clearly indicated were also held to be informal. The Court of Appeal was not asked to consider 'party' votes, because party affiliations will no longer appear on ballot papers. (Hunua Petition: Special Report).
21 The Kapiti Petition was abandoned after the *Hunua* judgment was released, the ruling being adverse to the petitioner's claim.

clearly indicate the intention of the voter.[22] Non-complying votes will not necessarily be rejected, but they will have to be considered for rejection by the Returning Officer, thus jeopardising the validity of the vote and delaying the declaration of the result.

Directions to the voter on how to mark his ballot paper are designed to help him record a valid vote. If the genuine intention of Parliament is as the Attorney-General claimed,[23] then not only do the directions to voters have to encourage this, but the manner of voting necessarily required must also be similarly conducive. There is no point in establishing a broad franchise, and then making the act of voting a difficult intellectual exercise, which can only be successfully accomplished by those of above-average intelligence.

In New Zealand, the only people who are denied a vote (once they have satisfied the residential qualification), are those detained in mental institutions,[24] those who have been found guilty of corrupt election practices,[25] those in prison,[26] and those under eighteen years.[27] Average intelligence and familiarity with the English language are not official requirements for qualification as a voter, although it could be argued that they are implicit assumptions of the system. Provision is made for illiterate voters, and those who have difficulty with the English language, to have assistance with marking their papers, but this assistance must be requested.[28] The easier it is to cast a valid vote in the first place however, the less chance there will be that a qualified voter does not have his vote counted.

When the Electoral Act was passed in 1956, the instructions appearing on the ballot paper were drafted to suit the average European voter. With many New Zealands no longer having English as their first language, and with an increasing Maori population, the form of the ballot is now a subtle hurdle in the voting process. A voter not only has to ensure that he is enrolled but he must also mark his ballot paper in such a way as to clearly indicate his preferred candidate. That the form of the ballot paper and directions on it do not ensure the latter is borne out by the higher levels of informal votes in lower socio-economic (and less educated) electorates.[29]

The diffculties involved with the current ballot paper form are (a) that different cultural meanings may apply to "strike out", leading to confusion,[30] (b) that voters may see a difference in voting for one candidate, and voting against all of the others (as is the direction) and (c) that the absence of lines between the names

22 Supra n.15, 153.
23 Supra n.1.
24 Electoral Act 1956, s.42(1)(aa)-(b).
25 Ibid. s.42(1)(c).
26 Ibid. s.42(1)(d).
27 Ibid. ss.39 and 2(1).
28 Supra n.7.
29 In the 1978 General Election the overall level of informal votes was 0.63 percent of total votes cast. However, in Auckland Central the figure was 2.07 percent, in Hunua 3.11 percent, in Western Maori 2 .07 percent and in Northern Maori a massive 14.26 percent. (General Election 1978; Report of Returns).
30 Downs, L.J. op.cit. n.14.

of the candidates could present difficulties for the careless voter. Additionally, many voters will want to vote for a party, rather than a specific candidate, and there is no longer any indication of party affiliations on the ballot paper, although these are set out on the poster in each inner compartment.[31] While the vast majority of voters have no trouble in recording valid votes under the present system, and the Court of Appeal judgment gives the Returning Officer a wide discretion to accept incorrectly marked votes, the form of the ballot paper and the instruction on it can confuse some voters and cause them to cast informal votes.

It has been argued, although seldom publicly, that it would be desirable to restrict the right to vote to the more intelligent and 'right thinking' members of society. In summary form the argument is that "Elimination of the feeble-minded and the ill-disposed must raise the general level of quality in the electorate, and make it more efficient in its operation."[32] Such a suggestion is a dangerous one, in that the 'right' to vote becomes a 'privilege', and exactly who will be allowed this 'privilege' becomes a crucial political issue. It is very difficult to argue that people who bear the same civic responsibilities as others, including the burden of taxes, should be deprived of the right to help elect the people who will make laws for them, simply because they are of lesser intelligence. And yet, while not expressly doing so, the provisions of the Electoral Act 1956 relating to the method of voting and instructions to be given to voters, may be doing just that. If all people who are qualified to vote are to have the same opportunity to cast a valid vote, then none should be disadvantaged because of his inability to record preference satisfactorily. If a simpler and more easily comprehended method of voting is available, it should be adopted.

V. VOTING METHODS ELSEWHERE

The method of voting in New Zealand local body elections is prescribed by section 25(1) of the Local Elections and Polls Act 1976. The method of voting differs from that for parliamentary elections in that a voter must mark the name of his preferred candidate(s) with a cross, and the form of the ballot is different in that the grid drawn around the names helps prevent the voter casting a mistaken or ambiguous vote. This method of voting has applied to local body elections since 1941,[33] when it was felt that because of the large number of candidates in such elections and the requirement to vote for a number of candidates, the strike-out method was impractical. In the *Hunua* case, the court commented that to avoid confusion, the same methods of voting should be prescribed for both parliamentary and local body elections.[34] The use of a cross to indicate preference for one candidate would appear to be more sensible than the requirement to vote against all the other candidates, voting being a positive rather than negative selection process.

31 Electoral Act 1956, s.92(1)(e).

32 Ross, J. F. S. *Elections and Electors* (Eyre and Spottiswoode, London, 1955) 45.

33 Local Elections and Polls Amendment Act 1941, s.4.

34 Supra n.9, 297.

In most countries, some sort of preferential voting system is in operation, where voters have to indicate with a series of numbers their preferred candidates. This is probably a more complex system again than the one currently operating in New Zealand parliamentary elections. In other countries with single-member constituencies and first-past-the-post ballots, the New Zealand strike-out system does not appear to be popular.

In the United Kingdom, the form of the ballot paper and instructions to voters are prescribed by section 16 of the Representation of the People Act 1949.[38] The ballot paper is similar to that used in New Zealand local body elections, and it is expressly provided[35] that a ballot paper marked elsewhere than in the space provided, or otherwise than by means of a cross, is not invalid if the intention of the voter is nevertheless clear. Under this system, the voter has to perform a simpler and more readily understandable task in order to record his vote, but the flexibility of the Returning Officer to be able to accept non-conforming votes is preserved.

In Canada, the British system is further refined for the House of Commons elections.[36] The background of the voting paper is coloured black, so that there is very little chance of the voter marking his ballot paper anywhere except in the circles provided. The voter is instructed to place a cross in one circle, although if he uses some other mark it will still be a valid vote.[37] There is no provision for accepting ballots where the names of non-preferred candidates have been struck out,[38] but this is unlikely to arise very often in that a voter would tend to realise that the circles were placed on the paper for the very purpose of having some mark placed in them (as is shown in the example given to voters).

VI. WICKS COMMITTEE REPORT

The Wicks Committee considered the method of voting in parliamentary elections, and agreed with the *Hunua* court that the method should be the same for both parliamentary and local body elections.[39] The Committee recommended the use of a cross, as being "the most simple and effective way of indicating the voter's choice."[40] An argument that a cross should not be used because it was a mark of disapproval was rejected in favour of those which maintained that it was better for a voter to be instructed to do something positive in indicating his preference, that a cross was more precisely drawn than a tick and that the fact that the cross was the mark used by an illiterate would assist such voters. The Committee also felt that the names of the candidates should be surrounded by a grid to assist voters in marking their intended choice:

35 Rule 48(2) in the Second Schedule to the Act.
36 Canada Elections Act R.S.C. 1970, C 14 (1st Suppl.) s.51(4)(b).
37 Ibid. s.51(4)(b).
38 Ibid. s.51(3(d).
39 Supra n.2.
40 Ibid. 155.

> [The cross] should be understood by everyone, and provided the space in which the mark is to be made could be clearly defined and limited, with the names of the candidates clearly separated, there should be minimal difficulty for persons of limited comprehension.[41]

The Committee saw the aim of a good electoral system as being to provide procedures which would help to ensure that every qualified voter could vote, and have his vote counted for the candidate he preferred. To this end it recommended that party affiliations be retained on the ballot paper, although in less bold type than the names of candidates. The overall tenor of their recommendations was that if a change in voting methods could assist voters, then it should be adopted.

VII. THE POLITICAL RESPONSE

The Wicks Committee Report was followed by the formation of a select committee on the electoral law which considered the more contentious issues raised by the Report. The first report of the Select Committee[42] formed the basis for the Electoral Amendment Act 1980. On the recommendation of a majority of the Select Committee, the party affiliations of candidates are no longer to be included on ballot papers.[43] There had been considerable confusion created by the printing of these affiliations as evidenced in the *Hunua* case,[44] and the government decided to remove them from the ballot paper altogether, rather than to include them in smaller type under the candidates' names, as recommended by the Wicks Committee. The opposition opposed their removal, presumably because they saw it as being to their political disadvantage, and argued that it was unrealistic to suggest that all people did in fact vote for candidates, rather than parties. However, given the current form of the ballot paper, and the fact that party affiliations are set out on the wall of each inner compartment, an element of confusion has been removed, at the expense of few, if any, 'party' votes.

On the question of the form of the ballot paper and prescribed method of voting, the government again declined to adopt the changes recommended by the Wicks Committee,[45] and decided to retain the current system. Both opposition parties favoured the adoption of the Canadian system as being more easily understood and complied with. The government argued that there would be little change in the numbers of informal votes under either system, and that there was no justification for any change. However, given that the form of voting prescribed in New Zealand is apt to confuse some voters, especially apparently larger numbers in less-educated electorates, any move towards a more simple system would seem logical. If the government thought that voters would continue to use the old strike-out method in the face of an instruction to use a cross, then provision could be made for Returning Officers to accept such markings. Compliance with a given method is not the object, but rather the recording of as many valid votes as possible. If a

41 Idem.
42 *First Report of the Select Committee on the Electoral Law* A.J.H.R. 1980, I,17.
43 Supra n.4.
44 Supra n.9.
45 Supra n.2.

simpler system would help just one elector to cast a valid vote, then it should be implemented.

VIII. THE QUESTION OF ENTRENCHMENT

Section 106 of the Electoral Act 1956 is one of the reserved provisions of the Act, and as such is stated to be able to be amended or repealed only with the approval of seventy-five percent of all Members of Parliament or fifty percent of voters in a referendum.[46] Thus, any amendment to the prescribed method of voting must be supported, in practice, by both major political parties, or by a majority of electors. However, the reserving section is not itself entrenched, so a determined government could repeal that section and then amend section 106 by a simple majority.

In introducing the 1956 Act, the Attorney-General said that it was an attempt to place the basis of the democratic system above and beyond the influence of government and party.[47] Prior to this, parties had frequently used their parliamentary majorities to amend the electoral laws to their own advantage.[48] While never intended to prevent amendment or repeal of the fundamental provisions, entrenchment was meant to provide a moral sanction: any electoral advantage a government might gain by repealing section 189 and amending reserved provisions by a simple majority would have to be weighed against the disadvantages arising from accusations that the government had acted in an unconstitutional manner.

The sections of the Act which are entrenched by section 189 can be seen as being of fundamental importance to the New Zealand democratic system, dealing as they do with the duration of a parliament, the composition of the Representation Commission, the number and size of electorates, the qualification of electors and the prescribed method of voting. Entrenchment of these provisions is designed to encourage joint government and opposition agreement as to any amendments to them.

In commenting on the entrenchment of the provisions relating to the prescribed method of voting, the Court of Appeal said:[49]

> Undoubtedly s.106 is meant to ensure as far as possible that each voter votes secretly and for one candidate only. The secrecy of the ballot and the single vote system are seen by Parliament as cornerstones of the Act. That is underlined by the inclusion of s.106 in the "reserved provisions" listed in s.189.

The entrenchment of section 106 also results in the entrenchment of the provisions

46 Section 189.

47 Supra n.1.

48 In 1945 the Labour Government repealed the country quota provision, altered the basis for calculating electorate size from total population to adult population, reduced the tolerance percentage and altered the composition of the Representation Committee — all without National's support.
In 1950 the National Government repealed the adult population provision and enlarged the tolerance percentage to 7.5, the largest ever.

49 Supra n.15, 152.

relating to the prescribed method of marking the ballot paper. However, the way in which a voter is required to mark his ballot paper is of a more procedural nature than the substantive requirements as to the secrecy of the ballot and the maintenance of a single vote system. Whether a voter is required to mark his ballot by the strike-out method or with a tick or a cross can scarcely be seen as of fundamental importance to our democratic system. Indeed, a similar type of procedural requirements is that contained in section 87, prescribing the form the ballot paper presented to the voter is to take. That section 87 is not entrenched would appear to be inconsistent with the entrenchment of the strike-out provisions in section 106 and tend to indicate that the entrenchment of the latter provisions was more by accident than design. It would thus appear that Parliament made section 106 subject to the entrenchment provisions in order to protect the concepts of the secret ballot and the single vote system, rather than to establish the strike-out method of voting as sacrosanct.

Since the passing of the 1956 Act, successive governments have respected the sanctity of the reserved sections, and any amendments to them have been agreed to by both major parties.[50] However, it has been argued that a moral sanction is not enough, and that certain sections of the Electoral Act should be doubly entrenched.[51] The argument assumes that a sovereign parliament is in fact competent to bind itself as to the manner and form of passing successive legislation,[52] but fails to take into account the fact that the courts would probably be unwilling to become involved in political brawls, and the danger than an outgoing ministry could bind parliament so as to make any further legislation impossible. It is sufficient to say that a New Zealand government would be unlikely to risk tampering with a double entrenchment which could subsequently result in future purported legislation being questioned in the courts and its constitutionality being held in doubt for a considerable time.

The practical effect of the current entrenching provision then, given the acceptance of its sanctity by both major parties, is that any changes made to the prescribed voting method must be jointly agreed to.

IX. CONCLUSION

It is clear that the provisions of the Electoral Act 1956 dealing with the

50 In 1965 the National Government dropped plans to amend s.99 to allow non-adult soldiers to vote, when the Labour Party refused to support the measure (and hence provide the 75 percent majority).
In 1975 the National Party refused to accept the Labour Government's proposal for a large increase in the number of Members of Parliament, possibly because it feared an accentuation of the political dominance of New Zealand's (Labour-held) urban areas. The proposal was abandoned.

51 Supra n.30. It was argued that the fundamental concept that voting rights once given cannot be taken away had been frighteningly eroded by the disenfranchising of prisoners in 1977.

52 For a discussion of which see: de Smith, S. A. *Constitutional and Administrative Law* (3 ed. Penguin, 1977) chapter 3, Robertson, J. B. "The Reserved Provisions of the Electoral Act" (1965-1968) 1 Otago L.R. 222.

prescribed method of voting were considered by its sponsors to be of paramount importance in protecting the democratic right of New Zealanders to vote in parliamentary elections. That is why they are entrenched. What is not so clear, however, is whether those same provisions are now in harmony with the original intention of the Act of ensuring that everyone entitled to vote could exercise his vote and have it counted. While the New Zealand system has remained unchanged, voting methods in overseas countries have been refined in order to assist voters in casting valid votes.

Following the declaratory judgment of the Court of Appeal, it is to be admitted that votes will no longer be rejected where the intention of the voter is clear. Nevertheless, there do appear to be alternativee forms of ballot paper and directions to voters, notably the Canadian example, which would further assist the voter in casting a valid vote. If an alternative system prevents just one voter from casting an ambiguous or completely invalid vote, then that system should be adopted. In practice, to harmonise the voting methods for both parliamentary and local body elections would likely save more than just a few votes from not being counted.