

# Electoral Law

## A Joint Consultation Paper

**Law Commission**

**Scottish Law Commission**

**Northern Ireland Law Commission**

**Joint Consultation Paper LCCP 218 / SLCDP 158 / NILC 20 (2014)**

**ELECTORAL LAW**

**A Joint Consultation Paper**



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**About the Commissions:** The Law Commission and the Scottish Law Commission were set up by section 1 of the Law Commissions Act 1965. The Northern Ireland Law Commission was set up by section 50 of the Justice (Northern Ireland) Act 2002. Each Commission has the purpose of promoting reform of the law.

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- The Scottish Law Commissioners are: The Honourable Lord Pentland (*Chairman*), Laura J Dunlop QC, Patrick Layden QC, TD, Professor Hector L MacQueen and Dr Andrew J M Steven. The Chief Executive is Malcolm McMillan.
- The Northern Ireland Law Commissioner is: Dr Venkat Iyer. The Interim Chief Executive is Ken Millar.

**Topic of this consultation:** The law governing the conduct of elections and referendums in the United Kingdom, including the legislative framework, rules governing electoral registration, polling, the count, campaign regulation, electoral offences and legal challenge.

**Geographical scope:** England and Wales, Scotland and Northern Ireland.

**Availability of materials:** The joint consultation paper is available at

- <http://lawcommission.justice.gov.uk/consultations/electoral-law.htm>;
- <http://www.scotlawcom.gov.uk>; and
- <http://www.nilawcommission.gov.uk>.

**Duration of the consultation:** We invite responses from 9 December 2014 to 31 March 2015.

## How to respond

Please send your responses either –

**By email to:** [electoral.law@lawcommission.gsi.gov.uk](mailto:electoral.law@lawcommission.gsi.gov.uk) or

**By post to:** Mr Henni Ouahes, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate,  
London SW1H 9AG

Tel: 020 3334 3599 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, where possible, you also sent them to us electronically (in any commonly used format).

**After the consultation:** In the light of the responses we receive, we will decide on our recommendations for reform in this area and present them to Government in the form of a report.

**Consultation Principles:** The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency.

The Principles are available on the Cabinet Office website at:

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**ELECTORAL LAW**

**CONTENTS**

<b>CHAPTER 1: INTRODUCTION</b>	<b>1</b>
Stages of this project	1
Terms of reference	1
Elections and referendums within scope	2
Outline of the consultation paper	4
Devolution and a tripartite reform project	5
Impact assessment	6
Engagement with electoral stakeholders	7
Glossary	8
<b>CHAPTER 2: THE LEGISLATIVE STRUCTURE</b>	<b>11</b>
Introduction	11
The Representation of the People Act 1983	11
Developing electoral policy in this legislative framework	15
Electoral law to be set out centrally for all elections	17
<b>CHAPTER 3: MANAGEMENT AND OVERSIGHT</b>	<b>20</b>
Introduction	20
Local electoral administration	20
Electoral registration officer	20
Returning officer	22

Co-operation between returning officers	24
The centralised administration of elections in Northern Ireland	27
The Electoral Commission	27
Promoting consistency	28
Reform of the management structure for UK elections	30
The duty to designate and review polling districts	31
Reforming the law on administrative areas	33
<b>CHAPTER 4: REGISTRATION OF ELECTORS</b>	<b>35</b>
The electoral franchises	35
Restating the franchise centrally for all UK elections	37
Residence and special category electors	37
The concept of residence in the electoral context	38
Notional residence and special category electors	46
Reforming the law on residence	50
Electoral registration generally	58
The modern electoral objective of registration	58
Five electoral registers in legislation	58
The organisation of electoral registration	60
Pending elections and the deadline for registration	70
Resident EU citizens and EU Parliamentary elections	73
Registration in Northern Ireland	75
Access to the register	78
Reforming electoral registration	80
The legislative framework for registration	80
Administering resident EU Citizens' declaration of intent to vote in the UK	84
<b>CHAPTER 5: MANNER OF VOTING</b>	<b>86</b>
Introduction	86

Voting is by secret ballot	86
Rights-based analysis of qualified secrecy	91
Qualified secrecy and the alternative of voter identification at the poll	93
The reform aims in the context of the ballot system and qualified secrecy	95
Reforming the provisions on secrecy and vote tracing	95
Ballot paper design and content	97
Detailed prescription in election rules	98
The alternative approaches to prescribing ballot paper form and content	99
Ballot papers to be prescribed in secondary legislation	100
Form of ballot paper	102
<b>CHAPTER 6: ABSENT VOTING</b>	<b>103</b>
Introduction	103
The scope of reform of absent voting in the UK	103
Absent voting entitlements and records	104
Absent voting in Great Britain	104
Absent voting in Northern Ireland	109
Reforming the legal framework for absent voting	109
The administration of absent voter status	111
Postal voter status in Great Britain	111
Proxy voter status in Great Britain	115
Absent voter status in Northern Ireland	117
Reforming the administration of absent voter status	119
Postal voting process	120
Outline of the rules governing the postal voting process	122
Differences in the postal voting process in Northern Ireland	126
Postal voting fraud	128
Campaign handling of absent voting applications and postal votes	131
Reform of the law on the postal voting process generally	134



<b>CHAPTER 7: NOTICE OF ELECTION AND NOMINATIONS</b>	<b>136</b>
Introduction	136
Notice of election	136
The nomination process	137
The nomination paper	137
Time, place and attendance at nominations	141
Powers of the returning officer in relation to nomination papers	142
Is abuse of the right to nomination a ground for invalidating papers?	144
Election-specific features of nomination rules	146
Provisional reform proposals	148
A single nomination form emanating from the candidate	148
The role of the returning officer	151
<b>CHAPTER 8: THE POLLING PROCESS</b>	<b>154</b>
Introduction	154
Voter information and other public notices	154
Reform of the duties relating to voter information and other public notices	156
The logistics of polling	157
Provisional reform proposals for logistics of the poll	160
Regulating polling day	162
Controlling access and maintaining order	162
Prescribing the voting procedure	163
Queues at the close of polls	167
Reforming the law governing polling	171
Equal access for disabled voters	173
Supervening events frustrating the poll	177
Suspending the poll for “riot or open violence”	177
Death of a candidate	177

Reforming the law on death of candidates	180
Rioting and other supervening events	181
<b>CHAPTER 9: THE COUNT AND DETERMINATION OF THE RESULT</b>	<b>185</b>
The classical rules: first past the post contests	185
Transposing the classical rules to other elections	193
Reforming the law on conducting counts	195
Elections using the single transferable vote	199
Provisional reform proposals regarding STV counts	202
Electronic counting	202
Provisional proposal on reform of electronic counts	205
Transparency of the electronic counting system	205
<b>CHAPTER 10: TIMETABLES AND COMBINATION OF POLLS</b>	<b>207</b>
Introduction	207
Electoral timetables	207
The orientation of timetables	208
The unique orientation of the UK Parliamentary timetable	209
Aligning the UK Parliamentary election timetable with others	212
Legislative timetables generally	214
A standard timetable for UK elections	216
The combination of polls	219
Combinability of coinciding polls	220
Management of combined polls	223
Combined conduct rules	227
Provisional reform proposals	233
<b>CHAPTER 11: ELECTORAL OFFENCES</b>	<b>237</b>
Introduction	237

Electoral offences and their place within the regulatory structure	237
Prosecution of electoral offences	237
Judicial relief in respect of illegal practices	238
The regulatory significance of the labels “corrupt” and “illegal practices”	239
The electoral offences	241
The classical campaign offences: bribery, treating, and undue influence	242
Illegal practices targeting campaign conduct	247
Combating electoral malpractice	251
<b>CHAPTER 12: REGULATION OF CAMPAIGN EXPENDITURE</b>	<b>253</b>
Introduction	253
The regulatory approach	253
The meaning of regulated “election expenses”	254
The requirement to appoint an election agent	255
Expense limits	258
Expense returns and declarations	259
The control of donations	263
Reform of campaign expenditure regulation	264
<b>CHAPTER 13: LEGAL CHALLENGE</b>	<b>269</b>
Introduction	269
The classical election petition	269
The jurisdiction of the election court	271
Scrutiny and correcting the result	272
Reviewing the validity of the election	274
A discrete ground of challenge for defective nomination?	276
Corrupt and illegal practices	280
Disqualification of candidate	283
Transposing the classical grounds of challenge to new types of election	286

Provisional reform proposals as to grounds of challenge	289
The procedure for bringing an election petition	296
The Parliamentary election court	296
The local government election court	296
The petition procedure	297
Provisional reform proposals as to the challenge procedure	307
Public interest petitions	311
Informal complaints	315
<b>CHAPTER 14: REFERENDUMS</b>	<b>318</b>
Introduction	318
The existing legislative framework for national referendums	318
The 2000 Act provisions	319
Referendum-specific provision in the instigating Act	322
Reform of the legislation governing national referendums	327
Local referendums and parish polls	329
Local referendums conducted under statute in England and Wales	329
Provisional reform proposals on local referendums	339
Parish polls	340
The poll question	341
Administration of the poll	342
The particular complexity of parish polls	344
<b>APPENDIX A: PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS</b>	<b>346</b>
<b>APPENDIX B: LIST OF ATTENDEES AT ADVISORY GROUP MEETINGS</b>	<b>356</b>



# CHAPTER 1

## INTRODUCTION

- 1.1 This Consultation Paper reviews the law governing the conduct of elections and referendums in the UK, and sets out our provisional proposals and questions for consultation with the public. This is a joint project by the Law Commission of England and Wales, the Scottish Law Commission and the Northern Ireland Law Commission.

### THE STAGES OF THIS PROJECT

- 1.2 The electoral law reform project is part of the Law Commission of England and Wales' Eleventh Programme of Law Reform, which was published on 19 July 2011. Due to the significant size of the project, the task has been structured in three stages. The first stage was undertaken only by the Law Commission of England and Wales, but in close consultation with the Scottish Law Commission and Northern Ireland Law Commission. Thereafter, the project became a tripartite one involving all three UK Commissions,
- (1) The scoping stage included consultation as to the scope of the reform project. A scoping consultation paper was published on 15 June 2012.<sup>1</sup> Conclusions on the scope of the project were set out in a scoping report published on 11 December 2012.<sup>2</sup> Following references from the UK Government to all three Law Commissions, and of the Scottish Government to the Scottish Law Commission, we embarked on the next stage of the project.
  - (2) The second stage, in which we are presently engaged, involves formulating the proposals for reform of electoral law set out in this Consultation Paper. This will start a broad public consultation. Our proposals are provisional only and we welcome consultees' views on them. After we have reviewed consultees' responses we shall formulate our recommendations, which shall present in a report setting out our to be published in the Autumn of 2015, concluding this stage of the project.
  - (3) The final stage will involve the production of a draft Bill or Bills to give effect to our final recommendations, and an accompanying final report. The aim will be to complete the final phase of the project before the end of February 2017, in order to allow sufficient time for implementation before the scheduled general election in May 2020.

### TERMS OF REFERENCE

- 1.3 At the scoping phase, which included public consultation on the proposed scope of reform, we concluded that this project should focus on the technical law governing elections and referendums, with a particular focus on electoral

<sup>1</sup> Law Commission, *Electoral Law in the United Kingdom, A Scoping Consultation Paper* (15 June 2012), [http://lawcommission.justice.gov.uk/docs/electoral\\_law\\_scoping\\_consultation.pdf](http://lawcommission.justice.gov.uk/docs/electoral_law_scoping_consultation.pdf).

<sup>2</sup> Law Commission, *Electoral Law in the United Kingdom, A Scoping Report* (11 December 2012), [http://lawcommission.justice.gov.uk/docs/electoral\\_law\\_scoping\\_report.pdf](http://lawcommission.justice.gov.uk/docs/electoral_law_scoping_report.pdf).

administration. We excluded from its scope subjects which had constitutional or political policy dimensions, such as reforming the franchise, voting systems or electoral boundaries. These conclusions are reflected in the terms of reference for this project, which are as follows.

“To review the law relating to the conduct of elections and referendums in the UK, including challenges and associated criminal offences, but excluding:

- a) fundamental change to the existing institutions concerned with electoral administration,
- b) the franchise,
- c) electoral boundaries,
- d) the regulation of national campaigns, political parties, and broadcasts, and
- e) voting systems.”

#### **ELECTIONS AND REFERENDUMS WITHIN SCOPE**

- 1.4 Elections are the means through which public officeholders are democratically elected and the source of legitimate authority in the performance of their functions, whether these are executive or legislative, local or national. Well-run elections promote confidence that they truly express the democratic will. Conversely, badly-run elections undermine public confidence in the electoral process and thus in its outcomes. The aim of the electoral law project is to provide a simple and modern legal framework that promotes well-run elections and referendums, and reduces the risk of loss of public confidence that might result from poorly run contests.
- 1.5 Elections to public office confer legal and often constitutional status on a person. As such, they call for special and careful legal treatment, the realm of electoral law. Referendums may not be legally determinative, but their answers carry great political weight by virtue of their democratic legitimacy. They are also run according to laws which are very similar to the law governing elections.
- 1.6 This project is concerned with reforming the law governing all elections and referendums conducted under statute. There is a long list of types of elections within its scope, which currently includes:
  - (1) UK Parliamentary elections;
  - (2) European Parliamentary elections;
  - (3) Scottish Parliamentary elections;
  - (4) Northern Ireland Assembly elections;
  - (5) National Assembly for Wales elections;
  - (6) Local government elections in England and Wales, including:

- (a) Principal area local authority elections; and
- (b) Parish, town and community council elections;
- (7) Local government elections in Scotland;
- (8) Local government elections in Northern Ireland;
- (9) Greater London authority elections (to the London Assembly and of the London Mayor);
- (10) Mayoral elections in England and Wales; and
- (11) Police and Crime Commissioner elections in England and Wales.

1.7 In addition, referendums are within the scope of the project if they are:

- (1) National referendums such as those held under the Political Parties, Elections and Referendums Act 2000;
- (2) Local referendums held under the Local Government Act 2000, the Local Government Finance Act 1992, or the Town and Country Planning Act 1990; or
- (3) parish polls.

## **LAW REFORM AND POLICY**

- 1.8 As the stages of this project show, reform will take time and commitment from the Law Commissions, Government and main electoral stakeholders. Electoral law has been the subject of significant change since 1983. There is no sign of abatement in the pace of change. We therefore expect the project to be able to adapt to reflect changes in electoral law over the life of the project. Several such changes have occurred in the run up to the publication of this Consultation Paper, such as the introduction of individual electoral registration and miscellaneous other amendments to the law on electoral administration. We have sought to state the law as at 1 December 2014.
- 1.9 If and insofar as electoral policy changes, we will take it into account in conducting this project. The UK Government has recently published a draft Bill which would empower the Secretary of State to introduce National Park Authority elections in England. This would enable direct elections to be held for some of the positions in English National Parks and the Broads Authorities.<sup>3</sup> If this occurs, this type of election will be added to the scope of the project.
- 1.10 The Law Commissions make proposals for law reform. The chief focus of this project is on rationalising, modernising and improving the fair and effective administration of elections. A large volume of electoral laws are technical in

<sup>3</sup> Draft Governance of National Parks (England) and the Broads Bill 2014. See also Cabinet Office Guidance, *Queen's Speech 2014: what it means for you* (4 June 2014), part 13, <https://www.gov.uk/government/publications/queens-speech-2014-what-it-means-for-you/queens-speech-2014-what-it-means-for-you#governance-of-national-parks-england-and-the-broads-draft-bill> (last accessed 2 December 2014).



nature. They remain of great significance to the mechanics of electoral administration, and of interest to electoral administrators and political actors alike. We can confidently make proposals for their reform.

- 1.11 Other issues, however, while they are within the areas which are within scope, have a fundamentally constitutional or political nature. In reviewing electoral law, we have sought to demarcate matters which involve judgements of political policy from the technical aspects of electoral administration law reform. It is not for the Law Commissions of the UK, as non-political expert law reform institutions, to make such judgements.

## **OUTLINE OF THE CONSULTATION PAPER**

- 1.12 Electoral law in the UK has become complex, voluminous, and fragmented. There is an enormous amount of primary and secondary legislative material governing elections and referendums. The twin aims of the project are to ensure first, that electoral laws are presented within a rational, modern legislative framework, governing all elections and referendums within scope; and secondly, that electoral laws are modern, simple, and fit for purpose.
- 1.13 These aims are reflected in the structure of this Consultation Paper. Chapter 2 considers the legislative framework governing elections. This is fragmented and, in particular, set out in an election-specific way. We consider electoral law under discrete headings in subsequent chapters. Chapter 3 concerns the management and oversight of elections. Chapter 4 considers the law governing the registration of electors. Chapter 5 concerns the manner of voting in the UK, which chiefly considers the secret ballot. Chapter 6 reviews the law governing absent voting (by post and proxy). Chapter 7 considers the nomination of candidates. Chapter 8 concerns the detailed polling process, including events which frustrate the poll. Chapter 9 reviews the law governing the count and determination of the result. Chapter 10 considers the law governing election timetables and the combination of polls. Chapters 11 and 12 deal with electoral offences and campaign expenditure respectively. Chapter 13 considers the law on legal challenge. Although chapters 3 to 13 concern the law governing elections, much of their content will be relevant to the law of referendums. Chapter 14 specifically reviews the law governing national and local referendums, including parish polls. In order to assist readers, we provide a glossary of terms at the end of this chapter.
- 1.14 We set out our provisional proposals for reform and consultation questions in each chapter. Appendix A brings these proposals and questions together. These are the matters which we highlight and on which we specifically seek answers from the public. However, we welcome responses as to the contents of this Consultation Paper and on the reform of electoral laws in general. We will be reviewing our provisional proposals and finalising our recommendations for reform in the light of the public's response to this consultation. The deadline for responding to the Consultation Paper is 31 March 2015.
- 1.15 In order to ensure that this Consultation Paper is a manageable size, care has been taken to outline the current law as succinctly as possible. Our review of the law has involved scrutinising many pieces of legislation that are specific to an election or group of elections, or a jurisdiction. When citing legislation in support of our statements in the law, we have had to restrict ourselves to one or a few legislative sources, rather than every one. This is to avoid voluminous and

overwhelming footnotes in this document. We have also had to summarise, and occasionally omit areas of law, many of them very detailed. For readers who wish to consult a fuller exposition of the current law, and extensive citation to discrete election laws, our research papers containing them will be made available online.<sup>4</sup>

## **DEVOLUTION AND A TRIPARTITE REFORM PROJECT**

- 1.16 The reform of electoral law is a tripartite law reform project undertaken by all three UK Law Commissions. UK Parliamentary and European Parliamentary elections, as well as UK-wide referendums, by their very nature are subject to shared rules across jurisdictional borders. Our review of these rules concerns all three legal jurisdictions of the UK leading to proposed reforms of electoral law in Scotland, Northern Ireland, and England and Wales.
- 1.17 We presently outline the devolution framework in the UK because it is relevant to this project. We note at the outset that this framework is likely to change during the life of this project. As ever we will be mindful of, and adapt to, the changing legislative landscape.

### **Scotland**

- 1.18 In Scotland, legislative competence for UK, Scottish and European Parliamentary elections and the franchise at local government elections is reserved to Westminster.<sup>5</sup> The Scottish Parliament has legislative competence over local government elections in Scotland, except for the franchise. It has, within its general competence, legislated for new elections to Health Boards, National Park Authorities and the Crofting Commission.<sup>6</sup>
- 1.19 Ministerial competence is shared with the UK Government for Scottish Parliamentary elections, with section 1 of the Scotland Act 2012 transferring some executive competence relating to the administration of Scottish Parliamentary elections to the Scottish Ministers.<sup>7</sup> However on 27 November 2014 the Smith Commission, which represents all five political parties represented in the Scottish Parliament, published a report recommending near complete legislative competence for the Scottish Parliament over its own elections. We therefore expect that the legal position will change during the lifetime of this project.<sup>8</sup>

### **Northern Ireland**

- 1.20 The Northern Ireland Assembly has no legislative competence in respect of

<sup>4</sup> Available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

<sup>5</sup> Scotland Act 1998, sch 5 part II s B3.

<sup>6</sup> The elections relating to the Health Boards, National Park Authorities and the Crofting Commission in Scotland are not within the scope of this project, nor are community council elections.

<sup>7</sup> Section 1 of the 2012 Act is not yet in force (at date of publication).

<sup>8</sup> Report of the Smith Commission for further devolution of powers to the Scottish Parliament (November 2014) paras 23 to 25. Available online at [https://www.smith-commission.scot/wp-content/uploads/2014/11/The\\_Smith\\_Commission\\_Report-1.pdf](https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf) (last accessed 2 December 2014).

elections. Elections to the UK Parliament, including the franchise, are exceptions to the legislative competence of the Northern Ireland Assembly. European Parliamentary elections, elections to the Northern Ireland Assembly, and local government (district council) elections are also excepted matters. The Secretary of State has executive powers in respect of elections to the Northern Ireland Assembly, as does the Crown in respect of local government elections.<sup>9</sup>

## Wales

- 1.21 The Government of Wales Act 2006 places local government, including “electoral arrangements for local authorities”, within the legislative competence of the National Assembly for Wales. However, the local government franchise is listed, along with “electoral registration and administration”, as an exception to that competence.<sup>10</sup> Although the matter is not clear, for the purposes of the subject matter of this paper, legislative and executive competence for elections remains with the UK Parliament and UK Secretaries of State respectively. The Silk Commission has recently published proposals as to devolution in Wales.<sup>11</sup> The Silk Commission’s report proposed that the administration of local government elections, including rules governing their conduct, should be devolved. We will continue to keep in mind any developments concerning the devolution settlement in Wales.

## IMPACT ASSESSMENT

- 1.22 The Law Commissions produce impact assessments in relation to their reform proposals. We were fortunate to receive assistance from stakeholders during the scoping stage in estimating the monetised and non-monetised costs of electoral administration.<sup>12</sup> We have published a preliminary impact assessment of our provisional reform proposals, which will be available online alongside this Consultation Paper. We hope that our public consultation will provide an opportunity to consolidate our evidence base for the current cost of electoral administration and oversight of electoral laws, so as to provide the basis for a robust impact assessment to accompany our recommendations for reform, and any eventual draft bill and final report. An equality impact assessment will also accompany our recommendations setting out positive, adverse, and neutral impacts of our recommendations on different groups of people who are protected by equality laws. We invite consultees to comment on the impact of our provisional proposals and the equality consequences of any matter on which we ask a question.

<sup>9</sup> Northern Ireland Act 1998, ss 34(4) and 84, and sch 2 paras 2 and 12.

<sup>10</sup> Government of Wales Act 2006, sch 7 para 12.

<sup>11</sup> Chaired by Paul Silk, former clerk to the National Assembly for Wales. The Commission on devolution in Wales was launched by the Secretary of State for Wales on 11 October 2011. The Commission published its report (Part II) on the current non-financial powers of the National Assembly in March 2014. Available at <http://commissionondevolutioninwales.independent.gov.uk/files/2014/03/Empowerment-Responsibility-Legislative-Powers-to-strengthen-Wales.pdf> (Last accessed 2 December 2014).

<sup>12</sup> Law Commission, *Electoral Law in the United Kingdom, A Scoping Report* (11 December 2012), [http://lawcommission.justice.gov.uk/docs/electoral\\_law\\_scoping\\_report.pdf](http://lawcommission.justice.gov.uk/docs/electoral_law_scoping_report.pdf).

## **ENGAGEMENT WITH ELECTORAL STAKEHOLDERS**

- 1.23 Our review of UK electoral law was conducted with the benefit of engagement with key stakeholders in the electoral field, including the UK, Scottish and Welsh Governments, the Electoral Commission, the Association of Electoral Administrators, the Society of Local Authority Chief Executives (SOLACE), the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and the HS Chapman Society. In particular, we have convened an advisory group of electoral experts, including the judiciary and lawyers, administrators, national agents of political parties who are represented on political parties panels maintained by the Electoral Commission and academics. The advisory group met on two occasions, on 2 July 2013 and on 19 June 2014. A list of its members is available at Appendix B. We thank all of those who helped us on this project and look forward to their participation in the consultation.

# GLOSSARY OF TERMS

The <b>1983 Act</b>	The Representation of the People Act 1983.
The <b>1985 Act</b>	The Representation of the People Act 1985.
<b>Absent voting</b>	Voting without personally attending at a polling station: either <b>postal voting</b> or voting by <b>proxy</b> .
<b>Additional member systems (AMS)</b>	Systems of voting in which, in addition to candidates elected by the <b>first past the post</b> system, further members of the elected body are elected by a different voting system such as the <b>party list</b> .
Candidate's <b>agent</b>	The legislation generally requires a person to be appointed by a candidate to perform certain functions in connection with an election on the candidate's behalf. Other persons acting in support of a particular candidate are also referred to as the candidate's agents, and misconduct by such agents is capable of invalidating a candidate's election.
<b>Assisted voting</b>	Voting with the assistance of a companion, or that of the <b>presiding officer</b> .
The <b>canvass/canvass form</b>	The process of identifying people who are qualified to vote, for the purpose of entering them on the local electoral register. It normally involves sending a canvass form to each household in the area.
The <b>corresponding number list</b>	A list supplied to a polling station containing the numbers on the electoral register of the voters who are entitled to vote at the polling station. When ballot papers are issued to voters, the ballot paper number is entered on the list opposite the voter's electoral register number. The list can be used if necessary for <b>vote tracing</b> .
<b>Chief Counting Officer</b>	The person with overall responsibility to conduct a national referendum, and sometimes a local referendum.
<b>Chief Electoral Officer for Northern Ireland</b>	The official who is the returning officer and electoral registration officer for all elections in Northern Ireland and is in charge of the Electoral Office for Northern Ireland.
The <b>classical rules</b>	A term we use to refer to the set of rules governing parliamentary and local government elections originating in the Victorian reforms of 1872 and 1883 and now found primarily in the Representation of the People Act 1983.
An <b>early general election</b>	A term used in the Fixed-term Parliaments Act 2011 to describe a general election occurring as a result of a vote in Parliament rather than at a fixed interval.
<b>Election-specific legislation</b>	Legislation governing elections to a particular elected body.
<b>Electoral Commission</b>	The independent statutory body that regulates political party and campaign finance in the United Kingdom and sets standards and provides guidance on the administration of elections. The

Commission is also tasked with administering national referendums.

An <b>election court</b>	The court constituted to hear an <b>election petition</b> .
<b>Election petition</b>	The legal process by which an election can be challenged before an <b>election court</b> .
<b>Electoral Management Board for Scotland</b>	The body which has the general function of co-ordinating the administration of Local Government elections in Scotland, assisting local authorities and others in carrying out their functions and promoting best practice.
<b>First past the post</b>	The traditional voting system in which the candidate who gains the most votes is elected.
<b>Franchise</b>	The right of suffrage; the legal expression of who is eligible to vote.
<b>household registration system</b>	A term we use to describe the former process of registering voters on the basis of a completed <b>canvass form</b> . Household registration has been replaced in Great Britain by <b>individual electoral registration</b> , which is has been in place in Northern Ireland since 2002.
<b>Individual electoral registration</b>	The process of registering electors on the basis of an application to be registered made by each individual.
The <b>local government model</b>	A term we use to describe those features of the <b>classical rules</b> that are specific to local government elections.
The <b>parliamentary model</b>	A term we use to describe those features of the <b>classical rules</b> that are specific to UK parliamentary elections.
The <b>party list system</b>	A system of voting in which electors vote for lists of candidates presented by <b>registered political parties</b> as well as for independent (non-party) candidates.
<b>Voting in person</b>	Voting in person at a polling station, rather than <b>postal voting</b> or <b>voting by proxy</b> .
<b>Judicial review</b>	The process for legal challenge before the High Court or Court of Session of public and administrative acts and decisions.
<b>Poll clerks</b>	Officials appointed by the returning officer to assist the <b>presiding officer</b> at a <b>polling station</b> .
<b>Polling district</b>	Part of an electoral area served by a particular <b>polling station</b> .
<b>Polling place</b>	An area or building within a polling district designated by the local authority as the area or place in which a <b>polling station</b> is to be set up.
<b>Polling station</b>	The set of apparatus for voting in person, usually consisting principally of a table at which polling clerks mark the polling station register and issue ballot papers, booths in which voters can privately mark their ballot papers and a ballot box or boxes into

which marked ballot papers are inserted. A room within a building can contain more than one polling station.

<b>Postal voting</b>	Casting a vote on a ballot paper which is sent by post to the <b>returning officer</b> , accompanied by a <b>postal voting statement</b> ; we refer to the postal voting statement and the ballot paper together as postal voting papers. Postal voting papers can also be handed in at a <b>polling station</b> .
<b>Postal voting statement</b>	A declaration in a prescribed form that a person voting by post is entitled to cast the vote.
<b>Presiding officer</b>	The official appointed by the <b>returning officer</b> to preside over a particular <b>polling station</b> .
<b>Primary legislation</b>	Legislation contained in an Act of Parliament.
<b>Principal areas</b>	The term used in legislation to refer to counties, districts, boroughs and county boroughs in England and Wales.
<b>Proxy voting</b>	Casting a vote through a “proxy” appointed to cast the vote in person or by post on an elector’s behalf.
<b>Registered political party</b>	A political party that is registered by the <b>Electoral Commission</b> under the Political Parties, Elections and Referendums Act 2000.
<b>Registration officer</b>	An official of a local authority charged with maintaining a register of people residing in the local authority area who are qualified to vote at elections held in the area.
<b>Returning officer</b>	The official charged with conducting an election in a particular area and making a “return” of the result. Currently in England and Wales the returning officer for parliamentary elections is a dignitary such as the sheriff of a county and most of the returning officer’s functions are discharged by an acting returning officer.
<b>Secondary legislation</b>	Legislation in the form of Regulations made under law-making powers conferred (usually) upon the Secretary of State or Ministers.
<b>The single transferable vote</b>	A voting system under which voters cast votes for more than one candidate, ranked in order of preference. The successful candidates are those whose vote reaches a 'quota' determined by the size of the electorate and the number of positions to be filled. The counting of voters proceeds in stages. At each stage the lowest scoring candidate is eliminated and votes cast for that candidate are transferred to the candidate marked next in order of preference on the ballot paper. Where a candidate’s vote reaches the quota at any stage, a proportion of the votes cast for that candidate are transferred to the candidate marked next in order of preference on the ballot paper. The process is repeated until all the seats are filled.
<b>The supplementary vote</b>	A voting system under which voters cast a first and second preference vote; if no candidate secures more than half of the first preference votes, the second preference votes are taken into account.

<b>Tendered ballot paper or tendered vote</b>	A ballot paper or vote cast by a voter who appears to have already voted in person or through a proxy or to be on the <b>postal voting</b> list. If the voter denies having voted or having applied for a postal vote, they must be issued with a ballot paper which is to be kept separately once marked. An <b>election court</b> can order the vote to be counted if satisfied it is valid.
<b>Verification</b>	The process of reconciling the number of ballot papers received from a polling station at the count with the number of papers issued to the polling station in question.
<b>Vote tracing</b>	Using the <b>corresponding number list</b> to trace the ballot paper issued to a particular voter. This can generally only be done by order of an election court where voting irregularities are suspected.
<b>Voting system</b>	The system for identifying the successful candidate[s] on the basis of the votes cast; examples include <b>first past the post</b> , the <b>party list system</b> , the <b>single transferable vote</b> and the <b>supplementary vote</b> .
<b>Warrant for a writ of by-election</b>	The step taken by the Speaker of the House of Commons to cause the Clerk of the Crown in Chancery to issue a <b>writ of by-election</b> to the <b>returning officer</b> .
<b>Writ of election or by-election</b>	A Royal document communicating to the <b>returning officer</b> the calling of a general election or by-election.



# CHAPTER 2

## THE LEGISLATIVE STRUCTURE

### INTRODUCTION

- 2.1 UK electoral law is fragmented, complex and voluminous. There is no single legislative provision, or set of primary and secondary legislation, which sets out the law governing UK elections. By a conservative estimate, at least 25 pieces of primary legislation and even more secondary legislation are relevant to the administration of UK elections – ignoring measures which tangentially address elections. A central aspect of this reform project is concerned with rationalising the various legislative sources. Before we consider it, we must outline the current legislative picture.

### THE REPRESENTATION OF THE PEOPLE ACT 1983

- 2.2 The primary piece of election legislation is the Representation of the People Act 1983 (“the 1983 Act”). Its core provisions set out:
- (1) the franchise for UK Parliamentary and local government elections,
  - (2) the infrastructure for registering voters and running elections,
  - (3) the regulation of electoral campaigns, and
  - (4) the mechanism for challenging elections.
- 2.3 Schedule 1 to the 1983 Act contains the detailed rules, called election rules, governing the conduct of UK Parliamentary polls and counts. Every other set of election rules, for each particular species of election in the UK, is in secondary legislation.

### New elections, different voting systems

- 2.4 The 1983 Act was a consolidating Act, bringing together the laws governing UK Parliamentary elections and local government elections. Most of these can be traced back to the Victorian reforms of 1872 and 1883, designed for the first past the post voting system. In this chapter, and throughout the document, we call the content of these laws “classical” due to their long established pedigree. Leaving Northern Ireland aside, parliamentary and local government elections were, for a long time, the only type of election, eventually joined by elections to the European Parliament. All of these, including initially elections to the European Parliament, continued to use the first past the post voting system, and the classical rules of the 1983 Act could be replicated to govern local government and European Parliament elections.
- 2.5 From 1999 onwards, there was a great increase in the number of elections in the UK, prompted by the twin policies of devolution and localism. All of these, and the current system of elections to the European Parliament, use a voting system other than first past the post:
- (1) the closed party list (European Parliamentary elections in Great Britain) (“party list”);

- (2) the additional member system, a combination of the party list and first past the post. (Scottish Parliamentary, Welsh Assembly and London Assembly elections) (“AMS”);
- (3) the supplementary vote (Mayor of London, Police and Crime Commissioners, and mayoral elections in England and Wales) (“the supplementary vote”); and
- (4) the single transferable vote (Scottish local government elections and elections in Northern Ireland for local government, the Northern Ireland Assembly and the European Parliament) (“STV”).

### **Election-specific legislation**

- 2.6 There was no systematic plan for dealing with this expansion in the number of elections, or for adapting the classical law to the new elections. The laws governing these elections were mostly contained in separate and distinct pieces of legislation. These either adopted provisions within the classical 1983 Act (notably as to the franchise), or took its provisions as a template for election-specific rules set out, with modification or adaptation, elsewhere. Even the 1983 Act’s structure is replicated – core provisions governing the registration and returning officer structure, campaign conduct, offences and challenges are contained in the main body of the election provision, with separate election rules scheduled to it.
- 2.7 A consequence of taking this approach is that UK electoral law is voluminous and fragmented. A large amount of word for word repetition occurs. Within the classical rules, there have always been (relatively minor) differences in approach between the law for UK Parliamentary elections and local government elections. Chiefly these were to do with the nominations process. Those drafting the new elections’ laws had to choose which of the classical rule sets to copy: they followed either the parliamentary or the local government model.

### **Inconsistent transpositions of classical rules**

- 2.8 However, differences also creep into the discrete election-specific measures. Some of these are merely differences in drafting. Others are slip-ups. But some engage with an issue of principle, a problem each drafter had to tackle: how do classical rules which are intrinsically linked to first past the post voting translate to a different voting system, for example, the party list where parties, not individuals, stand for election? We refer to this kind of challenge as a “transposition” problem, because it concerns how to transpose a classical law devised for first past the post to a new voting system. One of the problems with the election-specific approach to structuring electoral laws is that classical rules are transposed in different ways to elections which use the same voting system, such as the party list system.

### **Detailed prescription**

- 2.9 One key principle governing electoral law is that elections must be conducted according to legal prescriptions that aim, where possible, to deal exhaustively with particular matters. The intention is that, so far as possible, returning officers are not to make subjective or qualitative assessments at key stages of polling –

such as on the right to stand for elections, or the right to cast a vote on polling day. The processes of nominations and polling, for example, are very formalistic:

- (1) If a nomination paper is on its face good, so is the nomination of the candidate and their right to appear on the ballot paper.
  - (2) If voters identify themselves as persons on the polling station register, they have a right to vote subject only to formally answering prescribed questions (as opposed to answering them credibly).
- 2.10 Administrators are therefore, where appropriate, guided by hard and detailed laws. This advantageously shields them from the perception of partiality in a charged political atmosphere. At the scoping stage, we called this approach the “conventional model” of electoral administration law. While detailed prescription is in some places necessary, repeating that prescription in election-specific legislation contributes to the large volume of UK electoral laws.

### **Gaps and discretions**

- 2.11 There are, however, many gaps in the law’s regulation of elections. That leaves electoral administrators with difficult and sometimes wide discretions. An example is the doctrine of “sham nominations”, allowing returning officers to go behind the formal nomination papers and throw out a nomination because, for example, the nominated candidate is a pet animal or (in one case) a tailor’s mannequin. The Electoral Commission publishes guidance before elections which can plug the gaps, even though it has no strict legal force.

### **Patchwork implementation of policy developments**

- 2.12 Since the 1983 Act was passed electoral policy has moved on significantly. Innovations were introduced by supplementing the 1983 Act. This is sometimes referred to as a “bolt-on” legislative approach. It is certainly the case that existing provisions have been patched rather than reworked. However, some innovations have been the subject of new major pieces of legislation, such as the Representation of the People Act 2000 (on absent voting), the Political Parties, Elections and Referendums Act 2000 (as to the Electoral Commission’s functions) and the Electoral Administration Act 2006. Even such recently introduced Acts have been frequently amended.
- 2.13 This is a problem distinct from that of election-specific legislation, which also adversely affects the clarity and accessibility of electoral law. As the 1983 Act no longer encompasses the full range of rules governing elections, some issues such as postal voting require consideration of distinct pieces of legislation. For example, the postal voting process, which is to do with polling, is governed by pieces of secondary legislation that are distinct from the election rules, which also deal with polling – largely with in-person voting.
- 2.14 This approach makes for a very clumsy set of laws. The occasional legislative slip leads to unintended consequences and confusion. An example concerns the deadline for registering in time to vote at a forthcoming election. This had long been thought – by experts, administrators, the Electoral Commission, and Government – to be 11 days, the deadline derived from a mixture of the 1983 Act

and secondary legislation.<sup>1</sup> As a result of an amendment to the latter in 2006, the true deadline was 12 days, a fact that even experts did not discover until 2013.<sup>2</sup>

### **The remarkable consistency of electoral practice**

- 2.15 In contrast to the election-specific way in which legislation is structured, running an election is a remarkably uniform process across all election types. The same sorts of concerns and issues arise at most elections. Polling, from the point of view of voters and administrators, unfolds in a largely uniform way, with the major differences being the voting system and the size of the electorate. The same can be said of organising counts, with the notable exception of electronic counting and the special undertaking involved in carrying out a STV count.

### **DEVELOPING ELECTORAL POLICY IN THIS LEGISLATIVE FRAMEWORK**

- 2.16 The current legislative framework is not only impractical for electoral administrators, it also poses problems for Governments seeking to change or develop electoral policy. We give two examples to illustrate this problem.

#### **Introducing a new election**

- 2.17 Any new election requires new legislation. Moreover, under the current model, every aspect of conducting that election must be addressed by that legislation. Typically, the existing framework for conducting elections under the 1983 Act is invoked – the franchise, registers, registration and returning officers. Other core provisions, and bespoke election rules, must be drafted. The absent voting framework under the 2000 Act – which as we will see governs only certain elections – must also be copied. The slightest slip-up harms the legal integrity of the election. The legislation governing Police and Crime Commissioner elections, for example, did not include a power to produce Welsh language ballot papers and legislation providing that power had to be rushed through in short order.
- 2.18 Very little of such new legislation in fact addresses the particular characteristics of the new election. It would be much simpler if an existing electoral structure applied holistically to all elections. That would mean, for example, that an absent voter under pre-existing arrangements would automatically be an absent voter at the new election. Similarly, powers to use Welsh language ballot papers would not need to be specifically introduced for each new election.

#### **Changing the law for existing elections**

- 2.19 A much more common phenomenon is that Government policy evolves or changes. Changes to electoral law that have been made during the course of our review include a new provision ensuring that queuing electors can cast a vote at a polling station before the poll is closed, moving the deadline for withdrawing from candidature at certain elections, and enabling Police Community Support Officers to enter polling stations. These were introduced by the Electoral Registration and Administration Act 2013, which amended the Parliamentary Election Rules in the 1983 Act and received full Parliamentary scrutiny. However,

<sup>1</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341; Representation of the People (Scotland) Regulations SI 2001 No 497.

<sup>2</sup> See Chapter 4 Registration, para 4.145 below.

to extend them to other elections, discrete pieces of secondary legislation had to be introduced amending the provisions governing those elections. Changing electoral policy is thus a slow and time consuming process.

### **An example of an election-specific provision**

- 2.20 Every set of election rules establishes the various components of the election: the nominations process which finally identifies the candidates, the poll through which electors cast their vote, and the count ascertaining the result. The classical rule (headed “method of election”) is that if only one candidate stands nominated the provision governing the declaration of the winner applies, with the result that the candidate is declared elected without a poll or a count. If the statement of persons nominated shows more than one person standing nominated, a poll must be taken, and votes counted.<sup>3</sup>
- 2.21 This provision is transposed for other elections, taking account of the differences in voting system. But elections using the party list and AMS voting system do not make the same transposition consistently, which means there is legal uncertainty in the (admittedly unlikely) scenario of an uncontested party list election. The core rule expressing the relationship between nominations, polling and the count can be stated as follows:
- (1) If, after nominations, more candidates are nominated than there are seats to be filled, there should be a poll according to election rules. The supplementary vote system (in the case of elections to which it applies) is only used if there are three candidates or more, otherwise the first past the post system is used;
  - (2) If no more candidates are nominated than there are vacancies, they should stand elected on polling day;
  - (3) If all nominated candidates are on the same party list, they are elected according to list order.
- 2.22 This simple statement of the need to conduct a poll only in cases where an election is contested and that nominated candidates at an uncontested election should stand elected on polling day, currently requires one to consult twelve pieces of legislation, and does not yield precisely the same answer for all elections using the same voting system.<sup>4</sup>
- 2.23 We do not think there is any justification for either the number of sources that

<sup>3</sup> Representation of the People Act 1983, sch 1 r 17(1).

<sup>4</sup> Local Authorities (Mayoral Elections) (England and Wales) Regulations SI 2007 No 1024, sch 1 r 16; Greater London Authority Elections Rules SI 2007 No 3541, sch 3 r 15; Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 3 r 17. Northern Ireland Assembly (Elections) Order SI 2001 No 2599, sch 1 (adaptation for r 17); European Parliamentary Elections Regulations SI 2004 No 294, sch 1 r 20; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 1 r 17; Electoral Law (Northern Ireland) Act 1962, sch 5 r 14. Scottish Local Government Elections Order SI 2011 No 399, sch 1 r 12(2) to (4); Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 25. Greater London Authority Elections Rules SI 2007 No 3541, sch 1 r 15; sch 2 r 16; sch 3 r 15; Greater London Authority Act 1999, sch 2. National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 22.

must be consulted, or the inconsistency. There is even less of a case for articulating the fundamental principle that voting is by ballot in each and every set of election rules. Electoral law is replete with needless duplication in separate provisions on matters which, after careful analysis, we think are best set out uniformly for all elections. That would better direct the attention of law makers and readers to the impact of particular voting systems, and any special policy, applying at a particular election.

### **ELECTORAL LAW TO BE SET OUT CENTRALLY FOR ALL ELECTIONS**

- 2.24 In our view, a fundamental aspect of electoral reform must be to rationalise the legislative sources and to restate them within a coherent, rationalised legislative framework. That framework should conceive of electoral law holistically. Differences that are due to a different policy at the election should be dealt with specifically for that election within that central framework. Differences due to the use of a particular voting system should be consistent for all elections using the same voting system.
- 2.25 As a consequence, the law will be simpler, clearer and easier to understand and apply. We also consider that future changes to electoral law will then be easier to implement, and any new election easier to fit into the reformed framework.
- 2.26 There are many features which are common to all elections. In outline these are that:
- (1) the election will use a particular franchise;
  - (2) entitlement to vote at the election is governed by entry in the register of electors;
  - (3) voting is by secret ballot;
  - (4) there are mechanisms for voting in person, or by post or proxy;
  - (5) the election is to be conducted in accordance with a timetable and detailed conduct rules, currently set out in part in election rules scheduled to a core provision, and in detailed rules governing the postal voting process;
  - (6) the conduct of the campaign by candidates is regulated, by electoral offences; and
  - (7) there is a mechanism for legal challenge of elections before the courts.

### **Balance between primary and secondary legislation**

- 2.27 All of the above features are fundamental. As regards UK Parliamentary elections, they are all contained in primary legislation: the 1983 Act and the Representation of the People Acts 1985 and 2000 (as to entitlement to an absent vote in Northern Ireland and Great Britain respectively). Only the detailed provisions on electoral registration and the postal voting process are in secondary legislation. For UK Parliamentary elections, one can say that electoral law is heavily tilted towards being contained in primary legislation, thus benefitting from the fullest Parliamentary scrutiny of any changes in the law.

- 2.28 For some elections, such as local government elections, the law is contained in part in the 1983 Act and in part in secondary legislation which sets out the election rules. That has curious results. The only statement of the voting system for local government elections in England and Wales, for example, is in secondary legislation – the election rules.<sup>5</sup> A change to the voting system can be made by Order of the Secretary of State. By contrast, the duty of the returning officer to publish a copy of any petition challenging the result of the election in his or her area, or the power of the election court to adjourn trial from one place to another within that area – matters of detail, not fundamental principle – are in primary legislation and can only be changed by Act of Parliament.
- 2.29 For most of the newer elections, primary legislation creates the institution to be elected, and makes only brief provision governing the conduct of the election – usually including the franchise and voting system. Secondary legislation then copies the template of the 1983 Act – core provisions as to franchise, registration, returning officers, campaign conduct and legal challenge. These appear in the body of the secondary legislation, to which there are a number of schedules. These include a set of election rules and the provisions on absent voting and the postal and proxy voting process. For these elections, electoral administration law is contained almost exclusively in secondary legislation.
- 2.30 The balance of primary and secondary legislation governing these different elections appears to be a product of history rather than principle. This project provides an opportunity to consider the proper balance between primary and secondary legislation as regards electoral administration law. We have not sought to propose a definitive list of the rules which should be in primary or secondary legislation, although in places we suggest what should be in primary legislation. The final list is likely to emerge as a result of our consultation and ongoing reform work, including the final stage involving a draft Bill. We will work with Governments and stakeholders to determine the precise boundary between primary and secondary legislation.
- 2.31 Our reform aim is to set out electoral law within a rationalised legislative structure, using the fewest possible statutory measures consistent with the devolutionary framework. It may prove to be the case that a single Act of Parliament is not feasible and that separate primary legislation for each of the three jurisdictions in the UK, Scotland, Northern Ireland, and England and Wales, is more desirable.
- 2.32 In our provisional view, primary legislation should contain the key provisions governing all elections. These include:
- (1) the electoral franchises;
  - (2) the voting system;
  - (3) the apparatus for electoral administration, including:

<sup>5</sup> Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 15; Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 15. In relation to the voting system at other elections, primary legislation specifies the voting system, for example Representation of the People Act 1983, sch 1 r 19 or European Parliamentary Elections Act 2002.

- (a) the electoral register and registration officer infrastructure;
  - (b) absent voting mechanisms and records; and
  - (c) returning officers, their powers and their responsibility for conducting elections.
- (4) core provisions on elections:
- (a) the relationship between nominations, polling and the count;
  - (b) the election timetable;
  - (c) key principles governing the conduct of the poll, such as voting by ballot, secrecy and security, and the powers to prescribe detailed conduct rules for elections, ballot papers and other forms;
  - (d) the regulation of the election campaign and electoral offences; and
  - (e) provisions on legal challenge to elections.
- 2.33 Primary legislation should thus contain those aspects of electoral law which have a constitutional character or are fundamental to laying down the structure for conducting elections in the UK. The detailed administration process should be governed by secondary legislation. Beyond that, performance standards and guidance published by the Electoral Commission can continue to assist electoral administrators and participants in the electoral process in their conduct. Our key aim here is consistency across all elections.
- 2.34 Our views at this stage on what should be covered by primary and secondary legislation are provisional only. We welcome consultees' suggestions as to what matters should be covered by each category of legislation.

**The recurring reform proposal: rationalising election-specific laws**

- 2.35 In the remainder of this paper, when considering electoral law under discrete headings, we will set out our particular provisional reform proposal. An overarching theme, however, is that electoral law should be set out in a consistent and holistic way. Election-specific divergence should be scaled back. Only differences justified by principle (such as the use of a different voting system), or political policy, should be retained. We will gauge the level of prescription required on any particular issue – sometimes giving detailed prescription where no or insufficient legal guidance exists, at other times leaving matters to norms which do not have legal force, such as the guidance published by the Electoral Commission.

**Provisional proposal 2-1: The current laws governing elections should be rationalised into a single, consistent legislative framework governing all elections.**

**Provisional Proposal 2-2: Electoral laws should be consistent across elections, subject to differentiation due to the voting system or some other justifiable principle or policy.**



# CHAPTER 3

## MANAGEMENT AND OVERSIGHT

### INTRODUCTION

- 3.1 Electoral law must also lay down a structure for who is to oversee elections – a governance and administrative framework. Responsibility needs to be allocated for the performance of legal duties ranging from the registration of voters, the regulation of candidates and parties, and conduct of the poll to determining the result, as well as for general logistics and planning. While in some jurisdictions a single, centralised authority is responsible for all of these matters, in Great Britain there is primarily a decentralised management system.
- 3.2 In this chapter, we first outline and consider the management structure in Great Britain, where electoral registration and the conduct of polls is carried out by local government officials – registration and returning officers. For some elections, however, a regional or central returning officer has oversight of local returning officers, backed by a power to direct them as to how to exercise their functions. We refer to these generally as “directing returning officers”. We also consider the position in Northern Ireland, where a separate Electoral Office run by the Chief Electoral Officer undertakes the roles of both registration and returning officers. We then consider the many roles of the Electoral Commission. As regards electoral administration, the Electoral Commission performs an advisory as opposed to an executive role: monitoring the performance of electoral registration and returning officers, issuing guidance to electoral participants and providing voter education. The Electoral Commission does, however, oversee the conduct of national referendums.
- 3.3 We also consider, further on in the chapter, the law concerning the designation and review of “administrative areas” known as polling districts and places.

### LOCAL ELECTORAL ADMINISTRATION

- 3.4 Local government officials are identified as returning and registration officers and are given the statutory tasks of overseeing the registration of electors, the administration of absent voters and the conduct of polls. While the returning and registration officer roles may in practice be performed by the same person, they are legally distinct.

#### **The electoral registration officer**

- 3.5 The electoral registration officer maintains electoral registers and administers absent voting arrangements. That is an ongoing task, regardless of the incidence of an election. The registration officer will often be a returning officer for some elections in the locality, while the council’s election staff will, in England and Wales and Northern Ireland, form the core of the team running elections. The registration officer’s principal task, however, is to maintain electoral registers, to determine applications to become an absent voter, and to administer records of absent voters.
- 3.6 Section 8 of the 1983 Act requires that there shall be registration officers “for the registration of electors” and then requires local authorities to appoint a

registration officer:

- (1) In England, every district and London borough council must appoint an officer of the council to be registration officer for Parliamentary constituencies which are coterminous with or cross the boundaries of their local area. The same applies in Wales in relation to county and county borough councils. In England and Wales, the Chief Executive of the council is usually appointed as the registration officer.
  - (2) In Scotland, every local authority must appoint one of their officers as the registration officer for their area or for any adjoining area, or an officer may be appointed by any combination of local authorities. The role in Scotland has traditionally been undertaken by officers of the Valuation Joint Board and this is the case for all but two councils.<sup>1</sup>
  - (3) In Northern Ireland, the Chief Electoral Officer is the registration officer for each electoral area.<sup>2</sup>
- 3.7 It is the duty of councils and local authorities in the UK to assign such officers to assist the registration officer as may be required for carrying out the registration officer's functions under the 1983 Act.<sup>3</sup>

#### **Interaction between the registration officer and the returning officer**

- 3.8 The electoral registration and absent voting functions determine, respectively, entitlement to vote and to vote by post or proxy. Absent voting and registration are ongoing while the election is under way. The register is also a means of dividing the electorate into smaller geographical units called polling districts. Electors are allocated to a polling station at which they must vote if casting a ballot in person. A constituency may cross local authority boundaries, in which case data from two or more registers must be compiled in order to make up that constituency's electorate, and several registration officers' registers and absent voting records will be needed by the returning officer.

#### ***Supply of register to returning officers for electoral purpose***

- 3.9 The returning officer thus must have access to registration and absent voting data if an election is due. In Great Britain, there must be some legal mechanism for sharing the registration officer's data if the returning officer is not the same person.<sup>4</sup> Secondary legislation requires the registration officer to supply a copy of

<sup>1</sup> City of Dundee and Fife.

<sup>2</sup> Representation of the People Act 1983, s 8.

<sup>3</sup> Representation of the People Act 1983, s 52(4).

<sup>4</sup> In Northern Ireland, the Chief Electoral Officer fulfils both functions for all elections. In Scotland, the general tendency is for the offices to vest in different officers, with local assessors tending to be responsible for registration. In England and Wales, it is more likely that the returning and registration officers will be the same person, at least so far as the relevant electoral area or constituency is coterminous with or contained in a local government area.

the register to the returning officer free of charge and in data or hard copy form.<sup>5</sup>

- 3.10 Registration officers must compile absent voters lists comprising postal voters, proxy voters and postal proxy voters. As soon as practicable after the sixth working day before the date of the poll, a registration officer must supply a copy of the lists to the acting returning officer at a parliamentary election if, for any part of a constituency, the registration officer is not also that officer.<sup>6</sup>
- 3.11 Similar requirements apply in other elections where the returning officer and registration officer may not be the same person.<sup>7</sup> However, for elections to the National Assembly for Wales there is only an obligation on registration officers to publish the lists by making them available for inspection at their offices.<sup>8</sup>
- 3.12 Only by recent amendment is there a general duty to share, at an acting returning officer's request, absent voter lists relating to the UK parliamentary returning officer's constituency.<sup>9</sup>

### **The returning officer**

- 3.13 With the relevant registration and absent voting information to hand, the returning officer's task is to conduct the poll according to the law. Section 23 of the 1983 Act provides that "the proceedings at a parliamentary election shall be conducted in accordance with the parliamentary elections rules" scheduled to the Act. It is the returning officer's "general duty ... to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by those parliamentary elections rules."<sup>10</sup>
- 3.14 Section 36 of the 1983 Act makes similar provision concerning local government elections in England and Wales (to principal areas<sup>11</sup> and parish and community councils) and Greater London Authority elections. Election-specific measures

<sup>5</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 98; Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 1 para 1; Representation of the People (Scotland) Regulations SI 2001 No 497, reg 97; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 1 para 1.

<sup>6</sup> Representation of the People Act 2000, sch 4 paras 5 and 7(8). Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 61(6)(b); Representation of the People (Scotland) Regulations SI 2001 No 497, reg 61(6)(b).

<sup>7</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 3 para 16(7)(b); European Parliamentary Election Regulations SI 2004 No 293, sch 2 para 32(6)(b); Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 2 para 20(5)(b).

<sup>8</sup> National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 1 para 13(7)(a).

<sup>9</sup> Representation of the People (England and Wales) (Description of Electoral Registers and Amendment) Regulations SI 2013 No 3198, reg 27, inserting reg 61(6A) into the Representation of the People (England and Wales) Regulations SI 2001 No 341. Registration officers must also supply returning officers with personal identifier records for postal and postal proxy voters, so as to enable the officer to verify postal votes.

<sup>10</sup> Representation of the People Act 1983, s 23(2).

<sup>11</sup> A principal area in England is a non-metropolitan county, a district or a London borough; in Wales, a county or county borough, Local Government Act 1972, ss 20 and 270.

impose a similar duty.<sup>12</sup>

- 3.15 Unlike registration officers, the returning officer does not play a permanent administrative role. For each type of election, legislation either identifies or provides the means for identifying the returning officer. On the whole, these offices are bestowed on senior staff within local government, but they are expressly distinct from any local government office.<sup>13</sup> For larger constituencies or electoral regions, specific local government areas are chosen and their relevant officer made responsible for the conduct of that election. The returning officer is either identified in legislation or designated by Order of the Secretary of State.
- 3.16 At certain elections, the law requires the relevant local authorities to place their staff and services at the disposal of the returning officer. For local government elections, this is not necessary since the returning officer will be a senior official within the local authority in question. However, the 1983 Act makes such provision with respect to Greater London Authority elections and UK Parliamentary elections in Scotland. It is not clear to us why no similar provision is made for UK Parliamentary elections in England and Wales.<sup>14</sup>

#### ***Ceremonial and “acting” returning officers in England and Wales***

- 3.17 Returning officers are local dignitaries for UK Parliamentary elections in England and Wales (either the sheriff of the county, the mayor or council chairman); their only real roles are receiving the writ which triggers the election, and as those declaring the result and returning the writ of election. Most of the functions of the returning officer are performed by an “acting” returning officer, who is the person appointed by the local authority as the electoral registration officer for any constituency or part of a constituency within or coterminous with the local government area.<sup>15</sup> The ceremonial nature of returning officers in England and Wales is a product of history.<sup>16</sup> While seemingly innocuous, it adds further complexity. In its interim report on the 2010 UK Parliamentary election, the Electoral Commission said of these “plainly redundant ceremonial positions” that they are “out-of-date and confusing”.<sup>17</sup> We agree.

<sup>12</sup> European Parliamentary Elections Regulations SI 2004 No 293, reg 9; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 6; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 6; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, art 17; Police and Crime Commissioner Elections (Functions of Returning Officers) Regulations SI 2012 No 1918, reg 3; Local Authorities (Mayoral Elections)(England and Wales) Regulations SI 2007 No 1024, reg 3; Scottish Local Government Elections Order SSI 2011 No 399, art 3; Northern Ireland Assembly (Elections) Order SI 2001 No 2599, sch 1; Electoral Law Act (Northern Ireland) 1962, s 57.

<sup>13</sup> Representation of the People Act 1983, s 27(1).

<sup>14</sup> Representation of the People Act 1983, ss 25(2) and 35(6).

<sup>15</sup> Representation of the People Act 1983, s 28.

<sup>16</sup> J Hostettler and B Block, *Voting in Britain: A History of the Parliamentary Franchise* (2001) at p 4; I Gladwin, *The Sheriff: The Man and His Office* (1984) at p 160; The Times, *The High Sheriff* (1961) at p 23.

<sup>17</sup> Electoral Commission, *Interim Report on the 2010 UK Parliamentary General Election: Review of Problems at Polling Stations at Close of Poll on 6 May 2010* (May 2010) at p 32.

**Provisional proposal 3-1: The ceremonial role, in England and Wales, of sheriffs, mayors, and others as returning officer at UK parliamentary elections should be abolished.**

**CO-OPERATION BETWEEN RETURNING OFFICERS**

- 3.18 All elections apart from UK Parliamentary elections and local government elections in England and Wales involve co-operation between local returning officers and an identified “directing” returning officer, often having a power of direction over local returning officers. In Northern Ireland, all returning officers are subject to the direction of the Chief Electoral Officer by virtue of being members of the Chief Electoral Officer’s staff. In the case of Scottish local government elections, returning officers must follow the directions of the Electoral Management Board.<sup>18</sup>
- 3.19 A power to issue directions and correlative duty to follow them exist at the following elections:
- (1) European elections in Great Britain, where the European constituency returning officer’s directions must be followed by local returning officers (who are in practice returning officers for local authorities adjoining that of the constituency returning officer);<sup>19</sup>
  - (2) Greater London Authority elections, where constituency returning officers must comply with the directions of the Greater London returning officer;<sup>20</sup>
  - (3) Police and Crime Commissioner elections, where the Police Area returning officer directs local returning officers.<sup>21</sup>
- 3.20 Welsh Assembly and Scottish Parliamentary elections consist of regional contests using the party list voting system and constituency contests using first past the post. The laws governing these elections do not grant powers of direction to one officer over the other. Instead they confine themselves to defining the different areas of responsibility of regional and constituency returning officers. The former administer the contest in each region, while constituency returning officers run the poll in each constituency. The rules place both returning officers under a duty to cooperate with one another.<sup>22</sup>

<sup>18</sup> Scottish Local Government Elections Order SSI 2011 No 399, art 3(4) and Local Electoral Administration (Scotland) Act 2011, s 5.

<sup>19</sup> European Parliamentary Elections Regulations SI 2004 No 293, reg 9(3) and (4).

<sup>20</sup> Greater London Authority Elections Rules SI 2007 No 3541, r 11.

<sup>21</sup> Police and Crime Commissioner Elections (Functions of Returning Officers) Regulations SI 2012 No 1918, reg 4.

<sup>22</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 16(2); National Assembly for Wales (Representation of the People) Order SI 2007 No 236, art 20(3). There is no duty to cooperate in an election to fill a casual vacancy, since that can only be a single constituency contest where the regional returning officer can play no role. A duty to cooperate also exists in Greater London Authority elections, along with the GLRO’s power of direction. Greater London Authority Elections Rules SI 2007 No 3541, r 10(1).

### **Breach of official duty**

- 3.21 A returning officer who fails to observe election rules may be guilty of breach of official duty. Section 63 of the 1983 Act provides that if a person, including a registration officer, returning officer or presiding officer, “is, without reasonable cause, guilty of any act or omission in breach of his official duty”, that person is liable on a summary conviction to a fine up to level 5 on the standard scale.<sup>23</sup> This offence exists for all UK elections.<sup>24</sup>

### **Duty to follow directions**

- 3.22 The directing officer is empowered to give directions in accordance with which a local returning officer must exercise his or her functions. The offence of breach of duty thus extends to elections in which directions may be made by a lead officer. It therefore appears that an unreasonable failure to follow a lead officer’s directions can amount to breach of official duty, in the same way as breach of election rules.<sup>25</sup>

### **Power to correct “procedural errors”**

- 3.23 Section 46 of the Electoral Administration Act 2006 enables returning officers to take the steps they think appropriate to correct a mistake that they, the registration officer, their staff or a contractor have made. This does not extend to re-counts after the result has been declared. It appears that this provision was enacted to enable returning officers to put a stop to any ongoing breach of official duty, and the attendant risk of criminal prosecution. The section 46 power applies to parliamentary and local government elections, and is replicated in election-specific measures. At some elections it is dealt with under the provision which lays down the general power and duty to observe electoral law.<sup>26</sup> The one exception is the Northern Ireland Assembly (Elections) Order 2001, which does not apply section 46 of the 2006 Act. It is not clear why these elections alone in

<sup>23</sup> Level 5 currently corresponds to a fine of £5,000: Criminal Justice Act 1982, s 37 (applicable in England and Wales only). Similarly, in Scotland level 5 is set at £5,000: Criminal Procedure (Scotland) Act 1995, s 225(2).

<sup>24</sup> Representation of the People Act 1983, ss 63(1) to (3), 203 and 204 (“local government election” definition). Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 28; European Parliamentary Elections Regulations SI 2004 No 293, reg 25; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, art 32; Police and Crime Commissioner Elections Order SI 2012 No 1917, art 19; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 26; Northern Ireland Assembly Order SI 2001 No 2599, sch 1; Electoral Law Act (Northern Ireland) 1962, sch 9 para 32A. The offence of misconduct in public office may also be applicable; *Three Rivers DC v Bank of England (No.3)* [2003] 2 A.C. 1; [2000] 2 W.L.R. 1220.

<sup>25</sup> Representation of the People Act 1983, s 63(3).

<sup>26</sup> Electoral Law Act (Northern Ireland) 1962, s 57A; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, art 21; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 94; Local Electoral Administration and Registration Services (Scotland) Act 2006, s 4; Police and Crime Commissioner Elections (Functions of Returning Officers) Regulations SI 2012 No 1918, reg 6; Local Authorities (Mayoral Elections)(England and Wales) Regulations SI 2007 No 1024, reg 3(3)(e); European Parliamentary Elections Regulations SI 2004 No 293, reg 9(4A); European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 6(2A).

Northern Ireland should be excepted from the general rule in other elections.<sup>27</sup>

### ***Invalidity of the election***

- 3.24 Having laid down the duty to follow election rules, section 23 of the 1983 Act also provides that an election may not be invalidated for breach of official duty or conduct otherwise than in accordance with election rules where the election was conducted substantially in accordance with the rules and the breach did not affect the result. The same provision is made in other election-specific measures. We consider this further in chapter 13 when considering legal challenge.<sup>28</sup> In summary, elections are not invalid unless the breach of electoral law is fundamental or affects the result of the election.<sup>29</sup> While election rules prescribe in detail the conduct of the poll, electoral law thus seeks to protect electoral outcomes from uncertainty due to breaches of election rules which do not affect the result.

### ***The effect of combination of polls***

- 3.25 Some elections coincide, meaning that the respective returning officers must run their polls on the same day. If there is an area of overlap, the law on combination of polls, which we consider in chapter 10, provides for certain aspects of the poll to be taken together, led by one of the returning officers.
- 3.26 There is some tension between a directing officer's power of direction and the lead returning officer's function at combined polls. The power of direction may not always extend over the lead returning officer for the combined poll, where the directing officer and the lead returning officer are running different elections. This could cause uncertainty as to the proper effect of a direction at combined polls.
- 3.27 At Greater London Authority elections, the uncertainty is averted by the fact that the power of direction of the Greater London returning officer is expressly extended to the lead returning officer for a combined poll.<sup>30</sup> By contrast the police area returning officer only has a power of direction in relation to the timing of the count after the combined polls.<sup>31</sup>
- 3.28 It is also arguable that the convener of the Electoral Management Board for Scotland retains the power of direction in relation to Scottish local government elections, even where the lead returning officer is not the returning officer for the local government election. This is because the power of direction extends to returning officers in the exercise of their functions in relation to local government elections. The lead returning officer at a combined poll will be exercising functions in relation to local government elections.<sup>32</sup> By contrast, the power of

<sup>27</sup> Northern Ireland Assembly (Elections Order) SI 2001 No 2599 (no reference to the 2006 Act); sch 1 reference to s 63 of the 1983 Act (breach of official duty) furthermore specifically omits the reference to the 2006 Act power to correct procedural errors.

<sup>28</sup> See Chapter 13 Legal Challenge, para 13.22.

<sup>29</sup> *Morgan v Simpson* [1975] QB 151, 164.

<sup>30</sup> Greater London Authority Elections Rules SI 2007 No 3541, r 11.

<sup>31</sup> Police and Crime Commissioner Elections (Functions of Returning Officers) Regulations SI 2012 No 1918, reg 4.

<sup>32</sup> Local Electoral Administration (Scotland) Act 2011, s 5.

direction of the regional returning officer at European Parliamentary elections is expressed as extending only to local returning officers for local counting areas within the regions.

### **The centralised administration of elections in Northern Ireland**

- 3.29 The Chief Electoral Officer for Northern Ireland is the central electoral administrator, appointed by the Secretary of State for 5 year periods extendable to a maximum of ten years.<sup>33</sup> The Chief Electoral Officer is the electoral registration and returning officer for all elections in Northern Ireland and acts as an assessor for the country's two boundary commissions. The Chief Electoral Officer has the power to appoint supporting staff.<sup>34</sup> The Electoral Office for Northern Ireland provides administrative support for the provision of electoral services throughout Northern Ireland, and has local branches. Area electoral officers are appointed to act as deputy registration and returning officers within their constituencies for elections to the UK Parliament, the European Parliament and the Northern Ireland Assembly. For local government elections, clerks of district councils are appointed as deputy returning officers and perform functions as directed by the Chief Electoral Officer.<sup>35</sup> The Electoral Office for Northern Ireland acts as a single point of contact for voters seeking advice about electoral services.
- 3.30 It may be noted that centralised oversight occurs in some other countries, for example, in the case of the Australian Electoral Commission and the Chief Electoral Officer in Canada.<sup>36</sup> The UK's Electoral Commission has no such executive role in the running of elections.

### **THE ELECTORAL COMMISSION**

- 3.31 The Electoral Commission is generally described as the UK elections and referendums watchdog but its precise functions reveal a more complex picture. Originally established as an independent statutory body under the Political Parties, Elections and Referendums Act 2000, its Chair is the chief counting officer for national referendums, acting as a central administrative authority, delegating and overseeing functions at regional and local authority levels.<sup>37</sup>
- 3.32 In relation to elections, the Commission had at its inception a largely advisory and fact-finding role, which has evolved significantly in a short time.<sup>38</sup> It now has two core regulatory functions in relation to elections. The first concerns political parties. The Electoral Commission is responsible for maintaining a register of political parties. It also assists political parties to meet their obligations with respect to accounting and donations, monitoring and taking appropriate steps to

<sup>33</sup> Northern Ireland (Miscellaneous Provisions) Act 2006, s 8.

<sup>34</sup> Electoral Law Act (Northern Ireland) 1962, s 15.

<sup>35</sup> See Electoral Law (Northern Ireland) Order SI 1972 No 1264 (N. I. 13), art 9 and Electoral Law Act (Northern Ireland) 1962, s 15(3).

<sup>36</sup> L Massicotte, A Blais and A Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (2004) at p 66.

<sup>37</sup> Political Parties, Elections and Referendums Act 2000, ss 128 and 129.

<sup>38</sup> D Butler and I McLean, *Report to the Committee on Standards in Public Life: The Electoral Commission and the Redistribution of Seats* (2006) at p 20.



secure compliance with controls on party financing.<sup>39</sup>

- 3.33 The second function concerns wider electoral administration. Section 67 of the Electoral Administration Act 2006 gave the Commission power to set and publish performance standards for electoral registration officers, returning officers and referendum counting officers.<sup>40</sup> This power enables the Commission to require officers to provide reports on their level of performance against standards set by it, to publish assessments of their performance, and to collect information on the costs of electoral services. These powers do not apply in Northern Ireland, where there is a separate Chief Electoral Officer, or for local government elections in Scotland which are legislatively devolved.
- 3.34 The Electoral Commission's other powers include sending its own representatives and accrediting others to observe elections. It has a duty to publish reports on certain elections and referendums as well as to review electoral law issues generally. It also provides advice and guidance to electoral registration officers, returning officers, and registered parties. It plays a significant public information role, with responsibility for providing electoral information for the purpose of increasing voter participation.<sup>41</sup>

#### **Promoting consistency**

- 3.35 The approach in the Victorian reforms between 1868 and 1883 was to lay down detailed prescriptive rules, designed to be strictly and inflexibly administered by local administrators. Most of the legal rules governing the administration of the poll are subject to detailed, hard-edged prescription, where every breach has the potential to invalidate an election. We have already seen that powers of direction are designed to ensure there is some oversight and consistency at elections spanning large geographical areas. But not all elections feature directing officers. UK Parliamentary general elections, for example, are in law a set of local elections happening at once, but they occur throughout the UK and elect members to a single institution. Electors can fairly expect some consistency in how those elections are conducted, irrespective of where in the UK they occur.
- 3.36 In 2007, the Committee on Standards in Public Life expressed concern about wide variations in standards of electoral administration in Great Britain between different local authorities.<sup>42</sup> Local authorities may have varying levels of resources at their disposal, and electoral registration is funded without any dedicated budget or ring-fencing.<sup>43</sup> Variation in the effectiveness of electoral arrangements from one authority to another is an inevitable consequence of decentralising electoral administration. As the Association of Electoral Administrators noted, there are "considerable inconsistencies in structural and staffing arrangements" within local authorities, which may become more significant in the context of local government spending cuts and the sharing of

<sup>39</sup> Political Parties, Elections and Referendums Act 2000, ss 23 and 36.

<sup>40</sup> Political Parties, Elections and Referendums Act 2000 (as amended), ss 9A, 9B and 9C.

<sup>41</sup> Political Parties, Elections and Referendums Act 2000, ss 5 to 6F, 9A to 9C, 10(3) and 13.

<sup>42</sup> Eleventh Report of the Committee on Standards in Public Life (2007) Cm 7006 at paras 2.53, 2.54, 2.60 and 2.61.

<sup>43</sup> Representation of the People Act 1983, s 54.

Chief Executives.<sup>44</sup>

### ***The performance standards regime***

- 3.37 In recent years, a set of "soft" rules has emerged to promote consistency. In 2006, sections 9A, 9B and 9C were inserted into the Political Parties, Elections and Referendums Act 2000.<sup>45</sup> These empower the Electoral Commission to set and publish performance standards for registration and returning officers in Great Britain, and to require administrators to report their performance against these standards. The Secretary of State at the Electoral Commission's recommendation may reduce the charge payable to a returning officer who, in the opinion of the Electoral Commission, has performed inadequately.<sup>46</sup> This sanction has been extended to other elections.<sup>47</sup> The idea behind the standards is that there is some measurable output that, if satisfactory, will deliver the desired outcomes. There is also an emphasis on project planning and risk management which does not appear in electoral legislation.<sup>48</sup>

### ***Electoral Commission guidance***

- 3.38 The Electoral Commission publishes guidance before elections. It contains a significant volume of material directed at the need for effective election planning and other areas which are not addressed by electoral law. Since the guidance attempts to be a comprehensive account of legal duties and best practice, it is voluminous, but has the benefit of being in one place. In practice, many electoral administrators use the Electoral Commission's guidance to find out what their obligations are.

### ***The proper place of performance standards and guidance***

- 3.39 The performance standards regime supplies much needed emphasis on the centrality of project planning to good electoral administration, and on the need to have contingency arrangements in place in case of unexpected events. The classical law makes no attempt to give guidance in this field. However, electoral administrators have criticised the process as a "tick-box" exercise.<sup>49</sup>
- 3.40 Standards and guidance attempt to supply a measure of consistency in electoral administration. Organising elections is a significantly greater logistical task than it was in the past. More might be expected of electoral administrators than simple

<sup>44</sup> Association of Electoral Administrators, *Beyond 2010: the future of electoral administration in the UK* (July 2010) at p 10.

<sup>45</sup> Elections in Northern Ireland are run by the Chief Electoral Officer and are not subject to the performance standards regime. A reference to elections to the Northern Ireland Assembly in s 5(2) of the 2000 Act appears to be redundant. The standards regime applies to EU and UK Parliamentary elections, elections to the Scottish Parliament and Welsh Assembly, and local government elections in Great Britain.

<sup>46</sup> Electoral Registration and Administration Act 2013, s 18.

<sup>47</sup> For example, European Parliamentary Elections (Amendment) Regulations SI 2013 No 2876, reg 10.

<sup>48</sup> Electoral Commission, *Performance standards for returning officers in Great Britain*, (December 2011) pp 1 and 3 to 6.

<sup>49</sup> AEA, *A question of timing? The administration of Police and Crime Commissioner elections in England and Wales* (February 2013) pp 56 to 58.

adherence to hard edged rules governing the poll: good planning and providing electors with a satisfactory service. Modern training emphasises the importance of systematic and comprehensive project planning. There is widespread – though anecdotal – recognition among electoral administrators that one can run a “legal” poll, one that is not susceptible to legal challenge under the conventional model, while falling short of the standards that organisations such as the Association of Electoral Administrators would expect administrators to meet.

- 3.41 Electoral law should lay down minimum standards of conduct which are necessary to conduct a poll. If breached, these can amount to the crime of breach of official duty, or result in the invalidation of the election. Performance standards and guidance should focus on best practice, and practical guidance, or filling gaps in the law. Our provisional view is that this is largely reflected in the current practice. As standards and guidance develop, the distinction between the proper content of the law and the softer standards and guidance should become clearer. However, we are keen to hear from consultees as to what their experience of performance standards and guidance is.

### **REFORM OF THE MANAGEMENT STRUCTURE FOR UK ELECTIONS**

- 3.42 The main criticism of the law on management of UK polls is that the law is piecemeal and unclear. Very detailed rules exist in some places, such as those governing sharing registration information with returning officers, while elsewhere – such as the nature and extent of the power of direction, including at combined polls – the law is inconsistent and in some places vague. Electoral administration is decentralised, and fundamentally altering that institutional fact is outside the scope of this review. But the result of the current institutional framework is that registration officers and returning officers must be able to cooperate. Parliamentary boundaries, which are particularly fundamental, increasingly cross local authority boundaries, necessitating some cooperation between returning officers and neighbouring registration officers. Directing officers, or regional returning officers at Scottish Parliamentary and Welsh Assembly elections, must be able to work with local returning officers, and the nature and scope of powers of direction must be consistent across elections.
- 3.43 In our provisional view, the powers and duties of the returning officer should be centrally stated for all elections. The particular duties and powers of regional returning officers, the police area returning officer, the Electoral Management Board for Scotland, the Greater London Authority returning officer and European Parliamentary returning officer should be as consistent as possible, and should be clearly stated within rationalised conduct rules. One function shared by all these officers is the responsibility to oversee the election over a wide geographical area and to ensure there is consistency across elections in voters’ experiences. We consider that they should all have powers of direction to assist in that task, which would mean a change in the law governing Scottish Parliamentary and Welsh Assembly elections.
- 3.44 As to the role of performance standards, and the question of consistency generally, we consider that it is proper to hold registration and returning officers accountable for their performance and consistency of service to voters. The standards are not substitutes for electoral laws, however, and should not be.
- 3.45 We have found consistency in electoral administration to be a difficult subject.

Where the law properly admits of different – and thus inconsistent – ways of executing its rules, it effectively leaves the matter to the returning officer to decide, taking into account local circumstances. For example, the law does not state that a returning officer should print ballot papers for 100% of the registered electors. In practice, at most elections, fewer will be printed. The law’s approach is to view inability to issue a ballot paper to an elector as a breach of the law which is actionable before the court. At certain elections, a directing officer may direct a minimum print run. At the recent Scottish independence referendum, the direction was to print more ballot papers than there were registered electors, no doubt in recognition of the historic importance of that poll and hence the likelihood of a high turnout of voters.

- 3.46 Our provisional view is that this approach is correct. Where the law requires absolute consistency, the detailed electoral administration law should require a particular outcome. We consider such issues discretely, such as in the context of multiple registration, in chapter 4. However, we should welcome the views of consultees as to how the issue of consistency in the provision of electoral administration should be addressed.

**Provisional proposal 3-2: Electoral law should set out the powers and duties of returning officers centrally for all elections.**

**Provisional proposal 3-3: The functions, duties, and powers of direction of regional returning officers at elections managed by more than one returning officer should be spelled out.**

**Question 3-4: What is the proper role of powers of direction by directing officers at combined polls led by another returning officer?**

#### **THE DUTY TO DESIGNATE AND REVIEW POLLING DISTRICTS**

- 3.47 To facilitate the running of the poll, electoral areas (constituencies, wards or divisions) are broken down into administrative areas in which polling will take place. In the legislation, these are called “polling districts”. Within them is a polling place. This is not defined in the legislation, and can be a part of the polling district or a building within it. The law provides that if no polling place is designated, the polling place is deemed to be the polling district as a whole.<sup>50</sup> The periodic review and alteration of parliamentary polling districts and places is carried out, in Great Britain, by the local authority council. The significance of polling places is that the returning officer must locate polling stations within the designated polling place.<sup>51</sup>
- 3.48 The legislation requires local authorities setting polling districts for Parliamentary

<sup>50</sup> Representation of the People Act 1983, s 18B, repeated in legislation governing other elections. For elections to local government in Scotland, there is no requirement for polling stations to be in polling places; Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 22. There is no legislative obligation to designate polling places for elections to local government in Great Britain, but this has little practical effect since section 31(3) of the 1983 Act requires polling stations, absent special circumstances, to be situated within the Parliamentary polling places. P Gribble (ed), *Schofield’s Election Law*, loose-leaf 6th reissue, vol 1 para 6-014; Electoral Commission Circular EC 19/2010, Appendix A (Guidance), para 1.9.

<sup>51</sup> Representation of the People Act 1983, sch 1 r 25(3).

elections to seek to ensure that all electors in a constituency have such reasonable facilities for voting as are practicable in the circumstances.<sup>52</sup> The Electoral Commission has suggested that factors for consideration include, for example, whether the boundaries are well defined and whether there are suitable transport links. Part of the review process requires consultation by the council. The consultation should elicit representations by returning officers and disability experts, and any elector in a constituency within the authority's area may make representations.<sup>53</sup>

- 3.49 An appeal against the outcome of a review may be made to the Electoral Commission.<sup>54</sup> On consideration of the appeal the Commission may direct a local authority to make alterations to polling places and, if these alterations are not implemented within two months, may make alterations to the same effect itself.<sup>55</sup>
- 3.50 The law on polling districts is one aspect of electoral law which is directly concerned with planning for elections. Parliamentary polling districts are the only polling districts whose alteration and review is envisaged by the law. In Great Britain, they are the default administrative area for all other elections, so the review of parliamentary polling districts affects other elections. As a consequence, at any election, there exists a default administrative area to which voters are allocated. The election rules require "sufficient" polling stations to be provided, and electors are only permitted to vote at the polling station allotted to them. In order to facilitate this allocation, the law provides for electoral registers to be framed in separate parts for each parliamentary polling district.<sup>56</sup>
- 3.51 In Northern Ireland, the law is different. For local elections, the polling districts are simply the local government wards.<sup>57</sup> The Chief Electoral Officer maintains a polling station scheme, under which no council approval is necessary to place polling stations outside ward boundaries.<sup>58</sup> Parliamentary polling districts are designated and kept under review by the Secretary of State, after consulting the Electoral Commission.<sup>59</sup> The Chief Electoral Officer must review polling places every five years.<sup>60</sup>

<sup>52</sup> Representation of the People Act 1983, s 18A(3).

<sup>53</sup> Representation of the People Act 1983, ss 18A(2)(b) and 18B(3)(b) and sch A1; Electoral Commission Circular EC 19/2010, Appendix A (Guidance) para 4.23.

<sup>54</sup> Representation of the People Act 1983, s 18D.

<sup>55</sup> Representation of the People Act 1983, s 18D(4) and (5).

<sup>56</sup> Representation of the People Act 1983, sch 1 r 25(1), replicated in other election rules, has this effect. It states that the returning officer shall allot electors to polling stations in such manner as he thinks most convenient. Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 38(1).

<sup>57</sup> Electoral Law (Northern Ireland) Act 1962, (as amended), s 130. The ward plays a dual role in local government elections in Northern Ireland, because the number of wards contained in a district electoral area – five, six or seven – determines the number of seats the electoral area returns to the local council.

<sup>58</sup> Electoral Law (Northern Ireland) Act 1962, ss 15(2), 65; Electoral Law (Polling Station Scheme) (Northern Ireland) Regulations SI 2010 No1532, reg 4(3).

<sup>59</sup> Representation of the People Act 1983, s 18AA.

<sup>60</sup> Representation of the People Act 1983, s 18CA(1).

### **Guidance for local councils**

- 3.52 The Electoral Commission has also published guidance for local councils<sup>61</sup> concerning the obligation to review polling districts and places.<sup>62</sup> Polling districts and polling places for local government elections are not automatically part of the review.<sup>63</sup> It does, however, recommend that local government returning officers become involved in review of administrative areas for parliamentary elections, and that reviews of local government polling arrangements are conducted simultaneously, given that in practice polling arrangements for UK parliamentary elections are taken as the default for all elections.<sup>64</sup>

### **REFORMING THE LAW ON ADMINISTRATIVE AREAS**

- 3.53 The effect of the law on administrative areas is that there is an obligation to designate and keep under periodic review a set of geographical units to which electors are allocated, in order to make polling convenient. It is plainly sensible to provide for the upkeep of administrative areas, in other words, to ensure there is always a plan for the allocation of voters to the ballot box, irrespective of when (and whether) an election is due.
- 3.54 However, the existing legislation attempts to establish this plan in a complex and roundabout way. Our outline above seeks to simplify what is a rather complex set of rules. In particular the election-specific way in which the provisions on polling districts are set out, and their peppering in different parts of the legislation, is unhelpful. We furthermore question the relevance of the concept of a “polling place”. Despite the obligation to keep these under review, there is provision deeming the polling place to be the polling district, if one is not designated. Many sensible administrators may seek for a polling place not to be narrowly designated, so they have a freer hand as to where to locate a polling station. A very specifically designated polling place means, if the building is unavailable for any reason, the council must be convened at short notice to designate another in which to house a polling station. This strikes us as artificial and unnecessary.
- 3.55 Polling district designation and review is in truth an administrative task which is concerned with the effective organisation of polls. It is questionable, therefore, why this administrative task is one undertaken by local authority members in Great Britain, since these are political actors. In our provisional view, a better solution would be to transfer the task of designating administrative areas from the elected authorities to returning officers, as was previously the position in Scotland.<sup>65</sup> The law should set out the principles to be followed in designating these administrative areas.

<sup>61</sup> Electoral Commission Circular, EC 19/2010.

<sup>62</sup> Representation of the People Act 1983, ss 18A to 18D, and sch A1.

<sup>63</sup> Electoral Commission Circular, EC 19/2010.

<sup>64</sup> Electoral Commission Circular EC 19/2010, para 8. Electoral Commission Circular EC 19/2010, Appendix A (Guidance).

<sup>65</sup> The version of section 18 of the 1983 Act in force until 1996 specified that it was the role of the returning officer to designate polling districts and places in Scotland for elections to the UK Parliament.

### **Appeal from polling district reviews**

- 3.56 We consider it right that there should be a process for the designating of such areas to be appealed and scrutinised. At present the forum for such scrutiny is the Electoral Commission, which has a suitably UK-wide profile. During the life of our project, however, it has been suggested to us that the Local Government Boundary Commissions might be better placed to deal with these. They have greater institutional knowledge and expertise in making decisions in relation to dividing geographical areas. We welcome views on how well the present route of appeal works, how it might be improved, and whether another forum is more suitable, but are not at present convinced that a change in the law is necessary.

**Provisional proposal 3-5: The designation and review of polling districts is an administrative matter which should be the responsibility of the returning officer rather than local authority councils.**

**Question 3-6: Should appeals against designations of administrative areas be to the Electoral Commission or the Local Government Boundary Commissions?**

## CHAPTER 4

# THE REGISTRATION OF ELECTORS

- 4.1 The registration of electors is the permanent, year-round electoral function which is carried out in the UK by an official called the “electoral registration officer”. We noted in our review of the law on polling that entry onto the electoral register conclusively governs entitlement to vote on polling day. The requirement to register in order to vote is an aspect of the electoral franchise, which we outline below.
- 4.2 This chapter starts with the electoral franchise before moving on to the law on the meaning of electoral residence and the declaration of local connection, which are the legal tools for tying an elector to a particular area in which they vote. We also consider the possibility of an elector having more than one electoral residence. The chapter then covers the laws governing the operation of and access to electoral registers in Great Britain and Northern Ireland respectively. The law on residence and registration is voluminous, and we only provide an outline of it here. Fuller exposition and citations can be found in our research paper, available online.<sup>1</sup>

### THE ELECTORAL FRANCHISES

- 4.3 Section 1 of the Representation of the People Act 1983 Act sets out the basic franchise for UK Parliamentary elections. The local government franchise is set out in section 2 of the 1983 Act and applies to the election of local government councillors, Greater London Authority elections, and to mayoral elections in England and Wales.<sup>2</sup> Sections 3 and 3A disenfranchise from either type of election convicted serving prisoners and offenders detained in hospitals for the treatment of psychiatric disorder under the Mental Health Act 1983 or under the Criminal Procedure (Insanity) Act 1964.<sup>3</sup>
- 4.4 Elections to the devolved legislatures and of Police and Crime Commissioners also use the local government franchise.<sup>4</sup> The franchise for European Parliamentary elections is based on the Parliamentary franchise, but is more complex; we discuss it below.

<sup>1</sup> Available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

<sup>2</sup> Representation of the People Act 1983, ss 203(1) and 204(1)) include elections of councillors in England, Wales and Scotland, Greater London Authority and mayoral elections in the definition of “local government election”.

<sup>3</sup> For Scotland and Northern Ireland, the Representation of the People Act 1983, ss 3A(3) and (4) apply respectively.

<sup>4</sup> Scotland Act 1998, s 11; Government of Wales Act 2006, s 12; Northern Ireland Assembly (Elections) Order SI 2001 No 2599, art 4; Local Government Act 2000, s 43; Police Reform and Social Responsibility Act 2011, s 52.



### **Outline of the franchise in UK elections**

- 4.5 In order to vote at UK elections, a person must satisfy four requirements on polling day.

#### ***Entry in the relevant electoral register***

- 4.6 Registration is a condition of the franchise in the UK. It introduces a requirement of residence, which includes notional residence for certain overseas voters, “merchant seamen” and certain voters registered pursuant to making a declaration of local connection. While residence can be seen as an administrative device, determining where particular citizens can exercise their entitlement to vote, it also accords with the traditional concept of community representation.<sup>5</sup>
- 4.7 As registration is determinative of the right to exercise the franchise, it is crucial that only persons who also satisfy the following requirements are registered as entitled to vote.

#### **CITIZENSHIP**

- 4.8 To vote in a UK Parliamentary election a person must be a Commonwealth citizen (which includes a British citizen) or a citizen of the Republic of Ireland. In order to be entitled to be registered, a Commonwealth citizen must either have, or not require, leave to be in the UK under the immigration legislation. At all other elections, “relevant” citizens of the European Union also enjoy the franchise. A relevant citizen of the EU is one who is not a Commonwealth citizen or an Irish citizen.<sup>6</sup>

#### **VOTING AGE**

- 4.9 UK electors must be 18 years of age or older.<sup>7</sup>

<sup>5</sup> H Rawlings, *Law and the Electoral Process* (1988) p 80.

<sup>6</sup> Representation of the People Act 1983, s 4; European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations SI 2001 No 1184, reg 1.

<sup>7</sup> Representation of the People Act 1983, s 1.

## FREEDOM FROM LEGAL INCAPACITY TO VOTE

- 4.10 Certain persons are disqualified from voting. These include persons detained under the Mental Health Act 1983 pursuant to a criminal conviction,<sup>8</sup> prisoners serving a sentence after conviction, and persons guilty of corrupt or illegal electoral practices. At UK Parliamentary elections, peers of the realm are also subject to a legal incapacity from voting, save for hereditary peers unable to sit in the House of Lords under sections 1 and 2 of the House of Lords Act 1999. The current legal incapacity of peers to vote is not set out in legislation, but is instead based on old case law.<sup>9</sup>

### **Restating the franchise centrally for all UK elections**

- 4.11 Any substantive change in the current franchises is beyond the scope of this project. However, our provisional view is that the basic franchise and disqualifications should be set out in one place in primary legislation. The provisions should reflect the different franchises for different types of election.

### **Provisional proposal 4-1: The franchises for all elections in the UK should be centrally set out in primary legislation.**

## RESIDENCE AND SPECIAL CATEGORY ELECTORS

- 4.12 A person's entitlement to be registered turns primarily on their being resident within the electoral area in question.<sup>10</sup> Registration officers need to be able to determine whether someone is resident, and where. Unexpressed, but fundamental to the electoral system, is the idea that residence connects a person to a geographical area that has democratic representation. Residence provides a person with an "electoral connection".<sup>11</sup>

<sup>8</sup> Section 3A of the 1983 Act applies to detention in mental health institutions pursuant to the Criminal Procedure (Insanity) Act 1964, where technically there has been no conviction, but the detention results from criminal conduct, even if it falls short of being culpable in strict criminal law terms. The disqualification does not extend to persons detained under the Mental Health Act 1983 otherwise than under a court order made in connection with criminal proceedings. For Scotland and Northern Ireland, see ss 3A(3) and (4) respectively.

<sup>9</sup> Persons subject to "any legal incapacity to vote (age apart)" are not entitled to vote at UK Parliamentary elections or to be registered: Representation of the People Act 1983, ss 1(1)(b) and 4(1)(b); peers of the realm were the subject of repeated House of Commons resolutions declaring them not to have the franchise to elect members of the lower House, which was understood by the courts to be the House of Commons declaring the common law in its capacity as the highest court of the land: 13 Commons Journal 64 (1699); *Earl Beauchamp v Madresfield Overseers* (1872-3) 8 LRCP 245. Section 3 of the House of Lords Act 1999 entitles hereditary peers who are not members of the House of Lords by virtue of section 2 of that Act to vote at elections to the House of Commons.

<sup>10</sup> Representation of the People Act 1983, s 4.

<sup>11</sup> Residence is a concept in many other areas of the law, for example private international law. Our focus is on its meaning in electoral law.

### **The concept of residence in the electoral context**

- 4.13 Residence is a straightforward term which, when used in the electoral context, can extend to a variety of circumstances.

#### ***The central case of residence***

- 4.14 The predominant example of residence is that a person is settled at premises at a given address which is publicly recognised as such: it has a postcode, street name and house number and so on. The person may be away for reasons of work or leisure, but is principally settled in and lives there; it is their home. There is little difficulty in practice in identifying them as resident there. The difficulty arises in less typical cases.

#### ***Untypical examples of residence***

- 4.15 Some people inhabit places that may not have a postcode, living in a mobile home, or on a boat, and so on. They may be homeless and sleep in a different place on many nights. They may “couch surf” at the residences of friends. There is tension in how the law should deal with untypical examples of residence:

(1) On the one hand, it is no longer a function of residence to award the franchise on the basis of property-owning qualifications. It would not be right if homeless persons, travellers or people who live in boats were disenfranchised.

(2) On the other hand, if someone’s living arrangements are such that he or she moves from one place to another, it is more difficult to tie him or her to a particular area and its electoral community. It also opens up an opportunity for such persons to choose an electoral community for tactical reasons: to target particular seats, marginal ones for example.

- 4.16 Electoral law seeks to deal with untypical cases in such a way that as many electors as possible retain access to the democratic system. So far as possible, persons whose residence is untypical should be registered under ordinary residence principles. If they cannot, the mechanism of the “declaration of local connection” is used to allocate them to an electoral community. As we will see, the relationship between these two mechanisms is untidy.

#### ***The resident who is away from home***

- 4.17 In most cases, presence and residence go hand in hand. Some electors, however, are called away from their residence – for example, on business or for study – temporarily or indefinitely. They may nevertheless regard it as their “home”. The question here is: in what circumstances will a person retain an “electoral connection” to a place notwithstanding their absence, so that they should continue to be represented in that community? Electoral law seeks to guide registration officers so that they ignore temporary absences for work or study, and provides a mechanism for British residents overseas to vote at UK Parliamentary elections.

#### ***Second residences***

- 4.18 Some electors have more than one home and apportion their time between both. This raises the question whether the law should insist on only one residence

providing an electoral connection, or whether an elector can have a sufficient electoral connection to two places, so as to be entitled to be represented in each.<sup>12</sup> The law might seek to give a definitive answer, or test, for whether additional places can amount to second places of residence entitling them to register there too. We will see that at present the legislation says nothing about second residences, leaving guidance to the courts, from which registration officers take their cue.

### ***Section 5 of the 1983 Act and standard residence***

4.19 “Actual” residence is dealt with in section 5 of the 1983 Act, with particular cases of “notional” residence dealt with elsewhere.

4.20 Section 5 of the 1983 Act provides:

(1) This section applies where the question whether a person is resident at a particular address on the relevant date for the purposes of section 4 above falls to be determined for the purposes of that section.

(2) Regard shall be had, in particular, to the purpose and other circumstances, as well as to the fact, of his presence at, or absence from, the address on that date.

For example, where at a particular time a person is staying at any place otherwise than on a permanent basis, he may in all the circumstances be taken to be at that time –

(a) resident there if he has no home elsewhere, or

(b) not resident there if he does have a home elsewhere.

(3) For the purpose of determining whether a person is resident in a dwelling on the relevant date for the purposes of section 4 above, his residence in the dwelling shall not be taken to have been interrupted by reason of his absence in the performance of any duty arising from or incidental to any office, service, or employment held or undertaken by him if –

(a) he intends to resume actual residence within six months of giving up such residence, and will not be prevented from doing so by the performance of that duty; or

<sup>12</sup> Multiple registration does not mean the elector can vote more than once at the same election – for example at a general election – but it does allow them to vote at elections in different places on the same day: for example, concurrently held ordinary local government elections.

(b) the dwelling serves as a permanent place of residence (whether for himself or for himself and other persons) and he would be in actual residence there but for his absence in the performance of that duty.

(4) For the purposes of subsection (3) above any temporary period of unemployment shall be disregarded.

(5) Subsection (3) above shall apply in relation to a person's absence by reason of his attendance on a course provided by an educational institution as it applies in relation to a person's absence in the performance of any duty such as is mentioned in that subsection.

(6) Subject to sections 7 and 7A below, a person who is detained at any place in legal custody shall not, by reason of his presence there, be treated for the purposes of section 4 above as resident there.

#### THE "RELEVANT DATE"

- 4.21 Section 5 refers to residence on the "relevant date", defined by section 4(6) as the date on which an application for registration is made.<sup>13</sup> Residence at an address on that date only is not the same thing as presence there on that date. A person may be resident at an address even though absent from it on the particular date.<sup>14</sup> Similarly, moving persons into premises purely for the purposes of registration does not make them truly resident there.<sup>15</sup>

#### ***What can be gleaned from the section 5 guidance***

- 4.22 Section 5 gives guidance in particular scenarios, refers officers to certain factors, and highlights the notion that the context surrounding physical absence or presence is important. However, it uses the terms "resident", "factual residence", "home", "dwelling" and "address" without further definition and does not deal with multiple residence at all.

#### ABSENCE OR PRESENCE AS FACTORS WHICH TURN ON CONTEXT

- 4.23 While presence or absence is plainly an important indicator of residence, section 5 emphasises the importance of the reason for such presence or absence. For example, electors who are present at a place, but not permanently, may be resident there if they have no home elsewhere, but may not be if they do. The presence in a place may thus lead to different conclusions as to residence for

<sup>13</sup> Or is treated as having been made by virtue of section 10A(2), which refers to the canvass date in Northern Ireland.

<sup>14</sup> *Scott v Electoral Registration Officer for Kinross and West Perthshire* 1980 SLT (Sh Ct) 126 at 127 where Sheriff Henderson said: "Miss Ritchie was not in fact, it was agreed, present in Callander on [10 October 1978], but this is of itself of no practical significance".

electoral purposes, based on the context.

- 4.24 The provisions reflect a concern to avoid disenfranchisement. For some, there may be a choice of places which, based on the “fact” of physical occupation, might be identified as their residence. If one of those places is their home and the other is mere temporary accommodation, the former is taken as the residence. If a person has no “home” beyond mere temporary accommodation, then it does not matter that it is temporary. It establishes an electoral connection.

#### DISREGARDING INTERRUPTIONS IN PRESENCE

- 4.25 The emphasis on purpose and context enables the registration officer to determine the effect of absence upon residence, taking into account the reason for any absence and the elector’s intentions with respect to the residence. Ill health, for example, may cause an elector to seek prolonged treatment elsewhere, but their electoral residence may, in all the circumstances, continue.
- 4.26 Electoral law positively requires absences to be disregarded in only two contexts: work and study. Section 5(3), read with section 5(5), provides that a person’s residence in a dwelling “shall not be taken to have been interrupted” by reason of their absence in the course of employment<sup>16</sup> or study, provided either:
- (1) that person intends to resume “actual” residence within six months of leaving, or
  - (2) that the dwelling serves as a permanent place of residence for the person, with or without others, and the person would otherwise be in actual residence there.
- 4.27 This requirement to disregard absence is supplemental to the general requirement to have regard to the purpose and context of presence or absence.
- 4.28 The first condition is clearly defined. Absence from a residence for the purpose of work or study is discounted, provided it is of not more than six months intended duration. The second depends on establishing what the position would be in hypothetical circumstances in which the person was not absent for work or study.

<sup>15</sup> *Ali v Bashir* [2013] EWHC 2572 (QB) at paras 36 and 37.

<sup>16</sup> Temporary periods of unemployment being disregarded: Representation of the People Act 1983, s 5(4).

## SPECIAL RULES DEALING WITH THOSE PRESENT UNDER COMPULSION

- 4.29 Section 5(6) applies to persons “detained at any place in legal custody” and requires them not to be regarded as present there. This provision is capable of applying to serving prisoners and persons detained in a psychiatric institution by order of a criminal court (in whose cases it is otiose in view of their disenfranchisement to vote pursuant to sections 3 and 3A) as well as to remand prisoners and some other mental health patients. In the case of mental health patients (whether or not detained) and remand prisoners the rule is mitigated by special rules in sections 7 and 7A, to which section 5(6) is expressly made subject. Subsection (2) of each of those sections provides that persons to whom either section applies are to be regarded as resident in their institution if the likely length of their time there makes them resident under the ordinary rules. They can be registered for a maximum period of 12 months (though a further application can be made) and entitlement to be registered terminates if they are entered in a register elsewhere.

### ***Meaning of residence pursuant to case law***

- 4.30 The question as to whether a voter is resident at a particular property for electoral registration purposes is one of fact and degree. Thus it has been said that “each case must depend on its own facts”.<sup>17</sup> Similar statements appear elsewhere in the case law, such as, for example, “what should constitute residence in a question of this kind is a question of fact, and is largely a question of degree”<sup>18</sup>, and “it appears...to be merely a question of circumstances in each particular case whether the condition of residence can be held to have been satisfied or not”.<sup>19</sup>
- 4.31 This is in addition to the statutory criterion in section 5 of the 1983 Act that regard is to be had to the “purpose and other circumstances, as well as to the fact, of ... presence at, or absence from, the address on that date”. Case law has laid down some now well-established principles, including that:
- (1) A person can have more than one residence.<sup>20</sup>
  - (2) It is not relevant that residence is unlawful.<sup>21</sup>
  - (3) Temporary absence or presence does not affect residence.<sup>22</sup>

<sup>17</sup> *Scott and Another v Phillips* 1974 SLT 32, p 34.

<sup>18</sup> *Ferris v Wallace* 1936 SC 561, p 563.

<sup>19</sup> *Sim v Galt* (1892) 20 R 84, p 86.

<sup>20</sup> *Fox v Stirk and Bristol Electoral Registration Officer, Ricketts v Cambridge City Electoral Registration Officer* [1970] 2 QB 463; *Scott and Another v Phillips* 1974 SLT 32.

<sup>21</sup> *Beal v Ford* (1877) 3 CPD 73; *Hipperson v Electoral Registration Officer for the District of Newbury* [1985] QB 1060.

- (4) The intention of the applicant is relevant to a decision on residence.<sup>23</sup>
- 4.32 In the tax law context, recourse has been had to the Oxford English Dictionary definition of reside as “to dwell permanently, or for a considerable time, to have one’s settled or usual abode...”<sup>24</sup> In the electoral context, the courts have agreed that residence connotes a considerable degree of permanence.
- 4.33 In *Fox v Stirk and Bristol Electoral Registration Officer, Ricketts v Cambridge City Electoral Registration Officer*, the Court of Appeal considered whether certain students at Bristol and Cambridge Universities were resident there and entitled to be entered on the local electoral registers. Lord Denning referred to the above dictionary definition of residence. Lord Widgery elaborated on this definition by stating that “some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence”. The court held that the fact that the students were in their halls of residence for at least half of the year gave a sufficient degree of permanence for them to be resident for registration purposes.<sup>25</sup>
- 4.34 If residence is sufficiently permanent, occupation of makeshift accommodation is not a bar. In *Hipperson v Electoral Registration Officer for the District of Newbury*, the Court of Appeal dismissed objections to residence based on unlawful occupation by the campaigning “Greenham Common women” of an area outside an air base. Sir John Donaldson MR said:

[T]o import considerations based on the standard of accommodation into qualification for the franchise would be to put the clock back to the days when the franchise depended on a property qualification and is quite unwarranted by anything in the 1983 Act. It may be untypical to make one's home in a tent, bender or vehicle, but we can see no reason in law why it should be impossible. Section 5(2) of the 1983 Act may well have an application which is limited to dwelling houses, but this only means that circumstances which could not interrupt a person's residence in a dwelling house may interrupt his residence in

<sup>22</sup> Borough of Oldham (1869) 1 O'Malley and Hardcastle 151 at 158; *Fox v Stirk and Bristol Electoral Registration Officer, Ricketts v Cambridge City Electoral Registration Officer* [1970] 2 QB 463.

<sup>23</sup> *Fox v Stirk and Bristol Electoral Registration Officer, Ricketts v Cambridge City Electoral Registration Officer* [1970] 2 QB 463; Representation of the People Act 1983, s 5(3)(a).

<sup>24</sup> *Levene v Inland Revenue Commissioners* [1928] AC 217 at 222, cited in *Fox v Stirk* [1970] 2 QB 463 and *Hipperson v Electoral Registration Officer for the District of Newbury* [1985] QB 1060.

<sup>25</sup> [1970] 2 QB 463 at pp 475 and 477.



a tent.<sup>26</sup>

#### SECOND ELECTORAL RESIDENCE

- 4.35 There has been concern about inconsistent decision-making in the context of electors seeking to be registered at a second home, and thus in two electoral areas at once.<sup>27</sup> The legislation says nothing of multiple residences. In the case-law establishing that multiple electoral residences is in principle possible, the English courts have taken a less exacting stance than their Scottish counterparts on what amounts to a second electoral residence.
- 4.36 In *Fox v Stirk*, the Court of Appeal held that students could be registered in respect of their residence in student accommodation. In considering the concept of residence, one of the principles derived by Lord Denning was that “a man can have two residences. He can have a flat in London and a house in the country.” Lord Denning did not give guidance as to when occupation of a second home amounts to an additional residence.<sup>28</sup>
- 4.37 In the Scottish case of *Scott and Another v Phillips*,<sup>29</sup> an architect owned a house and was the tenant of a cottage. He had spent, over a period of seven years, three and half months each year on average at the cottage. He had certain local interests there. While the Registration Appeal Court accepted that his occupation of the cottage had the requisite degree of permanence, it held that the cottage was merely an “incidental” residence, and the house was the “substantive” home: the family home where the majority of time was spent. In contrast, the cottage was a holiday home for the “purpose of leisure and relaxation in the country” and thus insufficient.<sup>30</sup>
- 4.38 In coming to that conclusion, the court based its decision on a reference in section 4 of the Representation of the People Act 1949 to general principles applied under a predecessor Act. The 1949 Act had replaced the previous requirement of residence over a period with residence on one “qualifying” day, but had provided that the question of entitlement to registration was still to be determined “in accordance with the general principles formerly applied” in determining questions arising under the Representation of the People Act 1918.<sup>31</sup>

<sup>26</sup> [1985] QB 1060 at pp 1072 and 1073.

<sup>27</sup> Electoral Commission, Submission to 11<sup>th</sup> Programme of Law Reform (2010) at p 7.

<sup>28</sup> [1970] 2 QB 463 at p 476.

<sup>29</sup> 1974 SLT 32.

<sup>30</sup> 1974 SLT 32 at pp 33 and 34.

<sup>31</sup> A requirement that was initially carried over into the Representation of the People Act 1983, but removed when section 5 was replaced in 2001.<sup>31</sup>

- 4.39 The court accordingly referred to *Ferris v Wallace*,<sup>32</sup> a case decided under the 1918 Act, as follows:

It cannot be doubted that the general principles found to be applicable in that case apply to the present case. Each member of the registration court in that case decided that where, as here, a person has a “permanent home”, to use a neutral phrase, in two electoral areas, and one home is a home which is only incidental to the substantive home, the former is not to be taken as the “residence” for the purpose of qualifying under the said Act of 1949.<sup>33</sup>

- 4.40 The application in Scotland, but not in England and Wales, of the distinction, where a person has two residences, between a “substantive” and an “incidental” residence seems to indicate a difference in approach in the two jurisdictions to the interpretation of the same provision.

- 4.41 Where a person has two homes, the Scottish authorities have not doubted that a person can have two “substantive” residences. In *Dumble v Electoral Registration Officer for Borders*,<sup>34</sup> the Sheriff Principal held that a would-be candidate for election in Ancrum was resident both there, where he leased a property, and in Glasgow, where he owned another. Presence in each was necessary for Mr Dumble’s careers in law and politics, and neither was incidental to the other. If Parliament had intended registration to be confined to a single residence, it would not have made a separate provision to prohibit a person voting in more than one constituency. The Sheriff Principal did, however, add the following:

... I do not think that a holiday cottage, or a house which was used for purposes only incidental to the elector’s main activities in life would qualify as a residence. In England it may be otherwise... but the Scottish courts have not been willing to accept a house in the country, the main purpose of which is to afford facilities for relaxation and leisure as a qualifying residence.<sup>35</sup>

#### RATIONALISING THE CASES IN THE UK

- 4.42 The words of the 1983 Act apply equally to Scotland and England and Wales, and there is no justification for differences in practice between these jurisdictions. The wording of section 5, now devoid of reference to “general principles” formerly applied under earlier legislation, does not mention “substantive” and “incidental” residences. We consider that the following propositions summarise the legal position:

<sup>32</sup> 1936 SC 561, 1936 SLT 292.

<sup>33</sup> 1974 SLT 32 at p 34.

<sup>34</sup> 1980 SLT (Sh Ct) 60.

<sup>35</sup> 1980 SLT (Sh Ct) 60 at p 62.

- (1) The test for residence under section 5 applies to second homes. The courts have adjudged that presence at the second home must have the requisite degree of permanence.
- (2) However, section 5 requires registration officers to consider the “purpose and other circumstances”, as well as the fact, of presence at or absence from the second home. It is not simply a question of time spent there.
- (3) Full-time students are generally entitled to be registered as resident in their university towns and probably also at their parental home, where they are likely to spend a significant amount of time outside term.
- (4) Occupying a second home for the purposes of leisure or relaxation is less likely to suffice to establish an electoral connection between an individual and that home, though much will turn on the facts. If a second residence is necessary for someone’s career, study or some other occupation, the connection is easier to establish.

4.43 Second homes pose a real challenge to registration officers, partly because the law gives no guidance in respect of whether and when a person may be resident in, and thus entitled to be registered at, both their homes. Our view is that registration officers in the UK as a whole should approach the question in the same way. In addition to the divergent case-law as between England and Wales and Scotland, we have anecdotal evidence that registration officers in holiday areas of England take very different approaches to occupiers of second homes. We have seen no sign that second homes have posed practical problems in Northern Ireland.

#### **Notional residence and special category electors**

4.44 For some “untypical” examples of residence, the law makes particular provision to enable people to register, principally through an administrative mechanism called a “declaration of local connection”. They are instead registered at a “notional” residence, which may be fictitious. Underlying these provisions is a policy of ensuring that these people enjoy the franchise, through an administrative mechanism which provides them with a connection to an electoral area. Collectively, we refer to these persons as “special category” electors.

4.45 There are six groups of special category electors, five covered by the 1983 Act<sup>36</sup> and the sixth (overseas electors) by the 1985 Act:

- (1) Merchant seamen – persons a significant part of whose employment is

<sup>36</sup> Some view “anonymous voters” as a further special category. These, however, must have a residence under the ordinary rules – or under the special categories we are presently covering; the point is that their address and other details are kept private for their safety. We deal with them discretely below.

carried out on board seagoing ships, and who do not have a service qualification.<sup>37</sup>

- (2) Patients in hospitals for the treatment of psychiatric disorder who are not detained offenders.<sup>38</sup>
  - (3) Persons remanded in custody who have not been convicted of any offence or found guilty in criminal proceedings.<sup>39</sup> The situations in which a person is considered remanded in custody for the purposes of this section are listed at section 7A(6) of the 1983 Act.
  - (4) Homeless persons – those who do not have either a permanent or temporary residence under section 4 of the 1983 Act.<sup>40</sup>
  - (5) Service voters – those who are serving abroad as members of the armed forces, otherwise in the service of the Crown or are employees of the British Council, and their spouses and civil partners.<sup>41</sup>
  - (6) Overseas electors – British citizens who were registered in the UK, or could have been registered but for their age, before moving abroad, and have not lived abroad for more than 15 years.<sup>42</sup>
- 4.46 With the exception of merchant seamen, special category electors register via a declaration which connects the applicant to an address despite the fact they are not living there.

<sup>37</sup> Representation of the People Act 1983, s 6.

<sup>38</sup> Representation of the People Act 1983, s 7.

<sup>39</sup> Representation of the People Act 1983, s 7A.

<sup>40</sup> Representation of the People Act 1983, ss 6 to 7C.

<sup>41</sup> Representation of the People Act 1983, s 14.

<sup>42</sup> Representation of the People Act 1985, s 1.

## MERCHANT SEAMEN

- 4.47 “Merchant seamen”, a term defined so as to cover persons of either sex, may either be registered at a home address in the UK (if they have one) or “at any hostel or club providing accommodation for merchant seamen” where they commonly stay.<sup>43</sup> Unlike the other special categories, merchant seamen do not need to provide a declaration of local connection as proof that they would be at the address in question, but for the circumstances which make them a special category elector.

## THE DECLARATION

- 4.48 For all other categories of notional residence, the applicant must make a declaration connecting them to a particular address in the UK and providing specified details.<sup>44</sup> The declaration lasts for a maximum of 12 months, and can be revoked by the declarant.<sup>45</sup>

### *Patients in hospitals for the treatment of psychiatric disorder and persons remanded in custody*

- 4.49 It is convenient to deal with these two categories together, since the same rules apply to both. The scheme is permissive, and the declaration of a local connection is one of three possibilities. Such persons may be considered resident at their former home address by application of the normal rules;<sup>46</sup> they may be registered where the institution in question is located;<sup>47</sup> or, they may be registered at their former home address under a declaration of local connection.<sup>48</sup>

### *Homeless persons*

- 4.50 Homeless persons may also be registered under a declaration of local connection. These are persons who are not resident at any address in the UK, whether permanently or temporarily. The address provided in the declaration must be that of, or nearest to, a place where they commonly spend a substantial part of their time.<sup>49</sup>
- 4.51 There is a special rule in the case of a declaration submitted by a homeless person during the time between a vacancy occurring in a UK Parliamentary, Scottish Parliamentary or National Assembly for Wales election and the deadline

<sup>43</sup> Representation of the People Act 1983, s 6.

<sup>44</sup> Representation of the People Act 1983, ss 7B(3) and (4) and 16; Representation of the People Act 1985, s 2(1) and (4).

<sup>45</sup> Representation of the People Act 1983, s 7C(2).

<sup>46</sup> Representation of the People Act 1983, ss 7(5)(a) and 7A(5)(a).

<sup>47</sup> Representation of the People Act 1983, ss 7(2) and 7A(2).

<sup>48</sup> Representation of the People Act 1983, ss 7(5)(b) and 7A(5)(b).

<sup>49</sup> Representation of the People Act 1983, s 7B(4).

for nominations. Homeless persons must also declare that they have, over the preceding three months, commonly spent a substantial part of their time at or near the required address.<sup>50</sup> The policy is presumably to prevent homeless persons tactically registering in particular constituencies.

4.52 The Electoral Commission publishes extensive guidance concerning electoral registration, including on residence generally and special category electors. Two categories in particular can cause difficulties when considering whether a person is resident at a particular place. These are:

- (1) Travellers, who may not reside at an address, although they may settle for a period of time, for example at a site designated by a local authority. The Electoral Commission guidance states that registration officers should use council staff familiar with traveller communities in order to assess their situation, with a view to registering them, presumably, under normal residence rules. However, we have also heard, anecdotally, that some members of traveller communities are registered pursuant to a declaration of local connection, effectively being treated as homeless under section 7B of the 1983 Act.
- (2) Persons living in narrow boats or houseboats. The Electoral Commission guidance suggests that persons living in moored boats should be registered pursuant to the normal residence rules. Those living in a boat not fixed to a particular place cannot be treated as resident at any address, but the Commission says they can be registered by way of declaration of local connection, also treating them as homeless under section 7B of the 1983 Act.<sup>51</sup>

#### SERVICE VOTERS

4.53 Service voters include members of the armed forces serving abroad, persons in the service of the Crown abroad and employees of the British Council posted abroad. A service voter's declaration is similar to the declaration of local connection, and imputes residence at the UK address at which the service person is or would be resident but for their service abroad, or failing that, at a past residential address.<sup>52</sup> Spouses and civil partners of these persons who are otherwise entitled to be registered can also be registered as service voters, in recognition of the fact that many move abroad to accompany their partners.<sup>53</sup>

4.54 The Secretary of State may by Order extend the period of validity of a service

<sup>50</sup> Representation of the People Act 1983, s 7B(6).

<sup>51</sup> Electoral Commission, *Managing electoral registration in Great Britain, Guidance for Electoral Registration Officers*, Updated January 2014, Part B pp 11 and 12.

<sup>52</sup> Representation of the People Act 1983, ss 14 and 16(d).

<sup>53</sup> Representation of the People Act 1983, s 14.

declaration to up to five years. This power was exercised in 2010 to extend the period to five years.<sup>54</sup>

- 4.55 Service declarations in respect of members of the armed forces can be given directly to the registration officer, while other service voters' declarations must be transmitted to the registration officer by their employer. The registration officer must notify the declarant of whether their declaration has been accepted or not.<sup>55</sup>
- 4.56 The 1983 Act also requires declarations made by Crown servants or employees of the British Council or their spouses to be attested in a prescribed manner, but the 2001 Regulations do not prescribe any requirements. It may be that this requirement was mistakenly retained when provisions on attestation that were previously in force were repealed.<sup>56</sup>

#### OVERSEAS VOTERS

- 4.57 In order to be registered as an overseas voter, an applicant must be a British citizen and must within 15 years of the date of the application have been previously registered as a domestic voter in the UK. Alternatively, applicants must demonstrate that they were only prevented from registering as a domestic voter by reason of their age, and that a parent or guardian of theirs was registered at the address in respect of which the application is made.<sup>57</sup> In such a case, their first overseas voter's declaration must also be accompanied by a copy of their birth certificate, which must show the names of either or both of their parents and their date of birth.<sup>58</sup>

#### Reforming the law on residence

- 4.58 The law on residence and special category electors is complicated. The 1983 Act's provisions are in part a consolidation of older measures harking back to the age of property qualifications for the franchise, but they also bear the mark of modern policies. We see the role of law reform here as, first, to take stock of the

<sup>54</sup> Representation of the People Act 1983, s 15(9) – (12); Service Voters' Registration Period Order SI 2010 No 882, art 2.

<sup>55</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 15 to 17; Representation of the People (Scotland) Regulations SI 2001 No 497, regs 15 to 17.

<sup>56</sup> Previously, the first declaration made by an overseas voter also had to be attested by a British citizen bearing a British passport who was resident overseas. This was repealed as part of the package of reforms implementing individual electoral registration. Representation of the People (England and Wales) (Description of Electoral Registers and Amendment) Regulations SI 2013 No 3198, sch 2 para 1; Representation of the People (Scotland) (Description of Electoral Registers and Amendment) Regulations SI 2013 No 3206, sch 2 para 1.

<sup>57</sup> Representation of the People Act 1985, s 1.

<sup>58</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 19 and (now repealed) 20; Representation of the People (Scotland) Regulations SI 2001 No 497, regs 19 and (now repealed) 20.

modern legal position and to set it out simply and clearly. A second aim is to consider how the law can best assist registration officers to perform their tasks in a consistent fashion. The following paragraphs, and our provisional proposals on reform, will be influenced by any consultation responses as to the practical administration of the law on residence, which we shall welcome.

### ***The modern legal position on residence***

4.59 Nine principles summarise the position on residence for the purpose of electoral registration.

- (1) In law “residence” connects an individual who otherwise enjoys the franchise to an electoral area, a geographical community that has democratic representation. (Residence provides an “electoral connection”).
- (2) Residence can be said to connote a sufficient degree of permanence at a particular place. Physical presence or absence, and their purpose and context, are relevant factors.
- (3) In principle, a person may be resident (in the sense above) in two places. This is not the same as alternating between staying at two or more places. To have two residences means to have two concurrent electoral connections.
- (4) For those whose only accommodation is precarious or impermanent, the law equates physical presence at a place to residence, preserving their franchise by finding an electoral connection even if theirs is a untypical case of residence.
- (5) Registration officers are entrusted with taking these factors into account and making a decision in accordance with them, subject to certain exceptions.
- (6) One exception is that registration officers must disregard temporary absences due to work or study.
- (7) Where an electoral connection cannot be made using the ordinary concept of residence, an administrative process, called the declaration of local connection, exists to find a “notional” residence in order to enable persons (homeless persons, overseas and service voters) to exercise their franchise at a particular place.
- (8) For others who are resident in an institution, notional residence can be used to found an electoral connection to an area where they used to reside. This is the case for remand prisoners and mental health patients; the declaration of local connection being available as an alternative to residence in the institution.
- (9) Finally, different special provision is made for merchant seamen to register.



***Should residence be defined more closely?***

- 4.60 We are currently of the view that setting out a comprehensive definition of residence would be a difficult, if not impossible, task. Residence can mean different things depending on the context, because the aim is to find an electoral connection. A single, exhaustive definition, even if capable of formulation, risks introducing an unacceptable degree of complexity to what, in most cases, is a simple task.

***Dealing with the difficult scenarios***

- 4.61 Our currently preferred approach is for the law to give guidance in the difficult cases. This is essentially the approach of the 1983 Act, though the current section 5 may not be satisfactory.
- 4.62 First, the relationship between subsections (2) and (3) of section 5 of the 1983 Act may be thought to be an awkward one. The first unnumbered paragraph of section 5(2) refers to cases of both presence at and absence from a particular address. The second unnumbered paragraph appears to relate exclusively to the address at which a person is staying on the qualifying day and gives guidance as to the effect of a home elsewhere upon the quality of his occupation of that place. Conversely, section 5(3) necessarily relates to a place at which the person is not staying on the qualifying day, and makes provision as to when the person is to be taken (for the terms of section 5(3) are mandatory, unlike those of section 5(2)) to reside there despite their absence.

TEMPORARY ABSENCE FROM A SETTLED RESIDENCE

- 4.63 A second possible problem with section 5 of the 1983 Act is internal to section 5(3). The current wording of section 5(3), read with section 5(5), deals with absence for work or study, but not other cases of absence. It offers two alternative ways of dealing with both of those cases of absence: (1) residence is taken to persist, whether or not the place of residence is available to the person in the meantime, if the person intends to resume residence there within six months of moving away (section 5(3)(a)); (2) residence is taken to persist indefinitely if the place of residence continues to “serve” as a residence for the person and/or their family (section 5(3)(b)).
- 4.64 No provision is made, apart from the general proposition in the first part of section 5(2), for other cases of temporary absence, such as for medical reasons.
- 4.65 There is some degree of overlap between the two cases covered by sections 5(3)(a) and 5(3)(b). We question whether it is necessary to make these two forms of provision for broadly similar situations.
- 4.66 Secondly, the language of section 5(3)(b) may be thought to be somewhat opaque. It appears to cover the cases both of a single person and of a person with a family. It refers to an address which “serves as a permanent place of residence” for the person and/or for their family. In the case of a single person, it appears to contemplate the address serving as a place of residence although the person is, by definition, not there. In the case of other family members, it seems to be directed at the case where they have remained at the place. The notion of serving as a permanent place of residence therefore seems to have two different meanings, depending on whether one is looking at the person who has moved

away for work or study or at the other family members.

- 4.67 We are unsure whether section 5(3)(b) adds anything useful to the general guidance in the first part of section 5(2).

#### THE RELATIONSHIP BETWEEN UNTYPICAL CASES OF RESIDENCE AND NOTIONAL RESIDENCE

- 4.68 We are considering whether the law should more concretely define the line between ordinary residence and special category electors, giving clear direction as to when the electoral connection should be made through “standard” residence, and when notional residence should be used.
- 4.69 In the case of remand prisoners and mental health patients, the law currently admits of the possibility of their being resident either at their former address or in their place of stay or, as a further alternative, being “notionally” resident at their former address. Our current view is that this is unnecessarily cumbersome and apt to complicate a registration officer’s task.
- 4.70 People living in unconventional homes, such as caravans or narrow boats, may in practice prove difficult to register, for example, because they do not have a post code, or their place of living is difficult to allocate to a particular electoral area. The fact that the home is an unconventional one seems to us to present an operational challenge – perhaps a greater one than keeping up with new building developments, but not qualitatively different – and, at all events, not one that law reform can assist with.
- 4.71 The fact that such a home is mobile raises a different problem. In principle, the test under the general law is whether, in all the circumstances, their occupation of it within a particular electoral area is sufficiently permanent to amount to residence within that area. A person living in a caravan or a boat at a fixed place who occasionally uses it to move about but returns to the fixed place has the requisite electoral connection and is resident there, and not in places where the caravan or boat is temporarily accommodated. Plainly, borderline cases can at least in theory arise.
- 4.72 Ideally, it currently seems to us, the provision for registering a person using a declaration of local connection should be reserved for cases that cannot practically be resolved by rules. The difficulties we have noted with the law on residence arise out of the complexity of the current law and its expression in the 1983 Act. A simpler restatement of the law is in our provisional view desirable.

**Provisional proposal 4-2: The law on residence, including factors to be considered, and special category electors, should be restated clearly and simply in primary legislation.**

#### SECOND HOMES

- 4.73 Our analysis of the law as to second homes reveals that it is an area of the law which risks inconsistent decisions by registration officers. In principle, a person may be resident (in the sense of dwelling in a home with a sufficient degree of permanence) in two places. This is not the same as staying in more than one place. To have two residences means to have two concurrent electoral connections.

*Whether registration at a second residence is right in principle*

- 4.74 The first question is whether it is right in principle that electors should have concurrent electoral connections to two places. It means that they can vote simultaneously in those areas (though not in the same election). Thus electors registered in two electoral areas can vote:
- (1) in both areas' local government elections, even if they occur on the same day.
  - (2) in a UK Parliamentary by-election in one constituency even though they voted in a different constituency at the previous general election.<sup>59</sup>
- 4.75 It can be argued that this allows the wealthy more of a voice in the electoral system than most others. It certainly also complicates the registration officer's task since residence in the second home is likely to be harder to evaluate. It also gives rise to a possible problem of preventing multiple voting at parliamentary elections.
- 4.76 We are of the view that reviewing the availability of multiple registration lies outside the scope of the project. It would affect the exercise of the franchise of a substantial number of electors, not limited to owners of second homes but including students and others able to claim to be resident in more than one area. In 1998, the issue was considered by the Howarth Committee, but no proposal was made, apparently because it was thought to be wrong to deprive existing electors registered in two places of the opportunity to vote at both sets of local elections.<sup>60</sup> We consider this to be an issue of political policy which cannot be addressed in our law reform exercise.
- 4.77 The reform objective in relation to multiple residences is to secure clarity and consistency of decision making by registration officers. Our provisional view is that, at the minimum, legislation should lay down the principle that electors may be registered as resident in respect of a second home if they satisfy the test of residence in respect of the second home as well as the first.

**Provisional proposal 4-3: The possibility of satisfying the residence test in more than one place should be explicitly acknowledged in legislation.**

*The appropriate legal guidance as to second residence*

- 4.78 The next issue is what, if any, further guidance is necessary or appropriate in legislation. It is desirable that the law gives registration officers the requisite

<sup>59</sup> They could also vote in two simultaneous by-elections, an unlikely but possible eventuality, since in law, these are two separate elections, albeit to the same body.

<sup>60</sup> HC Deb 15 December 1999 vol 341 cc293-369  
[http://hansard.millbanksystems.com/commons/1999/dec/15/new-system-of-electoral-registration#S6CV0341P0\\_19991215\\_HOC\\_420](http://hansard.millbanksystems.com/commons/1999/dec/15/new-system-of-electoral-registration#S6CV0341P0_19991215_HOC_420) (last accessed 3 June 2014).

guidance to make consistent decisions across the UK. An obvious option is to define the circumstances in which a second home amounts to an additional residence for registration purposes. Like defining residence, however, this is extremely difficult. Some of the formulations which emerge from the cases and elsewhere remain vague, if not tautologous. A person has two residences for electoral purposes if both are substantive residences, and (in Scotland) neither is incidental to the other.<sup>61</sup> Alternatively, the two residences are “more or less equal”.<sup>62</sup> Such formulations do not help one to decide whether a second home is “substantive”, or equal to the first. We doubt that a satisfactory statutory definition is any more possible for second residences than for residence generally.

#### A LIST OF STATUTORY FACTORS?

- 4.79 If a definitive test is not practicable, the law might lay down the factors which registration officers should take into account, and provide for electors to declare their grounds for being entitled to be registered, additionally, at the second residence.

#### *Option 1: laying down the factors relevant to finding second residence:*

- 4.80 Based on the case-law the following factors seem relevant to determining whether a person is resident and entitled to be registered at a second home.

- (1) The duration of physical presence at the second home in a calendar year.
- (2) The length of time the person has spent at the second home.
- (3) The purpose of presence there – for example, relaxation and tourism, or work and study.
- (4) Links to local community and activity, whether social, political, or commercial.

- 4.81 The downside to laying down the factors in legislation may be said to be that registration officers are expressly asked to engage in more substantive judgements about the quality of persons’ connections to communities. However, this is precisely the exercise in which they must currently engage, albeit with no reference to particular factors whatsoever.

#### *Evidence of electoral connection through a second home*

- 4.82 In order to assist registration officers in making a decision, an elector applying to

<sup>61</sup> *Scott and Another v Phillips* 1974 SLT 32 at pp 33 and 34.

<sup>62</sup> Electoral Law and Administration, Fourth Report of the Home Affairs Committee (“Howarth Report”) 10 September 1998 HC 768 1997-8 App 1, para 3.26 (Home Office memorandum).

be registered in respect of a second home could indicate that fact, and be asked to complete a declaration in support of the application. That declaration would contain the following:

- (1) a declaration of intent to occupy the second home for the foreseeable future;
- (2) the typical duration of presence in the calendar year, and total length of occupation at the second home, accompanied by evidence in support;
- (3) a description of the person's connection, if any, to the local area, including past residences, local business or other interests; and
- (4) if the person is able to provide one, an attestation by a current elector in the area that they know the applicant and can attest to their being a member of the community.

4.83 The declaration should enable registration officers to come to a decision based on any guidance given by the Electoral Commission. We do not consider that items (3) and (4) should be mandatory, but provisionally consider that the information given at (1) and (2) should be required if this option is preferred.

*Option 2: No change*

4.84 The alternative is not to change the law. In this event, an applicant for registration in respect of a second home must satisfy the ordinary test for residence and will remain under the duty, which already exists, to notify the registration officer of their registration in another area. Registration officers may be required to have regard to Electoral Commission guidance as to what counts as sufficient connection for the purpose of residence at second homes. The present guidance is relatively equivocal but, after this review, it might reflect a new consensus on the relevant factors.

**Question 4-4: Should the law lay down the factors to be considered by registration officers when registering an elector at a second residence?**

**Question 4-5: Should electors applying to be registered in respect of a second home be required to make a declaration supporting their application?**

*Designation of electoral area for national elections*

4.85 At present, only the criminal law, and warnings that voting at the same election in respect of more than one area amounts to a crime, safeguard national elections from multiple voting by multiply registered voters. The national elections in question are those to the EU, UK or Scottish Parliaments, to the National Assembly for Wales and to the Northern Ireland Assembly. Similar considerations apply to national referendums.

4.86 In Great Britain, many electors registered in two places will elect to vote by post in one or both areas. If they do, they will be sent postal voting papers in respect of all elections occurring there. At combined Parliamentary and local government elections they may well receive four ballot papers, two from each area. An understandable concern is that they may vote in the Parliamentary election in

both places, whether intentionally or by inadvertence.

- 4.87 In 1998, the Howarth Committee understood these concerns and recommended that electors registered in more than one area should designate the area in which they wish to vote in national elections, provided the administrative costs were not excessive.<sup>63</sup> In the event, this proposal was not taken forward.
- 4.88 Making such a requirement effective would require co-ordination between different registration officers: an option to vote in constituency A would have to be communicated to the officer for constituency B, so that the elector could be marked as not entitled to vote in parliamentary elections there. The new electoral register that we propose as part of our provisional proposals would need to record the disenfranchisement, in the same way as for relevant EU nationals and peers.
- 4.89 We see a strong argument in principle for taking steps with a view to preventing multiple voting, and seek consultees' views on the issue.

**Question 4-6: Should electors be asked to designate, when registering at a second home, one residence as the one at which they will vote at national elections?**

SPECIAL CATEGORY ELECTORS

- 4.90 The administration of the groups of special category electors has many similarities, but they are nevertheless covered by different sets of provisions with minor differences between them. Our provisional view is that the same declaration of local connection should be used for all special category electors. Its primary tasks are to establish a notional place of residence and the basis for registering there. There is a need for periodic review, which for service electors might be, and currently is, less frequent than the standard 12 months. Overseas electors must satisfy the additional requirement of having been registered in the UK at some point in the previous 15 years, which is a franchise requirement set out in primary legislation. Apart from the requirement of a declaration of local connection, and the grounds of entitlement to be a special category elector, which we provisionally consider should be in primary legislation, we consider that the detailed regulation of special category electors should be governed by secondary legislation.
- 4.91 The registration of merchant seamen stands out from other special category electors in that they are not required to complete a declaration. This difference exists for purely historical reasons. We provisionally propose assimilating merchant seamen with other special category voters, by requiring a notional residence to be established through a declaration.

<sup>63</sup> Electoral Law and Administration, Fourth Report of the Home Affairs Committee ("Howarth Report") 10 September 1998 HC 768 1997-8, paras 1.119 to 1.121.

**Provisional proposal 4-7: Entitlement to be a special category elector should be governed by primary legislation which should require a declaration in a common form establishing a voter’s entitlement to be registered at a notional place of residence; other administrative requirements should be in secondary legislation.**

## **ELECTORAL REGISTRATION GENERALLY**

- 4.92 The law on registration has evolved significantly. The roots of the system lie in the reforms of 1832, and as a result it has historically been an exercise tied to properties and, later, households. More recently the focus has moved to the registration of individuals, starting with the introduction of individual electoral registration in Northern Ireland in 2002 and in Great Britain in 2014.

### **The modern electoral objective of registration**

- 4.93 Whatever its history, the electoral register’s task is to give practical expression to the universal adult franchise. Consequently, the modern understanding is that the objective of electoral registration is “completeness and accuracy”. Accuracy and completeness have, since 2007, been “registration objectives” in Northern Ireland.<sup>64</sup> In Great Britain, the duty to take steps to maintain the register under section 9A(1) of the 1983 Act refers to the purpose of:

Securing that, so far as is reasonably practicable, persons who are entitled to be registered in a register (and no others) are registered in it.

- 4.94 Whilst a 100% accurate register is unachievable, it is the key aspiration for electoral registration officers. At the same time, there is a need to guard against fraud.<sup>65</sup> False entries on the electoral register are also used for non-electoral frauds and deceptions, such as identity theft and credit card fraud. Apart from promoting democratic participation, the completeness and accuracy of the register has repercussions elsewhere in the electoral system, from planning for elections to allocating voters to polling stations, and even drawing electoral boundaries. The accuracy and completeness of registers is thus important for the health of the electoral system as a whole.

### **Five electoral registers in legislation**

- 4.95 The legislation on registration effectively creates five different registers. These are:

- (1) the UK Parliamentary register, which includes overseas voters;

<sup>64</sup> Representation of the People Act 1983, s 10ZB.

<sup>65</sup> *Ali v Bashir* [2013] EWHC 2572 (QB) (unreported) at paras 9, 27, 202 and 207.

- (2) the local government register;
- (3) the register of “relevant” European citizens residing in the UK;
- (4) the register of peers who live abroad; and
- (5) the Gibraltar register.<sup>66</sup>

#### EU PARLIAMENTARY ELECTIONS AND THE THREE EXTRA REGISTERS

4.96 The franchise for European Parliamentary elections is framed in a complicated way. In consequence, three of the five registers listed above exist only because of EU Parliamentary elections. The UK Parliamentary register is the register from which the majority of those entitled to vote in European Parliamentary elections are taken. Because that register excludes peers entitled to sit in the House of Lords, reference is made in regulations to the local government register in order to catch such peers resident in the UK. Since peers resident abroad are entitled to vote in European Parliamentary elections but are not on the local government registers, a distinct register is created in law to entitle them to exercise the franchise. The size of this register is, we suspect, very small.

4.97 EU citizens who are not Commonwealth or Republic of Ireland citizens are entitled to vote in European Parliamentary elections, but not in UK Parliamentary elections. While they are entitled to register to vote at local government elections, their entry in that register cannot be used for European Parliamentary elections, since these elections also require a declaration that they will vote only in the UK while their registration for European Parliamentary elections is in force.<sup>67</sup> A distinct register is thus created for these electors.

#### IN PRACTICE THE REGISTERS ARE COMBINED

4.98 A registration officer must so far as possible combine the four registers, marking the names to indicate in which elections electors are entitled to vote.<sup>68</sup> In practice, a registration officer is likely to keep registration records electronically using an “electoral management system”, software which keeps and maintains registration and absent voting records, and can produce the lists used for particular polls. In this chapter, we refer to the register in the singular, reflecting this practical reality.

<sup>66</sup> Representation of the People Act 1983, ss 1 and 2; Representation of the People Act 1985, ss 1 and 3; European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations SI 2001 No 1184, reg 5; European Parliament (Representation) Act 2003, s 14 (Act of the Gibraltar House of Assembly). The Gibraltar register was added when the franchise for European Parliamentary elections was extended to Gibraltar in 2003. It is maintained in Gibraltar.

<sup>67</sup> European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations SI 2001 No 1184, reg 6.

<sup>68</sup> Representation of the People Act 1983, s 9(5); European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations SI 2001 No 1184, reg 5(3).



## THE INFORMATION IN AND STRUCTURE OF THE REGISTER

- 4.99 The register contains electors' names, qualifying addresses and electoral numbers.<sup>69</sup> It is structured geographically. The law requires it to be framed in separate parts for each parliamentary polling district. Different letters are given to each polling district, and are used to make up electoral numbers in the relevant polling district.<sup>70</sup> Within each part, names and addresses must, so far as reasonably practicable, be arranged in street order. As we noted in chapter 3 the parliamentary polling district is the default administrative area for all elections, making the registers divisible into polling station registers.
- 4.100 Entries on the "combined" register must be marked to indicate in which elections an elector can vote, and with prescribed letters marked against an entry in the register where the elector is not one of the majority who is on both the parliamentary and local government registers.<sup>71</sup>

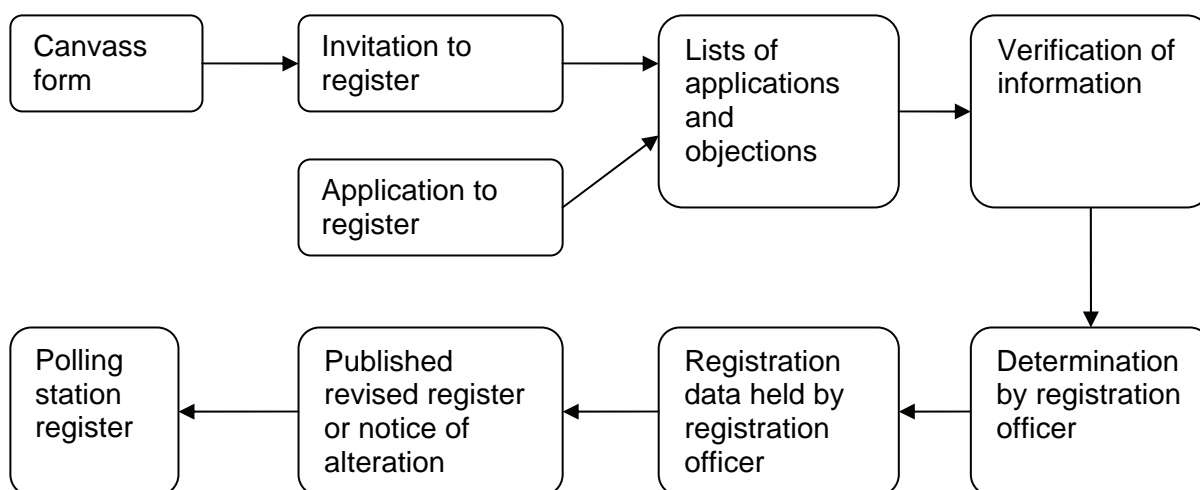
### **The organisation of electoral registration**

- 4.101 The 1983 Act lays the foundations for the management of electoral registration. Section 8 provides for electoral registration officers to be appointed by local councils. Section 9 requires these officers to maintain registers and sets out their core content. Section 9A governs what steps are involved in maintaining the register in Great Britain, while section 10 governs the same for Northern Ireland. We concentrate first on the law in Great Britain.
- 4.102 Figure A below represents diagrammatically the law's approach under the individual electoral registration system in Great Britain. It is formalistic, leading registration officers from one procedural step to the next.

<sup>69</sup> Representation of the People Act 1983, ss 9(2) to (4).

<sup>70</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 38 and 39.

<sup>71</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 42.



**Figure A: registration under individual electoral registration**

***“Maintaining” the register***

THE REGISTRATION OFFICER’S HISTORICALLY “PASSIVE” ROLE

4.103 One can characterise the historical role of registration officers as passive and reactive. In Sir John Donaldson MR’s words:

The average parliamentary constituency consists of about 90,000 voters and it would be impracticable for electoral registration officers to verify all claims to be included in electoral registers. They therefore publish electoral lists, in effect draft registers, based on information acquired from householders and others including therein the names of all those who claim to be, and prima facie are, qualified for registration. If anyone who appears from the electoral list to be himself entitled to be registered objects to the registration of any other person, he makes his objection to the electoral registration officer who inquires into the objection and determines it...<sup>72</sup>

4.104 Registration officers thus formerly relied on someone within a household to register those who lived in the property; they then entered them on the register if they seemed on the face on the canvass form to be entitled to be registered. In addition, they reacted to individual applications to be registered (under what was called “rolling registration”), or dealt with objections to registration, which we consider further below.

<sup>72</sup> *Hipperson v Electoral Registration Officer for the District of Newbury* [1985] QB 1060, at p 1068.

## THE MODERN REGISTRATION OFFICER'S DUTIES

- 4.105 Under the modern system, registration officers have a duty to encourage participation in the electoral process.<sup>73</sup> As to the register, their duty is set out in the 1983 Act and regulations made under it, and is supplemented by best practice which should be contained in guidance, or performance standards.

### *The 1983 Act duty to take all necessary steps to maintain the register*

- 4.106 Section 9A(1) of the 1983 Act lays down a duty to maintain the register and to “take all steps that are necessary for the purpose of complying” with this duty and for the purpose of ensuring completeness and accuracy.<sup>74</sup> Section 9A(2) provides that the steps include:

- (1) sending out repeat canvass forms to the same address;
- (2) making “on one or more occasions” house to house enquiries;
- (3) making contact by any other appropriate means;
- (4) lawful inspection of records; and
- (5) providing training to canvassers.

- 4.107 The law requires all necessary steps to be taken to “maintain” the registers and to promote accuracy and completeness; it then lists some of the steps that can be taken. It seems unlikely that the law requires every one of these steps to be taken in every case, and that it is a matter for the registration officer to decide which to take in a particular case. On one view, that carries a risk of inconsistent practice by registration officers, some conducting comprehensive house to house enquiries when canvassing while others will rely primarily on electors returning the canvass form by post. The Electoral Commission takes the view that door to door enquiries are necessary in relation to unresponsive canvassed households, save in exceptional circumstances (for example the safety of canvassers).

- 4.108 The contrary view is that registration officers are best placed to judge which of the above steps, or any other are necessary, taking into account local factors. Comprehensive house to house enquiries may be essential in an area with high population mobility, whereas in other areas resources may be better spent differently. However, to omit a necessary step, such as door to door enquiry, on grounds of cost would place the officer in breach of the section 9A duty. The guiding principle is accuracy and completeness, not saving cost.

<sup>73</sup> Electoral Administration Act 2006, s 69; in relation to the transition to IER a number of duties have been laid down: Electoral Registration and Administration Act 2013, sch 5 paras 4 and 8 to 15.

<sup>74</sup> Representation of the People Act 1983, ss 9 and 9A.

*Supplementary duties in relation to canvassing*

4.109 New regulations set out the role of the registration officer in conducting the canvass. Registration officers must:

- (1) send a canvass form to each residential address in the area for which they are responsible, with any residents' details of which they are already aware pre-printed on the form;<sup>75</sup> and
- (2) where they receive no reply to the canvass form, send a second and, if necessary, third canvass form to the same address. If they receive no reply to this third communication, they must make a visit to the household in question, unless they have already done so.<sup>76</sup>

*Performance standards issued by the Electoral Commission*

4.110 Performance standards apply to electoral registration officers as well as returning officers. At the time of writing, these focused on the transition to individual electoral registration. We anticipate that future performance standards, post the transition, will focus on the conduct of the canvass, and registration more generally. These may seek to promote consistency of practice, including on the use of door to door canvassing.

4.111 Under household registration, performance standard 3 sought to ensure that unresponsive canvassed properties were visited, unless registration officers were satisfied they were uninhabited. Other relevant performance standards included maintaining a property database for the registration area, the integrity of registration applications and a strategy for raising public awareness.<sup>77</sup>

THE ANNUAL CANVASS IN GREAT BRITAIN

4.112 The annual canvass used to be the basis of registration, and a completed canvass form amounted to an application to register each person named in it. Under individual electoral registration, the canvass is a mere inquiry as to who resides in the household. A returned canvass form gives the registration officer that information. Each reported resident must apply individually to register by

<sup>75</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 32ZA(4) and (5). Representation of the People (Scotland) Regulations SI 2001 No 497. We will refer to the England and Wales regulations in this chapter unless the equivalent Scotland regulation does not follow the same numbering.

<sup>76</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 32ZB(1) to (3)

<sup>77</sup> Electoral Commission, Performance standards for Electoral Registration Officers (September 2013), pp 2 to 6. Electoral Commission, Managing electoral registration in Great Britain, Guidance for Electoral Registration Officers, Part J.

returning an invitation to register form to the registration officer.<sup>78</sup>

*The canvass form*

- 4.113 A canvass form must be designed by the Electoral Commission, and regulations stipulate the contents of the form, including information on how to register online.<sup>79</sup>

*Invitations to register*

- 4.114 The registration officer must, under section 9E of the 1983 Act, invite a person to apply to register if the officer is aware of that person's name and address, the person is not registered and the officer has reason to believe they may be entitled to be registered. The Electoral Commission must design the invitation to register form, which must contain certain details, and contain information as to the circumstances when a civil penalty may be imposed for not complying with a requirement to apply to register. In practice, the invitation to register is indistinguishable from an application to register, to which we presently turn.<sup>80</sup>

APPLICATIONS TO REGISTER

- 4.115 Section 10ZC(1) of the 1983 Act requires registration officers in Great Britain to register a person ("P") if:
- (1) an application for registration is made by someone who appears to the officer to be P;
  - (2) any requirements imposed by or under the 1983 Act in relation to the application are met; and
  - (3) P appears to the officer to be entitled to be registered.
- 4.116 The registration officer must consider objections and there is a prescribed process for doing so and for determining applications, which we consider further below. The Minister has, for a period of five years from 10 June 2014, a power to give guidance about the determination of applications under section 10ZC, including the relative weight to be given to different kinds of evidence to satisfy the officer that the applicant is indeed who they are.<sup>81</sup>

<sup>78</sup> Electoral Registration and Administration Act 2013, s 1 inserting s 10ZC into the Representation of the People Act 1983.

<sup>79</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 32ZA.

<sup>80</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 32ZD.

<sup>81</sup> Electoral Registration and Administration Act 2013, s 1(3) to (5).

*Form of application to register*

4.117 An application to register must meet requirements prescribed in secondary legislation. It must be in writing, and must state the applicant's:

- (1) full name and any name used in the preceding 12 months;
- (2) address;
- (3) previous addresses, and an indication whether they were registered as an overseas voter;
- (4) an indication whether they reside at another address, including one under which they claim a continued entitlement to be registered;
- (5) date of birth, and if unable to provide one, a statement as to why and whether they are under 18 or over 70 years old;<sup>82</sup>
- (6) national insurance number, and if unable to provide one, a statement as to why;
- (7) nationality;
- (8) indication (where applicable) that they wish to be omitted ("opt out") from the edited register; and
- (9) declaration that the information provided is true.<sup>83</sup>

4.118 This information can be conveyed in one of three ways:

- (1) On a user-tested form designed by the Electoral Commission, subject to approval by the Lord President of the Council, which may be delivered or posted to the registration officer. There is no requirement for electors to use this form; it appears that the policy was merely to require that the form be sent to electors, so that the vast majority of hard copy applications would be made using it.<sup>84</sup>
- (2) A person may apply by telephone or in person to the registration officer, if authorised by the officer to do so. If this option is chosen, the registration officer is required to read to the applicant certain information which would otherwise be contained on the registration form. The information provided by the applicant must be transferred into an application in writing, suggesting this may be a way of dealing with electors unable to write or

<sup>82</sup> Registered electors aged 70 or over are exempt from jury service.

<sup>83</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 26.

<sup>84</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 26.

otherwise suffering from a disability preventing them from applying in writing. Those applying under pressure of time may also be authorised to apply in this way.<sup>85</sup>

- (3) Thirdly, applications may be made online through the Individual Electoral Registration Digital Service, accessible through a Government-hosted website. In that case, an email address and telephone number(s) will be required from applicants.<sup>86</sup>

#### DETERMINING APPLICATIONS TO REGISTER

- 4.119 Once a registration officer has received an application, the officer must determine whether it satisfies the requirements for entry onto the register. We noted above that, historically, this was a passive process, in which the registration officer generally only investigated the merits of an application if it was objected to. The registration officer has a more active role under individual electoral registration.

##### *Checking databases*

- 4.120 In particular, there is a duty in effect to check applications against government databases. On receipt of an application to register, the registration officer must disclose the name, date of birth and national insurance number to the Lord President of the Council “in such a format and through such a conduit system” as the latter notifies in writing. In practice this is a software system. What is envisaged is that central government compares these details against data kept by the Department for Work and Pensions and Her Majesty’s Revenue and Customs. The result may be disclosed to the registration officer and, if so, the registration officer must take it into account in determining the application.<sup>87</sup>

##### *Power to access and share information*

- 4.121 The pro-active transitioning of electors formerly registered under the household return system to the new individual electoral registration system is being aided by powers to use and share information held by government, central or local, given by schedule 2 to the Electoral Registration and Administration Act 2013. These powers will remain after the transition.

##### *Requesting additional evidence*

- 4.122 The registration officer may require additional evidence if he considers it necessary. An applicant who is unable to provide any or sufficient documentation

<sup>85</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 26(8).

<sup>86</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 3 and 26(9).

<sup>87</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 29ZA.

may be required to produce a signed attestation, by a person affirming the applicant's identity in full knowledge of the penalty for providing false information, to a registration officer. No one may attest more than two applicants at each canvass.<sup>88</sup>

#### DETERMINING APPLICATIONS AND THE OBJECTIONS PROCEDURE

- 4.123 The registration officer must determine applications in accordance with a prescribed procedure allowing registered electors to inspect and object to applications to register as well as existing entries on the register. The restriction to registered electors probably harks back to an age when property qualifications were required in order to be registered; local party representatives would "attend to the register". Even in the modern context, scrutiny of the register is most likely to be undertaken by members of local party associations out of political interest.<sup>89</sup>
- 4.124 Section 10A(3) of the 1983 Act requires the registration officer to determine any objection to a person's registration made in accordance with prescribed requirements by another whose name appears in the register in question. Regulations require objections to be in writing and to identify the application objected to (by naming the applicant, providing their address and electoral number if the objection postdates registration) and to provide equivalent information about the objector.<sup>90</sup>
- 4.125 Registration officers must enter applications and objections into one of three lists, which must be made available for inspection:
- (1) a list of applications;
  - (2) a list of objections relating to applications for registration; and
  - (3) a list of objections relating to entries in the register.<sup>91</sup>
- 4.126 In Scotland, England and Wales, there is a detailed procedure for determining objections. If no objection is made within a five day period, a registration officer may allow the application<sup>92</sup> and, while not under any obligation to do so, is likely to make that determination swiftly if an election is in prospect. The officer may ask for further information, refuse the application or proceed to a decision at a

<sup>88</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 26B.

<sup>89</sup> H Rawlings, *Law and the Electoral Process* (1988) pp 91 and 92.

<sup>90</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 27.

<sup>91</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 28 and 29(2BA) to (2BE); Representation of the People (Scotland) Regulations SI 2001 No 497, regs 28 and 29(2).

<sup>92</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 29(4).



hearing.<sup>93</sup>

#### *Hearings and appeals*

- 4.127 A registration officer who is minded to disallow an application or objection must give reasons, and the applicant or objector may request a hearing within three days from the date of the officer's notice. The registration officer determines the application in a quasi-judicial capacity and there is a right of appeal – in England and Wales to the county court and onwards on a point of law to the Court of Appeal, and in Scotland to the sheriff, and onwards on a point of law to a registration appeal court made up of three judges of the Court of Session. Similar provisions allow the officer, subject to the right to a hearing and a right of appeal, to review register entries.<sup>94</sup>

#### ALTERATIONS AND REMOVAL OF ENTRIES FROM REGISTER

- 4.128 Inaccurate entries must be altered and obsolete or unjustified ones deleted. These processes are governed by sections 10ZD and 10ZE of the 1983 Act.

#### *Applications for alteration of existing entries*

- 4.129 Section 10ZD mirrors section 10ZC, stating that the name or address in respect of an entry in the register must be altered if a person applies for an alteration in conformity with legal requirements for the application, and the applicant appears to the registration officer to be the person the entry in the register refers to. Regulations only prescribe the content of the application to alter an entry in the register in respect of the name; these require the Electoral Commission to design a form for applications for alteration in a similar manner to applications to register. The provisions on verification and requesting additional information apply to applications for alteration just as they do to new applications.

#### *Removal of entries*

- 4.130 Section 10ZE provides that a registered elector is entitled to remain so until the registration officer determines that:
- (1) they were not entitled to be registered;
  - (2) they ceased to be resident at the address or otherwise satisfy the conditions for registration under section 4 of the 1983 Act; or

<sup>93</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 29(5A) to (5D) and 31A.

<sup>94</sup> Representation of the People Act 1983, ss 56 and 57; Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 29(6) and (7), 30, 31, 31B, 31C, 31D, 31F, 31E and 32; Representation of the People (Scotland) Regulations SI 2001 No 497, regs 29(6) and (7), 30, 31, 31A, 31B, 31C, 31D, 31F, 31E and 32.

- (3) they were registered, or their entry was altered, by another person.
- 4.131 Such a determination must result in the person's entry being removed. A registration officer is empowered to make house to house inquiries for the purpose of deciding whether or not to make the determination. A registration officer must consider making such a determination if an objection is made to the entry or they otherwise become aware of information indicating that one of the conditions for removal of the entry is satisfied. Regulations provide a procedure for determining that a person has ceased to satisfy the conditions for registration.

***The register as a physical document***

- 4.132 The law plainly envisages the register of electors as a physical document. Section 13 of the 1983 Act requires registration officers to publish, each year, a "revised version" of their registers. That revised register is then amended each month by notice of alteration published by the registration officer. When an election is imminent, a special notice of alteration is published on what is called the "final publication date". Recent amendments mean that this is preceded by two "interim" publication dates.
- 4.133 Eligibility to vote at any election depends on being entered in the published register or in a notice of alteration. A registration officer's determination that an elector is entitled to be registered has no effect for the purpose of any election unless and until the elector is entered on the annually revised register or included in a notice of alteration.

THE ANNUALLY REVISED REGISTER

- 4.134 The revised register must be published between the end of the canvass period and 1 December that year. If an election is due to occur during the canvass, that date is pushed back to 1 February the following year.

MONTHLY NOTICES OF ALTERATION

- 4.135 Section 13A of the 1983 Act governs alterations to the revised register. Notices of alteration are monthly amendments to the register made by way of a notice issued in the prescribed manner specifying the alteration. If an alteration is required to be made, it must appear in a notice published on the first day of the following month, provided at least 14 days have elapsed. Otherwise, the alterations will be published in a notice on the first day the next following month.<sup>95</sup> No notice of alteration is required during the canvass period: alterations will be

<sup>95</sup> What this means is, determinations to accept individual applications to be entered on the register will be given effect in a notice of alteration on the first day of the month falling within the period of 14 to 45 days from the date of determination. A determination made on 2 January leads to publication on the first working day in February. A successful application made on 17 January leads to publication on the first working day in March.

shown in the revised register.<sup>96</sup>

### **Pending elections and the deadline for registration**

- 4.136 Special provision is made to give effect to applications close to a forthcoming election by providing a publication date for a notice of alteration ahead of the poll. The rules on registering late applicants are so convoluted that for many years the Electoral Commission, administrators, and participants all advised electors that the deadline was 11 days before a poll. It was only in 2013 that it was discovered that the deadline is in fact 12 days before.<sup>97</sup>
- 4.137 Section 13B of the 1983 Act provides that if, by normal application of the rules on alteration of the register, an alteration in a published version of the register is to take effect after the fifth day before a poll, the alteration does not have effect for the purposes of the election. Given this cut off period, the registration officer must publish a notice of alteration by that date in order to provide an up to date register effective at the election. (The final publication date for that notice can be the sixth day before polling day, at the registration officer's discretion, with the consequence that the deadline for registration would be 13 days before the poll. The assumption in the electoral community is that no registration officer will exercise the discretion to fix the publication date as the sixth day before the election. We refer to the fifth day before the election as the "final publication date").
- 4.138 If, at any time before the final publication date, the registration officer is required to amend the register (to add, alter or remove an entry under section 13A mentioned above), and the ordinary timescale for publishing a notice of alteration would mean the amendment would not take effect at the election, the officer must issue a notice of alteration, in the prescribed manner, on the final publication date, with the alterations taking effect as from the beginning of the day.<sup>98</sup>
- 4.139 Section 13B makes provision for an alteration to be effective after the fifth day before the poll, but only in the event of an appeal from a determination of the registration officer, or in the case of an alteration to correct a clerical error.<sup>99</sup>
- 4.140 The Electoral Registration and Administration Act 2013 amends the 1983 Act to add two "interim" publication dates before the final one, to enable a more staggered introduction of newly registered electors in notices of alteration in the run up to the election. The first interim publication date is the day on which nominations close for the election. The second interim publication date is a date after the close of nominations and before the final publication date, fixed by the

<sup>96</sup> Representation of the People Act 1983, s 13A(3).

<sup>97</sup> See para 4.145.

<sup>98</sup> Representation of the People Act 1983, ss 13B(1) to (3).

<sup>99</sup> Representation of the People Act 1983, ss 13B(3A) to (3D).

registration officer.<sup>100</sup>

***The deadline for electoral registration***

- 4.141 A complicated exercise must be undertaken to derive the deadline for applying for registration effective for a particular election. It involves piecing together the provisions in the 1983 Act referred to above and the registration regulations.
- 4.142 In order to publish a notice of alteration five days before the poll, the registration officer must have granted an application for registration “at any time *before*” the final publication date. The Act thus requires a determination to have been made at the latest on the day before publication of the notice of alteration.<sup>101</sup>
- 4.143 Determination of applications to be registered is governed by the Representation of the People Regulations 2001. Regulation 29 requires applications to be entered on a list of applications to register. Regulation 29(4) states that the registration officer may allow an application without a hearing provided that no objection is made within the period of five days beginning with the day *following* the entry of the application in the list of applications.
- 4.144 The deadline for applying to register in time for an imminent election is thus derived by adding together:
- (1) the day the application is made;
  - (2) the minimum period of five days for objections;
  - (3) one further day, on which the application is determined, which must be before the “final publication date”; and
  - (4) a further five days beginning with the date of publication of the notice of alteration.
- 4.145 Until recently, the understanding was this amounted to 11 days, but that was

<sup>100</sup> Representation of the People Act 1983, ss 13AB(5) and (6).

<sup>101</sup> That this is the right interpretation of the statute is strengthened by the words of section 13B(3C), concerning the deadline for notices of alteration to correct a clerical error (9pm on the day of the poll). The condition for making a notice is that “at any time *on or after* the [final] publication date” the registration officer determines that a clerical error has been made. The statute thus provides a complete scheme for late alterations to the register – one applying to all “determinations”, provided they are made before the final publication date, and another applying only to clerical errors and notifications of appeal decisions from determinations, which can be made on or after that date.

shown to be wrong, and the deadline is now understood to be 12 days.<sup>102</sup> Strictly speaking, that deadline assumes no registration officer will fix the “final publication date” for the notice of alteration as the sixth day before the election. If any did so, the deadline would be 13 days, which would be perverse since nowadays national advertising by the Electoral Commission publicises a specific day as the last day to register, based on the 12 day deadline. In our discussions with electoral stakeholders, we have not heard of any registration officer using the discretion in that way.

### **Anonymous registration**

- 4.146 An anonymous elector is one whose entry on the full register contains only their electoral number, not their name or address. We understand that the number of anonymous electors in England and Wales is about 1,800.
- 4.147 Anonymous registration is available for electors who have requested that their name and address do not appear in the full register for safety reasons.<sup>103</sup> Their names and addresses are entered in registration records – in practice software generically known as the “electoral management system” – allowing them to appear in the section of the register for the polling district appropriate to their address. In the published register which is available to candidates and the public, their name and address are omitted.
- 4.148 An application for an anonymous entry must be completed in addition to an ordinary registration application. It must include evidence justifying the request for anonymity, either in the form of a specified court order or injunction<sup>104</sup> granted to the applicant, or an attestation made by one of a listed group of persons, such as a police superintendent or higher officer, or a director of children’s services in England and Wales, or chief social work officer in Scotland.<sup>105</sup>
- 4.149 A registration officer must decide that a “safety test” is satisfied. This requires that the safety of the applicant or that of any other person of the same household would be at risk if the register contained the name or address of the applicant. If the safety test is not satisfied then no entry at all is made on the register in pursuance of the application to register. Once a registration officer has determined that the safety test is satisfied they may allow the application:

<sup>102</sup> Electoral Commission bulletin 64, January 2014.  
[http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0003/164676/Electoral-Administration-Bulletin-64.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0003/164676/Electoral-Administration-Bulletin-64.pdf); see also  
[http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0004/164677/Deadline-for-registration-ahead-of-an-election-detailed-note-January-2014.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/164677/Deadline-for-registration-ahead-of-an-election-detailed-note-January-2014.pdf) (last accessed May 2014).

<sup>103</sup> Representation of the People Act 1983, s 9B.

<sup>104</sup> Or, in Scotland, an interdict.

<sup>105</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 31G to 31J.

anonymous applications cannot be objected to, and can be determined at any time.<sup>106</sup> Anonymous registration lasts for one year at a time.<sup>107</sup>

- 4.150 Anonymous registration has recently been extended to Northern Ireland. The scheme is similar to that in Great Britain, save that status as an anonymous voter lasts for five years, there is a power to review a voter's entitlement to an anonymous entry in the register, applications may be made on the basis of court orders and injunctions issued in the Republic of Ireland or any other EU member state as well as in the UK courts, and all anonymously registered voters vote by post.<sup>108</sup>

### **Resident EU citizens and EU Parliamentary elections**

- 4.151 The registration of EU citizens (not being British or Irish citizens) residing in the UK necessitates special administrative steps. The basic position is that an EU citizen will vote in EU parliamentary elections in their home member state. In order to vote in their member state of residence instead, they must have "expressed a wish to do so".<sup>109</sup> That is done through a declaration stating:

- (1) their nationality and their address in the electoral territory of the member state of residence;
- (2) if possible, the locality or constituency in their home member state where they were last registered; and
- (3) that they will exercise their right to vote in the member state of residence only.<sup>110</sup>

- 4.152 The declaration remains in force until an elector is removed from the register.<sup>111</sup> EU legislation also requires member states to take the necessary measures to enable those who have wished to vote in their place of residence to be entered on the electoral roll in advance of polling day, and that the member state of residence informs an applicant of the action taken on their application for registration.<sup>112</sup>

- 4.153 Member states who receive such declarations must notify the home member

<sup>106</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 29(4A).

<sup>107</sup> Representation of the People Act 1983, ss 9B and 9C.

<sup>108</sup> Anonymous Registration (Northern Ireland) Order SI 2014 No 1116.

<sup>109</sup> Article 22(2) of the Treaty on the Functioning of the European Union; Directive 93/109/EC, art 8.

<sup>110</sup> Directive 93/109/EC, art 9(2).

<sup>111</sup> Directive 93/109/EC, art 9(4).

<sup>112</sup> Directive 93/109/EC, arts 9(1) and 11(1).

state of the declarant, so that they can be taken off the electoral register for European Parliamentary elections in that state.

### ***The declaration under law in the UK***

- 4.154 The European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations 2001 transpose the obligations in Directive 93/109/EC.<sup>113</sup> Regulation 6 replicates the requirements of Directive 93/109/EC. Regulation 4 specifies that a declaration must be sent to the registration officer along with an application for registration. Regulation 10 specifies that a declaration remains in force for 12 months, at which point the relevant citizen must make a further declaration in order to remain registered in the UK. This is not required by the Directive.
- 4.155 This requirement reportedly caused problems at the recent European Parliamentary elections on 22 May 2014, as many non-national EU citizens were unable to vote, having failed to return a declaration or having done so incorrectly.

### **PRACTICE**

- 4.156 The Electoral Commission guidance to registration officers, issued in relation to the previous system of household registration, explains that the annual canvass forms and rolling registration forms can only be used to register relevant EU citizens for local elections. To be registered to vote in European Parliamentary elections, they must complete a separate application form and the declaration outlined above.
- 4.157 The guidance further states that where a local government elector has indicated on the annual canvass form or in their registration application that they are a citizen of an EU member state, an electoral registration officer should send them the special application and declaration forms.<sup>114</sup>
- 4.158 Our current view is that the limitation of declarations to one year is not sensible, particularly where no European Parliamentary election is due until after that period. We provisionally consider that the declaration should remain in force for so long as the Union citizen remains registered.

### **Civil sanctions**

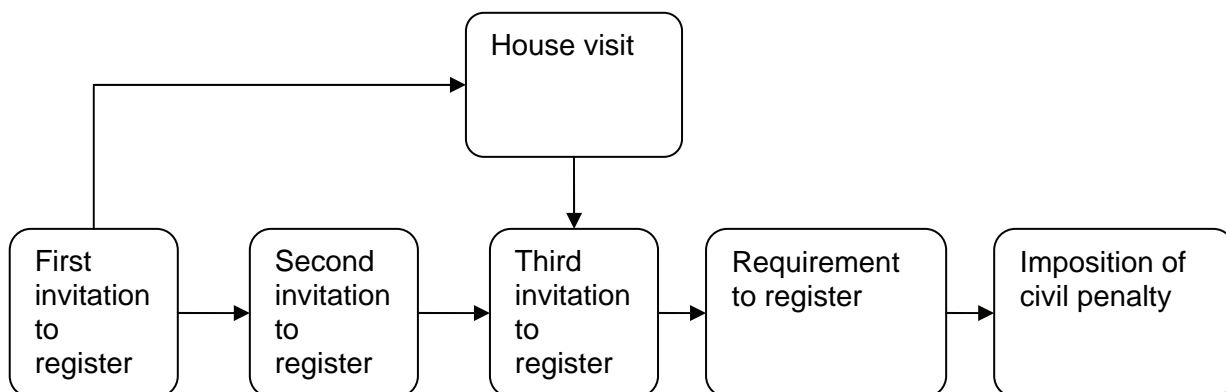
- 4.159 In the UK, registration as an elector is not optional. The registration officer can impose a civil penalty on persons who are entitled to register but fail to do so. However, this is viewed in practice only as a last resort once a number of other steps have failed to yield a response from a person; it is furthermore always the

<sup>113</sup> SI 2001 No 1184.

<sup>114</sup> Electoral Commission, *Guidance for Electoral Registration Officers: Part B – Entitlement to register* (July 2013), paras 6.32 to 6.37.

registration officer's choice whether to impose the penalty.<sup>115</sup>

4.160 Figure B below sets out the various steps a returning officer must carry out in Great Britain before being entitled to impose a civil penalty. Regulations make detailed provision concerning information to voters and triggering the civil sanctions regime.<sup>116</sup>



**Figure B: steps a returning officer must carry out before imposing a civil penalty**

#### **Registration in Northern Ireland**

4.161 Individual registration has been in place in Northern Ireland since 2002. However, the system remains notably different from the scheme eventually adopted in Great Britain.

#### ***The canvass in northern Ireland***

4.162 Section 10 of the 1983 Act, which governed the canvass throughout the UK, now applies to Northern Ireland only. Read with section 10ZA of the same Act, this obliges the Chief Electoral Officer to conduct a canvass every ten years, commencing in 2010. An extraordinary canvass may also be held in any other year if the Chief Electoral Officer recommends that one is required to meet the registration objectives of completeness and accuracy and the Secretary of State agrees that it would be in the public interest.<sup>117</sup> This power was exercised from August to September 2013, after an Electoral Commission study of the registers in Northern Ireland. Canvassing was conducted by electoral office staff hand-

<sup>115</sup> Representation of the People Act 1983, s 9E(7).

<sup>116</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 32ZD, 32ZE, 32ZF and 32ZH.

<sup>117</sup> Representation of the People Act 1983, s 10ZA.



delivering registration forms to every household in Northern Ireland.<sup>118</sup>

- 4.163 One of the effects of section 10 continuing to apply in Northern Ireland is that it remains the case that returning the canvass form constitutes an application to vote, so long as the requisite identifiers are provided.<sup>119</sup> The contents of the canvass form must be prescribed by the Secretary of State after consultation with the Electoral Commission.<sup>120</sup>

#### UNRESPONSIVE CANVASSED ELECTORS

- 4.164 Section 10A(5)(a)(i) of the 1983 Act provides that where a registration officer is not satisfied as to an elector's residence on 15 October of a canvass year because they have not returned a canvass form, they should be removed from the register.<sup>121</sup> Unlike the system previously applicable in Great Britain, there is no power allowing the Chief Electoral Officer to "carry over" entries into the next version of the revised register, where there is no evidence to suggest that an unresponsive elector is no longer resident.<sup>122</sup> With annual canvassing, "canvass fatigue" might explain the lack of response; with canvassing at ten year intervals it may be sensible always to conclude that unresponsive electors are no longer resident and should be deleted from the register. However, we have seen that extraordinary canvassing can occur; if it occurs frequently, the case for an equivalent power to "carry over" unresponsive household entries onto the new register may increase.

#### ***Applications to register***

- 4.165 Maintaining the register is governed generally in Northern Ireland by section 10A of the 1983 Act. The Chief Electoral Officer must determine applications for, and objections to, a person's registration in accordance with requirements prescribed in the 2008 Regulations.
- 4.166 The requirements for an application to vote that are set out in the 1983 Act and 2008 Regulations are similar to those which applied in Great Britain prior to

<sup>118</sup> The Northern Ireland Canvass 2013 – About my vote, produced by the Electoral Commission [http://www.aboutmyvote.co.uk/northern\\_ireland\\_canvass.aspx](http://www.aboutmyvote.co.uk/northern_ireland_canvass.aspx) (last accessed 1 April 2014).

<sup>119</sup> The canvass form used in Northern Ireland in 2013 did not seek information on which persons are residing at a property, and looked more like the form for an application to register. A separate canvass form would have had to be completed in respect of each person living at a particular address.

<sup>120</sup> Representation of the People Act 1983, s 10(4) (as amended by Northern Ireland (Miscellaneous Provisions) Act 2014, s 13).

<sup>121</sup> Representation of the People Act 1983, s 10A(2), (5) and (6).

<sup>122</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 34. This provision is technically still in force, although the reference to section 10A, which applies only in Northern Ireland, now renders it ineffective.

individual electoral registration. Personal identifiers must include a signature as well as a date of birth and national insurance number and there is a similar power to dispense with the national insurance number and the need to sign the application. There is much less detailed guidance as to the kind of evidence which is required to satisfy the registration officer as to the applicant's identity.<sup>123</sup>

- 4.167 The application must include details such as name and address, previous addresses, whether the elector wishes to opt out of the edited register and a declaration of truth. As with the old system of household registration in Great Britain, an application does not need to be made on a prescribed, user-tested form provided by the registration officer. Furthermore, there is no provision for the application to be made online. The fact that a signature is required as a personal identifier, and is relevant for postal voting applications, means that online registration is unlikely to be possible in Northern Ireland in the near future.<sup>124</sup>
- 4.168 Despite the fact that Northern Ireland has a system of individual electoral registration, the legislation still envisages that an application may be made in respect of multiple persons.<sup>125</sup> This seems to be a relic of household registration, and the fact that a canvass form returned in Northern Ireland is still considered an application to register. However, the canvass form used in 2013 could only be completed in respect of a single applicant.

#### ***Inspection and objections***

- 4.169 Substantively similar rules on inspection of registration applications and objections to applications to register apply in Northern Ireland as in Great Britain, although section 10A contains more detailed prescription concerning objections than the Great Britain primary legislation does.<sup>126</sup> There may be an issue with making registration applications publicly available for inspection in Northern Ireland, since they contain sensitive personal identifiers such as the date of birth, signature and National Insurance number of an applicant.
- 4.170 Broadly the same provisions on access to the register apply in Northern Ireland as in Great Britain.<sup>127</sup>

<sup>123</sup> Representation of the People Act 1983, ss 10A(1A) and (1B); Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 27.

<sup>124</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 27.

<sup>125</sup> Representation of the People Act 1983, s 10A(1A), inserted by the Electoral Fraud (Northern Ireland) Act 2002.

<sup>126</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, regs 28 to 30.

<sup>127</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, pt 6.

### ***Failure to respond to a canvass form***

- 4.171 In Northern Ireland, the rules on failure to respond to a request for information from the registration officer, which previously applied to household registration, are still in force. Thus a failure to respond to the canvass form is a criminal offence leading to a fine not exceeding level 3 on the standard scale.<sup>128</sup>

### **ACCESS TO THE REGISTER**

- 4.172 As a comprehensive record of names and addresses of adults living in an area, the register is both a sensitive document and one of extreme value to public and private bodies. It is not surprising therefore that strict rules apply to the communication of the register outside the small circle of registration officers and their staff. The legislation requires the registration officer to publish two versions of the register:

- (1) the full register, which is a comprehensive record of all persons registered to vote in the area that the registration officer is responsible for;<sup>129</sup> and
- (2) the edited register, which does not contain entries relating to persons who have opted out of inclusion in it, or anonymous voters.<sup>130</sup>

### **Access to the full register**

- 4.173 By way of exception to the general prohibition on supply or disclosure of the full register, a number of provisions of the 2001 Regulations apply to specific situations in which the register must be supplied or can be accessed. The regulations define the categories of people who are entitled to request a copy of the register. These persons are only permitted to use the registration data for particular purposes (referred to as “permitted purposes”). These include disclosure for certain legal purposes, such as selecting persons to serve on juries, and disclosure to parties and candidates to assist them in the electoral process. Information contained in the register is protected by data protection law, with which the registration regulations must comply.<sup>131</sup>
- 4.174 Free copies of the register are sent to some institutions, such as national or public libraries, where they can be inspected by members of the public under supervision. In some circumstances, the full register can be obtained for a fee by

<sup>128</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 24: level 3 corresponds to a fine of £1,000.

<sup>129</sup> Other than the small number of anonymously registered electors.

<sup>130</sup> Representation of the People Act 1983, s 13; Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 93.

<sup>131</sup> Data Protection Act 1998; *R (on the application of Robertson) v City Of Wakefield Metropolitan Council* [2001] EWHC Admin 915.

certain specified bodies, such as Government departments and certain other public bodies. Credit reference agencies are the only example of a body in the private commercial sector that is entitled to obtain a copy of the full register, which they use for the purpose of making assessments of creditworthiness. Recipients of the full register cannot use or further supply information in the register, other than information that is also in the edited register, except in connection with the specific purpose for which the register was provided to them.

#### ***Supply for “electoral purposes”***

- 4.175 One of the permitted purposes which applies to those involved in the electoral process – administrators, candidates, elected representatives, registered parties and third parties – is the use of registration data for “electoral purposes”. Although this term is used frequently in the provisions on access to the register in the 2001 Regulations, it is not defined.<sup>132</sup>
- 4.176 We do not propose a detailed definition of electoral purposes. However, it is our provisional view that the term should not require a connection between the use of data and a specific election. It should be understood in a looser sense as any purpose relating to an election; in contradistinction to the use of personal data contained in the register for marketing or other commercial purposes. Furthermore, there should be no distinction between “electoral” and “referendum” purposes. “Electoral purposes” ought to be understood as including purposes relating to a referendum.

#### **Access to the edited register**

- 4.177 There is no general prohibition on onward supply or disclosure of information in the edited register. Usage of the edited register does not need to relate to any particular purpose. The register is edited so as to exclude anonymously registered voters and others who have opted out of inclusion in that register. The Electoral Commission has introduced the term “open register” to make it clearer that this register is freely available. Although the legislation still refers to the edited register, voter-facing documents such as the household enquiry forms and invitations to register now use the term “open register” instead.

#### ***Opting out of the edited register***

- 4.178 An elector can notify the electoral registration officer that they wish to be removed from, or added to, the edited register at any time, or this can be indicated on an application to register. It is not now possible for this notification to be made on a

<sup>132</sup> For example, Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 98(7), 101(3), 105(3), 106(4) and 108(5); Representation of the People (Scotland) Regulations SI 2001 No 497, regs 97(7), 97A(3), 102(3), 104(4), 105(4) and 107(5).

household enquiry form.<sup>133</sup> Once a person has indicated that they wish to be excluded from the edited register, they will remain excluded until they submit a new application to register or notify the registration officer.

***Supply of the edited register by persons other than the registration officer***

- 4.179 Once a copy of the edited register has been purchased, information in it can be re-sold by the purchaser to other organisations. Furthermore, at present, anyone with access to the full register, such as a credit reference agency, may supply information in it to other organisations, so long as the information does not relate to people who have opted out of inclusion in the edited register.<sup>134</sup> We understand that various organisations process information taken from the full or the edited register – for example, amalgamating data taken from more than one local register and removing data not found in the edited register – so as to produce their own sets of edited register data for onward commercial supply.

**REFORMING ELECTORAL REGISTRATION**

**The legislative framework of registration**

- 4.180 The principal aim of law reform in the registration context is to take stock of the current position and to articulate it within a simpler, more modern legislative framework. The current law is extremely complex, particularly the relevant provisions of the 1983 Act which have, through repeated amendment, grown structurally and textually cumbersome. This is because of patchy implementation of policy developments, from supplementing the hitherto passive role of registration officers to introducing rolling, then individual, registration. These policies have been implemented by bolting on new provisions to the 1983 Act. Some formerly UK-wide provisions now apply only to Northern Ireland, which affects the clarity of presentation of the Act's provisions for registration officers in Great Britain or Northern Ireland.
- 4.181 In relation to Northern Ireland, there is an additional problem of mismatch of the legislation to modern practice, which is exemplified by the law's continuing conception of the canvass as a way of applying to register rather than of obtaining information about who resides at certain properties. This has led to the result that, in practice, the prescribed "canvass form" is not an enquiry about households but an individual invitation to register.

***Scaling back legal formalism in primary legislation***

- 4.182 Part of the reason for the complexity is the law's formalistic conception of the

<sup>133</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 93(2) and 93A.

<sup>134</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 92(10), 99(3)(b) and 112(4)(b); Representation of the People (Scotland) Regulations SI 2001 No 497, regs 98(3)(b) and 111(4)(b).

register. Underlying this is an antiquated conception of the register as a physical document which is compiled after the canvass, published as the revised register and then supplemented by notices of alteration at monthly intervals.

- 4.183 What worked in a different technological age, when registration was a yearly snapshot of canvassed electors, is less suited to the continuous, year-round activity of registering individual applicants, with the content of registers constantly changing, as well as there being many different elections with different franchises.
- 4.184 The reality is that information supplied by voters to registration officers is recorded electronically within their electoral management systems. The published “revised” register and notices of alteration are derived from the underlying registration data. Once a registration officer has determined an application to register and entered the elector on the registration system, that elector is effectively registered, although not entitled to vote until a certain period has passed – the time left until the next monthly notice of alteration is due, or five clear days if there is an imminent election.
- 4.185 A similar manifestation of the law’s formalism is the notion of five distinct yet combined registers. In reality these “legal” registers are combined into one set of data showing at which elections any elector can vote and capable of producing separate lists of voters for different types of election. When published, the combined register does the same by putting letters next to electors’ entries, which signify that they can vote at certain elections only.

***An electoral registration apparatus for all elections***

- 4.186 We provisionally propose to restructure the way that electoral registration is presented in legislation. Primary legislation should continue to govern the arrangements for registering electors all year around, including requiring local authorities to appoint registration officers.
- 4.187 Our provisional proposal is that the law should conceive of a single register containing records which include which elections the entry entitles an elector to vote at. We would thus do away with the legal notion that there are five distinct registers. This is already the practice and reality, given the duty to combine registers and the use of electoral management systems.
- 4.188 We currently consider that the provisions governing the electoral register should be drafted so as to apply to any election or referendum. This would allow any future type of election or referendum, once created, automatically to be run on the basis of the pre-existing electoral registration system.

***Core registration principles to be covered in primary legislation***

- 4.189 As well as restating the franchises and setting out the apparatus of electoral registration, primary legislation should lay down the core principles governing registration, leaving detailed procedure to secondary legislation and organisational or planning matters to registration officers who may be assisted by Electoral Commission guidance or performance standards.
- 4.190 The core electoral registration principles seem to us to include the following:

- (1) The register should be complete and accurate, and the registration officer should have the duties and powers appropriate to achieving this. These are presently the duty to canvass, powers to enquire as to applicants and existing electors, and to request additional evidence.
- (2) The register authoritatively determines, in advance of polls, entitlements to vote at any particular elections, and must be capable of being broken down geographically.<sup>135</sup> At present the requirement is to organise the register into the default “administrative area” for polling, the parliamentary polling district.
- (3) Registration must be transparent and subject to local scrutiny; applications to register and objections to them must be publicised, as must, periodically, the registration data themselves. At present this is done by publicising applications and the register.
- (4) In order to promote principles (2) and (3) above, the registration process must allow some time before someone’s entry in the register can take effect at a particular election. A minimum period of time must pass before an application to register can result in an entry effective to vote at an election. [At present the deadline is 12 days, though this is an unintended effect of complexity of the legislation.]

4.191 As to how the register should be conceived in primary legislation, our provisional views are as follows:

- (1) There should be a single electoral register maintained by each registration officer. A person would be entitled to vote at a particular election if they appeared to be so entitled from the electoral register.
- (2) Those on the electoral register should be those whom the registration officer has determined should be entered in the register, and those previously entered on the register whom he has not determined should be removed.
- (3) There should be a duty to take steps to ensure that electronic data are adequately and securely backed up so as to ensure they are not lost.<sup>136</sup>
- (4) The register must be maintained in such a way that it can:
  - (a) specify for which elections an elector enjoys the franchise;
  - (b) enable electors to be assigned to a geographical electoral area

<sup>135</sup> Subject to the jurisdiction of the electoral court to intervene after the event.

<sup>136</sup> Setting out this duty should not distract from the fact that registration data are, currently, held electronically, and no problems have been reported.

prescribed in regulations; and

- (c) specify from what date an elector is entitled to vote, so as to cater for both:
  - (i) “attainers” (electors entered on the register before they reach voting age); and
  - (ii) the operation of the deadline for effective entry in the register in order to vote – for pending elections this is currently five (or at registration officers’ discretion six) days before the poll.

4.192 We provisionally consider that the register should continue to be published annually, and amendments to it published monthly and also five days before a forthcoming election.

### ***Maintaining the register***

4.193 The principal duty of registration officers – to maintain the register so that it is complete and accurate – must be accompanied by supporting duties and the powers which registration officers need in order to perform the duty.

### THE CANVASS

4.194 In addition to the duty to encourage electoral participation generally, there is a specific duty to canvass electors annually by sending out forms and making house to house enquiries. Secondary legislation should define the quality of the obligation to conduct a house to house canvass, for example by requiring every unresponsive household to be visited, as it currently does.

4.195 We presently consider that this should continue to be in secondary legislation. The canvass is merely a way of gathering information resulting in individual applications to register. There may be a time in the future when other ways of obtaining this information come to be preferred. We would retain the current power in primary legislation to review and abolish the canvass, subject to a process involving the Electoral Commission. Placing detailed requirements as to canvassing in secondary legislation enables future governments to consider, in the longer term, the best way to reach out to unregistered eligible voters.

### THE APPLICATIONS AND OBJECTIONS PROCESS

4.196 Registration officers should have a duty to determine applications, satisfying themselves that the application meets the requirements to be registered. The detailed process should be located in secondary legislation, which can continue to prescribe when and how registration officers may request additional evidence or dispense with certain personal verifiers. Similarly, the duty to publicise applications to register, and to consider objections should be in primary legislation, while the detailed procedure is set out in secondary legislation much as is the case in the present law. The right of appeal from a decision of the registration officer in the context of determining an application or objection or reviewing an entry in the register should continue to be enshrined in primary legislation.



## REGISTRATION SYSTEMS COMPATIBLE ACROSS REGISTRATION AREAS

- 4.197 The law on polling assigns electors to particular polling stations rather than allowing them to choose which one suits them best. Allowing electors to choose their polling station without opening the door to multiple voting would require a digital polling station register updatable in real time. Many elections will require registration data from different registration officers, whose electoral management systems may not be compatible with one another. The law might specify that the software used by registration officers should be such that the data within it is capable of being exported to and interacting with other registration officers' software. This could be done either by:
- (1) laying down minimum or necessary specifications for all registration software, enabling data to be exported to other software providers; or
  - (2) requiring certification of particular software on offer to registration officers by the Electoral Commission or Government, backed by a requirement to use certified software.
- 4.198 We do not presently express a view as to which of these alternatives, or indeed any other, is preferable or practicable. It is likely that a transitional period would be required for procurement and management reasons before a requirement for software to be compatible would bite. However, our provisional view is that, in the long term, the structure of the reformed legislation should enable such a facility. If a policy decision is made by governments that digital polling station registers be used, enabling voters to choose which polling station to vote at, the infrastructure should exist to make the policy a reality.

### **Administering resident EU citizens' declaration of intent to vote in the UK**

- 4.199 Particular registration forms must be designed for service voter and overseas voter applications.<sup>137</sup> Forms for relevant EU citizens might be included in this list in due course, if it is thought that one is desirable. The benefits would include online availability of the form, which would empower electors proactively to ensure they can vote in their place of residence.
- 4.200 However, our main provisional proposal in this context is that declarations of intention to vote in the UK should not be limited to one year in duration. We provisionally propose that the declaration should continue to have effect for as long as the entry in the register for that person subsists; we seek consultees' views on whether the declaration should instead have a maximum life – perhaps of five years, the standard term of the European Parliament, so that any such declaration should be capable of applying to the next European Parliamentary election after it is made.

<sup>137</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 26(4) and (5).

**Provisional proposals on reform of the law governing electoral registration:**

**4-8: The 1983 Act's provisions on maintaining and accessing the register of electors should be simplified and restated for Great Britain and Northern Ireland respectively.**

**4-9: Primary legislation should contain core registration principles including the objective of a comprehensive and accurate register and the attendant duties and powers of registration officers, the principle that the register determines entitlement to vote, requirements of transparency, local scrutiny and appeals, and the deadline for registration.**

**4-10: The deadline for registration should be expressed as a number of days in advance of a poll.**

**4-11: Primary legislation should prescribe one electoral register, containing records held in whatever form, which is capable of indicating the election(s) the entry entitles the elector to vote at.**

**4-12: Secondary legislation should set out the detailed administrative rules concerning applications to register, their determination, publication of the register and access to the full and edited register.**

**4-13: Registration officers' systems for managing registration data should be capable, in the long term, of being exported to and interacting with other officers' software, through minimum specifications or a certification requirement laid down in secondary legislation.**

**4-14: EU citizens' declaration of intent to vote in the UK should have effect for the duration of the elector's entry on the register, possibly subject to a limit of five years.**

# CHAPTER 5

## MANNER OF VOTING

### INTRODUCTION

- 5.1 Voting in the UK is traditionally done by marking a ballot paper in person (or through a proxy) at a polling station to which electors are assigned based on their registered address. The elector (or their proxy) may also vote by post. In this chapter we consider the mechanics of the ballot system, including vote tracing and secrecy, before turning to the laws governing the design of ballot papers. Absent voting is discussed in chapter 6.

### VOTING IS BY SECRET BALLOT

- 5.2 Every set of election rules requires that votes be given by ballot, and furthermore that the ballot “shall consist of a ballot paper”.<sup>1</sup> Though awkwardly expressed, the use of the term ballot connotes secrecy. This emphasises that voting in the UK is by secret ballot. There is no other way of voting for election to public office.
- 5.3 In addition to the classical requirement in election rules that voting is by ballot, schedule 4 to the Representation of the People Act 2000 (the 2000 Act) contains a general statement of how electors can vote at parliamentary and local government elections in Great Britain;<sup>2</sup> in person, by post or through a proxy. Voting thus remains a physical process.
- 5.4 Trials have been undertaken of other ways of voting, and in other countries internet voting has been used. A power to undertake pilot schemes under section 10 of the 2000 Act extends to the method of voting. We consider that this power should be retained so as to enable policy to be tested and developed in future. However, it is not within the remit of this project to consider alternative methods of voting, which are a matter of political policy for Government.

### The secret ballot

- 5.5 Electors vote in the UK by secret ballot. In the privacy of the voting booth, no one can know how a particular elector voted. The secret ballot means that attempts to influence voters corruptly bring risks with little reward, since their effectiveness cannot be verified. This stands in contrast to polling by show of hands. Secrecy of voting is outwardly preserved by the ballot mechanism (and by associated criminal offences designed to prevent or contain any breaches of secrecy), subject to the possibility of judicial vote tracing.

<sup>1</sup> Representation of the People Act 1983, sch 1 rr 18 and 19.

<sup>2</sup> Representation of the People Act 2000, s 17(2). The elections include the election of councillors in England and Wales and Scotland, and elections to the Greater London Authority. The 2000 Act is applied to Mayoral elections in England and Wales in the same way that it applies to local elections by virtue of regulation 3 of the Local Authorities (Mayoral Elections) (England and Wales) Regulations SI 2007 No 1024. Its provision is repeated in other election measures: European Parliamentary Elections Regulations SI 2004 No 293, sch 2 r 2; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 7; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, art 7; Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 2 r 1.

### ***Corresponding number lists***

- 5.6 The modern mechanism for vote tracing, the corresponding number list, was introduced in 2006. Ballot papers are required to have a number, a unique identifying mark<sup>3</sup> and an “official mark”. The corresponding number list must contain the numbers and unique identifying marks of all ballot papers.<sup>4</sup> When a ballot paper is issued, the voter’s number on the electoral register is recorded by a polling clerk beside the ballot paper number on the corresponding number list. While it was intended that voters would also sign the list, the power to require this has not been brought into effect.<sup>5</sup> The key to unlocking secrecy is the corresponding number list. It enables one to link a particular ballot paper (requiring access to ballot paper packets) to an elector (requiring access to the register).

### ***Storage and destruction of ballot papers and list***

- 5.7 Once a poll has closed, ballot boxes, tendered votes and the corresponding number lists are sealed in separate packets by the presiding clerk, with polling agents also able to fix their own seals.<sup>6</sup> The ballot boxes are opened for the count and the counted and rejected ballot papers are placed in sealed packets afterwards.<sup>7</sup> After the count, the returning officer forwards sensitive and other sealed “packets” to the registration officer for the area, who must retain them for a year and then destroy them unless otherwise directed.<sup>8</sup> No further regulation exists relating to the conditions of such retention or its security, but given the context it ought to be plain that these must be stored securely, and we understand that that is the practice.

### ***Power of the court to inspect sealed documents***

- 5.8 Vote tracing operates by giving the courts the power to order the inspection or production of the packets, including ballot papers and the corresponding number list, if satisfied that this is required in order to institute or maintain a prosecution for an offence or to bring an election petition. An election court considering the validity and correctness of an election has a general power to do the same. It may impose conditions as to persons, time, place and mode of inspection, production or opening as it thinks expedient. As to inspecting corresponding number lists or counted ballot papers:

care shall be taken that the way in which the vote of any particular elector has been given shall not be disclosed until it has been proved—

<sup>3</sup> Such as a barcode, a mixture of letters and numbers or even a repetition of the ballot paper number with the addition of a prefix or suffix.

<sup>4</sup> Representation of the People Act 1983, sch 1 rr 19A and 20. The references here are to the Parliamentary Election Rules, but the operation of the corresponding number list is uniform across all elections.

<sup>5</sup> Electoral Administration Act 2006, s 75; Electoral Administration Act 2006 (Commencement No 2 Transitional and Savings Provisions) Order SI 2006 No 3412, sch 1 para 12(d).

<sup>6</sup> Representation of the People Act 1983, sch 1 r 43(1).

<sup>7</sup> Representation of the People Act 1983, sch 1 r 54.

<sup>8</sup> Representation of the People Act 1983, sch1 r 57(1).

(i) that his vote was given; and

(ii) that the vote has been declared by a competent court to be invalid.<sup>9</sup>

### ***Power of the House of Commons to order inspection***

- 5.9 In the case of UK Parliamentary elections, the House of Commons has a power, not conditional on the commencement of criminal or petition proceedings, to make the same orders as the courts can make, subject to the same duty not to disclose the vote of certain persons. The House may also make directions concerning the retention of packets by registration officers. For all other elections, only the courts can make such orders.
- 5.10 This power appears to be a vestige of the House of Commons' historical jurisdiction to adjudicate on elections to it, which remained after the creation of election courts. We can find no evidence of the House of Commons systematically using its jurisdiction to inspect sealed documents. The Electoral Commission's handbook for polling station staff at the 2010 General election set out answers to frequently asked questions. As to queries about the corresponding number list, the suggested answer emphasised the secrecy of the vote and that only a judge could order the opening of sealed packets. No mention was made of the House of Commons' power.<sup>10</sup>
- 5.11 There is, however, one example of the power being exercised. This occurred on 27 October 2009, when a motion was passed without debate in the House of Commons.<sup>11</sup> After the Glenrothes UK Parliamentary by-election on 6 November 2008, marked copies of the registers had been lost whilst in the custody of the Sheriff Clerk. These show which electors on the polling station register actually voted at the polling station and are required to be made available for public inspection. In order to reproduce the contents of the marked register, the returning officer obtained an order authorising him to re-open the sealed packets containing completed corresponding number lists on terms that forbade him from copying the ballot paper numbers. This example of the use of the power points at a lacuna in the grounds for which the courts may grant access to the corresponding number list; the only reason why the House of Commons' power was used was the unconditional nature of its power to order the inspection of sealed documents.<sup>12</sup>

### ***Safeguarding secrecy***

- 5.12 The law takes steps to preserve secrecy from being accidentally or deliberately

<sup>9</sup> Representation of the People Act 1983, sch 1 r 56.

<sup>10</sup> Electoral Commission, *Handbook for Polling Station Staff* 2010, appendix 10.

<sup>11</sup> *Hansard* (HC), 27 October 2009, vol 498, col 256.

<sup>12</sup> See: the "Protocol to create substitute marked register for Glenrothes by-election on 6 November 2008", October 2009  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/238524/7729.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238524/7729.pdf), and the minutes of a meeting of the Seventh Delegated Legislation Committee, Monday 26 October 2009  
<http://www.publications.parliament.uk/pa/cm200809/cmgeneral/deleg7/091026/91026s01.htm> (both last accessed 2 December 2014).

breached. Some of these measures take the form of general requirements to preserve secrecy, backed by criminal offences. Others, contained in election rules, are aimed at requiring the poll and the count to be conducted in a way that preserves secrecy.

#### GENERAL REQUIREMENTS OF SECRECY

5.13 Section 66 of the Representation of the People Act 1983 Act (the 1983 Act) sets out the overarching “requirement of secrecy”. It applies to UK Parliamentary elections, local and mayoral elections in England and Wales and elections to the Greater London Assembly, while election-specific legislation replicates its provisions elsewhere. Breach of these requirements is a criminal offence.<sup>13</sup> The secrecy requirements of section 66 are addressed to different target groups:

- (1) Candidates, agents, administrators and observers attending a polling station must “maintain and aid the secrecy of voting” and may not, unless authorised by law, communicate before the poll is closed any information as to the name or number on the register of any elector or proxy for an elector who has or has not applied for a ballot paper or voted at a polling station, or any information about the official mark.
- (2) The wider public must not, in a polling station, interfere with other voters casting their vote, induce them to display their completed ballot paper or obtain information as to how they voted. If they have that information they must not communicate it, nor communicate any information as to the ballot paper number and unique identifying mark.<sup>14</sup>
- (3) Those attending the count must not ascertain or attempt to ascertain the number or other unique identifying mark on the back of the ballot paper, or communicate information obtained at the counting of the votes as to the candidate for whom any vote is given on any particular ballot paper.<sup>15</sup> At European Parliamentary elections, there is an additional prohibition on expressing an opinion based on information gleaned from the verification process as to the likely result. This is because verification occurs in the UK before polls close in other member states.<sup>16</sup>
- (4) Those attending the issue and receipt of postal votes are under similar obligations relating to the official mark, whether a particular elector has

<sup>13</sup> Representation of the People Act 1983, s 66(6); European Parliamentary Elections Regulations SI 2004 No 293, reg 29; European Parliamentary Elections (Northern Ireland) SI 2004 No 1267, reg 30; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, art 35; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1; Electoral Law Act (Northern Ireland) 1962, sch 9 para 27 and s 111; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 31(7); Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 27.

<sup>14</sup> Representation of the People Act 1983, s 66(3).

<sup>15</sup> Representation of the People Act 1983, s 66(2).

<sup>16</sup> European Parliamentary Elections Regulations SI 2004 No 293, reg 29(3); European Parliamentary Elections (Northern Ireland) SI 2004 No 1267, reg 30(3). Act concerning the election of representatives of the Assembly by direct universal suffrage, Official Journal L 278 of 08.10.1976, p 6, article 9(2). Curiously, the same additional provision is made for Police and Crime Commissioner elections, despite there being no gap between verification and the count. It is likely that the inclusion of this provision is a drafting error.

returned a postal vote, how a vote was given on any particular ballot paper and the ballot paper number or unique identifying mark.<sup>17</sup>

#### APPLYING THE SECRECY PROVISION IN THE MODERN CONTEXT

- 5.14 Section 66(3) of the 1983 Act prohibits the communication of information obtained in a polling station as to how an elector voted, as well as inducing a person to “display” their marked ballot paper. The widespread use of camera-equipped mobile telephones capable of communicating over the internet can nowadays enable a marked ballot paper to be photographed and shown to another or even posted online to a wide audience. This might enable a corrupt person to check the efficacy of their influence, thus defeating the object of the secret ballot. We do not think there is any doubt that inducing a person to photograph their marked ballot paper is caught by section 66(3), but the law does not currently prohibit voters from voluntarily disclosing how they voted. However, creating photographic evidence of how a vote has been cast is a different matter.
- 5.15 The law does not currently prohibit the taking of photographs in polling stations, though the Electoral Commission advises the use of notices prohibiting it. We provisionally consider that it should be an offence to take a photograph in a polling station, whether of one’s marked ballot paper or of anything else.
- 5.16 With the advent of postal voting on demand in Great Britain, postal votes now make up a greater share of votes cast at elections. There is a disparity in the protection of secrecy between in-person and postal voting. Section 66(3), which applies to the general public, only protects information obtained in a polling station. It does not prevent a person communicating which candidate another voter has voted for if their ballot paper was marked outside a polling station, for example as a postal vote at home. Section 66(4), which applies to the postal voting process, only regulates the acts of those attending the proceedings in connection with the postal voting process, not the public in general. We provisionally conclude that the same offences should apply to postal voting as to voting in person.

#### CONDUCT RULES AIMED AT PRESERVING SECRECY

- 5.17 Ensuring that secrecy of polling is maintained underpins the substance of many detailed conduct rules. Each set of election rules contains virtually identical provision on secrecy which can be summarised as follows:<sup>18</sup>
- (1) Voters cannot be required at election petition proceedings to disclose whom they voted for.
  - (2) The returning officer must notify persons attending polling stations (other than to vote) and the count as to the general requirements of secrecy under section 66 of the 1983 Act or equivalent.
  - (3) Safeguarding secrecy is implicit in the procedure for polling and the count. Thus:

<sup>17</sup> Representation of the People Act 1983, s 66(4).

<sup>18</sup> Representation of the People Act 1983, sch 1 rr 21, 31, 37(1)(c), 37(5) and 45(4), which are replicated in other election rules.

- (a) The mark on the list of electors once a ballot paper is issued must not include the ballot paper number – that is for the corresponding number list only.
- (b) Voters are required to mark their paper “secretly”.
- (c) At verification and the count, care must be taken that the ballot paper numbers and unique identifying marks are not visible to observers.

### **Greater secrecy requirements**

5.18 We provisionally consider that the secrecy provisions in section 66 of the 1983 Act and the corresponding election-specific provisions should be simplified into a general set of rules applying to all persons present at a polling station, at the issue and receipt of postal votes, or at the count. Furthermore, we consider that the public in general should be required to observe secrecy in relation to the exercise of postal votes. Our provisional view is that the proscription on communicating how an elector voted should be extended to postal voting, so that a person is forbidden to communicate any information obtained by observing a postal voter’s vote to the same extent as information obtained in a polling station. We would also welcome views from consultees, particularly administrators who may have experience of this, on our proposal to prohibit the taking of photographs in a polling station.

**Provisional proposal 5-1: The secrecy requirements under section 66 should extend to information obtained when a person completed their postal vote, and should prohibit the taking of photographs in a polling station.**

### **Rights-based analysis of qualified secrecy**

5.19 It is beyond doubt that every voter has a right to the secrecy of their vote. This is the object of the ballot system as laid down in the Ballot Act 1872, which persists today. However, this secrecy is qualified by the possibility of vote-tracing through the corresponding number list, and can be “unlocked”. Most other democracies understand voter secrecy to be absolute, and not qualified. In other words, it involves secrecy even from the courts investigating fraud. That is not what voter secrecy has meant in the UK.

5.20 The Republic of Ireland, whose law is also derived from the Ballot Act 1872, adopted absolute voter secrecy after the Supreme Court of Ireland in *McMahon v The Attorney General*<sup>19</sup> held that qualified secrecy breached article 16 of the Irish Constitution. The constitutional requirement that “voting shall be by secret ballot” was interpreted to require absolute secrecy. This meant secrecy for every ballot paper cast, whether the person casting it was the true elector or not.<sup>20</sup> To compensate, requirements to produce some identification at polling stations were introduced, in order to combat impersonation.

5.21 There is no constitutional rule in the UK requiring a secret ballot. The UK is,

<sup>19</sup> [1972] IR 69.

<sup>20</sup> *McMahon v The Attorney General* [1972] IR 69.



however, the only party to the European Convention on Human Rights to use qualified secrecy. After the general election in 2005, the Organisation for Security and Co-operation in Europe (OSCE) recommended that the UK Government consider abolishing vote tracing and using other safeguards to preserve the integrity of the voting process, such as voter identification at the poll. In making this proposal, the OSCE referred to “suffrage provisions of the European Convention for the Protection of Human Rights”. The OSCE did not repeat this proposal after the 2010 General election.<sup>21</sup>

- 5.22 Article 3 of the First Protocol to the European Convention on Human Rights states:

*Right to free elections*

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

- 5.23 Plainly the UK has agreed to hold elections by secret ballot, and does so. Secrecy is merely qualified in certain circumstances prescribed by law. We do not consider that article 3 requires an absolutely secret vote so as to prohibit judicial vote-tracing. But since, despite the long-established practice of qualified secrecy in Irish history, the Irish Supreme Court interpreted the “secret ballot” to connote absolute secrecy, we have considered whether the same view might be taken in respect of article 3.
- 5.24 There is no case-law directly on this question. The jurisprudence on article 3 emphasises the constitutional system and political evolution of a state, so that what is a violation in one country may not be in another, at least so long as the chosen system provides for conditions which will ensure the “free expression of the opinion of the people in the choice of the legislature”.<sup>22</sup> Given that the UK system does not require voters to provide proof of identity at the poll, and given also the safeguards surrounding the judicial unlocking of secrecy – which include a requirement not to disclose a validly cast vote – we do not consider that judicial vote-tracing would be held to infringe the Convention.
- 5.25 A similar rule exists in EU law, to the effect that elections to the European Parliament should be by direct universal suffrage and “free and secret”. The preamble to the Council Decision amending the Act concerning the election of representatives in the European Parliament emphasises the need for elections to accord with “principles common to all Member States while leaving Member States free to apply their national provisions in respect of aspects not governed by this Decision”.<sup>23</sup> In our view, whilst the principle that voting is secret is

<sup>21</sup> Organisation for Security and Co-operation in Europe (Office for Democratic Institutions and Human Rights), *United Kingdom of Great Britain and Northern Ireland General Election 5 May 2005: OSCE/ODIHR Assessment Mission Report* (August 2005), pp 7 to 8.

<sup>22</sup> *Mathieu-Mohin v Belgium* (1987) 10 EHRR 1 (App No 9267/81) at [51] to [54].

<sup>23</sup> Council Decision of 25 June and 23 September 2002 (2002/772/EC) amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom.

common to all member states, the additional stipulation that secrecy should be absolute is not shared by the UK. The Treaty on the Functioning of the European Union provides for the rules to enter into force “following their approval by the member states in accordance with their respective constitutional requirements”.<sup>24</sup> We do not consider that the requirement of secrecy connotes absolute secrecy, which is not a principle common to all member states, or that the Treaty precludes the United Kingdom approving the Act on terms that secrecy of voting in the United Kingdom is not absolute.

### **Qualified secrecy and the alternative of voter identification at the poll**

- 5.26 If there is no fundamental right to absolute voter secrecy, there may nevertheless be questions about whether the current system of qualified secrecy functions satisfactorily. One argument against it invokes the risk of undermining the public perception of secrecy of the ballot without sufficiently deterring impersonation.<sup>25</sup> Similarly, given that vote tracing is rarely used to investigate and detect impersonation, it may not be the optimal means of tackling it. The operation of the corresponding number list is, furthermore, a serious administrative burden on polling day which may be exacerbated in combined elections or in elections involving multiple ballot papers, like those using the additional member voting system. Finally, the possibility of vote tracing by using numbered ballot papers requires countermeasures in the law, such as complex secrecy provisions at polling stations, postal vote opening sessions and the count.
- 5.27 If qualified voter secrecy were rejected as inadequate, a different mechanism would need to be employed to address impersonation in the context of absolute secrecy. The experience in the Republic of Ireland shows that adopting absolute secrecy requires adjustments elsewhere in the electoral system. In order to move away from numbered ballot papers, corresponding number lists and vote tracing, this project would have to consider bolstering the security of polling processes on polling day by means such as:
- (1) requiring identification of voters at the poll, by
    - (a) using existing and available forms of identification, which may not all be photographic, or
    - (b) extending the electoral identity card scheme in Northern Ireland to the rest of the United Kingdom; and/or
  - (2) empowering presiding clerks to reject voters at the poll having made qualitative judgements about their identity or entitlement to vote.
- 5.28 The Electoral Commission in its 2014 report on electoral fraud has recommended the use of photographic identification as a matter of principle. This is based on its

<sup>24</sup> Treaty on the Functioning of the European Union, art 223. The predecessor provision under which the Act was adopted, Article 190 of the former EC Treaty, was slightly differently worded, but not in our view materially so.

<sup>25</sup> Home Affairs Committee, Report of on Electoral Law and Administration (1998) HC 768-I at para 107.

assessment that it would deter impersonation at polling stations.<sup>26</sup> A requirement of photographic identification was introduced, alongside the regime of qualified secrecy, in Northern Ireland in 2002. The Chief Electoral Officer issues an electoral identity card to plug any gap in the availability of other official forms of photographic identification (passports, driving licences and the travel card known as a Smartpass). The Electoral Commission is not proposing that photographic identification should be an alternative to qualified secrecy.

- 5.29 We have concluded that it is not for this reform project to suggest the adoption of alternative or additional measures to combat impersonation such as a requirement for photographic identification at the poll. Such a proposal would involve weighing the balance between security from fraud and access to the poll, which is a question of political policy. In particular, we do not consider that it is within the remit of this project to propose reforms that might significantly affect the ability of voters to exercise their franchise.<sup>27</sup>
- 5.30 We are not aware of any published academic studies of voter identification requirements in the United Kingdom, though we have heard anecdotal evidence to the effect that the Northern Irish identification requirement does not deter voters and that the electoral identity card is popular as it is issued free of charge and can serve as a convenient proof of identity or of age in a variety of contexts.
- 5.31 There are studies emanating from other jurisdictions which paint a mixed picture, variously suggesting a range of impacts of identification requirements on the exercise by voters of the franchise from no statistically significant impact to a range of statistically significant impacts, albeit in single percentage figures. Greater impacts were found amongst the less well off and members of minority communities. The degree of impact is inevitably affected by the precise form of the identification requirements, which vary greatly, and can be difficult to dissociate from other factors affecting voter turnout. We would expect it to be impossible for us to come to firm conclusions about the impact of introducing a photographic identification requirement for polling against the background of what is currently a fairly permissive scheme for access to the poll in Great Britain. At its lowest, we can say that there is a real risk that a significant number of voters would be affected by such a change.
- 5.32 In June 2014, we asked members of our Advisory Group whether we could usefully ask consultees for their views on the impact of an identification requirement on turnout as part of the present consultation. On balance, members did not think this would be a question which would produce useful answers, and would be more likely to provoke arguments for or against visual identification requirements for voting than to give us confidence in any estimate of its impact upon access to the poll. It was also suggested that it would be somewhat anomalous for us to make proposals in relation to security of voting in person

<sup>26</sup> Electoral Commission, *Electoral fraud in the UK Final report and recommendations* (January 2014), p 26, [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0008/164609/Electoral-fraud-review-final-report.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/164609/Electoral-fraud-review-final-report.pdf) (last accessed 2 December 2014).

<sup>27</sup> The Electoral Commission conducted a survey suggesting only 1% of voters experienced problems with voter ID, but this does not address the empirical impact of introduction of a voter ID requirement on ability to vote. Electoral Commission, *Electoral fraud in the UK* (January 2014), p 25.

without also tackling the issue of security of absent voting – a controversial topic which, we are confident, lies outside the proper remit of our project.

- 5.33 Our proposed reforms are therefore predicated on the retention of the current balance between access to the poll and security from fraud, and of voter secrecy qualified by a corrective judicial mechanism for investigating fraud and correcting errors in the electoral process. We shall nevertheless consider improving the law from the point of view of the right to secrecy. Similarly, the concerns about vote tracing from a functional point of view must be met when considering the law on challenge, and the operation of the vote tracing system. We turn to these considerations presently.

#### **The reform aims in the context of the ballot system and qualified secrecy**

- 5.34 Whilst in our view article 3 of the First Protocol to the European Convention on Human Rights does not require absolute secrecy of the vote, it plainly requires secrecy in electoral law. Whether qualified secrecy conforms to article 3 will depend on the adequacy of the safeguards against improper breach of secrecy. Risks of unauthorised breach of secrecy should be avoided or minimised as a matter of principle.
- 5.35 We come to the same conclusion based on a functional analysis of judicial vote tracing. The ballot system seeks to eliminate outside influences in the privacy of the voting booth. Confidence in it is undermined by any misconception by the voting public that voter secrecy might be improperly unlocked. In practice, secrecy is very rarely unlocked. Where it is, the court must ensure that the process is confidential and that an elector's validly cast vote will not be made public (a protection that we provisionally propose extending to any vote not cast dishonestly). We understand, for example, that orders for the unsealing of ballot papers and the corresponding number list typically require "all necessary precautions being taken to preserve the secrecy of the ballot at each stage".<sup>28</sup>
- 5.36 The justification for rules enabling voter secrecy to be unlocked is that they are a judicial safeguard against impersonation and other forms of fraud. However, the House of Commons' power to unlock secrecy at UK Parliamentary elections is unconditional. By contrast, the courts' jurisdiction to make the same order requires a prospective legal challenge or criminal investigation. The Glenrothes by-election has provided the only recent example of use of the House of Commons' power. There it was used to remedy a technical problem, namely the loss of polling station registers.

#### **Reforming the provisions on secrecy and vote tracing**

- 5.37 There is no evidence of unauthorised access to ballot papers and counterfoils or corresponding number lists. It is therefore likely that secrecy is in practice adequately preserved. Nevertheless, our current view is that four steps can be taken to bolster public confidence in secrecy, and reduce or eliminate the risk of improper exposure of how an elector voted.

<sup>28</sup> This formulation is taken from the case of *Edgell v Glover* [2003] EWHC 2566 (QB); [2004] ACD 26 at [6]. There is still some risk that voters giving evidence at trial will state how they voted.

### ***Abolishing the power of the House of Commons to order inspection***

- 5.38 As we noted above, the power of the House of Commons at UK Parliamentary elections to order the production and inspection of voting documents is a vestige of a jurisdiction that long ago was transferred in practice to the judiciary. It is never used nowadays for the purpose of investigating electoral malpractice, as is acknowledged in the Electoral Commission's guidance to administrators on answering public queries. The Glenrothers by-election is an example of the power being used to fill a gap in the court's power to inspect corresponding numbers lists. The reformed law should, we provisionally consider, reflect the principle and practice that secrecy can only be unlocked by court order.<sup>29</sup>
- 5.39 Whilst we see no reason to lack confidence that the House of Commons would exercise the power responsibly – the order made after the 2008 Glenrothes by-election was accompanied by carefully drafted provisions to preserve secrecy of voting – it seems to us more consonant with the principles underpinning the Convention on Human Rights and the separation of powers that the unlocking of voting secrecy should be an exclusively judicial function. We therefore provisionally propose that the power of the House of Commons to order the production, inspection or unsealing of voting papers should be abolished and that the power of the High Court and the County Court<sup>30</sup> to do so should be widened to include production, inspection or unsealing for the purpose of correcting an administrative error, even if no legal challenge or prosecution is being considered.

### ***Clarifying the rules on judicial unlocking of secrecy***

- 5.40 Our provisional proposal relating to the operation of the vote tracing mechanism is that the law should increase the protection of the voter against their vote being made public. In relation to vote tracing, we consider that publicly available judgments and reports of court proceedings should not disclose how a voter voted without the consent of the judge, which should only be granted if the judge considers that the voter voted dishonestly. This aims to ensure that innocent voters, even if their vote is technically invalid, do not have the way they voted disclosed.

### ***Requiring secret documents to be stored securely***

- 5.41 In relation to the retention by registration officers of the sealed packets, the first issue is whether the rules should expressly state that such retention should be done securely. In practice, we understand that these documents are stored, and eventually destroyed, securely, but there is a strong argument that this should be the subject of a legal rule. This is an important aspect of safeguarding public trust that voting is secret and that only a court can access these documents.

### ***Separate storage of corresponding number list***

- 5.42 The second issue is whether the law should go further. Three documents are required to unlock secrecy. A ballot paper is the first. A full register, or list of electors assigned to polling stations, is the second. The third is the corresponding

<sup>29</sup> In *McMahon v Attorney General* [1972] IR 69 at pp 89, 90 and 95, it was conceded before the Supreme Court that the equivalent judicial powers given to the Dáil were unnecessary.

number list recording the ballot paper number and electoral number of the voter to whom it has been issued. The list of electors is fairly widely available. The ballot papers are sealed and stored by the registration officer. Comparing them with the corresponding number list is the key to unlocking secrecy. An obvious way to ensure that there is no improper breach of secrecy is to require the corresponding number list to be stored separately from the sealed packets of ballot papers and tendered votes. The courts might still order their production, unsealing or inspection. But an improper actor would need physical access to two locations in order to unlock voter secrecy.

- 5.43 Since sealed packets of ballot papers are likely to be voluminous and corresponding number lists compact and more easily stored, in practice the proposal might be that the latter be sent to the Electoral Commission, or possibly the courts themselves, for storage. There are likely to be some cost implications. These might be off-putting if one takes the view that the risk under the current system is fanciful or implausible. Subject to these considerations, our provisional proposal is that “two-step” protection of secret electoral documents should occur. If consultees agree, we invite their suggestions as to who should be the custodian.

**Provisional proposal 5-2: The obligation to store sealed packets after the count should spell out that they should be stored securely.**

**Provisional proposal 5-3: Corresponding number lists should be stored in a different location from ballot papers and in a different person’s custody.**

**Provisional proposal 5-4: Secrecy should be unlocked only by court order, with safeguards against disclosure of how a person voted extended to an innocently invalid vote.**

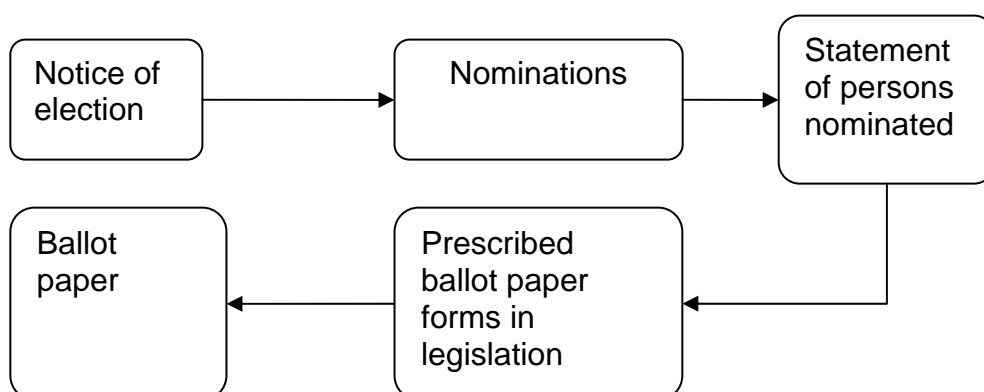
#### **BALLOT PAPER DESIGN AND CONTENT**

- 5.44 The law systematically guides administrators from the nominations process to the content of the ballot paper. The form and content of ballot papers is prescribed in detail in election rules.
- 5.45 Diagram 1 illustrates the picture generally for all UK elections. This approach guides the returning officer from one procedural step to the next. It is a highly formalistic process, with some divergence in the rules governing specific elections. The nominations process yields the candidate’s details (such as address and party affiliation). The statement of persons standing nominated must set out the candidates’ names in alphabetical order, which a separate rule states is the order in which they will appear on the ballot paper. For Scottish local government elections, the rules simply state that the names on the ballot paper should appear alphabetically. There is also provision concerning “commonly used” names, and dealing with details of candidates which are identical. At elections using the party list system, the order is determined alphabetically by party name or description, followed by the surnames of any independent

<sup>30</sup> And, in Scotland, the Court of Session and the sheriff court.

candidates alphabetically.<sup>31</sup>

**Diagram 1: Key steps in ballot paper content**



### **Detailed prescription in election rules**

- 5.46 A prescribed form is appended to each set of election rules, determining the contents of the front and back of the paper. Detailed direction is given on printing the ballot paper, covering subjects such as instructions for voters, page layout, and the font and size of the text. For UK Parliamentary elections, where the election rules can normally only be amended by primary legislation, the Secretary of State is specifically empowered by rule 19(4) of the rules to amend, by regulations, the prescribed form of ballot paper, the directions on printing it and the form of directions for the guidance of voters.<sup>32</sup>

### ***Discretion to arrange ballot paper into separate columns***

- 5.47 For UK Parliamentary elections and most other elections, returning officers may at their discretion arrange the ballot paper in more than one column, effectively splitting the paper into two or more sets of candidates' entries.<sup>33</sup> We understand that this is to accommodate the limitation on the length of a ballot paper that some printing equipment can print. The draft Representation of the People (Ballot Paper) Regulations 2013 set out a new prescribed form without this discretion, but have not been brought into force. If the discretion is to survive, columnisation

<sup>31</sup> Representation of the People Act 1983, sch 1, r 14(4A).

<sup>32</sup> The detail and differences in the rules governing discrete elections are considered in our Research Paper on Manner of Voting, available on our website. <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

<sup>33</sup> Representation of the People Act 1983, appendix to sch 1, para 2B; Local Elections (Principal Areas) Rules SI 2006 No 3304, sch 2 pt 7; Local Elections (Parishes and Communities) Rules SI 2006 No 3305, sch 2 pt 7; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 1 pt 8 form A; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1; Electoral Law Act (Northern Ireland) 1962, appendix to sch 5, para 4; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 10 forms CK1 and CL1; Scottish Local Government Elections Order SI 2011 No 399, sch 1 pt 7 form 5; Greater London Authority Elections Rules SI 2007 No 3541, sch 10 forms 5, 6 and 7. There is no equivalent discretion in the directions on printing ballot papers at Scottish Parliamentary elections, but art 90(1) of the Scottish Parliament (Elections etc.) Order SI 2010 No 2999 states that the forms in the Appendix of Forms may be used "with such variations as the circumstances may require".

should, in our provisional view, be seen as merely an aspect of design – the design rules could presumably permit it on specified conditions, such as the impracticality or impossibility of printing a long ballot paper.

### **The alternative approaches to prescribing ballot paper form and content**

- 5.48 Some have argued for more flexibility: legislation should only prescribe key information to be included in the ballot paper while the standard design could be specified by a lead body for particular types of election, such as the Greater London Returning Officer, the Electoral Management Board for Scotland or, as was the case in the May 2011 referendum, the Electoral Commission.<sup>34</sup> The Electoral Commission has commented on optimal ballot paper design in the past, emphasising the focus on the voter, and general design principles.<sup>35</sup>
- 5.49 The current approach emphasizes the benefit of having the design of ballot papers prescribed in legislation in advance of the election. This supplies a degree of certainty which is of practical benefit to administrators. Those who favour this approach do not necessarily oppose the review and improvement of current standard forms, but consider that final designs of ballot papers should continue to be set out in legislation.
- 5.50 There is a balance to be struck here between certainty and flexibility. The flexible approach is perhaps more suitable to a centralised framework for administering elections. At present the management structure for elections across the UK is asymmetrical. If the flexible approach were adopted for UK elections:
- (1) different executive bodies would have design functions for the ballot papers for their respective elections; and
  - (2) for some elections in England and Wales the design functions would have either to remain with the Secretary of State or be given to a new executive body for those elections.
- 5.51 The flexible approach risks inconsistent implementation across the UK. The prescriptive approach ought in principle to ensure greater consistency given the current management picture. However, historically, the standard of design and user-friendliness of prescribed forms has been patchy. For example, Northern Irish voters were asked to mark UK Parliamentary ballot papers on the right hand side, with a column on the left hand side containing pre-printed numbers, whilst at a Northern Ireland Assembly election they were asked to mark their vote by entering a number on the left hand side. In principle, however, prescribing the form of ballot papers in legislation should not prevent the forms from being well designed and user-tested prior to their inclusion in the legislation. Legislative authority, including prescribing ballot papers, is vested in the UK or Scottish Parliaments depending on the devolution settlement. Whether consistent, user-tested and effective ballot paper design happens in practice thus depends on processes which take place before the forms are prescribed in legislation. Recent developments suggest these processes are improving by focusing on user-

<sup>34</sup> Electoral Commission response to Scoping Consultation Paper on Electoral Law in the United Kingdom, p 12.

<sup>35</sup> Electoral Commission, *Making Your Mark* (2009).



friendliness and testing.

### ***The UK Government review of voter-facing forms***

- 5.52 The UK Government is currently undertaking a review of statutory voter-facing forms including ballot papers. The review encompasses UK Parliamentary, local government and European Parliamentary elections.
- 5.53 This reflects a new approach to producing forms and notices applied in the Police and Crime Commissioner elections in November 2012, after calls for improvement to the current legislation. Professional designers and public user-testing (which included testing of bilingual material in a session held in Wales) were employed, and consultations with key electoral stakeholders and the Electoral Commission occurred.<sup>36</sup> The draft Representation of the People (Ballot Paper) Regulations 2013 noted above set out a new prescribed form of ballot paper which reflects this new approach, which seeks to improve the pre-legislative processes for design of ballot papers.

### **Ballot papers to be prescribed in secondary legislation**

- 5.54 On balance, our provisional view is that the form of the ballot paper should remain governed by secondary legislation; this is in practice the current position, given rule 19(4) of the parliamentary election rules. The general principles of clarity of presentation and content and presentational equality between candidates would thus apply to the pre-legislative process of designing these forms before laying them down in legislation. The question remains: what exactly are these underpinning principles, and should they be laid down in primary legislation?

### ***General principles of ballot paper design***

- 5.55 Certain principles underpin the current prescribed forms and directions as to printing. These are not given legal expression but their existence can be deduced from detailed provisions governing ballot papers or current trends in pre-legislative work. These are:
- (1) internal consistency within the ballot paper, with equal treatment as between candidates; and
  - (2) promoting an informed and discernible choice by voters. This means:
    - (a) clarity of presentation and design; and
    - (b) clarity of directions to voters.
- 5.56 A third general principle in ballot paper design, which should arguably be recognised, is consistency across different elections, particularly those whose polls can be combined. This is distinct from the requirement of internal consistency. General consistency helps to foster voter recognition and habits,

<sup>36</sup> Under section 7(1) of the Political Parties, Elections and Referendums Act 2000, the Electoral Commission must be consulted before making regulations under the 1983 Act subject to the delegated legislation provision in section 201(2) of that Act. The duty to consult applies to all the main elections in the UK.

and to cater for them once acquired. Thus a Northern Irish voter who is accustomed to using numbers to cast his or her vote in Single Transferable Vote elections should arguably not, for example, encounter numbered entries in the ballot paper for UK Parliamentary elections.<sup>37</sup> Differences in voting systems are inescapable, but their impact on the voter should be restricted to such changes in ballot paper design as are strictly required. Numbered columns in first past the post elections are unnecessary. The difficulties experienced by voters using different voting systems simultaneously have been noted before.<sup>38</sup>

5.57 Accordingly, given the importance of general consistency, it is arguable that a third general principle of ballot paper design should be:

- (3) consistency of design and presentation with other elections occurring in the jurisdiction.

### ***Should general principles be contained in legislation?***

5.58 Under the current law the Secretary of State and Scottish Ministers must consult the Electoral Commission on proposed changes to electoral law. That includes changes to ballot papers and other voter-facing forms. This is a procedural duty which enables the considerations outlined in our three principles above to be taken into account.<sup>39</sup> We provisionally consider that there is merit in making that duty to consult refer specifically to these principles. The Governments and the Electoral Commission would then consider, as part of the consultation, the conformity of proposed changes with the principles of internal consistency of form design, clarity and general consistency with other elections.

5.59 There is a limit to what the law can usefully say to guide the pre-legislative process of ballot paper design. If both the UK Government and the Scottish Ministers consult the Electoral Commission on changes to ballot papers by reference to conformity with the three principles outlined above, sufficient safeguards would exist in the law to ensure that pre-legislative attention is appropriately focused. The design of the forms should be guided by the three principles outlined above:

- (1) internal consistency, which is concerned with preserving presentational equality between candidates;
- (2) clarity, which is concerned with the user-friendliness of the form from the

<sup>37</sup> See para 5.47. The continued numbering of rows in ballot papers for UK Parliamentary elections and local government elections in England and Wales appears to be due to the particular feature we described above, that the ballot paper can be arranged into two or more “columns” (or vertical divisions) of candidates, at the returning officer’s discretion. This is presumably to cater for a long list of candidates. There is a question as to how often in practice this discretion is exercised. The draft Representation of the People (Ballot Paper) Regulations 2013 set out a new prescribed form of ballot paper without left hand side numbering, and the directions on printing no longer give returning officers the power to arrange the ballot paper in columns.

<sup>38</sup> R Gould, *Scottish elections 2007: the independent review of the Scottish Parliamentary and local government elections 3 May 2007* (October 2007), pp 38 to 57. [http://www.electoralcommission.org.uk/\\_\\_data/assets/electoral\\_commission\\_pdf\\_file/0011/13223/Scottish-Election-Report-A-Final-For-Web.pdf](http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0011/13223/Scottish-Election-Report-A-Final-For-Web.pdf) (last accessed 2 December 2014).

<sup>39</sup> Political Parties, Elections and Referendums Act 2000, s 7.

point of view of voters; and

- (3) general consistency, which is concerned with consistency of design across elections, and fostering consistent voting habits.

**Form of ballot paper**

- 5.60 We consider that the form of ballot papers should continue to be set out in secondary legislation. In order to promote general consistency, we think a single appendix or schedule in secondary legislation should contain prescribed forms of ballot paper for all elections.
- 5.61 The duty to consult the Electoral Commission on changes to prescribed ballot papers should make reference to the need to consider the three general principles of clarity, internal consistency and consistency between elections..
- 5.62 We do not consider that adherence to these principles should be a condition of the validity of prescribed ballot papers, which might render election outcomes uncertain. Rather, these principles should be expressly incorporated into the existing – and general – duty to consult the Electoral Commission on changes to electoral law.

**Provisional proposal 5-5: The form and content of ballot papers and other materials supplied to voters should continue to be prescribed in secondary legislation.**

**Provisional proposal 5-6: The duty to consult the Electoral Commission as to the prescribed form and content of ballot papers should include consultation in relation to the principles of clarity, internal consistency of the design (with equal treatment between candidates) and general consistency with other elections' ballot papers.**

# CHAPTER 6

## ABSENT VOTING

### INTRODUCTION

- 6.1 Electoral law makes provision governing absent voting – the ability of an elector to vote without attending at a polling station. This is achieved either through postal voting, which involves completing a ballot paper at home and sending it (usually by post) to the returning officer to be counted, or through proxy voting, which involves appointing another elector to vote on one’s behalf. It is useful at the outset to distinguish between three aspects of absent voting:
- (1) First, there is the question of substantive entitlement to an absent vote.
  - (2) Secondly, there is the administration of applications for an absent vote, and the ongoing maintenance of the lists of absent voters. We refer to this as the administration of absent voters. This is overseen by electoral registration officers.
  - (3) Thirdly, there is the matter, at election time, of issuing postal voting packs and receiving completed postal voting packs up to polling day. We refer to this as the postal voting process. This is overseen by returning officers.
- 6.2 In this chapter, we first consider entitlements to an absent vote and the administration of absent voters, focusing in particular on the fragmented and complicated legislative framework governing the topic under election-specific legislation. We then consider the detailed law governing the postal voting process, focusing in particular on the regulation of the handling of postal voting applications and postal votes and the problem of countering postal voting fraud.

### **The scope of reform of absent voting in the UK**

- 6.3 In its response to our scoping consultation paper, the Association of Electoral Administrators said:
- There are two key overarching themes or principles that need to be balanced in any consideration of the manner of voting at electoral events. These are access to the process and integrity or security. In order to support confidence in the electoral process, the reformed framework for electoral administration must ensure access to the process so that all those who wish to vote and participate are not prevented from doing so by unnecessary barriers. However, at the same time the framework will need to contain measures with the aim of preventing anyone who is not entitled to vote or participate from doing so, and that a person is not deprived of their vote by fraudulent means. This will not be an easy balance to achieve.
- 6.4 In formulating our provisional reform proposals on absent voting, we bear in mind the following parameters relating to the balance between security and access.
- (1) Questions of entitlement to an absent vote belong to the realm of political

policy choice about access to the poll. Since 2000, the policy in Great Britain has been to make postal voting available on demand. In Northern Ireland a different policy exists.

- (2) Fundamentally altering the parameters of entitlement to an absent vote would alter the policy balance, and is outside the scope of a technical law reform project. This rules out certain reform measures which have been suggested by others. These include:
  - (a) scaling back the availability of postal voting in Great Britain so that it is once again available only for good cause – on the same basis as entitlement to proxy voting, and absent voting generally in Northern Ireland; or
  - (b) devising alternative modes of voting, such as advance voting or extending polling over a number of days.

### **ABSENT VOTING ENTITLEMENTS AND RECORDS**

6.5 We first consider entitlements to an absent vote and the administration of absent voters. The legislation underpinning absent voting exists outside the classical framework contained in the 1983 Act. In Great Britain, the law is contained in the Representation of the People Act 2000 (“the 2000 Act”) while, in Northern Ireland, the Representation of the People Act 1985 (“the 1985 Act”), which used to apply to the UK as whole, is still in force. The 2000 and 1985 Acts’ provisions are repeated in election-specific legislation.

6.6 To these provisions one must add the registration regulations in England and Wales, Scotland and Northern Ireland respectively, and the election-specific provisions for certain elections, which govern the detail of the administration of absent voters and the postal voting process. The legal framework governing absent voting is unwieldy and complex, even though the core provision is to a large extent the same for all elections.

#### **Absent voting in Great Britain**

6.7 We consider the law governing Great Britain first. Schedule 4 to the 2000 Act governs UK Parliamentary elections, local government elections in England and Wales, elections to the Greater London Authority, Mayoral elections in England and Wales and local government elections in Scotland.<sup>1</sup> The legislation is structured to enable a person applying for an absent vote to do so for a period, whether fixed or indefinite (a “periodic” absent vote), or for a particular election (a “specific” absent vote).<sup>2</sup> The practical difference between the two is that records of periodic postal and proxy voters are maintained on an ongoing basis. In contrast, once a specific absent voter has cast their vote by post or proxy at the election in question, their absent voting status is exhausted.

<sup>1</sup> Representation of the People Act 2000, sch 4 paras 1(1) and 1(2) read with s 203 of the Representation of the People Act 1983. Mayoral elections are included by virtue of regulation 3 of the Local Authorities (Mayoral Elections) (England and Wales) Regulations SI 2007 No 1024.

<sup>2</sup> Representation of the People Act 2000, sch 4 paras 3 and 4; Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 51(4) and (5).

- 6.8 The existence of separate legislation applying to particular types of election results in a great deal of complexity, particularly concerning how applications to vote by post at certain types of election can relate to voting at other types of election. For the sake of simplicity of exposition, we focus initially on postal votes. We consider proxy voting subsequently.

#### ***Applying for a postal vote under the 2000 Act***

- 6.9 Electors have a choice under the 2000 Act whether to apply for a postal vote at a parliamentary or local government election, or both, and a periodic postal vote application must state whether it is made for one or both types of election.<sup>3</sup>
- 6.10 Where an application is made for a specific postal vote (for a particular parliamentary or local government election) and the poll for that election falls on the same day as the poll at “another election”, the one application “may” (in England and Wales) relate to both elections, and, in Scotland, “shall, unless a contrary intention appears” relate to both elections.<sup>4</sup>

#### ***Applying for a postal vote for non-2000 Act elections***

- 6.11 The discrete legislation governing other elections closely follows the 2000 Act template, in general retaining the distinction between periodic and specific postal vote applications. Some attempts are made to enable applications in respect of one type of election also to constitute applications for a postal vote at other elections, but this is done in an inconsistent manner. At European Parliamentary elections, for example, paragraph 17(6) of schedule 2 to the European Parliamentary Elections Regulations 2004 (“the 2004 Regulations”) provides:

An application made under this Schedule [for a periodic absent vote] must state (a) that it is so made; and (b) that it is made for European Parliamentary elections.

- 6.12 This follows the template of the 2000 Act, which requires applications to state they are made under it, and the election they are for. Unlike the 2000 Act, the 2004 Regulations do not enable an application for a postal vote at a European Parliamentary election to be taken as an application to vote by post at a combined poll with another election. Instead, paragraph 17(9) of schedule 2 to the 2004 Regulations enables an application for a postal vote at the European Parliamentary election to be “combined with” an application made under the 2001 Regulations (for Scotland, and England and Wales), as well as applications for a postal vote at Mayoral elections and for Mayoral referendums.<sup>5</sup> This is plainly an attempt at enabling applications for a postal vote to be made on a more comprehensive basis, though hampered by the fact that the elections referred to are not all the elections in Great Britain. Similar attempts are made in other

<sup>3</sup> Representation of the People Act 2000, sch 4 paras 3(1) and 4(1); Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 51(4). Local election here includes GLA elections and Mayoral elections.

<sup>4</sup> Representation of the People Regulations SI 2001 No 341, reg 51(5); Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations SSI 2007 No 170, reg 3(5).

<sup>5</sup> European Parliamentary Elections Regulations SI 2004 No 293, sch 2 para 17(8) and (9).

measures.<sup>6</sup>

- 6.13 Article 8(1) of the Scottish Parliament (Elections etc.) Order 2010 envisages applications for a periodic postal vote to be made for Scottish Parliamentary elections alone or along with Scottish local government elections. Applications for a particular election are governed by article 9(1) of the 2010 Order; however there is no power to combine the application with one for any other election.<sup>7</sup>
- 6.14 One measure which does not follow the 2000 Act template is the Police and Crime Commissioner Elections Order 2012. Rather than envisaging periodic postal voting applications in respect of these elections, the legislation enables those who are included in one of the postal voters' lists under schedule 4 to the 2000 Act or schedule 2 to the European Parliamentary Elections Regulations 2004 to be automatically included in the postal voters list for Police and Crime Commissioner elections. Curiously, there is no reference to periodic postal voters under the National Assembly for Wales (Representation of the People) Order 2007.

***“Records” of periodic postal voters under the 2000 Act***

- 6.15 Registration officers must keep a record of postal voters whose application (whether for a fixed or indefinite period) has been granted. The record must state:
- (1) whether the application was in respect of parliamentary or local government elections or both;
  - (2) whether it was for a fixed or indefinite period; and
  - (3) the address provided by the elector as that to which the ballot paper is to be sent.<sup>8</sup>
- 6.16 Rules also govern the circumstances in which a person may be removed from this record. The obligation to keep a record applies only to “periodic” postal voters.

***Postal voters list***

- 6.17 The registration officer is also obliged to produce a “postal voters list” for an election. This contains the entries on the record of periodic postal voters, together with the names and addresses of specific postal voters. The 2000 Act requires lists to be kept for parliamentary and local government electors, while identical

<sup>6</sup> National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 1 para 1(5)(a) omits the additional requirement to identify the election for which a periodic postal vote is sought.

<sup>7</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, arts 8(1) and 9(1) and sch 3.

<sup>8</sup> Representation of the People Act 2000, sch 4 para 3(4).

provision is made in measures governing non-2000 Act elections.<sup>9</sup>

- 6.18 It is an elector's appearance on this list which governs entitlement to a postal vote with respect to a forthcoming election. Conversely, electors on this list will not be able to vote in person at a polling station. Their poll card, which tells them what type of voter they appear to be, is thus very important: it should give electors an opportunity to put the record straight if they wish to vote in a way other than the registration officer's records suggest.

#### ***Election-specific postal voting applications and records***

- 6.19 The legislative approach we have outlined suggests that the law envisages separate records of postal voters being kept under each governing measure. Thus the Police and Crime Commissioner Elections Order 2012 mentions a record for periodic postal voters under the 2000 Act, and a distinct record under the European Parliamentary Elections Regulations 2004. The omission of a reference to records kept under the National Assembly for Wales (Representation of the People) Order 2007 is hard to explain. There is a further set of records for Scottish Parliamentary elections. Furthermore, the law plainly envisages that the 2000 Act record should make it clear whether an entry is in respect of parliamentary or local government elections only, or both.
- 6.20 The outcome is that electors have the right to choose to be postal voters for one or another kind of election, as well as the option to apply to be a postal voter for only one or some of the elections not covered by the 2000 Act.

#### ***How postal voting entitlements work in practice***

- 6.21 In practice, many registration officers' postal vote application forms present electors with a simple choice whether to be a postal voter for all elections and referendums for a period or on a particular polling day. The Electoral Commission's own template application form adopts that approach. Electors completing such a form are taken to have applied for postal voting at both parliamentary and local government elections (for the purposes of the 2000 Act) and at each election governed by election-specific postal voting provisions, notwithstanding any legal requirement for an application to state that it is made for a particular type of election. We believe also that records of postal voters kept by registration officers tend not to distinguish between types of election.
- 6.22 We have seen other forms, however, that present electors with a choice whether to be periodic postal voters at parliamentary or local elections only. Software which we have observed in operation was capable of recording a voter's choice to vote by post at UK Parliamentary elections only. In that event, the voter would not be recorded as an absent voter at local elections. However, the software system would take the choice also to apply to EU Parliamentary elections – presumably because software designers had concluded that the use of the word

<sup>9</sup> Representation of the People Act 2000, sch 4 paras 3(4), 4(6), 5(1) and 5(2); European Parliamentary Elections Regulations SI 2004 No 293, sch 2 paras 3(4), 4(7) and 5(1) and (2); Scottish Parliament (Elections etc.) Order SI 2010 No 2999, arts 8(4) and 9(5) and (8); National Assembly for Wales (Representation of the People) Order SI 2007 No 236, arts 8(3), 9(6) and 10(1) and (2). As we noted, there is no periodic postal voters record for PCC elections, which seek to "import" lists from other elections: Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 2 para 4(2).



“parliamentary” meant that this must be the intention.

- 6.23 The implementation of the legislation is, unsurprisingly, confused. This is a result of the legislative approach taken. The practice of using application forms which apply to all elections is a pragmatic solution which compensates for the unsatisfactory features of the legislation. It is not clear to us why in principle the law permits an elector to apply to be a postal voter for a certain type of election, and an in-person voter for another election, even if both elections take place on the same day. This is not only administratively onerous, but divorced from practical reality. It is difficult to conceive of a reason why an elector would choose to cast an absent vote at one election, but to vote in person in another election on the same day.
- 6.24 Our enquiries of administrators threw up one factual example of an elector who chose to be a postal voter at local elections only, and not UK Parliamentary elections. The elector was registered in two constituencies and wished to vote at simultaneous local elections in both, which required him to vote by post at one of them. He only proposed to vote in one UK Parliamentary constituency and thought he would be committing an offence if he sought a postal vote in respect of his vote at the second constituency (wrongly, since only multiple voting is an offence). This exceptional case can be dealt with in another way; we are provisionally proposing, in our chapter on registration, the designation by voters registered in two constituencies of the constituency in which they will vote at General elections.<sup>10</sup>

#### ***Entitlements to a proxy vote and records of proxy voters***

- 6.25 Another way of casting an absent vote is for an elector who is unable to vote in person on polling day to appoint another person to do so on their behalf. Schedule 4 to the 2000 Act also governs entitlement and applications to vote by proxy.<sup>11</sup> The main difference with postal voting is that legal criteria must be met in order to vote by proxy.
- (1) Periodic proxy voting is available on the ground of blindness or some other disability, occupation, employment or attendance on a course, registration as a service or overseas elector, anonymous registration or registration at an address from which travel to a polling station would require a journey by sea or air.
  - (2) Proxy voting at a specific election is available on the ground that the voter’s circumstances on the date of the poll will be or are likely to be such that the voter cannot reasonably be expected to vote in person at their polling station.<sup>12</sup>
- 6.26 If the required information has been provided, and the registration officer is satisfied that the elector is eligible for a proxy vote, the application will be granted

<sup>10</sup> See Chapter 4 Registration, paras 4.73 to 4.77.

<sup>11</sup> Representation of the People Act 2000, sch 4 paras 3 and 4; European Parliamentary Elections Regulations SI 2004 No 293, sch 2 paras 3 and 4; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, arts 8 and 9; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, arts 8 and 9.

and the elector's details entered into the relevant record of proxy voters. The record of periodic proxy voters is then combined with a list of specific proxy voters to generate the proxy voters' list which governs entitlement to a proxy vote for a particular election.<sup>13</sup> The same problem of proxy voting being election-specific arises as with postal voting.

### **Absent voting in Northern Ireland**

- 6.27 Absent voting in Northern Ireland for UK Parliamentary elections remains governed by sections 5 to 9 of the Representation of the People Act 1985 ("the 1985 Act"), together with the Representation of the People (Northern Ireland) Regulations 2008 ("the 2008 Regulations"). Absent voting at elections to the European Parliament, local government, and the Northern Ireland Assembly is governed by election-specific measures.<sup>14</sup>
- 6.28 The chief difference from the law in Great Britain is that electors must satisfy legal criteria for an absent vote, whether by post or proxy. Postal voting is not available on demand. Entitlement to an absent vote in Northern Ireland is based on the satisfaction of the same conditions as apply to proxy voting in Great Britain. Anonymously registered electors, a recently introduced category, may only cast an absent vote by post.<sup>15</sup>
- 6.29 The distinction between "periodic" and "specific" applications for an absent vote obtains in Northern Ireland. The grounds of eligibility for a periodic postal or proxy vote are based on the grounds discussed further above. One distinct difference is that an application for a "periodic" absent vote can only be for an indefinite period.
- 6.30 Similarly to Great Britain, absent voting applications and records in Northern Ireland are tied by the legislation to specific elections. No attempt is made to enable applications for one type of election to be "combined" with others, as we saw was done in varying ways in the legislation in Great Britain. At Northern Ireland Assembly elections (like PCC elections), it is not possible to apply for an absent vote other than for a specific election; but electors entered on the relevant record of absent voters for local elections in Northern Ireland will automatically be included in the postal voters' list for Northern Ireland Assembly elections.<sup>16</sup>

### **Reforming the legal framework for absent voting**

- 6.31 The current legislation is inflexible and election-specific, resulting in the accretion of legislative texts governing absent voting. To a large extent the legislation exists separately from the principal pieces of legislation governing elections. This is a

<sup>12</sup> Representation of the People Act 2000, sch 4 paras 3(2)(a), 3(4)(c) and 4(2)(a).

<sup>13</sup> Representation of the People Act 2000, sch 4 paras 3(4), 4(6), 5(1) and 5(3).

<sup>14</sup> European Parliamentary (Northern Ireland) Regulations SI 2004 No 1267; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 2; Local Elections (Northern Ireland) Order SI 1985 No 454.

<sup>15</sup> Representation of the People Act 1985, s 5(5AA), as inserted by article 5 of the Anonymous Registration (Northern Ireland) Order SI 2014 No 1116.

<sup>16</sup> Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1 applying s 7 of the Representation of the People Act 1985 with modifications.

product of history, and not how one would structure the law on absent voting to cater for the current range of elections. We currently envisage assimilating the rules into a single set of measures. We do not propose altering the criteria of entitlement to an absent vote in Great Britain or Northern Ireland, which reflect political policy choices.

***A holistic framework for entitlements to absent votes***

- 6.32 The absent voting mechanism is part of the electoral structure. Our provisional view is that there should be a single set of rules governing entitlements to postal and proxy votes, contained in primary legislation. In addition, a single set of rules contained in secondary legislation should govern the administration, by registration officers, of postal and proxy voters. Such a holistic approach would provide the basis for enrolment as an absent voter at all elections, present and future. It would also simplify the task of policy makers seeking to introduce a new type of election or call a referendum. As the law presently stands, these would require legislation setting up a new discrete absent voting regime or providing specifically for the application to the new poll of an existing set of absent voting records and lists.
- 6.33 Our provisionally preferred approach would involve abolishing the choice currently given by the 2000 Act to be an absent voter at parliamentary elections or local government elections only, as well as the choice to apply for an absent vote specific to certain other types of elections. We have noted that some registration officers' forms, notwithstanding the strict requirements of the law, only offer voters an across-the-board option to be an absent voter. We do not currently consider that the choice to be an absent voter only at some types of election serves any useful purpose.

***Records and lists***

- 6.34 The current legislative approach ties entitlement to an absent vote to "records" (for periodic absent voters), with a view to producing absent voting lists which will govern the available mode of voting at the poll. In practice, no physical lists are kept; software is used to record absent voting status, and the period over which or polling day to which it applies. We consider that the law should simply require registration officers to record absent voter status in such a way that absent voters lists can be produced at future elections. In our view, this would not change electoral practice.

**Provisional proposal 6-1: Primary legislation should set out the criteria of entitlement to an absent vote. Secondary legislation should govern the law on the administration of postal voter status.**

**Provisional proposal 6-2: The law governing absent voting should apply to all types of elections, and applications to become an absent voter should not be capable of being made selectively for particular elections.**

**Provisional proposal 6-3: Registration officers should be under an obligation to determine absent voting applications and to establish and maintain an entry in the register recording absent voter status, which can be used to produce absent voting lists.**

## **THE ADMINISTRATION OF ABSENT VOTER STATUS**

- 6.35 We presently turn to the law governing the administration of absent voter status by registration officers, starting with postal voting before considering proxy applications and appointments. We consider first the law in Great Britain.

### **Postal voter status in Great Britain**

#### ***Content and form of applications to vote by post***

- 6.36 No form for applying to vote by post is prescribed. The law requires that applications must contain the elector's full name, registration address and the address to which the ballot paper should be sent and state (if it is the case) that the applicant is or has applied to be an anonymously registered voter.<sup>17</sup>

#### ***Personal identifiers to be in prescribed format***

- 6.37 In addition, the signature and date of birth of the applicant must be provided. These are generally referred to as "personal identifiers". These must conform to certain formal requirements, to enable them to be scanned and electronically recorded, for use in "verification" during the postal voting process.<sup>18</sup>

#### ***Personal identifiers record***

- 6.38 Registration officers must keep a personal identifiers record containing postal voters' signatures and dates of birth. The record must be kept for the period of 12 months either from the date an elector is removed from the record of periodic postal voters, or in the case of an elector applying for a postal vote at a specific election, from the date of that election.<sup>19</sup>

#### ***Fresh personal identifiers***

- 6.39 One issue with postal voting is the adequacy of personal identifiers. They are the means by which voters, when casting a vote by post, provide evidence that they are the person who applied for a postal vote. Accordingly, the law obliges registration officers to seek fresh signatures at five yearly intervals from periodic postal voters. If the elector fails or refuses to provide a fresh signature, their entitlement to a postal vote ceases six weeks after the date of the first notice, and the officer must remove the elector from the list of postal voters, and send a notice to the elector informing them of this. A voter thus removed may make a fresh application.<sup>20</sup>

#### ***Postal ballots to be sent other than to registered address***

- 6.40 Where electors wish their postal ballot paper to be sent to a different address from that at which they are registered, they must state why their circumstances will be or are likely to be such that the ballot paper should be sent to an alternative address. The same requirement applies where electors who are

<sup>17</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 51(2).

<sup>18</sup> Representation of the People Act 2000, sch 4 paras 3(1)(b) and 4(1)(b); Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 51(3A).

<sup>19</sup> Representation of the People Act 2000, sch 4 paras 3(9) and 4(6); Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 61B.

already postal voters wish their ballot paper to be sent to a different address from that in the record.<sup>21</sup>

6.41 The Electoral Commission guidance repays quoting verbatim.

5.8 The regulations make no provision for a [registration officer] to reject an application if they are not satisfied with the explanation provided for requesting redirection. This being the case, it is recommended that for the purposes of determining applications [the officer] should accept postal vote applications at face value if an explanation for redirection is given.... [The elector] cannot simply say, for example, “because I prefer it that way”.

5.9 There are many reasons why a person may wish their postal vote to be sent to an alternative address: they may be on holiday, be in hospital, have post sent to their work address, and so on. If no explanation...is given, [a registration officer] may wish to check with the elector and obtain an explanation, or could choose to reject the application on the grounds that it does not meet the prescribed requirements, notifying the elector accordingly.

5.10 Levels of proxy and postal redirections should be monitored and applicants asked for more information if necessary.<sup>22</sup>

***Waiver of requirement for a signature***

6.42 Registration officers may dispense with the requirement that applications for a postal or proxy vote contain the elector’s signature. Registration officers may do so if satisfied that the applicant is, by reason of any disability or inability to read or write, unable either to provide a signature or to sign their name in a consistent and distinctive way. Any waiver request must give the reason why the elector is unable to provide a signature, and include the name and address of any person who has assisted the elector to complete the application.<sup>23</sup>

6.43 The legislation gives no instruction on how registration officers should go about deciding whether there is a good reason for dispensation. The Electoral Commission guidance emphasises the potential for waivers to be used to avoid the safeguards surrounding postal voting, and encourages registration officers to take active steps to make sure that the security measures work to their fullest extent. One such step may be to require the person who assists the elector requesting the waiver to sign a declaration confirming that the elector is unable to provide a signature or consistent signature, on a form which could also draw attention to the offence of providing false information in connection with an application for an absent vote.

<sup>20</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 60A.

<sup>21</sup> This facility does not extend to anonymous electors: Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 51AA and 51B.

<sup>22</sup> Electoral Commission, *Managing electoral registration in Great Britain: Guidance for Electoral Registration Officers, Part G – Absent Voting* (July 2013), paras 5.8 to 5.10.

- 6.44 The Electoral Commission recognises, however, that registration officers cannot require attestation by medical professionals (such as is used to determine applications to vote by proxy), nor are they able to investigate applications or qualified to make medical judgements. In the end, it is the registration officer's decision and if they are not satisfied after appropriate enquiry that the request is well-founded, they should refuse it. Officers should remain vigilant to detect any trends emerging from waiver requests, such as inexplicably large numbers of applications assisted or signed by one person or relating to one street or area.<sup>24</sup>
- 6.45 How registration officers approach this task will affect how effective personal identifiers are as a safeguard against fraud. On the other hand, this is a measure designed to offer disabled electors access to absent votes on the same basis as everyone else. As the Association of Electoral Administrators has put it:

Guidance issued by the Electoral Commission offers as a practical solution a declaration by the person assisting the applicant that the elector in question meets the above criteria.

Whilst it is absolutely right that people with a genuine disability are supported to apply for the means of voting which suits them best within the current provisions, the lack of a statutory declaration means that the waiver continues to present a potential risk to the integrity of the process.<sup>25</sup>

- 6.46 The Association recommended that applicants requesting a waiver should be required to have their applications attested in the same way that proxy applications must be.

#### ***Mode of delivery of the application***

- 6.47 Electoral law does not make any provision beyond stipulating that applications be made in writing, and requiring receipt of an application by the registration officer. It need not be delivered or mailed by the applicant personally, and (with the exception of applications relating to Scottish Parliamentary elections and local government elections in Scotland) may be submitted electronically.<sup>26</sup>
- 6.48 Guidance for Electoral Registration Officers produced by the Electoral Commission states that scanned copies of a postal or proxy vote application form, attached to an email, should be accepted by a registration officer so long as the personal identifiers (signature and date of birth) satisfy the formal

<sup>23</sup> Representation of the People Act 2000, sch 4 paras 3(8), 4(5), and 7(11); Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 51(2)(f) and 51A(b).

<sup>24</sup> Electoral Commission, *Managing electoral registration in Great Britain: Guidance for Electoral Registration Officers, Part G – Absent Voting* (July 2013), paras 6.2 to 6.13.

<sup>25</sup> Association of Electoral Administrators – *Beyond 2010: The future of electoral administration in the UK* (July 2010), p 43.

<sup>26</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 5 and 51(3); Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations SSI 2007 No 170, reg 3(3); Scottish Parliament (Elections etc..) Order SI 2010 No 2999, art 91 and sch 3 para 1(1).

requirements in the legislation.<sup>27</sup>

### ***Electronic signatures***

- 6.49 Some of the current secondary legislation appears to contemplate the use of electronic signatures instead of written ones, provided that the electronic signature is certified.<sup>28</sup> An electronic signature is defined as anything in electronic form which is incorporated into or associated with an electronic communication for the purpose of establishing the authenticity or integrity of that communication or both. This only applies to requirements as to a signature which are contained in the Regulations, and seems to have been overtaken by the amendment made to the 2000 Act with effect from 1 January 2007, which inserts the requirement of a signature into the Act itself.<sup>29</sup> We presently consider that the reformed legislation should not preclude the use of electronic signatures in the future, though we doubt their time has yet arrived in the context of electoral administration.

### ***The decision of the registration officer***

- 6.50 So long as an application for a postal vote meets the requirements set out in statute, the registration officer “shall” grant the application, and has no discretion to refuse it. Upon granting an application the officer must notify the elector except in the case of applications for absent voting at Scottish Parliamentary and local elections in Scotland, where notification is only mandatory “where practicable”.<sup>30</sup> A registration officer who refuses an application for a postal vote must notify the elector and give a reason for the refusal. At Scottish Parliamentary elections this provision only applies to applications for a periodic postal vote.<sup>31</sup>

### ***Appeals***

- 6.51 A person may appeal against the decision of the registration officer, but must do so within 14 days of notification of the refusal of their application.<sup>32</sup> This is the same appeals system as applies to decisions relating to applications to register as an elector. We consider registration appeals in chapter 4.<sup>33</sup> No provision is made for an appeal in the rules on postal voting at Police and Crime Commissioner elections.

### ***Deadline for applications to be a postal voter***

- 6.52 The administration of postal voters is a continuous process. However, in order for

<sup>27</sup> Electoral Commission, *Managing electoral registration in Great Britain: Guidance for Electoral Registration Officers, Part G – Absent Voting* (July 2013), para 1.18.

<sup>28</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 6.

<sup>29</sup> Representation of the People Act 2000, sch 4 para 3(1)(b).

<sup>30</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 57(1).

<sup>31</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 3 para 10(1) and (4); Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations SSI 2007 No 170, reg12(1);

<sup>32</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 57(4) and 58(1).

<sup>33</sup> See Chapter 4 Registration, para 4.127.

an application to be effective to enable an elector to vote by post at a forthcoming election, it must be made by a certain deadline. Registration officers must “receive” a postal voting application by 5pm on the 11th day before the poll, failing which they must refuse the application as regards the particular election.<sup>34</sup> The practice, particularly on deadline day, is for the registration officer’s staff to mark the time of receipt of postal vote applications. The Association of Electoral Administrators has reported a tendency for parties to collect completed postal voting applications from their supporters and deliver these to registration officers, often shortly before the deadline for applications.<sup>35</sup>

### **Proxy voter status in Great Britain**

- 6.53 In general, registration officers perform the same function and have similar powers and duties when considering applications to vote by proxy; their duty to maintain records and lists applies equally to proxy voting.<sup>36</sup>

### ***Content of the application to vote by proxy***

- 6.54 There is no prescribed proxy voting application form; regulations prescribe its contents. The rules governing the form of personal identifiers, and the provision of fresh signatures at five yearly intervals, are the same for proxy voting as we have described for postal votes.<sup>37</sup>

### ***Attestation of eligibility for a proxy vote***

- 6.55 A corollary of the fact that applicants must identify a ground of entitlement to a proxy vote is the requirement that their application must be attested to – in the case of disability, by listed health professionals and other professionals involved in the provision or management of care homes. Where the ground relates to absence for reasons of work or study, details must be furnished and attested to by an employer or course provider. Evidence of receipt of certain benefits or registration as a blind person can corroborate an application instead of attestation.<sup>38</sup> No attestation is required where entitlement is evident from the applicant’s registered address, or if the application is to vote by proxy at a specific election.

### ***Deadlines relating to proxy voting***

- 6.56 In order to be effective for any impending election, applications to vote by proxy

<sup>34</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 56(1).

<sup>35</sup> Association of Electoral Administrators, *A question of timing? The administration of the Police and Crime Commissioner elections in England and Wales* (February 2013), para 6.57; Electoral Commission, *Electoral fraud in the UK: Evidence and Issues Paper* (May 2013), para 4.17; Association of Electoral Administrators, *Beyond 2010: The future of electoral administration in the UK* (July 2010), p 42.

<sup>36</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 57(2) and 60; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 3 paras 10(2) and 13; Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations SSI 2007 No 170, reg 12(2).

<sup>37</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 51(2), 60A.

<sup>38</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 52 to 55.



must ordinarily be received by 5pm on the sixth day before polling day. Where an elector is entered into the postal voters list, the deadline to move the entry from that list to the proxy voters list is the same date as the deadline for postal voting applications, apart from for Police and Crime Commissioner elections where the deadline is 5pm on the sixth day before polling day.<sup>39</sup>

- 6.57 An application to vote by proxy at a specific election may be made after the ordinary deadline in two circumstances: where the applicant becomes disabled after the ordinary deadline for proxy applications, is a mental health patient who is not detained, or is unable to vote on the ground of occupation, service or employment. Such an application may be received up to 5pm on polling day. In such a case, similar attestation requirements apply as in the case of applications for a periodic proxy vote, save that the attestor must additionally state, to the best of their knowledge and belief, the date upon which the applicant became disabled, since that must postdate the deadline for applying to vote by proxy.<sup>40</sup>

### ***Appointing proxies***

- 6.58 An application to be a proxy voter must be accompanied by the appointment of a proxy who is willing and able to vote on the voter's behalf, stating their full name and address, and their family relationship to the applicant, if any. Unlike the case with other applications in the field of absent voting, a specified form is to be used, called a "proxy paper". This is prescribed; a form to the like effect may be used.<sup>41</sup> The Scottish Parliament (Elections etc.) Order 2010 allows the registration officer to combine a proxy paper for a Scottish Parliamentary election with one issued in respect of any other type of election, meaning that the same form may be used to appoint the same person as proxy for multiple elections.<sup>42</sup> There is no equivalent provision for other elections, although in practice the same proxy is likely to be appointed for other elections.

### ***Qualifications for proxy appointment***

- 6.59 The basic principle is that any person who satisfies the relevant franchise and is not subject to any disqualification from voting is capable of being appointed proxy to vote for another. By a recent amendment of the law, a person must now also be a registered elector before he or she can be appointed as proxy. A proxy is not entitled to vote as proxy on behalf of more than two electors, "of whom that person is not the spouse, civil partner, parent, grandparent, brother, sister, child or grandchild".<sup>43</sup>

### ***Voting by post as proxy in Great Britain***

- 6.60 A person appointed to vote as a proxy may apply to vote by post as proxy, by

<sup>39</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 56; Police and Crime Commissioner Elections Order SI 2012 No 1917 sch 2 para 16(1).

<sup>40</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 55(3) and 56(3A).

<sup>41</sup> Representation of the People Act 2000, sch 4 para 6(9); Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 4(2) and 57(3) and sch 3.

<sup>42</sup> Scottish Parliament (Elections) Order SI 2010 No 2999, art 10(8) and sch 3 para 10(3).

<sup>43</sup> Representation of the People Act 2000, sch 4 para 6.

submitting an application by 5pm on the 11th day before the poll.<sup>44</sup> The application must include the full name, address, and personal identifiers of the proxy applying to vote by post as proxy, together with the name and address of the elector for whom he or she is appointed to vote.<sup>45</sup>

### **Absent voter status in Northern Ireland**

- 6.61 The administration of absent voting status relies on similar concepts to those used in Great Britain, but there are notable differences, which we focus on.

### ***Personal identifiers in Northern Ireland***

- 6.62 Personal identifiers include national insurance numbers. They must match those given at the point of applying to become a registered elector. The prescribed form of personal identifiers, and provision for waiving the signature requirement, is substantially the same as that for postal and proxy voters in Great Britain; personal identifiers must likewise be checked when postal votes are received.<sup>46</sup>
- 6.63 A problem may arise if an elector, having provided a signature at the point of registration, subsequently becomes unable to sign consistently or distinctively. That elector is not entitled to request a waiver of the requirement to provide a signature on a postal vote application or declaration of identity. Advice from the Electoral Office for Northern Ireland recommends that in such a situation the elector should apply for a proxy vote, as no signature is necessary in order to cast a vote by proxy.

### ***Attestation in Northern Ireland***

- 6.64 All applications for an absent vote in Northern Ireland must be attested by a person listed in the relevant legislative provision. This includes applications for an absent vote at a specific election.<sup>47</sup>
- 6.65 Applications which request a ballot paper to be sent to an address different from that in respect of which the applicant is registered or that listed in the record of postal voters must state why the applicant's circumstances are or are likely to be

<sup>44</sup> Representation of the People Act 2000, sch 4 para 7; Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 56(1).

<sup>45</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 51(2).

<sup>46</sup> Representation of the People Act 1983, ss 10(4A) and (4B), 10A(1A) and (1B), 13A(2A) and (2B), sch 1 r 45(2)(b) and (2A) as they apply in Northern Ireland; Representation of the People Act 1985, ss 6(1) and 7(1); Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 87. European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, arts 8(1) and 9(1); Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1 applying Representation of the People Act 1985, s 7(1); Local Elections (Northern Ireland) Order SI 1985 No 454, sch 2 paras 1(1) and 2(1).

<sup>47</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, regs 57 to 59; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 2 paras 4 to 6; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 2, applying Representation of the People (Northern Ireland) Regulations, reg 59; Local Elections (Northern Ireland) Order SI 1985 No 454, sch 2 paras 6 to 8.

such that their ballot paper should be sent to that address.<sup>48</sup> There is, however, no provision in the regulations governing European Parliamentary elections held in Northern Ireland for sending a ballot paper to a different address.

- 6.66 A proxy paper is prescribed except for Northern Ireland Assembly elections.<sup>49</sup>

***Applications to vote by post as proxy in Northern Ireland***

- 6.67 An application to vote by post as a proxy for an indefinite period must be granted if the person appointed as proxy is included in the record of periodic absent voters or if the address provided by the applicant for the ballot paper to be sent to is not in the same area as the elector's address. At European Parliamentary and local elections in Northern Ireland, a proxy may vote by post where their address is in a different ward to that of the elector.<sup>50</sup>

***Deadlines relating to absent voting in Northern Ireland***

- 6.68 Applications to vote by post, by proxy or by post as proxy must be received by 5pm on the 14th day before polling day. Emergency applications to vote by post or proxy in respect of a particular election may be made up to 5pm on the sixth day before polling day, if accompanied by the correct attestation.<sup>51</sup>

***Special Polling Stations in Northern Ireland***

- 6.69 Section 10 and schedule 1 to the Representation of the People Act 1985 provide for another permissible way to cast a vote in Northern Ireland: by voting in a "special polling station". The Secretary of State may bring the scheme for special polling stations contained in schedule 1 into force if he or she considers it necessary to prevent abuse of the system of postal voting, where applications are made in respect of a specific election. Under the provisions of schedule 1, a person may apply to vote at a special polling station under the same conditions as govern an application for an absent vote for a specific election.<sup>52</sup> A successful applicant will be allocated a special polling station by the Chief Electoral Officer

<sup>48</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, regs 55A and 55B; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 2 applying Representation of the People (Northern Ireland) Regulations, regs 55A and 55B; Local Elections (Northern Ireland) Order SI 1985 No 454, sch 2 paras 5B and 5C.

<sup>49</sup> Representation of the People Act 1985, s 8(8); Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, regs 4(2) and 62 and sch 3 form E; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, regs 2A(2) and 10(8) and sch 2 para 9; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1 applies s 8 of the 1985 Act, thus requiring the use of a proxy paper at Assembly elections, but does not prescribe the form of proxy paper.

<sup>50</sup> Representation of the People Act 1985, s 9(4); European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 11(4); Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1 applying Representation of the People Act 1985, s 9; Local Elections (Northern Ireland) Order SI 1985 No 454, sch 2 para 4(4).

<sup>51</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 61; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 2 para 8; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 2 applying Representation of the People Regulations 2008, reg 61; Local Elections (Northern Ireland) Order SI 1985 No 454, sch 2 para 11.

<sup>52</sup> Representation of the People Act 1985, sch 1 para 1(2).

and may only vote in person at that polling station.<sup>53</sup>

- 6.70 Though the Electoral Administration Act 2006 made two minor amendments to the special polling stations scheme,<sup>54</sup> schedule 1 has never been brought into force. The applicable polling rules remain dated; they envisage the use of counterfoils rather than a corresponding number list, for example. The special polling stations scheme is a unique provision in electoral law which seems to have little relevance in the modern context. Our present view is that there is no case for its remaining on the statute book.

**Provisional proposal 6-4: The special polling station procedure in Northern Ireland under schedule 1 to the Representation of the People Act 1985 should be repealed.**

**Reforming the administration of absent voter status**

- 6.71 As to postal voting status, the key issues for reform seems to us to concern standard forms for absent voting applications and waiver of the requirement to provide a signature.

***Informing voters and using standard forms***

- 6.72 There are no prescribed forms for applying for a postal or proxy vote. This means any person (or party or campaigner) can design and use their own form, to satisfy their immediate concern. There is a suggestion that this has caused problems in the past; at the May 2011 referendum on the parliamentary voting system, one of the designated campaigns sent voters a bespoke form. This form pertained only to postal voting at the referendum which was the campaign's concern. Yet that referendum coincided, and polls were combined, with some local government elections. Voters who used the bespoke form did not also obtain a postal vote for the local government election that was combined with it.
- 6.73 Furthermore, while there is no prescribed application form, there is a prescribed format for the giving of personal identifiers, so that they can be scanned and used to verify postal votes. Given that at least part of the application is subject to strict requirements as to form, we think it less of a leap for the entire form to be prescribed. These are voter-facing forms which should present clear options to the electors, and have been user-tested and professionally designed.
- 6.74 Our provisional view is that absent voting application forms should be prescribed. They should:
- (1) ensure that the statutory information is relayed; for example, if (contrary to our provisional proposal) voters' ability to choose to be an absent voter at certain types of election only is to be retained, voters should be presented with a list of the types of election in respect of which they are eligible to apply, and can choose to apply for an absent vote at all or some of them;

<sup>53</sup> Representation of the People Act 1985, sch 1 para 1(1) and (3).

<sup>54</sup> Electoral Administration Act 2006, sch 1 para 135; Representation of the People Act 1985, sch 1 paras 1(6) and 7(2).

- (2) ensure that voters are informed about their choices and what the application means; and
- (3) elicit the information necessary to facilitate the administration of absent voting applications by registration officers.

6.75 There are two arguments against introducing prescribed forms.

- (1) The first is that it would hamper campaigners' drive to "get out" their voters.
- (2) The second is that it introduces rigidity where the law is currently flexible.

6.76 We are not presently convinced that campaigners would be prejudiced by using a prescribed, as opposed to a bespoke, application form. If anything, it would improve the efficacy of their "get out the vote" drive by ensuring that the form is fit to achieve its purpose. The registration officer should be under an obligation to supply application forms to anyone requesting them. We provisionally consider that the second objection would be met by making the requirement of adherence to a prescribed form one of substantial adherence.

**Provisional proposal 6-5: Absent voting applications should substantially adhere to prescribed forms set out in secondary legislation.**

***Applications for waiver of the requirement for a signature should require attestation***

6.77 In order for personal identifiers to prevent fraud, they must be supplied wherever they can be. We noted above that registration officers may dispense with the requirement for a signature. We highlighted the difficulty in guiding registration officers as to the exercise of this discretion and an emergent practice of having those who assist the elector to complete the application sign a declaration. The AEA has recommended that applicants requesting a waiver should be required to have their applications attested in the same way that proxy applications must be.

6.78 Our present view is that requiring attestation is better than simply leaving the matter to registration officers. We provisionally propose that the attestation system which currently applies to proxy and emergency absent votes should be extended to those who cannot sign or do so in a consistent way.

**Provisional proposal 6-6 Requests for a waiver of the requirement to provide a signature as a personal identifier should be attested, as proxy applications currently must be.**

## **THE POSTAL VOTING PROCESS**

6.79 The postal voting process is currently governed either by the three sets of registration regulations covering England and Wales, Scotland and Northern

Ireland or by schedules to discrete election-specific provisions.<sup>55</sup> In substance their content within Great Britain or Northern Ireland is identical and we refer to one set of regulations for ease of presentation.

### **Volume, complexity and fragmentation**

- 6.80 The legislation governing the postal voting process is detailed and complex. Part V of the 2001 Regulations which govern postal voting in Scotland and England and Wales contains 31 regulations, some of them very lengthy. Moreover, these regulations need to be read with the relevant election rules, with other parts of the 2001 regulations (including prescribed forms), and with schedule 4 to the 2000 Act.
- 6.81 The Electoral Commission publishes guidance for every election type, a chapter of which is dedicated to absent voting. The guidance given in advance of the May 2010 General election ran to 51 pages, 49 of which were dedicated to postal voting. Electoral administrators must additionally refer to the Commission's performance standards for returning officers, in particular concerning planning for an election, and absent voting, which specifically stipulate the production of postal vote stationery, the issuing of postal voting papers and the receipt and opening of postal votes. Returning officers are required to maintain confidence and transparency in postal voting, and give voters sufficient time to return their postal votes.<sup>56</sup>
- 6.82 The substantive law governing postal voting is, nevertheless, remarkably consistent across election types within Great Britain and Northern Ireland respectively. The same policies apply within Great Britain and in Northern Ireland and we see, in principle, no reason why there should be any substantial divergence on how to administer the postal voting process from one election to another.

### **Adherence to the prescribed process and legal validity of postal votes**

- 6.83 Before we consider the law specifically governing the postal voting process, it is important to note an election rule which is replicated for every election.
- 6.84 Rule 45(1B) of the Parliamentary Elections Rules, for example, governs when a postal vote is valid and taken to be returned, so that it can be counted. It provides that:

a postal ballot paper shall not, in England, Wales or Scotland, be taken to be duly returned unless –

<sup>55</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341; Representation of the People (Scotland) Regulations SI 2001 No 497 (substantially identical to those in SI 2001 No 341); Representation of the People (Northern Ireland) Regulations SI 2008 No 1741; European Parliamentary Elections Regulations SI 2004 No 293, sch 2 pt 4; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 2 pt 2; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 3 arts 7 to 9 and 12; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 3; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 2; Local Elections (Northern Ireland) Order SI 1985 No 454, sch 2 pt 3; Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 2 pt 3.

<sup>56</sup> Electoral Commission, *Performance standards for Returning Officers in Great Britain* (December 2011), paras 2.1 and 2.3.

(a) it is returned [by hand or post]<sup>57</sup> and reaches the returning officer or a polling station in the constituency before the close of the poll, and

(b) the postal voting statement, duly signed, is also returned in [the same manner before the close of poll].

(c) the postal voting statement also states the date of birth of the elector or proxy<sup>58</sup>...

(d) in a case where steps for verifying the date of birth and signature of an elector or proxy have been prescribed, the returning officer (having taken such steps) verifies the date of birth and signature of the elector or proxy.<sup>59</sup>

6.85 It follows that, so far as the eligibility of a postal vote to be counted is concerned, strict adherence by the voter to the prescribed postal voting process which we outline immediately below is not necessary. The key requirement is in fact that a postal ballot paper and a matching postal voting statement duly signed and verified both reach the returning officer or a polling station before the close of poll.

#### **Outline of the rules governing the postal voting process**

6.86 Notwithstanding the rule above, detailed rules seek to prescribe both how postal voting papers are issued (sent to voters) and the process to be followed upon receipt. By “postal voting papers” we refer generally to two substantive papers: the postal voting statement and the postal ballot paper. These are sent to electors on the postal voters list in “postal voting packs”, the contents of which must include an “inner” envelope for insertion of the postal ballot paper and an “outer” envelope for insertion of the inner envelope and postal voting statement together. The voter is instructed to mark the ballot paper secretly and place it in the inner envelope and to provide personal identifiers (signature and date of birth) on the postal voting statement, and to return all of these in the outer envelope by post to the returning officer, or by hand to a polling station or the returning officer’s office.<sup>60</sup>

#### ***Issue of postal voting packs***

6.87 Only the returning officer and his or her appointed clerks attend postal vote issuing sessions. In practice, the postal vote issuing process may be contracted out to a specialist printer. The Electoral Commission’s guidance stresses that the returning officer must be satisfied that external contractors can effectively and transparently carry out the issuing of postal votes, and must monitor the process. Postal voting packs are issued as soon as practicable. If an elector changes their

<sup>57</sup> The rule requires return in the prescribed manner; reg 79 of the Representation of the People (England and Wales) Regulations SI 2001 No 341 prescribes return by post or hand to the returning officer, or delivery by hand to a polling station.

<sup>58</sup> Thus also covering the case where a person is voting as proxy by post.

<sup>59</sup> Representation of the People Act 1983, sch 1 r 45.

<sup>60</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 66 and 74(3).

postal voting status after one has been issued, the returning officer must cancel the ballot paper.<sup>61</sup>

### ***Receipt of postal votes***

- 6.88 Once returned, postal voting papers are placed in a “postal voters’ ballot box”, where they remain until opened at opening sessions held throughout the election, culminating in a final session after the close of polls. At these, postal voting packs are opened.

### ***Verification of personal identifiers***

- 6.89 The first stage is to look inside the outer envelope for a postal voting statement whose number matches that on the inner envelope. If so, at the next stage the personal identifiers are verified by scanning the postal voting statement and checking the date of birth and signature it contains against the personal identifiers record. The rules do not prescribe how this is done. In practice, computer software checks the personal identifiers and flags those it finds defective for a visual check by an administrator (often with forensic training) who either confirms the rejection or approves the personal identifiers. If identifiers are rejected, the postal voting statement and the ballot paper are placed in a receptacle of rejected ballot papers. If the identifiers match the record, the postal ballot paper (still in its inner envelope) is placed in a postal ballot box for opening and counting at the count.<sup>62</sup> The correct calibration of the software is crucial; in the case of *Ali v Bashir*, Commissioner Mawrey QC was critical of the fact that some forged signatures were approved by a software system set at 85% sensitivity.<sup>63</sup>

### ***Reconciling mismatched postal votes***

- 6.90 The practices of voters, particularly in households, will frequently result in mismatched ballot papers and postal voting statements arriving in the same outer envelope, or other mishaps. The rules therefore prescribe that if the postal voting statement is not found inside the outer envelope, the returning officer’s staff are entitled to open the inner envelope to ascertain whether the statement is inside that envelope. If not, or if the postal voting statement does not match the ballot paper, the inner envelope must be marked “provisionally rejected” and its contents placed in the receptacle for rejected votes.<sup>64</sup>

### ***Keeping records and lists***

- 6.91 Throughout this process, the returning officer keeps and maintains a number of

<sup>61</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 67, 68, 71, 72, and 78A. Electoral Commission, *Guidance for Police and Crime Commissioner Elections, Part D: Absent Voting* (2012), para 3.6.

<sup>62</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 82 to 86. Electoral Commission Guidance for PCC elections part B para 3.19; see also Electoral Commission, *Checking signatures at postal vote openings* [http://www.electoralcommission.org.uk/data/assets/pdf\\_file/0008/109079/Forensic-Science-guidance.pdf](http://www.electoralcommission.org.uk/data/assets/pdf_file/0008/109079/Forensic-Science-guidance.pdf) (last accessed on 2 December 2014).

<sup>63</sup> *Ali v Bashir* (unreported) 29 July 2013, at paras 20, 21 and 156.

<sup>64</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 85A and 86.



lists, in order to create an audit trail. The lists include:

- (1) a corresponding number list, which is compiled at the point of issue of a postal ballot paper;
- (2) a marked copy of the postal voters list noting against an elector's name whether:
  - (a) a ballot paper has been issued (without recording its number); and
  - (b) a postal voting statement has been received from the elector;
- (3) two lists of provisionally rejected postal votes recording the ballot paper number where:
  - (a) the ballot paper has been returned without a postal voting statement; or
  - (b) a postal voting statement has been returned alone; and
- (4) lists of spoilt and reported lost postal ballot papers.

### ***Transparency***

- 6.92 Underpinning the rules on the postal voting process is the principle that its administration should be transparent, subject to maintaining the secrecy of the ballot. This is achieved by giving candidates and their agents the right to scrutinise proceedings at postal vote opening sessions, of which they must be given at least 48 hours' notice, and to take proper precautions to prevent any person from seeing the votes marked on the ballot papers and from viewing the corresponding number list compiled when issuing ballot papers.<sup>65</sup>

### ***Reissuing postal votes***

- 6.93 The law enables postal voting papers to be reissued if they are lost or unintentionally spoiled, or a procedural error needs to be corrected. New postal voting documents may be handed or sent to an elector before 5pm on polling day (they may be reissued after 5pm but only if they are handed to the elector). If applicants claim to have lost or not received their postal ballot paper, they must identify themselves as the voter in question. This is presumably to avoid impersonators from taking over a legitimate postal voter's vote. The returning officer must be satisfied as to the voter's identity and have no reason to doubt that the voter has lost or not received their postal vote. No further prescription is made, but Electoral Commission guidance suggests that returning officers should require production of a passport or photographic driving licence, or two

<sup>65</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 68, 80 and 83. This must be read with regulation 69(8), whereby non-attendance by agents shall not of itself invalidate proceedings. The Scottish local government regulation is much more simply stated, requiring opening sessions "in the presence of any agents, if in attendance". Representation of the People (Postal Voting for Local Government Elections) (Scotland) Regulations SSI 2007 No 263, reg 21(1).

secondary identification documents, such as a bill or cheque book.<sup>66</sup>

### ***Cancelling postal votes***

- 6.94 The returning officer is under an obligation to cancel original postal votes that have been reported spoiled or lost.<sup>67</sup> The word “cancel” is undefined in the legislation, but there is a requirement to track down the cancelled voting documents, if and when returned, and to separate them from the pools of valid and rejected votes.
- 6.95 Regulation 86A of the 2001 Regulations governs the retrieval of cancelled ballot papers. The regulation applies if it appears to the returning officer that a cancelled ballot paper:
- (1) is in a postal voters’ ballot box (because the outer envelope has not been processed yet);
  - (2) is in a receptacle for ballot paper envelopes (because the inner envelope has not been opened yet); or
  - (3) is in a postal ballot box.
- 6.96 In any of the above cases, the returning officer must retrieve the cancelled ballot paper, show the ballot paper number on it to any agents present, attach it to the postal voting statement to which it relates, and place them in a sealed packet.
- 6.97 This regulation even permits the returning officer to retrieve a ballot paper which has reached the postal ballot box, and thus must have satisfied the verification requirements on the postal voting statement. It seems, therefore, that this power enables a voter to seek the retrieval of postal votes that have satisfied the verification requirements in full (and thus could not have been lost, unless the voter was impersonated). It also allows a voter to retrieve a postal vote after it has been placed in the ballot box on the ground that they inadvertently spoil the ballot paper.
- 6.98 By contrast, at polling in person:
- (1) A voter who is shown by lists as having already voted (that is, a ballot paper has been placed in a ballot box purportedly by them or on their behalf) may not seek the retrieval of that paper – they may only cast a tendered vote, with an election court able to determine the validity of that vote (and to invalidate the earlier vote).
  - (2) A voter who realises, after placing their vote in a ballot box, that he or she has spoiled their ballot paper, is unable to cast another vote.
- 6.99 While we recognise that postal voting is a different mode of casting a vote, and thus may afford electors opportunities otherwise not available to them, it is perhaps curious that the law contemplates that returning officers may retrieve

<sup>66</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 77 and 78.

<sup>67</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 78A.

ballot papers from ballot boxes. This is particularly so in circumstances where 100% of postal voting statements will have been verified. That said, the software may – as it did in *Ali v Bashir* – have let a forged signature pass through.

### **Differences in the postal voting process in Northern Ireland**

- 6.100 The framework for the issue and receipt of postal voting papers in Northern Ireland is largely as described above but contains some differences. A key difference is that personal identifiers – which include a national insurance number – must match those provided at the time of registration as an elector.<sup>68</sup> Others include that candidates and agents may attend postal vote issuing sessions as well as the receipt of postal votes, and that instead of postal voting statements a “declaration of identity” must be provided by the elector. This must be signed by the voter and a witness, who must provide their name and address.
- 6.101 No provision is made for the method by which a postal vote may be returned; the rule simply states that a postal vote is not duly returned unless it reaches the returning officer – in its proper envelope – before the close of poll.<sup>69</sup> There is thus no express provision for a postal vote to be handed in at a polling station, although presumably a postal vote handed in at a polling station and then transferred to the returning officer before the close of poll would be valid under the law and should be counted. The possibility that postal votes are returned by hand to the returning officer is not excluded, and is moreover supported by the instruction that a returning officer must insert a covering envelope – whether delivered by hand or post – into a postal voters’ ballot box as soon as it is received.<sup>70</sup>
- 6.102 There is no provision for postal voters in Northern Ireland to apply for a replacement postal ballot paper where they have lost or not received one. A spoilt ballot paper may be exchanged for a replacement, but the deadline for this is strictly 5 pm before the day of the poll – there is no provision, as in Great Britain, for a replacement ballot paper to be delivered by hand after 5 pm before the day of the poll.<sup>71</sup>
- 6.103 One anomaly with respect to UK Parliamentary elections held in Northern Ireland is that the rules do not require the absent voters’ list to be marked to indicate that a postal vote has been returned. All other election rules for Northern Ireland

<sup>68</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, regs 72, 75 and 87.

<sup>69</sup> Representation of the People Act 1983, sch 1 r 45(2)(a); European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 1 r 50(2)(a); Northern Ireland Assembly Elections Order SI 2001 No 1267, sch 1 inserting r 44B(3)(a); Electoral Law Act (Northern Ireland) 1962, sch 5 r 45(2)(a).

<sup>70</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 84.

<sup>71</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 84.

require the absent voters' list to be marked to indicate this.<sup>72</sup>

### **Maintaining secrecy**

6.104 Postal voting is inherently less secret than voting in person at the ballot box.

- (1) The classical ballot process is designed to deny third parties the opportunity to know how a particular elector voted. There is no similar mechanism to ensure that a postal vote is cast secretly and without third party oversight.
- (2) The mode of delivery of postal votes – through the public postal service and/or by a third party – is necessarily less secure. Envelopes may be unsealed and votes intercepted, destroyed, or altered.<sup>73</sup>
- (3) Postal vote opening sessions may expose both postal voting statements and ballot papers, and may be attended by candidates' agents. Since the voter's name and ballot paper number appears on postal voting statements, the matching ballot paper, if exposed face up, may expose how a particular elector voted.

6.105 The law therefore has to take other measures to promote secrecy in spite of these weaknesses.

- (1) The postal voting statement instructs voters to complete their ballot paper themselves and in private.
- (2) A returning officer who retrieves a postal vote after deciding to verify the postal voting statement is required to keep the ballot papers face down. What is looked for is the number on the back, for the purpose of matching it to the postal voting statement. Furthermore, the returning officers and their staff:
  - (a) must take proper precautions for preventing any person seeing the votes marked on the ballot papers, and
  - (b) may not view the corresponding number list that was compiled

<sup>72</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 86. This seems to be an oversight. Provisions requiring the marking of the absent voters' list were inserted into the Northern Ireland Assembly Elections Order 2001 which otherwise applied the relevant provision of the 2008 Regulations without modification. It is strange that these provisions were inserted into the 2001 Order without modifying the 2008 Regulations. Northern Ireland Assembly Elections Order SI 2001 No 1267, sch 2; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 2 para 31(5) to (7); Local Elections (Northern Ireland) Order SI 1985 No 454, sch 2 pt 3 para 17(5) to (7).

<sup>73</sup> In the *Bordesley Green and Aston* case, there was evidence suggesting that the fraudsters routinely opened envelopes, checked the postal ballot paper and, if it voted for an opponent, crossed out the voter's mark and replaced it with the fraudsters'. *Re Bordesley Green and Aston Ward of Birmingham City Council petition*, 4 April 2005 (unreported) at [314] to [316] and [393] to [394].

when issuing postal voting packs.<sup>74</sup>

- (3) Postal vote opening session staff and agents are notified of the secrecy requirements of section 66 of the 1983 Act.

### **Postal voting fraud**

6.106 A key theme in the law on absent voting is securing the system from fraud. It is important to distinguish four types of wrongdoing.

- (1) The first is the use of absent votes issued to fictitious electors. The fault here lies in the fraudulent registration. If a fraudster controls the registration entry, they are free to make up personal identifiers (at least in Great Britain where these do not include national insurance numbers). Security measures relating only to absent voting cannot secure an election against registration fraud.
- (2) The second is the unauthorised application for a postal vote on behalf of a genuinely registered elector, with a view to intercepting or re-routing postal voting packs to the fraudster. Here, in Great Britain, the fraudster has control over the personal identifiers (since they are supplied at the time of the application) although, since a real elector is involved, the practice is riskier: the real elector may decide to vote at the polling station, be refused a ballot paper and cast a tendered vote, or receive a notification to their address that they are a postal voter, all of which may trigger an investigation.
- (3) The third is the interception by a fraudster of a genuinely issued postal voting pack, which was sought by a real elector. This is the primary target of personal identifiers, which ought to defeat this kind of attempt at fraud because unless the fraudster has the elector's date of birth and can forge their signature, the fraud should be defeated. This is not a victimless attempt: even an unsuccessful interception can deprive the genuine voter of an effective vote at the poll. Unless they can apply for a reissued postal vote, the elector will be limited to casting a tendered vote which will only be counted in the event of an election petition being heard.
- (4) The fourth category of wrongdoing is direct interference with a postal voter. The fraudster might pressure the real voter to cast their vote under their supervision and control, or to complete a postal voting statement in respect of a blank ballot paper. No personal identifier measure, or any security mechanism for that matter, can address this type of fraud – it can only be addressed by better regulation of campaigners, and

<sup>74</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 85B(5).

detection of wrongdoing.<sup>75</sup>

#### VERIFICATION OF PERSONAL IDENTIFIERS AS AN ANTI-FRAUD MEASURE

- 6.107 The current personal identifiers system in Great Britain can only deal with the third example of fraud above, where the fraudster has no control over the signatures and dates of birth in the initial application for a postal vote. Concern has been expressed that this procedure is flawed, particularly for detecting fraud.<sup>76</sup>
- 6.108 Personal identifiers in Northern Ireland need to match those on the individual elector's initial application for registration as an elector. They therefore also help combat the second example of fraud we set out above, where the fraudster seeks to take over a real voter's right to an absent vote.<sup>77</sup>
- 6.109 When the UK Government announced a policy of moving to individual electoral registration across Great Britain as well as Northern Ireland, and indicated that the identifiers would be signatures, dates of birth and national insurance numbers, it was anticipated among key actors in the election field that the first two could also be used to verify postal vote identifiers. That is not so at present for a number of reasons.
- 6.110 First, there emerged during the move to individual electoral registration a concern to avoid a sharp reduction in the number of electors registered. Accordingly, the power to carry over electors from present (household) registers to the newly compiled register has been given greater prominence. Our understanding is that a significant proportion of entries in the registers will be carried over, perhaps as high as 80%. For those entries on the register, there may be no identifiers whatsoever: dates of birth are not required when registering, and signatures will only be available from the person who completed the household registration whose contents are being carried over.
- 6.111 Secondly, even those registering personally under the new system may register online, in which case they will supply no signature. It is a reasonable assumption that, given the convenience and growing use of the internet, the electorate's tendency to register online will be significant and will grow over time.
- 6.112 Thirdly, those making a paper application to be registered are strictly speaking only required to provide a date of birth and national insurance number. The prescribed application form requires a signature, but does not to adhere to the requirements of form that subsist for absent voting applications, which enable the

<sup>75</sup> There are other conceivable examples of fraud, which we can assimilate to category 4: for instance, Richard Mawrey QC's example in the *Aston and Bordesley Green* election petition of postal ballot papers being intercepted *after* they are marked and the identifiers supplied, initial marks being crossed out and other candidates voted for by the fraudster – or the vote being discarded or routed through without interruption. At any rate, personal identifiers cannot help against this type of fraud.

<sup>76</sup> Office for Democratic Institutions and Human Rights, *Report on the May 2010 UK General Election* (July 2010) at p 13.

<sup>77</sup> Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 87(1)(b); European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 2 para 32(1)(b); Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 2; Local Elections (Northern Ireland) Order SI 1985 No 454, sch 2 pt 3 para 17A(1)(b).

scanning of the signature for use as an identifier.

### ***Recognisability of postal voting documents***

- 6.113 Because outer postal voting envelopes must be marked “B”, and the standing Royal Mail policy is that they be marked with two purple “flashes” so that they are instantly recognisable, their timely delivery to the returning officer can be prioritised. It also means that they are instantly recognisable, including by any would-be fraudster. A respondent to our scoping consultation, Gareth Randall, suggested that the outer (B) envelopes also have polling districts printed on them, which might enable tactical suppression of postal votes from certain polling districts by a corrupt postal official.
- 6.114 We are unsure whether the practice is such that external markings on outer envelopes mean that an observer will be able to determine which polling district they relate to. There is certainly no reason in law why that should be so. We do not think that hard legal rules should pronounce on such matters unless necessary. Guidance should make clear that promoting the integrity of elections should include not revealing to which polling district an outer envelope relates.

### ***Criminal offences aimed at actual fraud***

- 6.115 All categories of fraud which we have mentioned require a fraudulent act by a person who seeks to advance the prospects of one candidate over others. All involve the commission of electoral offences which are not only crimes but, if shown to have been perpetrated by a candidate’s agent, will invalidate the candidate’s election if returned. The classical regulatory framework is thus still relevant in the postal voting context, and has been supplemented by new offences introduced by the Electoral Administration Act 2006.
- 6.116 The offences that are particularly relevant in this context include:
- (1) Personation. This is the most obvious offence in the context of postal vote fraud. Either a real (living or deceased) person is impersonated and their vote appropriated by a fraudster, or a fictitious elector created and a fictitious vote is cast. Personation is drawn widely enough in section 60 of the 1983 Act to cover any of these situations.
  - (2) Undue influence. This is a widely drawn offence, which in plain English encompasses conduct ranging from violence, threats and intimidation to abuses of religious authority. It also covers deception by “fraudulent device or contrivance”.<sup>78</sup>
  - (3) Postal voting offences. A person commits an offence if, intending to deprive another of an opportunity to vote, or to gain (for themselves or another) a vote to which they are not entitled, or money or property, they:
    - (a) apply for a postal vote as some other person (living, dead or fictitious);
    - (b) otherwise make a false statement in or in connection with an

<sup>78</sup> Representation of the People Act 1983, s 115.

application for a postal or proxy vote;

- (c) induce the sending of a postal ballot paper or any postal voting communication to an address which has not been agreed to by the person entitled to the vote; or
- (d) cause a communication relating to or containing a postal vote not to be delivered to its intended recipient.<sup>79</sup>

6.117 Criminal offences must be detected and prosecuted in order to act as a deterrent. The classical approach to tackling electoral misconduct was not based solely on criminal sanctions. Stringent regulation was coupled with the secret ballot mechanism, which could deter misconduct by making it impossible to check its efficacy at the polling station. Postal voting lacks that mechanism.

### **Campaign handling of absent voting applications and postal votes**

6.118 The provisions on applications for an absent vote offer a great deal of scope for third party involvement in the process. This can be a cause for concern where the third party has a strong interest in the outcome of the election – for example, a political party, or a group of politically affiliated campaigners. The legislation permits the collection of completed application forms for delivery to the registration officer. This might enable unscrupulous individuals to inspect applications and personal identifiers or alter the details of the appointment of a proxy or the address to which postal voting papers are to be sent.

6.119 There is also an administrative consequence of permitting third party involvement. The fact that the form may be delivered by anybody allows parties to collect postal voting applications and deliver large numbers of them to the registration officer close to the deadline, which as well as being burdensome might help suspicious applications to go unnoticed.

6.120 It is impractical – though certainly not impossible<sup>80</sup> – to develop a mechanism that addresses the vulnerability of postal voting to outside interference. The prescribed postal voting process seeks to mitigate the vulnerability of postal voting, not to provide protection equivalent to that of in-person voting. This arguably leaves the regulation of candidates' conduct with an increased load to carry in the task of keeping postal voting free from corrupt interference.

### ***The dangers of perceived fraud***

6.121 It is important to distinguish between two distinct concerns. The first is actual voting fraud, the evidence of which is brought to light by criminal prosecutions or election petitions. There has been, over a number of years, little evidence of

<sup>79</sup> Representation of the People Act 1983, s 62A, and for local government in Scotland, s 62B.

<sup>80</sup> "Special voting" in the Republic of Ireland is a variant of distance voting which is provided not through the general post but through staff of the returning officer who personally deliver the voting documents, oversee their free and secret completion, and retrieve completed votes directly from the voter: Electoral Law Act 1992, ss 78 to 83. However, Ireland also has a (separate) postal voting regime; to replace postal voting by special voting and to allow it to be available on demand would require substantially more resources than are currently dedicated to postal voting.



significant levels of voting fraud reflected in the joint reports by the Electoral Commission and the Association of Chief Police Officers.<sup>81</sup>

- 6.122 The second concern is to do with public perception of the extent of fraud, irrespective of its actual extent. After the May 2010 general election, observers from the Commonwealth Office commented that the process in the UK was not corrupted, but was corruptible. Surveys carried out by the Electoral Commission suggest that public perception of fraud is significant. Press reports which are pessimistic about the integrity of the postal voting process affect public confidence in electoral outcomes, which there is a serious need for electoral administration law to uphold.<sup>82</sup>
- 6.123 The perception of fraud may be harmful for a second reason. If a campaign is perceived successfully to be committing fraud, rival campaigns might worry that unless they behave likewise, they will lose the contest. There is an argument that this kind of reasoning remains relevant in the postal voting context. If one campaign is seen to have a drastic numbers advantage in postal votes which is believed to be due to fraud, rival campaigners may approach the next election with less integrity. The law must provide an incentive to campaigns to act within the bounds of its regulation while retaining the ability to win campaigns. Crucial to that is that wrongdoing must be prevented and, if not prevented, detected, remedied and punished.

*The Electoral Commission's voluntary code of conduct for campaigners*

- 6.124 The Electoral Commission maintains a voluntary code of conduct agreed with the political parties represented in the UK and Scottish Parliaments and the National Assembly for Wales. It publishes the code online and sends it to all registered political parties. It asks returning officers to distribute it to nominated candidates.
- 6.125 The Electoral Commission's code of conduct is drafted with one question in mind: what would a fair-minded observer think? It seeks to regulate areas of campaigning on which the law gives little or no guidance. In relation to postal voting, it sets out four norms.

- (1) Campaigners should never touch or handle anyone else's ballot paper.

<sup>81</sup> Electoral Commission and Association of Chief Police Officers, *Allegations of electoral malpractice at the May 2008 elections in England and Wales* (April 2009) pp 1 and 2; Electoral Commission and Association of Chief Police Officers, *Analysis of allegations of electoral malpractice at the June 2009 elections* (January 2010) pp 1 to 5; Electoral Commission and Association of Chief Police Officers, *Analysis of cases of alleged electoral malpractice in 2010* (February 2011) pp 1 to 10; Electoral Commission and Association of Chief Police Officers, *Analysis of cases of alleged electoral malpractice in 2011* (March 2012) pp 1 to 5; Electoral Commission, *Analysis of cases of alleged electoral fraud in 2012: Summary of data recorded by police forces* (May 2013), pp 1 to 3.

<sup>82</sup> For example, "Major electoral fraud alleged in marginal seat", *The Independent*, 26 May 2010, reporting that 4000 postal votes were handed in on polling day in Halifax. More recently, pessimistic reports emerged of over-registered properties in Poplar, which may be used for postal voting fraud: "Mayor voter fraud fears", *Evening Standard*, 21 February 2012; "Tower Hamlets ordered to tighten up its electoral register amid voting fraud fear" *Evening Standard*, 23 March 2012; "Widespread allegations of electoral fraud in Tower Hamlets, *Independent*", 26 April 2012; "Police probe London voting fraud", *Evening Standard*, 26 April 2012.

- (2) Campaigners should never observe voters marking their ballot paper, which should be done in secret.
  - (3) Campaigners should not ask or encourage voters to give them any completed ballot paper or ballot paper envelope.
  - (4) If asked by a voter to take a completed postal voting pack on their behalf, campaigners should immediately post it or take it directly to the office of the Returning Officer or to a polling station.
- 6.126 The code of conduct is voluntary and has no legal force. Even parties which adopt it cannot guarantee compliance by every campaigner for every candidate running under their party banner, at every election. However, adherence to all four principles is essential to the safeguarding of the postal voting process from fraud and the perception of fraud by other campaigns and the public. In this regard the principles go beyond the postal voting offences and those of personation and undue influence, which are aimed at proscribing actual fraud.
- 6.127 In a report on electoral fraud in the UK published in January 2014, the Electoral Commission recommended that campaigners at elections and referendums in the UK should also not be involved in the completion of postal or proxy voting applications, the delivery of completed applications, or the handling of any postal votes. The Electoral Commission hopes to implement its recommendation without a new offence being introduced, by seeking agreement from political parties to these prohibitions appearing in its Code of Conduct for campaigners.<sup>83</sup>

***Should the law prohibit involvement of campaigners in absent voting applications and the delivery of postal votes?***

- 6.128 In the in-person polling context, the ballot system guarantees secrecy. Postal voting lacks this inherent protection. Personal identifiers are only part of the solution to fraud, so that it is arguable that regulation should go further than at present, and prohibit campaigners' involvement in the return of completed absent voting applications to registration officers and/or of completed postal voting packs to returning officers. The difficulty here lies in balancing the public interest in allowing campaigns to "get out" the vote with the competing public interest in minimising opportunities for fraud.
- 6.129 The electoral system is hampered not only by actual instances of fraud, but also by the risk of loss of public confidence in electoral outcomes due to the perception of fraud. We are also mindful that, if rival campaigns come to the conclusion – rightly or wrongly – that postal voting fraud has affected past results without being detected, the temptation may be to retort with fraud of their own in the future. Regulation, if it is effectively enforced and policed, could provide the level playing field that is required here as elsewhere in the electoral process.
- 6.130 We can see possible merit in bolstering the regulation of candidates and their campaigns' involvement in the absent voting process. On the other hand we recognise that there are strong objections to such regulation, particularly from the point of view that such a measure would hamper campaigns' ability to "get out"

<sup>83</sup> Electoral Commission, *Electoral fraud in the UK* (January 2014), pp 41 and 42.

their vote: a perfectly legitimate aim, which campaigns as interested actors are motivated and well equipped to pursue. There may also be a difficulty in identifying who is and is not a “campaigner”. In our view, a campaigner for these purposes should include a candidate, election agent, appointed agent in their campaign or person who would be taken to be an agent for the candidate according to the law concerning legal challenge.

- 6.131 Since this project offers an opportunity to make proposals, where appropriate, for the reform of campaign regulation, we have decided to ask the public whether the law should regulate, by making it an offence, the involvement of campaigners in these various activities.

**Question 6-7: Should electoral law prohibit, by making it an offence, the involvement by campaigners in any of the following:**

- (1) **assisting in the completion of postal or proxy voting applications;**
- (2) **handling completed postal or proxy voting applications;**
- (3) **handling another person’s ballot paper;**
- (4) **observing a voter marking a postal ballot paper;**
- (5) **asking or encouraging a voter to give them any completed ballot paper, postal voting statement or ballot paper envelope;**
- (6) **if asked by a voter to take a completed postal voting pack on their behalf, failing to post it or take it directly to the office of the Returning Officer or to a polling station immediately;**
- (7) **handling completed postal voting packs at all?**

**Reform of the law on the postal voting process generally**

- 6.132 The legislation on postal voting suffers from many of the same problems as in-person voting. Election-specific laws – which are actually remarkably consistent from one election to another – add to the volume of election legislation where a single set of rules should govern the postal voting process. However, the level of detail in the prescription is of much more recent origin. Detailed provisions seek to govern postal voting in minute detail, almost guiding every action of administrators dealing with postal votes – mentioning receptacles for rejected and provisionally rejected ballot papers, for example. In practice, the entire exercise may be undertaken electronically, by scanning each postal voting statement, for example.

- 6.133 Our provisional view is that the postal voting process should be governed by legislation directed to the returning officer, setting down the outcomes which are required, for example the verification of postal voting statements and the concern not to reject votes unless and until there is shown to be no matching postal voting statement containing personal identifiers which match those on record. Rules stressing the need for transparency, maintaining secrecy, and an audit trail should be retained. For the rest, we provisionally consider, returning officers should be left to decide how best to manage the postal voting process according

to guidance and best practice.

**Provisional proposal 6-8: A single set of rules should govern the postal voting processes in Great Britain and Northern Ireland respectively; and**

**Provisional proposal 6-9: These rules should set out the powers and responsibilities of returning officers regarding issuing, receiving, reissuing and cancelling postal votes generally rather than seeking to prescribe the process in detail.**

# CHAPTER 7

## NOTICE OF ELECTION AND NOMINATIONS

### INTRODUCTION

- 7.1 The discrete election rules for each election govern the stages in the process from notice of the election to nomination of candidates. Notice of the election is the first formal act signalling that an election is under way, while nomination determines who is a candidate for election. Only if more candidates are nominated than there are vacancies will there be a poll.
- 7.2 The main purpose of the nominations process is administrative. It translates putative candidacies into final candidates, ensuring that returning officers have the details they need to settle the contest-specific contents of the ballot paper. These include the name, address and other details of candidates, as well as their party affiliation. But it also performs a cautionary function by warning candidates of the seriousness of the occasion of standing for election and filtering out frivolous candidacies. In large part this is done through requirements for subscription (or attestation by local electors to the candidate's suitability) and payment of a deposit. Finally, there is a minor qualifications function to the nominations process, which is to test or record the qualifications of candidates for the office sought.
- 7.3 This chapter reviews the law governing notice of election to nomination of candidates at all elections, starting with the classical rules developed for first past the post elections and considering the differences in approach required by other voting systems, before considering the powers of the returning officer to reject nomination papers, including on the ground that they are a sham.

### NOTICE OF ELECTION

- 7.4 Every election's timetable, set out in discrete election rules, starts with the giving of notice of election. The notice must state the place and time of delivery of nomination papers, that forms of nomination paper may be obtained at that place, the date of the poll in the event of a contest, and the absent voting deadlines.<sup>1</sup> As a public notice within the meaning of section 200 of the 1983 Act, it must be posted in a "conspicuous place or places" in the constituency, and may also be given in such other manner as the returning officer thinks desirable. In practice this is often done by issuing a press release and by publication on a council website, which are much more effective ways of publicising an election than the requirement to post – historically "placard" in the Ballot Act 1872 – a notice in a conspicuous place.<sup>2</sup> The language of section 200 is in need of modernisation.
- 7.5 The notice of election should be distinguished from the notice of poll, which is to be given if more candidates are nominated than there are seats, and from an elector's poll card, which is sent to electors by post and informs them of the poll and of the polling station they are allocated to. The poll card, in particular, clearly

<sup>1</sup> Representation of the People Act 1983, sch 1 r 5, replicated in other election rules.

<sup>2</sup> Electoral Commission, *Guidance for UK Parliamentary elections – Action before the poll* (December 2009), para 4.1.

shares a publicity function with the notice of election.

- 7.6 Publicity is not the only function of the notice of election. Crucially, it fixes a place at which nomination papers are to be delivered (“the nominations place”) which, as we will see, plays an important role in the nomination of Parliamentary candidates.

### **THE NOMINATION PROCESS**

- 7.7 Policy developments over time, particularly in relation to party affiliation, mean that the provisions on nominations have become extremely complex. At UK Parliamentary elections, for example, the nomination paper is accompanied by a separate consent to nomination from the candidate, and a home address form setting out the candidate’s residential address. Any claimed party affiliation is confirmed by a certificate of authorisation from the party’s registered nominating officer. A party candidate will also need to supply, in addition to those, their authorisation to use a party emblem. Although covered by election rules governing the poll, this must be submitted at the time of nomination. There are therefore potentially five sets of papers or authorisations that make up modern nomination documents.
- 7.8 It can fairly be said that simply providing adequate paperwork is in itself a test of the seriousness of a candidate. Our research paper, which is available online, considers election-specific rules governing nomination in more detail.<sup>3</sup>

### **The nomination paper**

- 7.9 A candidate must be nominated by a separate nomination paper in prescribed form. Although in practice the norm, nomination papers need not emanate from the candidate. Indeed, a candidate may be nominated by more than one paper, one purpose for doing so being insurance against a nomination paper being defective.<sup>4</sup>
- 7.10 Where subscribers are required, the nomination paper must be signed by each and contain the subscribers’ electoral numbers. The prescribed form of nomination paper for UK Parliamentary elections, for example, must be signed by a proposer, seconder, and eight other “subscribers” who must also give their electoral number.<sup>5</sup>
- 7.11 A subscriber assents not to the candidacy but to the nomination *paper*, and

<sup>3</sup> Research paper on Notice of Election and Nomination, available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

<sup>4</sup> Representation of the People Act 1983, sch 1 r 14(4). *Northcote v Pulsford* (1875) LR 10 CP 476. *Parker’s Law and Conduct of Elections* notes a practice of nominating a candidate by more than one nomination paper as a means of guarding against a candidate failing to be nominated because of a technical defect in his nomination paper, R Price (ed), *Parker’s Law and Conduct of Elections*, loose-leaf, issue 37 volume 1 at para 12.16.

<sup>5</sup> Representation of the People Act 1983, sch 1 r 14A(2)(b); Appendix of Forms. This can pose some problems as slips as to the electoral number, which can be corrected, will not be if the elector’s name is not obvious from their signature. By contrast, see the Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 pt 7 (Appendix of Forms). The nomination paper requires a person’s name to be given as well as their signature.

cannot validly subscribe more than one paper, even if they nominate the same candidate.<sup>6</sup> If a first nomination paper is rejected for any reason, all of its subscribers are ineligible to be subscribers to another paper. This can have adverse consequences for candidates. At an election for Mayor of London, 330 subscribers are required (10 from each borough plus the City of London). A defective nomination paper is a disaster for the candidate, who must look for 330 new subscribers.

- 7.12 Consequentially, the modern practice of returning officers is to look at nomination papers, at first, informally. Candidates submit draft nomination papers early, which are informally checked by the returning officer and flaws are pointed out in time to be cured by the close of nominations. This is not what is envisaged in the classical rules, which are highly formalistic and conceive of nomination papers being delivered, objected to, and accepted or rejected.<sup>7</sup>

### **Consent to nomination**

- 7.13 Candidates must consent to their nomination in writing on, or within one month before, the date of close of nominations. This is strange, since no one can be nominated before notice of election is given, and that is unlikely to be earlier than six working days before the deadline for nomination. The consent to nomination is a prescribed form for every election except UK Parliamentary elections (where rule 8 of the election rules specifies its contents), and must be witnessed and submitted at the nominations place. The rules empower the returning officer to dispense with these requirements if satisfied that the candidate is outside the UK, in which case the rules say that “a telegram (or any similar means of communication)” will suffice.<sup>8</sup> Some rules for other elections refer instead to a “facsimile”, although many reproduce the reference to a telegram.<sup>9</sup>
- 7.14 Since the consent to nomination is legally the only document at the nomination stage that must emanate from the candidate, it must contain a statement that the candidate is aware of the disqualification provisions, is not disqualified to the best of their knowledge, and is not a candidate for any other constituency election with the same polling day.

### **The names of candidates**

- 7.15 There is a great amount of material in legal guidance, textbooks and some judicial pronouncements on the presentation of the candidate’s name on the nomination paper. These concern issues such as whether the name on the statement of persons nominated should be with or without a prefix such as “Mrs”, “Dr” or “Councillor”, which are descriptions rather than part of the name, although

<sup>6</sup> Representation of the People Act 1983, sch 1 r 7(5).

<sup>7</sup> Electoral Commission, *Guidance for UK Parliamentary elections – Action before the poll* (December 2009), para 4.33.

<sup>8</sup> Representation of the People Act 1983, sch 1 r 8 (1) and (2).

<sup>9</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 9(3); National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 9(3); contrast European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 8(2); Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1. Section 74 of the Representation of the People Act 1983, which refers to telegrams in the context of expenses by agents, is also applied.

there may be an element of uncertainty in certain elections about titles such as “Rt Hon” or “Sir”. There has also been some debate concerning the meaning of a “surname”: for example whether it extends to names acquired by deed poll or maiden names if in use. Much of the case law emanates from the 19th or 20th centuries. In the modern context, however, section 50 of the 1983 Act prevents inaccurate descriptions or misnomers in nomination papers from affecting their validity where the description of the person is “such as to be commonly understood”.

- 7.16 The prescribed forms of nomination paper require surnames to be given, and permit the use of a “commonly used” surname. The latter will appear on the ballot paper unless the returning officer considers it obscene, offensive or likely to mislead or confuse electors. The returning officer’s discretion in this context determines not the validity of the nomination but the ability of the candidate to use the commonly used name on the ballot paper. If the officer rejects that name, the candidacy still proceeds, under the candidate’s formal name.<sup>10</sup>

### **Home Address**

- 7.17 Historically, candidates have been required to give a true home address, and the nomination paper must contain their full address. Section 50 of the 1983 Act cures inaccuracies only. While the returning officer cannot reject a nomination paper for giving an untrue address, that is a point that can be taken at an election petition, potentially resulting in the nullity of the election if the nomination was defective.
- 7.18 For UK Parliamentary elections, the concept of the “home address form” was introduced in 2009. Rule 6 of the Parliamentary Elections Rules enables candidates to decide whether their home address appears on the ballot paper. The aim is to protect candidates by withholding their precise address from the public. Nomination papers now must be accompanied by a “home address form”, including the candidate’s full home address. If a request is made not to make the address public, the ballot paper will indicate the constituency or, if applicable, the country outside the UK in which the address is situated.<sup>11</sup> The home address form must be destroyed 21 days after an MP is returned, or the day after the conclusion of any election petition.<sup>12</sup>

### **Description of candidate**

- 7.19 Section 22 of the Political Parties, Elections and Referendums Act 2000 prohibits the nomination for election of persons other than those standing in the name of a registered party and those who do not purport to represent any party; it also prohibits the nomination of a party other than a registered party (at elections where parties themselves stand). Each discrete set of election rules also makes provision to restrict candidates to an authorised party description, or the

<sup>10</sup> Representation of the People Act 1983, sch 1 r 14(2A) and (2B).

<sup>11</sup> Representation of the People Act 1983, sch 1 r 14(2) and (3A).

<sup>12</sup> Representation of the People Act 1983, sch 1 r 6(4) and (5).



description “independent” if they have no party affiliation.<sup>13</sup>

### **Certificates of authorisation**

- 7.20 Party endorsement of a candidate is by means of a certificate issued by or on behalf of the registered nominating officer of the qualifying registered party received by the returning officer before close of nominations.<sup>14</sup> The authorised description must be the party's registered name or one of twelve descriptions registered with the Electoral Commission.<sup>15</sup> This regime applies for all elections save those of parish and community councils. At Scottish Parliamentary elections party candidates standing in Scotland may use the prefix “Scottish” before the registered party name.<sup>16</sup>
- 7.21 At some elections, candidates must choose either their party name or a description.<sup>17</sup> At European Parliamentary elections in Great Britain and regional contests for the Scottish Parliament, party candidates must state the party name and may include a description as well. Constituency candidates for the Scottish Parliament may only use their party name.<sup>18</sup> This suggests the requirement to use the party name depends on whether a person or a party stands for election. The idea may be that a party should stand both in its name, and under a description. However, this does not explain why at the election of regional members of the Welsh Assembly and of London Members of the London Assembly, either the party name or a description must be used. This appears to be an inconsistency in how the party affiliation system is adapted to party list elections.
- 7.22 A nomination paper is invalid if it purports to use a description which includes words in addition to those specifically authorised by the party nominating officer.<sup>19</sup> The returning officer's power to reject a nomination paper on that ground,

<sup>13</sup> Representation of the People Act 1983, sch 1 r 6(3). The authorised party description must be either the name or registered description of the party: r 6 A(1A) . The Speaker may use the description “The Speaker seeking re-election”.

<sup>14</sup> Representation of the People Act 1983, sch 1 r 6A(1) and, as to candidates for more than one party, r 6A(1B) and (2).

<sup>15</sup> Political Parties, Elections and Referendums Act 2000, ss 28 (name) and 28A(2) (descriptions); Representation of the People Act 1983, sch 1 r 6A(1A) (authorised description must be the registered name or description).

<sup>16</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 rr 4(7) and 6(3).

<sup>17</sup> Representation of the People Act 1983, sch 1 r 6A(1A); replicated for elections to the National Assembly for Wales, the Greater London Authority, local government England and Wales (including parish and community councils), Scottish local government, mayors, police and crime commissioners, European Parliament (in Northern Ireland), Northern Ireland Assembly and local elections in Northern Ireland.

<sup>18</sup> European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 6(2) and (3) (in Great Britain only); Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 rr 4(5) and 6(2).

<sup>19</sup> *R (on the application of De Beer and others) v Returning Officer for London Borough of Harrow* [2002] EWHC 670 (Admin); (2002) ACD 83 which was decided under the equivalent rule in the local government election rules 1986. “Liberal Democrat Focus Team” was held to be unauthorised because it had not been specifically authorised by the party nominating officer. That description is a registered party description for the Liberal Democrat party. The issue was whether the nominating officer had authorised that description specifically and in time.

however, is curiously still worded in terms of the officer concluding that a description is “likely to lead electors to associate” a candidacy with a party. In reality, the question for the returning officer is simply whether a party description is authorised or not. If it is not, the description must be “independent” or the paper is void.

### ***Registered party emblems***

- 7.23 One aspect of the content of the ballot paper which is not dealt with in the sections of election rules dealing with nominations relates to the use of a party’s registered emblem. These can be included on a ballot paper if an authorised party candidate so requests. Up to three emblems may be registered with the Electoral Commission under section 29 of the 2000 Act.<sup>20</sup>
- 7.24 The responsibility for requesting the use of an emblem on the ballot paper in general rests with the candidate, who must seek authorisation to do so in writing.<sup>21</sup> At party list elections, the party stands and its nominating officer must request the use of an emblem.<sup>22</sup> Curiously, the position is different in elections in Northern Ireland (other than UK Parliamentary elections), where it is the party nomination officer who requests that a candidate be allowed to use the party emblem. Similarly, at the election of constituency candidates to the National Assembly for Wales, a request for an emblem must also emanate from the party nominating officer.

### **Time, place and attendance at nominations**

- 7.25 The nomination paper, consent to nomination and the certificate of authorisation must be “delivered”, and any deposit paid, at the time and place fixed by the returning officer in the notice of election. The time of between 10 am and 4 pm is set by the election rules, which also set the area in which the nominations place must be situated. The nature of the process of delivery of nomination papers as described in election rules differs between, on the one hand, UK Parliamentary elections and the elections whose rules adopt the “parliamentary” model of nominations and, on the other, local government elections and the elections which adopt their election rules as a model (the local government election model).
- 7.26 In general, the parliamentary model of nominations envisages candidates standing for one constituency or area by physically delivering nomination papers

<sup>20</sup> The rather complex wording of some of these phrases was introduced by later amendment in order to defeat parties registering the description “Place your X here” and so on.

<sup>21</sup> Representation of the People Act 1983, sch 1 rr 6A(1) and 19(2A) and (2B); Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 16; Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 16; Local Authorities (Mayoral Elections) (England and Wales) Regulations SI 2007 No 1024, sch 1 r 18; Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 14(5); Greater London Authority Elections Rules SI 2007 No 3541, sch 1 r 17 and sch 3 r 17; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 27; Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 3 r 19.

<sup>22</sup> European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 22; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 28; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 25; Greater London Authority Elections Rules SI 2007 No 3541, sch 2 r 18.

themselves or through stipulated agents at the nominations place, where the returning officer must attend. Nomination papers need to be “delivered” personally, as part of an almost ceremonial process. Delivery thus means delivery by hand. Only the candidate, their proposer or seconder, or their election agent if appointed, can validly deliver a nomination paper. These, along with a further nominee (until recently, the candidate’s spouse) may attend at the nominations place and inspect papers nominating rival candidates. Objections must be made before close of nominations and need not be in writing.

- 7.27 Under the local government model, the returning officer need not attend the nominations place and nomination papers need not be delivered there by specified persons. The place for nominations must be at the offices of the council in question. There is no restriction on the right to attend. A notable difference is that the nomination paper need simply be “delivered” to the nominations place, unlike at Parliamentary elections where delivery must be by the candidate and certain others, to the returning officer.<sup>23</sup> It appears to us to be strongly arguable, therefore, that delivery by post of nomination papers or perhaps of scanned electronic versions of the nomination paper, is permissible at local government elections. In a recent circular, however, the Electoral Commission stated on counsel’s advice that electoral administrators may not accept delivery of nomination papers by post. This ruling, we understand, is particularly problematic in county council elections, and runs counter to interpretations of the rules that had prevailed for some time.<sup>24</sup>

#### **Powers of the returning officer in relation to nomination papers**

- 7.28 The function of nominations is administrative: progressing from a putative candidacy to one that appears on the ballot paper. The candidates must be satisfied that they are qualified and not disqualified for election, and part of the process seeks to ensure they are warned as to the disqualifications and as to the seriousness generally of standing for election. But in general the returning officer’s role at the nominations stage is limited to examining the formal validity of nomination papers, as opposed to assessing the substantive validity of a nomination.
- 7.29 In *R (on the application of De Beer and others) v Returning Officer for the London Borough of Harrow*,<sup>25</sup> the High Court considered a challenge to the rejection by the returning officer of the nomination papers of 60 Liberal Democrat candidates for election to Harrow Borough Council on the ground that the party description used in the papers was not the one authorised by the party nominating officer’s certificate. Scott Baker J dismissed a claim for judicial review of the officer’s decision:

I have considerable sympathy with the returning officer, who was in a very difficult position. On the one hand he knew several, perhaps many, of the 60 candidates, some of whom were serving councillors or had previously served as councillors, and he was well aware that

<sup>23</sup> Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 rr 4, 7 and 11.

<sup>24</sup> Electoral Commission Bulletin Issue 61 (England and Wales) – 27 November 2013.

<sup>25</sup> [2002] EWHC 670 (Admin); [2002] ACD 83.

the difficulty into which the Liberal Democrats had got themselves could have been overcome had the nominations and certificates all been lodged in reasonable time before the deadline. Furthermore, he was aware from all the surrounding circumstances that the Liberal Democrats were perfectly content with these candidates describing themselves as "Liberal Democrat Focus Team". On the other hand, he had to apply the law without fear or favour, giving even treatment to every candidate, whether a single individual or member of a large or small party. There is no scope for bending the rules in what seem or may seem meritorious cases. For example, there is no discretion to accept a nomination paper received just after the deadline has expired, or indeed to accept a certificate under rule 4A(1) just after the deadline has expired... .

It is, in my judgment, important to keep in mind the role of the returning officer in the election process. He is in a sense the referee. He is there to see fair play and to ensure that the rules are complied with. As a matter of policy, it seems to me, the fewer occasions on which he is called upon to exercise questions of judgment and thereby lay himself open to criticism by one or more of the candidates the better. This is particularly pertinent if the exercise of judgement were to go outside issues that can readily be resolved by looking at a document or documents, and which involves weighing up facts or surrounding circumstances.<sup>26</sup>

7.30 There are two exceptions to the general position that the returning officer is restricted to the formal validity of nomination papers, excluding matters of judgement. First, there has emerged over time a power of the returning officer to reject "sham" nominations, which we consider further below.

7.31 The second exception arises out of legislation. Section 1 of the Representation of the People Act 1981 disqualifies convicted persons detained indefinitely or for more than one year anywhere in the British Isles or the Republic of Ireland from membership of the House of Commons. It is also applied to the European and Scottish Parliaments and the Assemblies for Wales and Northern Ireland. In this Consultation Paper we shall refer to it as "the 1981 Act disqualification". Unlike other disqualifications, the returning officer must inquire substantively into the 1981 Act disqualification, and a detailed procedure is laid down in the rules, after which the officer is entitled to hold the nomination paper invalid, on the ground that the candidate is subject to the 1981 Act disqualification.<sup>27</sup>

### ***The grounds in election rules for rejecting nomination papers***

7.32 The returning officer's role in determining the formal validity of nominations is governed by rule 12 of the Parliamentary Election Rules, which is substantially reproduced in other election rules. Where the nomination paper, consent to nomination and home address form are delivered and a deposit is made in

<sup>26</sup> *R (De Beer) v Returning Officer for London Borough of Harrow* [2002] EWHC 670 (Admin); [2002] ACD 83.

<sup>27</sup> Representation of the People Act 1981, ss 1 and 2; Representation of the People Act 1983, sch 1 r 15.

accordance with the rules, the candidate is “deemed to stand nominated” unless and until:

- (1) the returning officer decides that a nomination paper is invalid;
- (2) the officer decides that the home address does not comply with the rules;
- (3) proof is given to the returning officer’s satisfaction of the candidate’s death; or
- (4) the candidate withdraws.

7.33 The returning officer only has power to hold a nomination paper invalid on one of the following grounds:

- (1) that the particulars of the candidate or the persons subscribing the paper are not as required by law;
- (2) that the paper is not subscribed as so required; or
- (3) the candidate is disqualified under the Representation of the People Act 1981.

7.34 Apart from the 1981 Act disqualification, the returning officer cannot go behind the nomination paper, for example to verify the authenticity of the name on it.<sup>28</sup>

#### **Is abuse of the right to nomination a ground for invalidating papers?**

7.35 Notwithstanding the above, there has been some debate as to whether the returning officer has a wider power to reject nomination papers. Such a power has sometimes been labelled a “common law” power of refusal of nomination.<sup>29</sup> In the words of Wright J in *Harford v Linskey*:

We do not understand it to be laid down in the *Bangor* case that a nomination cannot ever be rejected except for informality in the form of presentation of it. If the nomination paper is, on the face of it, a mere abuse of the right of nomination or an obvious unreality, as, for instance, if it purported to nominate a woman or a deceased sovereign, there can be no doubt that it ought to be rejected, and no petition could be maintained in respect of its rejection.<sup>30</sup>

7.36 Later cases, when discussing the above passage, emphasised that it applied to manifest disqualifications “on the face of” the nomination paper, although they have been taken to approve the principle it states.<sup>31</sup> More recent cases have doubted whether the above passage reflects the current election rules, but

<sup>28</sup> *Greenway Stanley v Paterson* [1977] 2 All ER 663; *R v An Election Court ex parte Sheppard* [1975] 1 WLR 1319.

<sup>29</sup> C Morris, *Parliamentary Elections, Representation and the Law* (2012) p 63.

<sup>30</sup> [1899] 1 QB 852, 862.

<sup>31</sup> C Morris, *Parliamentary Elections, Representation and the Law* (2012) p 64. The principle, narrowly confined, has been taken to have been approved in *Hobbs v Morey* [1904] 1 KB 74, 78 to 79, and *Greenway Stanley v Paterson* [1977] 2 All ER 663, 667.

suggest that it leaves some scope for refusing a sham nomination paper.

- 7.37 In *R v Bennett, ex parte "Margaret Thatcher"*<sup>32</sup> a Mr Hanoman changed his name by deed poll to "Margaret Thatcher" and stood for election to Parliament in Barnet and Finchley, where the real Mrs Thatcher was the incumbent Member of Parliament and at the time Prime Minister. He gave his address as Downing St Mansions and his description as Conservationist. His election agent was his flatmate who had changed his name to Ronald Reagan.
- 7.38 The returning officer rejected the nomination paper as an abuse of the right to nomination and an obvious unreality. Mr Hanoman challenged the rejection. The Court noted that these reasons for rejection related to Wright J's statement in *Harford v Linskey*, but held that since that decision the election rules laid down grounds for refusing nomination papers that did not include these. The returning officer, however, had also given the reason that the particulars of the candidate were not as required by law, which is a ground for rejection under rule 12. Given that Hanoman's own evidence was that he sought "to make the electoral process more farcical, we believe it is already a frightening farce", and its conclusion that his candidature was a deliberate attempt to confuse the electorate, the Court of Appeal refused relief because the proceedings before it were an abuse of process. The Court did not decide "whether or not the returning officer has... the power to reject as he did for the abuse of the right of nomination." It follows that this decision does not affirm the correctness of Wright J's statement in *Harford v Linskey*.
- 7.39 More definitive guidance is found in *Sanders v Chichester*.<sup>33</sup> The High Court heard a special case stated in a European Parliamentary election petition. At the 1994 European elections in Devon and East Plymouth, a Mr Huggett stood as a "literal democrat" (saying he stood for the true meaning of democracy) and eventually polled over 10,000 votes. The petitioning Liberal Democrat candidate lost by 700 votes. The Court found that Wright J's statement in *Harford v Linskey* does not apply to the conduct of elections under the modern statutory regime. Dyson J (as he then was) added:

Candidates who give descriptions that are obscene, racist or an incitement to crime deliver particulars that are "not as required by law" because they contravene the law and/or will inevitably involve the returning officer in a breach of the law, not because they are an 'abuse of the right to nomination'.

There was discussion before us about the candidate who obviously gives a fictitious name and address such as "Mickey Mouse of Disneyland". The law has always treated sham documents and transactions as nullities. That would be a sufficient basis for holding the nomination paper to be invalid on the grounds that the particulars were not as required by law...

<sup>32</sup> (3 June 1983) CA (unreported), transcript available on electronic resources such as Westlaw.

<sup>33</sup> (1995) 139 SJLB 15, not fully reported but transcript available in P Gribble, *Schofield's Election Law*, loose-leaf, 6th reissue volume 5 p E99.

We would hold that there is no power in the returning officer to reject a nomination paper on any ground other than [the three set out in the election rules], unless the nomination paper is manifestly a sham. The words “not as required by law” are sufficient to exclude descriptions which are illegal. The exclusion of sham nomination papers would deal with [the example of nomination of a deceased sovereign].<sup>34</sup>

- 7.40 The effect of the recent case law, and of *Sanders v Chichester* in particular, is that there is no wider principle that a nomination paper may be refused as an “abuse of the right to nominations” or an “obvious unreality”. However the right to refuse a nomination paper for “not being as required by law” now includes the right to refuse a paper that gives particulars that contravene laws other than electoral laws, including apparently a general principle that the law treats sham documents as nullities. It has been suggested that this brings Wright J’s doctrine “in by the back door”.<sup>35</sup> Such a doctrine necessarily involves a departure from the conventional approach of shielding the returning officer from being involved in political judgements. In the absence of guidance as to what is a “sham” nomination paper or obscene or racist particulars, it has also been suggested, these may not be the sort of judgements best left to returning officers who have imperfect information and little or no legal assistance.<sup>36</sup>

#### **Election-specific features of nomination rules**

- 7.41 Our research paper on nominations considers election-specific differences in detail. As explained in chapter 2, our wider reform aim is to rationalise election specific laws so that they are consistently and centrally expressed for all elections. It is our current view that a single set of rules should govern nominations for all elections, and only differences justified by Government policy or by the use of a different voting system should be retained.

#### ***Transposing the rules on nomination for party-list elections***

- 7.42 In relation to the voting system, the chief driver of differences in the rules on nomination is the use of the party list at EU Parliamentary elections in Great Britain and at elections for London members of the London Assembly and regional members of the Scottish Parliament and National Assembly for Wales. We have noted the discrepancies within the detailed rules governing these party list elections, in relation to whether both the party name and an authorised description can be used on the ballot paper, or only one of those. Our provisional view is that the nomination rules for party list elections should be consistent. For example, it is the party that stands for election, through list candidates. When adapting the classical grounds for rejecting nominations to party list elections, defects in the party’s nomination ought to mean that it and its list candidates are rejected, while defects in the details of particular list candidates result in their

<sup>34</sup> *Sanders v Chichester* (1995) 139 SJLB 15, not fully reported but transcript available in P Gribble, *Schofield’s Election Law*, loose-leaf, 6th reissue volume 5 pp E99 and E114 to E115.

<sup>35</sup> Bob Watt, *UK Election Law: a critical examination* (2006) pp 112 to 114.

<sup>36</sup> C Morris, *Parliamentary Elections, Representation and the Law* (2012) p 66.

entry in the list being deleted.<sup>37</sup>

### ***Differences required by policy***

- 7.43 Other differences from one set of elections to another reflect particular policies that pertain to the election. Retaining such differences should not, we consider, affect the standardisation of the technical law on nominations which, subject to the demands of the particular voting system, should be the same.
- 7.44 An example of policy-led divergence is the requirement in elections in Northern Ireland for consent forms to contain a declaration against terrorism. A candidate for local election in Northern Ireland must submit a declaration against terrorism as part of their consent form; without this, the nomination will be invalid.<sup>38</sup> There is no equivalent in local elections in the rest of the UK, nor for candidates to the new Northern Ireland Assembly. This requirement does not extend the discretion of the returning officer to reject nomination papers; it is merely another formal requirement analogous to the provision on the consent form which requires candidates to attest that they are not disqualified from office.
- 7.45 Similarly, another difference pertaining to the nature of the EU-wide contest for EU Parliamentary elections is that relating to the declaration required of candidates that they are not also standing for election outside the UK. Candidates who are EU citizens, other than British or Irish nationals resident in the UK, must declare that they are not standing for election to the European Parliament in any other member state. They must also give details of where they are registered to vote in their member state of origin, if applicable, and state that they have not been deprived of the right to stand as a candidate through a disqualifying decision of the member state of which they are a national. The declaration must be received by the close of nominations; where it is delivered after 4pm on the 24th day before the day of the poll, the candidate must also provide a certification from their home member state that they are not disqualified from candidacy. In all other cases, it is the responsibility of the Secretary of State to contact the member state in question regarding any disqualification of the candidate. The declaration must be sent to the Secretary of State as soon as possible after the statement of persons and parties nominated. Failure to comply with these special provisions is the only ground for refusing nominations in addition to the classical grounds.<sup>39</sup>
- 7.46 Finally, there are divergent and asymmetrical subscription and deposit requirements for elections in the United Kingdom, ranging from no subscriber at all (which in practice always means one person attests to the candidacy, since consents to nomination must be witnessed) to 330 at GLA elections, while deposits also vary from £150 to £10,000. Subscription and deposit requirements perform the cautionary function of marking the seriousness of standing for election and testing the seriousness of the candidacy. This is justifiable given that

<sup>37</sup> See, for example, Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 16.

<sup>38</sup> Elected Authorities (Northern Ireland) Act 1989, s 3(1).



candidates have certain privileges. They are entitled to a copy of the full register of electors which the general public are not, and are entitled at some elections to post election addresses to the electorate at public expense.

- 7.47 We considered whether this project could propose to rationalise subscription and deposit requirements based on the size of the electorate and the nature of the election and recommend a system of tiers at which subscription and/or deposit requirements could be set by Governments. However, given the wide range of elections, the element of political policy judgement that would still be involved and the fact that this could lead to the introduction of subscriber requirements where there are none – for example in elections in Scotland or to the National Assembly for Wales – we have decided not to pursue this.

### **PROVISIONAL REFORM PROPOSALS**

- 7.48 In our view, the nominations process has grown unnecessarily complex and arcane. It is not fit for its main purpose which is to administer candidacies so they translate into ballot papers that assist voters in making their choice. Formalistic practices have developed which act as obstacles to the effective participation of independent candidates and even parties. They also add to the workload of electoral administrators at a busy point in the timetable, and to the legislator who must navigate through a complex sea of provisions in order to change the law.
- 7.49 An example of the current formalistic approach to nominations is the treatment of a nomination paper as incapable of amendment once formally delivered. If it is rejected, a wholly new nomination paper must be delivered. Furthermore, as we have noted, any subscribers to a rejected nomination paper cannot validly subscribe a second, even if they are assenting to the same candidacy. The rules admit of the possibility of a candidate being nominated by multiple nomination papers.<sup>40</sup> This practice is a way of insuring against a flaw in a nomination paper defeating the candidacy. It cannot be a proportionate exercise in efficient electoral administration to allow for multiple nomination papers in addition to consents to nomination and other forms, when one is centrally concerned with the administration of a single candidacy. The goal of subscription is for local electors to assent to a candidacy (not a paper). It is not consistent with this goal to debar valid subscribers to a defective nomination paper from subscribing a fresh nomination paper.

### **A single nomination form emanating from the candidate**

- 7.50 For all elections, we provisionally propose, electoral law should provide for a nomination paper emanating from the candidate, thus requiring no separate consent. The form should contain the information required to perform the “administrative” functions described above. These include: identifying the candidate by name and address, eliciting their party affiliation and authority to

<sup>39</sup> European Parliamentary Elections Regulations SI 2004 No 293, sch 1 rr 9, 9A and 13(3)(c); Directive laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a member state of which they are not nationals 93/109/EC, Official Journal L 329 of 30.12.1993 p 24.

<sup>40</sup> Representation of the People Act 1983, sch 1 r 11(2).

use it. It should also contain subscribers' details, the substantive rules on which we do not propose to reform for the reasons given above.

***A less complicated set of rules on party affiliation and its consequences***

- 7.51 We provisionally consider that party affiliation should also be provided for on the single nomination paper and that the rules on the consequences of party affiliation should be more straightforward. Party affiliation requires authorisation by a party nominating officer (or, in cases of joint affiliation, more than one such officer). That officer's authorisation should serve as a general authority to use the party's emblem and its registered descriptions, unless a particular description is authorised. The current law is that the party nominating officer must by certificate authorise the candidate to use a particular party description. In the *De Beer* case, which we considered above, 60 nominations were rejected because the specific party description used, though registered, was not specifically authorised by the party nominating officer. We provisionally propose that the law should allow party nominating officers to make clear whether they authorise all or only some of their 12 registered descriptions (and if so, which ones). This would avoid the *De Beer* problem.
- 7.52 The separate treatment of party description and party emblems strikes us as also questionable as a matter of principle. The current law requires a request to use a party emblem to be made by the deadline for nominations. In our view, the concepts of description and use of emblem are both facets of the notion of party affiliation in nomination papers. The use of a registered emblem depends on the use of a party description. Our current view is that a candidate ought, when providing details of their party affiliation, to be able to select the registered description which they wish to use, and the registered emblem. This would involve a change in the rules relating to who makes requests for emblems in nominations for elections in Northern Ireland to the European Parliament, Assembly and local government. It would also change the rule governing the election of constituency members of the Welsh Assembly. We cannot see any justification for the departures in these election rules from the rule elsewhere that it is for the candidate to request the use of an emblem.

***The manner of delivery of nomination papers: how, where, by whom, to whom?***

- 7.53 We provisionally propose departing from the parallel parliamentary and local government models for rules on nominations in favour of a single set of rules. This raises a question concerning the current requirement of attendance at the place for receiving nominations under the parliamentary model. In relation to the manner of delivering nomination papers, the less restrictive local government model simply requires that nomination papers be "delivered" at the nominations place. A further question is whether this should be extended to electronic delivery such as fax and email, which are already permissible means of filing consents to nomination by candidates outside the UK.<sup>41</sup>

<sup>41</sup> Representation of the People Act 1983, sch 1 r 8(2) referring to "a telegram or a similar means of communication". An electronically communicated nomination paper, in this context, would still need to be adequately completed and signed. Electronic communication should not be confused with electronic nomination.

- 7.54 Grounding the process in some form of personal attendance means that the returning officer can speak to an individual and that rival candidates can check nomination papers on site. Opening up the process to more modern forms of communication may be said to increase the risk of sham candidacies. However, the local government model requirement that a paper be “delivered” at the place for receipt of nominations means that nomination papers can be delivered by a third party such as a courier. The Electoral Commission guidance merely advises candidates to use someone they trust in order to ensure timely delivery. It is, moreover, possible for a determined person to enter a sham candidate despite the requirement for personal delivery of nomination papers.
- 7.55 We consider the issue of abuse of nominations further below. Presently the issue is how the risk of abuse should affect the lawful means of delivery of nomination papers. There seem to us to be three options:
- (1) Standardise the requirement that nomination papers be physically delivered by the candidate or agent at the place specified for receipt of nominations. This does not eliminate the possibility of fake candidates, as the recent attempt to nominate a tailor’s mannequin as a candidate at local government elections in Aberdeen demonstrates; the person behind the sham posed as the agent of the fictitious candidate, something that even the parliamentary model would not prevent.<sup>42</sup> That candidacy was only prevented from going forward by the invalidation of the nomination paper as a sham after it had been accepted by the returning officer, the sham having been discovered because the person responsible boasted about it on social media.
  - (2) Standardise the requirement that nomination papers be physically delivered to a place specified for receipt of nominations, by any means including by post.
  - (3) Enable nomination papers to be delivered electronically as well as physically.
- 7.56 None of the options are flawless. None obviates the risk of success by a person determined to make a sham nomination. Options 2 and 3 might be open to the objection that they encourage sham nominations, on the grounds that it requires less motivation and determination to send a document, physically or (still less in the modern context) electronically, than it does to attend a nominations place.
- 7.57 We provisionally propose that the more flexible procedures of option 3 be adopted, subject to the views of consultees.
- 7.58 We also provisionally propose that completed nomination forms should be open for public inspection during the period between notice of the election and notice of the poll, subject to the returning officer having a power to restrict public access to them to avoid overcrowding. That power should be exercised in such a way that no candidate is deprived of an opportunity to scrutinise nominations.

<sup>42</sup> BBC, *Aberdeen ‘Helena Torry’ mannequin election woman Renee Slater acquitted*, (11 January 2013), <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-20970395> (last accessed 2 December 2014).

**Provisional proposal 7-1: A single nomination paper, emanating from the candidate, and containing all the requisite details including their name and address, subscribers if required, party affiliation and authorisations should replace the current mixture of forms and authorisations which are required to nominate a candidate for election.**

**Provisional proposal 7-2: The nomination paper should be capable of being delivered by hand, by post or by electronic mail.**

**Provisional proposal 7-3: The nomination paper should be adapted for party list elections to reflect the fact that parties are the candidates; their nomination must be by the party's nominating officer and should contain the requisite consents by list candidates.**

**Provisional proposal 7-4: Subscribers, where required, should be taken legally to assent to a nomination, not a paper, so that they may subscribe a subsequent paper nominating the same candidate if the first was defective.**

#### **The role of the returning officer**

7.59 Rejecting a nomination is a drastic decision, since it prevents a person from putting their candidacy before the voting public. Discretion in this area should be limited and returning officers should be seen to be neutral arbiters. The conventional approach should be retained, so that the returning officer processes nominations according to the law's guidance, not their discretion.

7.60 Given that the returning officer must determine the validity of nominations according to law, irrespective of whether an objection is made, the formal "objections" procedure is an anachronism. The law need only provide that candidates or electors may object to a nomination. We also provisionally propose to make express the power of returning officers to offer a preliminary view to candidates as to the validity of their nomination papers in draft form, with a view to allowing the latter to put right any defects, before formal submission.

#### *The 1981 Act disqualification as a ground for invalidating nomination papers*

7.61 As we explained, the 1981 Act disqualification of serving prisoners is an exception to the purely formal grounds upon which returning officers can reject nominations. There are two principal criticisms of this rule.

7.62 The first is that it is an anomaly. A candidate may be a teenager who will not be 18 years of age on the day of the election, be a peer entitled to sit in the House of Lords, hold a disqualifying office or fail to satisfy nationality requirements. None of these grounds for disqualification, even if obvious, entitles the returning officer to reject a nomination paper. Faith is instead put in the democratic process, with provision for unseating disqualified candidates as the fallback measure.

7.63 The second is that the anomaly appears to be rooted in historical political considerations. As we explained above, the disqualification is of convicted persons detained indefinitely or for more than one year anywhere in the UK or Republic of Ireland. It is sometimes referred to as the "Bobby Sands rule", after the prisoner whose candidacy provoked this legislative response. It might be questioned whether the original mischief behind this rule justifies its continued

existence. The 1981 Act would, for example, be ineffective as a ground for rejecting the nomination papers of a candidate detained in Guantanamo Bay, or anywhere else outside the UK and Ireland.

- 7.64 Judgements as to who should be disqualified from being a candidate for election on grounds of being a convicted prisoner lie in our view in the political sphere of judgement and could not properly form part of this project. We provisionally propose only to suggest that there is no longer a practical need for disqualification on these grounds – uniquely among the grounds for disqualification – to be a matter within the purview of returning officers.

**Provisional proposal 7-5: Returning officers should no longer inquire into and reject the nomination of a candidate who is a serving prisoner. The substantive disqualification under the Representation of the People Act 1981 will be unaffected.**

*Sham nominations*

- 7.65 The second exception to the general rule concerns the power to reject sham nomination papers. This power is no longer understood to be based on a common law power to reject nominations for abuse of process, or obvious unreality. According to *Sanders v Chichester*, the power is based on the statutory ground for rejecting nomination papers for not being in accordance with the law.

- 7.66 In our view, this does not avoid the potential problem, which has existed since the “common law” doctrine of abuse of nominations emerged out of *Harford v Linskey*, of conferring on returning officers such a wide discretion that they might be seen to be becoming involved in exercising judgements which might drag them into the political sphere.

- 7.67 The underlying problem which led to consideration of the *Harford v Linskey* doctrine was spoiler candidates using misleading descriptions. That problem has since been overtaken by the restriction of candidates to the description “independent” or a registered description monitored by the Electoral Commission. That leaves outstanding two potential problem cases:

- (1) The spoiler candidate who uses not the party name, but a candidate’s or another well-known person’s name – the facts of the Margaret Thatcher case. A real candidate (Mr Hanoman) was standing, but had changed his name, apparently legally, to a rival candidate’s.
- (2) The fictitious candidate. A recent example of that was the use by a person of the name she had given to a tailor’s mannequin owned by her in order to nominate a candidate for local government elections in Aberdeen.

- 7.68 The *Harford v Linskey* formulation of the power to reject nominations as “mere” abuses of the right of nomination, or for obvious unreality, is too imprecise. The *Sanders v Chichester* formulation would empower returning officers to reject nominations that are “obscene, racist or an incitement to crime” or those that use an obviously fictitious name and address such as “Mickey Mouse of Disneyland”. This formulation is more precisely tied to the contents of the nomination papers. It can accommodate the Margaret Thatcher and mannequin examples. However

there are some problems. Margaret Thatcher was Hanoman's legal name at the time. In the mannequin example, the details on the face of the paper may not be patently false. Furthermore the *Sanders v Chichester* formulation of the power to reject is based on Dyson J's statement that the law has always treated sham documents and transactions as nullities. Our view is that more guidance is required for returning officers as to the grounds on which they may reject a nomination.

*Determining the grounds for rejecting sham nominations*

7.69 It is worth pausing to reflect where in the scheme this power is located. We are not concerned here with determining the grounds for bringing a legal challenge of the election. Nor are we concerned with deterring sham candidates through criminal offences. It is presently an offence knowingly to stand when disqualified. Rather, we are concerned with when a returning officer should intervene to prevent a particular candidate from appearing on the ballot paper.

7.70 We provisionally favour setting out in legislation a further ground for rejecting nomination papers which are obscene, racist, an incitement to crime, or fictions designed to confuse electors or manifestly seek to obstruct their exercise of the franchise. The challenge lies in calibrating that power so that it does not reverse in substance the conventional approach to the returning officer's role. In particular, this power should not:

- (1) involve the returning officer in substantively assessing the candidate's qualifications for office; or
- (2) involve the returning officer in weighing up the political merits of candidacies, or their chances of winning. Here the principal difficulty is distinguishing between the sham candidate and the protest candidate or protest (or fringe) parties.

7.71 There is already a formulation empowering returning officers to reject candidates' commonly used names (in favour of their legal names) on grounds very close to the *Sanders v Chichester* formulation, including that the returning officer thinks the use of the person's commonly used name may be likely to mislead or confuse electors.<sup>43</sup> Adapting this to our purposes, and making the words more definite, we provisionally propose that a returning officer can reject a nomination paper if:

- (1) any particulars of the nomination are a fiction or device liable to confuse or mislead electors, or to obstruct their exercise of the franchise; or
- (2) any particulars of the nomination paper are obscene or offensive.

**Provisional proposal 7-6: Returning officers should have an express power to reject sham nominations.**

<sup>43</sup> Representation of the People Act 1983, sch 1 r 14(2B).

# CHAPTER 8

## THE POLLING PROCESS

### INTRODUCTION

- 8.1 The law governing the polling process is almost entirely contained in discrete sets of election rules. While these may vary on points of detail, there is nevertheless a remarkably uniform way of regulating polling, with only minor differences attributable in particular to different voting systems. What follows should be read in the light of our proposals, made in chapter 2, that election law should, where possible, be set out in one place for all elections, subject to adaptations due to policy or voting system. This chapter considers the rules on polling, starting with those concerned with informing the public, the logistics of the poll, polling day administration, and the duties on close of polls. We separately consider the law dealing with supervening events which frustrate the poll: riots and death of a candidate during polling.

### VOTER INFORMATION AND OTHER PUBLIC NOTICES

- 8.2 An important aspect of access to the poll is the requirement that voters should have clear and reliable information as to how to vote. The current law lays down detailed rules which aim to give voters (and candidates) that information. We consider first the rules concerning providing voters with information about the poll and/or giving public notice of the stages in the election.

#### Poll cards

- 8.3 The returning officer is required as “soon as practicable” after notice of election to send to electors and proxies an official poll card.<sup>1</sup> Curiously, at parish and community council elections these need only be sent if the council of the parish or community so requests by noon on the nineteenth day before the election.<sup>2</sup> This means that incumbents may have a say in how well publicised a parish or community council election will be, but this is presumably intended as an economy measure, given that such elections tend to have the lowest turnout and are most likely to be uncontested.
- 8.4 Election rules prescribe the contents of the poll card, including the elector’s name, address and electoral number, the date and hours of the poll and the location of the polling station. The back of the poll card includes instructions on how to vote. The Electoral Commission’s guidance is for the notice to be sent the next working day after notice of election is given, and for a map to be included showing where the polling station is situated.<sup>3</sup> A prescribed form is contained in regulations, and in election-specific rules for other elections. In Great Britain a

<sup>1</sup> Representation of the People Act 1983, sch 1 r 28(1); Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 25(1). No poll card is required to be sent to overseas voters.

<sup>2</sup> Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 25(1). If the election is combined with any other, the general rule applies: sch 2 r 25(2).

<sup>3</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part B: Action before the poll* (December 2009), paras 7.1 to 7.3.

different form is prescribed for ordinary electors, proxy electors, postal electors and postal proxy electors. In Northern Ireland, only the first two poll cards are prescribed.<sup>4</sup> At Scottish Parliamentary elections, a poll card is also prescribed for electors who have appointed proxies, to remind them of their status.<sup>5</sup>

### **Strict versus substantial adherence to prescribed forms**

- 8.5 Poll cards are prescribed forms. Some election rules provide that a stipulated form “shall be used”, which we describe as a requirement of strict adherence, while in others a form to the “like effect” suffices, which is a requirement of substantial adherence to the prescribed form. Even strict adherence allows for some customisation, for example to identify the returning officer’s local authority. A requirement of strict adherence is set out in the election rules for UK Parliamentary, European Parliamentary, Scottish Parliamentary, Welsh Assembly and Northern Ireland Assembly elections as well as local elections in Northern Ireland (these being the election rules which use the UK Parliamentary election rule model), though the strict adherence requirement is softened at the level of the regulations in which the forms are prescribed, which permit the use of forms “substantially to the like effect”.<sup>6</sup> The rules governing local government elections in Great Britain, Greater London Authority, Mayoral and Police, and Crime Commissioners elections, all provide that a form to the like effect to that prescribed may be used.
- 8.6 The words “like effect” are inherently uncertain. We prefer to use the term “substantial” to describe the requirement to adhere to the prescribed form because we consider that the same or a substantially similar form to that prescribed should be used. We do not consider that substantial departure from the prescribed form is desirable in what is potentially the only pre-poll voter-facing document and which is intended to impart crucial information.

### **Other public notices**

- 8.7 Returning officers are presently under an obligation to publish various notices concluding the nominations stage and announcing the poll.<sup>7</sup> These are subject to the general publicity requirements of section 200 of the Representation of the People Act 1983 which we mentioned above.<sup>8</sup> They include the following:

- (1) A notice of the poll accompanies the statement of persons nominated at a parliamentary election. These combined notices mark the end of nomination and the beginning of the polling phase.<sup>9</sup> Local government

<sup>4</sup> Representation of the People (England and Wales) Regulations SI 2001 No 293, sch 3 forms A, A1, B and B1, replicated in other elections. We understand that the Electoral Office for Northern Ireland does send out poll cards to postal voters for “notification purposes” across all elections.

<sup>5</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 37; Appendix of Forms form N2.

<sup>6</sup> Representation of the People (England and Wales) Regulations SI 2001 No 293, reg 4(2).

<sup>7</sup> European Parliamentary Elections (Amendment) Regulations SI 2013 No 2876, sch 1 Form K.

<sup>8</sup> See Chapter 7 Notice of Election and Nominations.

<sup>9</sup> Representation of the People Act 1983, sch 1 r 23(1); European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 27(1).



election rules (and the election rules that adopt them as a model)<sup>10</sup> have historically required a later, separate notice of poll, to allow for the ability of candidates to stand in more than one ward and withdraw from all but one after the close of nominations. This different rule about the notice of poll is no longer needed, given the Government policy to abolish the opportunity to withdraw after close of nominations.

- (2) A notice of the locations of polling stations must also be given no later than the deadline for giving notice of the poll at a local government election.<sup>11</sup> No corresponding deadline exists for parliamentary model elections, the rules stating instead that the notice may be combined with the statement of persons nominated at a parliamentary election.<sup>12</sup> While this notice may have historically informed electors where their polling station was, this function has been taken over by poll cards. Its primary purpose is now to promote transparency. The notice must be sent to election agents as soon as practicable after publication, so that they can plan the attendance of polling agents at, and tellers outside, polling stations.

#### **Reform of the duties relating to public notices and voter information**

8.8 Bringing together the provision for all elections, the statement of persons nominated and the notices of the poll and polling stations, together notify the public of the following:

- (1) the need for a poll (and the day and hours of polling);
- (2) the number of vacancies (if a multiple member election);
- (3) the names and other details of the candidates finally standing; and
- (4) the location of each polling station and the voters entitled to vote there.

8.9 In our provisional view, it would be simpler if for all elections, after nominations are finalised, returning officers had to publish a single notice conveying the above information. Such a notice would mark the end of the nominations process and present finally to the public and contestants the details of the election contest about to take place. We refer to such a notice as the “polling notice”.

8.10 The duty to post notices in a conspicuous place is somewhat archaic. The drafting is wide enough to enable online publication as an adjunct to the primary, physical process of “posting” notices. We provisionally consider it sufficient to require returning officers to publicise documents by any reasonable means. The polling notice should also be communicated to candidates.

8.11 Furthermore, we provisionally consider it best to require “substantial” adherence

<sup>10</sup> See Chapter 7 Notice of Election and Nominations, para 7.25.

<sup>11</sup> Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 21(3); Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 21(3); Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 20(4).

<sup>12</sup> Representation of the People Act 1983, sch 1 r 23(2).

to a prescribed form, tolerating minor differences of presentation but not allowing returning officers a free hand to redesign the form.<sup>13</sup> We also provisionally consider that so far as possible the same form should be prescribed for all elections.

- 8.12 Poll cards are important documents imparting key information to voters. Prescribed forms should in our provisional view be subject to standards of professional design, user testing and user-friendliness similar to those that we provisionally recommended for ballot papers.<sup>14</sup> The form of poll cards should continue to be prescribed in secondary legislation, again subject to a requirement to adhere substantially to the prescribed form. We provisionally consider that the same forms of poll cards should be prescribed for all elections, and that the fifth type of poll card which exists at Scottish Parliamentary elections (informing an elector that they are on record as voting through a proxy) should be in use throughout the United Kingdom.<sup>15</sup>
- 8.13 In parish and community council elections, we do not think that councils, who are political actors, should decide whether or not poll cards should be sent. If the sending of poll cards must remain optional, the discretion should lie with the returning officer. However, we provisionally consider that the discretion should not be retained. We accept that there may be cost implications in systematically sending poll cards to eligible voters. But we do not think that the one form of guaranteed pre-poll interaction between administrator and voter should be optional in any election to public office.

**Provisional proposal 8-1: A single polling notice in a prescribed form should mark the end of nominations and the beginning of the poll, which the returning officer must communicate to candidates and publicise.**

**Provisional proposal 8-2: The same forms of poll cards should be prescribed for all elections, including parish and community polls, subject to a requirement of substantial adherence to the form.**

## **THE LOGISTICS OF POLLING**

### **Appointing staff**

- 8.14 Every election rule obliges the returning officer to “appoint and pay a presiding officer” for each polling station along with “such clerks as may be necessary for the purposes of the election”. No one who has been employed by or on behalf of a candidate in or about the election may be so appointed.<sup>16</sup> Both the presiding officer and poll clerks are given powers to give effect to the election rules, but the powers to order the “arrest, exclusion or removal” of any person from the polling

<sup>13</sup> In practice, it should be borne in mind that even strictly prescribed forms allow expressly for some customisation – such as to include the name of the constituency and so on.

<sup>14</sup> See Chapter 5, Manner of Voting.

<sup>15</sup> See para 8.4 above.

<sup>16</sup> Representation of the People Act 1983, sch 1 r 26(1); Electoral Law Act (Northern Ireland) 1962, sch 5 r 23.

station are not extended to the clerks.<sup>17</sup> This formulation is anomalous because the presiding officer has no power to order an arrest.

*Political neutrality of electoral administrators*

- 8.15 There is no express duty of political neutrality imposed on electoral administrators. It is implicit in the lawful application of rules, however, that they must be applied impartially. The election rules only require that presiding officers and clerks should not be appointed if they have been employed by a candidate. It is not clear whether this extends to counting staff.
- 8.16 The issue and receipt of postal votes is, meanwhile, governed by separate legislative measures. There the returning officers and their “clerks”<sup>18</sup> are the only ones permitted to attend postal vote issuing sessions. The term “clerks” is undefined – other election rules use the word “staff” – and it is unclear whether it refers to the “clerks” whom the returning officer may appoint “as may be necessary for the purposes of the election” under rule 26 of the Parliamentary election rules. The Electoral Commission’s guidance suggests that rule 26 refers only to poll clerks who attend polling stations.<sup>19</sup> We are not convinced that the wording of the legislation compels that interpretation. Postal voting staff are appointed “for the purpose of the election”, and ought equally to be transparently neutral. What turns on the point is whether returning officers, when appointing postal voting session staff, are equally under a duty not to appoint “any person who has been employed by or on behalf of a candidate in or about the election”. In our view, all election staff should be transparently neutral and not active in a candidate’s campaign, and that should be made clear in the legislation.

POWER TO REQUISITION SCHOOL ROOMS FOR POLLING

- 8.17 The election rules empower the returning officer to use, free of charge, for the purpose of taking the poll, any room in a school as defined by reference to the public educational systems in each jurisdiction.<sup>20</sup> The officer may also use a room the expense of which is “payable out of any rate”. At Northern Ireland Assembly and local elections in Northern Ireland the power extends to rooms required both for polling and for the count.<sup>21</sup> A further difference in Northern Ireland is that the Chief Electoral Officer must not use for Parliamentary electoral purposes rooms

<sup>17</sup> Representation of the People Act 1983, sch 1 r 26(3). This is an anachronistic provision which survives in today’s election rules having appeared in the rules appended to the Ballot Act 1872.

<sup>18</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, regs 67 and 68.

<sup>19</sup> For example, Electoral Commission, *Guidance for Police and Crime Commissioner Elections, Part B: Planning and organisation* (2012), paras 2.14 and 2.32.

<sup>20</sup> In England and Wales, a school means one maintained or assisted by a local education authority, or in respect of which grants are made out of moneys provided by Parliament to the person or body responsible for the management of the school. Parker’s Election Law comments that a sixth form college is not a school, being funded by the Further Education Funding Council for England (or Wales) under the Further and Higher Education Act 1992. In Scotland, the power does not extend to an independent school within the meaning of the Education (Scotland) Act 1980, s 135. In Northern Ireland, a school is defined as one in receipt of a grant out of moneys appropriated by Assembly Measure.

<sup>21</sup> Northern Ireland Assembly (Elections) Order SI 2001 No 2599, sch 1 r 22; Electoral Law (Northern Ireland) Act 1962, sch 5 r 19.

in schools which are attached to a religious institution.<sup>22</sup> However, this rule is not included in the election rules for local elections in Northern Ireland.

- 8.18 The parameters of the power are, it seems to us, ill-defined and apt to cause difficulties in practice. We have heard of disagreements between returning officers and school authorities over the use of school premises for polling. The rules do not make it clear, for example, whether the returning officer may demand the use of a particular room if the school prefers to offer a different one. Schools may be reluctant to accept the use of their premises for polling, in view of the disruption caused to teaching schedules and the unpopularity of closing a school (completely or even partly) with working parents who are forced to take a day off work or make alternative child care arrangements. We have heard of school authorities insisting or attempting to insist on criminal records bureau checks on polling staff. Some school authorities claim to require extra security if the school day is not cancelled, and seek to charge the returning officer. The returning officer is obliged to make good any damage done to, and “defray any expense incurred by the persons having control over, any such room by reason of its being used for the purpose of taking the poll”<sup>23</sup>, but it is not clear to what extent this extends to expenses that a school chooses to incur.

#### EQUIPPING POLLING STATIONS

- 8.19 The returning officer is under express and implied duties to equip polling stations with certain specified material, for example such numbers of ballot boxes and ballot papers as the officer thinks necessary.<sup>24</sup> Nevertheless, compliance with other election rules plainly requires equipment which is not specified. The Electoral Commission guidance’s checklist of polling station materials in fact runs to 32 items.<sup>25</sup> Indeed, the Scottish local government election rules add to the classical equipment list a catch-all clause: “copies of forms of declarations and other documents required for the purpose of the poll”.<sup>26</sup> While this makes the equipment provision truly exhaustive, we question the usefulness of prescribing exhaustively at the level of legislation what equipment the returning officer needs to furnish a polling station.

#### *What is a ballot box?*

- 8.20 Classically a ballot box was defined as a closed box which is “so constructed that

<sup>22</sup> Representation of the People Act 1983, sch 1 r 22(4); European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 1 r 23(4); Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1.

<sup>23</sup> Representation of the People Act 1983, sch 1 r 22(1), European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 26; Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 20(1)(a), Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 20(1)(a); Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 32; Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 18; Schools can also be used by candidates for election meetings under section 95 of the 1983 Act, subject to prior lettings. The appropriation power in election rules is not so qualified.

<sup>24</sup> The classical (UK Parliamentary) election rule in the Representation of the People Act 1983, sch 1 r 29 is replicated, with necessary modification, in every other election rule.

<sup>25</sup> Electoral Commission, *Guidance for UK Parliamentary elections: Part D Appendix – Resources* (December 2009), p 18.

<sup>26</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 25(3)(d).

the ballot papers can be put in it, but cannot be withdrawn from it, without the box being unlocked.”<sup>27</sup> That is the continuing requirement for UK Parliamentary elections. At other elections, either provision is made for a ballot box to have a seal as an alternative to a lock, or the sole reference is to the box being unsealed or opened.<sup>28</sup> We question the need for a lock as opposed to a seal. The alternatives of a locked or a sealed ballot box should be available for all types of election.

#### *Printing enough ballot papers*

- 8.21 The law does not stipulate how many ballot papers must be printed. However, every set of election rules provide that if an elector is entitled to a ballot paper and seeks one, it is a breach of the election rules not to issue one. Such a failure may lead to the invalidation of the election, something which returning officers will be conscious of. They will seek to print a sufficient number of ballot papers, well in advance of the poll. The Electoral Commission’s advice is that the starting point should be a 100% print run, with a lower number justified by a risk assessment based on previous turn-outs, local and national issues, and subject to a reserve stock being available for rapid delivery. In one context, the Electoral Commission suggests that steps should be taken to ensure that additional ballot papers can be printed at short notice if required and to decide how polling station staff would be briefed should this situation occur.<sup>29</sup>
- 8.22 The current law seems to strike a balance by requiring that every eligible voter should receive a ballot paper on request, while allowing returning officers to take account of maximum realistic turn-out figures, thereby conserving resources.<sup>30</sup> We do not at present envisage that the law could usefully intervene further here.

#### **Provisional reform proposals for logistics of the poll**

- 8.23 It is currently our view that all election staff should be transparently neutral and not active in a candidate’s campaign. Furthermore, the law should make it clear that, as part of the duty of neutrality of returning officers, they should not engage, in any capacity (including for the purposes of postal voting), persons who have had any involvement, whether locally or otherwise, in the election campaign in question.
- 8.24 Election day will often be a school day, so that an alternative to school rooms may well be desirable. In the absence of an alternative, however, and given the growing concerns that we have heard about the diminishing range of buildings available to returning officers, our focus is on clarifying the parameters of the

<sup>27</sup> The “closed box” and construction requirement appeared in the Ballot Act 1872 35 & 36 Vic 33, s 2 and sch 1 r 23. The quoted words are from the contemporary rule in the Representation of the People Act 1983, sch 1 r 29(2).

<sup>28</sup> The requirement is to lock the ballot box “if it has a lock”, save for elections to the Scottish Parliament, Scottish local government and National Assembly for Wales, which do not mention a lock at all.

<sup>29</sup> Electoral Commission, *Police and Crime Commissioner elections: guidance for local Returning Officers Part C - Administering the poll* .

<sup>30</sup> We understand that at the independence referendum in Scotland, the print-run for ballot papers was in excess of 100% of the registered electorate, making prudent provision for the anticipated high turn-out.

returning officer's power to requisition school premises. In particular:

- (1) The words "a room" may be too restrictive. A significantly higher number of voters may use a polling station now than did in 1872. Our provisional view is that the returning officer should be able to select such premises within the school as are adequate to meet the size of the electorate.
- (2) We provisionally consider that it should be made clear that, for the purposes of polling day, those premises are under the exclusive control of the returning officer. Some electoral staff, particularly those with less experience, might not be sufficiently insistent that their needs take precedence.
- (3) We are provisionally of the view that the requirement to defray expenses, originally intended to cover heating and similar costs directly incurred by the school in making the premises available, should be drafted so as to make it clear that remoter expenses incurred by the school – such as those of increased security for pupils – are not chargeable to returning officers, though we would welcome receiving the views of school authorities on this, as well as the views of the electoral community.

8.25 We do not think it is any longer necessary (or desirable) for legislation to lay down an exhaustive list of polling station equipment. It would be preferable for the law only to prescribe the essential equipment for a poll. That includes:

- (1) Ballot papers, which are prescribed as to their form, with the number provided for each polling station being left at the returning officer's discretion.
- (2) Ballot boxes, which should be secure repositories for ballot papers that are such that any attempt to tamper with them can be detected. We do not consider that the requirements for ballot boxes should vary, from those which must be lockable, to those which may be, and those which merely may be sealed or designed in such a way that their having been opened can be detected. There should be standard requirements for ballot boxes.
- (3) The key lists required for polling, including the polling station registers and absent voters list (which determine entitlement to vote, and the mode of voting respectively) and the corresponding number list which is central to the judicial vote tracing mechanism.

8.26 For the rest, returning officers should be under a general duty to furnish polling stations with the equipment and materials required for the lawful and effective conduct of the poll. A checklist can continue to be contained in extra-legal guidance.

**Provisional proposal 8-3: As part of their duty of neutrality, returning officers should not appoint in any capacity – including for the purposes of postal voting – persons who have had any involvement (whether locally or otherwise) in the election campaign in question.**

**Provisional proposal 8-4: The power to use school rooms should be clarified so that the returning officer is able to select and be in control of the premises required, and so that the duty to compensate the school for costs does not extend beyond the direct costs of providing the premises.**

**Provisional proposal 8-5: The law should specifically require that returning officers furnish particular pieces of essential equipment for a poll, including ballot papers, ballot boxes, registers and key lists. For the rest, returning officers should be under a general duty to furnish polling stations with the equipment required for the legal and effective conduct of the poll.**

## **REGULATING POLLING DAY**

- 8.27 Polling day is traditionally, and often as a matter of law,<sup>31</sup> a Thursday. All election rules start with a statutory timetable which stipulates that polling takes place between 7 am and 10 pm. The long polling hours – longer than in many other countries<sup>32</sup> – compensate for the fact that electors may only vote at their allocated residential polling station, often on a working day. This means a fifteen hour shift, with minimal informal breaks for the polling staff working at the station.

### **Controlling access and maintaining order**

- 8.28 The classical rules restrict entry into polling stations to certain individuals – administrators, voters (accompanied by their children and, in the case of disabled voters, their companions), candidates and agents, accredited observers, police and community support officers. Curiously, returning officers and their staff (including visiting officers whose role is to roam between polling stations, collecting postal votes) are not mentioned in the rules. The Scottish Parliamentary and local government election rules have been amended to include them in the standard list. Other election rules do not mention them, but in practice visiting officers frequently go to polling stations. Their role is to check progress and to pick up any postal votes cast at the polling station so they can be opened and processed before the close of polls.<sup>33</sup>
- 8.29 The presiding officer has a duty to keep order at the polling station. The officer

<sup>31</sup> Fixed-term Parliaments Act 2011, s 1(3) (regular general election); Northern Ireland Act 1998, s 31(1) (Northern Ireland Assembly general election); Scotland Act 1998, s 2 (Scottish Parliamentary general elections); Representation of the People Act 1983, ss 37, 37A and 37B (ordinary local government or Greater London Authority election in England and Wales, subject to the power of the Secretary of State to vary by order), applied to Mayoral and PCC elections respectively by the Local Authorities (Elected Mayors) (Elections, Terms of Office and Casual Vacancies) Regulations SI 2012 No 336, rr 3, 4 and 7 and the Police Reform and Social Responsibility Act 2011, s 50; Local Government (Scotland) Act 1994, s 6 (ordinary local government election in Scotland, subject to power of Scottish Ministers to vary); Electoral Law Act (Northern Ireland) 1962, s 11 (ordinary local election in Northern Ireland).

<sup>32</sup> R Rose (ed), *International Encyclopedia of Elections* (2000) at p 55. In France, Germany and Australia polling hours are from 8 am to 6 pm and polling takes place at the weekend. In Canada, polling takes place on Mondays over a 12 hour period, and in the Republic of Ireland polling occurs on a Friday and must run for a minimum of 12 hours, falling in a period set by the Minister between the hours of 7 am and 10.30 pm.

<sup>33</sup> Representation of the People Act 1983, sch 1 r 32; Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 28; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 41.

may order the removal of a person, by a constable or a person authorised in writing by the returning officer, for misconduct or refusal to “obey a lawful order”. It is not clear what orders can lawfully be given. The power to remove is subject to an express limitation that no voter otherwise entitled to vote there shall be prevented from doing so.

- 8.30 The precise wording of the UK Parliamentary election rule, reproduced in other election rules, dates back to 1872 and seems inappropriate today. It stipulates that a person so removed may, if charged with an offence, be dealt with as a person taken into custody by a constable for an offence without a warrant. This provision, originally intended as an empowering provision, would nowadays appear to bring into play, in England and Wales, the Police and Criminal Evidence Act 1984, which places certain obligations on constables concerning the place and length of time a person may be detained following arrest.<sup>34</sup>
- 8.31 We doubt that returning officers nowadays issue written authorisations to remove people from polling stations as part of a procedure potentially leading to criminal prosecution. We provisionally consider that presiding officers should have the power to use, or authorise the use by polling station staff, of reasonable force to remove a person who attempts to remain in a polling station otherwise than for the purpose of voting, but we do not consider that it should amount to a power of arrest. The appropriate response in most cases will be to call the police, who may arrest a miscreant inside or outside the polling station for commission of any criminal offence, in the normal way.

**Provisional proposal 8-6: Presiding officers should have the power to use, or authorise the use by polling station staff, of reasonable force to remove from a polling station a person not entitled to be there. The procedure for returning officers to issue authorisations to use force should be abolished.**

### **Prescribing the voting procedure**

- 8.32 Election rules prescribe in detail the procedure to be followed when voting. Although this structure does not leap from the pages of the election rules, it is useful to divide the rules into three kinds of voting procedure:
- (1) the “ordinary” voting procedure – voting unaccompanied and unobserved – which is the standard way of preserving secrecy;
  - (2) the assisted voting procedure, which compromises some secrecy in order to secure access for disabled voters; and
  - (3) the tendered voting procedure for those apparently not entitled to cast a vote, for example where the voter is recorded as having already voted or is on the postal voters list. To guard against the possibility of a mistake or a case of impersonation, they may cast a tendered vote, which will only be counted by an election court.
- 8.33 We consider the ordinary and tendered voting procedure first, before considering issues of disabled access further on in the chapter.

<sup>34</sup> Police and Criminal Evidence Act 1984, ss 30, 34, 35 and 37. For Scotland, see the Criminal Procedure (Scotland) Act 1995, s 14.



### ***The ordinary voting procedure***

- 8.34 A single election rule describes the voting procedure for any particular election, with minimal variation across elections.<sup>35</sup> The rule is addressed both to the presiding officer and clerks and to the voter. The instructions are substantially unchanged from their inception in 1872.
- 8.35 A ballot paper must be delivered to a voter who asks for one. Immediately before delivery:
- (1) the electoral number and name of the voter must be called out;
  - (2) the voter's electoral number must be marked against the ballot paper number on the corresponding number list at the polling station, which (unlike that for postal votes), omits the recording of unique identifying marks entirely;
  - (3) the polling station register is marked to indicate that a ballot paper has been received by the elector; and
  - (4) where a person is applying for a ballot paper as a proxy, a mark is also made against the name of that person in the list of proxies.
- 8.36 Anonymously registered electors must show the presiding officer their official poll card, and then only their number will be called out before resuming the standard process. In Northern Ireland, providing visual identification is a condition of receiving a ballot paper.

### INSTRUCTIONS TO THE VOTER

- 8.37 Upon receiving the ballot paper, voters must:
- (1) proceed into one of the compartments in the polling station;
  - (2) secretly mark their ballot paper and (in most election rules) fold it so as to conceal their vote or votes;
  - (3) show the presiding officer the back of the paper so as to disclose the number and the unique identifying mark; and
  - (4) put the folded ballot paper into the ballot box in the presiding officer's presence.
- 8.38 They must do these things without undue delay, and leave the polling station as soon as the ballot paper has been inserted into the ballot box.

### *Folding and showing the back of the ballot paper*

- 8.39 The instruction to fold the ballot paper is not reproduced at Greater London Authority elections; this is because doing so risks slowing down mechanised counting as counting machines may struggle with folded ballot papers. Consequently, at the 2012 Greater London Authority elections polling staff were trained to ask voters not to fold ballot papers but to accept folded papers all the

same. The Scottish Parliamentary election rules also depart from the classical requirement to fold ballot papers, presumably because votes at those elections were once (in 2007) counted mechanically.

- 8.40 Given our reform aim of a uniform set of conduct rules for all, we question why, if at some elections it is unnecessary or even undesirable, the rules require that ballot papers be folded at other elections. This strikes us as a difference which must be justified by principle. One reason might be to preserve secrecy at the point the ballot paper is cast. But if there are no secrecy concerns at Greater London Authority and Scottish Parliamentary elections, it is unclear why there should be any at others.
- 8.41 There is an historical explanation for folded ballot papers. Voters are also instructed to show the presiding officer the back of their marked ballot paper, disclosing the number and unique identifying mark.<sup>36</sup> This requirement dates back to the Ballot Act 1872. Legislators at that time were concerned with the “Tasmanian dodge”, a practice which could circumvent secrecy. A voter would be prevailed upon to give the appearance of voting by placing a piece of paper superficially resembling a ballot paper into the ballot box and to bring the blank ballot paper out of the polling station. It would then be marked by or under the supervision of the perpetrator of the scheme and given to another suborned voter who would return with a further blank ballot paper, enabling the process to be repeated.<sup>37</sup> Voters were and are, therefore, instructed to fold their ballot papers and show the official mark on the back of a genuine ballot paper to the presiding officer before casting it; this is to enable the officer to check that no imitation ballot paper is placed in the ballot box in order to enable a blank ballot paper to be smuggled out of the polling station.
- 8.42 In this context, folding the ballot paper before showing its back helps to keep the vote secret. If there were no need to show the back of the ballot paper, there would be no need to fold it. It is not clear to us how closely the instruction to show the back of ballot papers is followed or enforced in practice. We are not convinced that the Tasmanian dodge should be a modern concern. It is a highly labour-intensive and thus inefficient form of malpractice.
- 8.43 The election rules’ instruction to show the back of the ballot paper historically also appeared in notices to voters displayed at the polling station.<sup>38</sup> However, recent updates to electoral legislation include a new set of instructions to voters. These make no mention of the need to show the presiding officer the back of the ballot

<sup>35</sup> Representation of the People Act 1983, sch 1 r 37.

<sup>36</sup> Representation of the People Act 1983, sch 1 r 37(5), replicated in every other election rule.

<sup>37</sup> C O’Leary, *The Elimination of Corrupt Practices in British Elections 1868 – 1911* p 66. See also HC Deb 12 April 1872 vol 210 at p 1221, confirming that the main object of the relevant provision (Ballot Act 1872, s 2) was to counteract the Tasmanian dodge by preventing a false ballot paper from being cast to initiate the scheme.

<sup>38</sup> Representation of the People Act 1983, sch 1 Appendix of Forms, “Form of directions for the guidance of the voters in voting”, para 3, replicated in every other election’s equivalent form.

paper, even though the relevant election rule continues to require that.<sup>39</sup> We understand that the redesigned instructions will be prescribed in all election rules for which the UK Government is responsible. If so, we find it questionable whether the election rule (which voters will probably never see) should require the doing of something which the instructions (which voters will see) do not mention.

#### TRANSPOSING THE CLASSICAL VOTING PROCEDURE TO MULTIPLE BALLOT PAPER POLLS

- 8.44 The classical voting procedure was designed for simple contests involving a single ballot paper. It requires some modification so as effectively to transpose it to elections which involve multiple ballot papers, such as combined polls or elections using the additional member system. The requirement, for example, to maintain a corresponding number list at such elections is aimed at the need accurately to record the ballot paper numbers allocated to the voter. Some voters, however, will not want all ballot papers they are entitled to, while others will accidentally spoil one paper and request another. In our view, there ought to be a single answer, and not several, to the problem of maintaining a corresponding number list at elections involving multiple ballot papers. The list should be combined at all elections, with presiding officers allowing cancelled and spoiled ballot papers to be replaced while the list is maintained. We discuss this in chapter 10, when discussing combination of polls.

#### PRESCRIBED QUESTIONS

- 8.45 Eligibility to vote is based on being a person in respect of whom there is an entry in the polling station register. Before handing a ballot paper to a voter, the presiding officer is entitled to ask the questions prescribed in election rules.<sup>40</sup> Candidates and their election or polling agents have the power to require the presiding officer to ask some of the questions.<sup>41</sup> The presiding officer must not deliver a ballot paper to a person who does not satisfactorily answer a question. This rule exclusively regulates the ability to inquire into a person's right to vote – no other inquiry may be made of a person applying for a ballot paper.
- 8.46 Historically, these questions were preludes to the taking of oaths. Swearing a false oath was a crime that ranked with perjury.<sup>42</sup> There is no longer any oath-taking, and lying in response to a prescribed question adds no more to the offences of voting more than once or personation, against which the questions are targeted; these are committed regardless of a false answer to the questions. Presiding officers are powerless to prevent a person from voting if the person

<sup>39</sup> European Parliamentary Elections (Amendment) Regulations SI 2013 No 2876, sch 1 Form K; contrast with European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 41(4).

<sup>40</sup> Relating principally to whether the person seeking the ballot paper is the person listed under a particular name and address in the register of voters, and whether they have already voted in the election; there are further possible questions, to which we advert below.

<sup>41</sup> Representation of the People Act 1983, sch 1 r 35.

<sup>42</sup> Registration Act 1843 6 Vic. c 18, s 81; Ballot Act 1872, s 10; Corrupt Practices at Parliamentary Elections Act 1728 2 Geo 2 c 24.

gives a formally satisfactory answer which is suspected to be false.<sup>43</sup> At best, prescribed questions act as additional deterrents for nervous would-be impersonators.

- 8.47 The full list of questions can run to six (depending on the circumstances and the answers given), and is repeated, with adaptations, in each set of election rules. The prescribed questions purport to exhaust the kinds of questions polling staff may ask of voters, thus making clear their limited role in restricting access to the poll. Plainly however, common sense and good electoral administration may require the asking of other questions. For example, in the case (not covered by the rules) of a voter seeking a ballot paper who is not on the polling station register, it may be sensible to ask for the voter's previous address, in order to see if the voter is still registered under that address (and thus able to vote at another polling station, to which they can be directed). The point of prescribed questions is to limit the kind of enquiries administrators may make of a person's right to vote under a name which does appear on the register of the polling station where they are seeking to vote. However, even the asking of questions with a view to assisting a voter who is not on the register but entitled to vote elsewhere is arguably precluded by the rules.

#### ***The tendered voting process***

- 8.48 Tendered voting is available in certain situations, subject to answering further prescribed questions. The typical situation is that an elector presents at the polling station but is marked on the polling station register as having already voted. The aim of tendered voting is to enable an election court eventually to correct the position if the tendered voter was truly entitled to vote, by counting their vote and discounting any earlier vote falsely cast in the true elector's name.<sup>44</sup>
- 8.49 Tendered ballot papers are of a different colour, in order to prevent their being accidentally counted. Once marked, instead of being placed in the ballot box they must be endorsed by the presiding officer with the name and electoral number of the person casting the tendered vote, and set aside in a separate sealed packet. The same name and number must also be marked on a "tendered voters list". At UK Parliamentary elections in Great Britain and Scottish Parliamentary elections, a voter must sign that list opposite the entry relating to them. At elections held in Northern Ireland, the ballot paper itself must be signed by the voter, unless they have been assisted in their voting either by the presiding officer or by a companion. Where such a signature is required and is not present, the tendered ballot paper is void.

#### **Queues at the close of polls**

- 8.50 Polling must be open "between the hours of 7 in the morning and 10 at night" under rule 1 of every election rule. Issues can arise where voters are seeking to vote as 10 pm is reached. In the *Islington* election case, any suggestion of turning away voters and closing ballot boxes strictly at 10 pm was considered "almost contrary to common sense"; voters who had been issued with ballot papers

<sup>43</sup> Representation of the People Act 1983, sch 1 r 36.

<sup>44</sup> Representation of the People Act 1983, sch 1 r 40.

before the close of poll should be allowed to cast their votes.<sup>45</sup> Since (it has been held) ballot papers cannot be issued after 10 pm,<sup>46</sup> one question is how the presiding officer and clerks should approach the issuing of ballot papers to voters who have reached the polling station before that time. The election rules do not give guidance on this.

- 8.51 At the May 2010 general election, 27 polling stations in 16 constituencies experienced problems with queues, affecting over 1,200 people.<sup>47</sup> The reports illustrated the potential for inconsistent practice by presiding officers across the country. Some closed the poll strictly at 10 pm and turned away voters, some of whom had been queuing for some time. News reports showed footage of dissatisfied voters at a polling station in the London Borough of Hackney. At the Birmingham (Ladywood) constituency 65 to 100 electors were turned away at close of poll, even though the presiding officer extended the poll marginally by taking the time from the slowest watch of the administrators in the room.<sup>48</sup>
- 8.52 By contrast, in Lewisham the acting returning officer instructed the presiding officer to bring queuing voters into the polling station when it became clear that they would not all be able to vote before 10 pm, and to issue them with ballot papers before the deadline passed. Voters then queued inside the station, not to be issued with ballot papers, but to mark and cast them.<sup>49</sup>
- 8.53 Immediately after the May 2010 general elections, the Electoral Commission published a report concluding that poor planning and weaknesses in the administrative structure were contributing factors to the long queues experienced in some polling stations, but also called for the law to be changed to allow those queuing at the close of poll to cast a vote.<sup>50</sup> Both the Cabinet Office and the House of Commons Political and Constitutional Reform Committee stressed the importance of good administration and planning and allocation of resources as effective solutions to the problem of queues at the close of polls.<sup>51</sup>
- 8.54 In the event, however, legislative action has been taken – albeit with varying wording – to cater for queues at the close of poll. Amended Scottish local government election rules now provide that:

For the avoidance of doubt, in the event that a voter is held in a

<sup>45</sup> *Medhurst v Lough and Gasquet (West Division of the Borough of Islington)* (1901) 5 O'M & H 120, 129.

<sup>46</sup> *Fermanagh and South Tyrone* [2001] NIQB 36; Electoral Commission, *Handbook for Polling Station Staff* (2010) at p 17.

<sup>47</sup> Electoral Commission, *Report on the Administration of the 2010 UK General Election* (July 2010) at pp 3 and 47 to 48.

<sup>48</sup> *Hansard* (HC), 27 June 2012, vol 547, col 365.

<sup>49</sup> Electoral Commission, *Interim Report on the 2010 UK Parliamentary General Election: Review of Problems at Polling Stations at Close of Poll on 6 May 2010* (May 2010) at p 21.

<sup>50</sup> Electoral Commission, *Interim Report on the 2010 UK Parliamentary General Election: Review of Problems at Polling Stations at Close of Poll on 6 May 2010* (May 2010) at pp 29, 30 and 32.

queue at the polling station at the close of the poll and has not been able to cast their vote, the presiding officer shall permit them to cast their vote as soon as practicable immediately following the time specified as the close of the poll.<sup>52</sup>

8.55 The proviso “for the avoidance of doubt” suggests that this provision does not change the law. However, as we have mentioned, the case law suggests the key issue is whether, at 10 pm, a voter has been issued with a ballot paper. It does not address queues at all. The effect of this provision is that anyone in a queue to receive ballot papers at a polling station at 10 pm is entitled to cast their vote, and must therefore be issued with a ballot paper, after 10 pm.

8.56 A similar amendment is introduced into the UK Parliamentary election rules by section 19 of the Electoral Registration and Administration Act 2013. This provides that:

a voter who at the close of poll is in the polling station, or in a queue outside the polling station, for the purpose of voting shall (despite the close of the poll) be entitled to apply for a ballot paper under paragraph (1) [of rule 37]; and these rules apply in relation to such a voter accordingly.

8.57 The differences in the wording of the 2013 Act and the Scottish Local Government Elections Rules 2011 may suggest the former is broader. The 2013 Act clearly applies to a voter queuing “outside” the polling station at the close of polls (as opposed to “at” the polling station, which some may conclude is more restrictive), and entitles that voter to a ballot paper. However, the policy behind both provisions is the same, and the practical effect is that a cut-off point for any queue to vote must be established at 10 pm; no person joining the queue afterwards will be able to vote, but everyone in it will be.

8.58 The House of Commons Committee that considered the wording of the 2013 Act (in the context of a verbatim amendment to the European Parliamentary election rules) raised the question whether it might, perversely, enable a voter who is still queuing at 10 pm to leave the polling station and return later, still entitled to a ballot paper.<sup>53</sup> The Scottish local election rule is not capable of that interpretation since it requires that the vote be cast “as soon as practicable immediately following the time specified as the close of the poll”. We consider that the right to a ballot paper only persists while the elector is in the queue waiting to vote. At all events that is, in our view, the provision that the law should make.

8.59 With the new law making it clear that the critical factor for voting after hours is no longer the issue of a ballot paper before 10pm, but presence in a queue before

<sup>51</sup> Cabinet Office, *Response to Reports on the Administration of the 2010 UK Parliamentary General Election* (September 2011) at p 17. Political and Constitutional Reform Committee, Report on Individual Electoral Registration and Electoral Administration (2010-12) HC 1463, at para 98.

<sup>52</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 33(6).

<sup>53</sup> Hansard (HC), 21 September 2013, Sixth Delegated Legislation Committee, col 3 <http://www.publications.parliament.uk/pa/cm201314/cmgeneral/deleg6/130912/130912s01.htm> (Last accessed 2 December 2014).

10pm, a key issue will be the need to manage queues, not least to determine as a matter of fact where the cut off fell. It is likely that Electoral Commission Guidance will play an important role in ensuring consistent practice across the UK.

### ***The importance of planning and management***

- 8.60 Closing polls at a certain time will always cause problems at the margins. We have no reform suggestion to make on close of poll, save that a single formulation of the rule on queues at the poll should apply throughout the UK. The law is now changed, and is explicit. However, while queuing voters will no longer be turned away, the problem of queues generally must be dealt with. Careful planning in the allocation of voters to polling stations, and the management of queues in polling stations throughout polling day, will be important to ensure that queues, and the attendant delay and potential to turn away voters, are minimised.

### **Post polling duties**

- 8.61 Presiding officers must follow a strict procedure after the close of poll in relation to paperwork associated with the poll.<sup>54</sup> This is intended to keep ballot papers and other polling documents secure, as well as to help maintain an audit trail for scrutiny in due course. As soon as practicable, they must “make up into separate packets”:

- (1) the ballot boxes, sealed so that no more ballot papers can be inserted into them;
- (2) the unused and spoilt ballot papers;
- (3) the tendered ballot papers;
- (4) the marked copies of the register of electors (including notices issued pursuant to late registration) and the list of proxies;
- (5) the completed corresponding number lists;
- (6) the certificates of employment on duty on the day of the poll handed in at the polling station;<sup>55</sup> and
- (7) the tendered votes list, the list of voters with disabilities assisted by companions, and the list of votes marked by the presiding officer.

- 8.62 The presiding officer should mark the “packets” with the official seal, and allow the polling agents to affix their own seals if they wish. The packets must be delivered to the returning officer; any arrangements for delivery other than by the presiding officer in person must have been approved by the returning officer. As we have noted elsewhere, in general these documents are available for public inspection, save for the corresponding number list, rejected and counted ballot papers, and the certificates confirming those employed on the day of the poll.

<sup>54</sup> Representation of the People Act 1983, sch 1 r 43.

<sup>55</sup> These entitle a police officer or member of the returning officer’s staff to vote at the polling station at which they are on duty.

8.63 In order to assist with the count of votes, a ballot paper account must also be produced by the presiding officer which gives the numbers of ballot papers in a number of categories. These are: ballot papers initially issued to the polling station, ballot papers issued to voters, ballot papers inadvertently spoilt and returned to the presiding officer for replacement, tendered ballot papers and unused ballot papers. The number of ballot papers issued to voters, minus the number of spoilt and tendered ballot papers, ought to match the number of ballot papers later found inside the ballot box, and the overall total should match the number of ballot papers issued to the station, but Electoral Commission Guidance advises polling staff to have an explanation for any discrepancy between figures.

### **REFORMING THE LAW GOVERNING POLLING**

8.64 The polling rules strike a balance between key polling principles. These are not set out in express terms and sometimes pull in opposite directions. They include:

- (1) promoting access to the poll and voter information;
- (2) safeguarding against multiple voting;
- (3) ensuring voting is secret;
- (4) maintaining peaceful and orderly polling;
- (5) ensuring polling is transparently fair and neutral;
- (6) enabling judicial vote tracing; and
- (7) maintaining an audit trail for the purposes of the count and legal challenge.

8.65 The principal aim is to secure access to the poll for those who are entitled to vote, by laying down systems that take questions of entitlement away from polling day itself, giving good information to voters, and ensuring access for disabled people. That principle is qualified by concerns about security, chiefly impersonation and multiple voting. The conditions in which polling takes place must be such that voting is orderly and secret, peaceful, and transparently free from external influence. Finally, an audit trail must exist to account for key documents such as ballot papers, and in particular the corresponding number list must be maintained in order to enable an election or criminal court to investigate individual votes.

8.66 We consider that electoral law should continue to maintain the balance struck between these principles. However, the existing election rules strike us as in many places out of date and unhelpfully complicated. A modern electoral law should address contemporary concerns and free itself of historical preoccupations. We do not consider, for example, that the “Tasmanian dodge” is such a concern that rules need to continue to instruct voters to show the official marks to presiding officers, nor that voters should be instructed by election rules – which they will probably never see – to fold their ballot papers.

8.67 In addition to matters relating to voter information and the logistics of the poll, we provisionally consider that the law governing polling should cover:



- (1) the power to restrict entry into the polling station and to maintain order; and
- (2) the voting process including:
  - (a) the hours of polling;
  - (b) establishing the right to vote, and outlining topics of permissible questions;
  - (c) maintaining the corresponding number list;
  - (d) assisted voting and other disabled access matters;
  - (e) dealing with irregularities: spoilt, cancelled, and tendered votes; and
  - (f) securing an audit trail and giving a ballot paper account.

8.68 We consider the rules providing for the above should be set down as general requirements of the law on polling, and thus be addressed to the returning officer, who is responsible for the acts of his or her staff. The returning officer should continue to appoint a presiding officer at the polling station, and any visiting officer (who is, as a matter of practice, higher than a presiding officer in the hierarchy of polling day administration, but is not recognised under the current law). The returning officer, and any of his or her staff, should have a right of access to polling stations.

**Provisional proposal 8-7: A single set of polling rules should apply to all elections, simplified so that they prescribe only the essential elements of conducting a lawful poll, including: the powers to regulate and restrict entry, hours of polling, the right to vote, the standard, assisted, and tendered polling processes, and securing an audit trail.**

**Provisional proposal 8-8: Polling rules should set out general requirements for a legal poll which the returning officer should adhere to. These should no longer include a requirement for voters to show the official mark on their ballot paper to polling station staff.**

***Entitlement to vote and prescribed questions***

8.69 We currently consider that rules governing the determination of the basis of entitlement to vote should be set out in primary legislation. That should set out the principle that the right to vote at a polling station is based on an elector's name appearing on the polling station register, subject only to a power to ask questions on certain prescribed issues.

8.70 We do not think there is any longer a need for detailed, rigidly prescribed questions. Presiding officers have no power to refuse a ballot paper to a voter they suspect of personation if that voter has answered the questions "satisfactorily" in a formal sense. Historically, a false answer, if taken on oath, could bring in the punitive sanctions that applied to perjury. The maximum penalty for impersonation is 2 years, and is committed irrespective of whether a question was asked. It is the act of impersonating which is criminal. On the other

hand, the prescribed questions may deter impersonators, or remind proxies of the limits on how many electors they may act for. The prescribed questions' apparent exclusivity (in that none other may be asked) is unlikely to be borne out in practice. In real voting situations, voters may make queries, and polling staff ask a number of questions – for example to establish where the voter's assigned polling station is, if not the one he or she attended. In practice, the questions exist to highlight the inability of polling staff to go behind the face of the polling station register. They do not seek to limit the ability to ask questions as part of a good service for voters.

- 8.71 On balance, we consider that the ability of the presiding officer to ask questions of voters before issuing a ballot paper should be retained. Secondary legislation should prescribe the matters which questions may elicit (for example, confirmation of identity), leaving the detail of questions to legally relevant guidance. Guidance already advises polling staff as to how to answer questions in an FAQ format. It may also present model questions that comply with the limits on the line of inquiry a returning officer may take. Setting out the exact wording of the questions in legislation, whether primary or secondary, seems excessively prescriptive.

**Provisional proposal 8-9: The right to ask voters questions as to their entitlement to vote should be preserved, but secondary legislation should only prescribe the point they may elicit, and leave suggested wording to guidance.**

#### **Equal access for disabled voters**

- 8.72 Polling rules seek to facilitate voting for disabled voters. The standard procedure is designed for the individual to mark ballot papers, alone and in secret; the provision of a special device for visually impaired voters, and of enlarged ballot papers, helps some of them to use the ordinary voting procedure. For those who cannot do so, the law seeks to promote access to the poll by giving them some assistance, moderating its insistence on the solitude and secrecy of polling where the person assisting them will inevitably be privy to the way they vote. Legislation requires the returning officer to provide, where it is thought appropriate, notices and forms in accessible formats, such as in Braille, using graphical or pictorial representation, in audio format, or any other means of making information accessible.<sup>56</sup> This does not extend to ballot papers.
- 8.73 Following the 2010 general election, the charity Scope, in association with others, published *Polls Apart*.<sup>57</sup> It reported the progress made in improving the voting experience for disabled voters in the period running up to the general election, but concluded that there was still much work to be done to give disabled people equal access to the poll and in some cases to prevent their disenfranchisement. Much of the suggested improvement involves service delivery by, and training of, electoral administrators, as well as securing more disabled-friendly polling places. The accessibility of polling stations is a statutory consideration when designating

<sup>56</sup> Representation of the People Act 1983, ss 199B and 199C.

<sup>57</sup> Scope, *Polls Apart: Opening elections for disabled people* (July 2010), <http://www.scope.org.uk/Scope/media/Documents/Publication%20Directory/Polls-apart-2010.pdf?ext=.pdf> (Last accessed 2 December 2014).

and reviewing polling districts and places.<sup>58</sup> The Electoral Commission provides guidance to administrators emphasising the importance of equal access, which is a performance standard for returning officers.<sup>59</sup>

- 8.74 Electoral administrators are subject to the public sector equality duty under section 149 of the Equality Act 2010. The duty requires those bound by it to have regard to the need, among other things, to advance equality of opportunity between persons who share a relevant “protected characteristic” (including disability) and those who do not share it. In what follows we refer only to disability instead of relevant protected characteristics generally because this is the most relevant protected characteristic in the polling context.

#### HELPING DISABLED VOTERS USE THE ORDINARY VOTING PROCESS

- 8.75 The chief issue with the legislation enabling disabled voters to use the ordinary voting procedure is its complexity and volume. There is repetition (and occasional variation) in each election-specific measure. As to enlarged copies of the ballot paper, there is needless duplication caused by the election rule requiring one at each polling station, and a “core” provision (which for UK Parliamentary elections is section 199B of the 1983 Act) requiring enlarged sample copies of the ballot paper to be displayed at the polling station as well as enlarged hand-held copies of the ballot paper to assist partially sighted voters.

- 8.76 As regards the “tactile voting device” by which visually impaired voters can vote unaided, the detail of the description of the device varies in different election provisions. In some of the provisions the description comes close to resembling a patent specification. In other provisions, the description is more general: the device should be such that it should be possible to attach the ballot paper and remove it from the device easily and without damage to the ballot paper, and so that it is held firmly while it is being marked.<sup>60</sup> There is also a question as to how often this device is used by disabled voters, and how familiar poll clerks and presiding officers are with it.

#### *The assisted voting procedure*

- 8.77 Disabled persons may vote with the assistance of the presiding officer or a companion if they are unable to vote unaided because of blindness or other disability, or declare orally that they are unable to read. It should be borne in mind that proxy voting is a form of absent voting that is targeted at, among others, disabled voters. The benefit of assisted voting at the polling station is that the voter can attend while the person assisting them votes as they instruct.<sup>61</sup> The election rules on assisted voting are detailed, prescribing who counts as a voter’s

<sup>58</sup> Representation of the People Act 1983, ss 18A to 18E and sch A1.

<sup>59</sup> Electoral Commission, *Performance standards for Returning Officers in Great Britain* (December 2011), para 2.2; Electoral Commission, *Local government elections in England and Wales: guidance for Returning Officers, Part B: Planning and Organisation*, paras 3.3, 3.6, 3.12 and 4.8. Electoral Commission, *Handbook for polling station staff* (2010) pp 7 and 15 and appendices 1 and 4.

<sup>60</sup> Representation of the People Act 1983, sch 1 r 29(3A)(b); European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 32(5)(b). Contrast Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 3 r 29(5)(c).

<sup>61</sup> Representation of the People Act 1983, sch 1 rr 38 and 39.

“companion” and how the voter should declare that they require assistance; they do not, however, specify exactly how the assistance should be given.

- 8.78 Some guidance on the role of the presiding officer is given in the *Handbook for polling station staff* published by the Electoral Commission. The presiding officer should offer any polling agent the opportunity to observe the marking of the ballot paper and thus make sure that the voter’s wishes are being followed. However, the handbook also emphasises the need to maintain the secrecy of the vote. The vote should be kept secret from all in the polling station except the presiding officer and polling agents.<sup>62</sup>
- 8.79 Voters who seek to vote with the assistance of a companion must make an oral or written declaration as to their disability and inability to vote without assistance. Companions must make a written declaration that they are a qualified person (meaning either that they are entitled to vote as an elector at the election themselves, or that they are the parent, sibling, spouse, civil partner or child of the voter and are at least 18 years old) and that they have not previously assisted more than one voter with disabilities to vote at the election. If the presiding officer is satisfied with both declarations, the officer must allow the voter to be assisted by the companion, who stands in the shoes of the voter in the eyes of the election rules.
- 8.80 In either case, the presiding officer must maintain a list of the name and electoral number of every elector who votes with assistance, as well as the name and address of the assisting companion. The lists must be sealed into a packet and retained for later scrutiny.
- 8.81 It is noteworthy that companions are limited to assisting no more than two voters with disabilities; the limit also applies to family members (unlike the similar limit on acting as a proxy). That is at first sight anomalous as the limitation appears in both cases to be premised on the same principle, namely striking a balance between promoting access to the vote and limiting the scope for the potential exercise of undue influence.

### ***Ensuring equal access for disabled voters***

- 8.82 Setting out specific obligations securing access for disabled voters ensures that rules set an appropriate balance between accessibility and security in legislation scrutinised by Parliament (whether primary or secondary). In making recommendations for reform after consultation, and producing a draft Bill at the next stage of the reform work, we will be producing an equality impact assessment. We welcome the views of consultees, particularly any persons with experience of facing issues concerning access to the poll by disabled voters, as to the impact of our provisional proposals.
- 8.83 On balance, our view is that the best way to guarantee the consistent delivery of equal access to the poll for disabled voters is to continue to specify appropriate methods of voting. The question, then, is how the current law might be improved.

<sup>62</sup> Electoral Commission, *Handbook for polling station staff* (2010) p 28.

### ***Improving the current means of voting by disabled voters***

- 8.84 We provisionally consider that the rules on polling should continue to include:
- (1) a facility for assisted voting, whether with the help of a companion or of the presiding officer;
  - (2) a means of maintaining an audit trail by which courts can monitor assisted voting, in the form of a list of voters voting with the assistance either of the presiding officer or of a companion whose name should be recorded.
- 8.85 We suspect that the requirement that companions and disabled voters should make written declarations is more of an administrative hurdle than a helpful check against deception. It may put off genuine disabled voters (and their companions) more than it deters persons determined to exert undue influence.
- 8.86 We also question the policy of limiting the number of voters companions may assist. We appreciate that it can operate as a check on officious or unprincipled people seeking out disabled voters with a view to influencing their vote, but it could conceivably hamper a genuine assistant, such as a member of staff of a care home assisting a number of residents. We are also puzzled by the inconsistent application of the limit on assisting more than two family members, which does not apply to acting as proxy. We would welcome consultees' views on these issues. If the limit on the number of voters that companions may assist is to be retained, we would provisionally propose excluding its application to family members. As is the case for Scottish local government elections, we would propose including grandparents and grandchildren in the list of those who count as family members.

**Provisional proposal 8-10: Voting with the assistance of a companion should not involve formal declarations, but should be permitted by the presiding officer where a voter appears to be unable to vote without assistance. There should no longer be a limit on the number of disabled voters a person may assist; alternatively, the limit should not apply to family members, who should include grandparents and (adult) grandchildren.**

#### *The tactile voting device*

- 8.87 Most of the documented criticism of the tactile voting device has been about the level of detail in the law's description of the device to be used. The Representation of the People (England and Wales) Regulations 2001 lay down a very exact description of a very specific device.<sup>63</sup>
- 8.88 The value of the tactile voting device is that it allows blind and partially sighted voters to use the ordinary voting procedure unaccompanied and unobserved. They mark the ballot paper alone, in secret. The only assistance they need – which can be given by the polling station staff – is in finding out the order of candidates' names on the ballot paper. Everything else is done by the voters, who can thus keep secret how they voted.

<sup>63</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 12.

8.89 We provisionally consider that the law should continue to give voters the opportunity to use the ordinary voting procedure, which is the most secret and secure, wherever possible. We would therefore propose that the law should continue to require every polling station to have equipment to help blind or partially sighted electors to vote without assistance. Guidance might recommend particular equipment that has been tried and tested, but we do not currently consider that a specific device should be prescribed in election rules; it is in the public interest that there should be scope for competition between rival suppliers of the equipment, as well as an opportunity for new forms of such equipment to be developed. We also provisionally propose moving away from the terminology of a “device”, with a view to allowing the legal requirement to keep up with innovation in products.

8.90 We cannot see any reason for retaining the different ways of describing the tactile voting device in the current legislation. It makes sense that any satisfactory and approved piece of equipment should be capable of being used at any type of election. If such a device is to be prescribed, either in legislation or legally relevant guidance, the favourable option would be to adopt the more general provision used in European and local government elections rules across for all elections.

**Provisional proposal 8-11: The requirement to provide equipment to assist visually impaired voters to vote unaided should be retained. There should be a single formulation, applying to all elections, of the required characteristics of the equipment.**

#### **SUPERVENING EVENTS FRUSTRATING THE POLL**

8.91 Election rules deal with two sets of circumstances capable of frustrating the poll. The first is the obstruction of polling by “riot or open violence”. The second is the death of a candidate before or during the poll, which has received some modern attention from lawmakers.

#### **Suspending the poll for “riot or open violence”**

8.92 The law on obstruction is as it was in 1872; the rules require the poll to be suspended and resumed the next day. The decision to do so is left to presiding officers, with no requirement for them to contact returning officers – something which was understandable in the days before telephony but seems unsatisfactory now. There is very little academic discussion of this provision, which is replicated in every election’s distinct election rule.

#### **Death of a candidate**

8.93 As to the death of a candidate after close of nominations but before polls close, there are two main approaches: the parliamentary model approach and the local government model approach.

#### ***Parliamentary model***

8.94 The “parliamentary model” approach distinguishes between the death of a party candidate and that of an independent. Only in the former case is the poll abandoned; a new poll is called, with the surviving candidates remaining nominated and only a new candidate affiliated to the deceased’s party able to be

nominated in addition. If an independent candidate dies, the poll normally proceeds, with notices displayed at polling stations announcing the death; there is only a fresh poll if the deceased candidate gains the most votes.

- 8.95 If as a result of the death the poll becomes uncontested, the notice of poll is to be countermanded or the poll abandoned, and the election treated as uncontested. The parliamentary model is used at elections to the UK's Parliaments and devolved assemblies, as well as local elections in Northern Ireland.<sup>64</sup> Special rules apply in the case of the death of the Speaker of the House of Commons seeking re-election, the effect of which is to reopen all nominations (convention dictating that party candidates will not have stood against the Speaker).

### ***Local government model***

- 8.96 Under the local government approach taken in England and Wales, the death of any candidate triggers a completely new election, with nominations open to anyone, although existing candidates remain nominated. For convenience we refer to this as the "local government approach", though it is not followed in the case of local government elections in Scotland or in Northern Ireland. These follow the "parliamentary model" that we have described above.
- 8.97 Turning to the (England and Wales) local government model, there is one point of uncertainty regarding the interaction between the principal area election rules and section 39 of the 1983 Act regarding the position where the death of a candidate renders the election uncontested. Rule 55(1) of the local government election rules requires the returning officer to countermand or abandon the poll if a candidate dies; it goes on to provide that section 39(1) and (5) of the 1983 Act apply "in respect of any vacancy which remains unfilled".<sup>65</sup> Section 39(1) covers two situations: where a poll is countermanded or abandoned for any reason and where the number of nominated candidates has fallen below the number of vacancies; in either situation the returning officer must "order an election to fill any vacancy which remains unfilled". Section 39(5) provides that already nominated candidates remain nominated.
- 8.98 We interpret this as having the following effect. If the death leaves the number of surviving candidates higher than the number of vacancies, all the seats remain "vacant" within the meaning of section 39, since there is no means of filling them apart from the fresh poll. It is implicit in section 39(5) that additional candidates may be nominated. It is less clear what the position is in the event that the death leaves a number of surviving candidates equal to the number of seats. Undoubtedly, the returning officer must countermand or abandon the poll, but it is debatable whether there is any "vacancy which remains unfilled" so as to require a fresh poll. We take the view that all the seats are still "vacant" because there is no rule comparable to rule 14 (which applies where the number of candidates equals the number of seats as a result of withdrawals) providing for the surviving candidates to stand elected without a poll. This appears to be the view of the Electoral Commission, which in its guidance states:

<sup>64</sup> Representation of the People Act 1983, sch 1 rr 60 to 64.

<sup>65</sup> Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 55; Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 55.

If proof of the death of a validly nominated candidate at a contested election is received before the opening of the poll, the notice of poll is countermanded and the poll does not take place. A new election is required by law.<sup>66</sup>

- 8.99 The reference in rule 55 to “any vacancy” existing after the deceased candidate’s death suggests, however, that that was not the result intended by the drafter of the rule. It is, however, clear that a poll with the possibility of additional nominations occurs where the death of a candidate still leaves more candidates than there are vacancies; if that is the correct policy choice in those circumstances, there does not seem to us to be any reason for different treatment of the situation where the death leaves a number of candidates equal to the number of seats.

### ***Party list elections***

- 8.100 At party list elections, parties stand for election (taking up their seats through individual party candidates in list order), and/or individuals stand as independent candidates competing against each party. A party list is used for the election of regional members of the Scottish Parliament and National Assembly for Wales, and London members of the Greater London Assembly. There is no uniform approach in the rules concerning death of a candidate at these elections, although the effect of the rules at Scottish Parliamentary, Welsh Assembly and GLA (London members) elections is that polling is only abandoned if a list candidate’s death renders the regional election uncontested, which is very unlikely.<sup>67</sup>

### DEATH OF A CANDIDATE FOR EUROPEAN PARLIAMENT IN GREAT BRITAIN

- 8.101 A different approach is taken to death of a candidate at European Parliamentary elections in Great Britain, which also use the party list. A candidate’s death will never result in countermanding or abandonment of the poll. Where the returning officer is satisfied of the death of a list or individual candidate, he must request each local returning officer to provide each presiding officer with a sufficient number of notices to this effect for display in every compartment of every polling station.<sup>68</sup>
- 8.102 The provisions governing the allocation of seats at a general election in section 2 of the European Parliamentary Elections Act 2002 are entirely silent as to the death of a candidate, unlike the election rules governing the election of MEPs in Northern Ireland, which operate to prevent a deceased candidate from being elected. In principle, there is no reason why the death of a list candidate should affect the poll – a mechanism for replacing the deceased list candidate ought to suffice, while at most elections the next candidate in the party list can be elected.

<sup>66</sup> Electoral Commission, *Guidance for local government elections in England and Wales, Part C: Administering the Poll*, para 1.118.

<sup>67</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 77 referring to ss 7 and 8 of the Scotland Act 1998; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 75. Greater London Authority Elections Rules SI 2007 No 3541, sch 2 r 15(4).

<sup>68</sup> European Parliamentary Elections Order SI 2004 No 293, sch 1 r 32(9).



### **Reforming the law on death of candidates**

- 8.103 The rules on death of candidates are in general complex and untidy. The best example are the provisions for PCC elections, which adopt the local government model (death of any candidate results in a new poll), but also require returning officers to put up notices to voters announcing the death (a provision intended for the parliamentary model approach, since it is meant to inform voters of the death when the poll is going ahead).

### ***Separate treatment of party and independent candidates***

- 8.104 The first reform issue is whether the separate treatment of party and independent candidates is right and whether it is a political choice we should not disturb. In our provisional view, that difference of treatment is justified by principle. The primacy of party affiliation in the eyes of most voters at parliamentary elections is a political reality we must take into account. The death of a preferred party's candidate would deprive its supporters of an effective vote if the candidate could not be replaced. There is in general no one able to replace a deceased independent candidate. We cannot give a definite view, as to whether the same approach should be extended to local government elections in England and Wales, where party affiliation can be said to matter just as much to voters. The basic options are to do nothing, to assimilate the law in England and Wales to that in Scotland and Northern Ireland, or *vice versa*.

- 8.105 Accordingly, we do not at present see any need to disturb the position regarding the death of independent parliamentary candidates beyond making the obvious provision that a deceased candidate cannot be elected to the European Parliament. We are also not currently persuaded of any need to make any additional provision for the death of a list candidate. The existing rules allow a party to maintain the number of seats corresponding to its share of the vote by filling the vacancy with the next candidate on the list submitted at the election. Problems would only arise in the unlikely event that the death left a party without enough list candidates to achieve that.

### ***The local government approach to death of candidates***

- 8.106 The next issue concerns the possible reform of the rules on death of candidates in the local government model in England and Wales. We would welcome consultees' views on the correctness of our interpretation of the law and on whether we should make any reform proposals. The possible options seem to us to be to leave the position unaltered (possibly on the grounds that it involves a choice of political policy that we should not disturb) or to align the position at local authority principal area elections with that at parliamentary elections, such that fresh nominations should only be possible to replace a deceased party candidate. We would not propose a similar reform in the case of parish and community elections.
- 8.107 The law's different treatment of elections to local government in England and Wales seems to us to raise difficult questions. Not changing the law results in different rules subsisting for local elections in Scotland and Northern Ireland on the one hand, and England and Wales on the other. If the law must be changed, the question is whether the law in England and Wales should be assimilated to that in Scotland and Northern Ireland, or the reverse.

- 8.108 Our general approach is to assimilate divergent election rules, subject to a principled reason for differentiating. We have provisionally concluded that the importance of political parties in parliamentary elections justifies differentiating between party and independent candidates. Party affiliation is in our experience also a significant factor in local government principal area elections. The issue is whether it is right that the death of an independent candidate should trigger a fresh local government poll, with the possibility of additional nominated candidates.
- 8.109 The considerations militating against a fresh poll in these circumstances are, first, that if polling is delayed by the death of an independent candidate, the seat will remain vacant. That can affect political certainty. This is particularly important for legislatures, but is arguably less crucial in local government. Secondly, it is arguably anomalous that the death of a candidate should expose the surviving candidates to the possibility of there coming into the field additional candidates who chose not to be nominated originally.
- 8.110 The considerations militating in favour of a fresh poll when an independent candidate has died are, first, that the death may mean that some voters have unknowingly wasted their vote (where the death occurs on polling day or after some postal votes have been cast) and, secondly, that the deceased candidate's inability to be a contestant may justify additional nominations. The fact that a popular candidate – or a candidate standing for a particular cause or interest group – having been nominated might have deterred other potential candidates, who should be allowed an opportunity to stand once it is known that that candidate can no longer be a contestant.
- 8.111 We have not formed a provisional view on what the law on the death of candidates for local government elections should be, apart from taking the provisional view that the law ought to be uniform throughout the United Kingdom. We invite the views of consultees on this issue.

**Provisional proposal 8-12: The current provision, including the distinction between the death of party and independent candidates, should be retained as regards parliamentary elections.**

**Provisional proposal 8-13: At elections using the party list voting system, the death of an individual independent candidate should not affect the poll unless he or she gains enough votes for election, in which case he or she should be passed over for the purpose of allocation of the seat; the death of a list candidate should not affect the poll.**

**Question 8-14: We ask consultees whether, at local government elections, the death of an independent candidate should or should not result in the abandonment of the poll.**

#### **Rioting and other supervening events**

- 8.112 Certain events can occur which hamper orderly polling and access to the poll. The current law only envisages two sets of circumstances in which the polling process is affected by a supervening event. The first is the death of a candidate, just discussed. The second is where voting is obstructed by riot or open violence (which are undefined). It is conceivable that other major events, such as terrorism

or a natural disaster, might disrupt polling. This is demonstrated by the volcanic ash clouds which disrupted aviation and threatened to leave voters at the May 2010 general election stranded abroad.

- 8.113 The current law on “riot or open violence” obliges the presiding officer to adjourn polling until the following (working) day and to give notice of the adjournment to the returning officer.<sup>69</sup> The rule applies at the level of individual polling stations and is not discretionary; if riot or violence interrupts or obstructs proceedings, the presiding officer must adjourn polling. On the following day, the hours for polling must be the same as they were on the original day.
- 8.114 There is surprisingly little discussion of this provision, or mention of cases in which it has been applied. We attribute it to the violent atmosphere surrounding elections at the time the great Victorian reforms of electoral administration were introduced.<sup>70</sup> Given the lack of discretion in the matter, it is likely that the threshold is high before events are taken to interrupt or obstruct proceedings. But we find it difficult to escape the conclusion that, as currently expressed, the duty is outdated. Our provisional views are that riot and violence do not currently require distinct treatment and that adjournment of polls should not generally be a matter for presiding officers, given that means of instant communication with the returning officer are nowadays usually available.<sup>71</sup>

#### ***Other events obstructing the poll***

- 8.115 It is impossible to set out an exhaustive list of external events capable of obstructing a poll. An obvious example is extreme weather, such as flooding, which could make it difficult or impossible for voters in certain areas to reach polling stations; the volcanic ash clouds of 2010 nearly provided an example, likely to affect a smaller percentage of voters, but potentially over the whole of the UK. A terrorist attack or some other local or national disaster is conceivable.
- 8.116 The Electoral Commission has pointed to the lack of flexibility in electoral law which makes it difficult to adapt rules to emergency situations. In 2010, the Electoral Commission responded to the concern that the volcanic ash clouds in the UK skies might prevent voters reaching the addresses to which they had arranged for postal voting packs to be sent. The Electoral Commission recommended that the facility to send replacement ballot paper packs where the originals are lost or not received should be interpreted as enabling voters to apply for replacement postal ballot papers to be sent to a different address.<sup>72</sup>
- 8.117 Guidelines produced by the International Institute for Democracy and Electoral Assistance advise that electoral laws should clearly define the inherent powers of electoral management boards (which we can take to refer, for our purposes, to the returning officer) to issue instructions in emergency situations to meet

<sup>69</sup> Representation of the People Act 1983, sch 1 r 42.

<sup>70</sup> C O’Leary, *The Elimination of Corrupt Practices in British Elections 1868-1911* (1962) p 88.

<sup>71</sup> Presiding officers are usually given duty mobile telephones with pre-loaded numbers. That said, we have heard anecdotally that some polling stations in remote areas of the UK may not have mobile phone reception.

<sup>72</sup> Electoral Commission, Circular EC 15/2010 (April 2010).

unforeseen contingencies.<sup>73</sup> One possible approach (taken in Canada) is to create a general power to modify any provision of the applicable legislation where “an emergency, an unusual or unforeseen circumstance or an error makes it necessary”. The power is limited in respect of the modification of polling hours, which may only be extended in the case of an emergency on polling day which interrupts polling at a polling station and would prevent a substantial number of electors from being able to cast their vote.<sup>74</sup>

8.118 Another approach is to create a list of supervening events which will justify the use of emergency powers. This is the approach used at federal elections in Australia, where a presiding officer may temporarily suspend or adjourn polling if one of these situations obtains:

- (1) actual or threatened riot or open violence;
- (2) storm, tempest, flood or an occurrence of a similar kind;
- (3) a health hazard;
- (4) a fire or the activation of fire safety equipment (such as sprinklers or alarms); or
- (5) any other reason related to:
  - (i) the safety of voters; or
  - (ii) difficulties in the physical conduct of the voting.<sup>75</sup>

8.119 We provisionally consider that there should be an emergency power for electoral administrators to minimise the impact of supervening events on voters. Three main issues arise: first, the threshold for using the power, secondly, the effect of its use, and, thirdly, who may exercise it.

#### ***Threshold requirements***

8.120 We currently prefer the Canadian approach of a generally worded power rather than a list of specific situations which could be deficient in circumstances not foreseen by the legislature.

8.121 One possible threshold is that it appears (to the person or body entitled to exercise the power) that a majority of electors will be prevented from voting, whether at a polling station or by post. Alternatively, a lower threshold could be “polling risks being significantly affected”. We currently prefer the latter. Examples of the kinds of situation in which the power would be engaged, and to what extent they would have to impact on polling, could be provided in guidance, to which the returning officer should have regard.

<sup>73</sup> International IDEA, *International Electoral Standards: Guidelines for reviewing the legal framework of elections* (2002) p 17.

<sup>74</sup> Canada Elections Act 2000, s 17.

<sup>75</sup> Commonwealth Electoral Act 1918, ss 240A and 241.

#### THE EFFECT OF USING THE POWER

- 8.122 Here again, we currently prefer the Canadian approach of creating a power to alter particular elements of the administration of elections, rather than a power limited to suspending polling. This ought to make it possible to respond to some emergencies in a less drastic way than deferring polling, such as extending polling hours, allocating voters to a different polling station, or (in circumstances such as those threatened by the volcanic ash cloud) issuing emergency postal voting packs to stranded voters.

#### WHO MAY EXERCISE THE POWER

- 8.123 Our present view is that the power should be vested in returning officers, with the support of Electoral Commission guidance, and only exercisable by a presiding officer in circumstances where it is impossible to contact the returning officer. A returning officer in charge of a poll is best placed to assess whether there will be obstructions to polling in polling stations or by post in their locality and how the polling arrangements they have put in place in their area will be affected by the supervening event.
- 8.124 Where a supervening event threatens to obstruct the poll across multiple electoral areas or the entire area involved in the poll, power should, we provisionally consider, be given to the Electoral Commission to issue instructions that mandate a uniform approach.

**Provisional proposal 8-15: The existing rule, requiring the presiding officer to adjourn a poll in cases of rioting or open violence, should be abolished.**

**Provisional proposal 8-16: Returning officers should have power to alter the application of electoral law in order to prevent or mitigate the obstruction or frustration of the poll by a supervening event affecting a significant portion of electors in their area, subject to instruction by the Electoral Commission in the case of national disruptions. Presiding officers should only have a corresponding power in circumstances where they are unable to communicate with their returning officer.**

## CHAPTER 9

# THE COUNT AND DETERMINATION OF THE RESULT

9.1 Upon the conclusion of the poll, the immediate task is to determine the result, declare the winners, and ensure an orderly democratic transition to the newly elected body or office. Counting votes in elections in the UK is governed by a number of key principles.

- (1) *Ensuring outcomes are swiftly determined and certain.* The UK's political tradition in general seeks a speedy progression from the poll to final determination of its outcome.
- (2) *Accuracy and the audit trail.* The result should be an accurate reflection of the votes cast in polling stations, and the election paperwork received at the count – notably ballot papers (used, unused, spoiled and tendered) – must match the paperwork sent to polling stations before the election.
- (3) *Transparent neutrality.* The counting process must be legal and impartial – and seen to be so conducted by candidates and any observers.
- (4) *Maintaining voter secrecy.* It must not be possible for those observing the count to identify how a particular elector voted.

9.2 Despite the shared principles, and the fact that in practice counts unfold in very familiar ways at different elections, the law governing the count is once again set out in election-specific rules. This chapter starts with the classical rules on the count, before considering some of the transpositions of them to other elections. Our main reform proposal is that a single set of rules should govern election counts, with adaptations to particular elections. We consider two such adaptations in more detail: those for counting at elections using the single transferable vote (STV) and those for elections where counts are counted electronically.

### THE CLASSICAL RULES: FIRST PAST THE POST CONTESTS

9.3 The classical counting rules apply to first past the post elections. For UK Parliamentary elections they are found in election rules 44 to 50.<sup>1</sup> They deal with:

- (1) the logistics and timing of the count, including who may attend;
- (2) verification and the count;
- (3) the grounds on which ballot papers can be rejected; and
- (4) how to determine and announce the result.

9.4 The rules relating to verification and the count are less exhaustive and detailed than, for example, those concerning nomination or the poll. The Electoral

<sup>1</sup> Representation of the People Act 1983, sch 1 rr 44 to 50.

Commission guidance is much more extensive as to verification, the count, and even adds a later process, “reconciliation”, to make sure that no ballot papers are unaccounted for at the end of proceedings.

## **Logistics of the count**

### ***Appointing counting agents***

- 9.5 Counting agents are persons appointed by candidates or their election agents to supervise the count. They must be appointed five days before polling day.<sup>2</sup> The returning officer can limit their number provided that the limit is the same for case of each candidate. The minimum number of agents which each candidate should be allowed is calculated by dividing the number of counting clerks by the number of candidates. This means that every member of counting staff can be supervised by a counting agent.<sup>3</sup>

### ***Who can attend the count***

- 9.6 By law the following must be admitted to the count venue:
- (1) the returning officer and counting clerks;
  - (2) the candidates and one person chosen by them, the election and counting agents; and
  - (3) electoral observers appointed by the Electoral Commission.<sup>4</sup>
- 9.7 The returning officer may permit others to attend, such as the media and police officers. The returning officer must be satisfied that their attendance will not obstruct counting, and must consult the election agents unless it is impractical to do so. Electoral Commission guidance emphasises that there should be security measures in place to prevent and monitor unauthorised access to the count venue, such as providing a list of names to door staff, and name badges.<sup>5</sup>
- 9.8 Every person attending the count (other than a constable on duty) must be given a copy of the secrecy provisions in section 66(2) and (6) of the Representation of the People Act 1983 (“the 1983 Act”).<sup>6</sup>

### ***The count venue***

- 9.9 Election rules require the returning officer to make arrangements for counting the votes as soon as practicable after the close of poll, and to give the counting agents notice of the time and place at which the count will take place.<sup>7</sup> The officer is free to choose the count venue, which need not be located within the

<sup>2</sup> Representation of the People Act 1983, sch 1 r 30(3).

<sup>3</sup> Representation of the People Act 1983, sch 1 r 30.

<sup>4</sup> Representation of the People Act 1983, sch 1 r 44(2).

<sup>5</sup> Representation of the People Act 1983, sch 1 r 44(3); Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), paras 2.2 and 2.3.

<sup>6</sup> Representation of the People Act 1983, sch 1 r 31(b).

<sup>7</sup> Representation of the People Act 1983, sch 1 r 44(1).

constituency.<sup>8</sup> The law lays down a duty to give counting agents information about the count and reasonable facilities for overseeing it.<sup>9</sup>

- 9.10 Returning officers can thus opt for multiple counting venues rather than a single one. As a matter of good practice, returning officers should plan the layout of the count venue to ensure the count proceeds efficiently and accurately, and accommodates the need for oversight by candidates and their agents. This may not be an easy balance to strike.

### **Timing of the count**

- 9.11 The returning officer must make arrangements for counting the votes “as soon as practicable after the close of poll”.<sup>10</sup> This does not require the votes to be counted on the same day as the poll and, although it was customary to do so, returning officers could instead choose to postpone the count until the following day.<sup>11</sup> When the close of polls was extended, in 1969, from 7pm to 10pm, it was accepted that this was bound to lead to more counting on the following day.<sup>12</sup>
- 9.12 At Parliamentary elections, the rule which excludes non-working days from the election timetable does not mention the count.<sup>13</sup> Thus a returning officer who has begun to count for Parliamentary elections must continue the count on a Saturday and Sunday if counting has not finished by that stage. Almost all other election rules state that the returning officer is not obliged to count on non-working days.<sup>14</sup>

### CONTINUOUS COUNT AT PARLIAMENTARY GENERAL ELECTIONS

- 9.13 Rule 45(3A) of the Parliamentary Election Rules, introduced shortly before the 2010 General election, requires reasonable steps to be taken to commence the count within four hours of the close of polls. Any returning officer who is unable to comply must report the time that counting commenced, and the reason for the

<sup>8</sup> P Gribble (ed), *Schofield's Election Law*, loose-leaf 16th release vol 1 at para 11-001.

<sup>9</sup> Representation of the People Act 1983, r 44(4).

<sup>10</sup> Representation of the People Act 1983, sch 1 r 44(1); Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 44(1); Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 44(1).

<sup>11</sup> Electoral Commission, *The timing of election counts* (July 2012), paras 3.20 to 3.21 and 3.47 to 3.49.

<sup>12</sup> *Parker's Conduct of Parliamentary Elections*, first edition (1970), p 206. The editor cites Home Office Circular R.P.A. 154, which we have not seen.

<sup>13</sup> Representation of the People Act 1983, sch 1 r 2(1), as amended by the Fixed-term Parliaments Act 2011, sch 1 para 11(2).

<sup>14</sup> European Parliamentary Elections Rules SI 2004 No 293, sch 1 r 2(1); Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 2; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 2(1); Greater London Authority Elections Rules SI 2007 No 3541, sch 1 r 4(1), sch 2 r 4(1), sch 3 r 4(1); Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 2(1); Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 2(1); Local Authorities (Mayoral Elections) Regulations SI 2007 No 1024, sch 1 r 4(1); Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 3 r 3; Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 2(2); European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 1 r 2(1); Electoral Law Act (Northern Ireland) 1962, sch 5 r 2. The one exception is elections to the Northern Ireland Assembly, which simply apply the UK Parliamentary election rule.



delay, to the Electoral Commission. In their post-election report the Electoral Commission must set out the names of constituencies which did not comply with the requirement.<sup>15</sup>

- 9.14 The 2010 amendment has been criticised for putting returning officers under pressure, for example where a large electoral area requires ballot boxes to be transported long distances to the count, or where a large number of ballot papers must be verified.<sup>16</sup> This pressure is intensified where polls are combined, as verification must be completed for all the polls before any ballot papers can be counted. However, this amendment appears to reflect the special importance of swiftness and certainty of outcomes at UK Parliamentary elections.<sup>17</sup>

#### PAUSING THE COUNT

- 9.15 A returning officer should carry on counting continuously, only allowing pauses for refreshment. However, where the counting agents agree, the returning officer may “exclude the hours between 7 in the evening and 9 in the morning”. If the officer chooses to do so, ballot papers and other documents must be secured.<sup>18</sup> The hours the rule cites reflect that it is out of date. Polls once closed at 4pm, so a decision to pause the count at 7 pm on polling day was intelligible, whereas nowadays polling is still in progress at that time.<sup>19</sup> The rule arguably functions to permit counting to be halted between 10 pm and 9 am after the poll.
- 9.16 It is questionable whether counting agents should be able to veto the decision of the returning officer to pause counting overnight. This decision is an administrative one which the returning officer must take based on the number of staff and other resources available. If there is an argument in favour of a mandatory overnight count for UK Parliamentary elections, this should arguably be expressly required in legislation, not left to the discretion of candidates’ agents. At other elections, we provisionally consider that it should not be possible for individual counting agents to prevent a count being postponed where the returning officer believes it would be best to do so. At local elections, the returning officer may pause the count without the agreement of the counting agents.<sup>20</sup>

#### ***The counting process***

- 9.17 Unless prior arrangement has been made with the returning officer, presiding officers must personally transport the ballot boxes and other election documents

<sup>15</sup> Representation of the People Act 1983, sch 1 rr 44(6), 45(3A) and 53ZA.

<sup>16</sup> Electoral Commission, *The timing of election counts* (July 2012), para 3.7. The report notes in particular that problems might be faced if the Northern Ireland Assembly election were combined with the UK Parliamentary election in 2015.

<sup>17</sup> Electoral Commission, *The timing of election counts* (July 2012), para 3.10.

<sup>18</sup> Representation of the People Act 1983, sch 1 r 45(6) and (7); Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 45(8) and (9); Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 45(8) and (9).

<sup>19</sup> Ballot Act 1872, sch 1 r 35.

<sup>20</sup> Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 45(8); Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 45(8).

from their polling station to the returning officer after the close of poll.<sup>21</sup> The ballot paper account from each polling station must be verified before the count starts.

#### VERIFICATION

9.18 In this context, verification means accounting for all the ballot papers handed out, and making sure that they have arrived safely at the count venue. It aims to ensure that every ballot paper cast in a polling station is included in the count, thus producing a result which reflects the votes cast. Both verification and the count involve counting processes. Verification involves the counting of ballot papers; the count refers to the counting of votes cast on valid ballot papers.

9.19 The rules state that verification should be done by:

- (1) counting and recording, in the presence of counting agents, the number of ballot papers in each ballot box;
- (2) comparing, in the presence of election agents, ballot paper accounts with the number of ballot papers recorded, the unused and spoilt ballot papers and the tendered votes list; and
- (3) producing a statement of the result of verification, which may be copied by the counting agents.<sup>22</sup>

9.20 There is a general obligation to verify ballot papers facing upwards, and to take precautions so that those attending the count cannot see the numbers or other unique identifying marks printed on the back of the ballot papers.<sup>23</sup> Exposing the numbers can be problematic, as it creates a potential opportunity to identify the voter.

9.21 Whilst the object of verification is to count the total number of ballot papers in the ballot boxes received from a polling station, candidates' agents take the opportunity to keep a tally of voting as it emerges from the ballot papers exposed face up. Their purpose is not to deduce how a particular elector voted, but to get an early idea of the running at the election. Since ballot papers are counted at speed with no regard for how any one voter voted, it is a necessarily imprecise undertaking. Section 66(2) of the 1983 Act prohibits attempting to ascertain the number or mark on the back of ballot papers, and communicating any information obtained at the count as to for whom any vote is given on any particular ballot paper.<sup>24</sup>

9.22 The focus of the law on verification is thus on ensuring that all ballot papers are

<sup>21</sup> Representation of the People Act 1983, sch 1 r 43(1). The Electoral Commission recommends a cursory check of ballot paper accounts at this stage. Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 3.6.

<sup>22</sup> Representation of the People Act 1983, sch 1 r 45(1)(a), (1)(b) and (5).

<sup>23</sup> Representation of the People Act 1983, sch 1 r 45(4). At European Parliamentary elections, papers are kept facing down, to prevent voting data leaking to other member states where polling is ongoing. European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 51(4).

<sup>24</sup> Representation of the People Act 1983, sch 1 r 31(b).

accounted for – with limited provision to maintain secrecy of the vote. In fact it is a very important step, which sets out an audit trail at the count for all the electoral material, including ballot papers, and is an exercise that allows returning officers to detect irregularities early, and put them right. The detailed guidance on verification is contained in Electoral Commission guidance which sets out best practice on how returning officers should undertake the counting of ballot papers and comparison of accounts and what they should do in the case of any discrepancy.<sup>25</sup> A statement as to verification must be produced, once verification is complete, which election agents are entitled to copy.

#### HOW TO COUNT

- 9.23 After verification, the returning officer can count votes. The legal provision on how to count ballot papers is also limited. Expression is given to the principle of secrecy of the vote through the obligation to keep ballot papers face up, as explained above, and by a requirement to mix ballot papers with those from at least one other ballot box before they are counted.<sup>26</sup> Mixing ballot papers before they are counted is intended to reduce the risk of indirectly revealing how an elector voted.<sup>27</sup> This requirement also applies to postal ballot papers which are handed in at polling stations on the day of the poll and sent from there to the count venue for verification and counting.
- 9.24 No particular method of counting is legally prescribed, although the rules make reference to one method, which involves sorting ballot papers according to the candidate for whom the vote is given and then counting the ballot papers for each candidate.<sup>28</sup> Setting out a specific method for counting would be unduly prescriptive, preventing returning officers from choosing the method that best suits them.
- 9.25 At local government elections where multi-member wards are contested, counting becomes more complicated as ballot papers cannot be sorted into votes cast for particular candidates. Instead, ballot papers with “block votes” – where all votes have been given for the same party – are often separated from the other ballot papers. The votes for each candidate on the rest of the ballot papers are counted and a tally is kept on a separate table of the candidates’ names. Sometimes the ballot papers are stuck together to form a “grass skirt” of a predetermined number of ballot papers as the votes on them are counted; this makes conducting re-counts more straightforward.

<sup>25</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 3.17.

<sup>26</sup> Representation of the People Act 1983, sch 1 r 45(1A) and (4); Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 45(2) and (6); Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 45(2) and (6).

<sup>27</sup> For judicial consideration of this, see *Macmanomy v Westley* (The Walsall case) (unreported) 4 July 1986, cited in *Gough v Local Sunday Newspapers* [2003] 1 WLR 1836 at [25]. In the event, in the *Walsall* case, Saville J ordered a single ballot box to be opened and its votes counted, subject to undertakings of secrecy by the parties.

<sup>28</sup> Representation of the People Act 1983, sch 1 r 44(5). Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), paras 3.30 and 3.34.

## VOID OR DOUBTFUL BALLOT PAPERS

- 9.26 The law makes provision as to when a ballot paper should be considered void and any vote made on it disregarded, although it does not make explicit provision about the decision-making process. The practice which has developed has been to conduct “adjudications” in the presence of candidates or agents. The rules state that the decision of the returning officer in respect of a ballot paper is final, and that the officer must mark rejected ballot papers and any counting agent’s objection to a rejection.<sup>29</sup>

### *Which ballot papers are void*

- 9.27 The law specifies four circumstances in which ballot papers are void and should not be counted:

- (1) where the ballot paper does not bear the official mark;
- (2) where a vote has been given for more than one candidate on a ballot paper (an “over-vote”);
- (3) where any writing or marking on a ballot paper could identify the voter; and
- (4) where a ballot paper is unmarked or void for uncertainty.

- 9.28 However, this is qualified by a provision that a ballot paper will not be deemed void where the vote is not marked in the proper place, is not marked by a cross or is marked by more than one mark, so long as the voter’s intention is clear and the markings are not capable of identifying the voter. The returning officer must draw up a statement showing the number of ballot papers rejected under heads of want of official mark, over-voting, identification of the voter, and unmarked or void for uncertainty.<sup>30</sup>

- 9.29 The Electoral Commission issues advice for returning officers on doubtful ballot papers, which depict example ballot papers that they suggest should be allowed or rejected.<sup>31</sup> These, as well as *Schofield’s Election Law* and *Parker’s Law and Conduct of Elections*, refer to cases heard by the Election Court in the late 19th and early 20th centuries, where judges discussed in detail whether particular ballot papers should be held valid or void.<sup>32</sup>

- 9.30 The principle derived from these cases is that the intention of the voter is paramount: where it is evident, the ballot paper should be allowed, regardless of the way in which the intention is manifested. This is subject to two caveats:

<sup>29</sup> Representation of the People Act 1983, sch 1 rr 47(3) and 48.

<sup>30</sup> Representation of the People Act 1983, sch 1 r 47(1) and (2); Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 47(1) and (3); Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 47(1) and (3).

<sup>31</sup> For example, Electoral Commission, *Supporting UK Parliamentary elections: Dealing with doubtful ballot papers* (2010).

<sup>32</sup> P Gribble (ed), *Schofield’s Election Law*, loose-leaf 16th release vol 1 at 11-017 to 11-038; R Price (ed), *Parker’s Law and Conduct of Elections*, loose-leaf, issue 43 at 17.24 to 17.33.

- (1) where the voter's intention is clear, but he or she has voted for more than one candidate, the ballot paper is void; and
- (2) where the voter's intention is clear, but the marks on the ballot paper, such as a signature or the name of the voter, could identify him or her, the ballot paper is void.

*Elections where a voter is entitled to vote for more than one candidate*

- 9.31 At local elections in England and Wales, where voters may be entitled to vote for more than one candidate, a ballot paper may be considered partially valid. Where it is possible to say that the voter's intention with respect to one or more of the votes on the ballot paper is sufficiently clear, that vote or those votes can be counted.<sup>33</sup> Such a ballot paper should be marked "rejected in part" by the returning officer, who should indicate which votes on the ballot paper have been counted. The statement of ballot papers rejected should include a record of the number of ballot papers rejected in part.

*Reconciliation*

- 9.32 Reconciliation is an important step in ensuring the accuracy of the result. Essentially, it involves comparing the number of ballot papers counted in the counting of the votes with the number arrived at on verification. However, the law does not currently oblige the returning officer to reconcile these numbers.<sup>34</sup>

***Determining the result***

- 9.33 For elections using the first past the post voting system, calculating the result is simple: the candidate for whom the majority of votes have been cast is elected.<sup>35</sup> Where there is an equality of votes, lots must be drawn by the returning officer to determine which of the candidates with equal votes should be elected.<sup>36</sup> Accordingly, neither the law nor guidance deals in much detail with calculating the result.

PROVISIONAL ANNOUNCEMENT OF THE RESULT AND RE-COUNTS

- 9.34 Once the returning officer is satisfied that the result reflects the votes cast, the officer should make a provisional announcement of the result to candidates and election agents. While this is not explicitly stated in the law, it is strongly implied by a provision which requires candidates and election agents to be given reasonable opportunity to request a re-count before the count is completed.<sup>37</sup>
- 9.35 Returning officers have a discretion to refuse a request for a re-count if in their

<sup>33</sup> Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 47(2); Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3304, sch 2 r 47(2).

<sup>34</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 3.37.

<sup>35</sup> Representation of the People Act 1983, sch 1 r 50.

<sup>36</sup> Representation of the People Act 1983, sch 1 r 49.

<sup>37</sup> Representation of the People Act 1983, sch 1 r 46(2).

opinion the request is unreasonable.<sup>38</sup> This is important, as returning officers should not feel under pressure from candidates or their agents to hold unnecessary re-counts. A returning officer, having surveyed the count, will also be best placed to decide whether a re-count is reasonable. Electoral Commission guidance suggests that if a returning officer refuses a request for a re-count, candidates and agents may be allowed to inspect bundles of ballot papers to satisfy themselves that the count is accurate.<sup>39</sup>

- 9.36 Once a re-count has been carried out, a further re-count may be undertaken. However, this is the limit on the number of re-counts which may be carried out. Guidance recognises that a further re-count may be desirable where there is a significant difference between the first and second counts, or there is still a very close result. While the returning officer is again free to refuse a further re-count, guidance advises returning officers to provide a reason as to why it would not significantly change the result.<sup>40</sup>

### ***Declaration***

- 9.37 The returning officer must declare the candidate(s) elected and give notice of the total number of votes given for each candidate together with the number of rejected ballot papers under each head of rejection. Elected candidates' names must be returned to the relevant official; the Clerk of the Crown for UK Parliamentary elections, and the proper officer of the relevant council for local elections.<sup>41</sup>

## **TRANSPOSING THE CLASSICAL RULES TO OTHER ELECTIONS**

- 9.38 The classical counting rules governing first past the post elections are transposed to elections using other voting systems. Our Research Paper on the count and determination of the result covers election-specific rules in greater detail, and records election-specific differences in the drafting of the rules.<sup>42</sup>

### **Supplementary vote elections**

- 9.39 If more than two candidates stand at a supplementary vote election, electors are asked to cast a first and a second preference vote. If, after all the first preference votes are counted, no candidate has an overall majority (which means winning more than half of all votes cast) then the count proceeds to a second round. In this round the candidates with the two highest numbers of votes (which may be more than two candidates where there is an equality of votes) remain in the contest, while the rest are eliminated. Then the second preference votes cast for the candidates remaining in the contest, where these were cast by voters whose first preference candidate has been eliminated, are counted and added to the first

<sup>38</sup> Representation of the People Act 1983, sch 1 r 46(1).

<sup>39</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 5.3.

<sup>40</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 5.5.

<sup>41</sup> Representation of the People Act 1983, sch 1 r 50; Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 50; Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 50.

<sup>42</sup> <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

preference totals.<sup>43</sup>

- 9.40 Another difference is at Police and Crime Commissioner and London Mayoral elections. At such elections, the directing officer<sup>44</sup> collects returns from local returning officers and determines the overall result by carrying out the “central calculation”, which involves the second preference votes.

### **Party list elections**

- 9.41 European Parliamentary elections and the regional and London contests at Greater London Authority, Scottish Parliamentary and Welsh Assembly elections are run according to the party list system. The latter three elections use the party list as a component of an additional member system. Their counting rules therefore require that constituency contests are determined before the total number of votes given to each party and individual candidate in the region can be used to allocate regional (or London) seats.<sup>45</sup> At party list elections, local returning officers conduct counts under the overall direction of a directing officer.
- 9.42 The chief difference at party list elections is that parties, as well as independent non-party candidates, stand for election. Classical rules referring to candidates and agents must be adapted to the fact of parties standing. A simple adaptation is that each party (or independent candidate) is entitled to name a set of representatives to scrutinise the count, adjudications, and request re-counts. But the transpositions in election-specific rules are less straightforward, so that, for example, at European Parliamentary elections each list candidate may choose one person to attend the local count and the central calculation with them.
- 9.43 Some differences in the rules for particular elections are for reasons of policy. Verification at European Parliamentary elections uniquely requires ballot papers to be kept face down, in order to prevent voting tallies being leaked to other member states where polling is ongoing.<sup>46</sup> At Scottish Parliamentary elections, the rules require that where a voter has marked a ballot paper apparently in a numbered sequence showing his or her preference, and the ballot paper would otherwise be rejected as void, the ballot paper must be treated as a vote for the candidate against whose name the number 1 appears. This is plainly to deal with the potential confusion which could arise for Scottish electors who are accustomed to the single transferable vote (used for local elections).<sup>47</sup>
- 9.44 Another election-specific provision is the additional provision at Welsh Assembly elections for regional seats. A ballot paper which is marked for a particular party

<sup>43</sup> Police Reform and Social Responsibility Act 2011, sch 9; Local Government Act 2000, sch 2.

<sup>44</sup> The role of the directing returning officer is explained at para 3.2 above.

<sup>45</sup> Greater London Authority Elections Rules SI 2007 No 3541, sch 2; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 55.

<sup>46</sup> European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 51(4).

<sup>47</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 58(3). Electoral Commission, *Scottish Elections 2007: The independent review of the Scottish Parliamentary and local government elections 3 May 2007* (October 2007). Scotland Office, *Announcement: Scottish Parliament election rules change for the better*, 26 October 2010 <https://www.gov.uk/government/news/scottish-parliament-election-rules-change-for-the-better> (last accessed 2 December 2014).

list candidate must be taken as a ballot paper marked for the list candidate's party.<sup>48</sup> It is less clear why this rule is not replicated for other party list elections. On the whole, both of the above provisions' intended outcome can be achieved by leaving returning officers to ascertain the intention of the voter, with detailed guidance left to the Electoral Commission.

- 9.45 Some differences are hard to explain. For example, the election rules governing National Assembly for Wales elections uniquely grant the Secretary of State a power to direct that the counting of votes (but not verification) may be delayed until the morning after the close of poll. A time to start counting must be specified, which must be between 9 am and midday.<sup>49</sup>

### **Responsibilities of various officers**

- 9.46 Several elections which are managed by directing and local returning officers, hierarchically or collaboratively have provisions to define the respective duties and powers of the returning officers. This includes:

- (1) provisions for "central calculation" to be carried out by the directing officer to determine some or all of the results (London Assembly, Scottish Parliamentary, National Assembly for Wales and European Parliamentary elections in Great Britain); and
- (2) in large constituency contests, where the counts may be carried out at the local returning officer level, the determination and declaration of the result being done by the directing returning officer (Police and Crime Commissioner elections, Mayor of London elections).

### **REFORMING THE LAW ON CONDUCTING COUNTS**

- 9.47 In Chapter 8, we suggested that polling rules should essentially be the same for all elections, with differences to accommodate different voting systems or particular policies. We take the same view regarding conducting counts.

#### **A single set of counting rules for all elections**

- 9.48 Superficially, counting rules for different elections exhibit greater diversity than polling rules. But the central content of the rules governing the count is common to all elections. Irrespective of voting systems, at all elections, ballot paper accounts must be verified and thereafter votes must be counted, then the result determined in accordance with the applicable voting system and announced.
- 9.49 We provisionally propose that a single set of rules should lay down the basic requirements of a count (verification, count and determination of result). While a substantial part of the counting rules can be made uniform for all elections, in some areas the standard rules will need to account for justifiable differences such as the existence of a hierarchy of returning officers running some types of election. We consider further below the discrete issues of electronic counting and

<sup>48</sup> National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 58(3).

<sup>49</sup> National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 54(2).



the single transferable vote.

**Provisional proposal 9-1: A single standard set of rules should govern the count at all elections.**

**Provisional proposal 9-2: The standard counting rules should cater for differences between elections as regards their voting system and how their counts are managed.**

- 9.50 The areas where the current rules differ – and, we provisionally consider, ought to be standardised – tend to fall under the headings of timing and the role of candidates and agents.

### **Timing**

- 9.51 We provisionally consider that the classical rule should apply to all elections. Its starting point is that returning officers should make arrangements to count votes as soon as practicable after the close of polls. They may decide that this means counting on the day following the count.
- 9.52 We currently see no reason for departure from this basic approach at any election apart from UK Parliamentary elections, which we discuss below. Thus we do not currently consider that the Secretary of State ought to have power to direct that the count at elections to the National Assembly for Wales shall not start until the morning after the close of poll.<sup>50</sup> We have seen no evidence that the power has ever been used. Consistency can, we provisionally consider, be sufficiently achieved by regional returning officers agreeing in advance of an election when the count can pragmatically start. At all elections, returning officers are answerable for their decisions and may have regard to guidance, local circumstances, and other factors. At Northern Ireland local elections, for example, where single transferable vote counts are manual, it may be sensible not to commence the count for two days if these elections are combined with UK Parliamentary elections, to enable the Parliamentary count to be completed first. We do not think there is any need to depart from the basic classical rule that counting should take place as soon as practicable.
- 9.53 The timing of the count at UK Parliamentary elections is a more difficult issue. The recent amendment to the election rules, requiring steps to be taken to commence the count within four hours of the close of polls, can be taken as a strong policy indication by the legislature that the imperative to count swiftly at UK elections applies with greater force at UK Parliamentary elections. It is not within the remit of this project to reverse such a recent change in legislation.

### **Pausing the count**

- 9.54 The classical rule for UK Parliamentary elections (power, with consent of the candidates, to pause the count between 7 pm and 9 am on any day) requires updating. We provisionally consider that a single rule should subsist for all elections, which empowers the returning officer at any time to pause the count until 9 am. We do not think this rule should be expressly conditional on the

<sup>50</sup> National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 54(2). See above para 9.45.

agreement of all candidates. We consider that returning officers should be capable of being trusted to make a reasonable decision. They will no doubt be assisted by Electoral Commission guidance stressing the need to consult and to build consensus.

**Provisional proposal 9-3: The rules should empower returning officers to determine the earliest time at which it is practicable to start a count, and to pause one overnight, subject to the duty to commence counting at UK Parliamentary elections within four hours and the requirement to report any failure to do so.**

### **The presence and role of agents**

9.55 At all elections, the count should be undertaken consistently with the principle of transparency. Confidence in the result should flow not only from the existence of robust rules and fair-minded administration, but should also be reinforced by the ability of candidates and their representatives to observe proceedings and make representations if necessary. Therefore access to the count venue should be secured for candidates and their agents, as well as accredited observers. The formulation of the right to access the count venue differs at various elections, but this is a matter of drafting. All rules intend, and we provisionally consider ought, to allow access to the count by:

- (1) the returning officer and staff;
- (2) the candidates, their election agents and counting agents, and one more nominee;<sup>51</sup>
- (3) accredited observers (authorised by the Electoral Commission); and
- (4) other persons authorised by the returning officer to attend – in particular media representatives.

9.56 The returning officer is under a duty to ensure that all those who attend are given a copy of the secrecy provisions of the 1983 Act, and to take steps to protect the security of the ballot papers and protect the counting venue from unauthorised access.

9.57 The number of persons entitled by the rules to attend the count will depend on the circumstances of the election. The capacity of the counting venue will be finite. We consider that the returning officer should have a power to limit the number of people attending under headings (2) and (3) above. That power should be exercised if, in the light of the capacity of the counting venue, the returning officer is concerned about the security of the count or the health or safety of those attending. Any limit should apply equally to all candidates.

### REFERENCES TO CANDIDATES, ELECTION AGENTS AND COUNTING AGENTS

9.58 In general, election rules refer to any one or a combination of the candidate, their election agents or counting agents when laying down rules intended to bolster the transparency of the count. A counting agent may object to the rejection of a ballot

<sup>51</sup> Which used to be stipulated to be their spouse.

paper. In practice, it is more likely that an election agent or the candidate in person will attend the adjudication. Pragmatically we assume that the reference to a counting agent includes the candidate or election agent. Elsewhere – for example, as regards the ability to pause the count overnight with the agreement of counting agents – this is spelt out: “the agreement of a candidate or his election agent shall be as effective as the agreement of his counting agents”.<sup>52</sup> In yet other contexts, a clear demarcation is made between the role of counting agents (for example, overseeing the count of the number of ballot papers), and election agents (for example, overseeing the comparison of ballot paper accounts with the verified number). The candidate or the election agent – not the counting agent – may request a re-count.

- 9.59 Which of those personalities represents the candidate at different stages can vary at different elections. Our provisional proposal is that all a candidate’s agents should be able to act on behalf of the candidate – though counting agents’ functions will of necessity be limited to functions in connection with the count – with the consequence that the candidate and the election agent can do anything the counting agent can do.
- 9.60 The only arguable exception is requesting a re-count, which it seems to us to be sensible to restrict to the candidate, their election agent, or a counting agent specifically authorised by either of them to do so in their absence. Which official is sent to do which task is a matter for the candidate. If counts occur at multiple venues, some facility must exist for delegating that function to a counting agent at a particular venue.
- 9.61 The process of adjudication of doubtful votes itself is a vital aspect of the count. Guidance recommends that the process be undertaken by the returning officer in the presence of the candidate or their agent, although that is only obliquely addressed by the Parliamentary Election Rules, which stipulate that if a counting agent (and one must assume, a candidate or their election agent) objects to a rejection, the ballot paper must be marked with the objection. By contrast, the rule for Greater London Authority elections (which are counted electronically) specifically provides for scanned ballot papers, when examined for validity, to be examined on a screen visible to those attending the count.
- 9.62 We provisionally propose that the law should expressly require doubtful ballot papers to be examined by the returning officer having given an opportunity to the candidate (or an agent) to observe and to make objections, at all elections in the UK. This would reflect current practice rather than seek to alter it.

**Provisional proposal 9-4: Candidates may be represented at the count by their election agents or counting agents, who should be able to scrutinise the count in the way the law currently envisages. At party list elections, parties may appoint counting agents. Election agents and counting agents should be able to act on a candidate’s behalf at the count, save that a re-count may only be requested by a candidate, an election agent or a counting agent specifically authorised to do so in the absence of the candidate or election agent.**

<sup>52</sup> Representation of the People Act 1983, sch 1 r 45(6).

## **ELECTIONS USING THE SINGLE TRANSFERABLE VOTE**

- 9.63 Four species of elections in the UK use the single transferable vote system (STV). In Northern Ireland, local government elections, European Parliamentary elections and Northern Ireland Assembly elections use STV, as do local government elections in Scotland. The counting rules governing STV are significantly more detailed because the counting system is intrinsically more complex than any other in use in the UK.

### **How STV works**

- 9.64 STV is a system of proportional representation which allows voters to rank individual candidates in order of preference. STV seeks to maximise the use of preferences to determine the outcome. Candidates are elected if they meet a quota (called the Droop quota) based on the number of vacant seats and the total number of valid votes cast.<sup>53</sup> This is the number of votes a candidate needs to have in order to be deemed elected. It is also the number which is subtracted from their vote tally in order to determine the “surplus” to be transferred to candidates who continue to compete for election.
- 9.65 Once the first candidate is deemed elected, ballot papers voting for that candidate are examined for the next preference on the ballot paper; their votes are then “transferred” to the next preferred candidates, but only in proportion to the elected candidate’s surplus of votes over the quota. Therefore each transferred vote has a “transfer value” of one or less than one, so that the total sum of transferred votes cannot be more than the surplus of votes over the quota. Where no candidate has reached the quota, the lowest scoring candidate is eliminated and ballot papers voting for that candidate are examined for their next preference, and transferred to those candidates. This process of transfer and exclusion occurs until the seats are filled. STV counts therefore occur in “stages” marked by a candidate reaching the quota, or a bottom candidate being eliminated, and the next preference votes on their ballot papers being examined and allocated, until all seats are filled.
- 9.66 Our Research Paper covers the detailed rules governing STV counts in Northern Ireland and Scottish local government elections. These are different in two main respects. Firstly, STV elections in Northern Ireland are counted manually, and some of the rules reflect that. Secondly, the formulas for calculating transfer values are different in the two jurisdictions.

### ***Re-counts at STV elections***

- 9.67 A consequence of this complexity is that the classical approach to re-counts cannot be replicated in STV elections. Re-counting from the start is a serious and time-consuming task. In STV elections in Northern Ireland, where votes are counted manually, there is a duty to record data at each point at which votes are transferred, whether as the result of a surplus or the exclusion of a candidate. The data include in particular the total value of votes transferred; the new total of votes for each candidate as things stand; the value of votes not transferable in the transfer exercise; the new total of non-transferable votes as things stand; and

<sup>53</sup> R Rose (ed) *International Encyclopaedia of Elections*, p 293. Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 47.

a comparison between:

- (1) the total number of votes then recorded for all of the candidates plus the total number of non-transferable votes, with
- (2) the recorded total of valid first preference votes.<sup>54</sup>

9.68 The legislation does not say so, but the comparison should match precisely before the next stage begins, or there has been a mistake. This is important because it appears that re-counts can only be requested for a particular stage. The returning officer must comply with any request for a re-count of the latest completed stage of the count. The returning officer is not obliged to re-count any one parcel or sub-parcel more than once.<sup>55</sup>

9.69 At Scottish local government elections the classical rule is retained whereby returning officers may refuse a request for a re-count if it is in their opinion unreasonable.<sup>56</sup> Scottish local government elections are counted electronically and so the rules do not require the recording of data at each stage. Rather, the requirement is for the returning officer, in the eventual declaration, to produce the data relating to each stage, such as the number of ballot papers transferred and their transfer values at each stage.<sup>57</sup> The e-counting system must therefore enable returning officers to produce those data. We consider electronic counting further below. We note, however, that at local government elections in Scotland the returning officer may choose to count manually,<sup>58</sup> and if this is done, there are no rules equivalent to those at Northern Ireland elections making clear that only the last stage may be re-counted.

### ***Calculating the transfer value for surplus votes***

9.70 A key part of the STV process is calculating and recording the transfer value of transferable votes. That value cannot exceed one. The transfer value is calculated differently in Northern Ireland and Scotland. The details of the calculations are set out in our Research Paper.<sup>59</sup>

9.71 We do not consider that the difference between transfer value formulas in Scotland and Northern Ireland is the sort of difference this project can seek to eliminate. We consider the transfer value formula, and the quota formula, to be part of the voting system in use at those elections. We provisionally consider, however, that there is a strong case for the formulas to be set out in primary legislation rather than, as at present, in secondary legislation. If the transfer value

<sup>54</sup> Electoral Law (Northern Ireland) Act 1962, sch 5 rr 50(2) and 51(10); European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 1 rr 58(2) and 59(10); Northern Ireland Assembly (Elections) Order SI 2001 No 2599, sch 1 rr 44G(2) and 44H(10).

<sup>55</sup> Electoral Law (Northern Ireland) Act 1962, sch 5 r 53; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 61; Northern Ireland Assembly (Elections) Order SI 2001 No 2599, sch 1 r 44K.

<sup>56</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 54(1).

<sup>57</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 56 (c)(iii) to (v).

<sup>58</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 42 (3) and (4).

<sup>59</sup> <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

formula is to be expressed (and alterable) by secondary legislation, primary legislation should set out that the value should be such that it is one or less, so that the total value of transferred votes does not exceed the surplus.

### ***Equality of surpluses***

9.72 Where more than one candidate has been deemed elected, the transfer of their votes should start with the ballot papers of the candidate with the highest surplus. If two or more candidates have the same surplus (what is sometimes called “equality of votes”), there is a difference in the two jurisdictions:

- (1) At Scottish local government elections, the candidate with the most votes at the previous stage takes precedence; if candidates had an equal number of votes at that stage, the returning officer decides by lot whose votes are transferred first.<sup>60</sup>
- (2) At Northern Ireland STV elections, regard must be had to the earliest stage of the count where they had an unequal number of votes. If the equality persists, the returning office decides the matter by lot.<sup>61</sup>

9.73 It is not clear why the rules on resolving equality of votes are not consistent throughout the UK. The Northern Irish approach reduces the scope for the chance element of deciding by lot, and on that basis is to be preferred – although actual instances of when this difference matters are likely to be extremely rare.

### ***Time-saving provision at STV elections in Northern Ireland***

9.74 At STV elections in Northern Ireland, where votes are counted manually, there is a time-saving provision which states that the transfer of surpluses should be withheld where either:

- (1) the surplus is less than the difference between the total number of votes of the lowest scoring candidate and the total votes of the candidate immediately above them in the standings; or
- (2) the surplus is less than the difference between the total votes of the two or more lowest scoring candidates and the candidate next above those.<sup>62</sup>

9.75 The reason for this is that the transfer of votes in such circumstances serves no purpose; it cannot alter the relative position of candidates at the bottom of the standings in either of the situations. Since at the next stage, one or more of these candidates will be excluded and their votes transferred, it saves time to reserve the transfer of the surplus until after such exclusions. Similarly, if only one vacancy remains, and the votes of one candidate are equal to or greater than the remaining candidates’ votes together with any surplus not transferred, they are

<sup>60</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 rr 50 and 52.

<sup>61</sup> European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 1 rr 58(1), 59(13), 62(3) and (4); Northern Ireland Assembly (Elections) Order SI 2001 No 2599, sch 1 rr 44G(1), 44H(13) and 44L(3) and (4); Electoral Law Act (Northern Ireland) 1962, sch 5 rr 50(1), 51(13), 54(3) and (4).

<sup>62</sup> European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 57(10); Northern Ireland Assembly (Elections) Order SI 2001 No 2599, sch 1 r 44F(10); Electoral Law Act (Northern Ireland) 1962, sch 5 r 49(10).

declared elected.

- 9.76 The ballot papers at Scottish local government elections are normally counted electronically and, as such, do not involve the physical manipulation of parcels and sub-parcels and recording of data at each stage. However, the modifications of the standard rules applicable at a manual count do not make equivalent provision for withholding the transfer of surpluses to candidates bound to be excluded. The returning officer must transfer extant surpluses before excluding candidates, which takes more time.<sup>63</sup>

### **Provisional reform proposals regarding STV counts**

- 9.77 Whereas the classical counting rules do not specify the manner in which the count must be carried out, STV counting rules are carefully drafted to guide administrators through the count by requiring it to be in stages, requiring the division of transferable ballot papers into parcels and sub-parcels, and setting out the count and transfer values at each stage. We provisionally consider that the counting rules governing STV elections should continue to be detailed, but should be structured to apply to all elections using that voting system.

### **QUOTA AND TRANSFER VALUE FORMULAS**

- 9.78 The counting rules governing STV elections in Northern Ireland and Scottish local government elections currently set out the quota to be met in order to be deemed elected (which is the same at any STV election), and the transfer value formula to be used (which may differ in various STV elections, and differs as between Scotland and Northern Ireland). We have mentioned that we see a strong argument that the quota and transfer value formula are part of the voting system, and should be placed, in the legislative framework for elections, in primary legislation.

**Provisional proposal 9-5: Save for differences in the transfer value, the same detailed rules should govern all STV counts.**

### **ELECTRONIC COUNTING**

- 9.79 Two species of election are counted electronically in the UK, using devices that scan ballot papers on both sides, flag doubtful votes, and record and count votes electronically. These are Greater London Authority (“GLA”) and (as just mentioned) Scottish local government elections. However, the rules in relation to each adopt a different approach.

#### **The GLA approach**

- 9.80 At GLA elections, the rules are drafted throughout with a view to the electronic nature of the count. It is up to the Greater London returning officer (“GLRO”) to decide whether to use electronic counting; where the GLRO has provided an electronic counting system, constituency returning officers (“CROs”) must use it unless they have obtained written consent to their counting manually.<sup>64</sup> “Technical assistants” must be appointed by the CRO, and are entitled to attend

<sup>63</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 rr 55 and 51(1).

the count. They are subject to the same disqualifications as those appointed as presiding officers and clerks; they must not have been employed in or about the election by or on behalf of a candidate or a registered party which has been nominated.<sup>65</sup>

- 9.81 The counting rules largely follow the classical Parliamentary rules, with modifications for the electronic counting system. For example, the rules state that the CRO must cause the electronic counting system to count and record the number of ballot papers and the votes given on the ballot papers. There is no obligation to keep ballot papers face up during counting, although the CRO must take proper precautions to prevent persons from seeing the numbers on the back of ballot papers. The CRO must also not mix the contents of any ballot box with the contents of another ballot box at any stage during the count.<sup>66</sup>
- 9.82 A special rule is directed at the process for checking ballot papers which have been marked, but which the electronic counting machines identify as void:
- (1) a clerk must examine the ballot paper by looking at it on a screen so that it is visible to those attending the count;
  - (2) if the clerk considers the ballot paper to be void he or she must pass the issue on to the CRO; then
  - (3) the CRO must also examine the ballot paper on screen and make a final decision as to whether it is valid or not.<sup>67</sup>
- 9.83 The CRO is also entitled to examine any ballot paper (either the paper copy or on screen) not identified as void by the machine. The CRO's decisions on doubtful ballot papers must be recorded in the electronic counting system with reasons where the decision is that the ballot paper is void. Any objections made by counting agents must also be recorded.

#### ***Modification of rules for manual counts***

- 9.84 The rules for GLA elections also include a table of modifications in the case of a manual count system being used.<sup>68</sup> The main modifications are:
- (1) ballot papers must be separated before verification if joint ballot boxes are used;
  - (2) the references to technical assistants are omitted;

<sup>64</sup> Greater London Authority Elections Rules SI 2007 No 3541, sch 1 r 48, sch 2 r 49 and sch 3 r 48.

<sup>65</sup> Greater London Authority Elections Rules SI 2007 No 3541, sch 1 rr 25 and 47, sch 2 rr 26 and 48, sch 3 rr 27 and 47.

<sup>66</sup> Greater London Authority Elections Rules SI 2007 No 3541, sch 1 r 49, sch 2 r 50 and sch 3 r 49.

<sup>67</sup> Greater London Authority Elections Rules SI 2007 No 3541, sch 1 r 50, sch 2 r 51 and sch 3 r 50.

<sup>68</sup> Greater London Authority Elections Rules SI 2007 No 3541, sch 4 para 3.



- (3) ballot papers from different polling stations must be mixed after verification and before counting; and
- (4) the power to provide a breakdown of totals by ward is removed.

### **The Scottish local Government elections approach**

9.85 By contrast, the Scottish local government election rules principally deal with electronic counting in one rule generally empowering the officer to discharge the election rules by electronic means, and to interpret the rules accordingly. The returning officer must, at an ordinary election, provide and use an e-counting system unless it is impossible or impracticable to do so.<sup>69</sup> Rule 42(2) states:

For the purposes of enabling the count to be conducted using the electronic counting system the returning officer may carry out any functions or perform any procedure to be undertaken in connection with the count by electronic means and the references to ballot papers and parcels of ballot papers shall include references to such ballot papers or parcels in electronic form.

9.86 Other rules are designed to facilitate e-counting – this is evident from the fact that the ballot papers are not required to be mixed before counting or kept face up during counting, and that the official mark does not need to be checked. If the returning officer decides to count manually, these requirements are brought back by rule 55.<sup>70</sup>

### ***Manual counting at Scottish local government elections***

9.87 Another difference worth noting concerns when the count can be conducted manually. For GLA elections, a returning officer must use e-counting methods if the GLRO has so directed. Once any of the count processes has begun, the returning officer may change to a manual count if considered appropriate.<sup>71</sup> By contrast, at Scottish local government elections the returning officer must make a decision, at the outset, as to whether it would be impossible or impracticable to conduct the count or any part of it electronically. If the returning officer decides that this is the case, all or part of the count may be conducted manually. The rules do not state explicitly whether this decision can also be taken once the count has commenced, although the words “if it proves impossible or impracticable” can be interpreted to include a situation where impossibility arises during the count. This is the only sensible interpretation; in the case of, for example, machine failure, a returning officer must be able to revert to manual processes.

### **Provisional proposal on reform of electronic counts**

9.88 The current election-specific approach yields two sets of rules for each type of election which is counted electronically. These are drafted with the electronic counting method in mind. Retaining that approach would mean drafting new rules should any future decision be made to introduce electronic counting at other

<sup>69</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 42.

<sup>70</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 55.

<sup>71</sup> Greater London Authority Rules SI 2007 No 3541, sch 1 r 48, sch 2 r 49 and sch 3 r 48.

elections.. For example, the Northern Ireland STV elections may one day be counted electronically. If so, the current approach would require redrafting their election rules.

- 9.89 Conversely, in the event that an electronic counting system fails for any reason, the election rules have to envisage manual counts as a fallback. In the case of a manual count, at Scottish local government elections certain rules are disapplied and others introduced – for example, the requirement to mix ballot papers from two different polling stations before they are counted.
- 9.90 There are dangers in the current approach. One of them is under-inclusion. We have noted that if, at Scottish local government elections, the decision is made to count manually, then the standard rule governing re-counts applies. That means the entire count must be restarted. That would be disproportionate; the legislation governing re-counts of manual STV elections in Northern Ireland avoids such an eventuality by requiring only the last stage to be re-counted.
- 9.91 Our provisional view is that a standard set of rules should govern counts generally, and should differentiate between different voting systems and structures for managing counting. In our view, the standard rules should be expressed as neutrally as possible in terms of technology required for counting, but apply to the default (manual) method of counting. For electronic counting, there should be a standard subset of rules and adaptations to the standard rules. A separate power to provide by statutory instrument that a particular election should be counted electronically would affect whether the e-counting subset of rules applied to particular elections. At present it would apply to local elections in Scotland and GLA elections.
- 9.92 This approach would, we currently consider, bring greater clarity, at any election, as to how each method of counting is to be conducted (including manual counting where an electronic counting system has failed) and greater future-proofing of counting rules, by avoiding the need for significant redrafting if electronic counting is extended to more elections.

**Provisional proposal 9-6: A standard set of counting rules and subset of counting rules for electronic counting should apply to all elections. Which elections are subject to electronic counting should be determined by statutory instrument.**

#### **Transparency of the electronic counting system**

- 9.93 Whether or not a technology-neutral approach is desirable, we consider that there is a need to think of analogues, in the e-counting context, for the classical rules that are designed to ensure that the count proceeds transparently, observed by the candidate and their representatives. The classical approach seeks to build confidence in outcomes. The ability to observe e-counting machines in action is not, of itself, a substitute for those rules. The confidence of participants can only be sought and obtained at a prior stage, when the electronic counting system is selected and developed. We currently see three possible options for reform:
- (1) A certification requirement for electronic counting systems, based on standards and specifications.

- (2) A requirement for returning officers, in advance of an election, to demonstrate the effectiveness of their chosen e-counting equipment to representatives of the main political parties and the Electoral Commission.
- (3) Do nothing, and leave the choice and operation of the electronic system to returning officers.

9.94 There may be other possibilities. We do not currently have a preference for any option, and seek consultees' views and suggestions.

**Question 9-7: Should electronic counting systems be subject to a certification requirement, a requirement of a prior demonstration to political parties and/or the Electoral Commission, or should there be no change in the current law?**

# CHAPTER 10

## TIMETABLES AND COMBINATION OF POLLS

### INTRODUCTION

- 10.1 This chapter considers the timetable according to which elections are run, and the law governing the administration of coinciding elections – typically referred to as the “combination of polls”.

### The incidence of elections

- 10.2 We refer to “incidence rules” to mean the legal rules that govern when an election is triggered, and when polling day takes place. In general, incidence rules distinguish between:

- (1) ordinary (general) elections, referring to regular interval elections of the entire or part of the body to be elected;
- (2) extraordinary (general) elections, to refer to unplanned or irregular elections of the entire body electorate; and
- (3) casual or by-elections, to refer to irregular elections of individual elected members, rather than the entire body.<sup>1</sup>

- 10.3 These headings fit elections relating to legislatures better than local government. Local government elections have no concept of extraordinary (general) elections, for example. Elections happen at the appointed interval or as casual vacancies occur. Furthermore, ordinary elections may not be for the entire body in England and Wales, where many councils are elected by thirds every year.

- 10.4 Incidence rules are part of the rules that constitute the institution in question. They thus belong to local government law, or constitutional law, and are not purely questions of electoral law. Nevertheless, they are highly relevant to the law of elections since they trigger them. They are particularly relevant to two areas of electoral law: timetables and combination of polls, which we turn to presently.

### *Coincidence of elections*

- 10.5 If two or more polls for an election or referendum occur on the same day in the same area, the two polls coincide. Whether coinciding polls occur is a matter for the operation of the rules on incidence of elections. These will determine whether it is possible for two elections to coincide, and how often or rarely it will be so. We consider the so-called “combination of polls” below. At this point, however, it is important to note, and distinguish, the question of *coincidence* of polls, from their *combination*, the legal notion that the polls are taken together.

### ELECTORAL TIMETABLES

- 10.6 Each set of election rules sets out a timetable according to which the election must be conducted. We call this the “legislative” timetable. For historical reasons,

<sup>1</sup> A table containing incidence rules is available in our research paper on timetables, available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

this does not exhaustively set out all the deadlines and key timeframes in the administration of an election. With the exception of UK Parliamentary election timetables, however, it does structure the election's timetable by reference to a polling day which is yielded by the election's incidence rules.<sup>2</sup>

### **Calculating time**

- 10.7 In each case, the legislative timetable is followed by a rule headed "computation of time", which excludes non-working days, including bank holidays and "a day appointed for public thanksgiving or mourning". Bank holidays differ in each UK jurisdiction, so some specific days, for example Good Friday, are expressly discounted.<sup>3</sup>
- 10.8 UK-wide general elections (for the UK and EU Parliaments) occur in all three jurisdictions, and must be subject to the same timetable. Therefore the rules make clear that a bank holiday in any of the jurisdictions must be disregarded at a general election. If the election is a by-election, only bank holidays in the relevant jurisdiction must be discounted. Similar provisions appear in the legislation governing the deadlines for registering and for applying for an absent voting.<sup>4</sup>

### **The orientation of timetables**

- 10.9 The timetables for most elections are structured so that deadlines are calculated back from polling day as determined by incidence rules. Thus, for EU Parliamentary elections, polling day is on the day appointed by Order of the Secretary of State, which must be within the four day period set by the EU Council in consultation with the European Parliament. The four days cover a Thursday to a Sunday, to enable elections to take place throughout the EU on the days of the week on which member states normally hold elections. Similarly, a by-election, if one must be held, is to be held on a day appointed by the

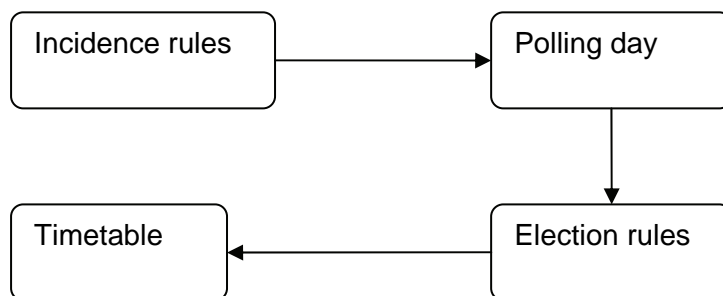
<sup>2</sup> See our research papers on timetables and combination, available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

<sup>3</sup> Representation of the People Act 1983, sch 1 r 2(1)(b), but not if the election is one that follows a poll countermanded on account of the death of a candidate or riot or open violence (r 2(2)(i) and (ii)). European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 2(2) – which also makes provision for bank holidays in Gibraltar to be taken into account, since the territory elects MEPs as part of a combined region with the South West of England. Bank holidays are set out in the Banking and Financial Dealings Act 1971, sch 1 paras 1, 2 and 3. Good Friday is a bank holiday in Scotland, however, and is already discounted on that basis; but Easter Monday is not, yet the UK Parliamentary election rules do not discount that day, nor do the Representation of the People (Scotland) Regulations 2001, for the purposes of late registration for both UK Parliamentary and Scottish local government elections. This appears to be a drafting slip-up. The rules for local government elections in Scotland and Scottish Parliamentary elections both discount Easter Monday from the calculation of periods of time for the purposes of the timetable. Representation of the People (Scotland) Regulations SI 2001 No 497, reg 8(3); Banking and Financial Dealings Act 1971, sch 1 para.; Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 2(1)(b); Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 para 2.

<sup>4</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 8; Representation of the People (Scotland) Regulations SI 2001 No 497, reg 8; Representation of the People (Northern Ireland) Regulations SI 2008 No 1741, reg 8.

Secretary of State.<sup>5</sup>

- 10.10 The European Parliamentary election timetable is set out in rule 1 of the election rules scheduled to the European Parliamentary Elections Regulations 2004.<sup>6</sup> All the steps within it are worked out by calculating back from polling day. This is the model employed by every election type apart from UK Parliamentary elections. It can be put in simple diagrammatical form:



### **The unique orientation of the UK Parliamentary timetable**

- 10.11 Despite the extension by the Electoral Registration and Administration Act 2013 of the UK Parliamentary timetable from 17 to 25 days, it remains markedly different from the timetable of every other election. Table 1 (below) sets out the UK Parliamentary general and by-election timetables.
- 10.12 The general election timetable is calculated by reference to the dissolution of Parliament, which triggers the issue of the writ.<sup>7</sup> Deadlines within the timetable are calculated either by reference to:
- (1) the date of dissolution of Parliament according to the Fixed-term Parliaments Act 2011 (in the case of polling day and the close of nominations); or
  - (2) the date of receipt of the writ of election by the returning officer (in the case of notice of election).
- 10.13 The deadlines calculated by reference to (2) above are variable, since they depend on how soon after dissolution the Lord Chancellor (or the Secretary of State in relation to Northern Ireland) issues the writ, and when it is delivered to the returning officer (by hand or post). In table 1 below, we have assumed issue of the writ on the day of dissolution (day 0), and receipt the next day (day 1). Notice of election must be published by day 3, nominations close on day 6, the statement of persons standing nominated must be published no later than day 7, and polling takes place on day 25.

<sup>5</sup> European Parliamentary Elections Act 2002, s 5(3).

<sup>6</sup> European Parliamentary Elections Regulations SI 2004 No 293; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267.

<sup>7</sup> Fixed-term Parliaments Act 2011, s 3(1) as amended by the Electoral Registration and Administration Act 2013, s 14(1).

	Trigger		Notice of election	Close of nominations	Statement of persons nominated	Polling day
UK Parliament (general).	Dissolution of Parliament by s 3(1) Fixed Term Parliaments Act 2011.	As soon as practicable after dissolution.	Not part of the statutory timetable but next deadline runs from receipt of writ.	Not later than 4pm on sixth day after dissolution.	One hour after close of nominations.	7 am to 10 pm on the day determined pursuant to the Fixed-term Parliaments Act 2011.
Day count (* denotes presumed day).	0.	0*.	1*.	6 (at 4pm).	6 (at 5pm).	25.
UK Parliament by-election.	Warrant for the writ of by-election.	As soon as possible after warrant for writ.	Not part of the statutory timetable but next deadline runs from receipt of writ.	On a day between: - third day after notice of election - seventh day after receipt of writ.	One hour after close of nominations.	7 am to 10 pm on a day not earlier than the 17th day, nor later than the 19th day, after the close of nominations.
Day (* denotes presumed day).	0.	0*.	1*.	6 to 8 (at 4pm).	6 to 8 (at 5pm).	23 to 27. <sup>8</sup>

**Table 1: Current UK Parliamentary general and by-election timetables**

<sup>8</sup> Polling day can be on any of those five days because it is fixed by reference to close of nominations, which itself can happen on any one of three days.

10.14 Before the Fixed-term Parliaments Act 2011 (“the 2011 Act”), rule 1 of the UK Parliamentary election rules was not only an administrative timetable for the election, but also determined when polling day took place. In other words, it was also an incidence rule. The dissolution of Parliament is what, in law, triggered a general election. It determined the date of the poll, and started the countdown to polling day.

10.15 The timetable is accordingly structured so that it counts forward from dissolution, not backward from polling day like every other election’s timetable. This makes a real difference: these timetables run back from polling day (which is day 0) to notice of election (which in most cases is day 25 before polling day). Under the UK Parliamentary election timetable notice of election is published 22 days, and dissolution occurs 25 days, before polling day. Compared to other timetables, the UK Parliamentary election timetable is a 22 day, not a 25 day, timetable.

***Date of general elections now governed by the 2011 Act***

10.16 The 2011 Act comprehensively determines when polling day is to be at general elections. Parliament is dissolved at the beginning of the 25th day before polling day thus determined.<sup>9</sup> The parliamentary election timetable used to serve a dual role as both an administrative timetable and a way of determining when, in law, polling day must take place. Now that the 2011 Act “triggers” general elections and determines polling day, rule 1 states that polling day is on the day determined under section 1 of the 2011 Act.<sup>10</sup> The election timetable is now in truth only an administrative timetable, into which polling day is inserted by the incidence rule provided by the 2011 Act.

***UK Parliamentary by-elections***

10.17 The position is materially different at UK Parliamentary by-elections. The 2011 Act makes no provision governing these. The legislative timetable continues to fix polling day. The issue of the warrant for the writ of by-election starts the timetable. Assuming, as we do in Table 1, that the writ is received the day after the issue of the warrant:

- (1) Close of nominations is to occur between the sixth and eighth day after the warrant of by-election. Strictly the rule expresses that close of nominations must be between:
  - (a) the third day after notice of election, itself published no later than two days after receipt of the writ; and
  - (b) the seventh day after receipt of the writ.
- (2) Polling is on a day, fixed by the returning officer, between:
  - (a) the 17th day after the close of nominations; and

<sup>9</sup> Fixed-term Parliaments Act 2011, ss 1(2), (3), (5), 2(7) and 3(1).

<sup>10</sup> By contrast, before the 2011 Act, rule 1 stated that polling day was on “The eleventh day after the last day for delivery of nomination papers”, itself the sixth day after the date of proclamation summoning the new Parliament – making 17, the length of the timetable before the change in the law under the Electoral Registration and Administration Act 2013.



(b) the 19th day after the close of nominations.

10.18 When receiving a writ of election, a returning officer is thus able to consider the range of days on which close of nominations can occur, and consequent on that range, a range of five working days on which polling day can occur. The idea, unexpressed in law, is that a Thursday will be chosen, and the timetable deadlines will be worked back from that day. Based on the assumption of next day receipt of the writ, the UK Parliamentary by-election timetable is thus 23 to 27 days long. It seems anomalous, however, that the returning officer's selection of the date of close of nominations, and thus the amount of time that candidates have to get their nomination papers in order, should be affected by the need to enable polling to take place on a Thursday.

### **Aligning the UK Parliamentary election timetable with others**

10.19 UK Parliamentary elections have special constitutional significance, being elections to the supreme legislative authority in the UK. It is not for this project to review the rules that constitute Parliament, including the convention that elections are prefaced by the issue of a writ of election, or the background processes leading to its issue.

10.20 The principle that the electoral timetable should be organised by reference to polling day yielded by a separate incidence rule is, however, part of technical electoral administration law. As a matter of consistency, it is desirable that parliamentary elections should conform to it, as other elections do. So far as possible, timelines should be fixed in advance and predictable.

10.21 Our analysis of the UK Parliamentary general election timetable suggests that, following the 2011 Act, its orientation can be aligned with that of other timetables. That Act determines polling day, from which every other deadline can be derived. The way the general election timetable is oriented is now an anachronism.

10.22 At first sight, the by-election timetable is different, since polling day is determined by reference to the warrant of by-election and subsequent receipt of the writ. However, as we have shown, the intent behind the timetable appears to be to allow for polling day to be on a range of days, to enable a Thursday to be selected as polling day.

10.23 Our provisional reform proposal here is to decouple the two functions of the timetable. A separate incidence rule should determine polling day so that it occurs on a Thursday. The administrative timetable would run back from that day. Re-orienting the by-election timetable in this way does not materially affect the timing of the election.

10.24 By-elections tend to see many candidates standing, as parties can focus on a single constituency. The unpredictability of their occurrence means that electors may be unaware of the need to register or indicate absent voting preferences in advance, and administrators may need to organise them at short notice.<sup>11</sup> The current law gives returning officers, on rare occasions when there is a choice of two Thursdays (because there is a bank holiday between them), a discretion to

<sup>11</sup> O Gay, *Electoral Timetables in the United Kingdom* (2003), para 2.38.

choose the earlier of the two Thursdays as polling day.

- 10.25 We provisionally consider that an incidence rule for by-elections should govern the setting of polling day on the last Thursday between days 23 and 27 after the warrant of by-election is issued. The only change in the current law would be to remove the discretion, on rare occasions when there is a choice of two Thursdays, to choose the earlier of the two Thursdays as polling day.
- 10.26 The administrative timetable for UK Parliamentary elections should be the same for a general or a by-election. Based on the current timetable length of 25 days, we envisage the re-orientated timetable working as follows.
- (1) The timetable should be re-oriented to count backwards from polling day, given under the 2011 Act or the incidence rule for by-elections.
  - (2) Notice of election would be published on the 25th day before the poll, thus aligning it with other 25 day election timetables.
  - (3) Reference could continue to be made to the writ and royal proclamation, but as steps to be taken prior to the notice of election on the 25th day prior to polling day, and the other steps within the timetable similarly oriented back from polling day.

***Dealing with the writ of election as a background process***

- 10.27 Sometimes the returning officer may not receive the writ of election in time to publish the notice of election the next day. That might be the case under the 2011 Act if an early general election is called (for example appointing polling day to be 26 days hence), or if a by-election is called unexpectedly. In order to alleviate such problems our view is that writs of election should be capable of communication by electronic means, reducing the delay between issue and receipt by the returning officer. We also consider that a rule should state that if the returning officer does not receive the writ in time to publish the notice of election on the 25th day before the poll, they should be permitted to publish it no later than the 23rd day before the poll. This would give candidates a minimum of four working days to prepare these nomination papers.

PROPOSED ORIENTATION OF THE UK PARLIAMENTARY TIMETABLE.

Notice of election	Close of nominations	Polling notice	Polling day
	4pm, day 19.	4pm day 18 before polling day.	7 am to 10 pm on the day determined pursuant to the Fixed-term Parliaments Act 2011, or determined by the returning officers to be the first Thursday 23 to 27 days after the issue of warrant for the writ of by-election.

***Table 2: Proposed reformed Parliamentary timetable (based on 25 days)***

**Provisional proposal 10-1: The UK Parliamentary election timetable should be oriented so that steps count back from polling day as shown above.**

**Provisional proposal 10-2: A separate rule should state that, for by-elections, polling day is on the last Thursday occurring between days 23 and 27 after the warrant for the writ of by-election is issued. (this is based on the current 25 day timetable length).**

**Provisional proposal 10-3: The writ should be capable of communication by electronic means.**

### **Legislative timetables generally**

10.28 The legislative timetable for each election is currently set out in each election's election rules. For the elections we cover in this project, therefore, there are 12 timetables for elections. Their lengths can be grouped into three categories:

- (1) A 25 day timetable for UK and EU Parliamentary elections, Welsh and Northern Ireland Assembly elections, local government and parish council elections, Mayoral and Police and Crime Commissioner elections in England and Wales, and local elections in Northern Ireland,<sup>12</sup>
- (2) A 30 day timetable for Greater London Authority ("GLA") elections,<sup>13</sup> and
- (3) A 28 to 35 day timetable for local government elections in Scotland and elections to the Scottish Parliament.<sup>14</sup>

10.29 The length of timetables is thus clustered around the 25 day mark. The two types of elections occurring only in Scotland stand out with their 28 to 35 day timetable, fixed at the returning officer's discretion. GLA elections' timetables are 30 days to allow for the creation of a leaflet publicising candidates for Mayor of London, which is sent out to every registered elector.

### ***Deadlines within the legislative timetables***

10.30 Each election's legislative timetable contains the following stages:

- (1) publication of the notice of election;

<sup>12</sup> Representation of the People Act 1983, sch 1 r 1; European Parliamentary Elections Regulations SI 2004 No 293, sch 1 r 1; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 1 r 1; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 1; Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 1 r 1; Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 1; Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 3 r 1; Local Authorities (Mayoral Elections) (England and Wales) Regulations SI 2007 No 1024, sch 1 r 1; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1 (applying with modifications Representation of the People Act 1983, sch 1 r 1); Electoral Law Act (Northern Ireland) 1962, sch 5 r 1.

<sup>13</sup> Greater London Authority Election Rules SI 2007 No 2541, sch 1 r 1 (Constituency Members); Greater London Authority Election Rules SI 2007 No 2541, sch 2 r 1 (London Members); Greater London Authority Election Rules SI 2007 No 2541, sch 3 r 1 (Mayoral Election).

<sup>14</sup> Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 1; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 1.

- (2) the deadline for delivery of nomination papers (“close of nominations”);
- (3) the deadline for withdrawals of candidature;
- (4) the deadline for making objections to nomination;
- (5) publication of the statement of persons nominated; and
- (6) polling day.

***Why only these steps?***

- 10.31 For the historical reason that the content of the legislative timetable was settled in 1872, two key deadlines do not appear in it: the deadline for registration as a voter to be effective at a forthcoming poll, and the deadline for new or altered absent voting arrangements. The classical deadlines in the legislative timetable were settled when registration was by canvass well in advance of scheduled polls. Postal voting was not introduced until 1918, and only became prevalent after its availability on demand was introduced in 2000.

***Differences across elections***

- 10.32 Historically, there was a split between elections following the “parliamentary” or “local” model of nominations, with different deadlines for delivery of withdrawals of candidature, and the making of objections to nomination papers. However, a recent policy of the UK Government is to assimilate the deadlines for withdrawing candidature for all elections. This is intended to be achieved by placing the deadline for withdrawal at local government model elections at the same time as the deadline for nominations.

***The deadline for nominations in elections in Northern Ireland***

- 10.33 There is a different deadline for the close of nominations in local elections and Northern Ireland Assembly elections and local government elections in Northern Ireland. Nominations close at 1pm on the 16th day before polling day, nine days after notice of election. All other elections running a 25 day timetable require nominations to close at 4pm on the 19th day before the poll: a six day gap between notice and nominations. This difference appears to be purely historical, and not justified by principle.

***The 28 to 35 day timetable in Scotland***

- 10.34 Both the Scottish Parliamentary and Scottish local government election timetables are between 28 and 35 days in length. Assuming the shortest possible timetable of 28 days, nominations close at 4pm on day 23, or five days after notice of election, so that there is only a five day gap from latest possible notice of election to close of nominations.
- 10.35 It is not clear why these elections are run according to a different, generally longer timetable. Perhaps it is thought that the geography of some electoral areas in Scotland, which are more sparsely populated, requires more time. If a standard timetable of 25 days were applied across the board in the UK, it appears arguable that Scottish electoral administrators and candidates might be put under greater strain.

### ***The 30 day timetable in Greater London Authority elections***

- 10.36 The 30 day timetable for Greater London Authority (“GLA”) elections is justified by reference to the need to prepare and publish a booklet containing the “election addresses” of candidates for Mayor of London. The booklet is sent by the Greater London Returning Officer to all registered electors.<sup>15</sup> The need to prepare this booklet has added five days to the timetable. Notice of election must be published on day 30 before polling day, and nominations close a standard six working days later, on day 24 (at noon). Because GLA election rules remain, at the time of publication of this Consultation Paper, based on the local government nomination model, candidates are not finally determined until three days after close of nominations, noon on day 21 before the poll, when the deadline for notice of withdrawals passes. Only after that date can the GLRO begin the process of producing the booklet.
- 10.37 The government’s current policy is to move away from the local government model approach to nominations. Compared to a 25 day timetable without the later deadline for withdrawal of candidacy, only two extra working days are gained by the present 30 day timetable for GLA elections.
- 10.38 The booklet is only required at ordinary elections, yet by-elections are still run on 25 day timetables.<sup>16</sup> It should be noted that Mayoral elections in England and Wales – where a booklet must also be produced – are nevertheless run on a standard 25 day timetable.<sup>17</sup> Furthermore PCC elections, which instead of physical booklets require candidate “addresses” to be published online by the police area returning officer, do not have an extended timetable.<sup>18</sup>
- 10.39 It might be argued, therefore, that the five days added to the GLA election timetable is disproportionate to the need to publish and post an election booklet. On the other hand, Greater London is the most populated conurbation in the UK and publishing and sending a booklet to every elector is a substantial undertaking. Experience shows that large numbers of electors choose to vote by post, which can place burdens on electoral administrators as well as postal service providers. Furthermore, the booklet may not be the only rationale for the longer timetables. GLA elections may be viewed to be more complicated to run due to the use of both the additional member system (itself a mixture of two voting systems, involving two ballot papers) and the supplementary vote.<sup>19</sup>

### **A standard timetable for UK elections**

- 10.40 Mirroring our proposal of a standard legal framework and set of polling rules for all UK elections, our provisional reform proposal is that there should be a

<sup>15</sup> Greater London Authority Act 1999, s 17A; Greater London Authority Elections (Election Addresses) Order SI 2003 No 1907.

<sup>16</sup> Greater London Authority Elections (Election Addresses) Order SI 2003 No 1907, art 2 (definition of “election”).

<sup>17</sup> Local Authorities (Mayoral Elections) (England and Wales) Regulations SI 2007 No 1024, reg 6 and sch 4. A material difference in schedule 4 is that the returning officer is not obliged to use the universal postal provider, and may decide the time and means of delivering the booklet.

<sup>18</sup> Police and Crime Commissioner Elections Order SI 2012 No 1917, art 52 and sch 8.

<sup>19</sup> O Gay, *Electoral Timetables in the United Kingdom* (2003), para 4.23.

standard timetable for all elections in the UK. Voters, administrators and campaigners would be better able to manage deadlines if they were the same for all elections. They would benefit to a greater extent if, at combined elections, the same deadlines were to occur on the same day. It would enable better planning, and efficiencies in dealing with key “choke points” in administering elections.

10.41 It strikes us as inappropriate that a single, UK wide election can have different timetables in different jurisdictions or areas, given that voters and campaigners are taking part in the election to the same body. Therefore we provisionally consider that the standard timetable must be UK-wide.

**Overall timetable lengths**

10.42 In our discussions above, we noted that legislative timetables range from a maximum of 35 days to 25 days in length from notice to polling day. In our view there are two options for adoption as a standard timetable which least disturb the current arrangements.

**OPTION 1: A 25 DAY STANDARD TIMETABLE**

10.43 The first is for all UK elections to be run according to a standard 25 day timetable running from notice to polling day. Table 4 below sets out this timetable.

10.44 In favour of this option, it appears to be the emergent norm for election timetables to be run to a 25 day timetable. It is the option that would require change to the lowest number of elections’ timetables in order to achieve standardisation. It may be considered the least disruptive option from a UK-wide perspective.

**Table 3: Proposed 25 day standard timetable**

Notice of election	Close of nominations	Polling notice	Late registration of electors	Last registration as absent voter		Polling day
				Postal vote	Proxy vote	
25	19	18	11 <sup>20</sup>	GB: 11 NI: 14	GB: 6 NI: 14	0

**OPTION 2: A 28 DAY STANDARD TIMETABLE**

10.45 Our second option for a standard timetable is based on a different perspective. There are arguments in favour of a longer timetable. It would lighten administrative burdens and make it easier for candidates and electors to satisfy the requirements for participating in the electoral process by the relevant deadlines.

<sup>20</sup> This reflects the intended deadline, not the actual deadline for late registration which because of faulty drafting is in fact day 12 before the poll.

**Table 4: Proposed 28 day standard timetable**

Notice of election	Close of nominations	Polling notice	Late registration of electors	Last registration as absent voter		Polling day
				Postal vote	Proxy vote	
28	22	21	11	GB: 11 NI: 14	GB: 6 NI: 14	0

10.46 As a matter of electoral administration, it strikes us that a longer timetable is preferable. If this is right, an option which does not reduce the effective length of any of the longer timetables, but marginally increases the length of others, is the less harmful option.

10.47 Our analysis of the longer GLA and Scotland-only timetables shows that a 28 day timetable is able, almost perfectly, to preserve the advantages of these longer timetables, while extending 25 day timetables only minimally:

- (1) First, a 28 day timetable for GLA elections that discards the “local government model” approach means the Greater London returning officer would, in fact, have the same amount of time to produce the booklet after nominations have finally been settled on day 22 before the poll.
- (2) Secondly, a fixed 28 day timetable for elections for the Scottish Parliament and local government, with a six day gap to close of nominations (rather than the current five day gap), would minimally affect the overall timetables in Scotland-only elections. Nominations would close on day 22 before the poll as opposed to day 23.
- (3) Finally, every other election’s legislative timetable would be affected by moving the deadline for nominations by three days, from day 19 to day 22.

10.48 On balance, our provisional proposal is that the standard timetable should be 28 days in length, although we are keen to hear consultees’ views on the merits in favour of a 25 day timetable or any other timetable.

***Alignment of deadlines between elections***

10.49 Whichever option is preferred, the best reform cannot be achieved by merely requiring the same overall length of the timetable. The steps within it must also be harmonised. Harmonisation or standardisation of timetables would plainly ease the administrative burden associated with combined polls, since both polls would share the same timetable. Furthermore, administrators and campaigners would only need to be aware of one set of deadlines, rather than many different ones associated with the different elections they might be involved in.

10.50 With the elimination by the UK Government of the different local government

nominations model, the only major issue with harmonising the steps within timetables is the different deadline for nominations in Northern Ireland which, as we have mentioned, appears to be purely historical.

#### STEPS WITHIN THE LEGISLATIVE TIMETABLE

- 10.51 We consider that the standard timetable should incorporate all of the key administrative milestones in an election. It should state the deadlines for effective applications to register as an elector, to become an absent voter, or change one's absent voting status. Because the latter are different in Northern Ireland and Great Britain, the timetables will need to reflect that.
- 10.52 We do not think the timetable should contain obsolete deadlines such as withdrawal from candidature or objecting to nominations, whose inclusion in the current legislative timetables is due to historical reasons rather than their particular importance.

#### PROVISIONAL PROPOSALS AS TO REFORM OF TIMETABLES

**Provisional proposal 10-4: A standard legislative timetable should apply to all UK elections, containing the key milestones in electoral administration, including the deadlines for registration and absent voting.**

**Provisional proposal 10-5: The timetable should be 28 days in length.**

#### THE COMBINATION OF POLLS

- 10.53 Where the application of the incidence rules results in a coinciding polling day for two elections, rules may require or enable the polls to be “taken together” or combined. This is one of the most complex areas of electoral law and what follows should be read with the following outline:
- (1) Every election is conducted by its returning officer according to its election rules.
  - (2) Incidence rules govern when elections should occur. By their application, elections will sometimes coincide, meaning their polls will happen on the same day.
  - (3) The area of law called the “combination of polls”, properly understood, deals with the following circumstances:
    - (a) two or more elections coincide in the same area, and
    - (b) without more, each returning officer must conduct each poll according to its own election rules.
  - (4) The law on the combination of polls considers three distinct issues:
    - (a) The combinability of particular polls: some must be combined and others may be. For others, nothing is said about combination, meaning there can be no combination – the default position is as we described in (3)(b) above.



- (b) The management issue: identifying, where polls are combined, which of the returning officers for the combined elections takes the lead role, and for which functions.
- (c) The combined conduct rules issue: where polls are combined what adaptations to the ordinary election rules are made to deal with the fact that the polls are combined.

### **Combinability of coinciding polls**

10.54 The first issue is which polls must, may or may not be combined if they coincide. The rules governing the “combinability” of elections are spread across a number of measures; some are found in the Representation of the People Acts 1983 and 1985 (the “1983 Act” and “1985 Act” respectively), others in election-specific measures or other statutory instruments. This is one of the most complex areas of electoral law, and fuller analysis can be found in our research paper on the matter, the appendices to which give an overview of the legislation and combinability.<sup>21</sup> We seek in this chapter to provide a brief outline.

10.55 The following options arise in relation to two or more coinciding polls:

- (1) they must be “taken together” (or, as we call it, combined);
- (2) they may be combined; or
- (3) they may not be combined.

10.56 In our view the effect of the current law is as follows:

- (1) Polls must be combined if a legal provision requires them to be taken together where they coincide.
- (2) Polls may be combined if:
  - (a) combination is not mandatory under (1) above; but
  - (b) a legal provision allows for combination.
- (3) Polls must not be combined if no provision exists requiring or permitting the combination. In other words, in the absence of a rule to the contrary, two coinciding polls must be taken separately, in accordance with each poll’s election rules, which will not pay any regard to the coincidence of the polls.

### ***Mandatory combination***

10.57 For certain elections, the rules state that coinciding polls must be combined. We provide a full list in our research paper but, for example, section 15(1) of the 1985 Act requires the polls for the following coinciding elections to be combined:

- (1) UK Parliamentary general elections and European Parliamentary general

<sup>21</sup> Research paper on Timetables and Combination, available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

elections;

- (2) UK Parliamentary general elections and “ordinary local government elections”;<sup>22</sup> and
- (3) European Parliamentary general elections and “ordinary local government elections”.

### ***Discretionary combination***

10.58 The majority of provisions on combination provide that coinciding polls may be combined if both returning officers agree. Keeping to our examples given above, the effect of section 15(2) of the 1985 Act is that polls may be combined if the following elections coincide:

- (1) UK Parliamentary and European Parliamentary elections, where at least one is a by-election;
- (2) local government elections and UK Parliamentary elections, where at least one is a by-election or casual election;
- (3) European Parliamentary and local government elections where at least one is a by-election or casual election.

### ***The difficulty of interpreting section 15 of the 1985 Act***

10.59 Section 15 of the 1985 Act is difficult to interpret. The term “election” refers to a UK Parliamentary election, Greater London Authority elections, elections under the Local Government Act 1972 or Local Government (Scotland) Act 1994 (which comprise elections for principal areas and parishes and communities in England and Wales and local government elections in Scotland), and mayoral elections.<sup>23</sup> Importantly, this definition also includes by-elections, or elections to fill a vacancy, as well as ordinary or general elections. Through various amendments, European Parliamentary elections, Police and Crime Commissioner elections and (prospectively) Scottish Parliamentary elections are also brought within this definition.<sup>24</sup>

10.60 Section 15(6) of the 1985 Act brings ordinary local elections in Northern Ireland within the mandatory combinations under section 15(1). However, casual local elections in Northern Ireland are not caught by section 15(2). It is obligatory to combine ordinary Northern Ireland local government elections with UK Parliamentary or European Parliamentary general elections, but not permitted to combine a casual local election with either of these other elections. Following the general scheme, combining those elections where they involve elections to fill a vacancy, or by-elections ought to be discretionary.

10.61 Subsection (3) excludes “elections under the local government Act which are not local government elections” from those which may be combined. This is strange,

<sup>22</sup> Meaning an election other than a casual election.

<sup>23</sup> Representation of the People Act 1983, ss 202(1), 203(1), (1A) and 204(1).

<sup>24</sup> Representation of the People Act 1985, s 15(3); Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 4 para 1; Scotland Act 2012, s 2(3) (not yet in force).

as all elections “under the local government Act” are also “local government elections” as defined in the 1983 Act.<sup>25</sup> This exclusion may have had historical relevance, and has not been modified since the 1985 Act was passed, but our working assumption is that it is an aberration.

### ***Scottish Parliament and local government elections***

- 10.62 The combination rules still provide for the mandatory combination of polls at Scottish Parliamentary general elections and ordinary local government elections in Scotland. Similarly, polls at Scottish Parliament and local government elections may be combined where one or both of these are a by-election or an election to fill a vacancy. The Gould Report concluded that Scottish Parliamentary and local government elections should never coincide, as the potential for voter confusion given the different voting systems is too great.<sup>26</sup> The incidence rules for Scottish local government elections have been changed to prevent ordinary elections from occurring in a year when a Scottish Parliamentary election will take place, and it is the policy of the Scottish Government to prevent these elections from taking place on the same day in future.<sup>27</sup>

### ***Combinations which are not permitted***

- 10.63 No rule expressly forbids any particular combination. Rather, the category of prohibited combinations is made up of those elections whose polls no rule requires or enables to be combined. The necessary implication is that the polls for these elections cannot be combined with each other, and must be taken separately. They include:

- (1) Welsh Assembly elections and UK Parliamentary elections;
- (2) Welsh Assembly elections and European Parliamentary elections;
- (3) Northern Ireland Assembly elections and UK Parliamentary by-elections;
- (4) Northern Ireland Assembly elections and European Parliamentary by-elections;
- (5) Police and Crime Commissioner elections and Welsh Assembly elections;
- (6) ordinary local government elections in Northern Ireland and a UK Parliamentary or European Parliamentary by-election;<sup>28</sup> and
- (7) elections to fill a vacancy in Northern Ireland local government and any

<sup>25</sup> Representation of the People Act 1983, ss 203(1), (1A) and 204(1). The Acts referred to are the Local Government Act 1972 and Local Government (Scotland) Act 2004. A GLA (or “Authority”) election is deemed to be an election under the former.

<sup>26</sup> Electoral Commission, *Scottish Elections 2007: The independent review of the Scottish Parliamentary and local government elections 3 May 2007* (October 2007), p 114 to 115.

<sup>27</sup> By s 1 of the Scottish Local Government (Elections) Act 2009.

<sup>28</sup> Representation of the People Act 1985, s 15(2) and (6).

other election.<sup>29</sup>

### ***Lack of clear rationale for prohibited combinations***

- 10.64 It is not clear to us what the reason might be for non-combination of these polls, or whether there is any reason whatsoever to prevent their combination. If a policy exists against combining campaigns for the two elections, and thereby allowing the politics of, for example, the Welsh Assembly, to mix with Westminster politics (what we call a policy of political disjunction), it goes to the coincidence of these elections, not their combination if they coincide. The same is true of preventing voter confusion, for example if the voting systems are considered incompatible, or there is an objection to combination as unfeasible, because it is not practical to run concurrent polls effectively.

### ***Bilateral and multilateral combinations***

- 10.65 The law's approach is to consider combination between two polls. Some modifications to section 15(1) in relation to newer elections, for example mayoral elections, envisage combination with one "or more" of a group of listed polls (a multilateral combination). However it is not clear how rules envisaging only bilateral combinations apply in the case of three or more coinciding polls.
- 10.66 An obvious problem arises where three or more coinciding polls occur in circumstances where combination of two among them is not permitted, but combination of each with a third is mandatory. For example, if a Welsh Assembly general election coincides with ordinary elections for both Police and Crime Commissioners and local government elections the law is that:
- (1) the Welsh Assembly and the local government polls must be combined;
  - (2) the PCC and local government polls must be combined; but
  - (3) the Welsh Assembly and PCC polls may not be combined.
- 10.67 If these elections were to coincide, the legal position would be a nonsense. The Welsh Assembly and PCC polls cannot be taken separately while also being combined with the local government polls.<sup>30</sup>

### **Management of combined polls**

- 10.68 If the coinciding polls for two elections are combined, the questions arise how they are to be managed by the elections' respective returning officers (the management issue), and what additional or amended rules should govern the combined polls (the combined conduct rules issue).
- 10.69 The law's answer to the management issue is to select a returning officer to take

<sup>29</sup> Representation of the People Act 1985, ss 15(2)(6); Representation of the People Act 1983, s 203; Electoral Law Act (Northern Ireland) 1962, s 130.

<sup>30</sup> The coincidence of a general election to the National Assembly, ordinary PCC elections, and ordinary local government elections was due to occur in May 2016, but the Welsh Government has exercised powers under section 87 of the Local Government Act 2000 to move the date of ordinary elections to May 2017; Local Authority Elections (Wales) Order SI 2014 No 3033.

the lead in running the combined polls in the area of overlap between the two elections.<sup>31</sup> Outside the area of overlap each returning officer is responsible for their own election.

10.70 The way the law identifies the lead officer depends on whether combination is mandatory or discretionary.

- (1) Where the combination is mandatory, the law sets out a hierarchy of returning officers to take the lead in managing the combined polls.
- (2) Where the combination is discretionary, the returning officers agree who should take the lead role.<sup>32</sup>

10.71 We refer to that officer as the “lead” returning officer. He or she will perform, or take over, certain combined functions – undertaking, for example, the equipment of polling stations in the area where polls are combined, and verifying ballot papers from combined polling stations. The other election’s returning officer still runs that election according to its election rules in the non-combined area. As a shorthand, we refer to that officer as the junior returning officer.

10.72 For some combinations, this is a purely technical exercise as the returning officer for both elections will be one and the same person. It will often be the case that the parliamentary election’s returning officer is also the returning officer for the principal local government area in the constituency. However, the boundaries for some elections, for example parliamentary constituencies, often encompass more than one local government area. If a set of ordinary local government elections is to occur on the same day as a parliamentary election, there will, technically, be two or more sets of combined polls in the constituency.

### ***Hierarchy in England and Wales***

10.73 The relevant rules in England and Wales are the Representation of the People (Combination of Polls) (England and Wales) Regulations 2004 (“the Combination of Polls Regulations”). From these, as well as the National Assembly for Wales (Representation of the People) Order 2007, a hierarchy of returning officers can be ascertained. The returning officer for the election which is higher up the list takes the lead. The hierarchy is as follows:

- (1) UK Parliamentary elections;
- (2) National Assembly for Wales and Greater London Authority elections;
- (3) county council elections;<sup>33</sup>
- (4) principal area (other than county council) elections;

<sup>31</sup> It is possible for one person to be returning officer for both combined polls, but the rules address the situation where different persons hold the offices. Electoral Commission, *Guidance for UK Parliamentary elections, Part G: Combination of polls* (December 2009), para 2.11.

<sup>32</sup> In Northern Ireland, the Chief Electoral Officer is always lead returning officer.

- (5) Mayoral elections;
- (6) local governance referendums;
- (7) parish and community council elections;
- (8) Police and Crime Commissioner elections; and
- (9) European Parliamentary elections.<sup>34</sup>

### ***Hierarchy in Scotland***

10.74 The hierarchy which applies in Scotland is found in the Scottish Parliament (Elections etc.) Order 2010 and the Representation of the People (Scotland) Regulations 1986:<sup>35</sup>

- (1) UK Parliamentary elections;
- (2) Scottish Parliamentary elections;
- (3) Scottish local government elections;
- (4) European Parliamentary elections.<sup>36</sup>

### ***Where combination is discretionary: free choice***

10.75 If elections are combinable at the discretion of returning officers, it is up to those officers not only whether they agree to combine polls, but also to decide who shall take the lead. This discretion is subject to one restriction – a returning officer for a European Parliamentary election may never be the lead returning officer.<sup>37</sup> This appears to be connected to the appearance of the returning officer for European Parliamentary elections at the bottom of the hierarchy. The rationale for this is not obvious, but may be to do with the greater size of European constituencies.

10.76 In the case of a three-way combination, where one set of elections is mandatorily combined (and thus the lead returning officer is identified by the hierarchy), and another is combined at the discretion of officers, returning officers can plainly only exercise their discretion to select the lead returning officer identified by the

<sup>33</sup> In law county council and district council elections are both the same “type” of election – principal authority elections. However s 36 of the 1983 Act in effect provides for their combinability, hence why they are addressed by the combination regulations.

<sup>34</sup> Representation of the People (Combination of Polls) (England and Wales) Regulations SI 2004 No 294, reg 4; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 4 para 1.

<sup>35</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 5 para 1; Representation of the People (Scotland) Regulations SI 1986 No 1111, reg 95.

<sup>36</sup> In the Representation of the People (Scotland) Regulations SI 1986 No 1111, the reference is to the European Assembly, but this is remedied elsewhere. See the European Communities (Amendment) Act 1986, s 3.

<sup>37</sup> Representation of the People (Combination of Polls) (England and Wales) Regulations SI 2004 No 294, reg 4(8); Representation of the People (Scotland) Regulations SI 1986 No 1111, reg 95(4).

hierarchy.

***Apportionment of costs***

- 10.77 Where polls are combined, the costs associated with the combined poll must be divided equally between all elections, except where a particular cost, such as the printing of ballot papers, can be attributed solely to one election.<sup>38</sup> Similarly, costs of verification of ballot papers should be apportioned, but as the count is not combined, the costs associated with the count are attributed separately with respect to each election. The Fees and Charges Order issued in advance of some elections will specify how costs are treated in the case of combination.

***Combined functions performed by the lead returning officer***

- 10.78 As noted above, the lead returning officer takes over certain functions in relation to the combined polls, but only for the area of geographical overlap. These are set out below.

ENGLAND AND WALES

- 10.79 The functions which the lead returning officer must perform in relation to combined polls in England and Wales are:

- (1) preparation of a corresponding number list in relation to in-person ballot papers;
- (2) publication of the notice of situation of polling stations, and the voters entitled to vote there;
- (3) provision of a sufficient number of polling stations and allotting electors to polling stations;
- (4) appointing presiding officers and clerks for polling stations, and presiding at a polling station;
- (5) providing specified equipment for polling stations, including notices to voters, ballot boxes and so on;
- (6) making arrangements for notifying specified persons of the requirement of secrecy;
- (7) signing the certificate of employment required by constables and persons employed by the returning officer to enable them to vote at the polling station at which they are on duty;
- (8) authorising polling station staff to remove persons misconducting

<sup>38</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part G: Combination of polls* (December 2009), paras 2.5 and 7.9 to 7.11. Representation of the People Act 1985, s 15(4); Representation of the People Act 1983, s 36(3B); Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 4 para 1; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 13(4); National Assembly for Wales (Representation of the People) Order SI 2007 No 236, art 16(4); Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, reg 13(6) and sch 4 table 2; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, reg 17(7).

themselves from polling stations; and

(9) verification of ballot paper accounts.<sup>39</sup>

10.80 The following additional functions may be combined at the discretion of returning officers:

(1) the issue and receipt of postal ballot papers under the 2001 Regulations;<sup>40</sup>

(2) preparation of a corresponding number list in relation to postal ballot papers;

(3) marking the postal voters list when a postal vote is returned; and

(4) verification of the personal identifiers of the postal voter.<sup>41</sup>

#### SCOTLAND

10.81 Broadly the same combination of functions applies to combined polls held in Scotland, but the 1986 Regulations have not been kept up to date. In particular, they do not deal with functions relating to the corresponding number list and the verification of personal identifiers of a postal voter. We consider that this is a purely formal problem with the law, and is not intended to change the reality that, at combined elections, just as at standalone elections, a corresponding number list must be maintained, for example. It is purely an indication of the pitfalls of the current election-specific and highly detailed way in which combination is addressed in law.<sup>42</sup>

#### **Combined conduct rules**

10.82 As we noted above, apart from the matter of who should lead the combined poll, there is the matter of how election rules should govern the combined polls – what we called the “combined conduct rules” issue. The combined conduct rules set out modifications to the ordinary elections rules where the poll is combined with another. Both the elections rules and the combined conduct rules are election-specific. There are two different drafting approaches. One simply sets out the

<sup>39</sup> Representation of the People (Combination of Polls) (England and Wales) Regulations SI 2004 No 294, reg 5; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 4 para 2.

<sup>40</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, reg 65. This does not include the printing of postal ballot papers, which is required under the general provision of r 19 of sch 1 to the Representation of the People Act 1983.

<sup>41</sup> Representation of the People (Combination of Polls) (England and Wales) Regulations SI 2004 No 294, reg 5; National Assembly for Wales (Representation of the People) Order SI 2007 No 236 sch 4 para 2.

<sup>42</sup> Representation of the People (Scotland) Regulations SI 1986 No 1111, regs 95 and 96. Similar difficulties arise in the Scottish Parliament (Elections etc.) Order SI 2010 No 2999 which deals with functions at combined Scottish parliamentary elections and local government elections. The Scotland Act 2012, s 2 will, however, insert a provision into the Representation of the People Act 1985, s 15 to prevent returning officers from exercising their discretion to combine such elections. This is not yet in force. For further detail, see the Research paper on Combination, available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.



insertions, amendments and deletions to be applied to the ordinary rules, subject to which those rules must be read. The other approach sets out combined conduct rules in full. The effect is the same – although it may be easier for a returning officer simply to turn to a full set of rules in the case of a combined poll, rather than having to cross-refer between the rules and the list of modifications.

10.83 We consider some of the modifications in outline here. Our research paper contains greater detail of bespoke combined conduct rules.<sup>43</sup>

### ***Combined conduct rules at UK parliamentary elections***

10.84 The Combination of Polls Regulations set out the modifications which are made to the Parliamentary Elections Rules where polls at UK Parliamentary elections are combined with those at other elections in England and Wales.<sup>44</sup> Some of the changes to the election rules are obligatory, others optional. They also make different provisions depending on whether the UK Parliamentary returning officer is the lead returning officer.

10.85 The mandatory changes are that:

- (1) the notice of poll must state that polls are being combined, and the names of the other electoral areas;
- (2) the ballot papers for the Parliamentary election must be of a different colour from those for the other elections;
- (3) a different notice to voters must be put up in polling stations, which explains which polls are being combined;
- (4) the large print version of the ballot paper for the assistance of partially sighted voters must be provided in the same colour as the ordinary ballot paper;
- (5) when packaging up voting materials after the close of poll, certain documents must be kept separate in relation to each election or referendum:
  - (a) unused and spoilt ballot papers;
  - (b) tendered ballot papers;
  - (c) certificates as to employment; and
  - (d) separate ballot paper accounts must be produced in relation to each election or referendum.

10.86 The returning officers furthermore have a power to:

- (a) combine poll cards, where they agree to do so;

<sup>43</sup> Available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

<sup>44</sup> Representation of the People (Combination of Polls) (England and Wales) SI 2004 No 294, sch 2 paras 4 to 29.

- (b) combine ballot boxes, where the lead returning officer chooses to;
- (c) combine the copies in each polling station of:
  - (i) the register, including any notices issued in respect of last minute amendments;
  - (ii) the list of proxies;
  - (iii) the lists of assisted and tendered votes; and
  - (iv) the list of corrections made to the register on the day of the poll.

### ***Combining the corresponding number list***

- 10.87 Whether two polls are combined, or a single election involves multiple contests (as is the case at AMS elections), maintaining the corresponding number list presents a problem. Either a separate list is kept for each ballot paper issued to voters, or the corresponding number list is combined and tracks all the ballot papers issued to voters. Whatever the solution, it is key to any subsequent investigation into or challenge of the election that the list should accurately record the elector's number and the ballot papers' numbers issued to them.
- 10.88 There is no explicit rule which states that the corresponding number list may or must be combined for both polls. The preparation of the corresponding number list used in polling stations and for the issue and receipt of postal ballot papers (where combined), is a function of the lead returning officer at combined polls. Prescribed forms exist for the list at combined polls. The difference in the forms of corresponding number list which apply in the case of a standalone election or combined poll is minimal.<sup>45</sup> Guidance produced by the Electoral Commission simply advises returning officers to be particularly careful when managing corresponding number lists for polls which are combined.<sup>46</sup>

### ***Modifications to elections rules for elections held in Scotland***

- 10.89 Combined conduct rules in Scotland are largely similar to those in England and Wales, with one notable difference.<sup>47</sup> The elections rules for UK Parliamentary elections are modified to state that the same ballot boxes must be used where the poll at a Parliamentary election in Scotland is combined with either a European Parliament or local government election.<sup>48</sup> The elections rules of European Parliamentary elections as modified for combined polls held in

<sup>45</sup> Representation of the People (England and Wales) Regulations SI 2001 No 341, sch 3 forms M1 and M2.

<sup>46</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part G: Combination of polls* (December 2009), paras 6.6 and 6.7.

<sup>47</sup> Representation of the People (Scotland) Regulations SI 1986 No 1111, reg 98; European Parliamentary Elections Regulations SI 2004 No 293, sch 3 Part 2; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 5 paras 4 to 40; Scottish Local Government Elections Order SSI 2011 No 399, sch 2.

<sup>48</sup> Representation of the People (Scotland) Regulations SI 1986 No 1111, reg 98(5).

Scotland state that ballot boxes may be combined, and the same applies to Scottish local government when combined with UK or European Parliamentary elections.<sup>49</sup>

- 10.90 The elections rules where the polls at Scottish Parliamentary elections are combined with those at Scottish local government elections require that separate ballot boxes must be used.<sup>50</sup> Scottish Parliamentary elections themselves involve multiple ballot papers thus raising the question whether to combine ballot boxes. The answer given in those elections – unlike analogues in England and Wales – is not to provide a power to combine.<sup>51</sup>
- 10.91 This mixture of approaches to combined ballot boxes in Scotland is confusing. It is difficult to understand why the legal answer to the same issue – how to deal with multiple ballot papers for different polls – can differ so. The modern approach, which applies to all elections in England and Wales, gives lead returning officers the discretion to combine ballot boxes if they see fit. If they choose to combine ballot boxes, they must have a system for retrieving misplaced ballot papers. Distinguishing them by colour should assist.

***Miscellaneous differences in combined conduct rules for other elections***

- 10.92 The combined conduct rules make several other changes to the standalone election rules, many of them purely drafting amendments. Others are substantive in nature. For example, one amendment is that postal ballot papers sent out in the area where the polls are combined can only be handed in to polling stations within the combined area; another states that the Parliamentary returning officer does not need counting agents to agree in order to pause the count.<sup>52</sup> This rule is not replicated in Scotland and Northern Ireland.
- 10.93 Where the UK Parliamentary returning officer is the lead officer, provisions stipulate that during verification, the returning officer must separate the ballot papers for the Parliamentary election from those for each of the other elections or referendums, and provide for the delivery of those and the various packets of documents to the returning officer for that election. The copies of the corresponding number lists, as well as the marked copies of the register, and the lists of assisted and tendered votes, must not be delivered to those other returning officers, which further suggests the use of a combined corresponding number list.<sup>53</sup> If the Parliamentary returning officer is not the lead returning officer, the rules make no requirement for verification, because the assumption is that it will have taken place already.<sup>54</sup>

<sup>49</sup> European Parliamentary Elections Regulations SI 2004 No 293, sch 3 para 6; Scottish Local Government Elections Order SSI 2011 No 399, sch 2 para 5.

<sup>50</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 5 paras 8 and 25.

<sup>51</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 38(1).

<sup>52</sup> Representation of the People (Combination of Polls) (England of Wales) Regulations SI 2004 No 294, sch 2 paras 23 and 24.

<sup>53</sup> Representation of the People (Combination of Polls) (England and Wales) Regulations SI 2004 No 294, sch 2 paras 20 to 22.

<sup>54</sup> Representation of the People (Combination of Polls) (England and Wales) Regulations SI 2004 No 294, sch 2 para 22(1AC).

- 10.94 Different prescribed forms are also included in the modifications which apply in the case of a combined poll: the form of direction for the guidance of voters in voting and the declaration for companions of disabled voters. Largely the differences are cosmetic.<sup>55</sup>

### ***Other elections***

- 10.95 The combined conduct rules of other elections largely replicate the modifications mentioned above. But some differences inevitably appear. At Greater London Authority elections, while the corresponding number list may be combined at an ordinary GLA election, it may not be combined with the corresponding number lists for other elections with which an ordinary GLA election is combined.<sup>56</sup>
- 10.96 The parish and community elections rules for combined polls do not make any provision for the ballot papers at combined polls to be of different colours. This seems to be an omission; there is no reason why the rule should not also apply to parish and community elections.
- 10.97 The modifications to the Welsh Assembly elections rules also set out (identical) modifications to the combined polls rules for local government elections held in Wales where these are combined with a Welsh Assembly election.<sup>57</sup> This would be totally unnecessary if the combined conduct rules for local government elections extended to combination of them with Welsh Assembly elections, but they do not. This is an example of combined conduct rules not speaking to each other because of the election-specific way in which they are structured.

### ***Elections in Northern Ireland***

- 10.98 Yet another drafting approach is employed to deal with combined polls at elections in Northern Ireland. The combined conduct rules for UK Parliamentary and local government elections in Northern Ireland are inserted (by the Elections Act 2001) directly into the ordinary elections rules, rather than being contained in a separate schedule. The European Parliamentary Elections (Northern Ireland) Regulations follow the approach in Great Britain. Recent provision has been made for the local elections rules to be amended where local elections are combined with European Parliamentary elections in Northern Ireland.<sup>58</sup>
- 10.99 Essentially the same modifications are made to rules at elections in Northern Ireland where polls are combined, as have been discussed in relation to UK Parliamentary elections above, save for the provisions which are a consequence of the relationship between the lead and junior returning officers.<sup>59</sup> Two further differences exist in Northern Ireland:

<sup>55</sup> Representation of the People (Combination of Polls) (England and Wales) Regulations SI 2004 No 294, sch 2 paras 28 and 29. Until 2014, however, the instruction to voters was that they would sign for their ballot paper.

<sup>56</sup> Greater London Authority Elections Rules SI 2007 No 3541, schs 5, 6 and 7.

<sup>57</sup> National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 4 paras 27 to 63.

<sup>58</sup> Local Elections (Northern Ireland) Order SI 2013 No 3156, sch 1.

<sup>59</sup> Elections Act 2001, sch 1; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 6 paras 3 to 17A; Local Elections (Northern Ireland) Order SI 2013 No 3156, sch 1.

- (1) An additional rule requires that the notice for the direction of voters should be of the same colour as the ballot paper for the election in question. This may be particularly helpful in the context of combining polls at first past the post elections with those at STV elections, where it will be important for electors to know which voting system to use on which ballot paper.<sup>60</sup>
- (2) An extra provision is introduced into the rules for UK Parliamentary and local government elections in Northern Ireland, which allows the returning officer to provide for the sorting of ballot papers inserted into the wrong box at combined polls.<sup>61</sup>

### ***Overview of the effect of combined conduct rules***

10.100 Notwithstanding the sheer number of modifications, the substantive changes made to the ordinary elections rules in combined polls are relatively small. Chiefly, they are that ballot papers must be of a different colour, and that the notice of poll must state which polls are being taken together; occasionally there is a power or duty to combine ballot boxes. Most amendments are to tidy up the drafting in election rules which govern the conduct of a returning officer in respect of that specific election; modifications are required in order to facilitate the running of more than one poll by the same “lead returning officer”.

### ***The conundrum of coinciding but non-combined elections***

- 10.101 If there is no provision permitting or mandating combination, or a returning officer exercises a discretion so as not to combine, the coinciding polls must be taken separately. In such a situation, non-combination does not affect coincidence. Two elections will still occur on the same day, in the same area. Voters will still be invited to vote at both. But combination rules will not apply to the polls, and so the substantive meaning of “separate” polls falls to be examined. The only requirement, in law, is that each of the coinciding elections is conducted according to its own election rules, unmodified by any combination rules.
- 10.102 Where coinciding polls are not combined, a great deal of uncertainty arises as to the legal position. Must different polling stations be used? If so, does that mean they cannot be in the same polling place, or staffed by the same presiding officer and clerks? If they can, how is voter confusion to be avoided?
- 10.103 On one view, the two elections must be run completely separately. At the second reading of the Elections Bill (enacted as the Elections Act 2001) which extended provisions on combination to Northern Ireland, Jack Straw MP, then the Home Secretary, explained that otherwise:

voters effectively would have to vote twice. Polling could not be in the same room and voters would have to present themselves to polling

<sup>60</sup> Elections Act 2001, sch 1 paras 5 and 19; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 6 para 6; Local Elections (Northern Ireland) Order SI 2013 No 3156, sch 1 para 7.

<sup>61</sup> Elections Act 2001, sch 1 paras 12 and 27; Local Elections (Northern Ireland) Order SI 2013 No 3156, sch 1 para 17.

stations twice to be issued with separate ballot papers.<sup>62</sup>

10.104 However, this is not made explicit in the law, and it is not clear how frequent non-combined but coinciding polls have been, or how returning officers have approached and run them. We would welcome responses from those who have any experience of the matter.

10.105 The combination rules can help shed light on what it means to run two coinciding, but non-combined polls. The implication, where polls are not combined, is that separate ballot boxes must be used. The same polling day lists may not be used. Different corresponding number lists must be maintained. However, we find it strongly arguable that the same polling place can be used to situate the respective polling stations for the non-combined poll. Furthermore, it may even be permissible for the same persons to be appointed to staff the polling stations in respect of those two polls. The ultimate legal requirement is that each non-combined poll is run according to its discrete and unmodified election rules, and since combination rules make such minimal substantive alteration to those, we take the view that non-combined polls are perfectly possible.

#### **Provisional reform proposals**

10.106 The law on combination of polls is a bewildering and complex array of overlapping provisions on combination, with multiple pieces of legislation applying to the same combined poll, and circumstances where no legal prescription is made at all addressing the fact that two elections coincide.

10.107 Our proposal for its reform must be considered against the background to our reforms so far. A single, and consistent set of electoral norms should govern all elections in the UK, with distinctions at some elections to deal with specific policies and an election's particular voting system. The legislative framework for electoral law should be set out in a singular, cohesive way. Many of the problems in combination of polls stem from the election-specific way that electoral laws are set out. These disappear in the face of a streamlined electoral law framework.

#### ***The framework for combination***

10.108 Our provisional reform proposal is that irrespective of their content, the law governing combination of polls should be set out for all coinciding elections in a single set of rules.

#### **Provisional proposal 10-6: The law governing combination of coinciding polls should be in a single set of rules for all elections.**

#### ***Combinability***

10.109 The effect of combination on substantive conduct rules is surprisingly minimal. Conversely, the effect of non-combination on conduct rules is equally minimal. Views will differ as to what is and is not permitted by non-combination of two nevertheless coinciding polls. That uncertainty in itself is highly undesirable.

10.110 If polls may not be combined, there is no legal prescription addressing the fact

<sup>62</sup> *Hansard* (HC), 04 April 2001, vol 366, col 399.

that the polls must still coincide, which is not in the interest of voters or good electoral administration. Furthermore, the law appears inconsistent. If it is right, as a matter of legal policy, to prescribe the use of different coloured ballot papers at coinciding polls which are combined, it is because the law so values reducing the scope for voter and administrative confusion that it requires that ballot papers for different polls be distinguished by colour. At coinciding, non-combined polls, however, the law leaves the returning officers for the elections (since no lead officer exists) a discretion whether to use differently coloured ballot papers. Why, if polls merely coincide, should the law leave that to the good sense of returning officers? Either colour coordination is the proper subject of a hard legal rule, or it should be left to the returning officers to decide. This problem applies both to prohibited combinations and discretionary combination, since the latter admits of non-combination.

10.111 In our view, the law on combinability should be twofold:

- (1) The default position is that all and any coinciding polls should be combined.
- (2) Any of the current prohibited combinations, if the prohibition is due to a policy objection based on political disjunction or voter confusion, should result not in the polls coinciding uncombined, but in the delay of one of the elections by a period of 21 days.

10.112 One real policy objection to combining polls is based on objections as to its feasibility. Given that the law imposes no upper limit on the number of combinations, there is the potential for three or more polls to coincide, particularly in England and Wales. There may be practical objections to combining more than three polls, such that a fourth should be deferred to a later date.

10.113 The Association of Electoral Administrators, in particular, has urged that this dimension of combination should be considered. Such an obligation is not without precedent; only recently a provision of the 1985 Act was repealed which required parish and community council elections to be deferred where they occur on the same day as a combined poll for a UK or European Parliamentary general election and an ordinary principal area election.<sup>63</sup>

10.114 The real issue is not whether polls for coinciding elections should be combined or not but, rather, whether the elections in question should happen on the same day (coincidence). Incidence rules for general or ordinary elections can be set so as to prevent undesirable and burdensome coincidences, as the recent deferral of Welsh local government elections from 2016 to 2017 (to avoid coincidence with both PCC and Welsh Assembly elections) shows. However, incidence rules cannot absolutely prevent the possibility of elections occurring on the same day in the case of early general elections, by-elections or elections to fill vacancies. In such cases, it may be sensible to enable returning officers to defer one or more of the by-elections or casual elections in question, if more than three elections would otherwise coincide and combine.

<sup>63</sup> Representation of the People Act 1985, s 16 (repealed by the Electoral Registration and Administration Act 2013, s 15).

- 10.115 Such a general power would have to be carefully considered. It could be very burdensome on both administrators and electors to require them to conduct or attend a second poll three weeks (or some other length of time) after the first set of polls. It might also be objectionable to empower returning officers to determine when a particular election occurs, opening them to accusations of partiality in their decision. Possible solutions to such problems include: first, setting out a hierarchy of elections for the purpose of deferral, and secondly, to subject the returning officer's power to safeguards, such as approval by the Electoral Commission or a regional returning officer. The factual background leading to the exercise of such a power, it should be stressed, means it will rarely arise. On balance we think we should ask consultees whether there should be an upper limit on possible coinciding polls, and how to implement it.

**Provisional proposal 10-7: Any elections coinciding in the same area on the same day must be combined.**

**Question 10-8: Should the returning officer have a power to defer a fourth coinciding poll in the interests of voters and good electoral administration? What safeguards might sensibly apply to the exercise of the power?**

#### ***Management of combinations***

- 10.116 A corollary of our provisional proposal that the polls for all coinciding elections should be combined, is that the current distinction between mandatory and discretionary combinations will disappear. The choice, then, is whether the law should set down a hierarchy of returning officers to take the lead for the combined polls (as currently happens in mandatory combinations), or whether it should be a matter of agreement between returning officers who should lead. Similarly, the distinctions and differences, across elections, as to which functions are combined should, we consider, be removed once a central set of conduct rules, including combination, replaces the current patchwork of provisions across all elections.
- 10.117 Our provisional view, given that there appears to be a policy to ensure that certain returning officers should take the lead over others, is that the hierarchy should remain.

**Provisional proposal 10-9: The lead returning officer and their functions should be determined by a single set of rules according to the existing hierarchy for mandatory combinations, with some discretionarily combinable functions.**

#### ***Combined conduct rules***

- 10.118 A central set of polling rules for all elections removes the need to make election-specific adaptations to deal with their coinciding and being run with one another. The polling rules governing composite elections using the additional member system already take account of the fact that multiple ballot papers are used. These require the ballot papers to be distinguished by colour, and, depending on the election, state that ballot boxes at the polling stations may or may not be combined.
- 10.119 In our view, in the reform context combined conduct rules should be to the polling



rules what such provisions at AMS elections are to their election rules: provisions enabling returning officers to deal with multiple ballot paper situations at the poll. We thus consider that standard polling rules should be drafted with combination in mind, so that if there is a combined poll or multiple ballot paper election there is a single solution to the coordination problem of how to deal with it. The issues which the combination part of polling rules should deal with would reflect the current law, and rationalise the differing provisions across elections. In our provisional view this should include the following:

- (1) A requirement to distinguish ballot papers by colour. There may be a case for extending such a requirement, as combination rules in Northern Ireland do, to notices and instructions to voters, although it may be that this is better left to guidance rather than law.
- (2) A power to combine ballot boxes at the polling station.
- (3) A power to combine polling notices and poll cards in view of the combined poll.
- (4) A power to combine corresponding number lists.

10.120 Insofar as possible, polling rules should be drafted generally and avoid election-specific detail, thus avoiding the need for extensive amendments to make comparatively small changes of substance, as are found in the current combination rules.

**Provisional proposal 10-10: A single set of adaptations should provide for situations where a poll involves several ballot papers.**

# CHAPTER 11

## ELECTORAL OFFENCES

### INTRODUCTION

- 11.1 The classical law governing electoral campaigns developed in the 19th century for UK Parliamentary elections. The modern law is principally set out in Part 2 of the Representation of the People Act 1983 (“the 1983 Act”), which also governs local government elections in England and Wales and elections to the Greater London Authority. For other elections, discrete legislative measures refer to the 1983 Act and apply some or all of its regulatory provisions, with or without modifications. Some of the main modifications relate to voting systems involving the closed party list system.
- 11.2 In this chapter we consider the regulation of the campaign through electoral offences. A more detailed description of the current law is contained in our research paper on the subject, which includes a table of electoral offences.<sup>1</sup>

### ELECTORAL OFFENCES AND THEIR PLACE WITHIN THE REGULATORY STRUCTURE

- 11.3 Electoral law lays down detailed rules. Some are administrative in character, and their breach is a ground for invalidating the election, although it is also an offence for electoral administrators knowingly to breach such rules.<sup>2</sup> Others relate to the conduct of the public generally, and candidates and campaigners in particular, which is the focus of this chapter.
- 11.4 Elections excite strong feelings and tension; when the classical electoral law was drafted, violence, rioting and influencing voters by offers of largesse or intimidation were serious concerns, reflected in the regulatory structure. This regulates conduct at elections (and thus the election campaign) by laying down criminal offences.
- 11.5 Some general criminal offences may be relevant in the electoral law context, such as offences against the person, public order offences and bribery under the Bribery Act 2010, but this project is not concerned to review the criminal law generally. Our focus is on the special offences that exist specifically to regulate electoral conduct.

### Prosecution of electoral offences

- 11.6 Criminal offences need to be prosecuted, and electoral law specifically directs public prosecutors to consider bringing prosecutions. The Directors of Public Prosecutions (“DPP”) for Northern Ireland and England and Wales respectively, and, in Scotland, the Lord Advocate (together referred to here as “the prosecuting authorities”) have a duty under section 181 of the 1983 Act to consider making inquiries and instituting prosecutions where information is given to them that an

<sup>1</sup> Research paper on campaign regulation and electoral offences, available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

<sup>2</sup> See Chapter 3 Management and oversight, para 3.21 above.

electoral offence has been committed.<sup>3</sup>

- 11.7 There is no public regulator of electoral conduct at the local campaign level. At national level, the regulation of political parties is overseen by the Electoral Commission, which can also impose civil penalties for wrongdoing. Other than private enforcement through the election petition jurisdiction, criminal prosecutions are the chief way of enforcing the regulation of campaign conduct.
- 11.8 The prosecutor must consider whether there is sufficient evidence to provide a realistic prospect of conviction and whether a prosecution is in the public interest. The CPS guidance states that the aim is to maintain the integrity and probity of the electoral process, so that a prosecution for “major infringements” will normally be in the public interest. A police caution or the provision of advice as to future conduct may suffice if the offence is of a “technical” nature, is due to a genuine mistake or misunderstanding, could not have influenced the result, or a breach has been remedied.<sup>4</sup>
- 11.9 The time limit for commencing proceedings is one year from the commission of the offence, which, in England and Wales, can be extended in exceptional circumstances to 24 months on application to a magistrates’ court, provided an application to extend time is made within the year. No similar extension of the time limit for prosecution is possible in Scotland.<sup>5</sup>

#### **Judicial relief in respect of illegal practices**

- 11.10 Separately from the question whether it is in the public interest to prosecute, a person may proactively apply for relief (in the sense of being excused of an illegal practice) under section 167 of the 1983 Act. The application is to the High Court or Court of Session or an election court; if it is in respect of the late payment of election expenses or payment of expenses submitted late, it may be made to a county court or sheriff. Notice of the application must be given to the prosecuting authority, which may attend the proceedings and make representations. Adequate notice of the application must be given in the relevant constituency or local authority area. The court has a discretion to exempt an innocent act, omission, payment or employment from being an illegal practice if it is shown that it arose from inadvertence, accidental miscalculation or some similar reasonable cause and “did not arise from any want of good faith”.
- 11.11 A court may also grant relief to a candidate or election agent under section 86 of the 1983 Act in respect of a failure to deliver the return or declarations as to election expenses, or in respect of any error or false statement in them, occurring by reason of illness, death, misconduct of another or inadvertence. It must grant relief to a candidate for an act or omission of the election agent in relation to the return and declarations where it was without the sanction or connivance of the candidate and the candidate took all reasonable steps to prevent it; relief in these

<sup>3</sup> Representation of the People Act 1983, s 181 read with ss 204(5) and 205(1)(aa).

<sup>4</sup> Crown Prosecution Service Legal Guidance “Code for Crown Prosecutors - Considerations” [http://www.cps.gov.uk/legal/d\\_to\\_g/election\\_offences](http://www.cps.gov.uk/legal/d_to_g/election_offences) at 08 (last visited 2 December 2014).

<sup>5</sup> Representation of the People Act 1983, s 176(1), (2A) (2B) and (2F). These provisions do not extend to Scotland, and the Scottish Parliament (Elections etc.) Order 2010 sch 6 specifically omits s 176(2A) to 2(F) from application to Scottish Parliamentary elections.

cases is not discretionary and must be granted.<sup>6</sup>

11.12 The concept of inadvertence has received judicial consideration. It includes a negligent act or omission in good faith, but not a reckless or dishonest flouting of the law.<sup>7</sup> It is a question of fact in every case whether the degree of carelessness involved in committing the offence was such that professionals could not have committed the offences inadvertently.<sup>8</sup>

11.13 A successful applicant for relief under section 167 is not subject to any of the consequences under the 1983 Act of the offending conduct. That person is effectively immune from criminal prosecution and a winning candidate avoids the invalidity of the election. Although worded differently, excuse or relief under section 86 has the same effect.

### **The regulatory significance of the labels “corrupt” and “illegal” practice**

11.14 All electoral offences are subject to prosecution and trial under ordinary criminal procedure. Some have no other public law significance. Others, however, are also labelled as “corrupt” or “illegal” practices. Offences which have this label gain special significance in public law terms:

- (1) they vitiate the validity of an election if an election petition is brought (which is discussed in chapter 13); and
- (2) they have special consequences for the offender:
  - (a) if the offender is the winning candidate, as well as being guilty of a crime, he or she must vacate the elected post, and a new election must be held;<sup>9</sup>
  - (b) on conviction the offender is disqualified from election for a period of 3 years (for illegal practice) or 5 years (for corrupt practice);<sup>10</sup>
  - (c) a person convicted of personation or postal voting offences (which are corrupt practices) under sections 60, 62A and 62B of the 1983 Act, or the voting offences under section 61 (which are illegal practices), is additionally disqualified from being registered and voting at any election for a disqualification period.<sup>11</sup>

11.15 In addition, in the case of holders of licences under the Licensing Act found guilty of bribery or treating on their licensed premises, the conviction must be considered by the licensing authority when the licence comes to be renewed.<sup>12</sup>

<sup>6</sup> Representation of the People Act 1983, s 86.

<sup>7</sup> *McCrorry v Hendron* [1993] NI 177 (High Court of Northern Ireland) at p 224 (Kelly LJ).

<sup>8</sup> *Finch v Richardson* [2008] EWHC 3067 (QB) at [49] [2009], 1 WLR 1338 at p 1348.

<sup>9</sup> Representation of the People Act 1983, s 173(1)(b) read with s 173(4) to (8).

<sup>10</sup> Representation of the People Act 1983, s 173(1)(a) read with s 173(2) and 173(3).

<sup>11</sup> Representation of the People Act 1983, s 173(1)(a)(i) read with s 173(2), referring to offences under ss 60, 61, 62A and 62B of the 1983 Act.

<sup>12</sup> Representation of the People Act 1983, s 168(7). This applies to those guilty of bribery or treating only.

Secondly, in Scotland, conviction of a corrupt or illegal practice results in incapacity for “any public or judicial office” and holders of such an office must, on conviction, vacate it.<sup>13</sup> We have found no corresponding provision elsewhere.

- 11.16 Corrupt practices are offences triable either on indictment or summarily, attracting a maximum sentence upon conviction on indictment of one year’s imprisonment (two years for personation and postal voting offences), a fine, or both, and on summary conviction six months’ imprisonment, a fine not exceeding the statutory maximum, or both. Illegal practices are summary only offences attracting a fine not exceeding level five on the standard scale.<sup>14</sup>
- 11.17 These are not particularly severe maximum sentences given the seriousness of some of the offences and the potential scale of wrongdoing.<sup>15</sup> Properly understood, however, corrupt and illegal practices are special electoral offences the punishment for which includes not only the fine or custodial sentence, but also the nullity of the election and disqualifications from future election. These are likely to be strong incentives for candidates and political campaigners to comply with the law.
- 11.18 In some cases an offence is additionally labelled an illegal practice where it is committed by the candidate or their election agent.<sup>16</sup> Into this category fall “illegal payments” and “illegal employment” under sections 107, 111 and 112 of the 1983 Act.
- 11.19 At other times an offence amounts to a corrupt or illegal practice to mark the seriousness of an electoral offence, because of the serious nature of the wrongdoing, or its centrality to the regulation of electoral law. Thus offences of bribery, undue influence, personation or postal voting offences or multiple voting are marked out as more serious offences than simple electoral offences, irrespective of who commits them. Others can only be committed by the public as opposed to the candidate and their campaign: for example, providing money or property in support of a candidate’s election expenses otherwise than to the agent, contrary to section 71A of the 1983 Act.

### ***The difference between corrupt and illegal practices***

- 11.20 As the labels indicate, there was once a qualitative difference between “corrupt” and merely “illegal” practices. This rationale has not survived the passage of time and the creation of additional offences. For example, it is a corrupt practice to incur certain expenses on behalf of a candidate or party without the authority of the election agent, contrary to section 75(5) of the 1983 Act – a strict liability offence which we consider further below. Ignorance or honesty is no defence. Were this merely an illegal practice, a third party responsible for accidental

<sup>13</sup> Representation of the People Act 1983, s 173A.

<sup>14</sup> Representation of the People Act 1983, ss 168 and 169.

<sup>15</sup> In England and Wales, level 5 on the standard scale and the statutory maximum are currently both set at £5,000. From a date to be appointed, both will increase to a fine of any amount: Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85(1). In Scotland, level 5 is currently £5,000 and the statutory maximum is £10,000: Criminal Procedure (Scotland) Act 1995, s 225(2) and (8) as amended.

<sup>16</sup> Representation of the People Act 1983, s 175.

overspending would be able to apply for relief from the offence, and to rely on innocent mistake to avoid punishment.

- 11.21 By contrast, it is an illegal practice “corruptly” to induce or procure any other person to withdraw from being a candidate at an election in return for payment, or for such a person to withdraw in consequence of the inducement.<sup>17</sup>
- 11.22 The difference between the labels “corrupt” and “illegal” when it comes to the criminal practices now lies mainly in the severity of the criminal sentence, the length of disqualifications from the electoral process, and the availability of relief.
- 11.23 An alternative to the current scheme that we have considered could be to use general criminal offences. If this option were favoured, it would be necessary to create an ancillary order available to the criminal courts to disqualify candidates from taking part in future elections, and require them to give up their seats, in the same way that conviction of a corrupt or illegal practice currently does. While it might be attractive to use such an “electoral prohibition order” to assimilate wrong-doing in an electoral context to the general criminal law, it would require a radical reworking of the current law. Many electoral offences, such as personation, voting offences and so on, apply only in the electoral context and would need to be retained. Furthermore, the offences labelled corrupt and illegal practice also operate as public law grounds for annulling an election by way of legal challenge, as we consider in chapter 13. We base our provisional proposals on the retention of the current scheme, which needs simplification and modernisation. Nonetheless, we welcome views on this alternative.

## **THE ELECTORAL OFFENCES**

- 11.24 One of the chief problems with the electoral offences is that they are repeated in each discrete election-specific measure. We refer here for brevity to the 1983 Act provisions. The problem of election-specific legislation therefore persists in relation to electoral offences, although the complexity of the offences also derives from difficult and outdated drafting and case law.
- 11.25 Our provisional view is that fundamental change to the scheme of offences should not be the focus of this project. We provisionally consider that these offences should be set out in a single set of provisions applying to all elections, so as to avoid the problems of volume and repetition that are manifest here as they are elsewhere in electoral law. We are also provisionally of the view that the classical offences are in need of modernisation and simplification.

**Provisional proposal 11-1: A single set of electoral offences should be set out in primary legislation which should apply to all elections.**

### **Complex or outdated drafting**

- 11.26 The classical offences have been joined by others which are designed to deal with modern problems, for example the postal and proxy voting offences in section 62A of the 1983 Act which were introduced by the Electoral Administration Act 2006 in the wake of a number of cases of postal voting fraud.<sup>18</sup>

<sup>17</sup> Representation of the People Act 1983, s 107.

<sup>18</sup> Section 62B governs local government elections in Scotland.

As a result, the 1983 Act lays down offences couched in differing drafting styles, contained in different parts of the statute. There is no consistent formulation of the mental state rendering conduct criminal (the “mental element” of the offences). The classical offences tend to use the rather vague term “corruptly” – for example in section 107 (corrupt withdrawal of candidature), section 114 (treating) or section 113 (bribery). Case law has established that this means an intent to break the law, although some cases still describe something done corruptly as done with an “evil mind or intention”.

- 11.27 Modern offences designed to combat malpractice use a precise formulation of the mental element necessary to commit the offence. For example, the section 62A offence’s mental element states that the wrongdoer:

intends, by doing so, to deprive another of an opportunity to vote or to make for himself or another a gain of a vote to which he or the other is not otherwise entitled or a gain of money or property.<sup>19</sup>

- 11.28 Our understanding is that the difficulty in interpreting the classical offences and predicting the likelihood of conviction means that the police and public prosecutors tend to use general criminal offences if they have a choice. If there is a disturbance outside a polling station, a complaint that may amount to undue influence is more likely to lead to action over non-electoral offences such as public order offences, assault or obstruction of the highway.

- 11.29 In our provisional view, the classical electoral offences should be modernised as part of our aim to simplify the legislation. The older offences should use a simpler mental element than the vague term “corruptly”, so as to avoid any connotation of evil intent and better to fit with the more recently drafted offences. We now turn to these in more detail.

### **The classical campaign offences: bribery, treating, and undue influence**

- 11.30 The 19th century offences were a response to contemporary problems faced by Victorians: those of violence and intimidation, treating the franchise as a commodity to be sold or bought, and the ancient view that elections could be influenced by those with land or some other source of power. The Victorian reforms sought to transform elections into expressions of the democratic will, fought on the issues. They strictly prohibited bribes, or the buying of votes with money or employment; largesse in the form of food or drink (a form of buying of votes, but also one which led to the forming of mobs on polling day); and intimidation and undue influence, which was targeted at reducing the effect of the powerful and influential on the electorate. These proscriptions continue in the form of the corrupt practices of bribery, treating and undue influence, to which we presently turn.

#### ***Bribery***

- 11.31 The offence of bribery is set out in extensive detail in section 113 of the 1983 Act. Both giving and receiving a bribe is criminal, and a bribe is defined widely to include money, “office”, gifts, loans, offers, promises of money and valuable

<sup>19</sup> Representation of the People Act 1983, s 62A(1)(b). In Scotland, s 62B of the 1983 Act applies in relation to local government elections.

consideration, a “place” or “employment”. The bribe may be directed at one person but the incentive given to another. A bribe may be given “directly or indirectly, by [the briber] or any other person on his behalf”.

11.32 It matters when the bribe is given. If a bribe is given *in advance* of an election, it is an offence if it is done in order to induce an elector to vote or not to vote (section 113(2)(a) of the 1983 Act). If the bribe is given *after* the election, it is an offence if it is given “corruptly” on account of an elector having voted or having refrained from voting (section 113(2)(b)). The old cases held that the use of the word “corruptly” in the second limb of the offence was significant. This understanding persists in modern practitioners’ works which rely on these cases for authoritative guidance on the law. Thus if the act of bribery occurred shortly before the voter voted, then bribery is said to be assumed until the contrary is shown, whereas if it is done after the election, it has to be shown to have been done corruptly in pursuance of a previous understanding.<sup>20</sup>

11.33 Proving that a payment made before an election was a bribe is harder the more distant from the election date the act is. Schofield notes:

It does not matter how long the corrupt act was before the election; it is just as much bribery as if it were offered at election time. However, where a considerable period elapses between the bribe and the election, the matter of proof becomes more difficult. The burden of proof is somewhat shifted where the bribery takes place at the election. It then becomes more the onus of the person charged to prove that it was an innocent act.<sup>21</sup>

11.34 It is unlikely that the legal burden of proof shifts to an accused to prove they did not have the requisite intent, and the books do not go so far as to say that. Recent case law has treated attempts to reverse the burden of proof in more explicit legislative terms as imposing an evidential burden only.<sup>22</sup> Article 6(2) of the European Convention on Human Rights guarantees the presumption of innocence until proven guilty in criminal proceedings. It is likely that the old cases were more concerned with the validity and outcome of the election than with criminal liability.

11.35 A bribe must be “operative” at the time of the election. The same is true of undue influence by the making of a threat. Repenting and withdrawing a threat or taking back a bribe before the election has the result that the earlier act of bribery or undue influence will not upset the election.<sup>23</sup>

11.36 Our provisional view is that bribery should be more simply drafted to capture that

<sup>20</sup> R Price (ed) *Parker’s Law and Conduct of Elections*, looseleaf, issue 37, vol 1 at para 20.12. The editors cite *Borough of Bradford case*, *Storey v Forster* (1869) 1 O’M&H 34 at p 36.

<sup>21</sup> P Gribble (ed), *Schofield’s Election Law*, looseleaf 6<sup>th</sup> reissue volume 1 at para 13-005.

<sup>22</sup> *R v Webster* [2010] EWCA Crim 2819, [2011] 1 Cr App R 16.

<sup>23</sup> *Third Borough of Stroud case* (1874) 2 O’M. & H 181 at p 183 as to bribes; *Windsor case*, *Herbert v Richardson Gardner* (1874) 2 O’M & H 88 at p 91 as to a threat of throwing tenants out. See also P Gribble (ed), *Schofield’s Election Law*, looseleaf 6<sup>th</sup> reissue, volume 1 at para 13-005; R Price (ed) *Parker’s Law and Conduct of Elections*, looseleaf, issue 37, vol 1 at para 20.11.



it is an offence concerned with buying a vote (or an abstention from voting), with a simple mental element of intending to procure or prevent a vote for a candidate at the election. We provisionally propose that both the giving and receiving of a bribe should remain criminal.

**Provisional proposal 11-2: The offence of bribery should be simplified, with its mental element stated as intention to procure or prevent the casting of a vote at election.**

### ***Treating***

11.37 Section 114(2) of the 1983 Act defines the corrupt practice of treating:

(2) A person shall be guilty of treating if he corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any meat, drink, entertainment or provision to or for any person –

(a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or

(b) on account of that person or any other person having voted or refrained from voting, or being about to vote or refrain from voting.

11.38 Accepting such meat, drink, entertainment or provision is also an offence.

11.39 This offence was targeted at election-time largesse, seeking to prevent direct influence on voters which might be akin to a bribe. It seems to us to overlap substantially with the offence of bribery, though bribery has overtones of a one-to-one arrangement, while treating is more suggestive of offering treats to a group of voters. The offence of treating also sought to combat the indirect consequence of largesse at elections in the 19th century, the problem of violent or intimidating inebriated mobs.

11.40 By and large these problems have not persisted at UK elections, but nevertheless the proscription has been strictly observed and seasoned politicians understand the dangers of giving hospitality near the time of an election. An MP was unseated in 1911 for giving coal to the poor and sweets to schoolchildren in celebration of his twenty-fifth year in Parliament.<sup>24</sup>

11.41 The words “meat, drink, entertainment or other provision” are at first sight confusing. “Provision” is so general as to catch all foods, and potentially more. There is confusion about hospitality at election events, for example providing refreshments at hustings. Among communities where hospitality may be expected, whether in the form of a meal at a community centre or tea and biscuits at a meeting, there is a risk of the criminal law intervening in circumstances well short of the originally perceived mischiefs: the buying of elections through largesse, and the creation of conditions out of which drunken mobs arise. The offence of treating is not, however, constituted by the mere offer of meat and

<sup>24</sup> *Kingston-upon-Hull Central Division case, Morely v Seymour King* (1911) 6 O'M & H 372.

drink, but by corruptly so offering it, seeking to influence the election. Pages 17 and 18 the Electoral Commission's Guidance on preventing and detecting electoral fraud refer to an 1892 election petition case, where Vaughan Williams J said:

If people are called together for the purpose of exciting their political enthusiasm, and if the so-called treating is a mere incident of such a gathering, it is not an offence within the Act. It does not make it corrupt treating that a roof or warmth is provided for the meeting, nor is it necessarily corrupt treating if the persons attending the meeting are provided with some sort of refreshment. But if they are gathered together merely to gratify their appetites and so to influence their votes, then it is treating within the Act.<sup>25</sup>

- 11.42 Section 114 proscribes treating a person “for the purpose of corruptly influencing *that person or any other person* to vote or refrain from voting” (our emphasis). Insofar as a person is treated to gain their or another person's vote, it is arguable that this should be seen as bribery. A bribe includes one procured by the giving of food and drink, or some other inducement. What treating historically targeted was the fuelling, with food and drink, of assembled persons who were likely to be powerful members of a community reinforcing their patronage over voters and/or intimidating towards other voters. The italicised words above are the only indication of this policy in section 114's drafting.
- 11.43 Our provisional proposal is that the provision of gifts or hospitality with intent to influence voting should be subsumed into bribery.
- 11.44 That leaves the other aspect of the offence of treating, the provision of significant food and drink to assembled voters, more loosely with a view to gaining their support (and perhaps a crowd of supporters). We question the continuing relevance of this concern, and whether the appropriate solution is truly to proscribe the provision of food and drink to voters beyond cases where they amount to bribes. If this remains a modern concern, it seems to us more sensible to proscribe the incitement or procurement, through the giving of any provision, of assemblies of persons intended to intimidate other voters. On balance, we provisionally consider that treating should be abolished as a distinct offence.

**Provisional proposal 11-3: The electoral offence of treating should be abolished and the behaviour that it captures should where appropriate be prosecuted as bribery.**

#### ***Undue influence***

- 11.45 Section 115(2) of the 1983 Act provides that a person is guilty of undue influence:
- (1) if he, directly or indirectly, by himself or by any other person on his behalf, makes use of, or threatens to make use of, any force, violence or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or

<sup>25</sup> *Borough of Rochester Case*, 1 December 1892, 4 O'M & H at p 157.

against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or

- (2) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents, or intends to impede or prevent, the free exercise of the franchise of an elector or proxy for an elector, or so compels, induces or prevails upon, or intends so to compel, induce or prevail upon, an elector or proxy for an elector either to vote or refrain from voting.

- 11.46 This offence is widely drafted and much if not all of the violent conduct covered by it is already criminal under the general law. The catch-all nature of the offence reflects its origin in an era when violent mobs were not uncommon at elections.<sup>26</sup> Electoral law sought to criminalise the organisers of such violence. As a crime it was aimed at candidates and their agents, hence its label of corrupt practice. Merely prosecuting crimes under the general law would be an oblique, and incomplete enforcement of electoral law. Those who use violence, intimidation, or trickery to get elected should suffer the consequences in public law of disqualification and vacation of their seat if elected. It seems to us to be important that electoral offences such as undue influence are drafted in such a way that they can be policed and, if appropriate, prosecuted.
- 11.47 Section 115(2)(b) of the 1983 Act was amended in 2006 to include within the second limb of the offence conduct intended, irrespective of success, either to impede or prevent the free exercise of the franchise or to “compel, induce or prevail upon” an elector or proxy to vote in a particular way, or not to vote. This covers certain instances of electoral fraud, including the opening of postal votes with a view to changing the marks on the ballot paper, even if the fraudster does not do so.
- 11.48 The reference to “spiritual” injury was a 19th century attempt to catch abuses of authority by members of the clergy. Undue influence by threat of spiritual injury invalidated an election in the Meath Southern Division Case *Dalton v Fulham*.<sup>27</sup> A bishop's pastoral letter was held to have exerted undue spiritual influence after it was read at the altar and the full organisation and power of the clergy was found by the election court to have been deployed in support of one candidate.<sup>28</sup> No definitive test was laid down or exists as to where to draw the line between undue influence and political activism. Such cases were most frequently brought in Ireland, where the influence of the clergy was considered to be stronger.
- 11.49 Reference to the common law has been persistent in election cases considering undue influence by persons in positions of religious authority. The reference is to the principle that undue influence will vitiate a private transaction, such as a contract or a will. Those with religious authority exert undue influence if they “make use of their power to excite superstitious fears or pious hopes, to inspire... despair or confidence...” in such a way that it amounts to an abuse of that

<sup>26</sup> See for example *Drogheda Borough case*, *McClintock v Whitworth* (1869) 1 O'M & H 252 and *Stafford Borough case*, *Chawner v Meller* (1869) 1 O'M & H 228.

<sup>27</sup> (1892) 4 O'M & H 130.

<sup>28</sup> See also the Northern Division of Meath case (1892) 4 O'M & H 186.

authority and power.<sup>29</sup>

### **Reforming undue influence**

- 11.50 Undue influence was derived from the common law, which used it to vitiate private acts and contracts. Within the modern common law it is understood to be complex and difficult to rationalise. We consider undue influence is best understood if broken down into these components:
- (1) Pressure and duress: to include any means of intimidation, whether it involves physical violence or the threat of it, or some other compelling threat.
  - (2) Trickery: to cover devices and contrivances such as publishing a document masquerading as a rival campaign's.
  - (3) Abuse of a position of influence: where a special relationship of power and dependence exists between the person exerting the influence and the voter.
- 11.51 The last of these could cover, in certain cases, the influence of a person with religious authority over those who defer to them, but we do not think the law is, or ever was, that any kind of statement by religious authorities as to a campaign matter amounts to undue influence.
- 11.52 There is a case for removing the express reference to threatening "spiritual" injury, leaving the courts to decide whether someone was in a special position of influence over another which he or she abused. The counterargument is that this might leave the law uncertain. One may go even further, and state that it is impractical for the law to distinguish between proper and improper reasons for voting in a particular way.
- 11.53 We provisionally propose that the offence of undue influence should be restated to involve pressure, duress or trickery as outlined above, and seek consultees' views on whether the offence should also cover the abuse of a position of influence.

**Provisional proposal 11-4: Undue influence should be restated as offences of trickery, pressure and duress.**

**Question 11-5: Should the law regulate the exercise of abuse of influence, religious or otherwise, by a person over a voter which does not amount to an existing electoral offence?**

### **Illegal practices targeting campaign conduct**

- 11.54 Other classical offences are labelled illegal practices. We consider three in particular.

<sup>29</sup> *The Galway Case* (1869) 1 O'M&H 303 at 305 to 307, citing the old (private law) case of *Huguenin v Baseley* 14 Ves 288.

***Failing to “imprint” campaign material: section 110 of the 1983 Act***

- 11.55 One of the most frequently alleged offences relates to the obligation to “imprint” campaign material with certain details. Section 110 of the 1983 Act applies to “any material which can reasonably be regarded as intended to promote or procure the election of a candidate at an election”.
- 11.56 Material in a printed document or an advertisement in a newspaper must include the name and address of the printer, the promoter who caused it to be published, and the person on whose behalf the material is being published (in practice, the candidate).<sup>30</sup> Failure to do so is an offence by the printer, the publisher and the “promoter” of the material (usually the candidate or election agent), subject to a defence that the contravention was beyond the control of the accused, and they took “all reasonable steps, and exercised all due diligence” to ensure that the contravention would not arise. Where the offence is committed by the candidate or election agent, it is an illegal practice.
- 11.57 The section 110 offence is best understood as an instrumental one. It exists to make sure that campaign material is on its face traceable to the candidate, so that campaign conduct norms (such as the offence in section 106, which we consider below) can be enforced.

ONLINE MATERIAL

- 11.58 The Secretary of State may, after consulting the Electoral Commission, make regulations regarding “any other material” not currently subject to requirements in section 110. No such regulations have been made, but presumably they could seek to regulate online publications, since only “printed” material and newspaper advertisements are covered by section 110.<sup>31</sup>
- 11.59 The Scottish Independence Referendum Act 2013 introduced regulation of online material for the first time. Paragraph 27(1)(b) of schedule 4 requires material that is made available to the public in whatever form and by whatever means to have an imprint. Provided it wholly or mainly relates to the referendum, a blog or social media post is caught. This differs from the test under the 1983 Act of the material being “reasonably regarded as intending to procure or promote any particular result”. It arguably regulates material that does not support any particular outcome.
- 11.60 Paragraph 27(6) of schedule 4 to the 2013 Act provides that if it is not reasonably practicable to include the details, then the imprint is not required. The Electoral Commission’s guidance explains that it would not be “reasonably practicable” to include an imprint where the size or format of the material means that the imprint would be illegible.
- 11.61 We can see why seeking to extend the regulation to the online sphere would pose difficulties, given the ease with which documents can be communicated digitally over the internet, and how easily control can be lost. Nevertheless, online media is the future of information sharing, and its relevance to electioneering is

<sup>30</sup> Representation of the People Act 1983, s 110(2)(a), (3) to (6) and (13). See s 110A regarding Scottish local government elections.

<sup>31</sup> Section 110A of the 1983 Act governs local government elections in Scotland.

only likely to grow.<sup>32</sup> Perhaps means will emerge of imprinting digital images, as barcoding currently works in some contexts. We would therefore ask whether it is desirable and feasible to introduce legislation regulating campaign material on the internet at this stage, or whether the current power to extend the imprint offence is sufficient.

**Question 11-6: Is the current power to make provision concerning imprinting of “other” (including online) material sufficient, or is it desirable and feasible, within the remit of this project, to recommend regulation of online material?**

***Disturbing lawful meetings***

- 11.62 It is an illegal practice under section 97 of the 1983 Act to disturb “a lawful public meeting” held in a locality when an election is imminent. A key ingredient of the crime is that the meeting must be lawful. Section 97(3) empowers constables, on reasonable suspicion of the offence and if so requested by the chairmen of the meeting, to ask for a person’s name, and, if the person refuses, to arrest them.<sup>33</sup>
- 11.63 The textbooks do not make it clear what makes a meeting unlawful, other than the meeting amounting to an obstruction of the highway or breach of a byelaw at a public park. Schofield’s *Election Law* states that one must consider the object of those present at the meeting: if that object is expressly to incite discontent or disaffection against the Government, there is authority to suggest that is an unlawful purpose.<sup>34</sup> The implication is that such a meeting can lawfully be disturbed, which strikes us as unsatisfactory. The real purpose of the offence is to deter campaigners from exciting tensions at rival campaign meetings, and thus to avoid violence or disorder at election time, a problem which was prevalent in the 19th century when rival mobs frequently clashed. To that extent, the lawfulness of the meeting would seem irrelevant.
- 11.64 As regards the conduct of the general public, and the ability of police officers to make arrests, the general criminal law under section 1 of the Public Meetings Act 1908 should suffice to criminalise disturbing lawful meetings.
- 11.65 We provisionally consider that the offence of disturbing a candidate’s meeting should not include a condition that it is a lawful meeting. Most public meetings are lawful. This offence is intended to proscribe interference by rival campaigns in each others’ meetings, thereby risking exciting tensions at a sensitive time.

**Question 11-7: Should the illegal practice of disturbing election meetings apply only to candidates and those supporting them, and no longer be predicated on the “lawfulness” of the meeting?**

<sup>32</sup> Note, for example, the considerable concern during the 2014 Scottish independence referendum campaign about online intimidation.

<sup>33</sup> Police officers’ general powers of arrest under the Police and Criminal Evidence Act 1984 s 24(c) simply provide a power to arrest on reasonable suspicion. For Scots law, see the Criminal Procedure (Scotland) Act 1995, s 14(1).

<sup>34</sup> P Gribble (ed), *Schofield’s Election Law*, loose-leaf 6th reissue, volume 1 at para 14-018. Two cases are cited as to unlawful purpose which are concerned with the general criminal law on unlawful assembly. These are *R v Fursey* (1833) 6 C and P 81, 172 E.R. 1155, and *R v Hunt* (1820) 3 B and A 566, 106 E.R. 768.

### ***False statements about candidates***

- 11.66 Section 106 of the 1983 Act makes it an illegal practice, before or during an election and for the purpose of affecting voting, to make or publish false statements of fact in relation to the personal character or conduct of a candidate, without believing, on reasonable grounds, that the statements are true. Any person can commit this offence, but it is plainly targeted at rival candidates and those affiliated to their campaign. Section 106(2) provides that a candidate does not commit the offence through an agent other than their election agent unless the candidate authorised or consented to the statement or an election court finds that the election of the candidate was “procured or materially assisted” in consequence of the making of the false statement. Section 106(3) expressly provides that a person guilty of this conduct may be restrained by interim or perpetual injunction.<sup>35</sup>
- 11.67 This offence was recently considered in the case of *Watkins v Woolas*.<sup>36</sup> Phil Woolas, the elected candidate, was found in his election publications to have made false statements about the petitioner contrary to section 106. These included saying that Mr Watkins had expressly sought the support of violent and extremist Muslims and had refused to condemn their advocacy of violence. There was also an allegation that Mr Watkins had gone back on a promise to live in the constituency. Woolas’ election was held to be void.
- 11.68 The case was the first since 1911 to have found a Member of Parliament guilty of making a false statement about a candidate at his election. However, upon a judicial review of the election court’s judgment, the Divisional Court upheld only the findings relating to the allegations that the petitioner condoned violence. Those allegations were an attack on his private character. The allegation that he had gone back on a promise to live in the constituency related to his political conduct, even if it was such as to raise doubt as to whether he was trustworthy or kept his word. The Divisional Court emphasised the distinction between the public or political sphere and private character, and the need to enable political debate in campaigns to continue.<sup>37</sup>
- 11.69 A distinct offence under the section concerns falsely stating, before or during an election, that a candidate has withdrawn from the election, for the purpose of promoting or procuring the election of another candidate.<sup>38</sup> It seems to us to be irrelevant to modern circumstances where false news is less likely to have a lasting impact. The public are better informed (in particular by media) and can rely on polling station material. If a false statement was effective to convince voters that a candidate had withdrawn, it would almost certainly amount to undue influence by trickery. We therefore ask consultees whether this offence has any continued relevance in the modern era.

### **Question 11-8: Should the offence of falsely stating that another candidate has withdrawn be retained?**

<sup>35</sup> Or, in Scotland, an interdict – Representation of the People Act 1983, s 204(6).

<sup>36</sup> [2010] EWHC 2702 (QB).

<sup>37</sup> *R (on the application of Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin), [2012] QB 1 at [109] to [124].

<sup>38</sup> Representation of the People Act 1983, s 106(5).

## Combating electoral malpractice

- 11.70 Most modern legislative efforts to amend existing electoral offences or to create new ones have been concerned with combating electoral malpractice. The emergence of postal voting on demand in 2000 led to a perceived risk of increased electoral malpractice in the UK.<sup>39</sup> The response by legislators, administrators, police and prosecutors was increased activity in the field of election petitions and the prosecution of electoral offences. Analyses of allegations of electoral malpractice at elections in June 2009 and May 2010 were carried out jointly by the Electoral Commission and the Association of Chief Police Officers. The 2010 analysis concluded that there was no evidence of widespread malpractice, noting that there had been a legislative and institutional response to prevent and deter it.<sup>40</sup>
- 11.71 The Electoral Administration Act 2006, for example, created the new postal and proxy voting offences contained in section 62A of the 1983 Act.<sup>41</sup> These offences, as well as personation, have a maximum sentence of two years' custody, whereas other corrupt practices attract a one year maximum sentence. They also attract an additional disqualification for five years from being registered as an elector or voting at any parliamentary or local government election.
- 11.72 There have been instances where sentences available for offences under the 1983 Act appear to have been thought insufficient to address the degree of criminality involved, leading to resort to offences under the general law. One that has been of particular interest to prosecutors in England and Wales is conspiracy to defraud, a common law offence which attracts a statutory maximum sentence of ten years' imprisonment.<sup>42</sup> The offence involves a dishonest agreement to defraud. Inducing a person to perform a public duty in a way they would not otherwise have done can amount to defrauding them.<sup>43</sup> Since returning officers and electoral registration officers have official duties whose exercise electoral fraudsters seek to manipulate, conspiracy to defraud has been used in the electoral context.

<sup>39</sup> S Wilks-Heeg for the Joseph Rowntree Reform Trust, *Purity of elections in the UK: causes for concern*, April 2008 <http://www.jrrt.org.uk/publications/purity-elections-uk-causes-concern> (last visited 28 November 2014); decision of Commissioner Richard Mawrey QC in *Re Bordesley Green and Aston Ward of Birmingham City Council petition*, 4 April 2005 (unreported, but transcript available in online legal databases); Library of the House of Commons Standard Note, "Postal Voting & Electoral Fraud" <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-03667.pdf> (last visited 6 February 2012).

<sup>40</sup> Electoral Commission and ACPO, *Analysis of allegations of electoral malpractice at the June 2009 elections*, (January 2010); *Analysis of allegations of electoral malpractice in 2010*, (February 2011).

<sup>41</sup> This does not apply to Scottish local government elections. See section 62B of the 1983 Act.

<sup>42</sup> Criminal Justice Act 1987, s 12(3). In Scotland, on indictment in the High Court, a sentence of unlimited imprisonment can be imposed in relation to this common law offence; on indictment in the sheriff court, a sentence of up to five years' imprisonment can be imposed.

<sup>43</sup> *Welham v DPP* [1961] AC 103, a decision of the Forgery Act 1913. The Law Commission for England and Wales has been critical of conspiracy to defraud, and most recently recommended its abolition in 2002: *Fraud (Law Com 278) 2002*, para 9.6.



11.73 In *R v Hussain*<sup>44</sup> the Court of Appeal upheld a deterrent sentence of 3 years and 7 months' custody imposed on a former member of Blackburn Council who had admitted completing 233 electors' postal voting forms, which he had obtained from them by deception. In upholding the sentence, Lord Chief Justice Woolf said:

The message is that that sort of conduct which undermines our system of democracy will not be tolerated. If those who commit offences of this nature are detected and brought to justice they will receive from the courts punishment which makes that clear.<sup>45</sup>

11.74 We understand that there may be less practical experience in Scotland of the offence of conspiracy to defraud being invoked in an electoral context. There are sometimes thought to be evidential and conceptual difficulties in proving the existence of a conspiracy under Scots law.

11.75 The main reason for recourse in England and Wales to the common law offence of conspiracy to defraud, however, is to seek longer custodial sentences as a deterrent to electoral fraudsters. That may indicate a need for longer custodial sentences for the commission of serious electoral offences. If so, there may be a case for an increased sentence in cases of serious electoral fraud. We are keen to hear the views of consultees as to whether such an increased sentence would be a preferable alternative to recourse to conspiracy to defraud.

**Question 11-9: Should an increased sentence of ten years' custody be available in cases of serious electoral fraud as an alternative to recourse to the common law offence of conspiracy to defraud?**

<sup>44</sup> [2005] EWCA Crim 1866; [2006] 1 Cr. App. R 62.

<sup>45</sup> [2005] EWCA Crim 1866; [2006] 1 Cr. App. R 62 at [20].

# CHAPTER 12

## REGULATION OF CAMPAIGN EXPENDITURE

### INTRODUCTION

- 12.1 During our scoping phase, consultation revealed a general consensus that the focus should be on clarification and simplification of the regulation of campaign expenditure, which had grown complex over time. Our review should eliminate inconsistencies and reduce fragmentation but not overhaul the law, set or change expense limits, or revisit the separate legal treatment of national campaigns.
- 12.2 The law regulating candidates' conduct does so within the boundaries of the constituency. As centralised, party-run campaigns gained prominence, there was a regulatory vacuum because in the eyes of the law the campaign was the constituency campaign. Spending outside that sphere was not regulated by electoral law.<sup>1</sup> Political parties are now regulated under the Political Parties, Elections and Referendums Act 2000 (the 2000 Act). These are political policy matters which it is not appropriate for the Law Commissions, as non-political bodies, to review.

### THE REGULATORY APPROACH

- 12.3 As well as electoral conduct, the 19th century reforms also sought to regulate and control election spending. They did so through three principal steps which continue to form the backbone of expense regulation at elections:
- (1) Responsibility for election spending falls to the candidate's election agent. An agent must be appointed and, with limited exceptions, no other person may incur expenses to promote or procure the election of a candidate.<sup>2</sup>
  - (2) Expense limits are prescribed by law as fixed ceilings or formulas. The election agent must complete and deliver to the returning officer a return and declaration of expenses signed by the candidate.<sup>3</sup>
  - (3) Breaches by candidates or their agents of expenditure regulations (whether to do with expense limits or accuracy of the returns reporting spending) are corrupt or illegal practices, bringing into play criminal sentences, disqualifying the candidate and agent from involvement in elections for a defined period, and constituting grounds for the invalidity of the election if challenged by election petition. This places the onus of complying with the regulation on candidates and their election agents.
- 12.4 The election agent is the key regulatory mechanism for:
- (1) channelling election spending so that, so far as possible, it is done by a

<sup>1</sup> *R v Tronoh Mines Ltd* [1951] 35 Cr App R 196, *Grieve v Douglas-Home* 1965 SC 315.

<sup>2</sup> Representation of the People Act 1983, ss 70, 70A, 71 and 75. Parish and community council elections do not require an agent.

<sup>3</sup> Representation of the People Act 1983, ss 81 and 82.

single person (the “channelling” function);

- (2) ensuring that this person is responsible for keeping campaign spending within the stipulated limits (the “limiting” function); and
- (3) requiring this person to give an account of spending, evidenced by receipts, in a return and declaration of expenses (the “reporting” function).

12.5 In order for this scheme effectively to govern the conduct of candidates and election agents, the law must be capable of being accessed, understood and applied by candidates and their election agent, including those who do not have experience of electoral campaign laws. Put simply, from a basic rule of law viewpoint, the law must be clear enough to achieve its policy aim of ensuring that candidates’ conduct conforms to its requirements.

12.6 Yet the law, which has been the subject of several amendments, has grown very complex. Our attempt here to present it in outline as simply as possible should not detract from the difficulty in understanding the relevant provisions of the 1983 Act, which are repeated in every election-specific measure. The scheme of the 1983 Act is hard to understand from a reading of its provisions, but the important points to note are that the Act aims to channel election spending through the election agent, to limit spending by candidates, and to ensure spending is reported after the election. Some items of expenditure are regulated only in respect of some of those functions; for example “personal expenditure” by the candidate can be paid directly by the candidate. It relates to the election since it includes, for example, campaign-related accommodation or travel. But such expenditure is not taken into account when ensuring spending is within prescribed limits, although it must be reported in the return of election expenses.

### **The meaning of regulated “election expenses”**

12.7 The phrase “election expenses” is defined by section 90ZA of the 1983 Act, which refers to headings of expenditure in schedule 4A to the Act (in summary, and subject to exclusions, advertising, materials addressed to electors, transport, public meetings, staff and accommodation and administrative costs).<sup>4</sup> Such expenditure will be considered to be election expenses if used after the date when a person becomes a candidate at an election “with a view to, or otherwise in connection with, promoting or procuring the candidate’s election”.<sup>5</sup> That includes doing so by prejudicing the electoral prospects of another candidate.<sup>6</sup>

12.8 The Electoral Commission may give guidance in a code of conduct as to matters falling within either Part of schedule 4A, subject to a detailed procedure, and the

<sup>4</sup> Representation of the People Act 1983, sch 4A pt 1.

<sup>5</sup> Representation of the People Act 1983, s 90ZA(3). This does not apply to Scottish local government elections.

<sup>6</sup> Representation of the People Act 1983, s 90ZA(6). In *DPP v Luft* [1977] AC 962 the House of Lords considered the meaning of “disparaging” under the predecessor provision to section 75(1) of the 1983 Act, and held that it had to be given its ordinary and natural meaning, such that it was not limited to attacks of a personal character but may extend to attacks on political views. In our view, the use of the term “prejudicing” more clearly extends to political views.

Secretary of State may by order amend Parts 1 and 2 of schedule 4A.<sup>7</sup>

***The time when a person becomes a candidate***

- 12.9 As we saw from section 90ZA, the regulation of an item of expenditure turns not on when an expense is incurred but whether it is used for the purposes of the candidate's election once he or she becomes a candidate. A person cannot circumvent the rules on expenses by spending money before becoming a candidate.<sup>8</sup> The relevance of when a person becomes a candidate is thus to when expenditure incurred prior to the candidacy becomes regulated because of its use for the purposes of the candidate's election.
- 12.10 Under section 118A a person becomes a candidate when declared a candidate "by himself or by others". Some have criticised this for lack of clarity. It appears to us to be recognising that candidacy is a matter of fact and that a person may be taken to be a candidate by virtue of the declarations of others in which he or she, in due course, acquiesces by accepting nomination and standing for election.

**The requirement to appoint an election agent**

- 12.11 Section 67 of the 1983 Act requires that an election agent be appointed in writing by the candidate no later than the time for giving notice of withdrawal of candidacy. In practice, this is the close of nominations at UK Parliamentary elections. The appointment must set out the address of the election agent's office, where claims for expenses are to be made.
- 12.12 Candidates may appoint themselves as their own election agent, and will be deemed to be so if they fail duly to appoint another person. No agent is required at parish and community council elections, where the responsibility for election expenses falls on the candidate directly.<sup>9</sup>
- 12.13 One election sub-agent may be nominated in county constituencies at UK Parliamentary elections and Greater London Authority elections.<sup>10</sup> The reason for this must be historical; county constituencies were geographically greater, and requiring a single person to carry out the election agent task over a geographically wide electoral area could have been a challenge in the 19th century. The power to appoint a sub-agent is repeated in elections using the additional member or party list system, as well as Police and Crime Commissioner elections and Northern Ireland Assembly elections.
- 12.14 At party list elections one election agent is appointed for the party (and thus its list of candidates). In default of an appointment the candidate highest on the list will be deemed to be the election agent, except in the case of European Parliamentary elections held in Great Britain where the party's nominating officer

<sup>7</sup> Representation of the People Act 1983, sch 4A Pt 3 paras 14 and 15.

<sup>8</sup> Representation of the People Act 1983, s 118A.

<sup>9</sup> Representation of the People Act 1983, ss 67 to 70 and 71.

<sup>10</sup> Representation of the People Act 1983, ss 67 to 70.

is held to be the election agent.<sup>11</sup>

***Channelling expenses through the election agent***

- 12.15 The channelling function, and the consequent restriction on spending by those not authorised to spend by the election agent, seeks to ensure that campaign expenditure is routed through the person of the election agent. Others (including the candidate) are severely restricted in spending to promote or procure the election of a candidate without the agent's authority.<sup>12</sup> This means that, so far as possible, payments should be made by the agent, and claims and demands for money addressed to the agent.
- 12.16 Section 73 of the 1983 Act provides that no payment is to be made by the candidate or any other person in respect of election expenses by or on behalf of the candidate unless it is made through the candidate's election agent.
- 12.17 There are strict exceptions to the above requirement, so that the prohibition of payment of expenditure by someone other than the election agent does not apply to the following:
- (1) personal expenses of the candidate connected to the election (including reasonable travel and living expenses at hotels or elsewhere), which must not exceed a prescribed maximum;<sup>13</sup>
  - (2) petty expenses authorised in writing by the election agent which are necessary for "stationery, postage, telegrams (or any similar means of communication) and other petty expenses";<sup>14</sup>
  - (3) expenses incurred with the leave or by order of the Court (which has to do with late or disputed claims);<sup>15</sup>
  - (4) expenses originally incurred otherwise than for the purposes of the candidate's election which become election expenses because of the property, services or facilities in respect of which they were incurred being used for the purposes of the candidate's election;<sup>16</sup> and
  - (5) expenses falling due before the appointment of the election agent, since

<sup>11</sup> Representation of the People Act 1983, ss 67, 70, 70A and 71; European Parliamentary Elections Regulations SI 2004 No 293, regs 33, 34, 37, 38 and 41; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, regs 34 and 37; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, arts 32 and 35; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, arts 37 and 40; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, ss 67 and 70); Electoral Law Act (Northern Ireland) 1962, ss 35 and 37; Police and Crime Commissioner Elections Order SI 2012 No 1917, arts 26 and 29.

<sup>12</sup> Representation of the People Act 1983, s 75.

<sup>13</sup> Representation of the People Act 1983, ss 74(1) and 118.

<sup>14</sup> Representation of the People Act 1983, s 74(3).

<sup>15</sup> Representation of the People Act 1983, ss 78(5) and 79(2).

<sup>16</sup> Representation of the People Act 1983, s73(5) and 74A.

these cannot be paid by the agent;<sup>17</sup>

- (6) election expenses which pre-date candidacy but are nevertheless regulated by virtue of section 90ZA(5) of the 1983 Act.<sup>18</sup>

***Provisions on the payment of claims***

- 12.18 Claims by third parties for payment in respect of election expenses have to be made within a certain time so that the agent can report them in an expense return. The time limit for claims is always earlier than the deadline for submitting expense returns. A court may grant leave to pay a claim received late; it may also adjudicate and determine any “disputed claim”. Claims for money which are not made within the prescribed time, or through the courts, appear to be extinguished.<sup>19</sup> Section 116 of the 1983 Act preserves the rights of creditors who, at the time they entered into a contract or the expense was incurred were ignorant of the contract or expense being in contravention of the 1983 Act.

***Spending by third parties of up to a permitted sum***

- 12.19 Another exception to the general rule that spending is through the election agent applies to spending by persons not connected to the candidate or their campaign, nor authorised to spend by the election agent, provided that it is within a “permitted sum”. This is in substance an exception to the regulation of spending: it need not (and indeed, cannot) be reported, nor is it taken into account for the purpose of limiting expenditure.
- 12.20 Unchecked expenditure by persons or groups unaffiliated with the campaign risks rendering the control of election expenditure through the election agent useless. It is therefore a criminal offence and a corrupt practice for a person to spend more than a permitted sum, and the exception applies only to spending up to that sum. Section 75(1ZZB) and (1ZA) of the 1983 Act exclude from the exception spending within the permitted sum which is part of a “concerted plan of action”.<sup>20</sup>
- 12.21 The permitted sum for UK Parliamentary elections is £700 while for local elections it is calculated according to a formula depending on the number of registered electors at the time of notice of election.

**POWER TO REQUIRE A RETURN OF THIRD PARTY EXPENSES**

- 12.22 The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (“the Transparency Act 2014”) amended the 1983 Act to include new provisions intended to bolster the policing of the regulation of spending by third parties. The returning officer or the Electoral Commission may, up to six months from the poll, request from a third party (that is, someone who is not a candidate, election agent, or person employed or engaged by them, or authorised to incur expenses) a return and declaration of permitted expenditure in relation to a candidate at the election who is specified in the request. Failing to

<sup>17</sup> Representation of the People Act 1983, s 74(1B).

<sup>18</sup> Representation of the People Act 1983, s 73(5)(d).

<sup>19</sup> Representation of the People Act 1983, ss 78 and 79.

<sup>20</sup> Section 75 does not apply in relation to local government elections in Scotland. Section 75A is the equivalent for such elections.

comply or knowingly making a false declaration are illegal and corrupt practices respectively. The court may mitigate or remit any incapacity resulting from a finding of guilt of these offences.<sup>21</sup>

### **Expense limits**

- 12.23 As well as channelling expenditure through the election agent, the law also limits overall expenditure by or on behalf of candidates, irrespective of whether it was paid by the election agent. An election agent or candidate who incurs or authorises the incurring of expenses in excess of the maximum amount, or knows or ought reasonably to know that the maximum will be exceeded, commits an illegal practice.<sup>22</sup>
- 12.24 For European Parliamentary elections in Great Britain, and the regional contests in Scottish Parliamentary and National Assembly for Wales elections, any expenses in relation to party list candidates which are paid by the election agent are dealt with as party campaign expenditure as regulated by 2000 Act.<sup>23</sup>
- 12.25 The limits apply to expenses which were not incurred for “election purposes” to the extent they are declared to have been used for such purposes.<sup>24</sup> The candidate’s personal expenses are excluded,<sup>25</sup> as is unauthorised spending by a third party.

### ***Fixed expenditure limits and legislative formulas***

- 12.26 Expense limits are prescribed by law as fixed ceilings or formulas. By way of example, at a UK Parliamentary by-election the maximum regulated expenditure is a fixed figure, currently £100,000.<sup>26</sup> At a general election the maximum is calculated by adding to a fixed amount, currently £8,700, a further sum calculated by multiplying the number of entries in the register for the constituency by nine pence in county constituencies, and six pence in borough constituencies.<sup>27</sup> The number of electors is taken as the number on the register on the last date for publication of the notice of election. The maximum for local government elections in England and Wales is similarly constructed from the fixed figure of £740 and a rate of six pence for every entry in the register in the electoral area in question.<sup>28</sup>
- 12.27 It may not be clear to a candidate whether a constituency is a borough or county one and the Electoral Commission guidance to candidates at the last general election advised candidates to ask the returning officer what type of constituency the candidate is standing in.

<sup>21</sup> Representation of the People Act 1983, ss 75ZA and 75ZB.

<sup>22</sup> Representation of the People Act 1983, s 76(1B).

<sup>23</sup> Political Parties, Elections and Referendums Act 2000, pt 5 and sch 9 paras 4 to 6.

<sup>24</sup> Representation of the People Act 1983, s 74A.

<sup>25</sup> Representation of the People Act 1983, s 76(5).

<sup>26</sup> Representation of the People Act 1983, s 76(2)(aa).

<sup>27</sup> Representation of the People Act 1983, s 76(2)(a).

<sup>28</sup> Representation of the People Act 1983, s 76(2)(b); “electoral area” is defined by section 203. For local government elections in Scotland, the fixed figure is £705 and a rate of six pence for every entry in the register (s 76(2)(b)). For Scotland, “electoral area” is defined by section 204.

### ***Reduction of maximums for jointly campaigning candidates at local elections***

- 12.28 Section 77 of the 1983 Act makes provision for reducing expense limits for “joint candidates” for local government election. Candidates are joint if they appoint the same election agent or jointly use “clerks or messengers”, jointly hire “committee rooms” or publish joint addresses, circulars or notices. Joint candidacy can start or cease during the election. If on ceasing to be a joint candidate one exceeds the reduced expense limit, section 77(3) prescribes circumstances where the excess is deemed to have arisen from a reasonable cause for the purposes of relief from sanction under section 167. These include good faith and overall expenditure being within the absolute (that is, unreduced) expense limit. The candidate must still apply for relief.
- 12.29 The references to the shared resources which constitute “joint candidacy” appear limited and potentially out of date. The policy behind this provision is that candidates for local government election (which should be read and understood to refer to candidates at the *same* election) should not be able to aggregate their expense limits if they are sharing campaign resources. The drafting could be simplified and modernised, with detailed exegesis left to secondary legislation or even tertiary guidance. In its recent report on election finance, the Electoral Commission suggested this provision had failed to keep up with modern campaign practices, while also pointing out that expense returns should indicate whether candidates campaigned jointly.

### ***Pre-candidacy expenses regulation for Parliamentary general elections***

- 12.30 In certain circumstances, defined by section 76ZA of the 1983 Act, a pre-candidacy period is also subject to regulation as to expenses. Regulation commences when a point in time is reached at which Parliament has not been dissolved for over 55 months since it first met. The pre-candidacy spending limit is £30,700 plus nine pence for every entry in the register in county constituencies, and six pence for every entry in the register in borough constituencies. That limit is tapered so that the actual spending limit depends on how long into a full term a particular Parliament lasts. Pre-candidacy expenses maximums are additional to the ordinary, post-candidacy limits, and apply only in respect of expenses incurred between the period after the 55<sup>th</sup> month and the date when the person formally becomes a candidate at the election.<sup>29</sup> It is worth noting that the precise spending limit cannot be precisely known by candidates, since it falls to be determined according to a formula using the number of registered electors *on the day of notice of election*, well after the section 76ZA regulation starts.

### ***Expense returns and declarations***

- 12.31 The election agent must complete and deliver to the returning officer a true return and declaration of expenses, signed by the candidate. A sub-agent and authorised third person must also do so, although the election agent’s return must deal under a separate heading with any expenses in respect of which a return is required in respect of authorised third persons. The expenditure limits

<sup>29</sup> Representation of the People Act 1983, s 76ZA(1)(c) and s 76ZA(3). A similar concept applies in the Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 43.



above will apply to the overall amount.<sup>30</sup>

- 12.32 The return as to expenses must be a “true return” containing:
- (1) a statement of all election expenses incurred by or on behalf of the candidate;
  - (2) a statement of all payments made by the election agent together with all bills or receipts relating to the payments;
  - (3) a statement relating to “such other expenses in connection with which provision is made by [Part II of the 1983 Act]” or claims (whether paid, unpaid or disputed) as the Electoral Commission provide in regulations; and
  - (4) a statement relating to “such other matters as is prescribed”.<sup>31</sup>
- 12.33 The return must contain certain specified information about the candidate and the poll in respect of which it is made, and the Electoral Commission has a power to prescribe a form of return which may be used.<sup>32</sup> The reference to “regulations” by the Electoral Commission is not clear. We are not aware of any regulations, or indeed any prescription, save for a regulation by the Electoral Commission prescribing the form of expense returns for local government elections.<sup>33</sup>
- 12.34 The return must also be accompanied by declarations made by the election agent and candidate, which are in a prescribed form. Failure to comply with the rules in sections 81 and 82 on returns and declarations is an illegal practice, and knowingly making a false declaration is a corrupt practice.<sup>34</sup>
- 12.35 Returning officers and their staff have no substantive role to play in advising candidates on their duties with respect to the regulation of the campaign, including expenses. Nor do they have any duty to enforce the law. However, the returning officer must retain the documents and make them available for inspection for a period of two years from the date of receipt of the return, which is the time limit for prosecuting electoral offences.<sup>35</sup> In certain circumstances the Electoral Commission must be sent copies of returns or declarations.

### ***Publicising expense returns***

- 12.36 Returning officers have, under section 88 of the 1983 Act, a duty to publish the availability of returns for inspection “in not less than two newspapers circulating in the constituency or electoral area”, and to notify election agents of their availability for inspection, within ten days of the deadline for submitting them. If any return has not been received, they must publicise that fact in the published notice.

<sup>30</sup> Representation of the People Act 1983, ss 76, 77, 81 and 82.

<sup>31</sup> Representation of the People Act 1983, s 81.

<sup>32</sup> Representation of the People Act 1983, s 81.

<sup>33</sup> Candidate’s Return as to Election Expenses (Prescribed Form) Regulations 2007.

<sup>34</sup> Representation of the People Act 1983, ss 82 and 84.

<sup>35</sup> Representation of the People Act 1983, ss 87A, 88 and 89.

- 12.37 There is a duty to exclude donors' addresses from statements of donations made available for inspection. The Electoral Commission's guidance to candidates points returning officers to the need to redact all documents in accordance with data protection legislation. Once two years have elapsed, there is a power to destroy the documents, and a duty to return them to the candidate or election agent if requested.
- 12.38 There have been suggestions that attempts to publish a notice online by administrators have been thwarted by the suggestion that they did not have a power to do so. The law envisages a paper process and the role of returning officers has been criticised by electoral administrators. After the 2010 general election, the Association of Electoral Administrators suggested an online facility for the submission of expense returns.<sup>36</sup> In a recent report, the Electoral Commission recommended that, as a matter of modernisation, notices of availability of returns for inspection should be available online in addition to or instead of notice in print media. It also recommended an order-making power for the Government as to how spending returns are made available for inspection.<sup>37</sup>
- 12.39 Plainly the current law seeks to publicise the availability of returns for inspection, in order to promote scrutiny and enforcement of the rules on the regulation of expenses. In our provisional view, any duty to notify the public should include a power to notify them at large by publication online. Making the submission of expense returns and their inspection an online process, however, poses significant operational questions. We are confident that in the future processes that currently involve physical paperwork will be comfortably and cheaply capable of taking place online. However, we are not in a position to recommend the transition in this review.
- 12.40 As to the role of electoral administrators, we acknowledge that the law places them as the medium through which compliance with election finance laws can be verified. However, we do not see any alternative. If, in the future, it is decided to transform the paper process of submitting and inspecting expense returns from a physical to a digital one, another institution may be able to take over as host for this process.<sup>38</sup> For the present, returning officers are the only persons able to fulfil the function of publicising expense returns.
- 12.41 Our provisional proposal is that the legislation should require returning officers to publicise and make available for inspection expense returns (as well publicising non-receipt of a return). Secondary legislation should prescribe in detail the process for that publicity and inspection. Should it become feasible to migrate from a paper process to an online one in the future, no changes in primary legislation would be required.

<sup>36</sup> Association of Electoral Administrators, *Beyond 2010: the Future of Electoral Administration in the UK* (July 2010), pp 61 and 62.

<sup>37</sup> Electoral Commission *A regulatory review of the UK's party and election finance laws: Recommendations for Change* (June 2013), pp 63 and 64 recommendations 34 and 35.

<sup>38</sup> That would not be without difficulty, however. The obvious candidate, the Electoral Commission, would have to be familiar with the roster of candidates for all and any election in order to notify non-receipt of an expense return by any of them. Since the Commission does not run the election, it would have to collect that information.

**Provisional proposal 12-1: Returning officers should publicise and make available for inspection expense returns (as well as publicising non-receipt of a return). Secondary legislation should prescribe in detail the process for that publicity and inspection, paving the way for publication online.**

***Enforcement of the law***

- 12.42 Like all electoral law, the regulation of campaign expenditure is enforced by election petitions and in some cases criminal prosecution. Candidates may apply proactively for relief from sanctions, under section 167 for committing an illegal practice, as well as under section 86 concerning failures as to expense returns and declarations. There is also a penalty for sitting and voting without delivering an expenditure return at certain elections.<sup>39</sup>

THE ROLE OF THE ELECTORAL COMMISSION IN ENFORCING REGULATION

- 12.43 The Electoral Commission acts as the public regulator of campaign finance in the national context. That means party spending and donations, and spending by permitted participants in referendums. However its role also extends to candidates. Section 145(1)(b) of the 2000 Act confers on the Electoral Commission the function of monitoring and taking such steps as it considers appropriate with a view to securing compliance with the restrictions and other requirements imposed by “other enactments” in relation to:

- (1) election expenses incurred by or on behalf of candidates at elections, or
- (2) donations to such candidates or their election agents.<sup>40</sup>

- 12.44 Section 146 of the 2000 Act gives the Commission the investigatory powers set out in Schedule 19B to the Act. These include a power to give a disclosure notice including one requiring the provision by a candidate or an election agent of “any information or explanation which relates to their income and expenditure which are reasonably required by the Commission for the purposes of carrying out their functions.”<sup>41</sup> It is an offence to fail, without reasonable excuse, to comply with a disclosure notice.<sup>42</sup>

<sup>39</sup> Representation of the People Act 1983, ss 85 and 86; European Parliamentary Elections Regulations SI 2004 No 293, reg 55; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 50; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, arts 52 and 53; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, arts 57 and 58; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 86); Electoral Law Act (Northern Ireland) 1962, ss 48 and 49. At Police and Crime Commissioner and Mayor of London elections, if a candidate’s return and declarations are not submitted in time they are disqualified from being elected, although they may still apply to the courts for relief for authorised excuse. Police and Crime Commissioner Elections Order SI 2012 No 1917, arts 44 and 45; Representation of the People Act 1983, s 85A.

<sup>40</sup> Political Parties, Elections and Referendums Act 2000, ss 22(5), 40 and 145(1)(b). This power does not presently extend to Scottish local government elections, unless and to the extent that the Scottish Ministers by order so provide. See s 145(2).

<sup>41</sup> The reference to income, and the function of monitoring and securing compliance with restrictions and requirements relating to donations to candidates, means that the Electoral Commission can seek information and explanations from candidates relating to donations.

<sup>42</sup> Political Parties, Elections and Referendums Act 2000, s 146, sch 19B para 1 and sch 20.

## **The control of donations**

### ***The legislative provisions on donations to candidates***

- 12.45 Section 71A of the 1983 Act regulates gifts and donations made for the purpose of meeting election expenses. Donations are defined as money or other property (widely defined) provided for the purpose of meeting election expenses. Schedule 2A contains detailed provisions on the control of donations which mirror those that apply to the regulation of political parties: in essence they promote transparency and limit permissible donors to registered electors. Unlike expenditure regulation, therefore, they do not impose limits on donations.
- 12.46 Other elections' discrete legislative provisions apply or copy section 71A and schedule 2A exactly, although for Scottish Parliamentary and National Assembly for Wales elections they only apply to constituency and individual regional candidates, since donations to parties are regulated by the 2000 Act.<sup>43</sup>

### ***A gap in the legislation for Scottish local government elections?***

- 12.47 Section 71A does not extend to Scottish local government elections, and we have not found any provision so extending it or replicating its content. Nevertheless, section 81(3)(e), as it extends to Scottish local government elections, clearly requires a statement as to donations to be contained in expense returns, leading us to conclude that the absence of a provision controlling donations is an accidental drafting slip.

### ***Substance of regulation of donations***

- 12.48 Section 71A provides that any money or other property provided as a gift or loan for the purposes of meeting election expenses incurred by or on behalf of the candidate must be provided to the candidate or election agent, unless the donation was provided for the purpose of meeting expenses which may lawfully be paid by a person other than the candidate or agent (for example, under sections 74(3) and 75 of the 1983 Act). Any person who provides money or property in contravention of this requirement commits an illegal practice.
- 12.49 Schedule 2A regulates donations, aiming to apply the policy under the 2000 Act to local campaigns. It describes what is to be regarded as a donation or sponsorship, and how donations should be valued.<sup>44</sup> A candidate who receives a donation must deliver it to the election agent along with any accompanying information about the donor(s).<sup>45</sup> Donations from anonymous or impermissible donors must not be accepted.<sup>46</sup> Sections 56 to 60 of the 2000 Act on the

<sup>43</sup> European Parliamentary Elections Regulations SI 2004 No 293, reg 42 and sch 6; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 38 and sch 4; Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 36 (applying sch 2A of the Representation of the People Act 1983); National Assembly for Wales (Representation of the People) Order SI 2007 No 236, art 41 and sch 6; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 71A and sch 2A); Electoral Law Act (Northern Ireland) 1962, s 37A and sch 3A; Police and Crime Commissioner Elections Order SI 2012 No 1917, art 30 and sch 5.

<sup>44</sup> Representation of the People Act 1983, sch 2A paras 2 to 5.

<sup>45</sup> Representation of the People Act 1983, sch 2A para 8.

<sup>46</sup> Representation of the People Act 1983, sch 2A para 6.

acceptance or return of donations are applied to donations received by a candidate or election agent as they apply in relation to those received by registered parties.<sup>47</sup> These require donations made by unidentifiable or impermissible donors to be returned where possible or paid into the Consolidated Fund. Acceptance of prohibited donations is an offence, but is not a corrupt or illegal practice and thus cannot invalidate the election. A court may also order the forfeiture of an amount equal to that donation.

#### DUTY TO INCLUDE DONATIONS STATEMENT IN EXPENSE RETURN

- 12.50 A statement of relevant donations must be made by the election agent; this must include details of the nature and amount of the donation and specified information about the donor in respect of both permissible and impermissible donations. While schedule 2A requires that statement to be included in the return of election expenses,<sup>48</sup> section 81 of the 1983 Act, which governs the content of expense returns, does not mention a statement as to donations.
- 12.51 This seems to us to be a drafting slip, not found in, for example, the equivalent legislation for elections to the National Assembly for Wales. Schedule 2A does not stipulate any consequence of breach of the requirement. Failure to comply with the requirements of section 81 or 82 of the 1983 Act is an illegal practice, but the inclusion of a statement of donations is not such a requirement.

#### REFORM OF CAMPAIGN EXPENDITURE REGULATION

- 12.52 We see no case for upsetting the foundations of the way in which electoral law regulates election expenditure. However, the legislation has been the subject of extensive amendment following policy developments, particularly since 1999. It also suffers, like other parts of electoral law, from an election-specific approach to structuring the legislation, increasing the volume and complexity of the legislative material.

#### Central legislative expression of core campaign regulation

- 12.53 In our view, the fundamental mechanism of the election agent and core items of campaign regulation should be retained in primary legislation, but expressed centrally for all elections. The adaptations to account for regional or national party list contests which are in the current law should be made in primary legislation. The core provisions include:
- (1) the duty to appoint an election agent;
  - (2) channelling expenditure through the agent, the prohibition on spending by others, and the exceptions;
  - (3) the mechanisms for paying claims and adjudicated payments of late or disputed claims;
  - (4) limiting expenditure to a prescribed maximum;

<sup>47</sup> Representation of the People Act 1983, sch 2A para 7.

<sup>48</sup> Representation of the People Act 1983, sch 2A para 10.

- (5) the provisions on donations to candidates;
- (6) the reporting of expenses and donations in expense returns and declarations; and
- (7) the associated offences in relation to the above (the corrupt and illegal practices).

### **Simplifying the legislation**

- 12.54 We consider that the current legislative provisions can be greatly simplified through re-statement, while retaining the substance of the current law. The key items of complexity lie in the different functions of expense regulation – channelling spending, limiting candidate expenditure, and reporting expenses (whether they are subject to the expenditure limit or not). Restating the law more clearly would start with the definition of expenditure that is subject to prescribed limits. It would then clearly define the additional kinds of expenditure which are subject to the channelling of expenditure through the election agent or which must be reported.
- 12.55 We provisionally consider that a single schedule guiding candidates as to what is within expenditure controls should govern all elections.

### ***Amendment of expenditure limits***

- 12.56 At present, the 1983 Act contains some expenditure limits in respect of UK Parliamentary elections and local government elections in England and Wales. Schedules 4 and 4A list the items of expenditure that are subject to prescribed limits. While these are currently set out in primary legislation, they may be amended by Order in consequence of changes in the value of money or to give effect to a recommendation of the Electoral Commission; the Order is subject to annulment in pursuance of a resolution of either House of Parliament.
- 12.57 Our provisional proposal is that the prescribed expense limits for all elections, and the guidance to candidates currently contained in schedules should be presented in one place. This should continue to be a schedule to the main legislative provisions. That schedule may be amended by Order subject to the same restrictions as it is under the current law (due to an Electoral Commission proposal or changes in the value of money) and subject to annulment by resolution of either House of Parliament.

**Provisional proposal 12-2: Provisions governing the regulation of campaign expenditure should be centrally set out for all elections.**

**Provisional proposal 12-3: A single schedule should contain prescribed expense limits and guidance to candidates as to expenditure and donations.**

### ***Expense limits established by formula***

- 12.58 It is not for this project to set expense limits. However, in order for the legal scheme to function, candidates and election agents must be able to know, in advance of spending, the expense limits which apply.

- 12.59 At present, the expenditure limits for UK Parliamentary general elections and local government elections in England and Wales are not fixed in legislation, but are calculated according to a formula which uses a fixed sum plus a rate per elector. The final expense limit will therefore depend on the number of registered electors in the constituency or electoral area on the day notice of election is given.
- 12.60 A formula is also used for pre-candidacy expenses, again using the time of notice of election as the material time for determining the number of electors in order to obtain a final figure. Given how far in advance of that time consideration of the pre-candidacy expenditure limits falls to be given, the problems of uncertainty are even more pronounced in that context.
- 12.61 This approach no doubt has the benefit of tying expenditure controls to the number of electors candidates need to reach out to. However, it is important to note that this approach was taken at a time when the registration of electors was an annual task. Until recently there was no facility for electors to obtain or change a register entry in anticipation of a forthcoming election. The per-elector formula did not have the same drawback of uncertainty as it does now.
- 12.62 A formula is also used to calculate the “permitted sum” for third person campaigners to spend without authority from the election agent.<sup>49</sup> The above-mentioned difficulties are exacerbated here by the fact that this provision is aimed at the public at large, and they will have less of an idea regarding how many electors are registered, or how to obtain that figure, than seasoned political actors.
- 12.63 In a review of election finance in 2013, the Electoral Commission concluded that alternatives to legislative formulas should be found, and recommended that candidate spending limits should be defined so that candidates and agents can work out their spending limit easily and in good time for them to plan their election campaign. The Commission noted that in the 2012 PCC elections, almost 90% of candidates reported the correct spending limit, which was fixed for each police area, whereas at the 2010 general election, where candidates had to apply a formula, fewer than 50% of sampled candidates reported the correct figure.<sup>50</sup> The Commission mooted several options for achieving that, without finally endorsing any of them. They included:
- (1) fixed prescribed sums for each constituency and electoral area, calculated using a formula taking into account the number of electors in each area;
  - (2) a single standard limit for all or most electoral areas; and
  - (3) an earlier date for the purposes of application of the formula.<sup>51</sup>

<sup>49</sup> Representation of the People Act 1983, s 75(1ZA).

<sup>50</sup> Electoral Commission *A regulatory review of the UK's party and election finance laws: Recommendations for Change* (June 2013), p 69 para 4.101.

<sup>51</sup> Electoral Commission *A regulatory review of the UK's party and election finance laws: Recommendations for Change* (June 2013), pp 68 and 69 para 4.99.

- 12.64 The Electoral Commission also recommended consideration of fusing the ordinary regulated expense period (pertaining to the election) with the pre-candidacy regulation period. A higher maximum would be set and one regulated period would apply.<sup>52</sup>
- 12.65 We are conscious of the limitations of this project as to setting expense limits. In our view, there is a question whether the current approach can deliver the legal policy aim, which underlies the entire scheme, of securing compliance with expense limits. However, we are not satisfied that we can make a proposal that in effect proposes substantial changes to expense ceilings.
- 12.66 Our provisional proposal is that expenditure limits for candidates should be calculated according to the current formula and should be declared by the returning officer for the constituency or electoral area in a notice accompanying, or immediately following, the notice of election (depending on practicalities of establishing the number of electors simultaneously with issuing the notice of election). Candidates may then rely on the notice in order to establish their spending limits. This proposal would also avoid the additional difficulty faced by some candidates in establishing whether the constituency they are standing in is a borough or county constituency.
- 12.67 The prescribed sum for third parties is also calculated according to a formula in local government elections. This is not so at UK Parliamentary elections, where a fixed sum of £700 is used. We provisionally propose that returning officers should also declare the permitted sum for third parties to spend in a notice accompanying the notice of election.
- 12.68 As to pre-candidacy expenses, we are conscious that our proposal does not avoid the problem of being subject to expense limits which cannot be precisely established until some point in the future. However, that is an inherent feature of pre-candidacy controls. Even after the Fixed-term Parliaments Act 2011, there is no certainty that Parliament will run to a full term, so that the final spending limit is always contingent on some future event.

**Provisional proposal 12-4: Expenditure limits which are calculated according to a formula should be declared by the returning officer for the constituency or electoral area in a notice accompanying, or immediately following, the notice of election.**

***Simplifying the provisions on expense returns***

- 12.69 We also provisionally consider that there is a case for simplifying the process of returns of expenses. Under the current law, two or more returns may be sent to returning officers in relation to the same candidate. The election agent's expense return under section 81 of the 1983 Act must deal under a separate heading with expenses incurred by an authorised person, but section 75(2) clearly envisages such persons, if they are not "engaged or employed" for payment by the candidate or election agent, delivering a separate return to the returning officer themselves.

<sup>52</sup> Electoral Commission *A regulatory review of the UK's party and election finance laws: Recommendations for Change* (June 2013), p 66 recommendation 36.



- 12.70 In our provisional view, returning officers should receive a single set of documents containing the return of expenses and declarations by the agent and the candidate. These should include any statement by an authorised person containing the particulars currently required to be sent to the returning officer by section 75(2).

***Inclusion of a donations statement within expense returns***

- 12.71 We have noted that it is not clear for all elections that a failure to include a statement of donations complying with schedule 2A in an expense return and declaration is an illegal practice. We consider that the content of the reporting requirements in the regulation of campaign spending should be clear on the face of the legislation, and so would clarify that a statement of donations is required content for expense returns.

**Provisional proposal 12-5: Returning officers should receive a single set of documents containing the return of expenses and declarations by the agent and the candidate. These should include any statement by an authorised person containing the particulars currently required to be sent to the returning officer by section 75(2) of the 1983 Act.**

# CHAPTER 13

## LEGAL CHALLENGE

### INTRODUCTION

- 13.1 The laws governing electoral administration and the regime prohibiting corrupt and illegal practices are largely enforced by private legal challenge before election courts – the “election petition”.
- 13.2 This is a very complex area of law; this chapter outlines the current law before making provisional proposals for its reform. This chapter considers, first, the grounds for invalidating or correcting elections, starting with the classical grounds of challenge, before considering how those are transposed to other elections, chiefly those using the party list voting system. Our reform proposals are chiefly concerned with clarifying the grounds and stating them in one place for all elections.
- 13.3 Next, we consider the election petition process and the nature of the election court, noting some of the problems with its current peculiar status. We provisionally propose a simpler procedural framework within the ordinary court system in the UK, and discuss the question of how to protect the public interest in lawful elections within a private challenge mechanism.

### THE CLASSICAL ELECTION PETITION

- 13.4 The term “petition” is derived from the jurisdiction of committees of the House of Commons to hear petitions concerning “controverted” elections. In 1868 the jurisdiction was transferred to election courts presided over by judges. As a result of its origin, the jurisdiction retains many unique features including some inquisitorial and quasi-criminal characteristics. We review the law on challenge in detail, including its history, in our research paper on the subject.<sup>1</sup>
- 13.5 The election petition is a private legal proceeding, brought by persons directly concerned by the election in question. The elected candidate and, if the petition questions the administration of the election, the returning officer are respondents to the petition. Petitions are tried by an election court made up, in parliamentary election cases, of two senior judges. The default position is that petitions are heard in the constituency concerned.<sup>2</sup>
- 13.6 While the parliamentary election court outwardly resembles one of the superior courts of the land, it is best thought of as a tribunal presided over by senior judges. It produces to the Speaker of the House of Commons a “certified determination” as to the correctness of the outcome and the validity of the election. The court additionally reports to the Speaker if it concludes that corrupt or illegal practices were perpetrated or prevailed extensively at the election.<sup>3</sup>

<sup>1</sup> Available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

<sup>2</sup> Representation of the People Act 1983, s 123(3). The High Court has a power to appoint another place for the trial.

<sup>3</sup> Representation of the People Act 1983, ss 144(4) and 160.

Having done so, the election court is dissolved.<sup>4</sup> The House of Commons must “give the necessary direction” for confirming or altering the return, or issuing a writ for a new election, or otherwise carrying the determination into execution.<sup>5</sup>

13.7 There is no appeal on issues of fact, though a special case may be stated on any question of law to the High Court in England and Wales, the Inner House of the Court of Session in Scotland, and the Court of Appeal in Northern Ireland.<sup>6</sup> In *R (Woolas) v The Parliamentary Election Court* an election court was held to be subject to judicial review for error of law.<sup>7</sup>

13.8 There are other features of the election petition which are unique and derive from its peculiar origins.

(1) Section 157(2) of the Representation of the People Act (the 1983 Act) enjoins the election court hearing an election petition to observe the principles, practice and rules followed by the House of Commons committees in dealing with election petitions. These include the principles relating to agency and the scrutiny which we examine further below.<sup>8</sup>

(2) While the election petition procedure is adversarial, it has some inquisitorial characteristics, such as the court’s power to examine witnesses not called by the parties,<sup>9</sup> and the obligation of witnesses to answer questions, which overrides the normal privilege against self-incrimination and is designed to assist the court in discovering the truth, particularly in cases of electoral corruption.<sup>10</sup>

(3) The election court had a dual civil and criminal jurisdiction until 1985. The standard of proof for finding someone “guilty” of corrupt or illegal practice is still the criminal standard of proof beyond reasonable doubt.<sup>11</sup> The prosecuting authorities may and, if requested, must, if they believe the circumstances require it, attend petition trials,<sup>12</sup> and must make inquiries and institute proceedings if informed that an offence under the 1983 Act

<sup>4</sup> In legal terms it is *functus officio*: *R v Cripps ex parte Muldoon* [1984] QB 686. There is therefore no “standing” election court.

<sup>5</sup> Representation of the People Act 1983, s 144(7).

<sup>6</sup> Representation of the People Act 1983, ss 144 and 146(4) and (5). That the procedure amounts to an appeal on a point of law was confirmed in *R (Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin), [2011] 2 WLR 1362 at [25], [29] and [41].

<sup>7</sup> [2010] EWHC 3169 (Admin), [2011] 2 WLR 1362. Judicial review is discussed further at paras 13.137 and 13.153 to 13.154 below.

<sup>8</sup> See paras 13.50 to 13.52 below.

<sup>9</sup> Representation of the People Act 1983, s 140(2) and (3).

<sup>10</sup> Representation of the People Act 1983, s 141. Section 141(2) makes the self-incriminating answer inadmissible as evidence in any subsequent proceedings.

<sup>11</sup> *R v Rowe ex parte Mainwaring* [1992] 1 WLR 1059, 1068B to D.

<sup>12</sup> In Scotland, one of the Advocate Deputes or the procurator fiscal of the district to which the petition relates may or, if the Lord Advocate so decides, must attend the petition trial as part of their official duty. Representation of the People Act 1983, s 140(7).

has been committed.<sup>13</sup> Except in the case of petitions relating to European Parliamentary elections, they are obliged to request that any person who appears able to give material evidence attend the trial and must, with the court's permission, examine that person.<sup>14</sup> In Scotland, there is no such power to call or examine witnesses.<sup>15</sup>

- 13.9 It is questionable how much use is made of the special features of the election petition process. Even in the earliest cases, courts were reluctant to take on an inquisitorial role, affirming the judicial character of the proceedings, in contradistinction to a Commission of Inquiry.<sup>16</sup> With the passage of time, the election court has developed a distinctly judicial character. While modern courts have voiced concerns about the likelihood of wider corruption at an election, they have concentrated on the cases pleaded by the parties and the evidence presented by them. We are not aware of any recent use of the power of the election court unilaterally to call and examine a witness. Similarly, the prosecuting authorities do not, we understand, routinely attend election petitions. If they do, they tend to be passive observers ready to investigate any criminality that emerges. We have not seen any instance of a prosecuting authority calling or examining witnesses in petition proceedings.

#### **THE JURISDICTION OF THE ELECTION COURT**

- 13.10 The result of an election can only be challenged by an election petition.<sup>17</sup> A parliamentary petition may either challenge an “undue return” or “an undue election”. Where the return is questioned, the petition seeks the return of another candidate while preserving the validity of the election.<sup>18</sup> The court has power to alter the return while upholding the election. Where the election itself is questioned, the consequence of a successful petition is that a new election must be held.
- 13.11 The statutory grounds for challenging a local government election are that the winning candidate was disqualified at the time of the election or that the election

<sup>13</sup> Representation of the People Act 1983, ss 181(1) and 204(5); European Parliamentary Elections Regulations SI 2004 No 293, reg 119; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 109; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, art 133; Northern Ireland Assembly Elections Order SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 181); Electoral Law Act (Northern Ireland) 1962, ss 72 and 120; Police and Crime Commissioner Elections Order SI 2012 No 1917, art 74 and sch 9 (applying Representation of the People Act 1983, s 181 to Police and Crime Commissioner elections).

<sup>14</sup> Representation of the People Act 1983, s 140(6).

<sup>15</sup> Representation of the People Act 1983, s 140(7).

<sup>16</sup> *Windsor Case* (1869) 1 O'M&H 1, 7 and *Taunton Borough Case* (1874) 2 O'M&H 66, 74.

<sup>17</sup> Representation of the People Act 1983, ss 120(1) and 127.

<sup>18</sup> Section 120(2) of the 1983 Act curiously provides that a “petition complaining of no return”, should be “deemed to be a parliamentary election petition”. “No return” must mean that the returning officer did not return a writ at all. This section envisages that the High Court (or, in Scotland, the Court of Session) would hear such a complaint. It can compel a return or allow the election court to hear the case “as provided with respect to ordinary election petitions”.

was void on account of corrupt or illegal practices.<sup>19</sup> In practice, it has been assumed that the election courts, whether parliamentary or local, may question an election on the same grounds.<sup>20</sup>

13.12 In this chapter, we refer to the election court's power either to *correct* the result of an election, or to *annul* it. Annuling the election results in a new election being called. An election can be annulled on one of three grounds:

- (a) a breach of electoral law during the conduct of the election which was either:
  - (i) fundamental; or
  - (ii) materially affected the result of the election;
- (b) corrupt or illegal practices committed either:
  - (i) by the winning candidate personally or through that candidate's agents; or
  - (ii) by anyone else, to the benefit of the winning candidate, where such practices were so widespread that they could reasonably be supposed to have affected the result; or
- (c) the winning candidate was at the time of the election disqualified from office.

13.13 This statement of the grounds for challenging elections is not obvious even on a careful reading of the 1983 Act. The law on challenging elections is complex and inaccessible. We will consider these grounds below and how they are adapted to elections using the party list voting system.

### **Scrutiny and correcting the result**

13.14 The court can correct the outcome of the election by deciding for itself, after a detailed and adversarial court process, which votes should lawfully be counted, and consequently who ought to have been returned as the winning candidate. The court is not restricted to a simple recount; it can come to its own view about the true result of the election by conducting a "scrutiny". For example, a voter in fact disqualified from voting may nevertheless appear on the polling station register; such a voter cannot be prevented from voting, but their vote may be rejected on scrutiny under section 49(5) of the 1983 Act. Similarly, a tendered ballot paper cannot lawfully be counted by a returning officer, but the election court can decide that it is the vote cast by the true voter, and count that vote while tracing and discarding the ballot paper falsely cast in the elector's name.

### ***The adversarial scrutiny process***

13.15 There is no guidance in the 1983 Act as to how to conduct a scrutiny, beyond

<sup>19</sup> Representation of the People Act 1983, s 127.

<sup>20</sup> Section 157(2) of the 1983 Act moreover extends the jurisdiction to perform scrutiny and to declare another candidate elected to the local government election court, which can thus correct the result as well as invalidating an election.

section 157(2) requiring the court to observe the “principles, practice and rules” of the former House of Commons committees. Leading practitioners’ textbooks summarise the process as an adversarial trial of each disputed ballot paper, with petitioner and respondent making their respective cases. Witnesses may be called in relation to each ballot paper, but witnesses may not be asked for whom they voted (although they may volunteer that information).<sup>21</sup>

### **Vote tracing**

- 13.16 In order to decide cases of personation, or to discard the votes of ineligible or corrupted electors, the election court will use the vote tracing mechanism, using the corresponding number list to identify the voter’s ballot paper.

### **The doctrine of “votes thrown away”**

- 13.17 One principle which survives today is the doctrine of “votes thrown away”. Where a candidate gives public notice to the electorate that a rival is disqualified from election, and the court subsequently agrees, votes cast for the disqualified candidate after the notice was given are discounted for the purpose of determining the outcome as having been “thrown away”.<sup>22</sup>
- 13.18 An example of this doctrine is the Bristol South East petition in 1961.<sup>23</sup> On the death of his father, Tony Benn became a hereditary peer and was thus disqualified from sitting in the House of Commons. He nevertheless stood for re-election and gained the largest number of votes. The court rejected Mr Benn’s arguments that he had effectively renounced his peerage. It found that the electorate, having been given notice by the petitioner, knew the facts on which the disqualification was based. Those who had nevertheless voted for Mr Benn were taken to have thrown their votes away, and the petitioner was declared elected. This was despite the fact that Mr Benn had publicly insisted that he was not disqualified, and the correctness of his arguments turned on technical issues of peerage law that were not readily understood by most voters.<sup>24</sup>
- 13.19 It can be said in favour of the doctrine of “votes thrown away” that it avoids the expense of a fresh election and that a voter who casts a vote in favour of a candidate who is plainly ineligible to sit can justifiably be regarded as having decided to throw the vote away. On the other hand, it operates harshly in a case such as *Bristol South-East*, where a voter wishing to vote for his or her preferred candidate risks having his or her vote regarded as thrown away on the ground that he or she ought to have anticipated the result that was eventually reached after a ten day trial on a point of law. Where a candidate found to have been disqualified had the support of a registered political party, a fresh election at which the party may nominate a fresh candidate – as happens when a party’s parliamentary candidate dies during polling<sup>25</sup> – seems a fairer outcome.

<sup>21</sup> Paul Gribble (ed) Schofield’s election law (looseleaf) vol 1 at paras 17.065 and 17.066.

<sup>22</sup> The returning officer has no power to do this.

<sup>23</sup> *Re Bristol South-East Parliamentary Election* [1964] 2 QB 257.

<sup>24</sup> The situation in the *Bristol South-East* case is now dealt with by s 1 of the Peerage Act 1963, which enables hereditary peers to renounce their peerage.

<sup>25</sup> See Chapter 8 Polling, paras 8.93 to 8.111.

- 13.20 While we can see some advantages to the doctrine, we incline to the view they are outweighed by its disadvantages. In the *Bristol South-East* case,<sup>26</sup> for example, electors who took it on trust from their preferred party's candidate that he was not disqualified might fairly expect a fresh election in the event that that turned out to be wrong. Deeming them to have thrown their votes away and declaring a less popular candidate elected, without allowing those electors an opportunity to vote for a duly qualified candidate from their preferred party, sits ill with a modern understanding of democracy or fairness. A disqualified candidate's election is void in any event. Our provisional proposal is that this principle should be abolished or at least modified. We welcome consultees' views on this.

**Provisional proposal 13-1: The doctrine of “votes thrown away” should be abolished.**

**Reviewing the validity of the election**

- 13.21 There are broadly three grounds for invalidating an election: first, a breach of electoral administration law, secondly, corrupt or illegal practice by or favouring the winning candidate, and thirdly, disqualification of the winning candidate.

***Breach of electoral administration law***

- 13.22 Electoral administration law lays down detailed and prescriptive rules governing the conduct of an election. If an election were invalidated by any breach of them, electoral outcomes might become extremely uncertain. On the other hand, the law must give teeth to its rules. A balance must be struck, and the law has placed some restraints on the consequences of breach which focus on whether the breach affected the result of the election and the seriousness of the breach.

- 13.23 Section 23(3) of the 1983 Act provides (emphasis added) that:

*No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that -*

- (a) the election was so conducted as to be substantially in accordance with the law as to elections; *and*
- (b) the act or omission did not affect its result.

**WHAT IS A BREACH OF ELECTION LAW?**

- 13.24 First, it is not stated what breaches of election law are capable of invalidating an election. An “act or omission” in breach of official duty by the returning officer or any other person in connection with the election might be a reference to the offence of breach of official duty. It is unlikely, however, that the court must establish an offence before section 23 is engaged. In practice, any breach of election law by an electoral administrator engages this ground of challenge. That includes both a breach of the rules governing the conduct of the election and a

<sup>26</sup> [1964] 2 QB 257.

breach of other election law, such as wrongly registering an elector – an act “in connection with the election”.

#### ELECTION NOT SUBSTANTIALLY IN ACCORDANCE WITH ELECTORAL LAW

- 13.25 Secondly, what kind of breach will result in an election not substantially in accordance with election law? In *Morgan v Simpson*,<sup>27</sup> issuing 44 ballot papers without the official mark was held not to pass the threshold; that required a “substantial departure” such as to make “the ordinary man condemn the election as a sham or a travesty of an election by ballot”.<sup>28</sup> The court gave the examples of allowing voters to vote for a person who was not in fact a candidate, refusing to accept a qualified candidate on some illegal ground, or disenfranchising a substantial proportion of qualified voters.<sup>29</sup> Less serious errors, such as on the facts before the court in *Morgan v Simpson*, or the giving out of fourteen ballot papers outside polling hours,<sup>30</sup> did not cross the threshold. The bar is thus set high for an administrative breach to invalidate an election irrespective of its impact on the result.

#### MATERIAL BREACH OF ELECTION LAW

- 13.26 The negative phrasing of section 23 is arguably unsatisfactory: it mandates that the election should *not* be declared invalid if the stated conditions are satisfied. There is no clear statement of the circumstances in which an election court should invalidate an election.
- 13.27 That issue was also considered by the Court of Appeal in *Morgan v Simpson*. A local government election<sup>31</sup> went largely well but 44 out of 23,691 ballot papers put into ballot boxes lacked the official mark. It was accepted that this was due to a breach of the local government election rules by those administering the poll. If the purported votes cast by these unmarked ballot papers could lawfully have been counted, the petitioner would have won the election. But the court could not give effect to those votes and declare the petitioner duly elected: the breach of one election rule as to the marking of the ballot paper did not enable the court to sanction the breach of another rule as to which ballot papers could be counted.
- 13.28 The Court of Appeal therefore declared the election invalid because the breach affected its result. Any such material breach of election law was by itself enough to compel the court to declare the election void. It was not necessary that the election was also not conducted substantially in accordance with election law. The provision now in section 23 of the 1983 Act emphasised that elections were serious and expensive matters not lightly to be set aside, but the court had no discretion to declare a candidate duly elected once a material breach of the rules had occurred.

<sup>27</sup> [1975] QB 151.

<sup>28</sup> [1975] QB 151, 168 by Lord Justice Stephenson.

<sup>29</sup> [1975] QB 151, 168 by Lord Justice Stephenson.

<sup>30</sup> *Islington West Division Case, Medhurst v Lough and Gaskett* (1901) 5 O'M & H 120.

<sup>31</sup> The equivalent saving provision in local government elections is s 48(1) and is materially identical to s 23(3).



*Restating the section 23(3) test in positive terms*

- 13.29 Lord Denning MR went further than the other two members of the Court and restated the effect of the section in three propositions:

I suggest that the law can be stated in these propositions:

(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not. That is shown by the *Hackney case*,<sup>32</sup> where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.

(2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is shown by the *Islington case*<sup>33</sup> where 14 ballot papers were issued after [the close of the poll].

(3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated. That is shown by *Gunn v Sharpe* [1974] 2 All ER 1058, where the mistake in not stamping 102 ballot papers did affect the result.<sup>34</sup>

- 13.30 Lord Denning's statement has proved to be authoritative. We have seen no sign that this judicial approach has upset any proper balance between upholding electoral laws and achieving certainty of outcomes, and in particular the need for most breaches materially to affect the result has saved elections that were, on the whole, sound, from being questioned in court.

- 13.31 Even where the precise effect of a breach cannot be determined, courts have sought to establish whether a breach of election law could have affected the result. In the *Fermanagh and South Tyrone* election petition, a presiding officer was pressured into re-opening the polling station after the close of polls. The court did not know how many voters were allowed to cast their vote. It estimated their numbers by dividing the length of time for which polling re-opened by the time it would take each voter to vote, and finding that at most, 30 voters were wrongly allowed to cast their vote, which fell short of the winning candidate's 53 vote majority at the election.<sup>35</sup>

<sup>32</sup> *Hackney Case* (1874) 2 O'M&H 77.

<sup>33</sup> *Islington West Division Case, Medhurst v Lough and Gaskett* (1901) 5 O'M & H 120.

<sup>34</sup> *Morgan v Simpson* [1975] QB 151, 164.

<sup>35</sup> *Fermanagh and South Tyrone case* [2001] NIQB 36 by Lord Carswell.

### **A discrete ground of challenge for defective nomination?**

- 13.32 On what ground can a candidate's election be annulled because their nomination is defective? A consequence of the patchwork way in which the election court's jurisdiction is laid out in the 1983 Act is that the answer is not clear.

#### ***Incorrect home address on nomination papers***

- 13.33 One aspect of that question is whether a candidate whose nomination paper gives an untrue home address can be unseated. There is an apparently long-established principle that giving an incorrect address on a nomination paper is a ground for annulling a winning candidate's election.<sup>36</sup> Most of the case law cited in support of this principle harks back to a different age, with many cases pre-dating the abolition of property-owning qualifications for office. A candidate's home address may have played a more significant role in identifying the candidate to the electorate in those times than it might now.<sup>37</sup>
- 13.34 In the more recent case of *R v An Election Court ex parte Sheppard*,<sup>38</sup> the High Court held that a candidate's election was invalid because the address given in the nomination paper was not his true home address. The Victorian cases were not cited before the court. Dealing with the issue in one paragraph, it held that there was an "undue election" because no election could be valid if the candidate's nomination was not.<sup>39</sup>
- 13.35 The summary nature of the court's reasoning in *Sheppard* is unhelpful. Analysing the issue through the grounds of challenge under the 1983 Act, one could conclude that it is a corrupt practice to cause or permit to be included in a nomination paper a statement, including one of a home address, which the person knows to be false. The election of a candidate guilty of or responsible for such a practice must be annulled by the election court.<sup>40</sup> Alternatively, the innocent misstatement of a home address, where election law requires such a statement, is a breach of election law; as such it would normally only invalidate the election if it affected the result.

#### ***Excluding challenge of a decision to accept a nomination paper***

- 13.36 Rule 12 of the Parliamentary Elections Rules, which is replicated for other elections, provides:

<sup>36</sup> Research paper 2, Notice of Election to Nominations, 1.49 to 1.50; available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

<sup>37</sup> P Gribble (ed) *Schofield's Election Law*, loose-leaf, 6th reissue volume 1 at para 9-009 to 9-010 on the subject of candidate's residence, cites some 23 petition cases decided between 1838 and 1892. Property qualifications were abandoned in 1858. Furthermore, some cases were examining the question of a voter's residence (and thus eligibility to vote), not the candidate's. A case which is given prominence is *R v Hammond* (1852) 17 QBD 772. The case predates both the abolition of the property and residence qualification and the detailed conduct rules introduced in the Ballot Act 1872. The extract of the judgment cited in *Schofield* at para 9.009 makes clear that the court was concerned with a requirement to give a place of abode which is sufficient truly to identify the candidate, as opposed to other places where the candidate may be less well known.

<sup>38</sup> [1975] 1 WLR 1319, 1325D.

<sup>39</sup> [1975] 1 WLR 1319, 1325D, by Lord Widgery CJ.

<sup>40</sup> Representation of the People Act 1983, s 65A(1)(a).

(5) The returning officer's decision that a nomination paper is valid shall be final and shall not be questioned in any proceeding whatsoever.

(6) Subject to paragraph (5) above nothing in this rule prevents the validity of a nomination being questioned on an election petition.<sup>41</sup>

- 13.37 Judicial review lies against a decision to refuse a nomination paper, although the courts will be slow to interfere with the decision of the returning officer.<sup>42</sup> Rule 12(5) excludes judicial review of a returning officer's decision to accept a nomination paper. If, however, in arriving at that decision the returning officer made an error of law, the decision is a nullity and the ouster of legal challenge under rule 12(5) would be ineffective.<sup>43</sup> The exclusion of judicial review, and the reluctance with which a court might interfere with a returning officer's decision if judicial review were not excluded, are explicable by the fact that judicial review here is a means of collateral challenge of the election. The primary way of reviewing the validity of elections is challenge by election petition.

#### CHALLENGE BY PETITION OF A DECISION AS TO NOMINATION

- 13.38 Rule 12(5) excludes legal challenge of a decision that a nomination *paper* is valid. Rule 12(6) adds that this does not prevent the validity of a *nomination* being questioned on an election petition. It appears that rule 12 therefore distinguishes between the validity of the nomination paper and the nomination itself. As to the nomination paper, only a decision that it is invalid can be challenged by election petition.<sup>44</sup> In *Sanders v Chichester*, Dyson J (as he then was) considered the distinction between the nomination paper and nomination.

The relevant distinction, recognised by the Rules is between the validity of a nomination paper and the validity of a nomination. It is unhelpful to introduce a different distinction which is not recognised by the Rules, namely that between form and substance... Rule 12(5) clearly provides that the returning officer's decision that a nomination paper is valid shall be final and shall not be questioned in any proceedings whatsoever. Rule 12(6) provides that subject to Rule 12(5), nothing in Rule 12 prevents the validity of a nomination being questioned on an election petition. Thus it is not possible to challenge a decision as to the validity of the nomination paper in any proceedings (including an election petition). It is, however, possible on an election petition to challenge any decision that a nomination paper is invalid and also to challenge the validity of the nomination (as opposed to the validity of the nomination paper) on any ground

<sup>41</sup> Representation of the People Act 1983, sch 1 r 12.

<sup>42</sup> *R (De Beer) v Returning officer for London Borough of Harrow* [2002] EWHC 670 at [36] to [38]; [2002] ACD 83.

<sup>43</sup> *Sanders v Chichester* (1995) 139 SJLB 15, not fully reported but transcript available in P Gribble, *Schofield's Election Law*, loose-leaf, 6th reissue volume 5 p E99 at p E116 to E118, applying *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147 on the effect of ouster clauses to prevent judicial review.

<sup>44</sup> *Re Melton Mowbray (Egerton Ward) Urban District Council Election* [1969] 1 QB 192.

whatsoever.<sup>45</sup>

13.39 A decision to accept a nomination paper as valid may thus appear unassailable. But Dyson J did not think this ouster of jurisdiction was absolute: if the returning officer erred in law, the decision was a nullity, applying general principles of public law (the case did not turn on this point). Dyson J held that the returning officer could not in law go behind the nomination paper in order to refuse a nomination on the grounds that the description “literal democrat” would spoil the Liberal Democrat candidate’s campaign. Had the returning officer erred in law, Dyson J thought that decision would be subject to challenge. On this basis, it is hard to escape the conclusion that the only decisions that are immune from challenge under rule 12(5) are those that are legally correct, and could not successfully be challenged in any event.

13.40 The reasoning involved in following the implications of the ouster clause and Dyson J’s decision is very complex. No consideration was given in the judgment in *Sanders v Chichester*, when considering and rejecting the submissions of counsel for the returning officer, to the general grounds of challenge under Part III of the 1983 Act. As we have noted, one of those grounds is material breach of electoral law.

***Why should defects in the nomination paper not invalidate an election?***

13.41 The editors of *Parker’s Law and Conduct of Elections* argue that the requirements about subscribers’ signatures and electoral numbers only concern the form of the nomination paper. Even if an election petition on those formal grounds is not ousted by rule 12(5), they argue that a winning candidate’s election should be saved by the provision of section 23 of the 1983 Act (the error not materially affecting the outcome of the election) if the election was otherwise in order. In support of that argument, they note that:

the requirement that electors should subscribe the nomination paper of a candidate can only be intended to indicate that there is some support for the candidate standing (subscription carries no commitment to vote for the candidate). If that candidate is elected (thereby showing that he is supported), it would be absurd to set aside the election because of an irregularity in the particulars of the subscribers.<sup>46</sup>

13.42 This rationale is inapplicable, of course, to the converse case of a nomination paper being wrongly rejected for being inadequately subscribed. In such a case, the election is vitiated since the electorate were not given the option of voting for

<sup>45</sup> *Sanders v Chichester* (1995) 139 SJLB 15, not fully reported but transcript available in P Gribble, *Schofield’s Election Law*, loose-leaf, 6th reissue volume 5 pp E99, E116 and E117.

<sup>46</sup> R Price (ed), *Parker’s Law and Conduct of Elections*, loose-leaf, issue 37 volume 1 at para 12.28.

the candidate whose nomination was rejected.<sup>47</sup>

13.43 One must be careful not to over-extend the argument that breaches of formal requirements as to nomination should not overturn a democratic election. It does not apply to defects which have a substantive impact on the election. The following are examples of defects that may appear to be formal but in fact are substantive:

(1) If the defect related to the name of the candidate or their address in such a way as to affect the accuracy or quality of the information available to voters – as to the identity of the candidate, or their location (if that is a factor) – it is not saved by the above argument. (Section 50 of the 1983 Act saves nomination papers from being impugned due to a misdescription or misnomer of a person or a place, but only if it was not likely to cause a misunderstanding.)

(2) Even in the context of subscribers or another formality, if the defect was the result of a knowing misstatement or fabrication by the candidate, they would be guilty of a corrupt practice and ineligible for election.

13.44 These examples illustrate that the current grounds upon which election courts will annul an election for defective nomination are extremely unclear. A simple assertion that a bad nomination paper will invalidate the election is too simplistic an analysis. We return to this issue below when considering our provisional reform proposals.

### **Corrupt and illegal practices**

13.45 The second ground for annulling an election divides into two limbs. First, corrupt or illegal practice committed by or attributable to the winning candidate invalidates his or her election absolutely, and also brings in the 3 or 5 year disqualification from elected office. Secondly, an election may be annulled for widespread corruption which may reasonably be supposed to have affected the result.

#### ***Corrupt or illegal practice by the winning candidate***

13.46 If a winning candidate is reported by an election court “personally guilty or guilty by his agents of any corrupt or illegal practice his election shall be void”.<sup>48</sup> Corrupt and illegal practices can be tried on election petitions because of their dual nature as both criminal offences and “vitiating factors” that invalidate an election. However, there is an important distinction between personal guilt and guilt by agents.

13.47 “Personal” guilt is defined by reference to commission of the offence with the knowledge and consent of the candidate. This definition does not apply to treating and undue influence, apparently because these offences are framed in

<sup>47</sup> For an example, see *Re Melton Mowbray (Egerton Ward) Urban District Council Election* [1969] 1 QB 192 where the returning officer rejected a nomination paper for inadequate signature by one of the subscribers. The court disagreed and annulled the election, which allowed the would-be candidate to stand for election by the electorate.

<sup>48</sup> Representation of the People Act 1983, s 159(1).

terms including the use of other people, so that a finding that the candidate employed others to treat or to exert undue influence will always amount to a finding of guilt of the offence by the candidate. This has always been the law.<sup>49</sup> It is not clear why bribery is not treated in the same way, since it too can be committed by using others.

- 13.48 “Guilty by his agents” refers to non-personal guilt. The significance of this distinction is that personal guilt both invalidates the election and also engages the disqualifications from the electoral process for the period of 3 or 5 years. Guilt by agents only vitiates the election of the candidate.<sup>50</sup>
- 13.49 Section 158(3) offers a defence from guilt by agents, in narrow circumstances. The candidate can avoid the nullity of the election by establishing that the offences were committed by persons other than the election agent, were committed contrary to orders and without the candidate’s sanction, that the candidate took all reasonable steps to prevent their commission, that the offences were of trivial character and that the election was otherwise free from corrupt or illegal practices. The subsection does not apply to offences of bribery or personation. The burden of proof is on the candidate.

#### WHO IS AN AGENT?

- 13.50 Part of the regulatory approach of electoral law to campaign behaviour is to hold a candidate responsible for all the acts and omissions of their agents. The private law principles of agency are not applicable, and election law’s notion of agency, which continues to be relevant by virtue of section 157(2) of the 1983 Act, was described in the earliest cases as “a stringent, harsh and hard law; it makes a man responsible who has directly forbidden a thing to be done, when that thing is done by a subordinate agent.”<sup>51</sup> Since guilt by agents impugns only the public law validity of the candidate’s election, the corrupt and illegal practices scheme, when it was established in 1883, sought to incentivise compliance with its regulations. This rationale was clearly understood by election judges:

Candidates put forward agents to act for them, and it cannot be permitted that these agents should play foul and the members should have all the benefit of their foul play without being responsible for it.<sup>52</sup>

- 13.51 Since the term “agent” is imprecise, the approach was to start from cases of express authority or engagement of a person to act for the candidate – such as a canvasser or polling agent. However, others, including unpaid volunteers, could fall under the category of someone expressly authorised as an agent by the candidate or their election agent. Finally, even if there was no express authority, agency could still be established as a matter of fact at trial, and could be restricted in scope. For example, a factory owner whose vote and “interest” were solicited by the candidate could be an agent in respect of any acts regarding the

<sup>49</sup> Corrupt and Illegal Practices Prevention Act 1883, s 4.

<sup>50</sup> An exception to this general scheme is Scottish local government elections. See Representation of the People Act 1983, s 159(3) and the Research Paper on Legal Challenge of Elections, para 1.125.

<sup>51</sup> The Westminster election petition 1 O&H 95 by Martin B.

<sup>52</sup> The Staleybridge election petition 1 O&H 66 by Lord Blackburn.

factory owner's employees, but possibly not more widely.<sup>53</sup>

*Employing a corrupt agent*

- 13.52 Section 165 of the 1983 Act effectively adds another vitiating factor that ranks alongside corrupt or illegal practice by or attributable to the winning candidate. This is the engagement by the candidate or their election agent of a person they know or have reasonable grounds to suppose is incapacitated from voting at the election because of a finding of corrupt or illegal practice under either the 1983 Act or the law relating to the Northern Ireland Assembly. When the 1983 Act was enacted, that factor caught all persons guilty of a corrupt or illegal practice; now it only refers to those guilty of personation or voting offences under sections 62A and 62B of the 1983 Act.<sup>54</sup> That, and the singling out of one other type of election, indicates that the logic of the provision has been compromised as a result of subsequent amendments.

***Extensive corruption***

- 13.53 There is a more general way in which corrupt and illegal practices affect the validity of an election. Where corrupt or illegal practices committed (by anyone) to promote or procure the election of a candidate have “so extensively prevailed that they may be reasonably supposed to have affected the result” of the election, that candidate's election is void. They also cannot be elected to fill the consequent vacancy.<sup>55</sup>
- 13.54 While the corrupt or illegal practices need not be personally committed by or attributable to the winning candidate, for the provision to apply the court must conclude that the extensive corruption may reasonably be supposed to have affected the result.
- 13.55 Examples of elections which were annulled for widespread general corruption include three decisions of Commissioner Mawrey QC: in 2004 at local government elections for the Aston and Bordesley Green Wards in Birmingham,<sup>56</sup> in Woking in 2013;<sup>57</sup> and in Slough in 2008. In the last of these, the election commissioner doubted whether it was appropriate to require proof that the widespread corruption affected the result:

This unsatisfactory state of affairs is highlighted in cases where, as here, there are allegations of widespread fraud in the use of postal votes. If a petitioner is able to establish such widespread fraud, ought he to have to prove that there were sufficient bogus votes to account for whatever margin of victory the successful candidate enjoyed? If the winner won by, say 100 votes, ought the petitioner to have to

<sup>53</sup> A compendium of the contemporary case law on agency when the 1883 Act was passed is available in *Parliamentary Elections Corrupt and Illegal Practices Prevention Act 1854 to 1883*, Vansittart Conybeare (1884) at pp 113 to 127. A manuscript in pdf format is readily searchable online. See also *Simmons v Khan* [2008] EWHC B4 (QB) (unreported) at [56] to [59]; *Ali v Bashir* [2013] EWHC 2572 (QB) (unreported) at [71] to [76].

<sup>54</sup> Applied by Northern Ireland Assembly (Elections) Order SI 2001 No 2599, sch 1.

<sup>55</sup> Representation of the People Act 1983, s 164(1).

<sup>56</sup> *Akhtar v Jahan* [2005] All ER (D) 15; *R (Afzal) v Election Court* [2005] EWCA Civ 647.

prove in court that it was likely that there were 101 or more bogus votes, with the result that, if he can only show 99 bogus votes, the successful candidate can thumb his nose at both the petitioner and, more importantly, the electorate?<sup>58</sup>

- 13.56 Reasonable supposition is not certainty, however. In a close election won by a narrow margin, if extensive corruption for the winning candidate is shown, the requirement may be very easily satisfied. Widespread corruption is a flexible term, and courts can interpret the provision so that the more serious the corruption shown, the less will be needed reasonably to suppose that it affected the result. However, Commissioner Mawrey QC also thought that proof of widespread fraud in favour of the winning candidate should result without more in the annulment of the election, which is a different point.

### ***Applications for “relief”***

- 13.57 There is a mechanism by which candidates can proactively seek to be exonerated from innocent or accidental breaches of the law. This has been described in paragraphs 11.10 to 11.13 of chapter 11 on electoral offences.<sup>59</sup>

### **Disqualification of candidate**

- 13.58 Election courts may annul the election of a candidate who is not qualified to take up the seat. For UK Parliamentary elections, this ground of challenge is not expressly spelt out in the 1983 Act. Nevertheless, the election court's competence to annul an election for disqualification of the winning candidate is not in doubt. While an election may only be questioned under Part III of the 1983 Act, the generality of the term “undue election” would appear to cover invalidity by reason of another provision.
- 13.59 Section 6(1)(a) of the House of Commons Disqualification Act 1975 (the 1975 Act) invalidates the election of any person disqualified under that Act, and expressly refers to the election court's jurisdiction under the 1983 Act. Other disqualifications include being under 18 years of age on the day of nomination, or being an alien. Here law outside the 1983 Act can be taken into account by the election court in deciding whether an MP was duly elected.<sup>60</sup>
- 13.60 The way the 1983 Act deals with disqualification for election to local government is much less tortuous; it is expressly provided that local elections may be questioned on the ground that the elected candidate was at the time of the election disqualified.<sup>61</sup>

<sup>57</sup> *Ali v Bashir* [2013] EWHC 2572 (QB) (unreported).

<sup>58</sup> *Simmons v Khan* [2008] EWHC B4 (QB) (unreported) at [36] to [41].

<sup>59</sup> Representation of the People Act 1983, ss 86 (authorised excuse) and 167 (general relief). See also *McCroy v Hendron* [1993] NI 177 (QBD of Northern Ireland) and *Finch v Richardson* [2008] EWHC 3067 (QB); [2009] 1 WLR 1338.

<sup>60</sup> The age qualification derives from the Electoral Administration Act 2006, s17; the disqualification of aliens exists at common law and under the Act of Settlement 1700, s 3, subject to provisions of the British Nationality Act 1981 and the Ireland Act 1949, s 4(1).

<sup>61</sup> Representation of the People Act 1983, s 127(a).



- 13.61 Disqualifications from elected office define the proper holders of that office. In the context of UK Parliamentary elections, these are listed in the House of Commons Disqualification Act 1975. Most disqualifications are for holding public offices which are considered incompatible with membership of the legislature. They are not so much a matter of election law as to do with the law governing the holding of the elected office in question.
- 13.62 The electoral law question is how disqualification of a candidate affects an election. On the face of it, since the disqualified person is unable to take up their seat, the election is frustrated and nullity is a just outcome. But the position is more complicated: a person may be able to free themselves of their disqualification, either upon being elected or between being nominated and the election.
- 13.63 Two other forums also deal with disqualification.
- (1) The House of Commons itself may by order direct, under section 6 of the 1975 Act, that a disqualification shall be disregarded, if it appears that the disqualification has been removed, and it is otherwise proper to do so.
  - (2) Individuals can make an application to the Privy Council for a declaration as to an MP's disqualification. Equivalent remedies exist in elections to the Scottish Parliament and Northern Ireland and Welsh Assemblies.<sup>62</sup>

***The material time at which initial disqualification bites***

- 13.64 Since the election of a disqualified candidate is void, the starting point is that disqualification must be judged at the time of the election. However, there is some support for the view that an election must be annulled if the winning candidate was disqualified at the time of nomination, even if they had divested themselves of the disqualification by the time of the election.<sup>63</sup>
- 13.65 Under the current legislation a returning officer generally has no power to refuse the nomination paper of a disqualified person; the officer's powers are restricted by the election rules to the formal validity of the nomination paper.<sup>64</sup> However, this was not always the case. In early election legislation, the grounds for refusing a nomination paper were not spelt out. Cases arose in which returning officers refused the nomination of a candidate who in their view was patently disqualified. This was the legislative context of the decision in *Harford v Linskey*, which upheld the refusal of nomination papers on the basis of disqualification of the candidate.

<sup>62</sup> House of Commons Disqualification Act 1975, s 7; Scotland Act 1998, s 18; Northern Ireland Act 1998, s 38; Government of Wales Act 2006, s 19.

<sup>63</sup> Electoral Commission consultation paper, *Standing for Election in the UK*, September 2013, citing *Harford v Linskey* [1899] 1 QB 852 and *Harrison v Gupta* (15 March 2007, London Borough of Brent) (unreported).

<sup>64</sup> See Chapter 7 Notice of Election to Nominations, paras 7.28 to 7.32 and 7.61 to 7.64. The exceptions are serving prisoners and the doctrine of sham nominations.

Accordingly, its authority in the modern legislative context is doubtful.<sup>65</sup>

- 13.66 When consenting to their nomination, however, candidates are required to declare to the best of their knowledge and belief that they are not disqualified from taking office.<sup>66</sup> Knowingly making this statement falsely is a corrupt practice, guilt of which annuls the winning candidate's election, though it is the commission of the corrupt practice, not the disqualification at the time of the nomination, which vitiates the election in those circumstances.
- 13.67 In the context of local government elections in England and Wales, one decision holds that the court has jurisdiction to avoid the election of a candidate disqualified at the time of nomination. In *Harrison v Gupta* the disqualification arose out of employment by the council. The Commissioner reasoned that the mischief addressed by the disqualification was the ability of a council employee to use their connection to the council while standing for election. In other words, they were disqualified from campaigning for election, and not merely from taking office once elected. Reliance was placed on *Harford v Linskey*, although the Commissioner said he would have come to the same view without it. No consideration was given to whether the disqualified candidate had knowingly made a false statement in his declaration that he was not disqualified.<sup>67</sup>
- 13.68 In reality, few candidates will be in a position where they do not know about their disqualification when consenting to nomination, but cease to be disqualified at the time of election. Most will either know they are disqualified when declaring they are not, or will be unaware of the disqualification and assume office while still suffering from it. In either case, the election court can only annul the election.
- 13.69 The rationale for disqualification biting at the time of election is that the candidate will be unable to take up their seat. The policy of the current legislation appears to be that disqualification at the time of the election generally vitiates the election; the legislation ignores the possibility of candidates divesting themselves of the disqualification and successfully applying to the House of Commons for relief under section 6 of the 1975 Act. If an election court is seized of an election petition, it must annul the election of the disqualified candidate even if the House of Commons has directed, or might direct, that the disqualification should be disregarded. There are exceptions to this approach. For example, the rules governing elections of Police and Crime Commissioners and to the Northern Ireland Assembly allow candidates a period after the election in which they can

<sup>65</sup> This was emphasised in a different context, sham nominations, in both *Sanders v Chichester* (1995) 139 SJLB 15, not fully reported but transcript available in P Gribble, Schofield's Election Law, loose-leaf, 6th reissue volume 5 p E99 and *R v Bennett, ex parte "Margaret Thatcher"* (unreported, 3 June 1983).

<sup>66</sup> Representation of the People Act 1983, sch 1 r 8(3)(b). Equivalent requirements are in discrete election rules, such as the National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, sch 5 r 9(4)(c). Notably, the prescribed form of consent to nomination for local government election requires the declaration to apply to both nomination and election. Local Elections (Principal Areas) (England and Wales) Rules 2006 SI No 3304, sch 2 form for rule 7 (Consent to Nomination). However the section 65A offence extends to disqualification at the election only: Representation of the People Act 1983, s 65A(1B).

<sup>67</sup> *Harrison v Gupta* (15 March 2007, London Borough of Brent) (unreported) at paras 66 to 74. The example given is vulnerable voters asked to vote for a powerful figure in the housing department and being bullied into compliance.

free themselves of certain disqualifications.

- 13.70 In the context of some disqualifications, the rationale may be that persons suffering from the disqualification should not only be incapable of election but also incapable of standing and campaigning for election while suffering from the disqualification, as was found in *Harrison v Gupta*. The law could be said to cater for this by the requirement to declare at the time of accepting nomination that one is not disqualified. A false declaration to this effect will, however, vitiate the election of a candidate suffering from any type of disqualification, but only if they make the false statement knowingly. The general policy of the current legislation appears to be to require freedom from disqualification both at the point of accepting nomination and of being elected. It offers no means of undertaking, in respect of any type of disqualification, to divest oneself of the disqualification before the election takes place.

### **Transposing the classical grounds of challenge to new types of election**

- 13.71 The classical grounds for challenging an election evolved over the course of the 19th and 20th centuries to fit the first past the post voting system. From 1997 onwards, many new elections were introduced, none of which used first past the post exclusively. Greater London Authority elections were brought under the 1983 Act scheme as concerns legal challenge; separate provision is made for European Parliamentary, Scottish Parliamentary, National Assembly for Wales, Northern Ireland Assembly, Mayoral and Police and Crime Commissioner elections, as well as for local government in Scotland and Northern Ireland.
- 13.72 The task was to adapt the classical grounds of challenge to the new voting systems. We consider how this was done in our detailed research paper. There are some differences across elections. For example, the provision which sets out the consequences of a local election being declared void – that a new election shall be held – is not applied to local government elections in Scotland.<sup>68</sup> Plainly a new election must be held if there is a vacancy, but we have found no provision requiring one. These elections also have a different disqualifications regime.<sup>69</sup>
- 13.73 In relation to two matters in particular – correcting outcomes after a scrutiny, and invalidating elections due to corrupt or illegal practice – some differences of approach have emerged.

### ***The scrutiny and correcting outcomes at party list elections***

- 13.74 Where individuals are running against one another (whether in the first past the post contest within an additional member system election, or at elections using the supplementary vote or single transferrable vote) transposing the jurisdiction to correct the result of an election is straightforward. In general, the discrete election rules employ the same grounds, and the effect is to apply classical scrutiny

<sup>68</sup> Representation of the People Act 1983, s 135.

<sup>69</sup> Representation of the People Act 1983, s 159(3). See Research Paper on Legal Challenge of Elections, currently 1.125, available at <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

principles to the new elections.<sup>70</sup>

- 13.75 But where a party is running for election against other parties and individuals (whether at party list elections for the European Parliament, or the party list component of elections to the Scottish Parliament, National Assembly for Wales, or London Assembly), it appears that the discrete legislation adapts the scrutiny jurisdiction inconsistently.
- 13.76 At Scottish Parliamentary elections, the principles and practices on which the Parliamentary election court acts – including scrutiny – only need be applied to constituency and regional election petitions “so far as appropriate having regard to the different system of election”.<sup>71</sup>
- 13.77 No reference is made at all to these practices in the case of European Parliamentary elections in Great Britain.<sup>72</sup> This prompts the editors of *Parker’s Law and Conduct of Elections* to conclude that the scrutiny jurisdiction has been excluded because of the difference between the regional party list and first-past-the-post systems.<sup>73</sup> Yet section 157(2) – requiring the court to apply, among other things, scrutiny – is applied to the election of London members in Greater London Authority elections and to the election of regional members of the National Assembly for Wales. Both use the party list system.
- 13.78 In our provisional view, scrutiny and judicial correction of results have a role to play in party list elections. There is just as much of a justification for the court being able to trace ballot papers and correct the result as in a first past the post election. All that is different is the magnitude of the task.

### ***Corrupt and illegal practices***

- 13.79 A greater transposition challenge occurs in the context of annulling elections for corrupt and illegal practice. At elections using voting systems where an individual stands, such as the supplementary vote or single transferable vote, transposing the classical rule is straightforward. However, in a voting system where the parties are the candidates, the classical grounds prove difficult. If one of the party’s list candidates is guilty personally or through agents of a corrupt and illegal practice, should that affect that candidate’s election only, or should it taint

<sup>70</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, art 107(2); Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, art 74 and sch 9 (applying Representation of the People Act 1983, s 157(2) to Police and Crime Commissioner elections); Electoral Law Act (Northern Ireland) 1962, s 93(1); European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, reg 96(1); Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 157(2) with modifications to Northern Ireland Assembly elections); Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, art 84 and sch 6 (applying Representation of the People Act 1983, s 157(2) with modifications to Scottish Parliamentary elections).

<sup>71</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, art 84 and sch 6 pts 1 and 2 (applying with modifications Representation of the People Act 1983, s 157(2) to Scottish Parliamentary elections).

<sup>72</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, reg 106.

<sup>73</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, regs 23, 24, 88(3), 100(1), and 107; R Price (ed), *Parker’s Law and Conduct of Elections*, looseleaf, issue 23, para 19.30.

the election of all of the party's list candidates? The current challenge rules for elections using the party list system offer inconsistent answers to this question.

13.80 The party list elements of Greater London Authority and National Assembly for Wales elections apply the classical rule that corrupt and illegal practices vitiate the election, but with differences:

- (1) For the election of London Members of the London Assembly, the 1983 Act is modified so there are two possible options where a party list election is vitiated: the entire election is held void, and must be re-run; or the election of the candidate in question is held void, and the vacancy may be filled by taking the next person on the party's list. In effect, the court has the option as to which remedy to use.<sup>74</sup>
- (2) By contrast, at National Assembly for Wales elections, if the return of any regional member is held void, the election in that region is also void, and a new election must be held.<sup>75</sup> Corrupt and illegal practices operate as vitiating factors for both constituency and regional elections, and so can result in the election being void.<sup>76</sup> Should the election be void because of personal guilt by candidate(s) of a corrupt or illegal practice, they are precluded from standing for the new election, or any election for the duration of the disqualification period. In the case of general corruption at the regional contest, which uses a party list voting system, every list candidate's election is void, and none shall be capable of standing at the new election.<sup>77</sup>

#### EUROPEAN PARLIAMENTARY ELECTIONS

13.81 At European Parliamentary elections there is no provision for the election court to report that corrupt or illegal practices have been committed. Only personation and voting offences serve as vitiating factors. It would be odd if the European Parliamentary election court could not report the commission of corrupt or illegal practices, and this may be a drafting slip. A regional candidate's election will still be annulled if they are convicted by a criminal court of committing a voting offence, the disqualification provisions apply and their seat will fall empty; the ordinary provisions on filling vacancies should apply. The seat will be filled from the party's list or a by-election will be held.<sup>78</sup> There is no provision for a European Parliamentary election to be voided on the ground that general corruption has taken place.

13.82 Similar grounds for challenge apply in Northern Ireland as in Great Britain; out of all corrupt and illegal practices, only the voting offences may ground a European

<sup>74</sup> Representation of the People Act 1983, s 135A.

<sup>75</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, arts 99 and 101.

<sup>76</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, art 109.

<sup>77</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, art 116.

<sup>78</sup> European Parliamentary Elections Regulations SI 2004 No 293, regs 82 to 85; European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, regs 76 to 76I.

election petition in Northern Ireland. Nevertheless, the rules on scrutiny and agency incorporated by section 157(2) of the 1983 Act do apply to European Parliamentary election petitions in Northern Ireland.<sup>79</sup>

#### SCOTTISH PARLIAMENTARY ELECTIONS

- 13.83 For Scottish Parliamentary elections the transposition approach to corrupt and illegal practices at the regional contest is simply to exclude them from the election court's jurisdiction. Corrupt and illegal practices committed in the course of the regional contest at Scottish Parliamentary elections can only be prosecuted through the criminal courts. A conviction will result in disqualification from holding elective office for a specified period, and a requirement to vacate the seat if already elected.<sup>80</sup> The normal provisions on the occurrence of a vacancy will be engaged – the next person on the party's list will be invited to take the seat, or the seat will remain empty until the next election.<sup>81</sup> The crucial difference is that there is no public law mechanism for invalidating the election of candidates for guilt by agents of corrupt and illegal practice, while personal guilt is left solely to the criminal courts. Nor is there any provision for avoiding the election for general corruption intended to procure the election of a particular party, as there is at National Assembly for Wales elections.

#### **Provisional reform proposals as to grounds of challenge**

- 13.84 The legislation concerning legal challenge is voluminous, election-specific, in places out of date, and generally very unclear even to trained lawyers. In our view, the reasons for this complexity are twofold: the historical legacy reflected in the current law and the election-specific approach to legislation. Our provisional reform proposals therefore focus on formulating a modern and clear judicial mechanism for challenging elections, and doing so holistically for all elections.
- 13.85 In its response to our scoping consultation, the Electoral Commission agreed that clarity of the grounds of challenge was a key issue for reform:

For a potential petitioner to establish whether any concern they have about an election is a ground for bringing a petition, they would have to consult the [entirety] of Part III of the [1983 Act]... and to review a large body of case law dating back to the mid-nineteenth century. Few potential petitioners would have access to electoral law guides prepared for electoral practitioners (such as Schofield's Election Law or Parker's Law and Conduct of Elections) and many choose to make contact with either, or both, the Electoral Commission and the Administrative Court Office to seek clarification on whether their concern is admissible.<sup>82</sup>

<sup>79</sup> European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, reg 6(3) and pt 4 in particular regs 79(3) and 96(1).

<sup>80</sup> Scottish Parliament (Elections etc.) Order SI 2010 No 2999, art 84 and sch 6 pt 2 (applying with modifications Representation of the People Act 1983, s 160 to the regional contest at Scottish Parliamentary elections). See also the Research Paper on Legal Challenge of Elections, para 1.138.

<sup>81</sup> Scotland Act 1998, s 10.

<sup>82</sup> Electoral Commission, *Challenging elections in the UK* (September 2012), para 57.

- 13.86 We currently consider the language of “undue election or return” unclear. Neither the oblique reference to the scrutiny jurisdiction in section 157(2) of the 1983 Act, nor the invocation of the principles and practice of House of Commons election committees before 1868, seems to us to be an appropriate or helpful approach to take in 2014. The court’s jurisdiction seems to us to be better expressed as one to correct the result (by declaring another candidate elected) or to annul an election.
- 13.87 As regards annulling an election, Lord Denning’s positive restatement in *Morgan v Simpson*<sup>83</sup> strikes us as preferable to the negative wording of section 23 of the Act, which is apt to mislead. The reference to the election not being substantially in accordance with electoral law is a reference to a fundamental breach such as to render the entire election unsound or, in the words of Lord Justice Stephenson, such as to make the ordinary person condemn it as a “sham or travesty of an election by ballot”.
- 13.88 Less serious breaches of electoral law should, we currently consider, invalidate the election if they can reasonably be supposed to have affected its result. In effect, other than clarifying the election court’s jurisdiction, we are not currently proposing to alter the current approach to breaches of electoral law.
- 13.89 The effect of the current test of materiality for non-fundamental breaches of election law is that the validity of the election is saved where the result is not thereby called in question. This balance was struck in the 19th century when elections were a much less arduous organisational task than now, when the electorate is much greater in size and elections are more numerous. We do not currently regard it as proportionate that every breach of election law should invalidate an election.

**Provisional proposal 13-2: The law governing challenging elections should be set out in primary legislation governing all elections.**

***Defects in nomination***

- 13.90 Particularly difficult problems arise in the nomination context. An incorrect home address in the nomination paper can invalidate the candidate’s election. One court reasoned simply that a bad nomination connotes an undue election; it did not seek to establish a breach of election law that materially affected the result.<sup>84</sup>
- 13.91 A candidate who submits a defective nomination paper breaches election law. The returning officer cannot address this breach because election law confines them to defined grounds for refusing a nomination paper, a rule which we provisionally propose to maintain. The question for the election court, we currently consider, is whether the breach of election law was either committed deliberately (in which case it will be a corrupt practice rendering the candidate ineligible for election) or is a material breach in the sense that it may reasonably be supposed to have affected the result of the election.
- 13.92 For example, a candidate may give a local address as their home address in their

<sup>83</sup> [1975] QB 151.

<sup>84</sup> *R v An Election Court ex parte Sheppard* [1975] 1 WLR 1319, 1325D, by Lord Widgery CJ.

nomination paper, whereas their true home address is outside the area they are seeking to be elected to represent. If the election court finds that the candidate did so knowingly, it will find the candidate guilty of the corrupt practice of knowingly making a false statement in the nomination document. If a knowing misstatement cannot be proved, we provisionally consider that the court should decide whether the misstatement may reasonably be supposed to have affected the result. We appreciate that gauging its effect on the election is difficult. For some voters, local residence may be a relevant factor. For others, party affiliation or the candidate's individual characteristics will count for more. It is also doubtful how many voters would obtain the information about the candidate's residence from the ballot paper. We nevertheless consider that this approach will lead to fairer outcomes than one that invalidates an innocent candidate's election whether or not the misstatement could have affected the election.

- 13.93 We are fortified in this view by the consideration that some of the requirements in relation to nomination are merely part of a filtering mechanism designed to test the seriousness of the candidate, and have no other impact on the outcome of an election. It is for this reason that the editors of *Parker's Law and Conduct of Elections* argue that an elected candidate's defectively subscribed nomination should not invalidate their election. It may also be the historical reason for the exclusion of legal challenge to a returning officer's decision to accept a nomination paper, under rule 12(5) of the Parliamentary Elections Rules and equivalent rules for other elections. Whilst we provisionally propose maintaining that exclusion, it is not an adequate substitute for a rule that clearly requires an election court to investigate the effect on the election (if any) of a defect in a nomination paper, and not to annul the election of democratically elected candidates on purely technical grounds.

**Provisional proposal 13-3: Defects in nomination, other than purely formal defects, should invalidate the election if they amount to a breach of election law which was committed knowingly or can reasonably be supposed to have affected the result of the election.**

***Corrupt or illegal practices***

- 13.94 Corrupt and illegal practices are grounds for invalidating an election where they are committed by or are attributable to the candidate (in the language of the current law, personal guilt and guilt by agents). Extensive corruption or illegal practices also invalidate the election, if they operated to the advantage of the winning candidate and can reasonably be supposed to have affected the result of the election. We provisionally propose to retain and restate this ground of challenge.
- 13.95 Personal guilt is defined as the commission of the offence with the knowledge and consent of the candidate; historically the corrupt practices of treating and undue influence have been excepted from section 159 of the 1983 Act and its predecessors. We find this apt to cause confusion. We therefore provisionally propose defining personal guilt of a corrupt or illegal practice as the commission of the offence by the candidate or with their approval.
- 13.96 Secondly, we provisionally consider that the notion of guilt by agents should be set out more straightforwardly. Guilt by agents vitiates a candidate's election as a result of conduct by others to which the candidate has not given approval. We



provisionally consider that candidates should continue to be answerable for the conduct of those they have chosen to employ for the purpose of promoting their election, whether or not they have specifically approved their conduct. But the relationship that will lead to such conduct being attributed to the candidate is therefore an important matter. Devising a legal definition of the relationship is difficult. It is a matter of fact for the court whether any one person's wrongdoing should be attributed to the candidate. Our provisional view is that the legislation should use the concept of persons whose conduct is attributable to the candidate. We do not think reference to pre-1868 principles is any longer necessary, but that the existing case-law may continue to be considered.

13.97 The election court is primarily concerned with the validity of the election, and the grounds of challenge should focus on that aspect. We therefore provisionally propose that an election court may annul a winning candidate's election if:

- (1) it has found the candidate personally guilty of a corrupt or illegal practice, in the sense that one was committed by the candidate or with their approval; or
- (2) the candidate's election is vitiated by the wrongful conduct of others in consequence of either:
  - (a) the commission of a corrupt or illegal practice by a person whose conduct is attributable to the candidate; or
  - (b) the extensive commission of corrupt or illegal practices at the election to promote or procure the candidate's election, which can reasonably be supposed to have affected the result of the election.

13.98 In cases of personal guilt, we provisionally propose that the candidate should continue to be unable to be a candidate at the fresh for election that follows the annulment of their election and to be subject to periods of disqualification for elected office. In other cases the unseated candidate should not be a candidate at the fresh election but should continue not to be subject to periods of disqualification.

13.99 Our provisionally proposed clarification of the election court's jurisdiction is therefore as follows:

- (1) The election court may *correct the result* of the election by conducting a recount of votes, including reviewing their legal validity at a scrutiny, unseating the winning candidate and declaring another elected as the person having the most lawful votes.
- (2) The court may *annul* the election resulting in the elected candidate being unseated and a new election being called. An election can be annulled on one of three grounds:
  - (a) there has been a breach of electoral law which was either:
    - (i) fundamental; or

- (ii) may reasonably be supposed to have materially affected the result of the election;
- (b) a corrupt or illegal practice was committed at the election either:
  - (i) by the winning candidate personally or through a person whose conduct is attributable to the candidate; or
  - (ii) by anyone else, to the advantage of the winning candidate, where corrupt and illegal practices were so widespread that they could reasonably be supposed to have affected the result; or
- (c) the winning candidate was disqualified from election.

**Provisional proposal 13-4: The grounds for correcting the outcome or invalidating elections should be restated and positively set out.**

***The election of a disqualified candidate***

- 13.100 The election of a disqualified candidate raises further issues. A review of the complex and voluminous grounds of disqualification from elected office (apart from disqualification resulting from electoral malpractice) is outside the scope of this project. It forms part of the rules governing the constitution of elected bodies and not the administration of elections.
- 13.101 That this area causes practical problems became clear after the National Assembly for Wales elections in May 2011, when two Assembly Members were elected despite holding disqualifying offices. A subsequent National Assembly for Wales inquiry into disqualifications made several recommendations, most of which relate to the disqualifications regime.<sup>85</sup>
- 13.102 Our remit in this project is to consider how, as a matter of electoral law, disqualifications should affect the legal validity of an election. Various aspects of the current law strike us as potentially unsatisfactory:
- (1) The election court generally must annul the winning candidate's election if the candidate is disqualified at the time of election. It cannot have regard, for example, to the power of the House of Commons to disregard a disqualification under section 6 of the House of Commons Disqualification Act, though it can have regard to the ability of newly elected Police and Crime Commissioners and members of the Northern Ireland Assembly to divest themselves of a disqualification.
  - (2) However, at least in the context of local government elections in England and Wales, there is authority suggesting that the material time at which to judge disqualifications is the day the candidate was nominated, though

<sup>85</sup> Inquiry on the Disqualification of Members from the National Assembly for Wales, Report of the Constitutional and Legislative Affairs Committee (July 2014), <http://www.assembly.wales/Laid%20Documents/CR-LD9881%20-%20Constitutional%20and%20Legislative%20Affairs%20Committee%20Inquiry%20into%20the%20Disqualification%20of%20Membership%20from%20the%20Natio/CR-LD9881-e.pdf> (last accessed 2 December 2014).

this is not clearly provided in the legislation.<sup>86</sup> The decision in question was based on the candidate's disqualifying office being one that would make it unfair for him to be a contender for election, though this may not be true of all disqualifying offices.

- (3) Candidates are, however, required to declare at the time of nomination that they are not disqualified. Knowingly making a false declaration is a corrupt practice under section 65A of the 1983 Act, but it is not clear to what extent doing so innocently invalidates an election unless it materially affected the result.
- (4) At present, the rationales for any particular office being a disqualification, or the range of persons caught by it, are not always clear. Nor is it clear which disqualifications preclude involvement in electoral campaigns (and so should bite at the time of nomination), and which are merely incompatible with taking up elected office (in which case they should only bite at the time of election).

13.103 In our provisional view, election law should state expressly in primary legislation that disqualification of the candidate at the time of election is a ground for invalidating the election, at least where there is no machinery for the elected candidate to free themselves of their disqualification.

13.104 It seems to us to be arguable that the rationale for annulling the election – that it is frustrated if the candidate cannot take up the seat – does not apply where there is a mechanism for disposing of the disqualification, enabling the candidate to sit in the relevant legislature. It is arguably perverse if the election court must annul the election of such a candidate. We seek consultees' views on whether the election court should have a discretion mirroring that of the House of Commons to disregard minor, technical and lapsed disqualifications or should be able to take into account the fact that the House has done so in a particular case.

#### THE POINT IN TIME AT WHICH DISQUALIFICATION BITES

13.105 In practice most disqualified candidates are likely to know that they are disqualified, and so are currently prevented from effectively accepting nomination. To this extent, disqualifications bite at the time of nominations. In the rare case of a candidate who is unwittingly disqualified at the time of nomination, but not at the time of election, it is currently uncertain whether their election falls to be annulled except in the case of local government elections in England and Wales covered by *Harrison v Gupta*.

13.106 There are theoretically three possible options for law reform: to extend to all elections the rule that disqualification bites at the time of nomination as well as at that of election; to apply to all elections a rule that disqualification only bites at the time of election; or to distinguish between disqualifications that only bite at the time of election and those that also bite at the time of nominations. The third option could be achieved either in legislation or by empowering election courts, if they find that a candidate was disqualified at nomination but not at election, to

<sup>86</sup> Electoral Commission consultation paper, *Standing for Election in the UK*, September 2013, citing *Harford v Linskey* [1899] 1 QB 852 and *Harrison v Gupta* (15 March 2007, London Borough of Brent) (unreported).

decide whether the disqualification was of such a nature as to preclude the candidate standing for election and campaigning. If the preferred option is one that involves disqualification not biting at the time of nomination, it would not appear to make any sense to retain the requirement for candidates to declare themselves not to be disqualified on the nomination form.

- 13.107 We find these issues difficult, and especially welcome consultees' views on the above and any alternative solutions.

**Provisional proposal 13-5: Disqualification at the time of election should be stated to be a ground for invalidating the election for all elections.**

**Question 13-6: Should the election court have a power to consider whether a disqualification has lapsed and, if so, whether it is proper to disregard it, mirroring the power under section 6 of the House of Commons Disqualification Act 1975?**

***Transposing the classical grounds of challenge to party list elections***

- 13.108 By and large, transposing the classical grounds of challenge does not pose great difficulty. The scrutiny jurisdiction and corrupt and illegal practices have, however, proven problematic at elections using the party list voting system. There is inconsistent transposition at present.

**CORRECTING THE RESULT AND THE SCRUTINY**

- 13.109 In our provisional view, there is no reason in principle why an election court should not be able to correct the result of any election by applying scrutiny. We provisionally propose that that aspect of the court's jurisdiction should extend to all elections.

**CORRUPT AND ILLEGAL PRACTICES AT PARTY LIST AND AMS ELECTIONS**

- 13.110 The grounds of challenge based on corrupt or illegal practice by the candidate (whether personally or through agents) and on other widespread corruption are not consistently transposed to party list elections, or the party list components of elections using the additional member system.

- 13.111 We provisionally consider that a uniform rule should apply to elections using a party list system. There are essentially three options:

- (1) The Greater London Authority approach, which gives the court the option of invalidating the entire election, or that of a particular list candidate;
- (2) The Welsh Assembly approach, where corrupt or illegal practice by an individual candidate results in the nullity of the regional election; or
- (3) The Scottish Parliamentary and EU Parliamentary election approach, where corrupt or illegal practices have no, or a restricted, role to play as a ground for vitiating the public law validity of an election.

- 13.112 At party list elections, parties, not candidates, stand for election. If an election court concluded that corrupt and illegal practices were designed to obtain the election of a party as a whole, it would be strange if that did not result in the

validity of the election being affected. However, re-running the election is an inconvenience to other parties' elected candidates. Their parties would have to stand again, even though their and their candidates' conduct was impeccable. The party in whose favour the corrupt and illegal practices were committed is free to field candidates again, and might not lose out.

- 13.113 We are provisionally of the view that the GLA approach is the preferable one. The election court should be able to address corrupt and illegal practice attributable to individual candidates before reaching the drastic conclusion that the entire election is void, thus forcing a London or region-wide contest for all parties, even those which were not the beneficiaries of corrupt or illegal practice. We nevertheless invite consultees to propose any alternative which suitably and effectively deals with corrupt and illegal practice without resulting in the entire election being compromised.

**Provisional proposal 13-7: At elections using the party list voting system, the court should be able to annul the election as a whole, or that of a list candidate, because corrupt or illegal practices were committed attributable to the candidate party or individual, or for extensive corruption.**

#### **THE PROCEDURE FOR BRINGING AN ELECTION PETITION**

- 13.114 The second part of this chapter focuses on the election petition procedure. The procedure for UK parliamentary and local election petitions is governed in part by Part III of the 1983 Act, section 182 of which empowers the Senior Courts in England and Wales to make rules of procedure. Different procedural arrangements exist in the three jurisdictions of the UK. Our research paper sets out the procedural law in detail.<sup>87</sup> What follows is an outline.

#### **The parliamentary election court**

- 13.115 UK Parliamentary election petitions are tried in open court without a jury. The court consists of two judges of the Queen's Bench Division (in England and Wales), the Court of Session (in Scotland), or the High Court or Court of Appeal (Northern Ireland) who are on a rota for the trial of parliamentary election petitions. The election court has the same powers, jurisdiction and authority as the High Court or the Court of Session. It is required to sit in the constituency for which the election was held, unless the High Court finds that special circumstances render it desirable that the hearing should take place elsewhere.<sup>88</sup> Notice of the time and place of the trial must be given not less than 14 days before the day of trial.<sup>89</sup> A House of Commons shorthand writer attends the trial and a transcript of the evidence accompanies the court's certified determination to the Speaker.<sup>90</sup>

<sup>87</sup> Election Petition Rules SI 1960 No 543; Act of Sederunt (Rules of the Court of Session) SI 1994 No 1443 (S.69), Ch 69 and Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) SI 1999 No 929 (S.65), Pt XI; Election Petitions Rules SR 1964 No 347. Electoral Office for Northern Ireland, *Local Government Elections 5 May 2011: Guide for Candidates* (2011), p 4.

<sup>88</sup> Representation of the People Act 1983, s 123(3).

<sup>89</sup> Representation of the People Act 1983, s 139.

<sup>90</sup> Representation of the People Act 1983, s 126.

- 13.116 The petitioner must be a person who voted or had a right to vote at the election in question or who was, or claimed to have had a right to be, a candidate at the election. Curiously, anonymously registered electors cannot challenge elections, presumably on the ground that it would identify them to the public. The MP whose election or return is challenged must be a respondent to the petition, even if their conduct is not challenged, because they are always directly concerned by a petition that could declare the election void. No candidate other than the sitting MP can be made a party without agreeing to be. If the petition complains about the conduct of the returning officer or his staff during the election, the returning officer is deemed to be a respondent.

### **The local government election court**

- 13.117 The local election court determines petitions arising out of elections to principal areas and parish and community councils, as well as Greater London Authority elections.<sup>91</sup> The local election court differs from its parliamentary counterpart as follows.

- (1) In England and Wales and in Northern Ireland, the court is ordinarily staffed by a senior lawyer called an election commissioner.
- (2) In Scotland, the local election court is presided over by the sheriff principal for the area where the local election took place.
- (3) A local election petition must be presented by at least four electors who voted, or had a right to vote at the election, or by an actual or putative candidate.
- (4) The local election court's accommodation is provided by the "proper officer" of the authority for which the election was held, whose expenses of so doing are to be paid by the authority.
- (5) Any report by the court as to corrupt or illegal practice is submitted to the High Court (and by it to the Secretary of State).<sup>92</sup>

### **The petition procedure**

- 13.118 In England and Wales, the petitions procedure is governed by three sets of rules. The first layer is in Part III of the 1983 Act, or equivalent election-specific provisions governing a particular type of election. Next are bespoke procedural rules which, in England and Wales, are contained in the Election Petitions Rules 1960 (the 1960 Rules).<sup>93</sup> These govern parliamentary and local election petitions, and are applied in election-specific provisions, while the European Parliamentary Election Petition Rules 1979 govern EU Parliamentary elections.<sup>94</sup> Thirdly,

<sup>91</sup> Representation of the People Act 1983, s 203.

<sup>92</sup> Representation of the People Act 1983, ss 123(2), 128(1), 130, 131, 134, 145(3), (5) and (7) and 160(3); Electoral Law Act (Northern Ireland) 1962, s 72. We could find no equivalent provision for Scottish local government elections.

<sup>93</sup> Election Petition Rules SI 1960 No 543; examples of discrete applications include National Assembly for Wales (Representation of the People) Order SI 2007 No 236 sch 9; Police and Crime Commissioners Elections Order SI 2012 No 1917 sch 9.

<sup>94</sup> European Assembly Election Petition Rules SI 1979 No 521.

subject to the 1983 Act and the 1960 or discrete petitions rules, the ordinary Civil Procedure Rules apply.<sup>95</sup>

- 13.119 The 1983 Act envisages that a “prescribed officer” shall accept petitions, produce and keep for inspection a list of all election petitions “at issue” (as to which, see further below) and certify the reasonable expenses of witnesses in giving evidence at trial.<sup>96</sup> In England and Wales, that officer is the Senior Master of the Queen’s Bench Division, whose election petitions office is staffed within the Administrative Court Office.

### ***Time limits***

- 13.120 The petition must be issued within 21 days of the date of the return of the writ (which in most cases will be the day after the election) and can be issued at any time up to, but no later than, midnight on the last day.<sup>97</sup> Failure to adhere to the time limit is fatal to the petition. The time limit is relaxed only if corrupt or illegal practices involving the payment of money or other reward are alleged, in which case the petition may be filed within 28 days after the date of the alleged payment or promise.<sup>98</sup>

### ***The formalities of launching an election petition***

- 13.121 The rules make provision as to the form and content of the petition. The petition must be in the form set out in the 1960 Rules and must state the prescribed matters, including the capacity in which the petitioner presents it, the relevant dates for the purposes of time limits, the particular grounds on which relief is sought and a “prayer” for, or formula setting out that relief.<sup>99</sup>

### **SECURITY FOR COSTS AND PETITION “AT ISSUE”**

- 13.122 Sections 136 and 137 of the 1983 Act and the 1960 Rules together lay down some additional steps before a petition is “at issue”, or properly filed and fit to be allocated to a court, listed and tried:
- (1) Within three days of initial presentation of the petition, an application must be made to give security for costs.<sup>100</sup>
  - (2) Within a further five days both the petition and details of the nature and

<sup>95</sup> *Ahmed v Kennedy* [2002] EWCA Civ 1793; [2003] 1 WLR. 1820.

<sup>96</sup> Representation of the People Act 1983, ss 121(4), 128(4), 138(1), 143 and 157.

<sup>97</sup> This is an unusual deadline. Since court administration closes outside business hours, the petition must be left with the Royal Courts of Justice’s main entrance security. See the Queens Bench Guide para. 13.3.7.

<sup>98</sup> Representation of the People Act 1983, s 122(2) and (3).

<sup>99</sup> Election Petition Rules 1960 SI 1960 No 543, r 4.

<sup>100</sup> Election Petition Rules 1960 SI 1960 No 543, r 5. The amounts of security are expressed as a maximum in s 136 of the 1983 Act but the practice is that the maximum is automatically required: see the election petitions office’s form setting out guidance to prospective petitioners, <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/loc002-eng.pdf> (last visited 2 December 2014).

amount of the security given must be served on the respondents.<sup>101</sup>

- (3) Finally, the period within which respondents may object to the adequacy of the security (which is a further 14 days)<sup>102</sup> must have passed without objection or, in the event of an objection, the court must have resolved the objection.<sup>103</sup>

13.123 In England and Wales, the Senior Master, under the 1960 Rules, fixes security for costs.<sup>104</sup> Section 136 of the 1983 Act provides that security for costs shall be such amount “not exceeding £5,000 as the High Court or a judge of the High Court directs on an application made by the petitioner”. The original text of the 1983 Act provided for security for costs to be a fixed sum. In practice we understand the maximums are routinely awarded.<sup>105</sup> By contrast, the Rules of Court in Scotland require security for expenses (costs) to be set by the Lord Ordinary or the vacation judge and not the prescribed officer.<sup>106</sup>

13.124 The reference to security for costs is far from simple. Section 136 of the 1983 Act requires the giving of security for “all costs which may become payable by [the petitioner] to any witness summoned on his behalf or to any respondent”. The security is to be given in “the prescribed manner by recognisance entered into by any number of sureties not exceeding four or by deposit of money” or a combination of both. The reference to paying witnesses’ costs, and to the legal term recognisance,<sup>107</sup> is rigid and outmoded. Similarly, in Scotland, a petitioner must find security for expenses either by consigning a sum of money of an amount fixed by the court or by a bond of caution or bank guarantee.

13.125 Once the above formal steps have been complied with within the time limits, an election petition is properly “at issue”. Rule 19 of the 1960 Rules states that the time limits in steps (1) and (2) above cannot be varied by order. Once a petition is at issue, an application to fix a date for the hearing can be made to a rota judge by the petitioner, respondent, or in the absence of a request from either, by the Senior Master.<sup>108</sup> The prescribed officer is required to list petitions in order of presentation, and to keep a copy of the list for inspection. The 1960 Rules require it to be “conspicuously” displayed in the election petitions office. Section 138 of

<sup>101</sup> Election Petition Rules 1960 SI 1960 No 543, r 6.

<sup>102</sup> Election Petition Rules 1960 SI 1960 No 543, r 7.

<sup>103</sup> Representation of the People Act 1983, s 137.

<sup>104</sup> Election Petition Rules 1960 SI 1960 No 543, r 5(1).

<sup>105</sup> Electoral Commission, *Challenging elections in the UK* (September 2012), part of the response to our Scoping Consultation Paper, paragraph 106, referring to information received by an official of the Administrative Court Office (in effect the election petitions office).

<sup>106</sup> Act of Sederunt (Rules of the Court of Session) SI 1994 No 1443 (S.69), r 69.4.

<sup>107</sup> A recognisance is essentially a conditional undertaking to the state (usually a court) to stand as unsecured surety for - in the present context - the petitioner. A petitioner can offer other persons as sureties against his paying the maximum sum (they entering into recognisances) or can pay into court that sum, or offer a mixture of payment and recognisances. The use of the term continues in s 136 of the 1983 Act and rule 5(2) and (3) of the 1960 Rules. The election petitions office form setting out guidance for petitioners simply uses the term “sureties”.

<sup>108</sup> Election Petition Rules SI 1960 No 543, r 9.



the 1983 Act requires petitions to be tried “so far as convenient” in the order in which they stand in the list.<sup>109</sup>

### ***Mandatory formal requirements***

- 13.126 The courts have, since 1879, consistently regarded compliance with requirements as to the form of the petition, as to security for costs, and as to the manner of and time for service as “mandatory”.<sup>110</sup> This means that failing to comply with them is absolutely fatal to the petition, and the court has no power or discretion to extend time or to dispense with formalities even in exceptional circumstances. In *Absalom v Gillett* the Divisional Court held that the failure to make the successful candidate a respondent and to serve him with a copy of the petition in time rendered the petition incompetent so that it must be struck out.<sup>111</sup>
- 13.127 In *Ahmed v Kennedy*,<sup>112</sup> Simon Brown LJ (as he then was) rejected a technical argument seeking to invoke powers to extend time under the Civil Procedure Rules. The hierarchy was: Part III of the 1983 Act, the 1960 Rules, the Civil Procedure Rules; and finally any residual “practice, principle or rule” of the House of Commons (likely to concern matters such as agency and scrutiny) under section 157(2).<sup>113</sup>
- 13.128 The absolute consequence of failing to comply with procedural requirements has led to some strained interpretations of the provisions. In *Scarth v Amin*<sup>114</sup> a returning officer applied to strike out a petition on the grounds of formal defects and late service. The petitioner had served notice on the returning officer at the local authority premises where he worked in his capacity as a senior local government official. Section 184(1) of the 1983 Act requires service by personal delivery or by post at a person’s last known place of abode in the relevant electoral area.
- 13.129 The High Court departed from decisions in previous cases that section 184 applied mandatorily to service upon returning officers.<sup>115</sup> It held that the returning officer was akin to the proprietor of a business so that he could be served at his place of business under CPR rule 6.5.<sup>116</sup> The court held that it was wrong in principle to adopt an interpretation of the 1960 Rules which placed conditions upon the presentation of valid petitions which were more restrictive than necessary to achieve the certainty that is required, and which obstructed the

<sup>109</sup> Representation of the People Act 1983, s 138; Election Petitions Rules SI 1960 No 543, r 8.

<sup>110</sup> *Williams v The Mayor of Tenby and Others* (1879-80) LR 5 CPD 135.

<sup>111</sup> [1995] 1 WLR 128, 138. Laws LJ had set out part of the decision of the Privy Council in a Malaysian appeal in *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31, 44 to 45 which offered the need for speedy resolution, among others, in support of the mandatory construction of formal rules.

<sup>112</sup> [2002] EWCA Civ 1793; [2003] 1 WLR 1820.

<sup>113</sup> *Ahmed v Kennedy* [2002] EWCA Civ 1793; [2003] 1 WLR 1820 at [23].

<sup>114</sup> [2008] EWHC 2886 (QB).

<sup>115</sup> *Fitch v Stephenson* [2008] EWHC 501 QB; *Ali v Hacques* (unreported, 10 October 2006).

<sup>116</sup> [2008] EWHC 2886 (QB) at [39].

determination of what opinion the voters had expressed.<sup>117</sup>

#### USING STRIKE OUT FOR INFORMALITY AS A FILTER MECHANISM

- 13.130 The *Scarth* case is an example of a respondent – in that case, the returning officer – using a technical formal defect to seek to throw out a petition. Under the current scheme, if a petition is formally sound, the next step is a full merits review and trial. There is no mechanism for parties to test, and the court to determine, the initial merits of a petition, and to filter out unmeritorious claims. In ordinary civil procedure, it is open to respondents to apply for a claim, or part of it, to be struck out for disclosing no reasonable grounds for bringing the claim.<sup>118</sup> Respondents to petitions are limited to applying to strike out for informality. It appears to us that this procedure sometimes masks an argument about the merits of the petition as pleaded, for example by alleging lack of particulars in the petition.<sup>119</sup> By and large, the courts have resisted using informality as an umbrella for considering the merits of cases.

#### COMPATIBILITY WITH HUMAN RIGHTS LEGISLATION

- 13.131 In *Miller v Bull*,<sup>120</sup> the returning officer sought to strike out a petition. The petitioner, who was not legally represented, had presented and served the petition in time. While he had paid the security for costs in time he served notice of the amount and nature of the security on the respondents about a week out of time. He served the Director of Public Prosecutions significantly out of time. The court held that the time limits in rules 5, 6 and 7 of the 1960 Rules (as to when petitions are at issue) remained mandatory under English law. A 2003 amendment to rule 19 empowered the court to extend time in respect of other time limits. For the first time, the court considered whether the mandatory nature of the time limits in rule 19 was contrary to article 6 of the European Convention on Human Rights (the right to a fair trial) and article 3 of the First Protocol to that Convention (the right to free elections).
- 13.132 Tugendhat J considered that there was a public interest in the certain and swift resolution of disputes as to the validity and outcome of elections. He concluded that the mandatory time limits were disproportionate to that legitimate aim, held that he could disregard the relevant part of rule 19, and granted an extension of time to the petitioner.<sup>121</sup> The returning officer did not appeal the decision.
- 13.133 As regards formal requirements in the 1960 Rules there is therefore now scope for extending time under rule 3.1(2)(a) of the Civil Procedure Rules. Failure to comply with mandatory requirements in the 1983 Act itself, however, will still result in the petition being a nullity; that is clear from the judgment of Tugendhat

<sup>117</sup> At [15] to [17], citing art 3 of the First Protocol of the European Convention of Human Rights and art 8 of the Bill of Rights Act 1688.

<sup>118</sup> Civil Procedure Rules, r 3.4(2).

<sup>119</sup> Lack of particularity in the case pleaded by the petition was the respondent's principal argument in seeking to strike out a petition in *Erlam v Rahman* [2014] EWHC 2766 (QB). This argument was rejected.

<sup>120</sup> [2009] EWHC 2640 (QB); [2010] 1 WLR 1861.

<sup>121</sup> *Miller v Bull* [2009] EWHC 2640 (QB), [2010] 1 WLR 1861 at [43], [68] to [82] and [92] to [94].

J, and was confirmed in a recent petition case heard by the Divisional Court.<sup>122</sup>

- 13.134 The reason for the distinction between the 1983 Act and the 1960 Rules is that there is no power under the Human Rights Act 1998 to disapply a provision of primary legislation that is contrary to a Convention right. The mandatory procedural requirements cannot be dispensed with so far as the provisions of Part III of the 1983 Act extend to any given election. However, other elections' provisions which apply the 1983 Act or repeat its provisions, do so in secondary legislation. Logically, therefore, any petitions arising in those elections may involve consideration of the human rights compatibility of provisions which for most elections are in the 1983 Act and thus mandatory.

### ***Procedure for election petitions in Scotland***

- 13.135 UK and European Parliamentary election petitions in Scotland are governed by Part III of the 1983 Act and Part 4 of the European Parliamentary Elections Regulations 2004 respectively, with the necessary changes due to institutional and jurisdictional differences in Scotland. Chapter 69 of the Rules of the Court of Session<sup>123</sup> supplements Part III of the 1983 Act and applies to all national elections, namely UK, EU and Scottish parliamentary elections.
- 13.136 The Parliamentary election court consists of two judges of the Court of Session selected by the Lord President to be on the rota for the trial of election petitions.<sup>124</sup> The same court hears European Parliamentary and Scottish Parliamentary election petitions. The Rules of the Court of Session, while similar to the Election Petition Rules 1960, contain notable differences. The time limit for intimation and service of the petition, and for objection to the form of security for expenses, is not fixed, but set at the judge's discretion.<sup>125</sup> The prescribed officer is the Principal Clerk of Session who accepts petitions, sends them to the returning officer and maintains the list of petitions. The time and place of trial is fixed by the Keeper of the Rolls.<sup>126</sup> The Lord Advocate performs functions in relation to election petition proceedings equivalent to those of the Director of Public Prosecutions.<sup>127</sup>
- 13.137 Local government elections are governed by the Local Governance (Scotland) Act 2004 and statutory instruments made under the Act by the Scottish Ministers.<sup>128</sup> The rules on election petitions in the 1983 Act apply to election petitions challenging Scottish local government elections. The local election courts are presided over by the sheriff principal for the area where the local election took place. The procedural rules governing local government election

<sup>122</sup> *Gartland v Little; Stoddart v Humes* Divisional Court, unreported, 8 May 2014.

<sup>123</sup> Act of Sederunt (Rules of the Court of Session) SI 1994 No 1443 (S.69).

<sup>124</sup> Representation of the People Act 1983, s 123(1); European Parliamentary Elections Regulations SI 2004 No 293, reg 91(1); Court of Session Act 1988, s 44.

<sup>125</sup> Act of Sederunt (Rules of the Court of Session) SI 1994 No 1443 (S.69), r 69.4(1).

<sup>126</sup> Representation of the People Act 1983, s 121(4). Act of Sederunt (Rules of the Court of Session) SI 1994 No 1443 (S.69), rr 69.4, 69.8 and 69.9.

<sup>127</sup> Representation of the People Act 1983, s 204(5).

<sup>128</sup> Local Governance (Scotland) Act 2004, ss 3, 3A and 16.

petitions are set out separately.<sup>129</sup> Though similar to the Rules of the Court of Session, they are more succinct and less demanding. There are no prescribed contents of the application or prescribed form.

### ***Out of date references in procedural rules***

- 13.138 Both the 1960 Rules and Chapter 69 of the Rules of the Court of Session are out of date. They contain rules concerning, and referring to, evidence required for withdrawal of petitions, substitution or death of petitioners, and abatement of petitions, even though the relevant legislation, sections 148 to 153 of the 1983 Act, was repealed in 2001.<sup>130</sup> Furthermore, rule 19 of the 1960 Rules, which states that time limits in rules 5 to 7 shall not be varied, has not been amended since *Miller v Bull*, despite Tugendhat J's decision in that case that it breached Convention rights and fell to be disapplied.

### ***Costs***

- 13.139 Section 154 of the 1983 Act makes provision for the costs of election petition proceedings to be paid as the court determines. The general principle is that the legal costs of the successful party are ordinarily to be met by the losing party to the proceedings.
- 13.140 Section 156 enables the court to make a costs order against someone who is not a party to the petition where corrupt practices have occurred without the knowledge or consent of the respondent to the petition and the respondent has taken all reasonable means to prevent corrupt practices being committed on his or her behalf. Section 133 applies to a petitioner whose petition was vexatious or frivolous, or a respondent found personally guilty of a corrupt practice. These may be ordered to pay the Treasury or the returning officer the cost of holding the hearing. This is in addition to liability for the costs of other parties.

### **COSTS AGAINST NON-PARTIES**

- 13.141 Some successful petitioners have not been able to recover their costs against impecunious respondents. In *R (Conservative and Unionist Party) v Election Commissioner*,<sup>131</sup> a successful petitioner sought an order for costs against the national and local party which had funded the unseated respondent. The election commissioner found he could hear the application, after he had made a determination and report including a final costs order against the respondent, who had become bankrupt. The respondent's party successfully judicially reviewed that decision in the Administrative Court. An appeal to the Court of

<sup>129</sup> Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 SI 1999 No 929 (S.65), pt XI.

<sup>130</sup> Electoral Commission, *Challenging Elections in the UK* (September 2012), [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0010/150499/Challenging-elections-in-the-UK.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf) (last visited 2 December 2014). Timothy Straker QC's response recalled encountering this issue while sitting as a Commissioner in an election petition. Election Petition Rules SI 1960 No 543, rr 14 and 16; Act of Sederunt (Rules of the Court of Session) SI 1994 No 1443 (S.69), rr 69.20 and 69.22 to 69.24. Sections 148 to 153 in Part III of the 1983 Act were repealed by sch 22(1) to the Political Parties, Elections and Referendums Act 2000. Section 158(3) of that Act provides that none of the repeals of Part III have effect in relation to local government elections in Scotland.

<sup>131</sup> [2010] EWCA Civ 1332; [2011] PTSR 416.

Appeal was dismissed.

- 13.142 In part, the reason for these decisions was that the election court was *functus officio*<sup>132</sup> and could not entertain a further application after it had made its final determination and report. Keith J in the Administrative Court and the Court of Appeal nevertheless fully considered the question whether a costs order could be made against a non-party to the election petition. Under the ordinary rules as to costs, it had been established that such an order could be made by the High Court in respect of proceedings before it.<sup>133</sup> However, these developments post-dated the 1983 Act, which provided a complete scheme as to costs, and section 156 set out the circumstances in which a non-party could be ordered to pay costs. There was no room for invoking the ordinary procedural rules.<sup>134</sup>
- 13.143 The scheme for ordering costs under the 1983 Act, originally more generous than the general law, has not kept up to date with legal policy elsewhere. This appears to us to be less a consequence of a deliberate policy than a historical accident.

#### PROTECTIVE COSTS ORDERS

- 13.144 Another recent development in procedural laws has been the ability of claimants to apply, in advance of proceedings, to cap the amount of costs that can be ordered against either party at the end of proceedings. Such “protective costs orders” have featured particularly prominently in environmental cases.<sup>135</sup> In Scotland, the equivalent orders are protective expenses orders. Similarly, these are a relatively recent innovation and have been developed by the courts in a number of cases<sup>136</sup> leading to the promulgation of a new Chapter in the Rules of the Court of Session on protective expenses orders in environmental appeals and judicial reviews.<sup>137</sup>
- 13.145 There is no reason in principle why such orders could not be made in election petitions. In *Pilling v Reynolds* the election court suggested that the case might

<sup>132</sup> A legal principle to the effect that a body that has completed its task in relation to a matter has no power to reopen the matter.

<sup>133</sup> Senior Courts Act 1981, s 51; *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965; Civil Procedure Rules 1999, r 48.2(1).

<sup>134</sup> *R (Conservative and Unionist Party) v Election Commissioner* [2010] EWCA Civ 1332 [2011] PTSR 416 at [37] and [38].

<sup>135</sup> See eg *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

<sup>136</sup> *McArthur v Lord Advocate* 2006 SLT 170, *McGinty v Scottish Ministers* 2010 CSOH 5, *Road Sense and William Walton v Scottish Ministers* [2011] Env LR 22. See also: *William Walton v Scottish Ministers* [2011] CSOH 131; [2012] CSIH 19; [2012] UKSC 44, *Fife Council v Penny Uprichard* [2011] CSIH 77; [2013] UKSC 21, *Doogan v Greater Glasgow and Clyde Health Board* 2012 SLT 1041, *The Scotch Whisky Association and Others, Petitioners* [2012] CSOH 156.

<sup>137</sup> Act of Sederunt (Rules of the Court of Session) 1994 SI 1994 No 1443 (S.69), ch 58A. Despite the somewhat misleading title of the new chapter of the rules, it is clear that they apply only to judicial reviews and statutory appeals challenging decisions which are subject to the public participation provisions of two European directives (2011/92/EU and 2008/1/EC). It appears, however, that these rules are not intended to affect the ability of the Court of Session to grant a similar order in cases falling outside the application of the rules, but this has not been tested in the context of election petitions; see r 58A.1(4).

have been suitable for a protective costs order (though none had been made).<sup>138</sup> However, in the Tower Hamlets election petition case, *Erlam v Rahman*, an application for a protective costs order was dismissed for want of evidence of the petitioners' financial means. The court did not consider the merits of the application in full, but made the observation:

It appears to us that Mr Straker may well be correct in his submission that the protective costs regime is inapt for an election petition. Elections and election petitions are specially provided for with their own particular legislative regime, which includes provision as to costs. By section 154 of the 1983 Act all costs of or incidental to the presentation of an election petition and the proceedings consequent upon it, except as provided for by the Act, shall be defrayed by the parties to the petition in such proportions as the election court or High Court may determine. We understand that a PCO has never been made in an election case. There are, in our view, good reasons why this is so, but it is not necessary for us to decide the point and we do not do so.<sup>139</sup>

***A cost-effective way of determining the merits of a petition?***

13.146 A less formal forum for testing whether breaches have affected the outcome of the election has emerged as a result of the decision of the Court of Appeal in the libel case of *Gough v Sunday Local Newspapers (North) Limited*.<sup>140</sup> After the result of a local election was declared, postal ballot papers were discovered uncounted. The returning officer was advised to apply to the county court, pursuant to what is now rule 53(1)(b) of the local government election rules,<sup>141</sup> for an order seeking inspection and counting of ballot papers.

13.147 The Court of Appeal (determining a claim for libel against a newspaper that had criticised the advice) held that the county court did have a power to make such an order before an election petition was presented. It was desirable, following an admitted error in the counting process, to have recourse to a quick and cost-effective way of establishing whether it was worthwhile to present a petition. Rule 53 permitted an application to be made before any final decision was taken to present a petition, provided that its purpose was to resolve a real doubt as to the correctness of the declared result and there was a real likelihood of an election petition being presented if the inspection showed an incorrect result. The court held that the application was not on notice to the interested parties, but that they could attend and participate if they wished. Furthermore, it was open to a returning officer to make such an application when he or she had made an obvious error.

13.148 It is not clear how often applications are made to the county court under rule 56 of the Parliamentary Elections Rules or its equivalents. An important indication of

<sup>138</sup> [2008] EWHC 316.

<sup>139</sup> *Erlam v Rahman* [2014] EWHC 2766 (Admin) at [41] to [49].

<sup>140</sup> [2003] EWCA Civ 297.

<sup>141</sup> This is replicated in every election rules. For example: Representation of the People Act 1983, sch 1 r 56. In Scotland, the sheriff has the jurisdiction equivalent to the county court's.

the merits of a petition is whether the result of the election was affected by the alleged breach. Furthermore returning officers cannot bring a petition themselves; nor can they correct the result after it has been declared. The Court of Appeal's conclusion that an application was not restricted to cases where a petition had already been presented, however, was based on the perceived need for a less costly procedure for establishing whether mistakes might have affected the result of the election. While such an application cannot affect the outcome of an election, the decision in *Gough* points to a possible inadequacy in the petition process in circumstances where admitted mistakes emerge after the declaration of the result. It also illustrates that the courts attribute to the returning officer a legitimate interest in making such an application, despite having no power to bring a petition.

### ***Finality and exclusivity***

- 13.149 The election petition procedure was devised with finality and exclusivity in mind. It was thought desirable to have a comprehensive process that delivered a certain outcome. Sections 144(1) and 145(1) of the 1983 Act provide that the election court's determination shall be final as to the matters raised in the petition. Its decision is undoubtedly final on questions of fact, but not on questions of law. The court has the power to state a special case on any question of law under section 146(4) of the 1983 Act to the High Court in England and Wales, the Inner House of the Court of Session in Scotland, or the Court of Appeal in Northern Ireland.
- 13.150 The "special case stated" procedure appears to be unique to electoral law. Its historical origin and operation after 1868 are not entirely clear but in practice today it is described as a procedure for appealing on a point of law, which was the view the High Court took in the *Woolas* case.<sup>142</sup> However, the "special case stated" is not always an appeal. The parties themselves may apply directly to the High Court for a special case to be stated and heard by the court under section 146(1) of the 1983 Act "if it appears to the High Court that the case raised by the petition can be conveniently stated as a special case". Under rule 11 of the Election Petition Rules 1960, this is by application notice to the Divisional Court.
- 13.151 If a special case is stated a further right of appeal emerges, but only in England and Wales. Section 157(1) of the 1983 Act provides for an appeal, with the "special leave" of the High Court, on any question of law to the Court of Appeal. No such appeal route exists in Scotland or Northern Ireland where, respectively, the Inner House of the Court of Session and Court of Appeal are the courts to whom cases are specially stated. This is nevertheless a striking asymmetry between the jurisdictions.
- 13.152 An appeal court common to all three jurisdictions would be the Supreme Court of the United Kingdom. Its predecessor, the Judicial Committee of the House of Lords, never featured in electoral law. This is probably because of the link between the judicial committee and the Upper House, which has traditionally refrained from involvement in the House of Commons' own electoral affairs. With the creation of the clearly separate Supreme Court, no such objections persist.

<sup>142</sup> *R (Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin); [2011] 2 WLR 1362 at [25], [29] and [41].

### *Judicial review*

- 13.153 In 1984 a local election court's decision was held to be subject to judicial review, albeit only in exceptional cases where it could be said to have exceeded the court's jurisdiction.<sup>143</sup> In *R (Woolas) v The Parliamentary Election Court*, the Divisional Court held that the Parliamentary election court was also subject to judicial review by the High Court to correct errors of law.<sup>144</sup>
- 13.154 The applicability of judicial review to the decisions of Scottish election courts appears to be untested.

### **Provisional reform proposals as to the challenge procedure**

- 13.155 The UK Parliamentary election court is presided over by High Court or Court of Session judges, and election petitions unfold as a judicial process. Our understanding is that the role of the Directors of Public Prosecutions and, in Scotland, the Lord Advocate, is in practice minor, and that the special provisions about evidence are rarely used.
- 13.156 Nevertheless, the historical characteristics of the election court which we outline have real ramifications. For example, the notion that the election court is not a standing one, and that even the Parliamentary election court is distinct from the High Court whose judges preside over it, has had two consequences.
- (1) First, it led to findings that once its determination and report have been made, the election court is *functus officio* and cannot alter a costs order. Nor could it use powers to make orders for costs against non-parties as the High Court can.<sup>145</sup>
  - (2) Secondly, it led to the decision in *Woolas* that the court was subject to judicial review. In the case of the Parliamentary election court, this is despite the fact that it is presided over in England and Wales by two High Court judges.<sup>146</sup>

### ***The special evidential provisions***

- 13.157 We have noted that the petitions process has a special rule designed to prevent witnesses from invoking the privilege against self-incrimination, and consequently making their evidence in petition trials inadmissible against them in later proceedings (other than perjury). The intent is to promote truthfulness, similar to promoting whistle blowing. We are not convinced that the evidential provisions continue to serve a role in promoting truthful evidence. We would therefore ask consultees, particularly those with experience of election proceedings:
- (1) To what extent are the evidential provisions offering some protection to self-incriminating witnesses relevant in modern petition practice?

<sup>143</sup> *R v Cripps ex parte Muldoon* [1984] 1 QB 686.

<sup>144</sup> *R (Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin); [2011] 2 WLR 1362 at [46] to [56].

<sup>145</sup> *R (on the application of Conservative and Unionist Party) v Election Commissioner* [2010] EWCA Civ 1332; [2011] PTSR 416.

<sup>146</sup> *R (Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin); [2011] 2 WLR 1362.



- (2) Would removing these provisions deter witnesses from telling the truth in petition trials?
  - (3) Might prosecutorial discretion not to prosecute election crimes by those who have effectively blown the whistle at election petition proceedings be a sufficient tool to promote truthfulness.
- 13.158 Depending on the answers to these questions, we would consider retaining a provision whereby the court may direct that a witness should answer questions and that their evidence given under that direction should not be admissible in subsequent proceedings other than for perjury in the instant trial.

***Bringing the petition procedure within the ordinary court system***

- 13.159 It strikes us as something of an anomaly that Parliamentary election petitions are heard by High Court and Court of Session judges who are not, strictly speaking, exercising jurisdiction as judges of the High Court or Court of Session. The roots of this probably lie in the original reluctance of the judiciary to take over election petitions; nowadays these are regarded as a standard type of judicial work. Our provisional proposal is that election petitions should be heard in the High Courts of England and Wales and Northern Ireland respectively and the Court of Session in Scotland. We would propose leaving the necessary internal arrangements to the respective Lord Chief Justices and the Lord President in Scotland, but we envisage an arrangement similar to that in respect of the Administrative Court or the Commercial Court in England and Wales, or to the Commercial Court in the Outer House of the Court of Session, and that the current system of appointing judges to be on a rota to hear election petitions would continue.
- 13.160 At present, a minimum of two High Court judges (in Northern Ireland, judges of the Court of Appeal and, in Scotland, judges of the Court of Session) sit in the election court. While we would not prevent this from continuing in appropriate cases, we provisionally consider that the court may appropriately be constituted by a single judge. If a single judge can determine matters of significance in (for example) judicial review proceedings, we consider the same is the case for election proceedings. As with the Administrative Court in England and Wales, the court could be constituted by two or three judges in appropriate cases.

***Deputy judges in England and Wales and Northern Ireland***

- 13.161 Under the current law, the local election court is constituted by senior lawyers in both England and Wales and Northern Ireland. In Scotland, sheriffs principal hear local government election petitions.
- 13.162 In our view, the default position in England and Wales and Northern Ireland should be that local election petitions are heard in the High Court. Deputy judges should be appointed to hear election petitions so that those currently entitled to hear local election petitions can continue to do so.<sup>147</sup> There should be flexibility as to whether a deputy judge, a full time judge or a two-judge combination of

<sup>147</sup> Some who sit as election Commissioners may already sit or be entitled to sit as deputy judges; our provisional proposal is that they should be appointed to sit as deputy judges to hear election cases, without commenting on their ability to hear other cases as deputy judges.

deputy and full-time judges were allocated to a particular case. If amendments need to be made to the Senior Courts Act 1981 and other statutes to allow suitable practitioners to be appointed as deputy judges to hear election cases, our provisional view is that those should be made. Election Commissioners have amassed considerable election law expertise which should be retained.

- 13.163 Subject to consultees' views, we do not currently propose to alter the position in Scotland where local government petitions are heard by sheriffs principal.

***The legal implications of bringing electoral petitions within the High Courts and Court of Session***

- 13.164 We have noted that the concept of the election court as both distinct from the High Court and a tribunal that arises with a petition and is defunct thereafter has had certain consequences. Chiefly, the procedural tools available to the ordinary courts have not been available to election courts, and the election petition process – despite being designed with finality in mind – is subject to judicial review at least in England and Wales. This will no longer be the case if our proposed structure within the High Court is adopted. The High Court (including a deputy judge) is not subject to judicial review and has available to it a range of procedural tools, which furthermore evolve over time.

ORDINARY PROCEDURAL RULES, SUBJECT TO SPECIAL PROVISIONS FOR ELECTORAL LAW

- 13.165 We consider that the general procedural rules within the UK jurisdictions should be available, subject to special provisions in primary legislation. At present we consider these should include:

- (1) Strict requirements as to time. A key electoral policy is that outcomes should be certain and officials free to discharge the duty of their office. Our starting point is that the present time limit of 21 days should be maintained, subject to clearly defined grounds for extending time. Subject to the views of consultees, we consider that these should be limited to:
  - (a) the grounds of challenge relate to a payment of money or some other reward relating to a corrupt or illegal practice; or
  - (b) the public interest in determining the challenge is such that an extension should be granted, and the delay is not attributable to the conduct of the petitioner.
- (2) We consider that there is a case for a “long stop” time limit beyond which no extension of time should be granted, such as three months. After that period, only conviction of a corrupt or illegal practice through the criminal process can result in a new election.
- (3) A requirement for petitioners to make an application for determination of security for costs. Under the present law, this operates as a filtering mechanism testing the seriousness of petitions, because despite the limits being expressed as maximums, they are treated as fixed fees in practice, as used to be the law. We do not propose changing the law, but emphasise that the court should be free to consider the means of the petitioners and the public interest when setting the level of security, and

not automatically to require the maximum amount. The reference to recognisances, and payment of witnesses are out of date concepts and should be omitted. The court should have a discretion to accept undertakings as surety for the costs instead of payments into court.<sup>148</sup>

- (4) Special provisions as to costs. We consider that the current powers of the court to make orders for costs against vexatious claimants, unfounded allegations or unfounded objections can be considered as part of the ordinary principles for awarding costs. However, we would preserve provisions enabling the court to make costs orders against persons guilty of corrupt or illegal practice under section 156 of the 1983 Act. The general procedural rules of the courts will govern the making of protective costs orders or protected expenses orders.

#### FILTERING OUT UNMERITORIOUS CLAIMS

13.166 At present, there is no scope for objecting to the arguable merits of a petition – only its informality. Either a petition is defective in form, and in its entirety null and void, or it is formally good and (irrespective of its merits), must proceed to full trial. Since the 1983 Act was passed, more flexible means have been employed by the civil courts to strike a balance between access to justice and security from speculative claims. Housing the challenge process within the ordinary court system means that challenges to elections can benefit from the more proactive judicial case-management.

13.167 The reform question is whether there should be some express power in electoral law to apply to strike out a petition or part of it for being without merit. The alternative is the general power in ordinary procedure for any party to apply to the court for an order striking out a pleading in whole or in part, whether it is a claim or a defence, if it discloses no reasonable grounds, is an abuse, or fails to comply with a rule. Our provisional view is that the general procedural power is adequate, subject to its expression in some special or additional part of the procedural rules in each jurisdiction of the UK that deals specifically with electoral petitions.

#### LIBERALISING STANDING TO BRING PETITIONS

13.168 Under the present law, a candidate at the election (or someone who was denied candidacy because their nomination was refused) and a voter (or someone who was denied the vote) can bring an election petition. We consider that this is right in principle. Four electors are required to launch a local electoral petition. Perhaps four electors deciding to bring a challenge is a sign of likely merit, and a single elector is more likely to bring an unmeritorious challenge. This is a formalistic approach to the problem of achieving security and certainty in outcomes. We consider procedural flexibility (such as the power to strike out a petition for want of merit) is a better tool for dealing with this issue. In principle, we provisionally consider a single elector should be able to bring a challenge whatever the election. We consider that anonymous electors should be able to bring a challenge, if they waive anonymity.

<sup>148</sup> This is already the case in Scotland. See para 1.274 above.

## THE RETURNING OFFICER'S STANDING TO BRING PETITIONS

- 13.169 Under the current law, the returning officer is only ever a respondent to petitions if the petition complains of the officer's conduct. In reality, however, returning officers have an interest in ensuring that the election they conducted was lawful. If they suspect, after declaring the result, that an irregularity has occurred, they are powerless to intervene and have to take a passive role, awaiting a candidate or elector formally challenging the election.
- 13.170 While a less formal, more cost-effective way for a returning officer to investigate whether an irregularity has affected the result emerged after *Gough v Sunday Local Newspapers (North) Limited*,<sup>149</sup> any petition must be commenced by someone else. Our provisional proposal is that the returning officer should be able to bring petition proceedings. The conduct of the election is their responsibility and if they consider that there has been a breach of electoral law or irregularity, they should be able to bring proceedings to correct the result of the election or annul it.
- 13.171 Furthermore, we consider that there should be special provision for the returning officer to bring a preliminary application to test whether a breach of electoral law affected the result of the election, at which votes can be counted with due regard to the breach. If, at the end of this exercise, the result is shown to have been affected, the court should be able to deal expeditiously with the validity of the election at full proceedings, subject to any objections by the winning candidate as to either the materiality of the breach or whether there was a breach of electoral law.

### *Rights of appeal*

- 13.172 There is no appeal from the decision of the election court, only the possibility of stating a case for the High Court or the Inner House of the Court of Session. There is an asymmetry under the current law as to appeals from cases specially stated to the High Court. In England and Wales, there is potentially an appeal to the Court of Appeal. In our view, there should be a right of appeal on a point of law to a single Court. In England and Wales the current route of appeal from the High Court to the Court of Appeal can be retained, while in Northern Ireland the same route can be introduced. As to Scotland, legal challenges would be heard by the Outer House of the Court of Session, and the appeals by the Inner House.
- 13.173 We consider that the above should serve to simplify and clarify the procedure for challenging elections, while preserving the balance between access to the courts and the certainty of electoral outcomes. Bringing the material together, our provisional proposals are as follows.

**Provisional proposal 13-8: Legal challenges should be heard in the ordinary court system in the UK, with a single right of appeal on a point of law.**

**Provisional proposal 13-9: Local election petitions in England and Wales should be heard by expert lawyers sitting as deputy judges.**

<sup>149</sup> [2003] EWCA Civ 297; [2003] 1 WLR 1836 at [41] to [50], by Lord Brown.

**Provisional proposal 13-10: Challenges should be governed by simpler, modern and less formal rules of procedure allowing judges to achieve justice in the case while having regard to the balance between access and certainty.**

**Provisional proposal 13-11: Returning officers should have standing to bring petitions, including a preliminary application to test whether an admitted breach affected the result.**

### **Public interest petitions**

- 13.174 A leading commentator on the Victorian reforms made the following remark as to the magnitude of the task faced by election judges.

The election judges were required to try as a private lawsuit between petitioner and respondent what was really a quasi-criminal proceeding in which the constituency in particular and the public generally were interested. They could not go beyond the charges made in the petition, and if the petitioners wished at any stage to withdraw their case, they could do so on payment of costs. If the judges thought that they had not unearthed the full facts their only remedy was to report to the Speaker that corrupt practices prevailed extensively.<sup>150</sup>

- 13.175 This design flaw was overcome by the early election courts' busy policing of elections, in consequence of a greater willingness and ability of private individuals, particularly party candidates, to bring challenges. Over time, the inquisitorial and criminal functions of the court have either been scaled back or fallen into disuse. It appears that even party candidates are less able to bring challenges. Legal costs and the uncertainty of being able to recover one's costs if successful and of establishing the merits of any petition in advance, are strong disincentives to sue. The overall sense from our Advisory Group is that many strong challenges never see the light of day because of such considerations.
- 13.176 There remains an inherent tension between the private character of the petition process and the public importance of electoral outcomes. In response to our scoping consultation paper, Timothy Straker QC, who regularly advises, acts and adjudicates on election matters, put the issue as follows.

There are (at least) two interests, which are not readily reconciled. There is the interest of the population as a whole in securing an electoral system in which they can have faith. There is the interest of individuals (often supported by parties) who want (quite often desperately) to be elected and who may want to question the election of others.

However, there is an inherent tension in the mechanism (derived from nineteenth century parliamentary practices) designed to police elections. An election petition is both a private action and a public

<sup>150</sup> C O'Leary, *The Elimination of Corrupt Practices in British Elections 1868-1911* (1961) p 47. For references to the Royal Commissions and the need for inquisitorial powers, see pp 31 and 39.

control mechanism but the public benefit [namely, maintaining the integrity of elections] can only occur if a private action is brought. It is apparent that there is intended to be a public benefit (for example petitions have to be tried locally, public announcements, the DPP can attend, leave required to withdraw, etc) yet the chance of a petition being brought cannot be relied upon to police (for example) widespread abuse of absent voting.

13.177 How is the public interest in free and fair elections, and trust in outcomes, to be maintained? Leaving it to the initiative of motivated private individuals is only a partial answer. Similarly, the fact that corrupt and illegal practices are subject to criminal prosecution does not address the right of aggrieved candidates and electors to bring challenges alleging that the election is unsound for a reason other than the personal commission of a corrupt or illegal practice by the winning candidate.

13.178 If a person is unable to bring and fund a formal legal challenge, they may expect to be able to turn to some public authority to consider from the point of view of the public interest whether the election was conducted lawfully. That authority may be able to investigate, and to bring an election petition in the public interest. In our view, there is currently only one UK-wide body which has the public profile and independence to take on the role of bringing election petitions in the public interest: the Electoral Commission. However, there may be arguments against the suitability of this role vesting in the Electoral Commission, four of whose Commissioners are put forward by political parties. We would welcome suggestions as to other possible candidates for this role.

13.179 In other areas of public law, statutory bodies with functions to protect the public interest have powers to investigate breaches and to bring proceedings, or endorse challenges brought by private individuals.

(1) The Information Commissioner has a power to assist any person, upon application, who is an actual or prospective party to a case relating to data processed for special purposes defined under the Data Protection Act 1998. The Commissioner must consider whether and to what extent to grant assistance, but may only grant it if the matter is one of substantial public importance. The assistance may include bearing the costs of legal advice and representation. Where assistance is given in relation to the cost of proceedings, it must cover any liability to pay adverse costs, while costs paid to the applicant must first meet the Commissioners' expenses in providing the assistance.<sup>151</sup>

(2) The Equality and Human Rights Commission has the power to institute or intervene in proceedings, by judicial review or otherwise, where it appears to the Commission that the proceedings are relevant to any matter in relation to which the Commission has a function. It may rely on breaches of the European Convention on Human Rights by public authorities in such proceedings, and for that purpose need not be a victim or potential victim of the unlawful act, so long as there will or would

<sup>151</sup> Data Protection Act 1998, ss 3 and 53 and sch 10 paras 2 and 4 to 6.

be one or more victims of that act.<sup>152</sup>

*Defining the public interest in policing elections*

- 13.180 We see the public interest petitioner role as a residual one. It involves stepping in to plug the gap in the system for policing elections: its reliance on private individuals to bring actions before the courts. A legitimate concern is that individuals who have the means to bring a challenge, or are backed by political parties, may seek to get a “free ride” from the public purse. We welcome suggestions by consultees as to how such concerns might be answered or assuaged.
- 13.181 A closely related principle is that the public interest petitioner should intervene only when a threshold requirement is satisfied. There must be a sufficient degree of concern about the outcome or validity of the election, having regard to:
- (1) the nature and credibility of the allegations made in relation to the election complained of, particularly any allegations of wrongdoing by candidates or administrators, or of widespread electoral fraud; and
  - (2) the risk of loss of public confidence in the fairness of the election or correctness of its outcome.
- 13.182 We welcome consultees’ views on these threshold criteria for a public interest petition being brought, as well as any supplemental considerations.

*The form that a public interest petition might take*

- 13.183 Provided the threshold is met, we see two forms that the public interest petition might take.
- 13.184 The first is to grant the public interest petitioner a power to commence petition proceedings – effectively granting them standing to commence petitions like candidates, voters and, we provisionally say, returning officers. Since the Electoral Commission is the obvious candidate for the role of public interest petitioner, it is worth noting that the Australian Electoral Commission has standing to bring petitions, although that should be seen in the context of its executive role in centrally administering federal elections. In that sense, it is the returning officer.
- 13.185 This option has simplicity to commend it. There is also the experience of the Equality and Human Rights Commission to consider, as well as the related (but different) power of the Information Commissioner to assist others in enforcing their rights. It is therefore not a completely novel option in the context of plugging the gap between private mechanism of challenge and public interest in enforcement.
- 13.186 On the other hand, elections are a substantially different context from discrimination or breach of data protection rules. Elections confer public power, and it is vital that a body such as the Electoral Commission continues to be seen to be a neutral arbiter of elections and access to democracy. Exercising a public

<sup>152</sup> Equality Act 2006, s 30.

interest petition function might lead to accusations, or the perception, that the Commission's actions are affected by political considerations, or in fact affect the balance of political power. Winning candidates and their parties may also be concerned about facing a publicly funded challenge to their election. A converse risk is risk aversion in using the power to bring petitions, in order to avoid such concerns.

- 13.187 These considerations lead us to canvass a second option. A public interest petition may only be brought after an assessment of the public interest threshold by independent legal or electoral experts appointed by the Commission. This would be a statutory panel with a specified membership, set out in law in a similar way to the Monetary Policy Committee or fitness to practise panels for healthcare professionals. We have in mind experienced lawyers, or senior electoral administrators. These would investigate the merit of applications seeking a public interest petition, and have the requisite powers to do so.
- 13.188 A public interest petition should be sought on application by individuals who would have standing to bring a petition. Applications should conform to guidelines designed to elicit the point of the complaint and the available evidence in support of it. These should be designed to channel complaints so that those which are without merit are considered by the independent expert.
- 13.189 If the independent expert concludes that the threshold for doing so is met, the Electoral Commission would be obliged to initiate an election petition. This would effectively shield the Electoral Commission from the concerns outlined above because the decision that the public interest justified bringing a petition would be made by an independent and expert person.
- 13.190 A public interest petition would be the same as any other petition, save for one consideration. The evaluation of whether the thresholds have been met for a public interest petition may take some time, as might the appointment of an independent investigator if our second option is preferred. We therefore consider that the court should have a power to extend time (subject to a long stop) for bringing an election petition brought in the public interest, if the reason for the delay was assessing whether the case met the threshold.

*Our questions as to public interest petitions*

- 13.191 We have outlined the foregoing as materials to suggest options to consultees for meeting the gap between the private character of the election petitions process and the public nature of concerns over the conduct of elections. We provisionally propose that this gap should be addressed by way of sufficient representation of the public interest in elections within the challenge mechanism. We accordingly ask consultees whether a public interest petitioner mechanism is desirable, and if so how it should operate.

**Provisional proposal 13-12: There should be a means of ensuring sufficient representation of the public interest in elections within that judicial process.**

**Question 13-13: Should there be a public interest petitioner with standing to bring election petitions?**



**Question 13-14: What should the threshold criteria be for bringing a petition in the public interest?**

**Question 13-15: How, if at all, should the law tackle the issue of individuals getting a “free ride” by challenging elections through the public interest petitioner?**

**Question 13-16: Should the decision to bring a public interest petition be subject to independent and expert assessment of the merits of the case, or left entirely at the discretion of the petitioner?**

### **Informal complaints**

- 13.192 The focus of this chapter has been on legal challenge to elections. This does not seek to vindicate minor complaints about the electoral process that do not affect the outcome of the election. Nor is it concerned with maladministration short of breach of electoral laws. Election petitions are not designed to deal with such matters. They are fundamentally concerned with the validity of the election or correctness of its outcome.
- 13.193 The orthodox view is that councils’ internal complaints mechanisms do not extend to complaints about the conduct of the returning officer, the registration officer, or their staff by reason of their status as independent statutory officers appointed by or under the 1983 Act. The Local Government Ombudsman in England and Wales similarly takes the view that he cannot investigate complaints concerning elections or electoral registration. There is no express legislative exclusion of electoral administration from the jurisdiction of the Ombudsman; rather the conclusion has been reached that complaints about electoral administration do not concern the exercise by local authorities of their administrative functions.<sup>153</sup>
- 13.194 The Association of Electoral Administrators (“the AEA”) in a 2010 report criticised the election petition process for being too costly and taking too long. It is not a proportionate way for dealing with the range of complaints that administrators encounter, which might allege errors which do not materially affect the outcome. The Association recommended that a first level complaints system be put in place with more serious complaints being resolved through the legal system. That would establish a clearer and local system of accountability and challenge.<sup>154</sup>
- 13.195 We agree, and provisionally propose that there should be a system for dealing with informal complaints that do not seek to affect the election or correct its result. We consider that returning officers should, in the first instance, be able to deal with complaints themselves and to investigate them to the extent they can and respond in writing. If the complainant has an outstanding grievance, we welcome

<sup>153</sup> Local Government Ombudsman, *What actions are we able to investigate?* <http://www.lgo.org.uk/guidance-on-jurisdiction/what-can-we-investigate/> (last accessed 2 December 2014). Local Government Ombudsman, *Fact sheet 6: Complaints about elections and electoral registration*, <http://www.lgo.org.uk/downloads/fact%20sheets/923-O6-elections.pdf> (last accessed 2 December 2014). Local Government Act 1974, ss 25 and 26.

<sup>154</sup> The Association of Electoral Administrators: *Beyond 2010: the future of electoral administration in the UK, July 2010* at pp 19 to 22. Available at [http://www.aea-elections.co.uk/downloads/reports/aea\\_election\\_report\\_final\\_PUBLICATION.pdf](http://www.aea-elections.co.uk/downloads/reports/aea_election_report_final_PUBLICATION.pdf) (last accessed 2 December 2014).

consultees' views on the proper forum for addressing any subsisting complaints. It seems to us the following options are available:

- (1) Escalation to the local government ombudsman in England and Wales, the Scottish Public Services Ombudsman or the Northern Ireland Ombudsman;
- (2) Use of a scheme whereby adjacent returning officers consider complaints, or the directing officer at European Parliamentary elections considers complaints which are not against their service; or
- (3) Consideration by the Electoral Commission.

13.196 Whatever the venue of the complaint, the focus should be on learning lessons from maladministration and meeting the voter's concerns. The paramount consideration is to gain or regain voters' confidence in the outcome of the election, the integrity of the election process, and the ability of electoral administrators to learn from mistakes.

**Provisional proposal 13-17: There should be an informal means of reviewing complaints about elections which do not aim to overturn the result.**

# CHAPTER 14

## REFERENDUMS

### INTRODUCTION

- 14.1 This chapter covers national referendums, local government referendums and parish polls. It summarises the legislation currently governing national and local referendums, including parish polls. It also makes provisional proposals as to how our provisional reform proposals for election law should affect them.
- 14.2 A national referendum is a poll of the electorate at national level which asks a question on a particular issue or issues. National referendums have been used on 12 occasions since 1973 to decide matters of constitutional importance, in particular devolution. They are part of the electoral landscape and use the infrastructure for electoral administration with some modifications.
- 14.3 Local referendums conducted under statute are examples of direct local democracy. There are three types of local referendums, concerned with local governance (such as the introduction of mayoral elections), increases in council tax and local planning decisions.
- 14.4 The differences between elections and referendums include the fact that referendums involve deciding questions or issues rather than electing people to office and that they are irregular events. As a matter of their administration, however, referendums raise similar issues to elections: what is the franchise? How is entitlement to vote to be determined? What will appear on the ballot paper? Who will campaign for one outcome or another? How is campaign spending and other conduct to be regulated? Who runs the poll?
- 14.5 Parish polls are a means by which decisions within the competence of a parish or community council may instead be taken by the parish electorate. In some cases they are referendums in all but name, since the range of decisions that may be taken include, for example, the election of a council chairman or a co-option to the council, they can have strong resemblance to an election.

### THE EXISTING LEGISLATIVE FRAMEWORK FOR NATIONAL REFERENDUMS

- 14.6 Part VII of the Political Parties, Elections and Referendums Act 2000 (“the 2000 Act”) makes provision for national referendums. It applies to referendums held either throughout the UK, or in any of England, Northern Ireland, Scotland, Wales or in a region in England. A referendum is defined as a referendum or poll held under an Act of Parliament, on one or more questions or propositions specified in that Act, or an order under it.<sup>1</sup>
- 14.7 Primary legislation is always required to instigate a national referendum. Along with providing for a referendum to be held on a particular question, the “instigating Act” (as we call it for brevity) sets out detailed conduct rules for the referendum. An instigating Act could depart from the provisions of the 2000 Act, as did the recent Scottish Independence Referendum Act 2013 (“the 2013 Act”),

passed by the Scottish Parliament following the grant to it of special powers. Nevertheless, the 2013 Act largely copied the provisions in the 2000 Act.

### **The 2000 Act provisions**

- 14.8 The 2000 Act lays down a framework governing referendums, regulating in particular the referendum campaign. It also lays down a procedure for formulating the referendum question.<sup>2</sup>

#### ***The referendum question***

- 14.9 The referendum question must be set out in the instigating Act, or an order under it. The 2000 Act lays down a process for assessing the wording of the question. The Secretary of State must consult the Electoral Commission on its proposed wording and the Electoral Commission is under a duty to consider that wording and to publish a statement explaining its views on the intelligibility of the question as soon as reasonably practicable. It must assess the intelligibility of the question in any way that it sees fit. The Electoral Commission's question assessment is a detailed document, and produced after extensive public consultation and research.<sup>3</sup>
- 14.10 Although the Electoral Commission's recommendations are merely advisory, its question assessments have tended to lead to changes in the wording of referendum questions. For example, changes were made to the Scottish independence, Welsh devolution, and Parliamentary voting system referendum questions following proposals made by the Commission.<sup>4</sup>

#### ***The referendum period and timetable***

- 14.11 Part VII of the 2000 Act is concerned with regulating referendum campaigns during a "referendum period". The referendum period is a matter for the instigating Act, but if an order is made by the Secretary of State applying the 2000 Act provisions to the proposed referendum, section 102 provides that the referendum period is to be such period, not exceeding six months, as is specified in the order.<sup>5</sup>
- 14.12 A minimum referendum period of ten weeks is laid down, made up of 28 days between the start of the referendum campaign and polling day, preceded by a 28 day period for applying to be a designated campaign organisation and a 14 day period for designating campaign organisations.<sup>6</sup> The Secretary of State can vary this timeline by changing the designation periods of 28 and 14 days,<sup>7</sup> but the

<sup>1</sup> Political Parties, Elections and Referendums Act 2000, s 101.

<sup>2</sup> Political Parties, Elections and Referendums Act 2000, s 101(4).

<sup>3</sup> Political Parties, Elections and Referendums Act 2000, s 104. Electoral Commission, *Our approach to assessing the intelligibility of referendum questions* (November 2009).

<sup>4</sup> Electoral Commission, *Advice of the Electoral Commission on the proposed referendum question* (January 2013).

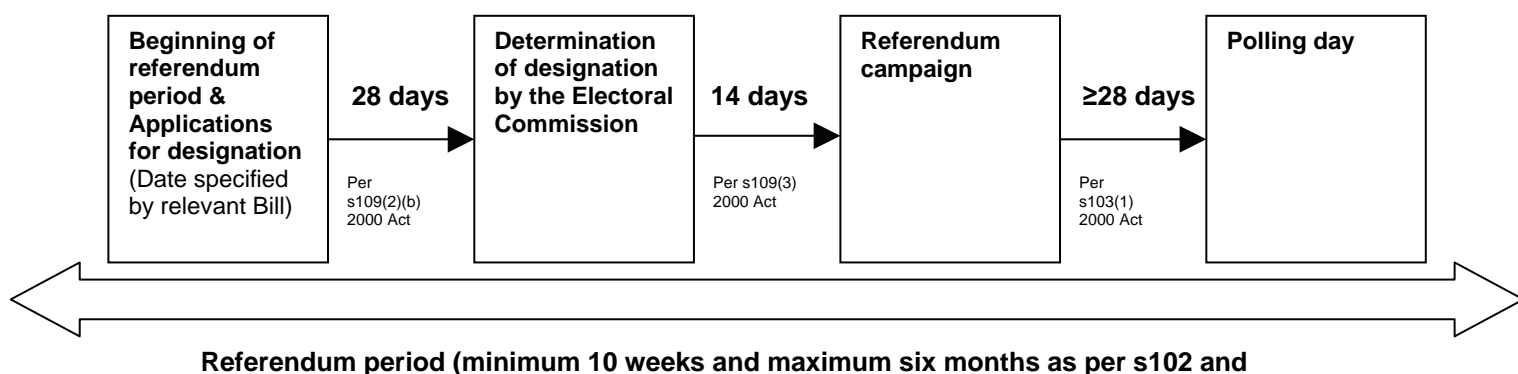
<sup>5</sup> Political Parties, Elections and Referendums Act 2000, s 102(4).

<sup>6</sup> Political Parties, Elections and Referendums Act 2000, s 103(1) and 109(2) and (3).

<sup>7</sup> Political Parties, Elections and Referendums Act 2000, s 109(6).

campaign period of at least 28 days cannot be varied in this way. Figure 1 below sets out the minimum timetable.

Figure 1: referendum timetable



- 14.13 The Electoral Commission has recommended that the statutory timetable be extended from 10 to 16 weeks. This would not affect the current 28 day designation application period or the current 14 day designation decision period, but would provide 70 days between the final date for the designation decision and polling day.<sup>8</sup>

#### **Campaign regulation**

- 14.14 The main difference between referendums and other kinds of national elections is that at referendums there are no candidates: there are campaigners for outcomes. The 2000 Act regulates campaigners according to who they are. Anyone may campaign for a particular outcome at a referendum. However, an individual or group campaigning at a referendum is subject to a spending limit of £10,000 in respect of referendum expenses.<sup>9</sup>

#### PERMITTED PARTICIPANTS

- 14.15 In order to spend more, a campaigner must obtain “permitted participant” status from the Electoral Commission. Registered political parties who declare themselves for a particular outcome are permitted participants, and their spending limit for the referendum is calculated according to their vote share at previous elections. Other persons and organisations are subject to a spending limit of £500,000. The Commission is obliged to maintain a register of permitted participants.<sup>10</sup>

#### DESIGNATED CAMPAIGN

- 14.16 Permitted participants may apply to be designated as lead campaign by the Electoral Commission. If there is more than one applicant, the Commission must designate an applicant who it considers adequately represents the particular outcome. Only one participant can be designated per outcome, and the

<sup>8</sup> Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011), p 107.

<sup>9</sup> Political Parties, Elections and Referendums Act 2000, s 117.

<sup>10</sup> Political Parties, Elections and Referendums Act 2000, ss 105 to 107, 117 and 118, and sch 14 para 1.

Commission cannot appoint a designated organisation for one outcome if there are no applicants for designation as lead campaigner for the other outcomes. Designated organisations have a spending limit of £5 million, and are able to access certain practical benefits, such as the exclusive right to make campaign broadcasts. Designated organisations also have a right to a financial grant from the Electoral Commission. For national referendums, the Commission must make a grant to each designated organisation of an amount not exceeding £600,000. Each organisation must receive the same amount.<sup>11</sup>

- 14.17 If no permitted participant supporting one outcome decides to apply for designation, this would prevent a participant for other outcomes from being designated.<sup>12</sup> Without a designated campaigner, awareness of the referendum could be stifled and voter turnout adversely affected.<sup>13</sup> In order to mitigate this, the instigating Act will generally supplement the Electoral Commission's powers under the 2000 Act with a discretionary power to provide information to voters on the referendum options.<sup>14</sup> Notably, the 2013 Act enabled the Electoral Commission to designate an organisation for one outcome in the Scottish independence referendum without having to do so for the other.<sup>15</sup>

### ***Financial control***

- 14.18 The 2000 Act defines "referendum expenses" in a similar manner to the definition of "election expenses" under the 1983 Act.<sup>16</sup> Certain property or services supplied to designated organisations free of charge or at a reduced cost give rise to "optional expenses".<sup>17</sup>
- 14.19 Referendum expenses are channelled through a single person, just as election expenses are channelled through the election agent. They can only be incurred by or on behalf of a permitted participant if they are incurred with the authority of the "responsible person", or a person authorised in writing by the responsible person.<sup>18</sup> To incur expenses otherwise, without reasonable excuse, is an offence.<sup>19</sup> There are also restrictions on who can make donations and loans to campaigners. Permitted participants and designated campaigns must send a spending return accounting for expenses and donations to the Electoral

<sup>11</sup> Political Parties, Elections and Referendums Act 2000, ss 108, 109 and 110, and sch 12 para 1. It is notable that the Electoral Commission did not have any duty or power to grant monies to designated organisations campaigning for the Scottish independence referendum.

<sup>12</sup> As occurred prior to the Welsh devolution referendum in 2011; see Electoral Commission, *Report on the referendum of the law-making powers of the National Assembly for Wales* (June 2011).

<sup>13</sup> Electoral Commission, *Report on the referendum of the law-making powers of the National Assembly for Wales* (June 2011). Electoral Commission, *Referendum on the voting system for UK parliamentary elections: Report on the May 2011 referendum* (October 2011).

<sup>14</sup> See, for example, Parliamentary Voting System and Constituencies Act 2011, sch 1 para 9(2).

<sup>15</sup> Scottish Independence Referendum Act 2013, sch 4 para 6.

<sup>16</sup> Political Parties, Elections and Referendums Act 2000, s 111.

<sup>17</sup> Political Parties, Elections and Referendums Act 2000, s 112.

<sup>18</sup> Political Parties, Elections and Referendums Act 2000, s 113.

<sup>19</sup> Political Parties, Elections and Referendums Act 2000, s 113(2).

Commission.<sup>20</sup>

### ***Controls on publications***

- 14.20 The 2000 Act restricts, subject to certain exceptions, publication by central or local government of material relating to the referendum in the 28 day period before the poll. Only designated campaigns may make a referendum campaign broadcast.<sup>21</sup>

### **IMPRINTS**

- 14.21 The imprint offence under section 110 of the 1983 Act is replicated in the 2000 Act. The definition of “referendum material” in the 2000 Act is broader than that of “election material”, which hinges on the material being reasonably regarded as intended to promote or procure the election of a candidate. Referendum material is material “wholly or mainly *relating* to the referendum”.<sup>22</sup> It catches material which does not support a particular outcome, such as a balanced and impartial description of the campaigns on either side. The 2013 Act (on the Scottish independence referendum) additionally expanded the regulation of imprints to online material, as we noted in chapter 11.<sup>23</sup>

### ***Electoral Commission enforcement***

- 14.22 The Electoral Commission has a regulatory role in the enforcement of the rules in the 2000 Act. It has investigatory powers and the authority to impose civil sanctions in the form of a fixed or variable monetary penalty. These powers are exercisable against a person who either commits an offence set out in the 2000 Act or contravenes a requirement or restriction stipulated in the 2000 Act. Contraventions may include, for example, broadcasting a referendum broadcast by a campaigner that is not a designated organisation, or a public body distributing referendum material during the campaign period.<sup>24</sup>

### ***Referendum-specific provision in the instigating Act***

- 14.23 The 2000 Act is mainly concerned with regulating referendum conduct. Most of the detailed law covering the administration of the referendum has to be contained in the instigating Act; there is no standing set of legal rules governing the administration of referendums.
- 14.24 In practice, instigating Acts import and adopt provisions of election legislation, such as the 1983 Act, with some adaptation to take account of the different nature of a referendum. The fundamental elements of electoral law invariably apply: voting is by secret ballot, entitlement to vote is established by entry on the register, and so on.

<sup>20</sup> Political Parties, Elections and Referendums Act 2000, s 120 and sch 15.

<sup>21</sup> Political Parties, Elections and Referendums Act 2000, ss 125 and 127.

<sup>22</sup> Political Parties, Elections and Referendums Act 2000, s 126(1) (emphasis added).

<sup>23</sup> Scottish Independence Referendum Act 2013, sch 4 para 27(1)(b); see chapter 11 Electoral Offences, paras 11.55 to 11.61.

<sup>24</sup> Political Parties, Elections and Referendums Act 2000, schs 19B and 19C.

### ***Timing of the enactment of referendum legislation***

- 14.25 The instigating Act will often be enacted only a matter of months before the stipulated referendum date. To enable them to prepare for the referendum, electoral administrators have asked for a minimum of six months between the Act coming into force and polling day. This was achieved for the recent independence referendum in Scotland, but has not always been, for example in the referendums in 2011 in Wales (on further devolution) and the UK (concerning the Parliamentary voting system).
- 14.26 In practice, electoral administrators can expect to know the vast majority of the rules that will govern the referendum, but have to wait for the instigating Act to come into force before they have effect. Later in this chapter, we outline some of the aspects of administration that instigating Acts typically provide for.

### ***The two provisions on conduct of referendums in the 2000 Act***

- 14.27 The 2000 Act is not completely silent as to how referendums are to be conducted.

#### CHIEF AND LOCAL COUNTING OFFICERS

- 14.28 First, it outlines the management structure for referendums. Section 128 provides that there shall be a chief counting officer for referendums, who shall be the chairman of the Electoral Commission or a person appointed by her. For referendums conducted solely in Northern Ireland, the Chief Electoral Officer for Northern Ireland is the chief counting officer. The Electoral Commission (as a body) also reports on the administration of the referendum. Some have argued there is a potential conflict between this function and its Chairman's function as chief counting officer.<sup>25</sup>
- 14.29 The chief counting officer must appoint a counting officer for each relevant area in Great Britain. These areas are local government areas. In practice, the counting officer will be the local returning officer for the relevant local government area. In Northern Ireland, the Chief Electoral Officer is the counting officer for all of Northern Ireland. The counting officer must certify the number of votes counted and declare the result in the area. The chief counting officer certifies the result for the referendum as a whole.<sup>26</sup>

#### POWER TO MAKE CONDUCT RULES

- 14.30 Secondly, section 129 of the 2000 Act empowers the Secretary of State by order to make provision regulating the conduct of referendums, including creating offences and applying, with or without modification, any provision of any enactment. No such provision has been made, although the Electoral Commission has recommended that the powers be exercised so that generic conduct rules following the model of the 2011 Parliamentary voting system

<sup>25</sup> Political Parties, Elections and Referendums Act 2000, s 5; Association of Electoral Administrators, *The Administration of the Referendums and Elections across the UK* (14 July 2011), p 30 para 3.9.

<sup>26</sup> Political Parties, Elections and Referendums Act 2000, s 128.



referendum should apply to all referendums.<sup>27</sup>

### ***Importing the existing apparatus for electoral administration***

- 14.31 Each instigating Act replicates the provisions of the 1983 Act, but how it does so is a matter of approach. For example, the Parliamentary Voting System and Constituencies Act 2011 (“the 2011 Act”) lays down the basic apparatus for the referendum in its main provisions; referendum rules mirroring the content of election rules are scheduled to it, while a separate schedule contains a table (known as a Keeling schedule) listing the sections of the 1983 Act which are applied, with a column setting out any modifications.

#### REGISTRATION AND FRANCHISE

- 14.32 The franchise for the referendum (and consequently the applicable electoral register) is selected by the instigating Act. At the Parliamentary voting system referendum, a person was eligible to vote if he or she was entitled to vote in UK Parliamentary elections.<sup>28</sup>

- 14.33 A different or modified franchise may be created by the instigating Act, as occurred at the Scottish independence referendum. The Scottish Independence Referendum (Franchise) Act 2013 extended the right to vote to persons aged 16 and 17 years. Nevertheless, the local government register under section 9(1)(b) of the 1983 Act was used in part.<sup>29</sup>

#### ABSENT VOTING REGIME

- 14.34 We noted in our chapter on absent voting the complexity of the rules governing entitlement to an absent vote and the administration of absent voting. Periodic absent voters are entered on a record, which is theoretically tied to the provision governing absent voting at particular elections. Separately, electors may apply and obtain an absent vote for a specific polling day.<sup>30</sup> An instigating Act must as a matter of practicality incorporate absent voters under existing regimes, importing absent voter records governing elections. In practice, of course, registration officers have an electronic record of absent voting entitlements. The instigating Act must provide a legal basis for using those records, but this is not a straightforward task.

- 14.35 The difficulties deriving from the untidy legislative framework governing absent voting at elections became evident at the time of the Parliamentary voting system referendum. Until a very late stage in the passage of the Parliamentary Voting System and Constituencies Bill, a person entitled to an absent vote in the regional or local elections that were combined with the referendum poll was not automatically entitled to an absent vote for the referendum.<sup>31</sup> This was addressed by an amendment at a relatively late stage, entitling an elector to vote in the

<sup>27</sup> Electoral Commission, *Referendum on the voting system for UK Parliamentary elections: Report on the May 2011 referendum*, pp 10 and 38 (October 2011).

<sup>28</sup> Parliamentary Voting System and Constituencies Act 2011, s 2(1)(a).

<sup>29</sup> Scottish Independence Referendum (Franchise) Act 2013, s 2(1)(b).

<sup>30</sup> See Chapter 6 Absent Voting, para 6.7.

<sup>31</sup> Association of Electoral Administrators, *The Administration of the Referendums and Elections across the UK in 2011* (14 July 2011) paras 2.52 onwards.

referendum by post if the person was on a list of postal voters in an election combined with the referendum,<sup>32</sup> or in Parliamentary elections.<sup>33</sup> However, no reference was made to postal voters in European Parliamentary or National Assembly for Wales elections, meaning that some postal voters were left out.

- 14.36 The Scottish Independence Referendum Act 2013 Act did not follow the example of the 2011 Act, introducing instead a category of “existing absent voters” consisting of those registered, in respect of a period covering the date of the referendum, as postal voters in local government or Scottish Parliamentary elections.<sup>34</sup> Both referendums’ instigating Acts also made provision for applying to be an absent voter specifically at the referendum, necessitating replication of the relevant provisions of the Representation of the People Act 2000 governing entitlement to an absent vote.

#### ELECTORAL OFFENCES

- 14.37 The instigating Act must lay down any necessary electoral offences, since the 2000 Act creates only a few offences relating to the referendum campaign and imprints, and these are not designated as corrupt or illegal practices. Schedule 4 to the 2011 Act, for example, incorporates sections of the 1983 Act creating offences, modifying the offences to refer to referendums.

#### CORRUPT OR ILLEGAL PRACTICES AT A REFERENDUM

- 14.38 If a person is convicted of a corrupt or illegal practice adopted, for example, by schedule 4 to the 2011 Act, they plainly may receive a criminal sentence. However, it is unclear whether a person convicted of a corrupt or illegal practice at a referendum is subject to the incapacities under section 173 of the 1983 Act (incapacity to vote in parliamentary or local government elections, or to hold elective office).<sup>35</sup> That provision is not incorporated by schedule 4 to the 2011 Act, but it is not expressed in such a way as to exclude referendums from its field of application. On balance, we think it does apply.

#### CHALLENGING REFERENDUMS

- 14.39 On the other hand, corrupt or illegal practices do not operate as vitiating factors in the case of a referendum. The challenge mechanism for elections under the 1983 Act is not applied to referendums. Typically, the referendum result can only be legally challenged by judicial review brought within six weeks of the result.<sup>36</sup>

#### THE AUTHORITY OF THE CHIEF COUNTING OFFICER

- 14.40 While the 2000 Act envisages that the chief counting officer should declare the national result of referendums, the instigating Act determines the parameters of the chief counting officer’s leadership. Consistency of administration and the correct and timely determination of the result are particularly important when a

<sup>32</sup> Parliamentary Voting System and Constituencies Act 2011, sch 3 paras 5(2) – 2 and 3.

<sup>33</sup> Representation of the People Act 2000, sch 4 para (3)(4).

<sup>34</sup> Scottish Independence Referendum Act 2013, sch 2 para 2(2).

<sup>35</sup> See Chapter 11 Electoral Offences, paras 11.14 to 11.19.

<sup>36</sup> E.g. Scottish Independence Referendum Act 2013, s 34; Parliamentary Voting System and Constituencies Act 2011, sch 1 para 23.

referendum is determining a sensitive issue.

- 14.41 Under the 2011 Act, the chief counting officer had, for the first time, a power of direction over counting officers. These had to relate to the discharge of the counting officer's functions and required them to take specified steps in preparation for the referendum or to provide the chief counting officer with information.<sup>37</sup> The 2013 Act gave the chief counting officer a more general power of direction.<sup>38</sup>
- 14.42 The volume of directions at the voting system referendum in 2011 was the subject of criticism by the Association of Electoral Administrators, whose report said these were overly prescriptive, complex, and increased the cost of conducting the referendum. There were over 80 directions, which the Association likened to an additional set of rules.<sup>39</sup> This was noted by the Electoral Commission. At the Scottish independence referendum, only eight directions were issued.<sup>40</sup> The chief officer had, however, been granted an express power to issue guidance to counting officers, which the Electoral Commission had requested after a review of the 2011 referendums.<sup>41</sup>

#### ***The detailed conduct rules for referendums***

- 14.43 The detailed rules concerning the administration of the referendum are typically scheduled to the instigating Act, in the way that election rules are, and are called referendum rules. These scrupulously follow the template set by classical election rules, with a few necessary adaptations. There are no particular transposition difficulties for referendums, but some necessary differences due to the different nature of referendums.
- 14.44 One such difference is that referendums take place over a wide area. Accordingly, the rule that a postal vote can be handed in at any polling station within the "constituency" cannot simply be extended to the entire area in which the referendum takes place; instead, the postal vote must be handed in at a polling station within the same counting area.<sup>42</sup>
- 14.45 The rules for counting the referendum votes also tend to follow the 1983 Act

<sup>37</sup> Parliamentary Voting System and Constituencies Act 2011, sch 1 para 5(5).

<sup>38</sup> Scottish Independence Referendum Act 2013, s 7(6) and (7).

<sup>39</sup> Association of Electoral Administrators, *The Administration of the Referendums and Elections across the UK in 2011* (14 July 2011).

<sup>40</sup> Electoral Commission, *Referendum on the voting system for UK Parliamentary elections: Report on the May 2011 referendum* (October 2011). Elections Scotland, Directions from the Chief Counting Officer, [http://www.electionsscotland.info/emb/downloads/file/90/directions\\_from\\_the\\_chief\\_counting\\_officer](http://www.electionsscotland.info/emb/downloads/file/90/directions_from_the_chief_counting_officer) (Last accessed 3 December 2014).

<sup>41</sup> Scottish Independence Referendum Act 2013, s 24(2). Electoral Commission, *Referendum on the voting system for UK Parliamentary elections: Report on the May 2011 referendum* (October 2011).

<sup>42</sup> Parliamentary Voting System and Constituencies Act 2011, sch 2 r 40(3)(a). At the Scottish independence referendum on 18 September 2014, we observed that a postal vote handed in late in the wrong polling station was accepted on the basis that it may not be counted, but processes existed for sending these to an adjacent counting area, so that if at all possible, they would be counted.

template, with modifications to account for the management structure, and the special importance and sensitivity of recounts. Thus, for example, the chief counting officer for the 2011 voting system referendum had power to direct a re-count and the counting officer had to comply as soon as reasonably practicable.<sup>43</sup> The Scottish Independence Referendum Act 2013 took a slightly different approach. Both the chief counting officer and the counting officer could request a re-count twice. In theory, the votes could be re-counted up to four times.<sup>44</sup>

- 14.46 Unlike the position at the Parliamentary voting system referendum, neither permitted participants nor designated organisations at the Scottish independence referendum could require a counting officer to re-count the votes, which follows the classical rule. This is no doubt explained by the expected high voter turnout, the significant constitutional implications and political controversy concerning the result.

### ***Combination of polls***

- 14.47 If a referendum is to coincide with other polls, as did the 2011 referendum on the Parliamentary voting system, the instigating Act must make any required provision governing the combination of the polls.
- 14.48 The 2011 Act specified that the counting officer should be the lead returning officer, and set out specific rules governing the conduct of the combined poll.<sup>45</sup> The counting officers were subject to a power of direction by the chief counting officer. Notably, the 2011 Act was amended at a late stage to require that the voting areas for the referendum be the same as the constituencies for the Scottish Parliament and National Assembly for Wales general elections, and local authority areas in England. In relation to Wales and Scotland, this required a departure from the 2000 Act's provisions governing identifying the voting areas.<sup>46</sup>

### **Reform of the legislation governing national referendums**

- 14.49 Any set of standing rules governing referendums is inevitably going to be incomplete. Crucial details such as their incidence, the question, polling, the area, the threshold to be reached and the like, can only be determined by the instigating Act.
- 14.50 However, the current approach is inefficient. At present, referendum law is on the whole contained in the instigating Act, even if it concerns basic elements of referendum administration such as electoral registration, absent voting, offences, and the core rules governing polling and the count. It is inconceivable that polling should not be by secret ballot; and yet a referendum rule must on each occasion be drafted to that effect. This presents administrators with a large volume of new rules, legislatures with an unnecessary workload, and presents an unnecessary risk of a legislative slip.

<sup>43</sup> Parliamentary Voting System and Constituencies Act 2011, sch 2 para 43.

<sup>44</sup> Scottish Independence Referendum Act 2013, sch 3 para 34.

<sup>45</sup> Parliamentary Voting System and Constituencies Act 2011, schs 5 to 8. Representation of the People (Combination of Polls) (England and Wales) Regulations SI 2004 No 294, reg 5.

14.51 The task of reproducing whole sections of the electoral system in each Bill instigating a new referendum no doubt contributes to the delay in producing the legislation. An example of the problems inherent in the legislative framework for referendum conduct rules is the preparation of the Welsh devolution and Parliamentary voting system referendums in 2011. The respective instigating legislation was being prepared by different legislative processes and by different bodies. The Electoral Commission's report on the Parliamentary voting system referendum noted that, due to the introduction of the Parliamentary Voting System and Constituencies Bill:

many detailed issues in the Wales referendum rules, which were already at a late stage of drafting, had to be revisited to ensure that the two sets of referendum rules were aligned. In some cases, alignment was not possible; while the [Parliamentary Voting System] Bill, as primary legislation, could introduce some more substantive changes, these could not be achieved through secondary legislation for the Wales referendum.<sup>47</sup>

14.52 Clearly, this is an inefficient means of arranging the legislative framework for referendums. It seems to us to be desirable to produce a set of generic referendum conduct rules that could simply be applied with minimal adaptation to a specific referendum. This would reduce the current complexity of the law, speed up the legislative process and make the conduct rules accessible in advance, avoiding what the Electoral Commission have referred to as "eleventh hour changes" that disrupt planning for a referendum – such as the amendments necessary to remedy a problem with the absent voting framework for the 2011 referendum.

14.53 In large part, these problems would be mitigated by including referendums within the apparatus, in primary legislation, for electoral registration, core polling laws, and offences. Our provisional proposal that a single register in law should govern voting entitlement at all elections could, for example, include referendums. That would mean the instigating Act need only select the franchise. Similarly, in our provisional view, absent voting entitlements should be expressed holistically for all elections. Extending that to referendums would mean that any elector's existing absent voting status would apply equally to any referendum.

14.54 We provisionally consider also that core polling laws relating to the secret ballot, corresponding number list, and so on, should apply to referendums without the need for further legislation. Offences should be drafted so that those applicable to referendums, such as personation, bribery, and voting offences, will be so without the need for further legislation. No instigating Act has done anything but reproduce such provisions word for word, save for changes to make them intelligible in the context of referendums. Some offences are plainly limited to candidates and elections; these would be restricted to elections only.

<sup>46</sup> Electoral Commission, *Referendum on the voting system for UK parliamentary elections: Report on the May 2011 referendum* (October 2011).

<sup>47</sup> Electoral Commission, *Referendum on the voting system for UK Parliamentary elections: Report on the May 2011 referendum* (October 2011).

- 14.55 That leaves the matter of detailed conduct rules: the postal voting process, polling, the count and combination with any coinciding poll. In large part, the existing rules contained in instigating Acts reproduce the classical rule set, with some minor modifications relating to the chief counting officer. The Secretary of State has a power by order to make secondary legislation governing the detailed conduct of referendums, but has not yet exercised it.
- 14.56 Our provisional view is that this should be done, and secondary legislation, closely integrated with that governing elections, should govern referendums generally. That legislation will always be subject to change by the instigating Act if necessary. Indeed, Parliament will always have the option of starting afresh, and departing from the existing primary legislation as well as subordinate measures. However, experience suggests that truly different rules governing particular referendums are very rare. The vast majority of rules follow the established template. Having them set out in advance would enable administrators and the chief counting officer properly to plan for, and execute, referendums before an instigating Act becomes law. It would also result in simpler and clearer legislation, which is more consistently expressed for all referendums, and which is less costly to produce.

**Provisional proposal 14-1: Primary legislation governing electoral registers, entitlement to absent voting, core polling rules and electoral offences should be expressed to extend to national referendums where appropriate.**

**Provisional proposal 14-2: Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring that governing elections, save for necessary modifications.**

#### **LOCAL REFERENDUMS AND PARISH POLLS**

- 14.57 At the scoping stage of this project, we concluded that it should include a review of local referendums conducted under statute and parish polls. We excluded from scope local advisory polls conducted under local government's general powers, and business improvement district polls.<sup>48</sup>

#### **Local referendums conducted under statute in England and Wales**

- 14.58 There are three types of local referendums in England and Wales. Each is conducted under statute, with an Act setting out the process for instigating such a referendum, rules as to their incidence as well as identifying the franchise by stating that entitlement to vote at the referendums is based on appearing on the local government register.<sup>49</sup> The detailed conduct rules are set out for each kind

<sup>48</sup> Law Commission, *Electoral Law in the United Kingdom, A Scoping Report* (11 December 2012) paras 5.53 and 5.54.  
[http://lawcommission.justice.gov.uk/docs/electoral\\_law\\_scoping\\_report.pdf](http://lawcommission.justice.gov.uk/docs/electoral_law_scoping_report.pdf)

<sup>49</sup> Local Government Act 2000, s 9MG; Local Government Finance Act 1992 ss 52ZG and 52ZN; Town and Country Planning Act 1990, sch 4B, paras 14 and 15.

of referendum in separate statutory instruments.<sup>50</sup>

14.59 The three species of referendums are:

- (1) referendums on local governance changes under the Local Government Act 2000 (these referendums can also take place in Wales). The most common example is a change to elected mayors. These may be instigated by the local authority, the Secretary of State, or by a petition reaching a certain threshold of the electorate.<sup>51</sup>
- (2) referendums approving excessive rises in council tax in England under the Local Government Finance Act 1992 (“council tax referendums”),<sup>52</sup> and
- (3) referendums approving neighbourhood planning orders in England under the Town and Country Planning Act 1990 (“neighbourhood planning referendums”).<sup>53</sup> The electorate can thereby adopt neighbourhood plans, development orders or a community right to build order which will govern planning law in their community.

14.60 All of these referendums share the characteristic that the result of the referendum is binding and must be implemented by the local authority in question, or is binding by operation of law.<sup>54</sup>

14.61 The three different kinds of local referendums have specifically prescribed purposes. Firstly, local governance referendums decide whether or not the local governance structure for a particular area should be changed from one form to another. For example, a local governance referendum could decide whether or not a particular area should have a mayor. Second, where a council tax increase is proposed that is “excessive”, a referendum is required to be held to either approve or veto the proposal. A council tax increase is determined to be excessive according to a set of principles determined by the Secretary of State for the year, which are set out in a report and approved by the House of Commons. Third, local referendums are also the means by which communities can adopt neighbourhood plans, development orders or a community right to

<sup>50</sup> Local Authorities (Conduct of Referendums)(England) Regulations SI 2012 No 323; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031; Local Authorities (Conduct of Referendums)(Wales) Regulations SI 2008 No 1848.

<sup>51</sup> Local Government Act 2000, ss 9M to 9ME, 25 to 27 and 34 to 36; the instigation mechanism in Wales is set out in the Local Authorities (Referendums) (Petitions and Directions) (Wales) Regulations SI 2001 No 2292.

<sup>52</sup> Local Government Finance Act 1992, s52ZB, for billing authorities, see ss 52ZF to 52ZI, for major precepting authorities see ss 52ZJ and 52ZK and 52ZN to 52ZP, and for local precepting authorities see 52ZL to 52ZP.

<sup>53</sup> Town and Country Planning Act 1990, ss 61E, 61J and 61L, sch 4B paras 8(2) and 12(4).

<sup>54</sup> Local Government Act 1990, s 45; Local Government Finance Act 1992, ss 52ZH, 52ZI, 52ZO, and 52ZP; Town and Country Planning Act 1990, s 61E, sch 4B, para 5. If a business and neighbourhood planning referendum have conflicting results, then the decision as to whether to implement the Neighbourhood Development Order is left to the local planning authority (see para 14.64 below).

build order.<sup>55</sup>

### ***Instigation***

- 14.62 The instigating procedure, franchise and provision for registration are contained in the primary legislation outlined above. Generally, a local referendum may be instigated by the local authority or Secretary of State. The procedure for instigation is unique for each kind of statutorily prescribed referendum. There are two ways in which local referendums may be initiated by a body or persons other than the local authority or Secretary of State. Notably, local government electors in the area may instigate a change in the permitted governance arrangements by organising a petition. A valid petition, which is signed by 5% of the number of local government electors in the area, will trigger a local governance referendum.<sup>56</sup>

### ***Use of the local government franchise and register***

- 14.63 The three statutes select the local government franchise by providing that entitlement to vote at local referendums is based on entry in the local government register.<sup>57</sup> It is possible for council tax and neighbourhood planning referendums to cross local authority boundaries, requiring parts of different registers to be put together.

### **BUSINESS REFERENDUM AND REGISTER**

- 14.64 Where a Neighbourhood Development Order is proposed in relation to an area designated as a business area under the Town and Country Planning Act 1990, an additional “business referendum” must be held in that area. A business referendum has a special franchise and different register from the concurrent neighbourhood planning referendum. As businesses do not have votes in any other form of election, a bespoke “business voting register” is provided for in the neighbourhood planning regulations, which is managed by the “business registration officer”. Businesses in the relevant area (known as “business vote holders”) are required to name a person to vote on their behalf, in a manner not dissimilar to proxy voting.<sup>58</sup>

<sup>55</sup> Local Government Act 2000, ss 9M to 9ME, 25 to 27, 34 to 36; Local Government Finance Act 1992, s52ZB, for billing authorities, see ss 52ZF to 52ZI, for major precepting authorities see ss 52ZJ and 52ZK and 52ZN to 52ZP, and for local precepting authorities see 52ZL to 52ZP; Town and Country Planning Act 1990, ss 61E, 61J and 61L, sch 4B, paras 8(2) and 12(4).

<sup>56</sup> Local Government Act 2000, ss 9MC, 25 and 45, Local Government Finance Act 1992, ss 52ZC, 52ZD and chapter 4ZA, as amended by s71 of the Localism Act 2011; Local Authorities (Referendums) (Petitions) (England) Regulations SI 2011 No 2914, regs 3, 6, 9, 10, 11, 12, 18. The petition regulations for Wales are largely similar to those for England, except for a few differences. For example, a petition will only be valid in Wales if it is signed by 10% of local government electors in the relevant area, instead of 5%. Local Authorities (Referendums) (Petitions and Directions) (Wales) Regulations SI 2002 No 2292, regs 4, 6, 9 and 23.

<sup>57</sup> Local Government Act 2000, s 9MG; Local Government Finance Act 1992, s 52ZN; Town and Country Planning Act 1990, sch 4B, para 14(4).

<sup>58</sup> Town and Country Planning Act 1990, s 61H, sch 4B paras 12(4) and 15; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, sch 6.



### ***The referendum question***

- 14.65 The referendum regulations stipulate not only the form of the ballot paper and how the question should appear within it, they also set out the questions which can be asked. For example, there are only a small number of permissible executive governance arrangements, which the regulations can thus stipulate. Equally, the possible questions to be asked for neighbourhood planning referendums are set out according to whether the referendum is being called regarding a neighbourhood planning order, plan or community right to build. Council tax referendums only ever concern whether council tax should be increased to a certain amount.<sup>59</sup>

### ***Local authority's duty to publicise referendums***

- 14.66 The conduct regulations impose a duty on the local authority to publicise information connected with the referendum within a specified deadline. The local authority must provide information concerning the date of the referendum, the question, how the referendum will be conducted, and how to get further information concerning the referendum proposal. These provisions supplement the ordinary duty of counting officers to publish a notice of the referendum, notice of the poll, and to send poll cards. Curiously, only the notice of poll is required to state what the question to be asked at the referendum is.<sup>60</sup>

### **ABSENT VOTING REGIME**

- 14.67 The conduct regulations replicate the provision for absent voting in schedule 4 to the Representation of the People Act 2000 and the Representation of the People (England and Wales) Regulations 2001.<sup>61</sup> The conduct regulations state what sections of the 2000 Act and 2001 regulations apply, and then set out some modifications to these sections, in what is known as a "keeling schedule". This enables an elector to apply to be a periodic absent voter at local referendums, as well as at local government or parliamentary elections. If a person applies to be an absent voter for a local referendum, that person will automatically have an entitlement to an absent vote at an election that is combined with the referendum

<sup>59</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, reg 3 and sch 1; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, reg 3 and sch 1; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, reg 3 and sch 1; Local Authorities (Conduct of Referendums)(Wales) Regulations SI 2008 No 1848, reg 3 and sch 1.

<sup>60</sup> Local Authorities (Conduct of Referendums)(England) Regulations SI 2012 No 323, regs 4 to 7, sch 3, rr 5 and 12; Local Authorities (Conduct of Referendums)(Wales) Regulations 2008 SI 2008 No 1848, reg 4, sch 3, rr 5 and 12, Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, regs 4 to 7, sch 3 rr 5 and 12, Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, reg 4, sch 3, rr 5 and 13.

<sup>61</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 323, sch 4. Local Authorities (Conduct of Referendums) (Wales) Regulations SI 1848, sch 4; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, sch 4; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, sch 4.

poll.<sup>62</sup>

- 14.68 This is a relatively limited attempt at providing a regime for absent voting for local referendums. The conduct regulations fail to provide those with a prior entitlement to an absent vote at a Parliamentary or local government election (or both) with an automatic entitlement to an absent vote at a local referendum. In order to gain an entitlement to an absent vote at a local referendum, an elector has to apply from scratch.

### ***Campaign regulation***

- 14.69 Unlike the 2000 Act, the local referendum regulations do not define “campaigners”, or make provision for designating certain persons as a campaigner subject to special regulation, expense limits, and a duty to provide a return of expenses. Nor is there a mechanism for channelling expenses through a responsible person analogous to an election agent. Anyone who campaigns with a view to promoting or procuring a particular outcome in relation to a question being asked at a referendum is subject to regulation.<sup>63</sup>

### EXPENDITURE CONTROLS

- 14.70 Anyone who incurs referendum expenses during the referendum period must adhere to a stipulated limit. The exact limit is specified in the relevant regulations by way of a formula. Referendum expenses are listed in the regulations in prescriptive and detailed terms. For example, advertising, distributing material to voters, transport costs for the purpose of obtaining publicity, market research concerning voters’ intentions, public rallies and the provision of services or facilities in connection with press conferences, for referendum purposes, are all explicitly defined as referendum expenses.<sup>64</sup>
- 14.71 Where any referendum expenses are incurred in excess of the limit, a person who knew, or ought reasonably to have known, that the limit would be exceeded, or who, without reasonable excuse, authorised spending over the limit, is guilty of an offence. This is an ordinary offence to be prosecuted and tried in the ordinary way, so that there is limited scope for private enforcement of overspending in

<sup>62</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 323, r 12(3); Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, r 17(3); Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, r 12(5). As no provision is made for combining local governance referendums in Wales, there is no equivalent entitlement to an absent vote for a combined poll in the Welsh regulations.

<sup>63</sup> Local Authorities (Conduct of Referendums) (England) Regulations No 323, reg 6; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, reg 6; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, reg 12; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, reg 6.

<sup>64</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, reg 6 and sch 2; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, reg 6, Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, reg 7 and sch 2; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, reg 6 and sch 2.

local referendum campaigns, which we outline further below.<sup>65</sup>

#### REGULATING REFERENDUM PUBLICATIONS

- 14.72 There is a prohibition on publication of promotional material by the local authority during the referendum period. This prohibition is expressed in similar terms to the prohibition imposed on government and public bodies during national referendum periods contained in the 2000 Act. Material may be provided by the relevant council in order to correct an inaccuracy in material published by someone else.<sup>66</sup>

#### IMPRINT OFFENCE

- 14.73 The referendum regulations incorporate the election imprint offence in section 110 of the 1983 Act, so that if an individual or body publishes a leaflet or newspaper advertisement, which is aimed at promoting or procuring a particular outcome in a referendum, and fails to include certain details, known as an “imprint” then they will be guilty of an offence.<sup>67</sup>

#### ***Electoral offences and corrupt or illegal practices***

- 14.74 The referendum regulations incorporate some of the offences in the 1983 Act, with minor wording substitutions or additions. Key corrupt practices such as personation, voting offences, bribery, treating and undue influence are also corrupt practices at referendums, as are the illegal practices such as illegal payments and employment. An obvious omission is the offence of making a false statement as to the personal character or conduct of a candidate, as there are no candidates involved in local referendums. The incapacities from participation in future electoral events on conviction of a corrupt or illegal practice are also incorporated at local referendums.
- 14.75 In our chapter on electoral offences, we noted that some ordinary electoral offences become illegal or corrupt practices by virtue of having been committed by a candidate or election agent. An example is the imprint offence under section 110. While that offence is incorporated by the referendum regulations, as there are no agents or candidates at referendums, it must remain an ordinary offence and not an illegal practice.

#### ***Legal challenge***

- 14.76 With the exception of neighbourhood development referendums, local

<sup>65</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, regs 6 and 7, sch 2; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, regs 6 and 7, sch 2; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, regs 12 and 13, sch 2; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, regs 6 and 7, sch 2.

<sup>66</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, reg 5; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, reg 5; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, reg 10; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, reg 5.

<sup>67</sup> Local Authorities (Conduct of Referendums) (England) Regulations 2012 SI No 323, sch 4; Local Authorities (Conduct of Referendums) (Wales) Regulations 2012 SI No 1848, sch 4; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, sch 4; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, sch 4.

referendums may be challenged by election petition before the local election court filed no later than 21 days after polling day. The Election Petition Rules 1960 have effect as they would for a challenge to a local government election, and provisions concerning local government election petitions in the 1983 Act are also replicated.

*The grounds for bringing a legal challenge*

14.77 The grounds for bringing a legal challenge are not the same as those for challenging elections. They are:

- (1) that the result of the referendum was not in accordance with the votes cast.<sup>68</sup>;
- (2) “on the ground that the referendum was avoided by such corrupt or illegal practices, within the meaning of the 1983 Act” as are relevant to referendums;
- (3) that the referendum is avoided by extensive corruption under section 164 of the 1983 Act. This is where it is shown that corrupt or illegal practices committed for the purpose of promoting or procuring a particular outcome in relation to the question asked in the referendum have so extensively prevailed that they may be reasonably supposed to have affected the result.

14.78 The election court must, following a determination of ground (1) above, confirm or reverse the result of the referendum. In the case of grounds 2 or 3 above, the result must be that the referendum is confirmed or annulled.<sup>69</sup>

14.79 There is an inherent difficulty with applying ground (2) above, particularly when distinguished from ground (3), extensive corruption. In Chapter 13 we note that the distinction between extensive corruption and corrupt and illegal practices as grounds for vitiating an election is that the latter relate to the candidate.<sup>70</sup> If the candidate personally commits such an offence, or is responsible for its commission by others, the election is not safe in public law terms and must be annulled. The problem is that there is no equivalent to a candidate at local referendums. It is simply not intelligible, in the local referendum context, to conceive of corrupt or illegal practices as grounds of challenge *within the meaning of the 1983 Act*, other than through the concept of extensive corruption.

BREACH OF REFERENDUM LAW NOT A GROUND FOR CHALLENGE

14.80 A notable absence from the grounds of challenge set out above is that none enables the election court to annul a referendum result for breach of referendum

<sup>68</sup> Presumably, this allows an election court to determine whether any vote accepted and counted was in fact invalid, and that a tendered vote was a true vote which should be counted.

<sup>69</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, regs 15, 16 and 17, and sch 6; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, regs 11, 12 and 13, sch 5; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, regs 20, 21 and 22, sch 6.

<sup>70</sup> See Chapter 13 Legal Challenge, para 13.45.

rules. Section 23 of the 1983 Act is not incorporated into the referendum regulations, which simply state that referendums are to be conducted in accordance with referendum rules. While it appears that the election court can correct the outcome of the referendum based on votes cast, it appears that it cannot investigate whether a breach – such as turning voters away at close of polls, or opening a polling station late – was fundamental or affected the result of the referendum.

- 14.81 Since the conduct rules are in secondary legislation, and it plainly cannot be the case that a fundamental breach of referendum laws which they set out cannot be challenged at all, we consider that the High Court would be able to scrutinise the referendum by way of judicial review. In our view, this is an unintended consequence, since the policy is clearly for the election court to have jurisdiction to review the referendum, and it does not make sense to limit its jurisdiction to errors which manifest themselves only in votes cast.

#### JUDICIAL REVIEW OF NEIGHBOURHOOD PLANNING REFERENDUMS

- 14.82 Proceedings questioning anything relating to a neighbourhood planning referendum may only be entertained by a court in judicial review proceedings brought within six weeks of the day the result is declared.<sup>71</sup> Consequently, as is the case for national referendums, no grounds for challenging the referendum are spelt out.

#### ***Detailed conduct rules for local referendums***

- 14.83 The rules governing the conduct of the three types of referendums are in schedules to four pieces of secondary legislation. These local referendum rules follow closely the template of the local government elections, save for adaptations being made to account for the difference between a local referendum and an election. The four sets of referendum rules are remarkably similar to one another, with only minor differences.<sup>72</sup>

#### NO NOMINATION OF CANDIDATES

- 14.84 The main difference between local government elections and local referendums is that at referendums there are no candidates. The legislative timetable for local referendums thus omits the nomination stage, and contains only three steps:

- (1) notice of referendum – 25 days before the date of the poll;
- (2) notice of poll – 7 days before the date of the poll; and
- (3) polling – 7 am to 10 pm on the day of the poll.

- 14.85 Highlighting notice of the poll in the timetable is puzzling. At election it marks the end of nominations, and highlights the need for a poll if there are more

<sup>71</sup> Town and Country Planning act 1990 s 61N(3).

<sup>72</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, sch 3; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, sch 3; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, sch 3; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, sch 3.

candidates than there are vacancies. In the referendum context that purpose is otiose.<sup>73</sup>

### ***The counting officer***

- 14.86 Referendums are organised by a counting officer, who will be the returning officer responsible for local government elections in the referendum area.<sup>74</sup> The counting officer fulfils the same functions that a returning officer does in relation to an election.

### POLITICAL NEUTRALITY OF ELECTORAL ADMINISTRATORS

- 14.87 The classical election prohibition on employing clerks who are associated with a campaign is not replicated at local referendums. Since there are no candidates or designated campaigns, such a prohibition would be unintelligible. However, a more abstract provision requiring political neutrality of electoral administrators would resolve the issue. It would be plainly wrong to appoint a petition organiser, for example, as a presiding officer.

### A CHIEF COUNTING OFFICER

- 14.88 Two sets of the referendums regulations, those for council tax referendums and neighbourhood planning referendums, make provision for a chief counting officer to be appointed where this is necessary for management purposes. In the case of council tax referendums, a chief counting officer will be appointed where there are two or more council tax referendums, in respect of a precepting authority's relevant amount of council tax for the financial year, while a chief counting officer is necessary for neighbourhood planning referendums where the referendum area cuts across different local council areas. Where necessary for council tax referendums, the precepting authority must appoint a chief counting officer. At neighbourhood planning referendums, the officer must be appointed by one of the councils in the referendum area – where agreement cannot be reached, by the council with the greatest number of local government electors registered in the referendum area.<sup>75</sup>
- 14.89 The chief counting officer may issue directions to counting officers, which they are bound to comply with,<sup>76</sup> and also has a limited role in relation to recounting votes and declaration of the result. Counting officers must draw up a provisional statement of the result, and inform the chief counting officer of its contents. The chief counting officer may direct the counting officer to recount the votes. If no

<sup>73</sup> The accompanying notice of situation of polling stations does impart relevant information, however.

<sup>74</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, reg 9; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, reg 9; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, reg 15; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, reg 9.

<sup>75</sup> Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, reg 16; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, reg 10.

<sup>76</sup> Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, reg 16(3) and (4); Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, reg 10(5) and (6).

recount is necessary, the chief counting officer must declare the result of the referendum and authorise the counting officer to declare the local result.<sup>77</sup>

### ***Attending polling and the count***

- 14.90 The fact that there is no mechanism for designating campaigners at local referendums and consequently, no “referendum” agent means that the classical provisions ensuring there is access to the poll and count for candidates and their agents are difficult to transpose. For all referendums the counting officer must appoint counting observers, and may appoint polling observers for the purpose of detecting personation. At local governance referendums initiated by petition, petition organisers may nominate persons to be polling or counting observers.<sup>78</sup>

### ***Recounts***

- 14.91 For all referendums the counting officer must appoint counting observers, and may also appoint polling observers for the purpose of detecting personation if they wish.<sup>79</sup> At local governance referendums, petition organisers are also entitled to attend polling stations and the count. Where the referendum concerns a possible move away from an elected mayor to a different governance arrangement, the incumbent mayor is also entitled to attend polling stations and the count venue, as the outcome of the referendum may directly affect his or her position.<sup>80</sup>
- 14.92 For local governance referendums, petition organisers are able to request a recount in the same way that election agents may do at local elections, and the counting officer is entitled to refuse such a request if in their view it is unreasonable.<sup>81</sup> A counting officer may recount the votes once or twice at neighbourhood planning referendums;<sup>82</sup> no similar provision is included in the rules for council tax referendums, although as discussed below a recount at both these elections may be ordered by a chief counting officer (if one exists).
- 14.93 There are other minor differences between local referendum rules and local government election rules. For example, there is no requirement periodically to change the official mark on ballot papers, as there is for elections. Other differences are between the referendum rules, which for instance deal with

<sup>77</sup> Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, rr 40 and 41; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, rr 38 and 43.

<sup>78</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, r 18; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, r 18; SI 2012 No 444, r 18; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, r 19.

<sup>79</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, r 18; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, r 18; SI 2012 No 444, r 18; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, r 19.

<sup>80</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323 r 35(2); Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, r 35(2).

<sup>81</sup> Local Authorities (Conduct of Referendums) (England) Regulations SI 2012 No 323, r 37; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, r 37.

<sup>82</sup> Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, r 38(1).

equality of votes differently. At local governance referendums, an equality of votes is resolved by lot. At neighbourhood planning referendums, the result is that there is no majority in favour of making the plan or order. No provision is made for what should occur where there is an equality of votes in a council tax referendum.<sup>83</sup>

### **Combination of polls**

14.94 Different provision is made in relation to combination of polls at each referendum. The regulations also provide materially identical rules stipulating the conduct rules for combined polls. Some of the main issues are as follows:

- (1) All of the combination provisions affect the *incidence* of the local referendum: if the referendum poll is taken on a day that falls 28 days before, or 28 days after, a scheduled election then the regulations stipulate as to whether the polls may or must be combined. So in truth, the combination provisions not only say something about the combination of coinciding polls: they also allow (or require) referendum polls occurring within a certain window to coincide with certain other elections.
- (2) Local governance referendums in England must be combined with certain coinciding elections. The elections are listed comprehensively in the Act, and include Parliamentary general elections, local government elections, European Parliamentary elections, Police and Crime Commissioner elections and mayoral elections. Local governance referendums may also be combined with other types of election. At council tax and neighbourhood planning referendums, combination is discretionary.<sup>84</sup>

### **Provisional reform proposals on local referendums**

14.95 The law governing local referendums has evolved in a piecemeal way. As concerns local referendums conducted under statute, four distinct pieces of secondary legislation govern the three species of referendums on local governance (in England and Wales respectively), council tax increase and neighbourhood development orders. These are largely based on the law governing local government elections, albeit with necessary (though not fully consistent) adaptations due to the fact that they relate to referendums.

14.96 At present, materially identical laws are needlessly replicated across different pieces of legislation. Our main provisional reform proposal is that a single set of provisions should govern the mechanisms by which local referendums, which may be required by existing enactments, are undertaken. There should be a single set of conduct rules and challenge provisions governing these elections. This would eliminate inconsistencies in the detail of the rules where they are not justified by the nature of the referendum in question.

<sup>83</sup> Neighbourhood Planning (Referendums) Regulations SI No 2031, regs 40 and 4; Local Authorities (Conduct of Referendums) (Wales) Regulations SI 2008 No 1848, r 40.

<sup>84</sup> Local Authorities (Conduct of Referendums)(England) Regulations SI 2012 No 323, regs 10, 11, 12 and 13, sch 5; Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations SI 2012 No 444, regs 17, 18 and 19 and sch 5; Neighbourhood Planning (Referendums) Regulations SI 2012 No 2031, reg 11 and sch 6.



### ***Legal challenge***

- 14.97 We provisionally consider that a single set of grounds should be enunciated as to challenging local referendums, which are in line with those governing challenging elections, save in one respect. Since there is no candidate, the Commission by anyone of a corrupt and illegal practice cannot serve to annul the validity of the referendum in the same way that conduct by or attributable to a candidate vitiates his or her election. In the election context, corrupt or illegal practice committed by or attributed to the candidate invalidates the election, even if it is just one instance which cannot have affected the election. The rationale is that the conduct of the candidate is impeachable. This cannot be applied in the local referendums context where issues, not people, are being voted for. In truth, the only ground that is intelligible in the referendum context is that of “extensive” corruption at the referendum which may reasonably be supposed to have affected the outcome. The court will still be able to review, and to annul, referendums for corruption which tended to favour the eventual result.
- 14.98 One question we have regarding neighbourhood development order referendums is whether the different challenge mechanism is a justifiable departure from a policy point of view from the default challenge mechanism of legal challenge before an election court. It may be that judicial review, and the more generous deadline for bringing a claim (six weeks as opposed to 28 days), makes more sense as part of a scheme which is part of the wider planning laws concerning such orders. The result of a referendum affects only the status of a neighbourhood development order, not the arrangements of a local authority concerning council tax increases or its governance. We therefore ask consultees whether neighbourhood planning order referendums should be an exception to the general rule that local referendums are to be challenged before the court with jurisdiction to hear challenges to elections. If so, however, we are nevertheless minded to state the grounds to which the Administrative Court should have regard when hearing a judicial review claim. At present, no guidance whatsoever is available to a court.

**Provisional proposal 14-3: A single legislative framework should govern the detailed conduct of local referendums, subject to the primary legislation governing their instigation.**

**Provisional proposal 14-4: The grounds of challenge governing elections should apply to local referendums, save that only extensive corrupt or illegal practice shall be a ground for annulling the referendum.**

**Question 14-5: Should challenge to neighbourhood planning referendums continue to be by judicial review only?**

### **PARISH POLLS**

- 14.99 Parish polls are local citizen-initiated polls that occur in English parishes and Welsh communities, the smallest tier of local councils in England and Wales. They are unlike the local referendums considered above in that they are a form of direct decision by the local electorate on matters before the parish or community council. As Russell LJ put it:

The question is: can a poll be demanded except upon a question which has been the subject of a vote at a parish meeting? If not, then

the plaintiff must fail in his action. I agree with Buckley J. that a poll cannot be demanded except upon such a question. The object of a poll is to check that the opinion expressed by the parish meeting is that of the electors as a whole, and of course the parish meeting expresses its opinion by means of a vote on a resolution.<sup>85</sup>

- 14.100 The outcome of a parish poll thus has the same standing as a council resolution. It may therefore be reversed by subsequent resolution of the council.
- 14.101 Provision for parish polls is made in the context of rules governing parish and community council meetings in Schedule 12 to the Local Government Act 1972 (the 1972 Act). The conduct rules for parish polls are set out in the Parish and Community Meetings (Polls) Rules 1987 (the 1987 rules).<sup>86</sup>
- 14.102 We outline the current law on parish and community polls and base our reform proposals on the current law. We understand that there may be changes to the law as a result of ongoing consultation and review by the Welsh and UK Governments respectively.<sup>87</sup>

### **The poll question**

#### *When the poll is in truth an election*

- 14.103 Since parish and community councils may elect a chairman, and provision is made for appointing councillors, and they do so by making resolutions at parish meetings, these matters may properly be the subject matter of a poll. Accordingly, the 1987 rules envisage that polls may be asked on two kinds of question. The first is about the election of a chairman of the parish council, or any other appointment to office. Here the prescribed ballot paper envisages different applicants, independent and party affiliated, being put forward. In effect, this is an election by the parish or community's electorate to the chairmanship of the parish council or other office. The 1987 rules refer to persons running for chairmanship or other office as "candidates".<sup>88</sup>

#### *When the poll is a true referendum on a parish or council issue*

- 14.104 The second, and more common, type of poll, asks a question on any issue arising for decision by the parish council. Although nowhere expressly stated, the question cannot lie outside the proper range of decision making by a parish council, or be devoid of practical application.<sup>89</sup>
- 14.105 Section 9 of the Local Government Act 1972 states that parish meetings are for the purpose of discussing parish affairs, and the exercising of any functions conferred on meetings by enactment. A reasonable interpretation is that the

<sup>85</sup> *Bennett v Chappell* [1966] Ch. 391 at 399.

<sup>86</sup> Local Government Act 1972, sch 12 paras 18 and 34; Parish and Community Meetings (Polls) Rules SI 1987 No 1.

<sup>87</sup> The Welsh Government has asked a series of questions on community polls: <http://wales.gov.uk/docs/dsijlg/consultation/131120comm-polls-en.pdf>; we understand that the UK Government is considering a review of the law on parish polls.

<sup>88</sup> See, for example, Parish and Community Meetings (Polls) Rules 1987 SI 1987 No 1, r 3.

<sup>89</sup> *Bennett v Chappell* [1966] Ch. 391 at 399.

question at a parish poll must concern “parish or community affairs”, although the meaning of that phrase is unclear. In 2007 and 2008, a number of parishes held polls regarding the Lisbon Treaty. The Audit Commission issued guidance stating that such polls were unlikely to concern “parish or community affairs” and were therefore possibly unlawful, which would render the costs irrecoverable. This, in the Audit Commission’s view, was because the treaty did not have a “direct effect” on parish matters. This requirement is not stipulated in the Polling Rules, and therefore what can be defined as the legitimate scope of a parish poll question remains somewhat ambiguous.<sup>90</sup>

### **Initiating a poll**

- 14.106 A poll can be sought before the conclusion of a parish or community meeting on any question arising at that meeting. In England, the poll can only be taken if either the person presiding at the meeting consents or the poll is demanded by not less than ten, or one-third, of the local government electors present at the meeting, whichever is the less. In Wales, the requirement is that the poll is demanded by a majority of local government electors present so long as they do not constitute less than 10% of the electorate for the community or less than 150 of the electors (if 10% exceeds 150 electors). The wording of the question must be decided by the end of the meeting.<sup>91</sup>

### **Returning officer**

- 14.107 If a poll is required, the chairman of the meeting is under a duty to notify the district council of the referendum. The district council then appoints a returning officer, who must be an officer of the council. The chairman of the meeting must provide the necessary information in order to enable the returning officer to issue a public notice of the poll. The notice must contain the particulars of the question. For polls that are in truth an election, the notice must contain the name of the office, number of vacancies and the particulars of candidates and their proposers. In the case of polls that do not concern an appointment to office, the name and address of the question’s proposer must be included.
- 14.108 Furthermore, the returning officer may appoint presiding officers and clerks for the administration of the polls, as long as, if the poll concerns an appointment to office, such persons are not employed by or on behalf of a candidate for that office, in or about the poll. The returning officer is able to use a school or public room free of charge in order to take the poll or count the votes.<sup>92</sup>

<sup>90</sup> Local Government Act 1972, sch 12, paras 18(4) to (6); Parish and Community Meetings (Polls) Rules SI 1987 No 1, s 4. See also National Association of Local Councils, *Legal Briefing* L18-07 (13 November 2007); Audit Commission, *Technical directory – local government*, Section 10.15: “Parish polls on the Euro Treaty conducted by principal local authorities”. See also the National Association of Local Councils, *Legal Briefing* L04-08 (30 January 2008) and *R (on the application of Letchworth Garden Heritage Foundation) v The Returning Officer for the District of North Hertfordshire and another* [2009] All ER (D) 76 (Mar).

<sup>91</sup> Local Government Act 1972, sch 12, paras 18(4) and 34(4) to (6). The poll can only be had on the specific question that arises for a vote at the parish council meeting. See *Bennett v Chappell* [1965] 3 WLR 829.

<sup>92</sup> Parish and Community Meetings (Polls) Rules SI 1987 No 1, s 4, rr 7, 8 and 12.

### **Administration of the poll**

- 14.109 The 1972 Act states that it is local government electors who are entitled to attend the parish or community meeting. However, neither the 1972 Act nor the 1987 rules expressly stipulates which register is to be used. There are references in the 1987 Act to the local government register, for example, in one of the prescribed questions to be put to a voter. Parish polls are paid for by the parish council. Polling must take place between the hours of 4pm and 9pm. The poll is not restricted to one question.<sup>93</sup>
- 14.110 The 1987 rules are out of date compared to modern conduct rules. There is no provision for poll cards to be sent to electors, no mechanism for enabling absent voters to vote by post or proxy. Vote tracing is still achieved by using counterfoils to ballot papers, instead of using corresponding numbers lists. A counterfoil is a detachable part of a ballot paper on which the elector's number is written against the ballot paper number.<sup>94</sup> There is no provision considering the combination of parish polls with any coinciding poll.
- 14.111 At parish polls which in truth are elections, there is no provision for nomination. One assumes that, at the parish meeting which initiates the poll, the candidates are known. The election rules then make the usual provision for candidates to appoint persons to scrutinise the poll and the count. Where the poll is on a question, the proposer of the question is able to attend the count as if he were a candidate or agent of a candidate.<sup>95</sup>
- 14.112 In essence, the voting procedure and provisions on close of polls and the count are largely the same. Newer provisions such as requiring a tactile voting device for partially sighted voters, or on queues on the close of polls, are omitted.

### ***Campaign regulation***

- 14.113 The 1987 rules incorporate a significant number of the campaign regulation provisions from the 1983 Act. Notably, there are no expenses restrictions. Furthermore, which exact provisions from the 1983 Act apply depend on whether the parish or community poll concerns an appointment to office or not.<sup>96</sup>

#### *When the poll is in truth an election*

- 14.114 When the poll concerns the election of a chairman of the parish council, or any other office, then the 1987 rules incorporate the full range of relevant provisions from the 1983 Act.

#### *When the poll is a true referendum on a parish or council issue*

- 14.115 When the poll concerns a question other than that of an election to office, then the 1987 rules specify which provisions of the 1983 Act apply. Many classic electoral campaign offences, such as bribery and treating, are included.

<sup>93</sup> Local Government Act 1972, ss 150(2) and (7), sch 12, paras 18 and 34; Parish and Community Meetings (Polls) Rules SI 1987 No 1, rr 1 and 17.

<sup>94</sup> Parish and Community Meetings (Polls) Rules SI 1987 No 1, rr 4(2)(2) and 5.

<sup>95</sup> Parish and Community Meetings (Polls) Rules SI 1987 No 1, rr 12 and 28.

<sup>96</sup> Parish and Community Meetings (Polls) Rules SI 1987 No 1, r 6; Representation of the People Act 1983, s 187.

However, it is curious that certain provisions of the 1983 Act are excluded. For example, personation is an offence whilst tampering with ballot papers is not.<sup>97</sup> It does not seem, to us, that there is a good reason why the latter should not be an offence.

### ***Legal challenge***

- 14.116 A parish poll can be challenged by the method of questioning local elections. The 1987 rules expressly incorporate the procedure to question local elections from the 1983 Act. The 1987 rules do make some modifications. For example, the maximum security for costs for a petition against a parish poll is £1,500 rather than £2,500.<sup>98</sup>

### **The particular complexity of parish polls**

#### ***Parish polls which are akin to elections***

- 14.117 As to parish polls, the main source of difficulty arises out of their diverse purpose and proper scope. The first matter of difficulty is whether such polls ask the electorate about an issue, and are thus properly referendums, or whether they seek to appoint someone to an office, and are as such akin to an election. Indeed, the 1987 rules, and section 127 of the 1983 Act, envisage that in at least one respect, parish polls are elections: if they are concerned with the “election of the chairman of a parish or community council” or “the appointment to any other office”.<sup>99</sup> In that case, they are conducted according to rules akin to those governing parish council elections. In our view, there is no reason in principle why such polls, if properly demanded at parish meetings, cannot be conducted according to the rules governing parish and council elections within the standard framework governing elections, subject to there being no nomination stage. The prerequisite, implied in the current rules but which should be made express, is that the candidates for the election should be stipulated at the meeting. We would particularly welcome consultees’ views as to the range of appointments which can be put to the electorate.

#### ***The proper scope of questions to be put to a parish poll***

- 14.118 The second matter of difficulty arises with respect to parish polls on an issue before the council, which are true referendums. What is properly within the scope of the council to decide at a meeting, and thus to put to a poll? We have noted that there has been some difficulty with polls being sought on questions of a constitutional character, such as membership of the EU or signing a treaty.<sup>100</sup> These are plainly not within the proper scope of decision making by the council, since the decision is meaningless. The question is whether the law should seek to formulate what may properly be asked at a parish poll.

<sup>97</sup> Parish and Community Meetings (Polls) Rules SI 1987 No 1, r 6(a).

<sup>98</sup> Parish and Community Meetings (Polls) Rules SI 1987 No 1, r 6(f) to (g); Representation of the People Act 1983, s 127.

<sup>99</sup> Representation of the People Act 1983 s 187(1); 198 Rules para 6 and 6(a).

<sup>100</sup> See para 14.104 and footnote 90 above.

*The conduct rules governing parish polls on a question*

- 14.119 Finally, the problem with the 1987 rules is that their provision is out of date, for example referring to counterfoils, not allowing for absent voting, hours of polling and so on. In our view, there is no reason in principle why the single set of conduct rules governing local referendums should not also govern polls at parish level concerning a question before the council. Electors who are used to voting at multiple elections, and who may do so by post or proxy, can fairly expect to avail themselves of the full range of ways of voting provided for by electoral law.
- 14.120 Subject to our question about the proper scope of issues which can be put to a poll being defined, our provisional view is that parish polls should be run according to the standard conduct rules governing local referendums (where the poll asks a question) and the standard rules governing elections (where the poll concerns an appointment), save for a modification to omit the nominations stage.

**Provisional proposal 14-6: A parish poll pertaining to an appointment should be governed by the conduct rules governing elections, omitting the nomination stage.**

**Provisional proposal 14-7: A parish poll pertaining to an issue should be governed by the conduct rules for local referendums.**

**Question 14-8: Should the scope of issues before a parish council which can be put to a poll be defined so as to restrict parish polls to issues of parish concern?**

# APPENDIX A

## LIST OF PROPOSALS AND QUESTIONS

- A.1 This appendix brings together all of the provisional proposals and consultation questions contained in this consultation paper. We particularly invite consultees to comment on all or some of these, as appropriate. This will greatly assist us in formulating our recommendations for reform.

### CHAPTER 2: LEGISLATIVE FRAMEWORK

**Provisional proposal 2-1:** The current laws governing elections should be rationalised into a single, consistent legislative framework governing all elections.

**Provisional proposal 2-2:** Electoral laws should be consistent across elections, subject to differentiation due to the voting system or some other justifiable principle or policy.

### CHAPTER 3: MANAGEMENT AND OVERSIGHT

**Provisional proposal 3-1:** The ceremonial role, in England and Wales, of sheriffs, mayors, and others as returning officer at UK parliamentary elections should be abolished.

**Provisional proposal 3-2:** Electoral law should set out the powers and duties of returning officers centrally for all elections.

**Provisional proposal 3-3:** The functions, duties, and powers of direction of regional returning officers at elections managed by more than one returning officer should be spelled out.

**Question 3-4:** What is the proper role of powers of direction by directing officers at combined polls led by another returning officer?

**Provisional proposal 3-5:** The designation and review of polling districts is an administrative matter which should be the responsibility of the returning officer rather than local authority councils.

**Question 3-6:** Should appeals against designations of administrative areas be to the Electoral Commission or the Local Government Boundary Commissions?

### CHAPTER 4: THE REGISTRATION OF ELECTORS

**Provisional proposal 4-1:** The franchises for all elections in the UK should be centrally set out in primary legislation.

**Provisional proposal 4-2:** The law on residence, including factors to be considered, and special category electors, should be restated clearly and simply in primary legislation.

**Provisional proposal 4-3:** The possibility of satisfying the residence test in more than one place should be explicitly acknowledged in legislation.

**Question 4-4:** Should the law lay down the factors to be considered by registration officers when registering an elector at a second residence?

**Question 4-5:** Should electors applying to be registered in respect of a second home be required to make a declaration supporting their application?

**Question 4-6:** Should electors be asked to designate, when registering at a second home, one residence as the one at which they will vote at national elections?

**Provisional proposal 4-7:** Entitlement to be a special category elector should be governed by primary legislation which should require a declaration in a common form establishing a voter's entitlement to be registered at a notional place of residence; other administrative requirements should be in secondary legislation.

**Provisional proposal 4-8:** The 1983 Act's provisions on maintaining and accessing the register of electors should be simplified and restated for Great Britain and Northern Ireland respectively.

**Provisional proposal 4-9:** Primary legislation should contain core registration principles including the objective of a comprehensive and accurate register and the attendant duties and powers of registration officers, the principle that the register determines entitlement to vote, requirements of transparency, local scrutiny and appeals, and the deadline for registration.

**Provisional proposal 4-10:** The deadline for registration should be expressed as a number of days in advance of a poll.

**Provisional proposal 4-11:** Primary legislation should prescribe one electoral register, containing records held in whatever form, which is capable of indicating the election(s) the entry entitles the elector to vote at.

**Provisional proposal 4-12:** Secondary legislation should set out the detailed administrative rules concerning applications to register, their determination, publication of the register and access to the full and edited register.

**Provisional proposal 4-13:** Registration officers' systems for managing registration data should be capable, in the long term, of being exported to and interacting with other officers' software, through minimum specifications or a certification requirement laid down in secondary legislation.

**Provisional proposal 4-14:** EU citizens' declaration of intent to vote in the UK should have effect for the duration of the elector's entry on the register, possibly subject to a limit of five years.

## **CHAPTER 5: MANNER OF VOTING**

**Provisional proposal 5-1:** The secrecy requirements under section 66 should extend to information obtained when a person completed their postal vote, and should prohibit the taking of photographs in a polling station.

**Provisional proposal 5-2:** The obligation to store sealed packets after the count should spell out that they should be stored securely.



**Provisional proposal 5-3:** Corresponding number lists should be stored in a different location from ballot papers and in a different person's custody.

**Provisional proposal 5-4:** Secrecy should be unlocked only by court order, with safeguards against disclosure of how a person voted extended to an innocently invalid vote.

**Provisional proposal 5-5:** The form and content of ballot papers and other materials supplied to voters should continue to be prescribed in secondary legislation.

**Provisional proposal 5-6:** The duty to consult the Electoral Commission as to the prescribed form and content of ballot papers should include consultation in relation to the principles of clarity, internal consistency of the design (with equal treatment between candidates), and general consistency with other elections' ballot papers.

## **CHAPTER 6: ABSENT VOTING**

**Provisional proposal 6-1:** Primary legislation should set out the criteria of entitlement to an absent vote. Secondary legislation should govern the law on the administration of postal voter status.

**Provisional proposal 6-2:** The law governing absent voting should apply to all types of elections, and applications to become an absent voter should not be capable of being made selectively for particular elections.

**Provisional proposal 6-3:** Registration officers should be under an obligation to determine absent voting applications and to establish and maintain an entry in the register recording absent voter status, which can be used to produce absent voting lists.

**Provisional proposal 6-4:** The special polling station procedure in Northern Ireland under schedule 1 to the Representation of the People Act 1985 should be repealed.

**Provisional proposal 6-5:** Absent voting applications should substantially adhere to prescribed forms set out in secondary legislation.

**Provisional proposal 6-6:** Requests for a waiver of the requirement to provide a signature as a personal identifier should be attested, as proxy applications currently must be.

**Question 6-7:** Should electoral law prohibit, by making it an offence, the involvement by campaigners in any of the following:

- (1) assisting in the completion of postal or proxy voting applications;
- (2) handling completed postal or proxy voting applications;
- (3) handling another person's ballot paper;
- (4) observing a voter marking a postal ballot paper;

- (5) asking or encouraging a voter to give them any completed ballot paper, postal voting statement or ballot paper envelope;
- (6) if asked by a voter to take a completed postal voting pack on their behalf, failing to post it or take it directly to the office of the Returning Officer or to a polling station immediately;
- (7) handling completed postal voting packs at all?

**Provisional proposal 6-8:** A single set of rules should govern the postal voting processes in Great Britain and Northern Ireland respectively; and

**Provisional proposal 6-9:** These rules should set out the powers and responsibilities of returning officers regarding issuing, receiving, reissuing and cancelling postal votes generally rather than seeking to prescribe the process in detail.

## **CHAPTER 7: NOTICE OF ELECTION AND NOMINATIONS**

**Provisional proposal 7-1:** A single nomination paper, emanating from the candidate, and containing all the requisite details including their name and address, subscribers if required, party affiliation and authorisations should replace the current mixture of forms and authorisations which are required to nominate a candidate for election.

**Provisional proposal 7-2:** The nomination paper should be capable of being delivered by hand, by post or by electronic mail.

**Provisional proposal 7-3:** The nomination paper should be adapted for party list elections to reflect the fact that parties are the candidates; their nomination must be by the party's nomination officer and should contain the requisite consents by list candidates.

**Provisional proposal 7-4:** Subscribers, where required, should be taken legally to assent to a nomination, not a paper, so that they may subscribe a subsequent paper nominating the same candidate if the first was defective.

**Provisional proposal 7-5:** Returning officers should no longer inquire into and reject the nomination of a candidate who is a serving prisoner. The substantive disqualification under the Representation of the People Act 1981 will be unaffected.

**Provisional proposal 7-6:** Returning officers should have an express power to reject sham nominations.

## **CHAPTER 8: THE POLLING PROCESS**

**Provisional proposal 8-1:** A single polling notice in a prescribed form should mark the end of nominations and the beginning of the poll, which the returning officer must communicate to candidates and publicise.

**Provisional proposal 8-2:** The same forms of poll cards should be prescribed for all elections, including parish and community polls, subject to a requirement of substantial adherence to the form.

**Provisional proposal 8-3:** As part of their duty of neutrality, returning officers should not appoint in any capacity – including for the purposes of postal voting – persons who have had any involvement (whether locally or otherwise) in the election campaign in question.

**Provisional proposal 8-4:** The power to use school rooms should be clarified so that the returning officer is able to select and be in control of the premises required, and so that the duty to compensate the school for costs does not extend beyond the direct costs of providing the premises.

**Provisional proposal 8-5:** The law should specifically require that returning officers furnish particular pieces of essential equipment for a poll, including ballot papers, ballot boxes, registers and key lists. For the rest, returning officers should be under a general duty to furnish polling stations with the equipment required for the legal and effective conduct of the poll.

**Provisional proposal 8-6:** Presiding officers should have the power to use, or authorise the use by polling station staff of, reasonable force to remove from a polling station a person not entitled to be there. The procedure for returning officers to issue authorisations to use force should be abolished.

**Provisional proposal 8-7:** A single set of polling rules should apply to all elections, simplified so that they prescribe only the essential elements of conducting a lawful poll, including: the powers to regulate and restrict entry, hours of polling, the right to vote, the standard, assisted, and tendered polling processes, and securing an audit trail.

**Provisional proposal 8-8:** Polling rules should set out general requirements for a legal poll which the returning officer should adhere to. These should no longer include a requirement for voters to show the official mark on their ballot paper to polling station staff.

**Provisional proposal 8-9:** The right to ask voters questions as to their entitlement to vote should be preserved, but secondary legislation should only prescribe the point they may elicit, and leave suggested wording to guidance.

**Provisional proposal 8-10:** Voting with the assistance of a companion should not involve formal declarations, but should be permitted by the presiding officer where a voter appears to be unable to vote without assistance. There should no longer be a limit on the number of disabled voters a person may assist; alternatively, the limit should not apply to family members, who should include grandparents and (adult) grandchildren.

**Provisional proposal 8-11:** The requirement to provide equipment to assist visually impaired voters to vote unaided should be retained. There should be a single formulation, applying to all elections, of the required characteristics of the equipment.

**Provisional proposal 8-12:** The current provision, including the distinction between the death of party and independent candidates, should be retained as regards parliamentary elections.

**Provisional proposal 8-13:** At elections using the party list voting system, the death of an individual independent candidate should not affect the poll unless he or she gains enough votes for election, in which case he or she should be passed over for the purpose of allocation of the seat; the death of a list candidate should not affect the poll.

**Question 8-14:** We ask consultees whether, at local government elections, the death of an independent candidate should or should not result in the abandonment of the poll.

**Provisional proposal 8-15:** The existing rule, requiring the presiding officer to adjourn a poll in cases of rioting or open violence, should be abolished.

**Provisional proposal 8-16:** Returning officers should have power to alter the application of electoral law in order to prevent or mitigate the obstruction or frustration of the poll by a supervening event affecting a significant portion of electors in their area, subject to instruction by the Electoral Commission in the case of national disruptions. Presiding officers should only have a corresponding power in circumstances where they are unable to communicate with their returning officer.

## **CHAPTER 9: THE COUNT AND DETERMINATION OF THE RESULT**

**Provisional proposal 9-1:** A single standard set of rules should govern the count at all elections.

**Provisional proposal 9-2:** The standard counting rules should cater for differences between elections as regards their voting system and how their counts are managed.

**Provisional proposal 9-3:** The rules should empower returning officers to determine the earliest time at which it is practicable to start a count, and to pause one overnight, subject to the duty to commence counting at UK Parliamentary elections within four hours and the requirement to report any failure to do so.

**Provisional proposal 9-4:** Candidates may be represented at the count by their election agents or counting agents, who should be able to scrutinise the count in the way the law currently envisages. At party list elections, parties may appoint counting agents. Election agents and counting agents should be able to act on a candidate's behalf at the count, save that a recount may only be requested by a candidate, an election agent or a counting agent specifically authorised to do so in the absence of the candidate or election agent.

**Provisional proposal 9-5:** Save for differences in the transfer value, the same detailed rules should govern all STV counts.

**Provisional proposal 9-6:** A standard set of counting rules and subset of counting rules for electronic counting should apply to all elections. Which elections are subject to electronic counting should be determined by statutory instrument.

**Question 9-7:** Should electronic counting systems be subject to a certification requirement, a requirement of a prior demonstration to political parties and/or the Electoral Commission, or should there be no change in the current law?

## **CHAPTER 10: TIMETABLES AND COMBINATION OF POLLS**

**Provisional proposal 10-1:** The UK Parliamentary election timetable should be oriented so that steps count back from polling day.

**Provisional proposal 10-2:** A separate rule should state that, for by-elections, polling day is on the last Thursday occurring between days 23 and 27 after the warrant for the writ of by-election is issued. (this is based on the current 25 day timetable length).

**Provisional proposal 10-3:** The writ should be capable of communication by electronic means.

**Provisional proposal 10-4:** A standard legislative timetable should apply to all UK elections, containing the key milestones in electoral administration, including the deadlines for registration and absent voting.

**Provisional proposal 10-5:** The timetable should be 28 days in length.

**Provisional proposal 10-6:** The law governing combination of coinciding polls should be in a single set of rules for all elections.

**Provisional proposal 10-7:** Any elections coinciding in the same area on the same day must be combined.

**Question 10-8:** Should the returning officer have a power to defer a fourth coinciding poll in the interests of voters and good electoral administration? What safeguards might sensibly apply to the exercise of the power?

**Provisional proposal 10-9:** The lead returning officer and their functions should be determined by a single set of rules according to the existing hierarchy for mandatory combinations, with some discretionarily combinable functions.

**Provisional proposal 10-10:** A single set of adaptations should provide for situations where a poll involves several ballot papers.

## **CHAPTER 11: ELECTORAL OFFENCES**

**Provisional proposal 11-1** A single set of electoral offences should be set out in primary legislation which should apply to all elections.

**Provisional proposal 11-2:** The offence of bribery should be simplified, with its mental element stated as intention to procure or prevent the casting of a vote at election.

**Provisional proposal 11-3:** The electoral offence of treating should be abolished and the behaviour that it captures should where appropriate be prosecuted as bribery.

**Provisional proposal 11-4:** Undue influence should be restated as offences of trickery, pressure and duress.

**Question 11-5:** Should the law regulate the exercise of abuse of influence, religious or otherwise, by a person over a voter which does not amount to an existing electoral offence?

**Question 11-6:** Is the current power to make provision concerning imprinting of “other” (including online) material sufficient, or is it desirable and feasible, within the remit of this project, to recommend regulation of online material?

**Question 11-7:** Should the illegal practice of disturbing election meetings apply only to candidates and those supporting them, and no longer be predicated on the “lawfulness” of the meeting?

**Question 11-8:** Should the offence of falsely stating that another candidate has withdrawn be retained?

**Question 11-9:** Should an increased sentence of ten years’ custody be available in cases of serious electoral fraud as an alternative to recourse to the common law offence of conspiracy to defraud?

## **CHAPTER 12: REGULATION OF CAMPAIGN EXPENDITURE**

**Provisional proposal 12-1:** Returning officers should publicise and make available for inspection expenses returns (as well as publicising non-receipt of a return). Secondary legislation should prescribe in detail the process for that publicity and inspection, paving the way for publication online.

**Provisional proposal 12-2:** Provisions governing the regulation of campaign expenditure should be centrally set out for all elections.

**Provisional proposal 12-3:** A single schedule should contain prescribed expense limits and guidance to candidates as to expenditure and donations.

**Provisional proposal 12-4:** Expenditure limits which are calculated according to a formula should be declared by the returning officer for the constituency or electoral area in a notice accompanying, or immediately following, the notice of election.

**Provisional proposal 12-5:** Returning officers should receive a single set of documents containing the return of expenses and declarations by the agent and the candidate. These should include any statement by an authorised person containing the particulars currently required to be sent to the returning officer by section 75(2) of the 1983 Act.

## **CHAPTER 13: LEGAL CHALLENGE**

**Provisional proposal 13-1:** The doctrine of “votes thrown away” should be abolished

**Provisional proposal 13-2:** The law governing challenging elections should be set out in primary legislation governing all elections.

**Provisional proposal 13-3:** Defects in nomination, other than purely formal defects, should invalidate the election if they amount to a breach of election law which was committed knowingly or can reasonably be supposed to have affected the result of the election.

**Provisional proposal 13-4:** The grounds for correcting the outcome or invalidating elections should be restated and positively set out.

**Provisional proposal 13-5:** Disqualification at the time of election should be stated to be a ground for invalidating the election for all elections.

**Question 13-6:** Should the election court have a power to consider whether a disqualification has lapsed and, if so, whether it is proper to disregard it, mirroring the power under section 6 of the House of Commons Disqualification Act 1975?

**Provisional proposal 13-7:** At elections using the party list voting system, the court should be able to annul the election as a whole, or that of a list candidate, because corrupt or illegal practices were committed attributable to the candidate party or individual, or for extensive corruption.

**Provisional proposal 13-8:** Legal challenges should be heard in the ordinary court system in the UK, with a single right of appeal on a point of law.

**Provisional proposal 13-9:** Local election petitions in England and Wales should be heard by expert lawyers sitting as deputy judges.

**Provisional proposal 13-10:** Challenges should be governed by simpler, modern and less formal rules of procedure allowing judges to achieve justice in the case while having regard to the balance between access and certainty.

**Provisional proposal 13-11:** Returning officers should have standing to bring petitions, including a preliminary application to test whether an admitted breach affected the result.

**Provisional proposal 13-12:** There should be a means of ensuring sufficient representation of the public interest in elections within that judicial process.

**Question 13-13:** Should there be a public interest petitioner with standing to bring election petitions?

**Question 13-14:** What should the threshold criteria be for bringing a petition in the public interest?

**Question 13-15:** How, if at all, should the law tackle the issue of individuals getting a “free ride” by challenging elections through the public interest petitioner?

**Question 13-16:** Should the decision to bring a public interest petition be subject to independent and expert assessment of the merits of the case, or left entirely at the discretion of the petitioner?

**Provisional proposal 13-17:** There should be an informal means of reviewing complaints about elections which do not aim to overturn the result.

## **CHAPTER 14: REFERENDUMS**

**Provisional proposal 14-1:** Primary legislation governing electoral registers, entitlement to absent voting, core polling rules and electoral offences should be expressed to extend to national referendums where appropriate.

**Provisional proposal 14-2:** Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring that governing elections, save for necessary modifications.

**Provisional proposal 14-3:** A single legislative framework should govern the detailed conduct of local referendums, subject to the primary legislation governing their instigation.

**Provisional proposal 14-4:** The grounds of challenge governing elections should apply to local referendums, save that only extensive corrupt or illegal practice shall be a ground for annulling the referendum.

**Question 14-5:** Should challenge to neighbourhood planning referendums continue to be by judicial review only?

**Provisional proposal 14-6:** A parish poll pertaining to an appointment should be governed by the conduct rules governing elections, omitting the nomination stage.

**Provisional proposal 14-7:** A parish poll pertaining to an issue should be governed by the conduct rules for local referendums.

**Question 14-8:** Should the scope of issues before a parish council which can be put to a poll be defined so as to restrict parish polls to issues of parish concern?



## APPENDIX B

### LIST OF ATTENDEES AT ADVISORY GROUP MEETINGS IN JUNE 2013 AND/OR JULY 2014

Member	Sector
Cabinet Office	Government
Scottish Government	Government
Northern Ireland Office	Government
Welsh Government (Dr Hugh Rawlings CB)	Government
Crown Prosecution Service (Simon Orme)	Government
Electoral Commission	Electoral administration
Electoral Management Board for Scotland	Electoral administration
Chief Electoral Officer for Northern Ireland	Electoral administration
Society of Local Authority Chief Executives (SOLACE)	Electoral administration
Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)	Electoral administration
Scottish Assessor's Association	Electoral administration
Lady Paton	Judiciary
Lord Eassie	Judiciary
Master Leslie	Judiciary
Senior Master Whitaker (now retired)	Judiciary
Mr Justice Nicol	Judiciary
Sir Michael Tugendhat (now retired)	Retired judge
Mr Richard Price OBE QC	Election lawyer
Mr Timothy Straker QC	Election lawyer
Richard Mawrey QC	Election lawyer
Mr Gerald Shamash (Steel & Shamash)	Election lawyer

Mr Keith Bush (Legal Wales Foundation)	Election lawyer
Mr Dominic Spenser Underhill (Spenser Underhill Newmark LLP)	Election lawyer
Mr Piers Coleman (K&L Gates)	Election lawyer
Professor Ron Johnston OBE FBA	Academic
Professor Bob Watt	Academic
Dr Caroline Morris	Academic
Dr Toby James	Academic
The Labour Party (Ms Margaret Lynch)	Political party
Liberal Democrat Party (Mr David Allworthy)	Political party
Conservative Party (Mr Alan Mabbutt/Andrew Stedman)	Political party
Scottish National Party (Mr Scott Martin)	Political party
Plaid Cymru (Ms Rhian Medi Roberts)	Political party
Alliance Party (Ms Sharon Lowry)	Political party
SDLP (Ms Gerry Cosgrove/ Mr Ray Kennedy)	Political party
Sinn Féin (Mr Gary Fleming)	Political party
Ulster Unionist Party (Mrs Hazel Legge)	Political party
Scottish Green Party (Mr Alastair Whitelaw)	Political party
Mr Paul Gribble CBE, editor of Schofield's Election Law	Third sector
Scope (Ms Cristina Sarb)	Third sector
Diverse Cymru (Ele Hicks)	Third sector
Electoral Reform Society (Darren Hughes)	Third sector