



**Law
Commission**
Reforming the law



Scottish Law Commission
promoting law reform



ELECTORAL LAW

Summary of final report

INTRODUCTION

This is a quick read summary of the Law Commission of England and Wales and the Scottish Law Commission’s final report on Electoral Law.

The structure of this summary follows the structure of our final report. In Part One we give an overview of electoral law, and some of the problems with it. Here we also discuss our recommendations for improving the legislative framework governing elections (see chapter 2 of the final report). In Part Two we focus on the reform of discrete, technical areas of electoral law, with a focus on electoral administration. That includes the management and oversight of elections, the registration of electors, absent voting by post or proxy, the nomination of candidates, electoral offences and legal challenge.

In December 2012 we published a scoping report and agreed with government that we would not consider issues such as: who is entitled to vote (known as the franchise); whether the voting system at elections should be first-past-the-post or proportional representation; and electoral boundaries.

We published our interim report in 2016, and it received a great deal of support from bodies such as the Electoral Commission and the Association of Electoral Administrators. There is consensus in the electoral law community that there is a pressing need for reform of electoral law.

“The updating and simplification of electoral law must be seen as a pressing priority for the Government.” – Parliamentary and Constitutional Affairs Committee.



PART ONE: THE BIG PICTURE

Overview of electoral law

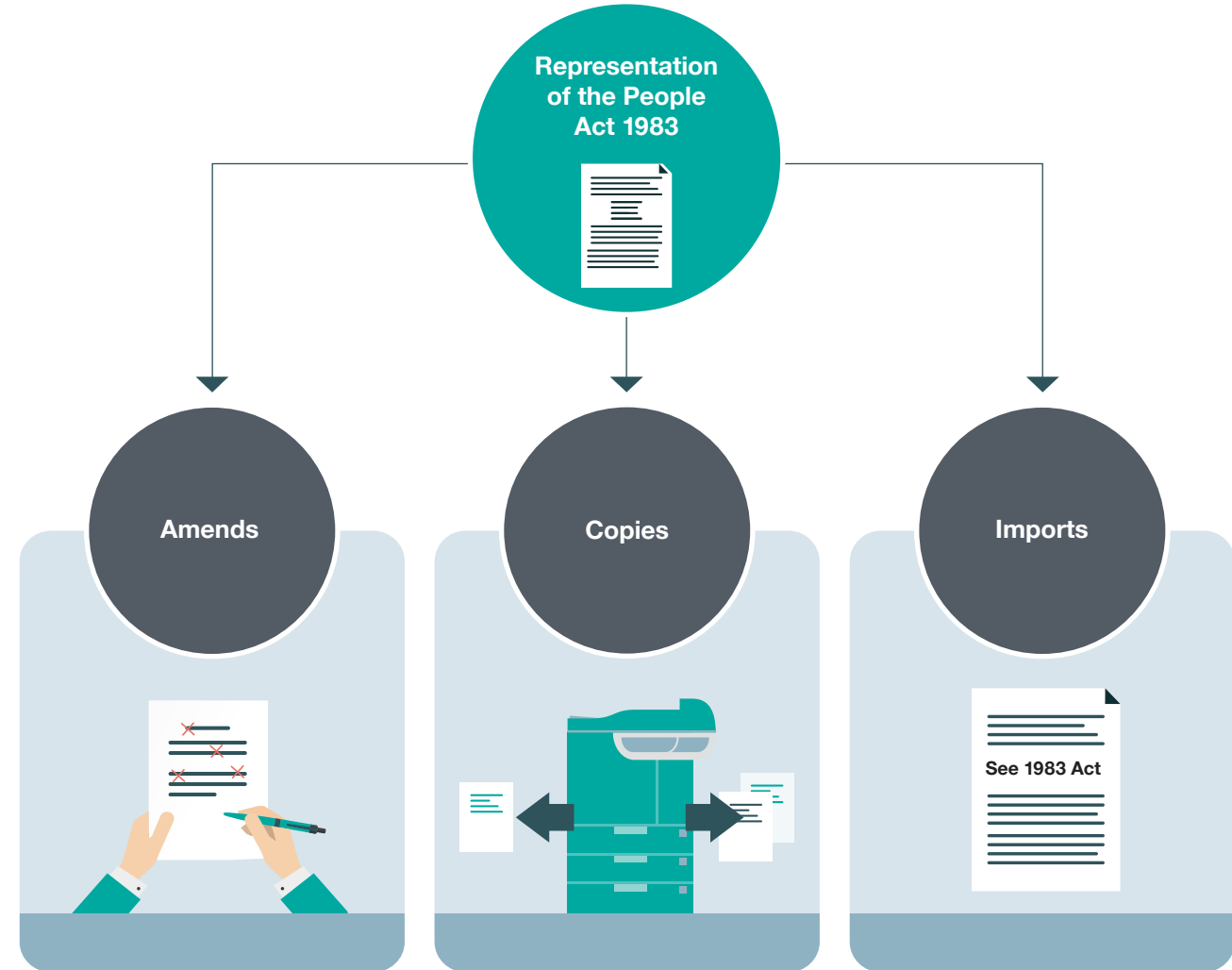
This project covers many different types of election, a number of which were introduced after 1999. The project covers:

- 1. UK Parliamentary elections;
- 2. Scottish Parliamentary elections;
- 3. Welsh Parliamentary elections;
- 4. local government elections in England and Wales;
- 5. local government elections in Scotland;
- 6. Greater London Authority elections (to the London Assembly and of the London Mayor);
- 7. mayoral elections in England and Wales;
- 8. combined authority mayoral elections in England and Wales; and
- 9. Police and Crime Commissioner elections in England and Wales.

The main Act governing elections is the Representation of the People Act 1983 (“the 1983 Act”), which contains the law governing UK Parliamentary and local government elections. It sets out the parliamentary and local election franchise, the framework for registering voters and running elections, how electoral campaigns are regulated and the mechanism for challenging elections. Schedule 1 to the 1983 Act also contains more detailed rules for running UK Parliamentary elections. These are known as the parliamentary “elections rules”.

The rules for all other types of election are contained in separate pieces of legislation that apply to that particular type of election. We describe this as an “election-specific” approach to electoral legislation. As shown in the diagram, the pieces of legislation governing other types of election generally amend, copy or import sections of the 1983 Act.

Adapting the 1983 Act for new elections.



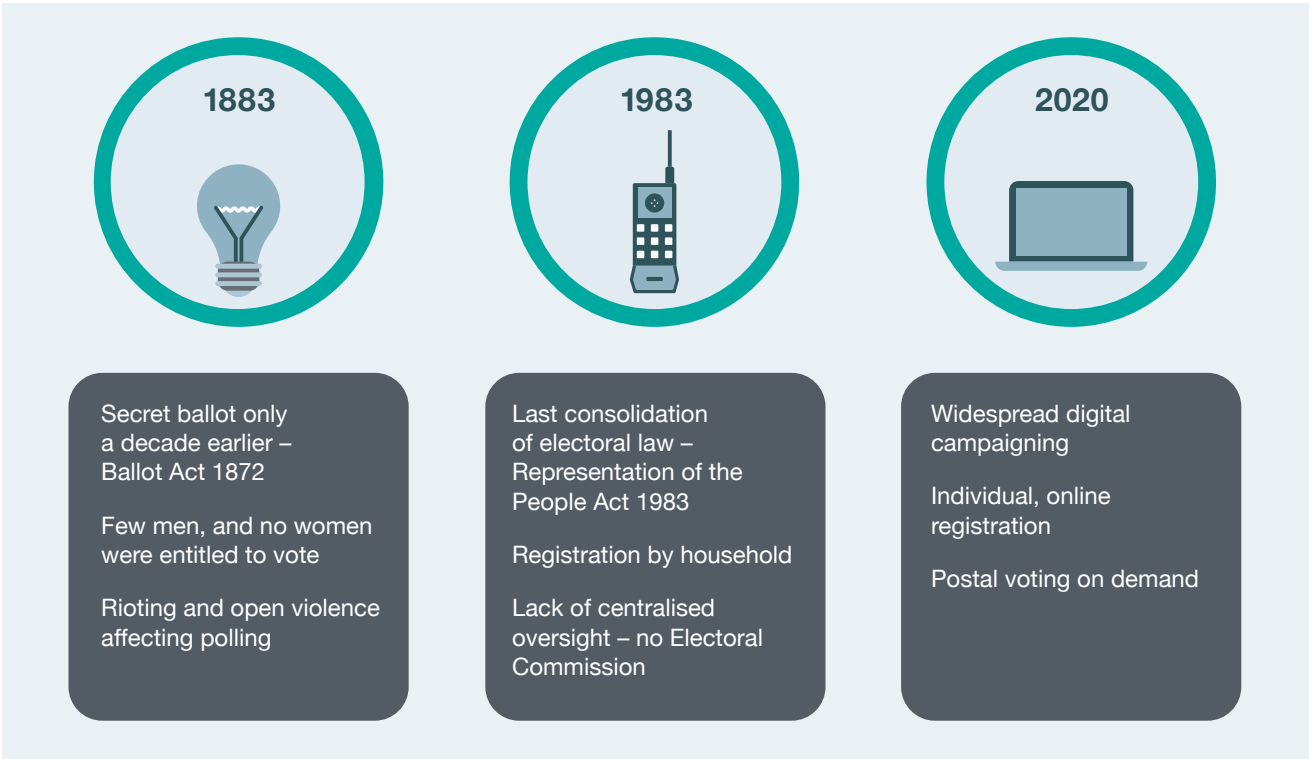
The problems with electoral law

- 1. **Out-of-date:** The 1983 Act has its origins in legislation dating from the mid-19th century. Much of it has not been updated since.
- 2. **Complicated:** Electoral law is very detailed and prescriptive. It leaves electoral administrators very limited discretion in how to run polls. Over time, the drafting of these laws has become complex. This means bodies such as the Electoral Commission have to spend a lot of time preparing guidance to administrators to explain how they should interpret the law.
- 3. **Legislative gaps:** Another aspect of electoral law’s detailed, prescriptive approach, is that there are several gaps in its regulation. Gaps generally arise where there have been new developments, such as postal voting, social media or modern technology, and older law has not been modified accordingly.

- 4. **Fragmented:** There are now at least 25 statutes containing rules for running elections. After 1999, each time a new election was introduced a new piece of legislation was also introduced to provide the rules for that election. Any new legislation tends to either copy the 1983 Act word-for-word, or replicate significant portions of it, adapting the wording to account for any differences in voting systems. As a result there is simply too much legislation, much of it almost identical to the 1983 Act.

This approach also means that when innovations are introduced, or policy updated, amendments need to be made to multiple pieces of legislation. For example, when the law was changed to allow those queuing at the close of polls to cast their vote, changes had to be made to ten distinct pieces of legislation. The innovation was intended to apply at all elections, but the election-specific approach to electoral legislation meant it had to be implemented bit by bit.

Elections over time



Devolution

Some electoral law is devolved to the Scottish and Welsh Parliaments (the Senedd). The Scottish and Welsh governments have power to make elections rules for Scottish and Welsh Parliamentary elections and local government elections in those jurisdictions. There are some rules for those elections that remain the responsibility of the UK Parliament. These include the rules regulating donations to registered political parties.

Our recommendations

We recommend there should be a single, consistent legislative framework which applies to all elections and referendums. We refer to this as “rationalisation”. The result is that there would be one UK Act of Parliament, and secondary legislation made under it, that governs UK-wide and England-only elections and referendums. The Scottish and Welsh Parliaments have the power to create their own legislation governing devolved elections. This recommendation received near unanimous support from consultees.

Rationalisation



The current laws governing elections should be rationalised into a single, consistent legislative framework governing all elections (enacted in accordance with the UK legislative competences).

We also propose that there should be, as far as possible, a general and consistent set of rules for elections. The current law is unnecessarily complicated, and many rules are repeated in each election-specific piece of legislation. Again, nearly all of our consultees supported this proposal.

Rationalisation

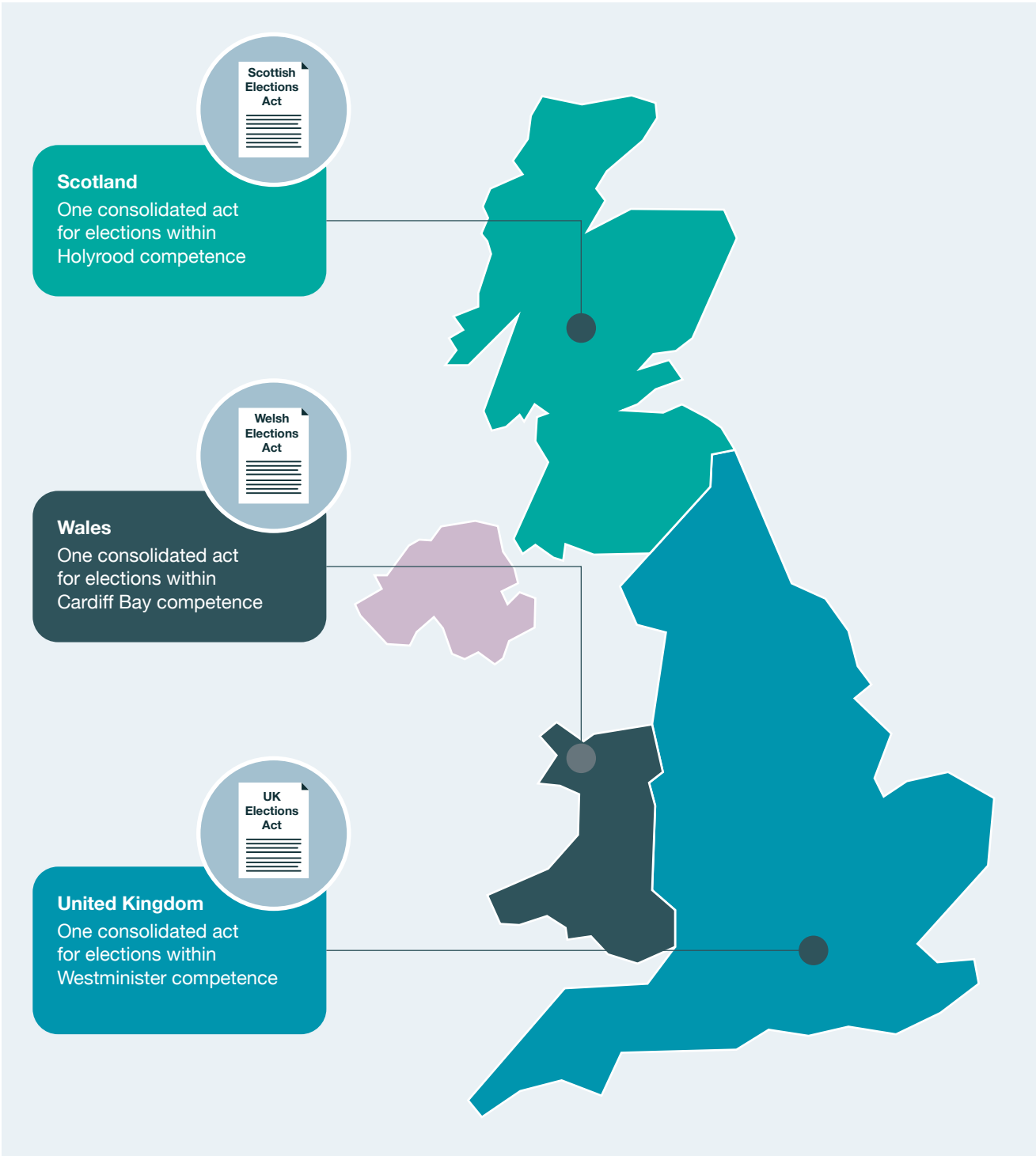


Electoral laws should be consistent across elections, subject to differences in voting systems or other good policy reasons.

“Electoral law should be framed in a manner which enables the interested citizen at least to locate the statutory setting of relevant rules. Our legislative regime is opaque and often impenetrable to the non-expert...”
– Dr Heather Green (University of Aberdeen).

The diagram shows our recommended framework for electoral law in the UK.

Our proposed legislative scheme



The balance between primary and secondary legislation

Next time there is a wholesale reform of electoral law, decisions will have to be made about whether rules should be contained in primary or secondary legislation. Some provisions may not need to be in legislation at all, and could be left to the judgement of returning officers, supported by Electoral Commission guidance.

We think the balance between primary and secondary legislation and Electoral Commission guidance should be as follows:

- 1. **Primary legislation:**
 - a. Fundamental provisions, which include constitutional matters, such as the franchise and voting system, and
 - b. Structurally important electoral law, including the electoral register, absent voting, the regulation of the election campaign, electoral offences, and provisions on legal challenge to elections.
- 2. **Secondary legislation:** More detailed or technical rules on the conduct or administration of the poll and count.
- 3. **Electoral Commission guidance or returning officer discretion:** Purely administrative, best practice or organisational provisions.

Who's Who

There are a number of individuals and bodies responsible for different aspects of elections, including voter registration, preparing ballot papers and managing polling stations and campaign regulation.

Registration officer	An official of a local authority who is responsible for maintaining a register of people residing in the local authority area who can vote at elections.
Returning officer	The official responsible for conducting an election in a specific area. In England and Wales, the returning officer is usually also the registration officer. In Scotland the posts are usually held by two different officials.
Presiding officer	The person appointed by the returning officer to preside over a particular polling station.
Polling clerk	Officials appointed by the returning officer to assist the presiding officer.
The Electoral Commission	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.

PART TWO: REFORMING
ELECTORAL ADMINISTRATION

“Potential voters may find that important aspects of registering, voting and campaign transparency are so old-fashioned or opaque that they don’t have enough trust in politicians or elections to cast their vote.”
– The Electoral Commission

Before Polling Day

Registration

The 1983 Act contains the rules governing registration at UK Parliamentary elections. Those rules are recreated in separate pieces of election-specific legislation. The 1983 Act was passed at a time when registration was done once a year by household. Now, registration is year round (individual registration was introduced in 2013) and voters can register online.



A person is entitled to be registered in an electoral area if they are resident in that area. However, defining what is meant by residence is difficult and the law is very complex. The 1983 Act does not define residence, and instead lists factors that tend to establish residence. Those factors have been supplemented by case law.

There are also complex rules governing particular types of voter, who are entitled to vote in an area, even though they do not usually reside there. The category includes merchant seamen, mental health patients, remand prisoners, service voters, overseas electors and homeless people. Those voters are deemed to be “notionally resident” in an electoral area.

We take the view that the complex test for determining residence should be restated in primary legislation, incorporating any interpretation of residence that has been provided by case law.

Filling legislative gaps



The law on electoral residence should be set out clearly and simply in primary legislation. A list of factors should be provided to assist registration officers with their decisions and ensure consistent decision-making.

The current patchwork of legislation and regulations governing registration also envisage five different electoral registers kept on paper. In reality, those five registers are combined in one dataset contained in software operated by the registration officer. This is known as an “electoral management system”. We think it is important that the law reflect current practice.

Simplification



Primary legislation should prescribe one electoral register that can be in either paper or electronic form. It should be possible for the single register to show which election(s) an individual is entitled to vote at.

One of the aims of this project is to modernise electoral law. At present an individual can only vote at the polling place they are assigned to. In order to allow people to vote at a polling station of their choosing, a “live” register would be required, showing in real time if the voter had already voted. In order for that to be possible, electoral management systems will need to be able to export data to each other.

Modernisation



Secondary legislation may require that the data in registration officers’ electoral management systems should be capable of being exported to and interacting with other officers’ software.

Absent voting

An absent vote is a way of voting without attending a polling station on polling day. This can be done through a postal vote or by appointing a proxy (someone who casts a vote on behalf of another person). Since 2000, postal voting has been available on demand in Great Britain. A voter can only appoint a proxy to vote on their behalf if they can’t attend the polling station, for example because of work or illness.

In Great Britain the law governing entitlement to an absent vote is contained in the Representation of the People Act 2000 (“the 2000 Act”). The 2000 Act applies to UK Parliamentary elections, local government elections in England and Wales, elections to the Greater London Authority, and local government elections in Scotland. Separate pieces of secondary legislation apply the 2000 Act provisions to other types of election.

One of the difficulties with the law’s election-specific approach is that it envisages separate records of postal voters under each piece of legislation. That means an individual may be registered for an absent vote at one type of election, but not another, even if they are held on the same day. Complex drafting is required to ensure a voter is entitled to an absent vote at all the elections and referendums they might vote at.

This election-specific approach created a problem at the May 2011 referendum on the parliamentary voting system. The Yes campaign sent voters a bespoke form applying for a postal vote at the referendum only. However, the referendum took place on the same day as some local government elections, notably in London. Voters who used the bespoke referendum form did not also get a postal vote for the local government elections. Since many voters who apply to vote by post do so because they are away from home (for example, on holiday), many were only able to vote at the referendum, and not at local elections happening on the same day.

We think the law governing entitlement to an absent vote should reflect the fact that, in reality, people are choosing to vote by post or proxy at any and all elections for a certain period, or on a particular day, rather than at a particular type of election. We also think a prescribed form would reduce the risk of inconsistency in absent voting applications, and should be set out in secondary legislation.

Rationalisation



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 types of elections.

Simplification



Absent voting applications should substantially adhere to prescribed forms set out in secondary legislation.

Nomination of candidates for election

The nominations process determines the name and details of candidates that will appear on a ballot paper. Here also, electoral law's election-specific, highly detailed approach to prescription results in the law being overly complex, while leaving gaps in regulation.

At UK Parliamentary elections, for example, a candidate (or their agent) must personally deliver a number of separate forms to a returning officer: a nomination paper, a consent to nomination form and a home address form setting out the candidate's residential address. If the candidate is affiliated with a political party they must also deliver a certificate of authorisation and request to use the party's emblem. Other elections' rules make similar provisions, though these occasionally diverge.

We think the law's requirement for nomination should be simpler, and see no reason why a would-be candidate should be required to deliver multiple separate forms.

Simplification



A single set of nomination papers, emanating from the candidate, and containing all the necessary details such as their name and address, should replace the current mixture of forms.

As noted above, at UK Parliamentary elections the rules require a candidate to physically deliver their nomination paper to the returning officer. However, the position at local government elections is less clear. We think the law should be modernised to allow candidates to deliver nomination papers by post or email. This may be helpful for would-be candidates in more remote, rural areas. We also think a candidate should still be able to deliver their nomination paper by hand if they so wished.

Modernisation



Nomination papers should be capable of being delivered by hand and other means, such as post and electronically (for example by email).

Sham nominations

Over time the courts have accepted that returning officers can reject what we call "sham nominations". There are two types of case which still pose a problem for returning officers:

- 1. The spoiler candidate who imitates a well-known person's name – for example the candidate who changed his name to Margaret Thatcher and ran in her constituency.
- 2. The fictitious candidate – for example the mannequin who was nominated for a local government election in Aberdeen.

We think this area of law is unclear and risks confusion and inconsistent practice. A power to reject nominations should be set out in legislation.



Filling legislative gaps



Returning officers should have an express power to reject nominations that use a candidate's name which is designed to confuse or mislead electors, or obstruct voting generally, or is obscene or offensive.

Polling Day

The secret ballot

The secret ballot has been the cornerstone of voting in the UK since 1872. Requiring votes to be cast in the privacy of the polling booth helps protect against influence and corruption. Section 66 of the 1983 Act provides:

- 1. candidates, administrators and observers must maintain and aid the secrecy of the poll;
- 2. the voting public must not interfere with other voters, induce them to display a completed ballot paper or obtain information as to how they voted; and
- 3. those attending the count of ballot papers must not communicate information obtained at the count or ascertain ballot paper numbers.

Section 66 does not apply to postal voting. The law is also silent on a significant new challenge to secrecy: the possibility of the voter using their mobile phone to take a picture of a completed ballot paper. The secret ballot is key to maintaining both the integrity of the poll, and public confidence in elections. But there may be good reasons – for example publicising electoral participation – to allow some photos to be taken of the voting process. We think the law should be expanded and updated to reflect modern conditions.

Modernisation



The secrecy provisions in section 66 of the 1983 Act should be expanded to ensure postal voting is secret, and prohibit individuals taking photographs at the polling station unless approved by the presiding officer.

Management and oversight

Returning officers are responsible for the administration of elections. The 1983 Act sets out returning officers' duty to conduct elections. The duty is copied, with some changes, in legislation applying to other types of elections. We do not think there is any reason for this duplication.

Rationalisation



The powers and duties of returning officers should be set out in as few statutes as possible; ideally one statute for each of the UK, Welsh and Scottish Parliaments.

To help the running of the poll, constituencies, wards and divisions (depending on the type of election) are broken down into administrative areas. These areas are called "polling districts". Under the current rules, local councillors (who are necessarily political actors) review parliamentary polling districts. We think the designation and review of polling districts is an administrative matter which ensures the effective organisation of polls, and that polling is convenient for voters. For those reasons, we think it is a job for returning officers.

Modernisation



The designation and review of polling districts is an administrative matter which should be the responsibility of returning officers, rather than local councils.

The polling process

The rules governing polling are long and complex. Like many other areas of electoral law, they are set out in separate pieces of legislation for different types of election. Despite that, the content of these rules is very similar, and voters’ experiences of the polling process are typically identical regardless of the election they are voting at. We outline three of the difficulties we identified in the current rules.

- 1. The election rules allow a returning officer to use any room in a school for the purposes of a poll for free. There is often disagreement between returning officers and schools, especially if an election would interfere with exams or Christmas plays. It is also unclear whether a returning officer may demand the use of a particular room, if the school would prefer to offer another one. We think the law should be simplified and made clearer.



Simplification



Returning officers should have the power to select and control premises maintained at public expense for polling. However, the returning officers have a duty to compensate the direct costs of providing the premises.

- 2. Voters with disabilities may vote with the assistance of a companion at the polling station if they need assistance to cast their vote. To be a companion a person must either be entitled themselves to vote at the election, or be an adult family member (meaning a parent, sibling, spouse, civil partner or child) of the voter who needs assistance. We think the list of family members should be expanded to include grandparents, adult grandchildren and cohabitants.

Under the current rules, both the voter and companion must make a formal declaration. We do not think the formal declaration is a meaningful check against deception; in our view it is unnecessary and makes the process overly complicated for voters with disabilities.

Simplification



Presiding officers should permit voters with disabilities to vote with the assistance of a companion where a voter appears to be unable to vote without assistance. Neither a voter nor a companion should have to make a formal declaration.

- 3. As we discussed in Part One, the 1983 Act has its origins in laws that were introduced in the mid-19th century. In the 19th century it was not uncommon for candidates to pay individuals to interrupt polling. Surprisingly, the 1983 Act still states that the presiding officer should adjourn the poll if there is rioting or open violence.

This is outdated and does not allow a poll to be adjourned for any other emergency. Recent examples that threatened to disturb polling are: the volcanic ash clouds which led to flight cancellations close to the 2010 general election, and flooding in the south-east during the 2016 referendum. We think the law should permit a poll to be adjourned in the event of emergencies generally, not just rioting and open violence.

We also think returning officers, not presiding officers, should decide if a poll should be adjourned because of an emergency. Returning officers can make decisions covering the electoral area, whereas presiding officers only deal with their assigned polling station. Leaving such a decision to presiding officers made sense in the 19th century. Nowadays, presiding officers can instantly contact the returning officer for a direction. We think the law should reflect modern conditions and recognise that such a weighty decision should be for returning officers.

Modernisation



Returning officers should have the power to adjourn a poll in the case of an emergency that affects a significant number of voters in the electoral area.

Counting ballot papers

At Greater London Authority (“GLA”) elections and Scottish local government elections ballot papers are counted electronically. At both, the electronic counting devices scan ballot papers on both sides, detect votes that may be fraudulent, and record and count the papers electronically. However, the rules for electronic counting are not consistent at GLA and Scottish local government elections. We think inconsistent counting rules are unsatisfactory and if electronic counting was introduced for other types of elections could lead to many different sets of rules. We think the law should deal with that issue by providing a standard set of electronic counting rules. This would make it easier to implement electronic counting in the future.

Modernisation



A standard set of counting rules should apply to all elections with a subset of rules for electronic counting. Secondary legislation should determine which elections use electronic counting.

Electoral offences

“Some criminal offences are created by remarkably inaccessible and tortuous forms of legislative drafting” – Professor James Chalmers and Professor Fiona Leverick (University of Glasgow).

There are dedicated criminal offences that regulate conduct at elections. The 1983 Act sets out these electoral offences for UK Parliamentary and local government elections. Those offences serve as a template for the offences in legislation governing other elections. In our report, we focus on some long-established offences regulating the conduct of candidates and their agents; in particular undue influence, bribery and treating (we refer to these as the “classical offences”). There are other electoral offences not considered in detail, such as pretending to be another person in order to cast a vote (“personation”) and interfering with postal votes.

Some electoral offences are also labelled as “corrupt” or “illegal” practices. If a candidate or their agent is found guilty of a “corrupt” or “illegal” practice, the consequences are:

- 1. if the guilty candidate won the election, their election will be declared invalid;
- 2. the guilty person is disqualified from standing as a candidate in future elections for a set period. For “corrupt” practices that period is five years; for “illegal” practices it is three years.

Like many other areas of electoral law, the electoral offences are complex and outdated, and some overlap with each other. They originate from a time when candidates routinely bribed voters and hired violent mobs to disrupt polling. The painting shows an election in Oxford in 1754. It is clear a lot has changed since the painting, and widespread violence does not regularly affect polling.



‘Chairing the Member’ by William Hogarth – from The Humours of an Election series, 1755

As well as being outdated, some of the classical offences are widely drafted and overlap with each other. For example, bribery and treating.

We think the classical offences should be simplified and modernised to reflect the current challenges in electoral law. The diagram on the next page shows the current definition of the classical offences alongside our recommended reforms.

Digital Imprints

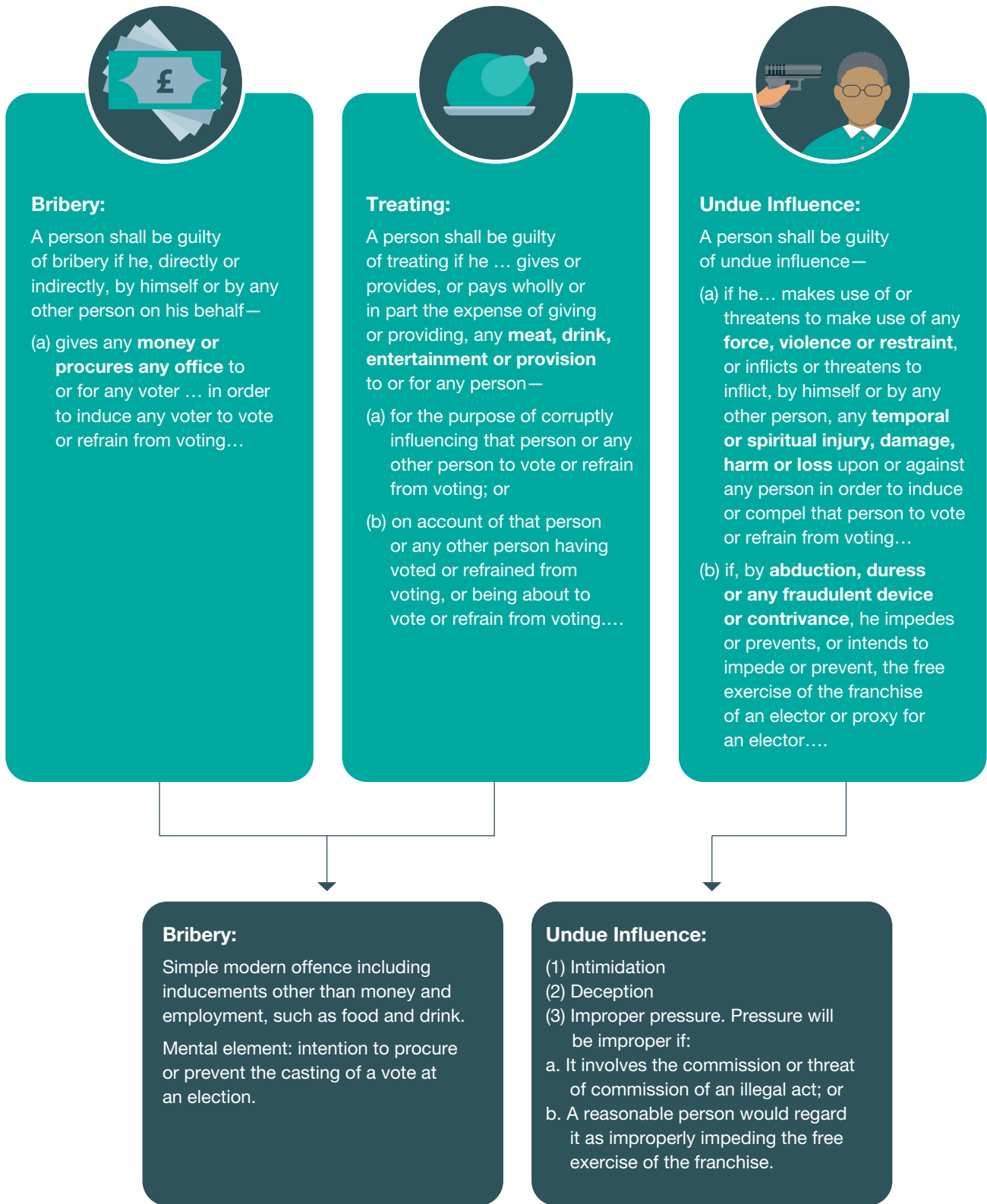
Under the current law printed campaign material must be labelled (or “imprinted”) with the name of the person who causes it to be published. The law does not currently apply to online campaign material, making it difficult to see who is responsible for political advertising online (and to track whether spending in that sector is accounted for in expenses returns). We think the imprinting requirement should be modified to reflect the growth of online campaigning and the use of social media in recent years. The UK government is already considering how the imprinting requirement should be applied to online campaign material.

Modernisation



The imprinting offence should be extended to cover online campaign material that may be regarded as intending to promote a particular result in an election.

Proposed reforms of the “classical offences”



Legal challenge

An individual can challenge the result of an election by bringing an “election petition”, seeking to have that election declared invalid, or correct the result. Petitions are heard by an “election court”. An election court is not part of the ordinary court system in England and Wales, and the standard rules of procedure, the “Civil Procedure Rules”, do not apply (instead the rules for election courts are found in the 1983 Act).

We recommend the procedural rules governing electoral petitions should be modernised and simplified, and that election petitions should be heard in the ordinary court system in England and Wales.

Election Petitions problems and solutions

Problems:

- (1) No way to filter out unmeritorious petitions means that “far-fetched” arguments are still heard in court. This takes up lots of court time and results in unnecessary costs being incurred by all parties.
- (2) Electoral petitions are expensive. To challenge a parliamentary election a claimant must pay up to £5,000 into court to cover the defendant’s costs.
- (3) Electoral petitions are for complaints which seek to affect the election or overturn the result: there is no system for hearing informal complaints.

“For Election Petitioners it was very frustrating that we had to take on and try to fund a massive High Court action, with a trial lasting 7 weeks” – Andy Erlam, who challenged the election of Lutfur Rahman in Tower Hamlets.

Solutions:

- (1) Modern rules of procedure, allowing judges to filter out unmeritorious claims and parties to refine the issues.
- (2) Election courts should be able to cap the amount of costs any party will be required to pay. This is known as a protective costs order in England and Wales, and a protective expenses order in Scotland.
- (3) Electors should be able to refer less serious problems to local government ombudsmen.

Another problem with the current system is that the law is not clear on exactly what grounds an election can be challenged. Anyone who wants to challenge an election must decipher complex legislation and difficult and outdated case law.

We think it is important that the grounds for challenging elections should be clear and accessible to the public. This will require a positive statement in statute of those grounds, in contrast to the current complex mixture of opaque statutory provisions and case law.

Simplification

The grounds for challenging an election should be restated and positively set out.

