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## **Electoral Law** **An Interim Report**

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**4 February 2016**

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**Law Commission**

**Scottish Law Commission**

**Northern Ireland Law Commission**

**ELECTORAL LAW**

**A Joint Interim Report**

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**INTERIM REPORT**

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# 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. 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.  |

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| 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 has been in place in Northern Ireland since 2002. |

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| <b>Individual electoral registration</b> | The process of registering electors on the basis of an application to be registered made by each individual.  |
| <b>The 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.   |
| <b>The parliamentary model</b>           | A term we use to describe those features of the <b>classical rules</b> that are specific to UK Parliamentary elections.   |
| <b>The 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 in Scotland the 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. |

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| <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.   |

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| <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> .  |

**Writ of election or by-election** A Royal document communicating to the **returning officer** the calling of a general election or by-election.

# CHAPTER 1

## INTRODUCTION

- 1.1 On 9 December 2014, the Law Commission of England and Wales, the Scottish Law Commission and the Northern Ireland Law Commission (the Law Commissions) jointly published a consultation paper on electoral law in the UK.<sup>1</sup> This interim report outlines the response to the provisional proposals we made and the questions we asked, and sets out our recommendations for reform.
- 1.2 Its publication is a stage in the project provided for in our terms of reference, with a view to enabling governments to decide whether to request us to move on to the production of a final report and draft legislation. Our consultation paper and the responses to it have revealed considerable demand and an urgent need for technical reforms that will streamline the management of elections and challenges to them, removing inefficiencies and saving costs. There is also a broad consensus on the form that such improvement should take.

### THE STAGES OF THIS PROJECT

- 1.3 The electoral law reform project was structured in three stages:
  - (1) The scoping stage involved determining the scope of the reform project. A scoping consultation paper was published on 15 June 2012.<sup>2</sup> Conclusions on the scope of the project were set out in a scoping report published on 11 December 2012.<sup>3</sup> Following references from the UK Government to the Law Commissions, and from the Scottish Government to the Scottish Law Commission, the project moved to the next stage.
  - (2) The second stage involved formulating proposals for reform of electoral law. These proposals were set out in the consultation paper dated 9 December 2014. A broad public consultation continued until 31 March 2015. The publication of this interim report concludes the second stage of the project.
  - (3) The envisaged final stage, as mentioned in the preceding paragraph, will involve the production of a final report and draft legislation to give effect to our final recommendations. The aim will be to publish a report and a draft Bill for the UK Parliament in 2017 in order to allow sufficient time for

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp218\\_electoral\\_law.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp218_electoral_law.pdf) (last visited 11 January 2016).

<sup>2</sup> Law Commission, *Electoral Law in the United Kingdom, A Scoping Consultation Paper* (15 June 2012) [http://www.lawcom.gov.uk/wp-content/uploads/2015/06/electoral\\_law\\_scoping\\_consultation.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/06/electoral_law_scoping_consultation.pdf) (last visited 11 January 2016).

<sup>3</sup> Law Commission, *Electoral Law in the United Kingdom, A Scoping Report* (11 December 2012) [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/electoral\\_law\\_scoping\\_report.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/electoral_law_scoping_report.pdf) (last visited 11 January 2016).



implementation before the scheduled UK general election in May 2020.<sup>4</sup>

- (4) We recognise, however, that the further shifts in devolution which have occurred (and are still evolving) since this project began, have resulted in a need for separate legislation to be enacted by the devolved legislatures.<sup>5</sup> Accordingly, we envisage, in a draft UK Bill, a new general structure or framework which could be used for all elections and referendums. This would represent a move away from the current unworkable mass of election-specific legislation towards a more principled and more efficient way in which to organise electoral law. Such a Bill would be drafted bearing in mind that it could also serve as a template for the devolved legislatures to adopt in their own legislation if they so wished, subject to any changes required by them; for example, a Scotland-only Bill would provide for the different franchise in Scotland.

- 1.4 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.

## **TERMS OF REFERENCE**

- 1.5 We concluded at the scoping phase that this project should focus on the technical law governing elections and referendums, with a particular focus on electoral 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.

<sup>4</sup> The current Scottish Elections (Dates) Bill provides for the general election for membership of the Scottish Parliament to take place one year later.

<sup>5</sup> See chapter 2, paras 2.28 to 2.36.

## **ELECTIONS AND REFERENDUMS WITHIN SCOPE**

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:<sup>6</sup>

- (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 Electoral law has been the subject of significant change since 1983. There is no sign of abatement in the pace of change. Since our consultation paper was published, the Scotland Bill and a draft Wales Bill have emerged which will affect the devolution of electoral law in Scotland and Wales respectively. This interim report makes recommendations based on the current law, while taking account of impending changes in the law. In and insofar as electoral policy changes, the next

<sup>6</sup> Elections to community councils, Health Boards, National Park Authorities and the Crofting Commission in Scotland are outside scope.

stage of the project will reflect those changes.

- 1.9 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 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.
- 1.10 Other issues, however, while they are within the scope of the terms of reference for this project, have a fundamentally constitutional or political nature. In reviewing electoral law, we have sought to separate 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.
- 1.11 Several consultees have urged us to tackle features of the present legislation that they regard as problematic. Suggestions have included moving polling to the weekend, requiring voters to produce identification documentation at the polling station, replacing postal voting on demand to make it available only where a reason for requiring it is shown, making provision for electronic or internet voting and abolishing the possibility of an elector being registered to vote in more than one district. We return to some of these topics later in this report. All of them are, however, issues of policy rather than of law.
- 1.12 The policy question of whether any adjustment should be made to the balance between access to polls and security from fraud remains a matter for Government and the legislature. We note that Sir Eric Pickles has been tasked with investigating the issue of electoral fraud and the response to it.

## **OUR PUBLIC CONSULTATION**

- 1.13 Our consultation period ran from 9 December 2014 to 31 March 2015. During that period, we attended a number of events and meetings in order to listen to responses, and interact with those interested in the content of our consultation paper. A list of the consultation events we attended is available in appendix C. We received 74 responses from a broad range of consultees, including electoral administrators, academics, political parties and third sector organisations. We are very grateful to all those who provided a response to our consultation. A full list of consultees is contained in appendix B.
- 1.14 This interim report outlines the public response to each of our proposals or questions. A fuller account of responses is available in consultation analysis documents which are available online.<sup>7</sup>

<sup>7</sup> Law Commission, *Electoral Law Interim Report Consultation Analysis* (January 2016), available at <http://www.lawcom.gov.uk/project/electoral-law/>.

## OUTLINE OF THIS REPORT

- 1.15 Electoral law in the UK has become complex, voluminous and fragmented. There is an enormous amount of primary<sup>8</sup> and secondary<sup>9</sup> 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 its scope; and secondly, that provisions of electoral law are modern, simple, and fit for purpose.
- 1.16 Unlike our consultation paper, this report does not seek to set out the law in detail. Instead, it outlines the law and the response to our proposals and questions, before making recommendations for law reform in the light of that response. Chapter 2 considers the legislative framework governing elections, setting out our recommendations for rationalising the framework governing elections and referendums. Subsequent chapters consider the response to proposals and set out our recommendations in discrete areas of electoral law, namely: the management and oversight of elections (chapter 3); the registration of electors (chapter 4); the manner of voting in the UK (chapter 5); absent voting by post or proxy (chapter 6); the nomination of candidates (chapter 7); the polling process, including events which frustrate the poll (chapter 8); the count and determination of the result (chapter 9); election timetables and the combination of polls (chapter 10); electoral offences (chapter 11); the regulation of campaign expenditure (chapter 12); legal challenge to elections (chapter 13); and national and local referendums, including parish polls (chapter 14).

<sup>8</sup> Including the Representation of the People Acts 1981, 1983, 1985 and 2000; Electoral Administration Act 2006; Local Government Act 1972; Local Government Act 2000; Greater London Authority Act 1999; Local Government Finance Act 1992; Town and Country Planning Act 1990; Police Reform and Social Responsibility Act 2011; Electoral Law (Northern Ireland) Act 1962; Elections Act 2001; Local Governance (Scotland) Act 2004; Local Electoral Administration and Registration Services (Scotland) Act 2006; Local Electoral Administration (Scotland) Act 2011; Northern Ireland (Miscellaneous Provisions) Act 2006.

<sup>9</sup> Including the Representation of the People (England and Wales) Regulations 2001 SI No 341; Representation of the People (Scotland) Regulations 2001 SI No 497; Representation of the People (England and Wales) Regulations 2008 SI No 1741; Anonymous Registration (Northern Ireland) Order 2014 SI No 1116; Local Elections (Principal Areas) (England and Wales) Rules 2006 SI No 3304; Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI No 3305; Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 SI No 1024; Greater London Authority Elections Rules 2007 SI No 3541; Police and Crime Commissioner Elections Order 2012 SI No 1917; Police and Crime Commissioner Election (Functions of Returning Officers) Order 2012 SI No 1918; Northern Ireland Assembly (Elections) Order 2001 SI No 2599; European Parliamentary Elections Regulations 2004 SI No 294; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI No 1267; Electoral Law (Northern Ireland) Order 1972 SI No 1264; Local Elections (Northern Ireland) Order 1985 SI No 454; Scottish Local Government Elections Order 2011 SI No 399; Scottish Parliament (Elections etc.) Order 2015 SSI No 425; National Assembly for Wales (Representation of the People) Order 2007 SI No 236; European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations 2001 SI No 1184; Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations 2007 SSI No 170; Representation of the People (Combination of Polls) (England and Wales) Regulations 2004 SI No 294; Representation of the People (Scotland) Regulations 1986 SI No 1111; Neighbourhood Planning (Referendums) Regulations 2012 SI No 2031; Local Authorities (Conduct of Referendums) (England) Regulations 2012 SI No 323; Local Authorities (Conduct of Referendums) (Wales) Regulations 2008 SI No 1848; Local Authorities (Conduct of Referendums (Council Tax Increases) Regulations 2012 SI No 444; Parish and Community Meetings (Polls) Rules 1987 SI No 1.

## **IMPACT ASSESSMENT**

- 1.17 An impact assessment and equality impact assessment will accompany our final reform recommendations. Our public consultation provided some evidence for the current cost of electoral administration and oversight of electoral laws. However, we will continue to work with the Governments, the Electoral Commission and electoral actors to identify the costs of UK elections. A preliminary impact assessment document is available online which identifies which of our recommendations will result in savings and efficiencies, and which will result in any additional costs. An interim equality screening document is also available on our website.

# CHAPTER 2

## LEGISLATIVE FRAMEWORK

### INTRODUCTION

- 2.1 As chapters 3 to 14 will demonstrate, electoral law is complex, voluminous, and fragmented. More than 25 statutes and many more pieces of secondary legislation govern elections. Some of their content is repeated, almost word for word, taking the “classical” law contained in the Representation of the People Act 1983 (the 1983 Act) as a starting point. That Act sets out part of the law governing UK parliamentary elections and local government elections in England, Wales and Scotland. The rest of the legislation governing these elections is in other Acts of the UK or Scottish Parliament, and secondary legislation.
- 2.2 Our consultation paper noted that this picture poses problems not only for those consulting the law, such as electoral administrators, campaigners, and voters, but also for policy makers. Legislation introducing a new election must address every aspect of the existing electoral law; failing to do so has drastic implications. For example, urgent secondary legislation had to be introduced in 2012 to enable Welsh language ballot papers to be used at Police and Crime Commissioner elections in Wales. The power to do so had long before been introduced, but only for elections governed by particular legislation. Similarly, introducing a new policy, such as allowing those queuing at the close of polls to cast their vote, requires several separate pieces of legislation for each type of election. This is an unnecessary burden on Governmental policy and drafting resources, and on legislative scrutinisers. At the same time, those who wish to ascertain the law governing elections need to consult separate pieces of legislation, sometimes containing puzzling discrepancies as between different elections. Finally, the volume of the legislation is unnecessarily swollen by needless repetition.
- 2.3 All of this strikes us as unnecessary. The reader should be able to consult one main source of the law governing elections. Policies of the sort described in paragraph 2.2 above need only be developed once, drafted once, and scrutinised once. They should then become law for all existing elections, and apply to any new elections introduced later.
- 2.4 Our consultation paper’s central reform policy, therefore, was that electoral legislation should be rationalised so that it should apply to all elections, with fundamental or constitutional matters contained in primary legislation. Detailed rules on the conduct of elections should be contained in secondary legislation so far as possible. The legislation should be uniform, subject to differences in the voting systems in use, or in policy between the UK’s jurisdictions. This resulted in two provisional proposals,<sup>1</sup> which we explore further below.
- 2.5 We will see that these two proposals have attracted the largest number of specific responses, and the strongest support. This is because key actors and practitioners of electoral law have long called for something of this sort.

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 2.1 to 2.39.

- 2.6 It is impossible to do this without changing the law, because the existing provisions diverge, often on the same issue (such as what the grounds of challenge should be in a party list election). Much of the work underlying our consultation paper was concerned with identifying these differences, and coming to a consistent, correct conclusion as to what the law might say for all elections, and what changes are required to deal with particular voting systems. Our focus, therefore, has been on “rationalising” the various laws into one coherent, consistent, and, so far as possible, uniform legislative framework.

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

- 2.7 Our first proposal was addressed by 47 consultees, nearly all of whom agreed with it. A significant portion of consultees stressed how strongly they agreed with this key proposal, and indeed many, such as the national branch of the Association of Electoral Administrators (AEA), have long argued for it.
- 2.8 Consultees variously described this proposal as “an absolutely fundamental principle and...entirely the right approach”, “long overdue” and “the single most important task of reform that is required”, referring to the “nightmare for electoral administrators and anyone else interested in elections (such as candidates) to navigate the law”. Diverse Cymru, a disability charity, described the complexity and confusion of information about elections and the processes involved in them as a key barrier to participation by voters and, in particular, to standing as independent candidates. One consultee asked for “acceptance by politicians that only very rare circumstances will justify the passing of election specific legislation in relation to any new type of election”.
- 2.9 Two points of discussion arose in consultees’ responses, which we now turn to address. The first concerns what the balance should be as between primary and secondary legislation, and the second concerns the impact of the ongoing developments in devolution across the UK and our proposed legislative framework.

**THE BALANCE BETWEEN PRIMARY AND SECONDARY LEGISLATION**

- 2.10 One of the ways in which election laws diverge is their placement in the hierarchy of laws: primary and secondary legislation. For UK Parliamentary elections, all of the “classical” laws, even those to do with the detail of administering a poll, are in primary legislation. For other elections, very little is in primary legislation and secondary legislation contains nearly all the laws governing them.

2.11 Primary legislation (an Act) is passed by a Parliament and can generally only be changed by a new Act; it cannot be over-ridden by the Government of the day without the consent of Parliament.<sup>2</sup> On the other hand, the process of amending it by a new Act is cumbersome. Secondary legislation (usually in the form of regulations) is made, usually by Ministers, under powers conferred by Parliament. Regulations are relatively straightforward to make and to amend. Primary legislation is therefore the right place for important rules of law which the Government should not be able to over-ride. Rules on matters of detail, which may need to be adapted to changes in circumstances, are better placed in secondary legislation.

2.12 Our provisional view was that primary legislation should contain the key provisions governing all elections. This, we said, should include:

- (1) the electoral franchises;
- (2) the voting system;
- (3) the apparatus for electoral administration, including:
  - (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 such as:
  - (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.

<sup>2</sup> Unless the Act confers a power to the Government to amend the Act in particular ways by Regulations.



- 2.13 We suggested that 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. We stressed that we welcomed consultees' views.<sup>3</sup>
- 2.14 The national branch of the AEA broadly agreed, suggesting a distinction between high level matters and principles which reflect electoral policy and the detailed rules relating to electoral registration and the conduct of elections, while the Electoral Commission considered the rationale for our proposed legislative hierarchy to be sound. The Commission expressed a hope that one of the results of our reform project would be that detailed rules were moved lower down the hierarchy, to secondary legislation or Electoral Commission guidance, so as to allow greater flexibility.
- 2.15 Sir Howard Bernstein (Manchester CC) saw "the special status that the legislature appears to have deliberately afforded to the legislation governing UK parliamentary elections" as a potential difficulty in respect of this objective. He doubted that this special status was an "accident of history" but instead reflected a political policy decision that the detailed rules governing elections to the UK Parliament should be subject, on account of their special constitutional importance, to the full parliamentary scrutiny that primary legislation entails.
- 2.16 We take this point very seriously, but the way in which our consultation paper proposed to deal with it was by ensuring that primary legislation should continue to contain those aspects of electoral law that have a constitutional or fundamental character. It remains reasonably clear to us that the allocation of some rules to primary or secondary legislation is an accident of history. Those rules which have their origins in the Ballot Act 1872 continue to be in primary legislation, even though some concern matters of an incidental character, such as the duty of a returning officer to publish a copy of any petition challenging the result of the election in the area. Those rules that have a different or later origin tend to be located in secondary legislation, even if they are fundamental or important, such as the deadlines for registration and absent voting applications in advance of an election. Our proposal is not to shift important matters from primary to subordinate legislation, but rather to modernise and simplify primary legislation so that it addresses, for all elections, the fundamental elements of a lawful poll and provides power to deal with matters of detailed electoral administration by way of subordinate legislation, subject to Parliamentary scrutiny.

<sup>3</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 2.30 to 2.34.

- 2.17 Dr Caroline Morris (Queen Mary, University of London) saw merit in elevating the Electoral Commission's guidance to electoral administrators into a single Code, to be approved by Parliament, so as to provide an opportunity for Parliament to scrutinise the guidance and give it greater moral force. This would not require legislation; we see it as a matter between Parliament and the Electoral Commission. Dr Morris also suggested that the prescribed form of ballot paper be set out in a schedule to consolidated primary legislation. For the reasons given in chapter 5, we see merit in there being flexibility to amend the form of the ballot paper.<sup>4</sup>

## **RATIONALISING ELECTION LAW WITHIN THE DEVOLUTIONARY FRAMEWORK**

- 2.18 The evolving devolutionary picture was raised by several consultees. It was also raised at meetings with the Electoral Commission's UK Parliamentary and Scottish Parliamentary Political Parties Panels. The most important point we sought to highlight during the consultation was that any reform must necessarily be delivered within the eventual devolutionary framework.
- 2.19 We suggested in our consultation paper that reformed electoral law should be set out in the fewest possible pieces of legislation consistent with the devolutionary structure. It was clear, at the time of publication, that this structure was likely to change during the life of this project. We acknowledged that a single Act of the UK Parliament may not be feasible and that separate primary legislation for the different jurisdictions in the UK may be necessary.<sup>5</sup>

### **SCOTLAND**

- 2.20 The Scotland Bill seeks to implement the Smith Commission proposal for full legislative competence of the Scottish Parliament over its own elections, and the UK Government's commitment to implementing it.<sup>6</sup>
- 2.21 At the time we published our consultation paper the Scottish Parliament had legislative competence over local government elections in Scotland (except for the franchise). Some powers to make or modify secondary legislation had been transferred from the Secretary of State to the Scottish Ministers. After the passage of the Scotland Bill, the Scottish Parliament will have nearly full legislative competence over both local government elections in Scotland and Scottish Parliamentary elections, although certain aspects of the incidence and combination of polls are reserved.<sup>7</sup>

<sup>4</sup> See chapter 5, paras 5.52 to 5.56.

<sup>5</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 2.31.

<sup>6</sup> The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (November 2014) <https://www.smithcommission.scot> (last visited 11 January 2016); Scotland in the United Kingdom: An enduring settlement (January 2015) Cm 8990, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397079/Scotland\\_EnduringSettlement\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf) (last visited 11 January 2016).

<sup>7</sup> Scotland Bill 2015-16, cls 3 to 9, particularly cls 3(5), 4(1), 4(2) and 5. Combination of polls is discussed in chapter 10.

- 2.22 Also reserved to the UK Parliament is the responsibility for digital registration services that may be introduced by UK Ministers, and the subject matter of the Political Parties, Elections and Referendums Act 2000 (the 2000 Act), notably the registration of political parties and control of donations to registered parties.<sup>8</sup>
- 2.23 So far as matters within the scope of this reform project are concerned, however, overwhelmingly the law concerning elections to the Scottish Parliament will be a matter for that Parliament. The Scotland Bill will introduce a new section 12 into the Scotland Act 1998 so as to provide Scottish Ministers with the power to make provision about elections, including:
- (a) the conduct of elections for membership of the Parliament;<sup>9</sup>
  - (b) the challenge of such an election and the consequences of irregularities; and
  - (c) the return of members of the Parliament otherwise than at an election.<sup>10</sup>
- 2.24 In addition, the Scottish Parliament will have the power to modify certain sections of the Scotland Act 1998, which will include section 12.<sup>11</sup> Where we recommend that rules that are currently in secondary legislation should be in primary legislation, the Scottish Parliament will have the power to implement our recommendations.

#### WALES

- 2.25 The devolution settlement in Wales is contained in Part 4 of the Government of Wales Act 2006 (the 2006 Act), and is based on a conferred powers model, meaning that the Welsh Assembly can only legislate within the specific competences conferred to it by way of schedule 7. Presently, elections to the National Assembly for Wales are not a conferred matter. However, the matter of “local government” is conferred, subject to specific exceptions. Most notably, the franchise at local government elections, electoral registration and administration of local government elections are excepted from the conferral.<sup>12</sup>

<sup>8</sup> Scotland Bill 2015-16, cl 3(5).

<sup>9</sup> This includes registering electors and limiting candidates’ expenditure.

<sup>10</sup> Scotland Bill 2015-16, cl 4(1).

<sup>11</sup> Scotland Bill 2015-16, cl 12.

<sup>12</sup> Government of Wales Act 2006, ss 108(4) and (5).

- 2.26 The UK Government has recently published a draft Wales Bill, which seeks to implement recommendations made by the Silk Commission regarding changes to devolution in Wales.<sup>13</sup> As regards to elections, the draft Wales Bill replicates much of the Scotland Bill.<sup>14</sup>

#### NORTHERN IRELAND

- 2.27 The Northern Ireland Assembly has no legislative competence in respect of 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>15</sup>

#### **Consultees' responses on rationalising electoral law and devolution**

- 2.28 The Electoral Commission's support for our new legislative framework, with consistent rules governing all elections was subject to achieving these aims within the evolving devolutionary picture. The Electoral Commission doubted the possibility of UK-wide legislation.
- 2.29 The Scottish Government saw it as important to "balance the desire for a consistent framework with the fact that some elections, or aspects of elections, are (or will be) devolved to the Scottish Parliament", enabling Scottish Ministers "to propose electoral reforms that best reflect the needs of the Scottish electorate."
- 2.30 Similarly, the SDLP were of the view:

that separate pieces of primary legislation are required for elections within Northern Ireland, Scotland and England and Wales... allowing for specific factors particular and unique to Northern Ireland to be addressed.

<sup>13</sup> Draft Wales Bill 2015, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/469392/Draft\\_Wales\\_Bill\\_Web\\_\\_2\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469392/Draft_Wales_Bill_Web__2_.pdf) (last visited 11 January 2016); See also, Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (March 2014) <http://webarchive.nationalarchives.gov.uk/20140605075122/http://commissionondevolutioninwales.independent.gov.uk/files/2014/03/Empowerment-Responsibility-Legislative-Powers-to-strengthen-Wales.pdf> (last visited 11 January 2016); UK Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement in Wales* (February 2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/408587/47683\\_CM9020\\_ENGLISH.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408587/47683_CM9020_ENGLISH.pdf) (last visited 11 January 2016).

<sup>14</sup> Draft Wales Bill 2015, cls 4 to 6, and sch 1, para 1. This would insert a new schedule 7A into the Government of Wales Act 2006. The reservation concerning elections is in part 2, Section B1.

<sup>15</sup> Northern Ireland Act 1998, ss 34(4) and 84, and sch 2, paras 2 and 12.

- 2.31 Scott Martin (Scottish National Party) saw the devolved legislative competence of the Scottish Parliament and Scottish Ministers as “fundamental to the whole project”. He drew our attention to a number of exercises by the Scottish Parliament of legislative competence regarding elections and the development of a number of distinct policies as to electoral administration. He also noted the abstention of the UK Parliament from legislating in respect of Scottish local government elections since those became a devolved matter and observed that the recent divergence in the application of the 1983 Act in Scotland and in England and Wales had been a source of confusion.<sup>16</sup>

#### DEVOLUTION AND THE ELECTORAL LAW LEGISLATIVE FRAMEWORK

- 2.32 It is foreseeable that the Scottish Parliament and Welsh Assembly will have almost full legislative competence over the conduct of and challenge to their respective devolved elections. Our reformed legislative framework must necessarily reflect this constitutional arrangement.
- 2.33 By virtue of the Sewel convention,<sup>17</sup> the UK Parliament will not normally legislate for devolved matters without the concurrence of the devolved legislatures. It is not for us to speculate about (or make recommendations as to) the passing of legislative consent motions in the devolved legislatures.
- 2.34 Therefore, we consider ourselves bound to proceed on the basis that primary legislation that emerges from our recommendations will be enacted in accordance with the legislative competences of the parliaments within the UK. The Secretary of State and the devolved administrations will respectively make provision by way of secondary legislation for the elections covered by each piece of primary legislation.
- 2.35 The result would be that an Act of the United Kingdom Parliament would govern UK-wide elections, elections in England, and any aspects of elections in Scotland or Wales for which legislative competence is not devolved. It would be consistent with the current devolutionary position for that Act to also govern elections in Northern Ireland, along with secondary legislation made by the Secretary of State for Northern Ireland. We think Northern Ireland has much to gain from a single set of secondary legislation governing Northern-Ireland-only elections. Separate Acts of the Scottish Parliament and Welsh Assembly would govern elections within Scotland and Wales respectively as regards matters within the two legislatures’ competence.
- 2.36 We maintain the proposal in our consultation paper (which received unanimous support) for consistent legislative provision to govern all types of election.

***Recommendation 2-1: The current laws governing elections should be rationalised into a single, consistent legislative framework governing all elections (enacted in accordance with the UK legislatures’ legislative competences).***

<sup>16</sup> Mr Martin’s response was received after our consultation ended. It was considered and detailed. We have tried to reflect the response in this interim report to the extent that time permitted. The response on each proposal can be found in our consultation analysis document online.

<sup>17</sup> The Scotland Bill 2015-16, cl 2 puts the Sewel convention into statutory form.

**Electoral laws should be consistent across elections, subject to differentiation due to the voting system or some other justifiable principle or policy. (Provision proposal 2-2)**

- 2.37 A necessary adjunct of our central proposal to rationalise election law was to make these consistent across all elections. We identified two principles which could legitimately cause election law to differ from one election to another. The first was the use of a particular voting system. Even in that case, our work in the consultation paper, in chapters 6 to 13, was to derive a consistent “transposition” of classical election laws for each voting system in use in the UK. The second principle was that a deliberate policy reason existed to justify the difference. Many of the divergences in election laws identified in our consultation paper in fact appeared to us to be caused by inconsistent approaches to the problem caused by use of a new voting system, or accidents of drafting.
- 2.38 Nearly all of the 46 consultees who provided a response to this provisional proposal agreed. The Electoral Commission expressed agreement with us that “some inconsistencies are deliberate and can be justified by a principle or policy”, referring to “the law on registration, absent voting and in-person voting in Northern Ireland”, which the Commission thought should be retained.
- 2.39 The Society of Local Authority Chief Executives and Senior Managers (“SOLACE”) similarly argued that:
- different approaches should be avoided to the greatest extent possible, as this would make it easier for electoral administrators, candidates, agents and electors.
- 2.40 Dr Caroline Morris (Queen Mary, University of London) said:
- I further agree that electoral law should be rationalised within one centralised framework and that differences should only exist on principle or political policy grounds – and that these differences should nonetheless be incorporated into the central framework rather than being given separate legislative treatment. Not only would this make electoral law easier to find, understand, interpret and administer from a practical point of view, the benefits to the rule of law principle in improving the clarity, certainty and accessibility of the law are considerable.
- 2.41 Scott Martin (Scottish National Party) noted divergences of policy in Scotland and stressed that these should be respected.
- 2.42 Crawford Langley (Aberdeen CC) thought it “essential that all elections using the same voting system are subject to a single set of rules”, referring to the differences in wording between Scotland and Northern Ireland in relation to STV (the single transferable vote).

- 2.43 We think that our work on analysing electoral laws and their differences enables us to derive general and consistent sets of rules for elections, and the appropriate adaptations required by the use of any particular voting system. Finally, we will respect the considered policies that have given rise to differences between rules, such as the ones mentioned by consultees. We will continue to work with Governments to identify these. In the light of the response to our consultation, we are minded to recommend as we proposed.

***Recommendation 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 administration involves, first, the permanent task of maintaining the register of electors and absent voting records and, secondly, running elections when they are called. The law allocates these tasks to a registration officer and a returning officer respectively. In Great Britain electoral administration is decentralised: registration and returning officers are local government officials. In Northern Ireland electoral administration is centralised, with the Chief Electoral Officer acting as both registration and returning officer.

### THE LEGAL STRUCTURE FOR RUNNING ELECTIONS

- 3.2 Our consultation paper outlined some of the provisions associated with making this structure work, such as the powers and duties to share information between returning and registration officers, the crime of breach of official duty which promotes compliance by them with electoral law, and powers to correct “procedural” errors. While elections must be conducted according to electoral law, they cannot be legally challenged for breach of election law unless that breach was fundamental or affected the result of the election.<sup>1</sup> The consultation paper then made three provisional proposals, and asked one question, concerning the returning officer’s role. We now turn to responses to the proposals and consultation questions.

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

- 3.3 At UK Parliamentary elections in England and Wales, the law names local dignitaries (such as the sheriff of a county or mayor or council chairman) as returning officers, but their only legal role is to receive the writ which triggers the election, declare the result and return the writ. Every other (and administratively very significant) aspect of running an election is performed by an “acting” returning officer, who is the registration officer within the constituency. We considered that this additional layer of complexity was redundant and confusing, and provisionally proposed to abolish the legal notion of a purely ceremonial returning officer. The returning officer should be the person actually responsible for running the election.<sup>2</sup>
- 3.4 Of the 32 consultees who provided a response to this provisional proposal, 31 agreed with it. Alan Mabbutt OBE (Conservative Party) disagreed with it on the basis that it “[did] not enhance the election process for electors and removes history to no purpose”.

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 3.24.

<sup>2</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 3.17.



- 3.5 A significant majority of consultees who agreed with our proposal considered that the ceremonial role was out of date and confusing. There appears to be a case that the pageantry and ceremonial nature of declarations of results on live television may be valuable to some, if not most, of the public. Crucially, we do not consider that our own proposal, if we recommended it, would prevent the oral declaration of the result, in front of TV cameras, from being carried out by a local dignitary as is currently the case. Rather, we propose to remove the legal notion that the writ is addressed to and returned by those persons, when they have no responsibility for running the election.
- 3.6 The Electoral Commission stated that the simplification and clarification of “the roles, responsibilities and powers of returning officers should be a goal for electoral law consolidation and simplification”. Diverse Cymru pointed out that the proposal would remove a layer of complexity in the law, making it more accessible.
- 3.7 A minority of consultees discussed who ought to declare the results. Gifty Edila (Hackney BC) considered that, as the returning officer administers the election and is the person most likely to be named in any election petition following the declaration, the returning officer should declare the results. Conversely, David Boothroyd (Labour Councillor) noted that he would “not like this transfer of the formal post of returning officer to the chief executive of the local authority to make it impossible for the Mayor or Sheriff to preside at the declaration of result of poll and to read the formal declaration”.
- 3.8 We see the merit in retaining the ability for the oral declaration in front of the press to be carried out by a local dignitary, in the spirit of retaining tradition. However we do not think a rationalised law applying to all elections in England and Wales should be complicated by allocating some returning officer functions to a dignitary. We certainly do not consider that the writ should be addressed to, or returned by, anyone other than the official who is responsible for administering the election. We therefore consider that returning officer functions should be bestowed on the person in England and Wales who is currently the acting returning officer. We also recommend that the returning officer may be required by secondary legislation to delegate the declaration of the result to others. If the UK Government’s policy is to preserve the pageantry of election declarations in England and Wales, it will have the power to do so.

***Recommendation 3-1: The person in the current law who is the acting returning officer at UK Parliamentary elections in England and Wales shall have all powers in respect of the election, but may be required by secondary legislation to delegate the oral declaration of the result to another person.***

#### **Legislative framework for management and oversight of elections**

- 3.9 Most types of elections in Great Britain take place over large electoral areas. Because of this, they are managed by more than one returning officer, with a senior officer overseeing the entire election. These “directing” returning officers usually have a legal power of direction over the local returning officers who oversee the poll in a subdivision of the area or constituency. The framing of the power of direction varies from one election to another. In the context of

combination of polls, where one of the combined polls' returning officers is a lead officer,<sup>3</sup> there is some confusion over the role and status of directions by the directing officer to the lead officer.

- 3.10 Consistency in standards of electoral administration has also been a major concern. The Electoral Commission publishes performance standards. Failure to meet them can lead to naming and shaming and, in some elections, a reduction in fees and charges payable to the officer. In addition, it publishes non-binding guidance.
- 3.11 In our consultation paper, we explained our view that the law governing management of elections should be restated and centrally expressed for all elections. This should spell out, in particular, the duties and powers of regional returning officers at elections managed by more than one returning officer. We also asked what the proper role of powers of direction is in the context of combined polls led by another returning officer.<sup>4</sup>
- 3.12 By using the term "centrally" we intended to convey the idea that aspects of the law that are common to more than one election should, so far as possible, be set out in a single piece of legislation, rather than (as is the case now) repeated in separate pieces of legislation each applying to a particular election. Some consultees took us to mean that the legislation should be enacted by the UK Parliament or by Ministers in Whitehall even where legislative competence is devolved. That was not our intention and we avoid using the term in this report.

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

- 3.13 Of the 39 consultees who gave a response to this proposal, 38 supported it.
- 3.14 Some consultees considered that further clarification about the extent of the powers and duties of returning officers should also be undertaken. Crawford Langley (Aberdeen CC) suggested that "the opportunity should be taken to deal with known uncertainties such as a power to reject sham nominations".
- 3.15 The New Forest DC expressed reservation about the powers of the Electoral Commission, noting that the Electoral Commission's staff were not practitioners and that their role "is best suited to an advisory one". Conversely, Richard Mawrey QC thought that management of elections should be centralised, so that "the conduct of elections should be taken out of the hands of local authorities altogether". He added that "the only way to ensure consistent and efficient management of elections is to appoint some body – whether or not the Electoral Commission – to conduct elections".
- 3.16 Fundamental change to the institutional landscape for administering elections is, however, outside the scope determined in the first stage of this project. We cannot alter the advisory nature of the Electoral Commission's function in the context of electoral administration.

<sup>3</sup> See chapter 10, paras 10.37 to 10.40.

<sup>4</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 3.18 to 3.46.

- 3.17 In light of responses, we remain of the view that electoral legislation requires clearer, simpler, and uncluttered statements of the powers and duties of returning officers. There was overwhelming support for this proposal, and we therefore recommend as follows.

***Recommendation 3-2: Electoral law should set out the powers and duties of returning officers for all elections within the legislative competence of the parliaments and governments within the United Kingdom.***

**Correcting “procedural errors” and correcting declarations of the result**

- 3.18 In our consultation paper, we explained that section 46 of the Electoral Administration Act 2006 (the 2006 Act) 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 provision does not extend to re-counts after the result has been declared. We explained that it appeared 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>5</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 Northern Ireland should be exempt from the general rule in other elections.<sup>6</sup>
- 3.19 Three consultees commented on this exception. The SDLP, while agreeing that powers and duties of returning officers should be clearly and centrally set out, did “not believe that Section 46 of the Electoral Administration Act 2006 should apply within Northern Ireland”. Two consultees, including the Electoral Office for Northern Ireland, argued that the power *should* apply to Northern Ireland.
- 3.20 We agree, and consider the omission a drafting slip. We do not think it promotes accountability for the returning officer not to be able to correct errors while there is time to do so.
- 3.21 Dr Caroline Morris (Queen Mary, University of London) argued for a broader power, commenting that not only should the section 46 power apply to Northern Ireland, but that “it should be amended to include errors such as mistakes in the

<sup>5</sup> Electoral Law Act (Northern Ireland) 1962, s 57A; National Assembly for Wales (Representation of the People) Order 2007 SI No 236, art 21; Scottish Parliament (Elections etc.) Order 2015 SSI No 425, art 94; Local Electoral Administration and Registration Services (Scotland) Act 2006, s 4; Police and Crime Commissioner Elections (Functions of Returning Officers) Regulations 2012 SI No 1918, reg 6; Local Authorities (Mayoral Elections)(England and Wales) Regulations 2007 SI No 1024, reg 3(3)(e); European Parliamentary Elections Regulations 2004 SI No 293, reg 9(4A); European Parliamentary Elections (Northern Ireland) Regulations 2004 SI No 1267, reg 6(2A).

<sup>6</sup> Northern Ireland Assembly (Elections Order) 2001 SI No 2599 (no reference to the 2006 Act); sch 1 reference to s 63 of the Representation of the People Act 1983 (breach of official duty) furthermore specifically omits the reference to the 2006 Act power to correct procedural errors. See Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 3.23.

declaration of the result”. According to Dr Morris’ research, such mistakes are an ongoing problem and one that currently “can only be corrected through the petitions process... [which] seems an unnecessary burden on all parties concerned”.

- 3.22 We do not agree that there should be a power to correct the return of a candidate after the result has been finally declared. That should always require a petition and attendant scrutiny by affected parties and the election court. There is an attraction to enabling returning officers to use a “slip-rule” to correct simple and uncontested mistakes. It is a superficial one however. In practice, in the charged election atmosphere, few errors are uncontroversial and consensus is hard to establish. All a returning officer would be doing, by exercising a power to correct the result, is re-allocating the burden of bringing a petition on the candidate who was initially declared elected. Instead, we propose in chapter 13 that the returning officer should have standing to bring a petition and to seek an expedited, judicially supervised recount to correct the result.<sup>7</sup> We think this is the preferable approach; under judicial supervision, incontestable mistakes can be established and remedied in a transparent and careful manner.

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

- 3.23 Of the 38 consultees who provided a response to this proposal, 37 agreed with it and one consultee did not offer a firm view. The Electoral Commission, who expressed agreement, noted that such a change in the law would involve the creation of powers of direction at Scottish Parliamentary and National Assembly for Wales elections. It added that it supported the proposal, “provided that regional returning officers at Scottish Parliamentary elections are subject to direction by the Convener of the Electoral Management Board for Scotland”. Scott Martin (Scottish National Party) likewise referred to the possibility of giving a power of direction to the Board.
- 3.24 In paragraph 3.20 of our consultation paper, we explained that 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. Regional returning officers 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>8</sup> The joint response submitted by the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and the Electoral Management Board for Scotland made the point that cooperation

<sup>7</sup> See chapter 13, paras 13.85 to 13.92.

<sup>8</sup> Scottish Parliament (Elections etc.) Order 2015 SSI No 425, art 16(2); National Assembly for Wales (Representation of the People) Order 2007 SI 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 Greater London returning officer’s power of direction (Greater London Authority Elections Rules 2007 SI No 3541 r 10(1)).

works well in Scotland.

- 3.25 A number of consultees commented on what the detail of the functions, duties and powers of direction of regional returning officers should be, which we will consider carefully as we produce draft legislation. All consultees are in support of a clear and consistent legislative expression of the powers of directing or regional returning officers at elections managed by more than one returning officer. We are not minded to alter the way those officers are identified by law – which is usually by secondary legislation. We are, however, in favour of a consistent expression of powers of direction.

**What is the proper role of powers of direction by directing officers at combined polls led by another returning officer? (Consultation question 3-4)**

- 3.26 Consultees placed different emphases on what the proper role of powers of direction should be. Many, like the Electoral Commission, thought securing consistency was the primary aim. Powers “should be used to ensure consistency of outcome and experience for voters and campaigners across the electoral area”. Such consistency fostered confidence in the election among voters and campaigners. This view was echoed by the national branch of the Association of Electoral Administrators (AEA).
- 3.27 The Scottish Assessors Association noted the role of non-statutory bodies such as itself in delivering consistency alongside the statutory Electoral Management Board for Scotland. It noted that the Board “has the general function of coordinating the administration of local government elections in Scotland”. This function will soon be extended to Scottish Parliamentary elections. During the Scottish independence referendum in 2014, the Convener of the Board acted as the chief counting officer. According to the Association, this “has provided a model that is readily capable of implementation elsewhere in the UK”.
- 3.28 The Scottish experience of using a management board will provide UK policy-holders in Government with food for thought, but we do not think it is for this project to recommend a UK-wide shift to a central directing body for all elections. That would be a fundamental alteration to the institutional landscape for delivering UK elections.
- 3.29 The national branch of the AEA, whose response was endorsed by a significant number of respondents, argued for defined limits to the power of direction, stating that powers “should be limited and should be consistent with the Electoral Commission performance standards for that election or referendum, and consistent across elections”.
- 3.30 The eastern branch of the AEA thought the power should be exercised “reasonably”, noting that its region holds a diverse make-up of local authorities and that “these differences mean that directions must be practical for all returning officers and not be issued with the limited perspective of one local authority, i.e. that of the direction officer”.
- 3.31 Some electoral administrators said directions should only be used “sparingly”. Ian Miller (Wyre Forest DC) called for “formal consultation on directions” to be required and limits to ensure directions do not restrict “local returning officers

[from reaching] sensible conclusions based on local knowledge and experience". But limiting the remit of directions comes at the cost of flexibility. Requiring 100% printing of ballot papers to meet the number of electors might be excessively didactic in some polls, but sensible in others (as was proven by the recent independence referendum in Scotland.) We are not convinced that limiting powers of direction is sensible. It would be preferable to identify the best persons to act as directing officers, and to let them evolve a sensible practice together with colleagues.

- 3.32 Some consultees considered that no limitations should be prescribed on a directing officer's power of direction, stating that if they are "to be personally responsible for returning the result of an election, they must be able to satisfy themselves that any aspect of the administration of the election has been carried out to the standard which they believe is appropriate and necessary".
- 3.33 Many consultees considered that it was important for directing officers to consult local returning officers. The national branch of the AEA explained that "the detail and precise nature of such a direction needs to be subject to consultation with the other returning officer/s in the constituency/region and agreed in plenty of time to allow sufficient time for the returning officer/s to plan and implement the directions issued".
- 3.34 The Electoral Commission also commented on the importance of directing and local officers working together. It considered that where local returning officers disagreed with the coordinating officer's approach, the issue "should be managed and mitigated locally by individual coordinating officers through their relationships with local returning officers ... rather than constraining their authority in law". It added that it is important for the Electoral Commission to work with directing officers in order to ensure that performance standards are consistent with directions given by the directing officer. On this topic, Ian Miller (Wyre Forest DC) suggested that directing officers be subject to a statutory duty to consult local officers prior to issuing directions, and to have regard to their comments.

#### APPROACHES TO MANAGEMENT OF COMBINED POLLS GENERALLY

- 3.35 Our question related specifically to the *exercise* of powers of direction at combined polls. Sir Howard Bernstein (Manchester CC) offered two approaches which could be taken to the management of combined polls, and the role of directing officers and power of direction more generally.
- 3.36 The first would involve providing the directing officer with a clear power to direct any lead returning officer on the combined elements of the poll – that is what Sir Howard refers to as the "GLA model", given the Greater London returning officer's power to direct in this way. The second suggested approach would provide no overriding power of direction of the kind referred to above.
- 3.37 Sir Howard considers that the GLA model has the advantage of being a straightforward practical solution, applicable in all cases of combination. However, he explains, its disadvantage is that it might be said to offend against the policy position reflected in the hierarchy of elections. Sir Howard suggests that, if the GLA model were to be generally adopted, provisions enabling directions to be given to lead returning officers in respect of combined elements should specify that no direction may be made that could substantially prejudice

the lead officer's ability to effectively deliver the lead election.

#### THE PROPER ROLE OF POWERS OF DIRECTION

- 3.38 We consider that the proper role of powers of direction is simple. A single officer is in overall charge of delivering an election over a large area. Local returning officers are in charge of running the local polls. Returning officers have a series of discretions: when to count, how to tackle coinciding polls, and so on. Some of these decisions directly affect the voter or the candidates, who will rightly expect a consistent experience, given that the officers are running the same election. The directing or regional returning officer's task is to make such directions as are necessary to ensure he or she delivers a consistent experience of the poll. A power of direction thus connotes judgement and discretion. It has no application where the law requires a particular course of action: no returning officer can direct another to breach electoral law.
- 3.39 We therefore conclude that powers of direction should relate to anything the directing returning officer considers necessary for the proper running of the election they are in overall charge of. Where such an election coincides (and under our recommendation, falls to be run) with another election run by a local "lead" returning officer, the returning officer must comply with the direction, but remains in charge of delivering the local poll.
- 3.40 We consider that legal expression of powers of direction should be general, subject to secondary legislation supplying any detail considered necessary to running the poll properly. Thus, secondary legislation may decide that the local or lead returning officer should be the one to decide whether to combine ballot boxes for two or more coinciding polls, not the directing officer. What is clear to us is that the power must be consistently expressed, as must the duty of cooperation by returning and registration officers faced with multiple coinciding elections run by a range of different returning officers.
- 3.41 We are not in favour of a "legal" duty to consult local returning officers as that might mire directions in legal uncertainty as to their validity. However we do consider that the duty on returning or registration officers to cooperate should be spelled out alongside the power of direction. We agree with consultees who said that directions should be used sparingly. However we think that is a matter of practice and good institutional habits. We do not think that primary legislation should be overly prescriptive of what the direction should relate to.

***Recommendation 3-3: The functions, duties, and powers of direction of regional returning officers at elections managed by more than one returning officer should be set out in primary legislation, along with the duty of officers to cooperate with others running the same poll. It should extend to the administration of the election in question. Secondary legislation may provide more detail as to the extent of powers of direction, including the effect on combined polls.***

#### ADMINISTRATIVE AREAS

- 3.42 To facilitate the running of the poll, electoral areas (constituencies, wards or divisions) are broken down into administrative areas in which polling takes place. These areas 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. The periodic review and alteration of parliamentary polling districts and places is carried out, in Great Britain, by the council of the local authority. The significance of polling places is that the returning officer must locate polling stations within the designated polling place. In Northern Ireland, the polling districts are simply the local government wards.

- 3.43 Our consultation paper discussed two matters. First, it noted that the designation and review of polling districts is an administrative matter which, we provisionally proposed, should be the responsibility of the returning officer rather than local authority councils, whose members are elected politicians.

**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. (Provisional proposal 3-5)**

- 3.44 Of the 36 consultees who provided a response to this proposal, 32 consultees agreed with our proposal. Two consultees disagreed and two consultees did not offer a firm view.
- 3.45 The national branch of the AEA stated that the returning officer “would be better placed to represent the geographical and community needs and would have an unbiased and apolitical opinion when allocating polling districts and places”. It added that the consultation process should include local political parties, and that political parties should also be invited to comment on the returning officer’s final proposals. This view was supported by responding regional AEA branches and electoral administrators, many of whom stressed the need for returning officers to consult with councillors and political parties when reviews are to be undertaken. Scott Martin (Scottish National Party) said that councillors received approaches from the public about suitable and unsuitable buildings for voting.
- 3.46 Sir Howard Bernstein (Manchester CC) commented that narrowly defining the location of polling places may have helped electors in the past, but that this was no longer necessary as information about their location is easily accessible. Sir Howard added that “the need to designate a polling place within the polling district, within which polling stations must then be located, does not now serve a useful purpose and can... needlessly restrict returning officers when having to change the location of a polling station at short notice”. Sir Howard concluded that the requirement to designate polling places should not be maintained: “returning officers should instead have a free hand to locate polling stations anywhere within the polling district (or outside the polling district where special circumstances justify it)”.
- 3.47 We think that a polling district review should continue to identify with reasonable particularity where a polling station will be situated. Ease of access to that location will be a key factor in choosing it. However we think the returning officer should have the power to select another place if, at short notice, the envisaged polling premises become unusable or unsuitable for polling.
- 3.48 The Electoral Commission’s response considered the necessity for a “polling place” in the light of our consultation paper. It noted, however, that “if the concept of a ‘polling place’ is abolished the current law governing the factors to be taken



into account when designating and reviewing polling places will need to be applied to the designation and review of polling stations". The Electoral Commission also highlighted that consideration will have to be given to the law in Northern Ireland, where the review of polling places and a consultation on a polling stations scheme is currently the duty of the Chief Electoral Officer for Northern Ireland.

- 3.49 Few consultees disagreed with our proposal. David Boothroyd (Labour Councillor), who was wary of the proposal, stated that "[i]t must be possible for those who are involved in the local political process to require the administrators of elections to think again". We think, however, that this can take place within a framework where the returning officer, not councillors, is the decision maker.
- 3.50 Colin Everett (Flintshire CC) said "[w]e would question whether the designation and review of polling districts is an administrative matter and believe this should remain with Local Councils rather than be the responsibility of the returning officer".
- 3.51 The Labour Party in its response disagreed in part with our proposal, considering that decisions as to the location of polling stations and the geography of polling districts will always exist and "will always be viewed as being politically motivated". It added:

In order to maintain... transparency and to prevent returning officers being placed under political pressure, these decisions should remain with the local authority. However, there may be independent rules or regulations which would trigger a review by the returning officer for consideration by the local authority.

- 3.52 This is an argument against our proposal which we initially encountered during the first meeting of our advisory group, and took very seriously. However, we concluded that housing the responsibility with the returning officer as part of a similarly public process, subject to independent and effective appeal on clear grounds, was the better option. The scope for administrative areas being decided by a vote of the council that breaks down upon partisan lines, as one consultee recounted, is in our view an unacceptable risk created by the current arrangements.

**Should appeals against designations of administrative areas be to the Electoral Commission or the Local Government Boundary Commissions? (Consultation question 3-6)**

- 3.53 At present, appeals against designation and review decisions go to the Electoral Commission. It has been suggested to us that the Local Government Boundary Commissions might be better placed to deal with appeals. They have greater institutional knowledge and expertise in making decisions in relation to dividing geographical areas. We therefore asked consultees whether appeals against designations of administrative areas should be to the Electoral Commission or the Local Government Boundary Commissions.
- 3.54 A total of 34 consultees answered this question. Opinion was finely split as to whether the Electoral Commission should retain the responsibility for hearing appeals (which was the preference of 14 consultees) or whether that

responsibility should be transferred to local boundary commissions (which was supported by 13 consultees). Seven consultees did not express a preference for either.

- 3.55 The Electoral Commission in its initial response said it would carefully consider the matter. In a further submission, it considered that it should retain the responsibility, commenting that it has the “necessary expertise to carry out this function effectively and [has] demonstrated this in the appeals that [it has] determined” as well as having a “UK-wide remit to ensure that voters’ interests are properly served”. This view was shared by the national branch of the AEA.
- 3.56 The boundary commissions who provided a response to our proposal offered different views. The Local Government Boundary Commission for England considered that it has the experience and expertise necessary to deal with these appeals. The Local Government Boundary Commission for Scotland expressed no preference. By contrast, the Local Democracy and Boundary Commission for Wales thought the Electoral Commission was the better appeals body, saying that “the issues raised in the appeals go beyond the current institutional knowledge and expertise of this Commission”.
- 3.57 Professor Bob Watt (University of Buckingham) supported local government boundary commissions being responsible for appeals, but recognised that “there should be room for consultation with the Electoral Commission who may have a view on the interests of electors”. Scott Martin (Scottish National Party) stressed the boundary commissions’ better understanding of conditions in particular areas. Crawford Langley (Aberdeen CC) commented that the designation of polling districts was a subset of the designation of constituencies and wards, noting that it was a “map based matter to which the Boundary Commission is more suited”.
- 3.58 We do not agree that the designation and review of polling districts is a subset of boundary reviews. Boundary reviews establish geographical areas which have democratic representation. Administrative area reviews make polling convenient for voters. The only overlap is that both exercises involve geographical boundaries. Administrative areas are about the convenience of the voter first. Having a single UK wide body establish best practice through appeal decisions is better than several. For these reasons we consider that the current law correctly identifies the Electoral Commission as the body with responsibility for hearing appeals. Insofar as further expertise is required to establish geographical areas, we consider that the Electoral Commission could, if it so wished, seek expert help to make decisions.
- 3.59 Given the responses to our proposal and question on administrative areas, we are minded to recommend the following:

***Recommendation 3-4: The designation and review of polling districts is an administrative matter which, in Great Britain, should be the responsibility of the returning officer rather than local authority councils. Appeals against such decisions should continue to be heard by the Electoral Commission.***

# CHAPTER 4

## THE REGISTRATION OF ELECTORS

### INTRODUCTION

- 4.1 This chapter outlines the law governing the franchise, electoral residence, and registration, which is a key element of electoral administration as it governs entitlement to vote at any election or referendum. In the consultation paper we set out eleven provisional proposals and asked three questions regarding the registration of electors. We now consider these under the headings of the franchise, residence, and registration generally. The law under these headings is complex and voluminous; a summary with citations is available in our consultation paper. We only give an overview of the law here, focussing on the discussion points raised by the consultation and setting out our recommendations.

### FRANCHISE

- 4.2 Our consultation paper explained that the law setting out the franchises and entitlement to vote for different elections is layered, fragmented and complicated.<sup>1</sup> While reform of the franchise is outside the scope of this project, we provisionally proposed that the full franchise should be restated for all UK elections, in primary legislation.

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

- 4.3 There was unanimous support for our proposal on the franchise. The Electoral Commission and others stressed that this proposal must reflect the different franchises within the UK's devolution settlement. We agree and it is plainly not for this project to change the franchises in any way; we were merely proposing restatement of the current law so that it is in statute. Insofar as legislative competence over the franchise lies somewhere other than the UK Parliament, the franchise will be in a different piece of legislation.

#### **Can the Law Commissions do more than restate the existing law?**

- 4.4 Some consultees urged us to go further than a restatement. We do not think it is for this project to change any part of the existing franchise. Indeed, this matter was excluded from the scope of reform in our scoping report.<sup>2</sup> It is thus outside our terms of reference from the UK and Scottish Governments. We make recommendations on technical law reform: the franchise remains a political and constitutional matter.

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.3 to 4.11.

<sup>2</sup> Law Commission, *Electoral Law in the United Kingdom, A Scoping Report* (11 December 2012) [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/electoral\\_law\\_scoping\\_report.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/electoral_law_scoping_report.pdf) (last visited 11 January 2016).

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

## **RESIDENCE**

- 4.5 Entitlement to be registered turns on residing within the electoral area in question. Residence connects a person to a geographical area that has democratic representation – it provides a person with an “electoral connection”. Besides noting that this is the purpose of residence, defining it is difficult and the law on residence is very complex. The following contributes to the complexity:
- (1) central cases of residence are easily recognised, but untypical examples such as mobile homes, boats, or “couch surfing” can be difficult to capture;
  - (2) cases of absence from “home” for a period due to work or some other reason can pose problems; and
  - (3) some people have more than one residence, and the law says nothing to assist registration officers in determining whether they are entitled to be registered in respect of a second residence.
- 4.6 The law uses the concept of notional residence to tie an elector to a place, even though he or she may not actually reside there. Such electors are called “special category” electors, and include: “merchant seamen”, mental health patients, remand prisoners, service voters, overseas electors and homeless persons. Various legal devices are used to establish “notional” residence, notably a declaration of local connection. Our provisional view was that one legal structure should govern all “special category” electors.
- 4.7 The detail of the law is complex. In summary, section 5 of the Representation of the People Act 1983 (the 1983 Act) lays down factors that tend to establish residence, without seeking to define it. Case law has expanded on statute to establish that residence connotes a considerable degree of permanence, and has also emphasised that the standard of accommodation should not determine residence. Our consultation paper proposed that the law be restated simply and clearly, setting out the factors registration officers should consider to make consistent residence decisions.

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

- 4.8 Of the 35 consultees who addressed this proposal specifically, 34 agreed with it. There was a strong consensus among stakeholders that the law on registration was unduly complex.

- 4.9 The Scottish Assessors Association, representing registration officers in Scotland, summed up a corpus of views among administrators that residence defied simple definition, stating the current law was “outmoded and contradictory”; classifications such as ‘home’, ‘second home’, ‘work’ and ‘student’ were no longer reliable in terms of definition. It concluded that a “clear and simple restatement of the law” would “reflect modern life and promote consistency and fairness in terms of access to the democratic process”.
- 4.10 The Labour Party was more equivocal in its response, emphasising the difficulty in defining residence:

The purpose here must be to allow persons to easily register for any address for which they qualify, whilst preventing fraudulent registrations. For registration purposes it may be that people have to describe their residency or attachment to an area in explicit terms which could be challenged at a court or other hearing.

- 4.11 Any restatement of the law in this area will indeed require caution. We did not detect disagreement in the consultation response, or at the events we attended, with our summation of the current law. There is universal agreement that the provisions of the 1983 Act are almost impenetrable. We therefore recommend proceeding, assuredly but cautiously, to restate the current law in primary legislation.

***Recommendation 4-2: The law on electoral residence, including factors to be considered by electoral registration officers, and on special category electors, should be restated clearly and simply in primary legislation.***

#### **The issue of registration at a second residence**

- 4.12 Case law has established the possibility of a second residence in principle. It is established, for example, that full time students can be registered at halls of residence as well as in their home district.<sup>3</sup> In Scotland, a person was found resident in both Ancrum and Glasgow, because his presence in both was necessary to his career in law and politics.<sup>4</sup> But a holiday home leased for the purpose of relaxation was incidental to an elector’s main home, and did not constitute a second residence for the purpose of registration there.<sup>5</sup>
- 4.13 Neither primary nor secondary legislation makes any provision to guide registration officers as to whether someone is entitled to be registered in respect of a second residence. An elector resident in two local government areas may vote at elections to both. But at national elections the elector cannot cast votes in both areas without committing an offence.

<sup>3</sup> *Fox v Stirk* [1970] 2 QB 463.

<sup>4</sup> *Dumble v Electoral Registration Officer for Borders* 1980 SLT (Sh Ct) 60, pp 61 and 62.

<sup>5</sup> *Scott v Phillips* 1974 SLT 32. See Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.73 to 4.89. Our research minute *Research Paper: The Registration of Electors in the UK*, which discusses the case law in more detail is available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/Electoral-Law\\_Registration-of-Electors\\_Research.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/Electoral-Law_Registration-of-Electors_Research.pdf) (last visited 11 January 2016).

- 4.14 The consultation paper noted the risk of inconsistent practice by different registration officers, and of electors unwittingly voting twice at the same election if they are sent postal ballot papers for both. We sought views as to what should be done about that. First, we proposed that legislation should reflect the possibility of residence in (through an electoral connection to) two places at once. Secondly, we asked whether the law should lay down factors to be considered. Thirdly, we asked whether applicants should make a declaration in support of their claim to be entitled to be registered in respect of a second residence. Finally, we asked whether persons registered at two residences should designate one as the place in respect of which they will vote at national elections. We now turn to the response to our proposal and questions.

**Acknowledging in legislation the possibility of satisfying the residence test in more than one place. (Provisional proposal 4-3)**

- 4.15 Of the 32 consultees who addressed this proposal specifically, 30 agreed that legislation should acknowledge the possibility of a second residence.

**IS THE CURRENT LAW JUSTIFIED?**

- 4.16 Two consultees disagreed with our proposal as a matter of policy. Richard Mawrey QC thought that “the question should seriously be considered whether any elector should be permitted to be registered in two places within the United Kingdom”. Scott Martin (Scottish National Party) considered that question in some detail:

The starting point of this proposal is that a voter should be able to be registered at more than one address. It is time to review whether this should be possible, particularly in light of the facilities now afforded to register to vote shortly before elections. At the time when *Fox v Stirk* was before the courts, there was no “rolling registration” – questions of residence being assessed with reference to a fixed date with only two registers published each year, rather than an annual register with regular monthly updates and one or more “election registers”. If a voter had not taken steps at the correct time to get on the register, they would lose their vote. Postal voting was not available on demand. Parliamentary elections did not occur on a fixed date, making it sensible to give options to voters who may be at a different address depending on when the election took place.

As a matter of policy consideration with the law as it stood in 1970 and based on a first principles consideration of “putting the voter first”, the decision in *Fox v Stirk* cannot be faulted. The immediate cause of the litigation was the then recent reduction in the voting age from 21 to 18. Although not explicitly stated in the decision, the court presumably thought that registration at term time addresses was necessary to enfranchise students who did not wish to travel back to their “home address”. Whether courts would have come to the same decision had the issue remained open until today to be litigated on first principles under the very different registration scheme now operating, is genuinely open to question.

... At every General election, voters with the wealth to be able to register to vote in consequence of the ownership of two substantial homes in different constituencies get to decide tactically where they are best to vote for their party of preference. At local elections, they may be able to vote twice. It is difficult to see, with 21st Century notions of democracy, how the fortune of holding office [or wealth] should give a voter the opportunity to vote in multiple elections or make tactical voting decisions.

- 4.17 The Scottish Assessors Association, while agreeing with our proposal, stressed that confidence in the democratic process requires adequate safeguards to prevent unlawful multiple voting while also catering for multiple residences. The London and eastern branches of the Association of Electoral Administrators (AEA), who also agreed with our proposal, noted dissenting voices in their membership.
- 4.18 Ian Miller (Wyre DC) suggested that we recommend that, where an individual has two or more residences, one must be designated as the principal voting address even at local elections, so that the individual would only be able to vote in elections “relevant to that address.”
- 4.19 Deciding whether either of the outcomes referred to by Mr Martin is justified requires, in our view, a judgement to be made which is a political, not a legal one. We are not qualified, for example, to weigh the above arguments against the competing one that a person who pays local taxes in two places, spends time in both, and is concerned by council decisions in both, should be able to vote at elections to both councils. We note the preponderance of support for our provisional proposal amongst consultees, which included the other political parties on whose behalf responses were made.
- 4.20 In short, our proposal that legislation should acknowledge the possibility of registration at a second residence was generally well received. There is no doubt that the current law raises the difficult issues of a resident at two places being able to vote for local government elections in both, and of being able to choose in which place to cast a national vote. We do not think that this project is the proper forum for reviewing the law’s conception of the possibility of a second electoral residence. Our concern in the consultation paper was to secure consistency of decision-making by registration officers, by providing adequate and proper guidance through law.
- 4.21 In the light of all these considerations, we recommend as we provisionally proposed.

***Recommendation 4-3: Primary legislation should explicitly acknowledge the possibility of satisfying the residence test in more than one place.***

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

4.22 After giving an overview of the case-law both in Scotland and in England and Wales, our consultation paper suggested that the following factors are 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; and
- (4) links to local community and activity, whether social, political, or commercial.

4.23 We asked consultees whether the law should lay down these factors. Alternatively, there might be no change in the law, which would mean registration officers would have to refer to their own understanding of the relevant factors, guided perhaps by case law and non-legal sources (such as Electoral Commission guidance). Of course, even if factors do appear in legislation, the courts, guidance and professional best-practice statements will continue to be important.

4.24 Of the 32 consultees who specifically answered this question, 26 consultees thought the law should lay down the factors to be considered when establishing a second residence. Ten expressly endorsed our suggested factors, led by the Association of Electoral Administrators. The Senators of the College of Justice stressed that our list should not be exhaustive. We agree.

4.25 The Electoral Commission broadly agreed with our suggested factors, save that it thought the first ((1) at paragraph 4.22 above) would be administratively burdensome. It stressed that certain elements of the factors would require more specific elucidation. We did not take the Commission to say, however, that the factors should either be definite in every specific detail, or not be laid down at all.

4.26 The Labour Party's response detected a potential problem with our approach, namely that when applying to register in respect of a single residence, no special proof of residence is required:

If someone moves, the previous registration [entry] will be deleted and [a] new one inserted. But if there are factors to be considered for a second registration then the person applying must have to justify both (or all) of the multiple registrations. Otherwise it would be possible to register a spurious residence first (unquestioned) and then one's permanent home (for which there would be plenty of evidence) as the 'second' home.



Seeking some retrospective proof of residency would immediately penalise people who are moving to first or second homes – students are the obvious example – and who are, therefore, unable to show retrospective proof of residency.

- 4.27 We are unsure how likely this is to arise in practice. It would appear to involve refraining initially from applying to be registered at a “real” residence. Whether the elector in the example is entitled to remain registered in respect of the first residence will be a matter for the registration officer with responsibility for that area.
- 4.28 We think that primary legislation can help registration officers to achieve greater consistency. The answers to our questions revealed, however, a cautious approach among many stakeholders. While there was endorsement of our suggestion to lay down the factors, several consultees wanted to see the draft clauses to make sure that they are practicable. We are sympathetic to these concerns.
- 4.29 Whilst bearing in mind that finalisation of the detail will be a matter of Bill drafting, we recommend that the law’s approach should be as follows, reflecting the existing case law.
- 4.30 To be a residence, an address does not have to be a person’s only or main residence, but it does have to qualify as a residence rather than merely accommodation occupied by them. In deciding whether a property is a person’s residence, the relevant factors include the following.
- 4.31 The legal basis upon which the person occupies a property (ownership, lease, etc) is in itself of little relevance. Property occupied, for example, as staff accommodation or by a carer living in the client’s home, is capable of being a person’s residence.
- 4.32 Where a person’s occupation of a property is not continuous, such as where the person also occupies a residential property elsewhere, the permanence of the arrangement is a relevant factor. If, for example, the property is to be occupied once for a relatively brief period, it will not qualify as a residence. A clear example would be short-term rental of holiday accommodation. Another would be the leasing of a flat to cover a short period of secondment in connection with work.
- 4.33 Where living arrangements involving two sets of accommodation are long-term or permanent, the pattern of the person’s occupation of the accommodation is relevant. The fact that a property is occupied for, in the aggregate, a small portion of the year will militate against it being occupied as a residence, as will the fact that occupation of it is concentrated at a particular time of the year, such as in the case of a seaside cottage occupied for a summer holiday only. Conversely, regular occupation of the accommodation tends to suggest occupation of it as a home.

- 4.34 The availability of the accommodation for the person's occupation may be relevant, particularly if it dictates a pattern of occupation not amounting to occupation as a residence. A timeshare interest in a property for one or a small number of weeks per year would be unlikely to be sufficient to found occupation of it as a residence. The same would be true of ownership of a property which the owner let out for most of the year, only reserving it for their occupation occasionally.
- 4.35 The purpose of a person's occupation may be a relevant factor, particularly if it shows the intended duration of the occupation to be short-term, occasional or for purposes characteristic of a holiday – a retreat from everyday life rather than a continuation of it.
- 4.36 Where a person has a family or household, their pattern of occupation is a relevant factor. If a person occupies a property leaving their household or family elsewhere, but there is a reason for this such as the demands of work and the person returns regularly, the household or family's continued occupation of the other property will suggest that it remains a residence of the person.
- 4.37 For most people, residing in a place connotes involvement in the local community. Social contact and involvement in local politics or community activities are indicative of home life being continued in two places.

***Recommendation 4-4: The law should lay down the factors to be considered by registration officers when determining second residence applications.***

**Should electors applying to be registered in respect of a second home be required to make a declaration supporting their application? (Consultation question 4-5)**

- 4.38 Of the 33 consultees who went on to answer this question, 23 consultees did so affirmatively. That is not to say that they did not raise difficulties with requiring such a declaration. The Electoral Commission's concern that a requirement for electors to give evidence of their annual duration of occupation at the second home is unworkable. It also objected on the same ground to the idea of attestation by a current elector in the area that they know the applicant and can vouch for their being a member of the community.
- 4.39 The McDougall Trust's response stressed the benefits of a declaration, namely focussing on the elector being able to justify the second residence:

We agree that an elector should be required to make a declaration supporting an application to be registered in respect of a second home. We also think that each elector should be expected, in registering, to make a declaration either that the address at which they are registering is the only address at which they are registering, or alternatively that they are registering at one or more other addresses, which they are required to name on the application form.

Against each address, they should be given simple options stating the reason why they are registering (eg they are a student, they own the property or have a long-term tenancy there and reside there for a

number of weeks each year which they are required to state, etc), with an 'other' option which allows them to make a statement in their own words.

An elector should be expected to justify their preference on objective grounds such as the length of residence, and not for example by choosing to use their national vote in a marginal seat.

- 4.40 Five consultees answered the question in the negative. The Senators of the College of Justice thought that no declaration should be necessary in support of an application for registration in respect of a second home. In addition, the Scotland and Northern Ireland branch of the AEA considered that the idea was a superficially attractive one, but were not sure how declarations would be monitored and enforced in practice:

The current European declarations get lost in a mire of bureaucracy.<sup>6</sup> However the suggestion that a declaration may be required to be supported by another elector in the area is concerning. It would mean that new residents in an area would be reliant on existing residents to register. That could be open to abuse.

- 4.41 Similarly the Scottish Assessors Association foresaw difficulties:

A declaration concerning such issues as occupation, presence, connection and membership of a community raises issues that should either be addressed in the factors for registration for all electors or omitted. Consistency would suffer if different tests are applied to the nature of the residence at different addresses where issues of competing or multiple residences arise.

- 4.42 Sir Howard Bernstein (Manchester CC) struck a similar note:

Requiring this additional information could create an additional barrier to registration and may prevent certain hard to register groups who live between addresses, such as students, from registering and participating in elections.

It may also create a significant additional administrative burden for registration officers, that may not be justified given the apparent lack of real evidence as to any significant degree of incidence of unlawful "double voting" as a result of dual registration.

- 4.43 The eastern branch of the AEA also doubted the practical benefits a declaration would bring:

It is likely that a declaration sent to an elector after the point of registration would not be completed, especially in areas with high student populations, and therefore defeats the purpose.

<sup>6</sup> See also, Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.154 to 4.158.

It would also save administrative time chasing electors for answers to queries, which already take up large amounts of time in some areas. Other members feel that this is unnecessary administration, when the current system works.

- 4.44 We are not persuaded that the idea is wrong in principle. It is justifiable to ask someone who is about to be registered in respect of a second place to give reasons in support. A registration officer will often not have enough information in a standard application to make the decision that, both under the current law and our proposed reforms, he or she is required to make.
- 4.45 Notwithstanding the above, and the support for a simple requirement for a declaration in support of an application to be registered in respect of a second residence, we are persuaded that there are practical concerns about doing so. We think it is best left to secondary legislation to guide how registration officers obtain the data they need to make good decisions on second residence, and how to do so without unduly putting off voters. We therefore limit our recommendation to requiring applicants for registration to indicate whether they seek to be registered at that address while remaining registered at another.

***Recommendation 4-5: Applicants for registration in respect of a second home should be required to state that fact. Secondary legislation may prescribe how registration officers should seek to acquire the information required to decide the application.***

**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? (Consultation question 4-6)**

- 4.46 Of the 32 consultees who provided a response to this question, 24 answered that electors registered in respect of two addresses should designate one as the place at which they will cast national votes. Some among those focussed on practical implications. Paul Gribble, former editor of Schofield's Election Law, stressed that electors should be given an opportunity to change their preference in advance of each election, so that they are free to change their mind. Others noted that this would mean that there would be a deadline after which no change of preference would be permitted.
- 4.47 Two consultees answered the question in the negative, while four more were unsure about designation. For the Labour Party, voting at national elections "should be a matter of choice and there are remedies if people vote more often than allowed. In addition it may have the effect of preventing people from voting in multiple elections where they are permitted so to do".
- 4.48 The eastern branch of the AEA stated that it was split on this question. It explained that some of its members considered that such a designation would create difficulties in managing the information between authorities. Another problem highlighted by some members was that electors may "change their minds on designation and turn up to vote without informing the relevant Electoral Registration Officer." However, it related that other members felt that our proposal would improve transparency and confidence in the process, and would provide a way of "managing the perception that the current arrangement encourages voting fraud to occur".

4.49 The Electoral Commission's response was equivocal:

[We have] not yet reached a firm position on the merits of this proposal, and we will therefore focus on the likely practical impact of any change. If a person, in relation to a second residence, were to designate one home as the one from which they vote at national elections, the electoral registration officers in both electoral areas where each residence is situated would require to be informed (as the Law Commissions note).

This would not just apply to UK parliamentary elections and European parliamentary elections but also, depending where the second residence is located, to elections to the devolved legislatures which, within each country, are national elections.

This would entail the creation of new categories of electors depending where each main and second residence is located. It may also be necessary to devise a system whereby electors could change their declaration of residence at which they are registered for national elections.

For practical purposes (e.g. for the issue of poll cards) before an election there would then need to be a deadline prior to polling day for such changes to be notified to the [electoral registration officer].

4.50 The Scottish Assessors Association thought the questions raised a number of issues to be considered: the timing and duration of such a designation along with the means of ensuring the integrity of such designations, given that registration officers do not hold a unique and national means of identifying individual electors.

4.51 Sir Howard Bernstein (Manchester CC) added that there was merit in the requirement of a designation, but that there would be circumstances in which an elector could be disadvantaged by it (for example, where an elector is uncertain as to which address they will be residing at at the time of a national election). He also considered that it would create important additional administrative burden for registration officers.

4.52 There is no doubt that this issue has significant practical implications. It may well be that some electors will not be identifiable as the same person in different registration officers' systems. They may be registered under different names, for example. In the longer term, however, this will be part of a reformed system where new applicants to be registered in respect of a second home are required to reveal that fact. As responses to our consultation noted, new data matching techniques in use since 2013 have helped match electors to other government databases. Registration officers are currently required to communicate with colleagues under the current law: where an applicant reveals their old registered address, from which they are moving, to the new one. In order of magnitude, the number of persons moving their only home is likely vastly to exceed the number of persons acquiring or moving into a second home. Nevertheless, we do take the point that caution and fine-tuning is advisable in this context. We will work closely with stakeholders and Governments to ensure that this so.

***Recommendation 4-6: Electors applying to be registered in respect of a second home should be asked to designate which home they wish to be registered at to vote at national elections.***

### **Special category electors**

**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 4-7)**

- 4.53 All but one of the 31 consultees who submitted a response to this proposal agreed with it. Some, like the southern branch of the AEA, were astute to note that, read literally, the proposal would be very difficult in practice, because a single form for all special category<sup>7</sup> electors would be unduly long and self defeating. We agree. The key reform issue is that the law should conceive of a single legal structure for dealing with these cases of "notional" residence, as it was explained in our consultation paper.<sup>8</sup> The actual forms may vary between each type of elector; however, the same provisions will govern them, the same notion of a declaration of local connection, and they will be subject to the same administrative requirements (notably deadlines) in secondary legislation.
- 4.54 Accommodating the helpful qualification suggested by consultees, we make the following recommendation.

***Recommendation 4-7: Primary legislation should deal with "special category" electors through a single regime providing for a declaration of local connection establishing a notional place of residence; other administrative requirements should be in secondary legislation.***

### **REGISTRATION GENERALLY**

- 4.55 Electoral registration definitively establishes an individual's right to vote at any given election. Electoral registers must be comprehensive and complete so as to capture a true picture of those entitled to vote. Registration officers have a duty to "maintain" their registers, by reacting to information provided by electors through the canvass and processing individual applications to register. They have certain powers to access databases and share information to help them do so. The process must be transparent so as to maintain public confidence in the accuracy of the register.

<sup>7</sup> See para 4.6 above.

<sup>8</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.44 to 4.57 and 4.90 to 4.91.

- 4.56 As our consultation paper outlined, the detailed law governing the function of registration officers and the registration process is extremely complex.<sup>9</sup> Primarily set out in the 1983 Act and supplemented by regulations, it has been subject to significant change in recent years. Major policy shifts have occurred: moving from a “household” registration (done by a yearly canvass of households), to “rolling” registration (which allowed for year-round registration by individual application), and onwards to “individual electoral registration”, first in Northern Ireland then in Great Britain. The recently introduced system in Great Britain has resulted in significant changes in the law, from the introduction of online registration to widening the powers of registration officers proactively to access other sources of information to establish residence.
- 4.57 There are in law five registers (to reflect the different franchises for elections), which are in practice combined onto one dataset contained in software operated by the registration officer (referred to as an “electoral management system”). The law conceives of the registers as physical documents, a revised version of which is published yearly, with monthly notices of alterations. These must be publicised, and entries on the register take effect on publication. An effective deadline for registering in time to vote at an impending election is provided for by making special provision for publishing a notice of alteration ahead of the poll. The provisions here are so confusing, involving consideration of both the 1983 Act and secondary legislation, that for many years until 2013 the deadline for registration was incorrectly thought to be 11 days before the poll. It is, in fact, 12 days.
- 4.58 The law of registration in Northern Ireland operates a different system of individual electoral registration, which has been in place since 2002. The canvass must by law be conducted only once every ten years, while applicants must provide a signature, date of birth and national insurance number in order to be registered; these are then used to check the identity of applicants for a postal vote and the propriety of postal votes cast.
- 4.59 The electoral community has recently been concerned to manage the transition into the individual electoral registration system. The national branch of the AEA, in a post election report, made a number of recommendations based on the experience at the last election.<sup>10</sup> In our consultation paper our focus was to simplify and restate the law to reflect current policy. The registration provisions in the 1983 Act are some of the least accessible in electoral law. The law reform aim in this context is to restate the law within a simpler, more modern framework. Unsurprisingly, therefore, these proposals received near unanimous support, with few words of qualification. We outline the responses to each of our proposals and bring our recommendations together below.

<sup>9</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.92 to 4.171.

<sup>10</sup> Association of Electoral Administrators, *Elections and Individual Electoral Registration – The Challenge of 2015* (July 2015) <http://www.aea-elections.co.uk/wp-content/uploads/2015/07/aea-report-elections-and-ier-challenge-of-2015.pdf> (last visited 5 January 2015).

**The 1983 Act's provisions on maintaining and accessing the register should be simplified and restated. (Provisional proposal 4-8)**

- 4.60 There was unanimous support among the 31 consultees who specifically addressed this proposal. This level of support is unsurprising as the majority of those that responded were persons whose professional lives required them to use and understand the provisions on registration in the 1983 Act. The support of Scott Martin (Scottish National Party) was conditional upon the legislation being enacted in accordance with devolved competence.

**Primary legislation should contain core registration principles. (Provisional proposal 4-9)**

- 4.61 All 30 consultees who provided a response to this proposal agreed with it, although two qualified their agreement. We listed the core principles as 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.
- 4.62 Two consultees had reservations about some of these principles. Ian White (Kettering BC) was unsure that some of these matters should be in primary legislation, noting that the objective of comprehensive and accurate registers may best be left to guidance. The Electoral Commission made clear that, in its view, the deadline for registration should be in secondary legislation, because it may need to be altered due to changing circumstances. We consider this with the next proposal.

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

- 4.63 This proposal was unanimously supported by the 33 consultees who provided a response, with many adding observations of their own. Some, like the Electoral Commission, noted the lack of consistency on timing across electoral legislation. Some electoral administrators who we met at consultation events said that the deadline should be 5pm on the last day for registration, not midnight. Scott Martin (Scottish National Party) pointed to the anomaly of anonymous registrations having a later deadline as the application is not publicised.



- 4.64 Primary legislation currently contains part of the deadline for registration: a voter must be on the register no later than five days before the poll.<sup>11</sup> The second part (the deadline for applying for registration) is laid down in regulations, which lead to the deadline of 12 days in Great Britain, and 11 days in Northern Ireland.<sup>12</sup> We do not think it right that the deadline for registration, in practice an important aspect of the franchise, should be located entirely in secondary legislation. However, we take the point made by the Electoral Commission; making the setting of the deadline entirely a matter for primary legislation may result in more inflexibility than is currently the case.
- 4.65 Primary legislation should clearly set out core principles, and the deadline for applying for registration is one, but we do modify our proposal so as to retain the power of the Secretary of State to fix the deadline, between 12 and five days before the poll. Based on the current policy, we envisage the initial deadline will be 11 days across the UK, since the 12 day deadline in Great Britain is due to a misinterpretation of the way time was to be calculated. Simply put, only Parliament would be able to change the deadline for registration so as to make it fewer than five days before the poll, or more than 12 days before the poll. This best reflects the current law, but achieves our reform objective of having a clearly stated, clearly derived deadline for registration in a standard timetable for UK elections.

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

- 4.66 All 31 consultees who submitted a response to this proposal agreed with it. Many made some comment here about the edited or “open” register, which we cover under the next proposal. Crucially, no one was of the view that the law should continue to conceive of five legally distinct registers. The law should reflect the practice: that a single register is held in data form, which is capable of revealing which elections the elector entered can vote at. Scott Martin (Scottish National Party) observed that the proposal did not sit well with devolved legislative competence. We maintain the proposal, whilst envisaging that the obligation may have to have more than one statutory source.

<sup>11</sup> Representation of the People Act 1983 ss 13B(1) and 13BA(1); Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.138 to 4.145.

<sup>12</sup> The 11 day deadline is prescribed in the Representation of the People (Northern Ireland) Regulations 2008 SI No 1741, reg 25(1). However, on a proper construction of section 13BA(1) of the Representation of the People Act 1983, the prescribed date cannot post-date the fifth day before the poll.

**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 4-12)**

- 4.67 All 32 consultees who provided a response to this proposal agreed with it. Several consultees, however, remarked particularly on the law relating to access to the full and edited (or “open”) register. Many were in favour of abolishing the open register, or alternatively renaming it as the “electoral marketing list”. This view was the prevailing one among electoral administrators, led by the national and local branches of the AEA. At events which we attended, we gathered the chief justification for this view was voter confusion as to their registration data being sold to third parties. Either no registration data should be made available to third parties, or the choice of opting out should be clearly stated.

**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 4-13)**

- 4.68 Of the 31 consultees who submitted a response to this proposal, 26 agreed with it. One consultee, Professor Bob Watt (University of Buckingham), gave conditional agreement: in his view the pace of technological change meant that any provision should be left to guidance rather than (less flexible) secondary legislation.
- 4.69 Four consultees disagreed with our proposal. The London branch of the AEA stated that there was no need to legislate on the matter. This view was shared by the Scotland and Northern Ireland branch of the AEA and Scott Martin (Scottish National Party). The Scottish Assessors Association also sounded a note of caution, stating that it was not convinced that specific provisions on the matter were necessary or practical as it was “not confident that legislation would be sufficiently dynamic to reflect the constant development of IT protocols and data conventions”. It found the concepts of real time updateable digital polling station registers and electors choosing their polling station to be “very significant in terms of administrative and integrity considerations. IT considerations would only come to the fore once the more fundamental issues around these concepts have been addressed.”
- 4.70 We remain convinced that there is merit in our provisional proposal. Some of the administrators we met suggested that there was already a facility for data to “cross” from one electoral management system to another. If so, then a recommendation that the law should manage, over a long term, a transition so that all registration officers’ systems can do so, is not unfeasible. Nor are we convinced that the operation of the private market can secure our suggested goal. A business whose income depends on continued use of its system may not have an incentive to make it easier for a user to switch to a competitor’s system.

**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. (Provisional proposal 4-14)**

4.71 Our consultation paper noted a particular problem in the context of resident EU citizens' entitlement to vote at EU Parliamentary elections. They are entered in a distinct register. Here there is a special requirement of a declaration stating, in particular, that the elector will exercise their right to vote only in the UK, and not their home state. This is to avoid double voting in two member states. However, there are potentially practical problems in administering the declaration, which can last only one year. Our provisional view was that the declarations should last for as long as the elector is registered, or for a maximum of five years.

4.72 A total of 30 consultees addressed themselves specifically to this proposal, all but one of whom agreed with it. Seven consultees, however, thought there should be no limit at all on the duration of the declaration. In the words of the Scottish Assessors Association,

The SAA supports the move to simplify the position but considers that declarations for specific periods will continue to confuse the elector and that a 5 year declaration will essentially merely coincide with European Parliamentary elections. With the introduction of IER [individual electoral registration], the elector is given the opportunity to opt-out from the edited/open register and that status will persist until they advise to the contrary. In the interests of consistency and clarity for the elector, the same principle of a declaration of intent to vote in the UK that remains in force for the duration of the registration, or until advised to the contrary by the elector, should apply.

4.73 Only one consultee disagreed with our proposal. While it supported the intent of the proposal, the Electoral Commission preferred changing the law so that EU citizens are automatically entitled to vote in European Parliamentary elections once registered, without completing any additional declaration at the time of registration. It told us it is working with representative groups in order to achieve this.

- 4.74 The Law Commissions can only make recommendations for changing domestic laws in the UK. The declaration is an EU law requirement. By contrast, the length of time for which it operates is a matter of domestic law. Twelve consultees agreed with our proposal without commenting on our proposed limitation of five years. Eight consultees agreed with our proposed limit of five years. Scott Martin (Scottish National Party) recommended a longer or differently expressed duration, given that the interval between European Parliamentary elections could be longer than five years precisely. The national branch of the AEA noted that limiting the declaration to five years in effect still means the EU elector has to complete a declaration at each European Parliamentary election. That was the intention behind that part of the provisional proposal, and in our view straightforwardly complies with the EU law requirement of a declaration. We do not mean to go so far as to require a “one time” declaration to have effect in perpetuity. We think it right that, in advance of each EU Parliamentary election, EU citizens should be reminded of their choice under EU law of where to vote. We do not consider that the duration need be longer than five years. The likelihood of a declaration expiring before a European election has occurred is low and we envisage that electors will receive a prior warning.

#### **Other issues raised during the consultation**

- 4.75 Given the importance of registration within the electoral system, and that Great Britain was in the midst of the first major elections since transitioning to the new individual electoral system registration, a number of consultees made some general points besides or instead of responding directly to our proposals and questions. Diverse Cymru stressed the importance of promoting access to the poll. It also pointed out that anonymous registration still required evidence by means of specified court orders or attestation by officials, whereas many instances of abuse and domestic violence went unreported. It proposed a procedure for allowing evidence from friends and third sector organisations (with a statement regarding the nature of the reason for anonymous entry) in cases of hate incidents or crimes and domestic abuse, in order to protect these individuals without compromising their ability to vote. In our view this would be a policy decision, requiring a new balance to be struck between access and security. Anonymous registrations are not subject to public scrutiny, and allowing them without evidence provided by court order or attestation by the police would require a judgement to be formed about whether the risk of abuse is acceptable. That judgement can only be made by Government.
- 4.76 A number of consultees stressed that the detailed practicalities and law concerning electoral registration will be reviewed in the light of the recent transition to individual registration and the general election in 2015. The issues include, but are not limited to, the extension of data sharing and confirmation tools primarily envisioned for the *transition* from household to individual electoral registration, streamlining the interface between registration officer and electors, and possible online mechanisms to check registration status. Naturally, this review will adapt to any changes in electoral policy during its life, and the drafting of an eventual reform Bill will be compatible with such developments.

### **Recommendations on electoral registration generally**

4.77 We have gleaned from the response to our consultation paper overwhelming support for our principal aims in reforming the technical laws on electoral registration. These are:

- (1) To take stock of the current position and to articulate it within a simpler, more modern legislative framework.
- (2) Scaling back legal formalism in legislation, and having straightforward laws that reflect the modern practice. The register is a collection of electors' data which can be used to determine who can vote at any particular election, and where. The law should conceive of a single register that can be used for any election or referendum.
- (3) Core registration principles should be in primary legislation. These principles should include the aims of a comprehensive and accurate register, the duties and powers of registration officers to maintain it, the principle that the register determines entitlement to vote, the deadline for registration and attendant requirements of transparency, local scrutiny and appeals.
- (4) Secondary legislation should contain more detailed rules governing the exercise by registration officers of their duties and powers, the form and security of registration data, and detailed rules on access to the register. Organisational or planning matters should be left to registration officers who may be assisted by Electoral Commission guidance or performance standards.

#### ***Recommendations:***

***Recommendation 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.***

***Recommendation 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 applying for registration.***

***Recommendation 4-10: The deadline for applying for registration should be expressed as a number of days in advance of a poll. It may be varied by the Secretary of State provided it falls between days 12 and five before the poll.***

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

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

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

***Recommendation 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 subject to a limit of five years.***

# CHAPTER 5

## MANNER OF VOTING

### INTRODUCTION

- 5.1 Our consultation paper approached the law governing the manner of voting by considering; first, the secret ballot in principle and operation and, secondly, the question of designing and legislating for the content of ballot papers. We retain this structure in this chapter.

### THE SECRET BALLOT

- 5.2 The secret ballot has been the cornerstone of voting in the UK since 1872. Our consultation paper outlined how it was designed to protect against influence and corruption, by reducing their efficacy, whilst retaining the ability to trace particular ballot papers at court proceedings to combat fraud. This is done through the corresponding number list (on which polling station staff record the number of the issued ballot paper against the elector's number).<sup>1</sup>

- 5.3 This system of qualified secrecy remains in place today, and our four provisional proposals were aimed at simplifying and modernising the law rather than uprooting it. We sought to bolster compliance with the UK's obligations under EU law and the European Convention on Human Rights, as well as the UK's own policy of promoting voting secrecy. In particular;

- (1) secrecy of voting should only be "unlocked" by judges. For UK Parliamentary elections, there is a vestigial power of the House of Commons to order the inspection of ballot papers and corresponding number lists, which is in our view an anachronism. We provisionally proposed that this should be abolished;
- (2) safeguards should guarantee the secrecy of how a person voted even if they innocently cast an invalid vote; and
- (3) the obligation to store sealed packets of ballot papers and corresponding number lists should expressly be to do so securely. We suggested that the corresponding number lists should be stored separately from ballot papers.

- 5.4 In order to bolster secrecy, section 66 of the Representation of the People Act 1983 (the 1983 Act) lays down requirements to keep how a particular elector voted secret. These fall on three groups of people:

- (1) at polling stations, candidates and their polling agents, administrators, and observers must maintain and aid the secrecy of voting, and must not communicate before the poll is closed any information as to the name or number on the register of anyone who voted;

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 5.2 to 5.43.

- (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. If they have such information, they must not communicate it; and
  - (3) at the count, those attending must not ascertain ballot paper numbers (printed on the back of ballot papers) or communicate information obtained at the count as to the candidate for whom any vote is given on any particular ballot paper.
- 5.5 At sessions during which postal votes are opened, similar duties of secrecy apply, in particular prohibiting communicating how a vote was given on any particular ballot paper.
- 5.6 Our consultation paper noted that these secrecy provisions, most of which date back to 1872, are under potential threats from technology (in the form of mobile phone photography). Meanwhile, in the postal voting context, no duty is imposed on the public to keep how an elector voted secret.<sup>2</sup> We sought to plug these gaps with our proposals, to which we now turn.

**Section 66 of the 1983 Act should be extended to apply to information obtained<sup>3</sup> at completion of a postal vote and to prohibit the taking of photographs at a polling station. (Provisional proposal 5-1)**

- 5.7 Of the 40 consultees who specifically addressed this provision, 35 agreed with both of our suggested prohibitions. Those who disagreed or were unsure typically had doubts about the enforceability of our proposed prohibitions, or the breadth of the prohibition as to photographs. It is important to note that some of these concerns were shared even by some of those who agreed with our proposals.
- 5.8 The national branch of the Association of Electoral Administrators (AEA) supported our proposal, noting that, in relation to the taking of photographs, it would reduce doubt and promote clarity as to the legal position.
- 5.9 Crawford Langley (Aberdeen CC) thought the prohibition on photography should also extend to individuals photographing their own postal vote. He noted, however, that enforcing a ban of photography may be problematic where images were published under a pseudonym on the internet. Similarly, Professor Bob Watt (University of Buckingham) wondered how a prohibition on photographing postal votes after completion was to be enforced.
- 5.10 For the London branch of the AEA the prohibition should be of photographing identifiable ballot papers, leaving wide-shots of electoral events acceptable. Ian Miller (Wyre Forest DC) also thought a blanket ban too broad, stressing that the public might benefit from seeing what a polling station looks like “in action”. He suggested that only persons authorised by the returning officer may take photographs in a polling station.
- 5.11 Likewise, the Electoral Commission focussed on whether the prohibition could be

<sup>2</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 5.16.

<sup>3</sup> Chiefly, how the voter marked the ballot paper.



more closely aligned to the mischief (photographing an identifiable and completed ballot paper):

Perhaps a more logical prohibition and more in line with the spirit of current legislation, although equally difficult to police, would be for the prohibition to be of photographs portraying a completed and visibly complete ballot paper. On the other hand, presiding officers may find it simpler to enforce an absolute prohibition on the use of cameras in polling stations than attempting to ascertain the circumstances of individual incidents.

- 5.12 The News Media Association's consultation response disagreed with our proposal primarily on the ground that media presence in polling stations is desirable and should continue. At present, local and national newspapers can, with the permission of the returning officer, film and photograph polling stations before polling begins as well as film and photograph candidates as they cast their ballots. The News Media Association considered that these images "have long been a staple of election media coverage". Instead of a ban, they suggest that returning officers and polling station staff "continue to use their discretion to distinguish between harmful and innocuous uses of photography inside polling stations as part of their existing duty to ensure the secrecy of the ballot".
- 5.13 It is not our intention to transform polling into a behind-the-scenes process where photographs or videos are absolutely prohibited. But the fact remains that the secret ballot was designed as a mechanical protection against nefarious influences being able to verify that their corruption or intimidation has worked. Plentiful mobile photography is one way that this can be done: a voter taking a photograph of their ballot paper may well be expressing publicly their support for the electoral process, their candidate of choice, or both. But they may also be under pressure to do so from others.
- 5.14 We therefore conclude that the section 66 prohibitions should extend to the taking of photographs at polling stations. We have been persuaded, however, to qualify this, so that electors may seek the presiding officer's permission to take a photograph. We envisage that guidance produced by the Electoral Commission, as well as the directions or policies of returning officers, can ensure that such permission is given where it is clear to the presiding officer that the photograph is of the polling station as a whole, of a blank ballot paper, or of a candidate voting before the press, and secrecy is not undermined. We think this will be less straightforward to implement than a blanket ban on photography, but it has the merit of allowing electors and the press to publicise the civic act of voting while still protecting secrecy.

***Recommendation 5-1: The secrecy provisions currently in section 66 of the 1983 Act should extend to information obtained at completion of a postal vote and to prohibit the taking of photographs at a polling station without prior permission of the presiding officer.***

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

- 5.15 A total of 36 consultees addressed themselves to this proposal, 35 of whom agreed with it.

- 5.16 A theme which emerged from the responses and consultation events was that electoral administrators were surprised that no legal rule expressly required secure storage.<sup>4</sup> The southern branch of the AEA said that members felt this was common practice already, as did New Forest DC.
- 5.17 The Electoral Commission's response supported further protection for the secrecy of individual votes, although it stressed that it was not aware of any instances where the secrecy of the ballot has been compromised as a result of inadequacies in the storage of ballot papers and corresponding number lists.
- 5.18 Crawford Langley (Aberdeen CC) cautioned that the term "secure" is open to interpretation:
- I would argue that my use of the Council's document store managed by professional records management staff is appropriate secure storage. Others might argue that a strongroom is required, or, at the other extreme, a locked room where the key is kept in a safe.
- 5.19 As Mr Langley notes, the point of secure storage is to prevent unauthorised access to the documents (in practice, only a judge should be able to require or sanction access to the sealed packets). How that is achieved will be a matter of practice which can be left to guidance.
- 5.20 Following consultation, we are therefore minded to turn this proposal into a recommendation for reform.

***Recommendation 5-2: The obligation to store sealed packets after the count should specify that they should be stored securely.***

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

- 5.21 Of the 34 consultees who provided a response to this proposal, 13 fully agreed with it. Six consultees disagreed with our proposal entirely, while 14 agreed only that corresponding number lists should be stored separately from the rest of the packets – in other words, they rejected the suggestion that they should be in a different person's custody. Scott Martin (Scottish National Party) suggested the Electoral Management Board as a suitable custodian in Scotland, but did not comment on the separation of corresponding number lists.
- 5.22 In agreeing with our proposal, Sir Howard Bernstein (Manchester CC) noted that the introduction of an additional layer of assurance to voters concerning the circumstances in which the secrecy of their vote can be "unlocked" would be welcome. Dr Heather Green (University of Aberdeen) thought the courts would be a more appropriate custodian than the Electoral Commission, the latter saying that it did not feel well placed to take on this responsibility.
- 5.23 No consultee rejected the principle of security or the notion that both law and practice should safeguard secrecy so that only judicially sanctioned vote tracing can occur. Indeed, several of those who rejected our proposal did so on the ground

<sup>4</sup> "Secure" means that no one may access the document other than the election official, either on the orders of a court or to destroy the documents after a certain period.

that additional transport of corresponding number list documentation would involve a risk of loss or an inadvertent breach of security.

5.24 Crawford Langley (Aberdeen CC) said:

The recent experience of the returning officer in Glasgow in respect of the loss of marked registers when stored by the Sheriff Clerk is eloquent testimony of the risks attendant on storage of any election documents by someone who is not responsible for defending an election petition in which they may be required. If “secure storage” is defined in such a way as to ensure that no unauthorised person can open the packets, I do not think that the...proposal of keeping corresponding number lists in a different location adds anything to the security.

5.25 Alan Mabbutt OBE (Conservative Party) shared this view:

If there is a requirement to store sealed packets securely and they may only be unsealed by court order, then this extra step would just create a bureaucratic system that increases the chance of the information not being available if requested by a court.

5.26 Some consultees questioned how a more central body in charge of storing corresponding number lists might deal with the sheer volume of documents, and stressed the resource implications this would have for local courts or the Electoral Commission (which we envisaged might have custody of the documents).

5.27 The joint response submitted by the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and the Electoral Management Board for Scotland encapsulated the views of many electoral administrators on this issue. There was no history of, and no issue in practice regarding, breach of secrecy, this was a matter best left to an auditable performance standard.

5.28 We are persuaded by the response to our proposal, whether written or oral at the events which we attended, that the legal requirement to keep the documents securely suffices to protect secrecy. As a matter of practice, we do believe that it is desirable for custodians of sealed packets to store the corresponding number lists separately from the ballot papers, but this is something best left to returning officers and Electoral Commission guidance.

**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 5-4)**

5.29 The principal aim of the proposal was to reflect current practice, namely that only the courts may unlock vote secrecy (in the process abolishing an antiquated rule whereby the House of Commons could unlock secrecy at UK Parliamentary elections),<sup>5</sup> and that this is done subject to safeguards to keep how a person voted

<sup>5</sup> This was used only once, after the Glenrothes Parliamentary by-election, because the courts had no power to make an order to inspect the corresponding list to remedy the problem at hand: marked copies of the registers were lost. Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 5.9 to 5.11.

secret. We thought these safeguards should extend to someone whose vote is invalid, but who acted in good faith. Some 33 consultees provided a response to this proposal, 31 of whom agreed with it.

- 5.30 Several consultees agreed that the House of Commons process was archaic. Professor Bob Watt's response strongly backed proper safeguards for secrecy so as to preserve the UK's qualified secrecy system from legal challenge. He thought that proper statutory procedures subject to close judicial scrutiny would suffice to do so. He welcomed abolition of the provision enabling the House of Commons to order inspection of sealed packets (and thus to unlock secrecy), which he adds may have arisen from a resolution of the Commons following *Ashby v White* (1703) 92 ER 126, and have eluded scrutiny in 1848 and 1868.
- 5.31 Timothy Straker QC disagreed with our proposal, saying it appeared to be unnecessary. Crawford Langley (Aberdeen CC) expressed some doubt as to the extension of safeguards to innocently invalid votes.
- 5.32 The News Media Association opposed the proposal that courts could only disclose how a particular voter voted where it could be demonstrated that the voter acted dishonestly. It added:

Courts already have very wide powers to restrict reporting of individual cases where it is in the interest of justice to do so. In these circumstances, we would fear that the press would be severely restricted from reporting fully on electoral frauds where voters have been coerced into voting a particular way or had their votes interfered with, rather than were necessarily dishonest themselves. This would conceal from the public the extent and nature of these crimes and so shield the individuals (and possibly even candidates and political parties) responsible for them from public condemnation. Furthermore, the consultation document does not supply any evidence to suggest that the absence of such a reporting ban is in any way undermining public confidence in the voting system or deters voters who fear they may have been defrauded from coming forward.

- 5.33 The point of our proposal was not to prevent public reporting of fraud and corruption. It is to preserve the ability of our electoral system to expose fraud while securing compliance with European and human rights laws, along with the UK's own and long-established policy of secrecy of the vote. Ensuring that an "innocently invalid" vote is not revealed, except by the voter, does not extend to a vote cast due to fraud, impersonation, or any other electoral offence.
- 5.34 Subject to this clarification, therefore, we are minded to recommend as we proposed.

***Recommendation 5-3: Secrecy should be unlocked only by court order, with safeguards against disclosure of how a person voted extended to an innocently invalid vote; however nothing in such safeguards should prevent public reporting of electoral fraud.***

## **BALLOT PAPER DESIGN AND CONTENT**

- 5.35 Our consultation paper outlined the law relating to ballot paper design and content. At present, ballot papers are in a form prescribed, mostly in secondary legislation. Historically, different designs have been used, which may cause confusion in electors.<sup>6</sup> In more recent times, there has been a welcome shift towards professionally designed, user-tested forms of ballot papers, evidenced by recent changes in the prescribed forms as part of a review by the UK Government.
- 5.36 We made two provisional proposals. Firstly, the form and content of ballot papers and other materials supplied to voters should continue to be prescribed in secondary legislation (provisional proposal 5-5).
- 5.37 Secondly, in order to improve the experience of voters and the effectiveness of ballot papers, we favoured the statement in law of general principles on ballot papers by reference to which the existing duty of the Secretary of State to consult the Electoral Commission should be exercised. These are:
- (1) internal consistency, concerned with preserving presentational equality between candidates;
  - (2) clarity, concerned with the convenience and accessibility of the form; and
  - (3) general consistency, concerned with consistency of design across elections and fostering consistent voting habits.
- 5.38 We thus also proposed that the duty to consult the Electoral Commission as to the prescribed form and content of ballot papers should include consultation by reference to the three principles above (provisional proposal 5-6).

### **The form and content of ballot papers should be prescribed in secondary legislation. (Provisional proposal 5-5)**

### **The duty to consult the Electoral Commission on prescribed ballot paper form and content should be executed by reference to the principles of clarity, internal consistency and general consistency with other elections. (Provisional proposal 5-6)**

- 5.39 Of the 37 consultees who specifically addressed proposal 5-5, 30 agreed with it. Four consultees disagreed, two consultees commented without providing a firm view and one consultee was undecided. Diverse Cymru and Mencap did not offer a firm view, but commented on wider accessibility issues and the need to recognise expressly that no single ballot paper can meet the access requirements of all voters. A total of 37 consultees provided a response to proposal 5-6, 32 of whom agreed with it. Two consultees disagreed and one consultee was unsure. One consultee commented but provided no firm view. Scott Martin (Scottish National Party) doubted the need for principles to be stated in legislation, questioning how consistency as between elections would fit with devolution.

<sup>6</sup> For example, at one time electors in Northern Ireland accustomed to using the STV system, had to cast their vote by marking a number on the left hand side column of the ballot paper for elections to the Northern Ireland Assembly. However, ballot papers for UK Parliamentary elections had to be marked with a cross on the right hand side column, while the left hand side column listed candidates with numbers. This lack of consistency was liable to cause voter confusion.

- 5.40 One of the main issues to emerge from both proposals was whether the form of the ballot paper should instead be prescribed by the Electoral Commission, or even left to returning officers. There was also support for the ballot papers to be prescribed in primary legislation. For these reasons, we have decided to analyse responses to both proposals together.

#### **Support for our twin proposals**

- 5.41 As outlined above, there was very strong support for our twin proposals above. One question raised in the joint response submitted by SOLAR and the Electoral Management Board for Scotland and in the response submitted by Scott Martin (Scottish National Party) was whether the affirmative resolution procedure should be used for prescribing ballot papers to ensure debate and detailed scrutiny of the justification for changes. Indeed, this is the current law concerning UK Parliamentary elections.<sup>7</sup>

#### **Promoting access by disabled voters**

- 5.42 In its response, the RNIB thought that “accessibility for disabled voters” should be added after “clarity” as a design principle. Others, such as Diverse Cymru, emphasized that no single form would suit every voter and, consequently, that language considerations such as community languages should be taken account of alongside accessibility and Plain English requirements. It commented that “the importance of accessibility of design to the ability of voters to vote renders accessibility an important principle which should be expressly stated in the duty to consult with the Electoral Commission”.

- 5.43 Mencap’s response relayed feedback from people with a learning disability:

... The ballot paper ... can be confusing. The list of candidates is alphabetised with the candidate names next to the party name and logo. Many people with a learning disability are not familiar with party logos particularly in black and white and can become confused. Many have said that ballot papers with pictures next to the candidate name and logo would help them identify the candidate they wish to vote for...

Polling station staff should be aware some people may want to take in a piece of paper with the candidate name or photo into the booth with them.

- 5.44 Mencap recommended that secondary legislation should be amended so that photographs of the candidates can be added to the ballot paper alongside the candidate name, party and logo. This will aid people with a learning disability to vote and vote without the support of anyone else.

#### **Disagreement with our proposals**

- 5.45 A minority of consultees expressed disagreement with our proposals, but argued for different alternatives. Crawford Langley (Aberdeen CC) argued for ballot paper forms to be set out in primary legislation. Jeff Jacobs (Greater London Authority), by contrast, made the case for returning officers being able to adapt prescribed

<sup>7</sup> Representation of the People Act 1983, s 201, sch 1 para 19(4).

forms in order to:

... make minor variations to the ballot paper/prescribed materials where he/she considers this would be beneficial to the voter and the effective administration of the election (and would have no adverse effect on any candidate).

### **The case for design and prescription by the Electoral Commission**

5.46 Among those who disagreed with our proposals, there was a greater number who argued that prescribed forms of ballot paper should be taken outside Government and legislative controls and should instead be produced by the Electoral Commission.

5.47 Alastair Whitelaw (Scottish Green Party) said:

Secondary legislation is subject to political control and although it is usually deemed relatively uncontroversial, there is one major case in which a ministerial decision led to major problems (combined Scottish elections in 2007: combination of the regional and constituency Parliamentary ballots on a single sheet with two columns). Decision of ballot paper design should be independent of politicians and passing the decision to the Electoral Commission is [preferable]... It has expertise in consulting interested parties, disability groups etc.

5.48 This is in line with the view of the Electoral Commission itself. The Electoral Commission argued in its response that the content and format of forms should be prescribed by the Commission rather than legislation, noting that:

There are often problems with the prescribed form that are only noticed shortly before an election; sometimes there is insufficient time to bring forward amending legislation to correct this in time for the election.

5.49 The Electoral Commission's view applies not only to ballot paper forms but to other notices and forms prescribed in electoral law. The Electoral Commission argued that "flexibility to correct and improve the forms...would be in everyone's best interests". This was because the Electoral Commission considered that flexibility is necessary in order to "deal more swiftly and responsively with unforeseen problems and to make it easier to improve designs for future elections".

5.50 If ballot papers were to continue to be prescribed in secondary legislation, the Electoral Commission did say it supported our proposed duty to consult the Electoral Commission on the form and content. It stressed that it will be important to consult other organisations. But it seemed to regard it as very much second best to its preferred scheme. This view was shared by Professor Bob Watt (University of Buckingham).

5.51 Crawford Langley (Aberdeen CC), who argued for ballot paper forms to be prescribed in primary legislation, nevertheless added:

While provisional proposal 5-6 reflects current realities, a form of wording which requires greater weight to be given to the

Commission's views would be helpful.

### **Our recommendations**

- 5.52 The views of consultees, while generally supportive of our proposals, do reveal some strongly argued positions in other directions. We consider that prescribing ballot papers in primary legislation would make forms too inflexible, incapable of periodic adaptation without amending primary legislation.
- 5.53 We do not, however, agree that flexibility is the dominant goal in designing laws on ballot paper forms. Once proper stock is taken of the sheer variety of elections and voting systems in use throughout the UK and how clarity and consistency is best served across all of these, we do not envisage the current practice, by which ballot papers are prescribed before each and every "regular" election, necessarily needs to continue. Changes to ballot paper forms should be undertaken after careful reflection, or for strictly required technical electoral (or technological) reasons. We also think it is right in principle, and reflects a long-established tradition in the UK, that the ballot paper template is fixed by law and subject only to cosmetic and minor adaptation by returning officers. We can see a case, for some elections such as those for Greater London Authority elections, for a greater power to adapt the forms for reasons of branding or to enable electronic counting.
- 5.54 The above position does not mandate that the powers to prescribe ballot papers need to be located with UK or Scottish Ministers. A policy decision may in the future be made to transfer such responsibility to the Electoral Commission. However, we ruled out, at the scoping stage of this project, fundamentally altering the institutional landscape in elections. That includes, in our view, recommending a transfer of powers to prescribe ballot paper and other election notices and forms from Whitehall or Holyrood to the Electoral Commission. Such a measure would have a constitutional character.
- 5.55 Nevertheless, we recognise the importance of the Electoral Commission's uniquely UK-wide role, which is why our recommendation maintains our proposal as to the duty to consult it in our recommendation. We continue to consider that the legislation should set out guiding principles. We will endeavour to ensure that "clarity" is defined so as to include consideration of accessibility by disabled voters. The equality duty will continue to apply to Departments when developing the forms. The key responsibility for Governments, the Electoral Commission, and other stakeholders, will be to ensure that voters are able to vote easily, and to form and foster electoral habits from one election to the next because form design is both good and consistent across different elections.
- 5.56 We stress that this recommended duty is a formal legal one; we do not suggest that the current Governmental practice of wider consultation of the electorate, including stakeholders and disability groups, should cease.

***Recommendation 5-4: The form and content of ballot papers should continue to be prescribed in secondary legislation.***

***Recommendation 5-5: There should be a duty to consult the Electoral Commission on prescribed ballot paper form and content by reference to the principles of clarity (including for disabled voters), internal consistency and general consistency with other elections.***



# CHAPTER 6

## ABSENT VOTING

### INTRODUCTION

- 6.1 An absent vote is a way of voting other than at a polling station on polling day. It is done through a postal vote or by appointing a proxy. Postal voting is available on demand in Great Britain, while proxy voting, and absent voting generally in Northern Ireland, are available only for certain reasons, such as absence due to work or illness. This chapter considers the responses to our eight provisional proposals and one question concerning absent voting in the UK.
- 6.2 Our consultation paper outlined the law on absent voting, which is complex. It is found in a mixture of primary and secondary legislation which is distinct from the sets of rules that contain the core laws on the conduct of elections and the detailed election rules.<sup>1</sup> This chapter divides into three parts:
- (1) entitlement to an absent vote;
  - (2) the administration of applications for an absent vote, and the ongoing maintenance of the lists of absent voters. We refer to this below as the administration of absent voters. This is overseen by electoral registration officers; and
  - (3) issuing postal voting packs and receiving completed postal voting packs up to polling day. We refer to this as the postal voting process, and this is overseen by returning officers.

### ABSENT VOTING ENTITLEMENTS AND RECORDS

- 6.3 The law governing entitlement to an absent vote is set out, for Great Britain, in the Representation of the People Act 2000 (the 2000 Act) and, for Northern Ireland, in the Representation of the People Act 1985 (the 1985 Act). Statute is supplemented in each jurisdiction of the UK by regulations made by Secretaries of State. The Acts and regulations govern UK Parliamentary and local government elections, while distinct pieces of election-specific secondary legislation copy their provisions for the particular elections they govern. The law is therefore both fragmented and voluminous, with much repetition of provisions appearing in the 2000 Act. A consequence of laws applying to particular elections or groups of elections is that records of absent voters produced by application of these laws do not apply to elections not governed by them, leading to a number of problems which we identified in the consultation paper.<sup>2</sup>
- 6.4 Our main reform position in the consultation paper was that a holistic legal framework in primary legislation should govern entitlements to an absent vote. To

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.5 and 6.6.

<sup>2</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.7 to 6.34.

that end, we made a number of proposals, the response to which we now turn.

**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 6-1)**

- 6.5 All 39 consultees who provided a response to this proposal agreed with it. Some consultees made suggestions for improving the clarity of the current law. Diverse Cymru, a disability charity, stressed the importance of ensuring that:

...processes are simple and clear to all voters and the fact that anyone can choose a postal vote must be expressed clearly and in plain language on all registration materials and election communications.

- 6.6 Mencap UK thought that secondary legislation should clarify that accessible – in particular easy-read – information should be issued where appropriate to postal voters with a learning disability.

- 6.7 In the light of the response, we are minded to recommend as we proposed.

***Recommendation 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.***

**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 6-2)**

- 6.8 A total of 39 consultees addressed themselves to this particular proposal, 34 of whom agreed with it. The other five agreed only to an extent, and did so for different reasons.
- 6.9 The national branch of the Association of Electoral Administrators (AEA), whose response was supported by a significant number of electoral administrators, supported this proposal, but stressed the importance of ensuring there are necessary safeguards built in to prevent double voting by those registered at two different addresses.<sup>3</sup>
- 6.10 The importance of removing confusion in the current system and the resulting additional “unnecessary work” it causes was stressed by many others. Problems have in the past been caused by the use of bespoke forms by political parties. As the Electoral Commission noted in its response:

We reported in our May 2014 report on the European Parliamentary and local government elections<sup>4</sup> that absent vote application forms had been sent out by parties which only applied to the European

<sup>3</sup> We address this issue in chapter 4, paras 4.5 to 4.52.

Parliament elections – so that electors who completed them were not sent postal ballot packs for the local government elections on 22 May.

- 6.11 The Electoral Commission, however, did not agree that applications should be incapable of being made selectively for particular election types, stating that voters should “continue” to be able to choose to vote as an absent voter for any specific type or set of polls, or to vote as an absent voter for all polls.
- 6.12 In our consultation paper, we explained that although voters may, under the 2000 Act, choose to be an absent voter for Parliamentary or local elections only, many forms used by registration officers do not reflect that choice, including the Electoral Commission’s own online template.<sup>5</sup> We could not think of a practical example where a voter would gain from such a choice, and none was given by consultees in writing or at the events we attended. It makes little sense, where a parliamentary and local election occur on the same day, to vote by post for one while turning up at the polling station for the other.
- 6.13 The joint response of the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and the Electoral Management Board for Scotland also suggested that standard applications should be for all elections, and that options to cancel a postal voting arrangement or to change to proxy voting as a one-off should be retained, such as in circumstances where a postal voter will be away from home on holiday or business when postal packs are due to be delivered for a particular poll.
- 6.14 Our proposal simplifies the elector’s choice as to what form of absent vote they seek (postal or proxy) and whether to be an absent voter indefinitely, for a specified period of time, or only on a particular polling day. It also clarifies the law underpinning absent voting and simplifies the task of electoral administrators. We are accordingly minded to maintain it.

***Recommendation 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.***

<sup>4</sup> Electoral Commission, *The European Parliamentary elections and the local government elections in England and Northern Ireland May 2014 - Report on the administration of the 22 May 2014 elections* (May 2014) [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0010/169867/EP-and-local-elections-report-May-2014.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/169867/EP-and-local-elections-report-May-2014.pdf) (last visited 11 January 2016).

<sup>5</sup> Electoral Commission, *Application to vote by post* [http://www.aboutmyvote.co.uk/\\_\\_data/assets/pdf\\_file/0009/177408/Postal-vote-general.pdf](http://www.aboutmyvote.co.uk/__data/assets/pdf_file/0009/177408/Postal-vote-general.pdf) (last accessed 11 January 2016); Many local authorities use this or a similar template, and this appears to us to be a reasonable pragmatic approach given the impracticality of strict compliance with the 2000 Act, and its counterparts for other elections. See Law Commission, *Research Paper: Manner of Voting at UK Elections* (2014) [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/Electoral-Law\\_Manner-of-Voting\\_Research.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/Electoral-Law_Manner-of-Voting_Research.pdf) (last visited 11 January 2016).

**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 6-3)**

- 6.15 All 34 consultees who submitted a response to this provisional proposal agreed with it. Some consultees noted that the proposal reflected current practice.
- 6.16 Ian Miller (Wyre Forest DC) urged us to introduce a number of restrictions on proxy voting, for example, to limit the number of people for whom one person may be appointed as proxy. Mr Miller also suggested that candidates and campaigners should not be able to be proxies at all, or alternatively should only be able to be a proxy for close relatives. His view was echoed by the Society of Local Authority Chief Executives and Senior Managers in the UK (SOLACE).
- 6.17 We have not seen any evidence that proxy voting is being abused. Wrongful pressure, or trickery of a voter to name a candidate or campaigner as a proxy, amounts to undue influence.<sup>6</sup> Altering the basis of entitlement to an absent vote is, we consider, a political question for Governments and Parliaments. Our focus is on simplifying and clarifying the law on absent voting, and to fit it into the framework for electoral legislation we recommend in chapter 2. We are therefore minded to maintain our proposal and recommend as follows.

***Recommendation 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.***

## **ADMINISTRATION OF ABSENT VOTER STATUS**

- 6.18 No postal or proxy voting application form is currently prescribed by law, but an application must contain personal identifiers (in Great Britain, signature and date of birth) in prescribed forms so that they can be scanned and used by registration officers.
- 6.19 The ability of campaigns to use their own bespoke forms has resulted in difficulties in the past, such as the Yes campaign's use of its form in the 2011 "alternative vote" referendum. Our consultation paper outlined the law and current problems, noting that these forms should present clear options to the electors, and should be user-tested and professionally designed.<sup>7</sup> We also noted problems with the lack of legal guidance on how registration officers should go about exercising their power to dispense with the requirement for a signature from an applicant for a postal or proxy vote. Finally, we noted that in Northern Ireland a special scheme remained on the statute book, never brought into force, providing for certain voters to vote at a "special polling station". We now turn to the response to our proposals.

<sup>6</sup> See chapter 11, paras 11.23 to 11.66.

<sup>7</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.35 to 6.78.

**The special polling station procedure in Northern Ireland under schedule 1 to the Representation of the People Act 1985 should be repealed. (Provisional proposal 6-4)**

- 6.20 Sixteen consultees offered a response to this particular provisional proposal. Only one consultee disagreed.
- 6.21 The Chief Electoral Officer for Northern Ireland, who runs registration and conducts polls in Northern Ireland, agreed that the special polling station procedure should be repealed.
- 6.22 Alan Mabbutt OBE, the Conservative Party nominating officer, was the only consultee to disagree, saying of our proposal that it seemed “an unnecessary repeal in the current circumstances as it gives flexibility to act in an emergency situation”.
- 6.23 We take the point that the option for the Secretary of State to bring in the special polling scheme does provide flexibility to act in an emergency situation. However, we consider that repealing the scheme under the Representation of the People Act 1985 would not preclude Parliament from responding to an emergency situation if necessary. Indeed, an emergency would require primary legislation in any event, since the provisions in schedule 1 to the 1985 Act are out of date and locked to electoral law as it was at that time. We are therefore persuaded to recommend as we proposed.

**Absent voting applications should substantially adhere to prescribed forms set out in secondary legislation. (Provisional proposal 6-5)**

- 6.24 A total of 35 consultees provided a response to this provisional proposal, 27 of whom agreed with it. Three gave qualified agreement, while a further four disagreed. One consultee did not express a firm view.

**SHOULD THE FORMS BE PRESCRIBED?**

- 6.25 Alan Mabbutt OBE (Conservative Party) did not agree that absent voting application forms should be prescribed at all, stating that the proposal would “disadvantage a voter who provided all the necessary information” in a form that was not prescribed. Mr Mabbutt considered that the proposal did not make “it as easy as possible for an elector to legitimately vote”. Scott Martin (Scottish National Party) thought the current law worked relatively well.
- 6.26 Sir Howard Bernstein (Manchester CC) also considered that an elector should not be obliged to use a prescribed form, arguing that as long as the elector provided all the relevant information, by way of a letter for example, he or she should be considered as having made a valid application.
- 6.27 Currently an absent voting application must contain personal identifiers adhering to strict formal requirements (for example a person’s signature must appear against a background of white unlined paper of at least five centimetres long and two centimetres high).<sup>8</sup> If an elector provided relevant information by a letter without complying with that requirement, the application would be invalid. We do

<sup>8</sup> Representation of the People (England and Wales) Regulations 2001 SI No 341, reg 51(3A)(a).

not consider that voters would be disadvantaged by being required to submit their application by way of a prescribed form. Indeed, we made our proposal because it would ensure they complied with formal requirements.

- 6.28 Furthermore, requiring the use of a prescribed form further secures for voters the benefit of a well-designed, user-tested form. Parties or campaign groups would be able to customise the prescribed form, provided they substantially adhered to it. We consider voters would be better served by making available a well-designed prescribed form, than for strict formal requirements (such as the signature box) to exist but their existence to be concealed by the absence of an overall prescribed form.

#### SHOULD THE FORMS BE IN SECONDARY LEGISLATION?

- 6.29 The Electoral Commission did not agree that the form should be prescribed in secondary legislation. Instead, the Electoral Commission argued that legislation should prescribe a requirement to adhere to “wording and options for the completion of application forms as specified in the form set out by the Electoral Commission”. The Electoral Commission considered that would help to ensure greater consistency and flexibility.
- 6.30 This is an aspect of the Electoral Commission’s general position on prescribed electoral forms and notices, which we address in part in the preceding chapter.<sup>9</sup> Requiring the use of a particular prescribed form is our main reform aim, and the general institutional arrangements in the UK are for such forms to be prescribed by Ministers exercising powers of subordinate legislation. We therefore consider prescribing absent vote application forms in secondary legislation to be the correct course.

#### SHOULD VOTING APPLICATIONS “SUBSTANTIALLY” ADHERE TO THE FORMS?

- 6.31 Whilst a majority of consultees agreed that absent voting applications should substantially adhere to the prescribed forms, some discussed the leeway to be given to applicants in adhering to the forms. In our consultation paper, we explained that this requirement is aimed at ensuring that voters are not disadvantaged if they do not strictly adhere to a prescribed form.
- 6.32 The need for flexibility was echoed, to a lesser extent, by the London branch of the AEA who said that the substantial adherence requirement should allow electoral registration and returning officers “reasonable leeway” to adapt prescribed forms to suit local circumstances. As long as the form adapted by electoral registration and returning officers substantially adheres to the form prescribed in legislation, this would not be problematic. We do not consider that the “substantial adherence” requirement needs to be relaxed.
- 6.33 Other consultees considered that the requirement to apply by way of a prescribed form should be stricter. Professor Bob Watt (University of Buckingham) said that there should be almost no flexibility at all; applications should adhere “exactly” to a prescribed form designed by the Electoral Commission and published by the returning officer. Professor Watt considered that applications made in any other form should be rejected, “save where there is demonstrable good reason”.

<sup>9</sup> See chapter 5, paras 5.46 to 5.56.

- 6.34 The joint response of SOLAR and the Electoral Management Board for Scotland said that the “substantially adhere” requirement introduces uncertainty and risks voter confusion and software issues. SOLAR explained that this is because forms need to be capable of being read electronically. SOLAR also stressed that the use of bespoke forms by political parties made this significantly more difficult.
- 6.35 While we take the point that “substantially adhere” involves some uncertainty, we think it less uncertain than the current term in use elsewhere in the law (use of a form to the “like effect”). In our view a minor departure from the prescribed form should not penalise voters, provided that the personal identifiers can be scanned for later verification of postal votes.

**At the time of election, requests for a waiver of the requirement to provide a signature as a personal identifier should be attested, as proxy applications currently must be.<sup>10</sup> (Provisional proposal 6-6)**

- 6.36 In total, 36 consultees addressed themselves specifically to this proposal, 29 of whom agreed with it. Five consultees expressed qualified agreement while two consultees disagreed.
- 6.37 The importance of protecting the absent vote application process against fraud was recognised by consultees who expressed full agreement with our provisional proposal. The Electoral Commission said that it would help ensure the “integrity of the absent vote application process”. This was echoed by the Senators of the College of Justice who replied that this procedure would “offer some protection against fraud”. Scott Martin (Scottish National Party) said that waiver applications should be capable of being made on polling day; it was his regular experience that carers only discovered on polling day that an elderly voter had lost the ability to sign the form.
- 6.38 Alan Mabbutt OBE, who disagreed, said that there was no advantage to our proposal as it would make it harder for legitimate requests to be made in exchange for a “very minor deterrent”.
- 6.39 We consider that the advantages of our proposal are twofold. First, as the Senators of the College of Justice and the Electoral Commission have noted, it will help to minimise risks to the integrity of the poll. Second, it will help to ensure consistency across constituencies, as currently, whether or not the requirement to provide a signature is waived depends entirely on the discretion of the registration officer.<sup>11</sup>
- 6.40 However, we take the point that it is important to ensure that access to the poll is not made excessively difficult. Indeed some consultees who agreed with our proposal, including Sir Howard Bernstein, the Scottish Assessors Association and Ian White (Kettering BC), reminded us to take care to ensure that any recommendation arising from our provisional proposal would not be discriminatory or have a negative impact on accessibility.

<sup>10</sup> A relevant person, such as health professionals or employer, must attest an application to vote by proxy on the ground of, respectively, disability or employment.

<sup>11</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.42 to paras 6.46.

WHO SHOULD BE ABLE TO ATTEST A WAIVER OF THE REQUIREMENT TO PROVIDE A SIGNATURE?

- 6.41 Some consultees considered that the list of persons who may attest an application to waive a signature should be broader than the list of persons who may attest a proxy application. Specifically, the national branch of the AEA, with whom a number of other consultees agreed, stated that those who may attest should include a “health professional, including a carer”.
- 6.42 Diverse Cymru explained that some people do not have access to a health professional to attest the waiver, noting:
- [There] must be other means of attesting to a waiver of the requirement to provide a signature and for proxy voting, such as a social worker, other social or community care professional, or any third or public sector organisation providing support to the individual who can also provide a statement as to their knowledge of the individual and their requirement for a proxy vote or signature waiver.
- 6.43 Crawford Langley (Aberdeen CC) took a different view. Mr Langley considered that the risk of fraud is particularly great in care homes, as “large numbers of residents may be in receipt of postal votes and dates of birth, which would be the only remaining identifier, are often widely known”. Therefore, Mr Langley argued that attestation by an independent health professional should be the minimum requirement of waiver, preferring instead that consideration be given to enabling returning officers to set up early in-person voting arrangements in care homes.
- 6.44 Under the Representation of the People (England and Wales) Regulations 2001 (the 2001 Regulations), the list of persons who may attest an application to be a proxy voter on the grounds of blindness or other disability includes a significantly broad range of health professionals, including a registered social worker or care worker.<sup>12</sup> Under our proposals, the persons able to attest whether someone is unable to provide a signature to vote by post would be the same as those able to attest a proxy voting application. Designating the professionals who are able to attest is and will remain a matter of policy for governments exercising their regulation-making powers.
- 6.45 Concerns about the integrity of the poll were reflected in the response of the London branch of the AEA. The London Branch argued that the rules should be changed to require any person supporting a waiver application to provide their own signature and date of birth in addition to their name and address, and to require that the declaration be underpinned by appropriate penalties for false declaration.
- 6.46 Under the current law, there is already an offence of knowingly providing false information in connection with an application for an absent vote, liable on summary conviction to a fine not exceeding level 5 on the standard scale.<sup>13</sup>

<sup>12</sup> Representation of the People (England and Wales) Regulations 2001 SI No 341, reg 53(2) and (3); This list is replicated, with some variations, in The Representation of the People (Scotland) Regulations 2001 SI No 497, reg 53(2) and (3), and in the Representation of the People (Northern Ireland) Regulations 2008 SI No 1741, reg 57(2).

<sup>13</sup> Representation of the People Act 2000, sch 4 para 8.



Furthermore, any person attesting a request to waive the signature requirement will need to provide a signature, as is currently the case for persons attesting a proxy vote application.<sup>14</sup> We therefore think that the AEA branch's concerns would be assuaged under our proposal.

SHOULD THE REGISTRATION OFFICER RETAIN A DISCRETION TO ACCEPT A NON-ATTESTED REQUEST?

- 6.47 Some consultees said that the final decision should be at the registration officer's discretion. Is a discretion to decide whether or not a waiver of the signature requirement should be granted necessary to preserve the integrity of the postal voting process? That is not the position in the context of attestations for applications to be a proxy. A discretion to waive attestation rather undermines the utility of an attestation by prescribed medical professionals. Registration officers are not qualified to make medical judgements.

WAIVING THE REQUIREMENT TO PROVIDE A SIGNATURE FOR A POSTAL VOTE APPLICATION IN NORTHERN IRELAND

- 6.48 Currently in Northern Ireland, a person's signature must match the signature given at the point of applying to become a registered elector. However, as we noted in our consultation paper, 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 unable to request a waiver of the requirement to provide a signature on a postal vote application or declaration of identity. The Northern Ireland Electoral Office stated:

We are of the view that there should be a facility to waive the signature requirement on a postal vote application. This is not, to our knowledge, the result of anti-fraud policy but is an unintended complication.

- 6.49 If an elector's request to waive a signature requirement is properly attested by a health professional, as would need to be the case under our provisional proposal, we do not envisage that returning officers might nevertheless refuse to allow that person to waive the signature requirement. Nevertheless, this will be a matter for secondary legislation, which currently makes prescription for attesting proxy applications.

***Recommendations for the administration of absent voter status:***

***Recommendation 6-4: The special polling station procedure in Northern Ireland under schedule 1 to the Representation of the People Act 1985 should be abolished.***

***Recommendation 6-5: Absent voting applications should substantially adhere to prescribed forms set out in secondary legislation.***

***Recommendation 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.***

<sup>14</sup> Representation of the People (England and Wales) Regulations 2001 SI No 341, reg 53(2).

## THE POSTAL VOTING PROCESS

- 6.50 Our consultation paper outlined the law governing the postal voting process, through which postal voters are issued with voting papers and cast a vote.<sup>15</sup> The detail is contained in secondary legislation such as the 2001 Regulations.<sup>16</sup> Postal voting packs are issued to postal voters to the address shown on the postal voters list, and detailed rules govern the verification of personal identifiers. Detailed provisions allow, in Great Britain, for reconciling mismatched postal voting statements and postal ballot papers, cancelling postal votes and even retrieving one from a postal ballot box.
- 6.51 An election rule, contained in a different part of the secondary legislation or, for UK Parliamentary elections, schedule 1 to the Representation of the People Act 1983 (the 1983 Act), stipulates when a postal vote is validly cast. In Great Britain, that means return by hand or post, reaching the returning officer before the close of poll, of a duly completed ballot paper and postal voting statement containing the correct personal identifiers (signature and date of birth), which must be verified by the returning officer against those provided in the application for a postal vote. In Northern Ireland, postal votes may not be returned by hand.
- 6.52 Our aim with our provisional proposals for reform was that patchy, voluminous and repetitious election-specific rules should be replaced with a single set of provisions, respecting the differences between Great Britain and Northern Ireland, and setting out the powers and responsibilities of the returning officer generally rather than seeking to prescribe the process in exhaustive detail. We formulated two provisional proposals.

### **A single set of rules should govern the postal voting processes in Great Britain and Northern Ireland respectively. (Provisional proposal 6-8)**

- 6.53 All 35 consultees who submitted a response to this proposal agreed with it, one nevertheless noting the need for consistency with devolved legislative competence.

### **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. (Provisional proposal 6-9)**

- 6.54 All but one of the 35 consultees who addressed this proposal agreed with it. Timothy Straker QC thought that a prescribed process is easier for returning officers than discretion, which “leads to problems”.
- 6.55 We agree that detailed prescription, and minimising the discretion of returning officers, are important aims in electoral law. However the step-by-step detail contained in the regulations concerning the issue and receipt of postal votes is in our view excessive and no longer necessary. Significant volumes of postal voting

<sup>15</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.79 to 6.133.

<sup>16</sup> Representation of the People (England and Wales) Regulations 2001 SI No 341; Representation of the People (Scotland) Regulations 2001 SI No 497; Representation of the People (Northern Ireland) Regulations 2008 SI No 1741.

have now become the norm and returning officers and their staff have gathered considerable experience of it. A step-by-step description of the process is best left to guidance, best practice or training documents for electoral administrators. The law should contain the powers and duties of returning officers administering the postal voting process, just as it guides in-person voting. This furthermore reduces the risk of confusion or error in the law, and assuages the problem of updating secondary legislation from time to time.

#### RETRIEVAL OF CANCELLED POSTAL BALLOT PAPERS

- 6.56 As we noted in the consultation paper, the returning officer is under an obligation to cancel postal votes that have been reported spoilt or lost, even if personal identifiers have been accepted and the ballot paper placed in the postal ballot box.<sup>17</sup>
- 6.57 The national branch of the AEA, whose response many electoral administrators endorsed, noted that, given “recent changes in legislation allowing for the early despatch of postal vote packs before the deadline for absent vote changes, the number of retrieved ballot papers may increase”.
- 6.58 Crawford Langley (Aberdeen CC) advocated the abolition of the retrieval and replacement of postal ballot papers, the provisions on which he found “bizarre”.
- 6.59 In our consultation paper, we commented that it is curious that the law contemplates that returning officers may retrieve postal ballot papers, but not ballot papers cast by hand, from ballot boxes. This is particularly so in circumstances where all postal voting statements will have been verified. On the other hand, we noted that the software may – as it did in *Ali v Bashir* [2013] EWHC 2572 (QB) – let a bad signature through. It appears that, as a matter of policy, the decision has been made that a person who can show, for certain, that he or she is the voter, retains the right to seek to retrieve a postal vote cast in his name. Reversing that policy is a matter for Governments.

#### ***Recommendations for the postal voting process:***

***Recommendation 6-7: A uniform set of rules should govern the postal voting processes in Great Britain and Northern Ireland respectively; and***

***Recommendation 6-8: 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.***

#### THE RESPONSE TO POSTAL VOTING FRAUD

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

- 6.60 Our consultation paper, in line with our scoping report, ruled out making proposals on matters which, while technically within the scope of the project, have a fundamentally constitutional or political nature. We have sought to

<sup>17</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.94 to 6.99.

distinguish 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.<sup>18</sup> We concluded that fundamentally altering the parameters of entitlement to an absent vote, such as abolishing postal voting on demand, was one such matter.<sup>19</sup>

- 6.61 A few consultees disagreed with this conclusion. Philip Coppel QC's response was that the Law Commissions should abolish postal voting on demand. In an extensive response, he noted that, contrary to the intent of the policy, it has not increased voter turnout since 2000. He also argued that the availability of postal voting on demand has increased instances of fraud. To assuage the effects of removing the postal vote from those who use it, Mr Coppel also advocated weekend voting. He roundly rejected our conclusion that reviewing the availability of postal voting on demand was fundamentally political and outside scope. All electoral laws, no matter how technical, were also political.
- 6.62 A second consultee submitted a response to the same effect. Timothy Straker QC, who has acted in several election cases involving allegations and findings of fraud, argued that postal voting on demand undermines the integrity of the poll. Professor Bob Watt (University of Buckingham) and Richard Mawrey QC shared in substance the views of Mr Straker and Mr Coppel, but acknowledged that restricting postal voting may not be within the proper remit or scope of this review.
- 6.63 We have considered very seriously the responses on this subject and take note of prevalent views among some of the most expert lawyers in this field. Nevertheless, we remain of the view that the Law Commissions of the UK are not best suited to decide such an important point of public policy as the basis upon which postal voting is available. In particular, removing the preferred way to vote of a significant portion of the electorate has ramifications elsewhere in the electoral system, as Mr Coppel notes by coupling that suggestion with making weekend voting the norm. These are policy choices that are best developed by Governments and considered by Parliament. We see our task as the technical one of making sure we have a simpler, more modern set of electoral laws that achieve the pre-existing policy of free and fair elections. We do not see that the evidence of postal voting fraud is of the sort that can justify technical law reform bodies such as the Commissions suggesting a severe retrenchment in the availability of a postal vote.

<sup>18</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 1.11.

<sup>19</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.3 and 6.4.

### **Regulating campaigners' handling of postal votes**

- 6.64 Our consultation paper analysed the problems with postal voting fraud and the adequacy of safeguards within the existing system. Documented instances of actual fraud are rare.<sup>20</sup> The source of concerns stem from, first, the lack of guaranteed secret voting conditions in a person's home, as opposed to a polling station. Second, if a fraudster controls a person's registration entry or application to vote by post, the verification of personal identifiers offers no protection.
- 6.65 Our consultation paper noted that the public perception of fraud, even if it is misplaced, can be damaging because it undermines confidence in electoral outcomes. Furthermore, we thought that, if candidates' campaigns perceived rivals to be getting away with postal voting fraud, this might lead to a lowering of standards – what might be colloquially termed a “race to the bottom” in standards of conduct among campaigners on the ground.
- 6.66 While the majority of postal votes actually involve using the post, and the law ensures that postage is free, applications to vote by post or proxy, and postal vote packs (that is, completed postal voting statements and ballot papers), may be handed to the registration and returning officers by any person in Great Britain. Many campaigners hand deliver applications and postal votes directly to the electoral office. In doing so, they perform an important (and free) public service, as some electors may be unable or unwilling to use the post. Promoting electoral participation is plainly an important aim in the current law. Delivering by hand also eliminates the risk of loss of papers in the post, although substantial arrangements are made at regular elections to ensure that Royal Mail delivers postal voting envelopes.
- 6.67 Any misuse of postal voting applications or completed voting packs, such as tampering, personation or the like, amounts to an electoral offence which can be prosecuted in the criminal courts and is a ground for annulment of the election by an election court.
- 6.68 The Electoral Commission, in a report on fraud in January 2014, recommended that campaigners should not handle completed postal voting applications or any postal voting packs. It initially proposed to introduce this requirement by updating its non-binding code of conduct for campaigners and had suggested that if that requirement was not agreed by the main parties, it would recommend legislative action. In the event, the main parties did not agree to this requirement, and it was not therefore introduced in the code of conduct for campaigners.<sup>21</sup>
- 6.69 Our consultation paper noted that we could see the merit of bolstered legal regulation of campaigner handling of completed absent voting applications and of postal votes. Such regulation would seek to prevent the risk of fraud and provide a level playing field for campaigners. On the other hand, it would hamper the ability of campaigns to “get out the vote” and promote public participation in

<sup>20</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.106 to 6.133.

elections, which is a legitimate aim. We therefore decided to ask consultees whether the law should regulate involvement by campaigners in certain activities relating to completed absent voting applications and postal votes by asking the following question:

**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? (Consultation question 6-7)**

6.70 Thirty-eight consultees provided a response to this consultation question, of whom 23 considered that all seven of the above activities should be prohibited. Ten thought that one or more (but not all) of these suggestions should be offences, while five consultees thought none should be, and considered that there should be no special regulation of campaigners.

6.71 In our meetings with the Parliamentary Political Party Panels in Great Britain, the represented parties expressed support for the code of conduct approach. Some stressed that further regulation of campaigners was wrong in principle and would be unworkable. Not all of the parties represented in these panels submitted a response to our consultation paper.

#### **SUPPORT FOR SPECIAL REGULATION OF CAMPAIGNERS**

6.72 The principle of regulating the handling of postal voting applications and voting packs by campaigners was supported by many other consultees. The national branch of the AEA considered that all seven activities in our question should be prohibited; whilst it was legitimate for political parties to "promote" participation, "assistance" carried considerable risk to the integrity of the poll. It stressed that the code of conduct is only a voluntary code.

<sup>21</sup> Electoral Commission, *Code of conduct for campaigners: electoral registration, postal voting, proxy voting and polling stations* (December 2014) [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0011/179741/Code-of-conduct-for-campaigners-2015.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0011/179741/Code-of-conduct-for-campaigners-2015.pdf) (last visited 11 January 2016).

- 6.73 Sir Howard Bernstein (Manchester CC) noted the difficult balance to be struck between the (actual and perceived) integrity of the absent voting process and the benefit that might be provided by campaigners assisting voters wishing to exercise their right to an absent vote. He saw a significant disparity between (the comparatively rare) incidences of proven electoral fraud and the public perception of the prevalence of electoral fraud. In his view, “the benefits of retaining high levels of public confidence in the system outweigh the possible benefits of campaigner involvement in assisting electors with postal voting”.
- 6.74 Mark Heath (Southampton CC) considered that “in the same way that returning officers should not campaign, those contesting the election should not take part in the administrative processes”.
- 6.75 The joint response by SOLAR and the Electoral Management Board for Scotland related some practical problems that arose as a result of campaigners taking part in the administrative processes, such as duplication of applications to vote by post, or the handing in of large volumes of applications at the same time, and concluded that “on balance, the interests of the voter would be better served by excluding campaigners from handling postal votes”.
- 6.76 The Association of Chief Police Officers Electoral Malpractice Portfolio (ACPO) expressed support for the voluntary code of conduct, but recognised “the issues with enforcement for non-compliance”. This comment was echoed by the Metropolitan Police Special Crime and Operations team (Metropolitan Police), who said that, in 2014, they had undertaken a number of investigations where campaigners had breached the code of conduct in relation to handling of postal votes. The Metropolitan Police related that complainants felt “disappointed and frustrated” that there was no breach of the law, but only of the unenforceable voluntary code.
- 6.77 Paul Gribble CBE, the former editor of *Schofield’s Election Law*, added:
- There need to be specific offences to safeguard those who seek assistance from another person, either for advice or to post their completed postal vote.

#### **Reservations about regulation targeted at campaigners**

- 6.78 On the other hand, the Electoral Commission did not consider that introducing further statutory regulation or new offences was necessarily the right first step to change campaigner behaviour. In a further response submitted to us after the experience of the May 2015 elections, the Electoral Commission, having deliberated with its electoral advisory board and the political parties, thought that the answer should not be regulation targeted at campaigners handling absent voting documents, but that clarification of existing electoral offences should suffice to deal with the problem:

The Law Commissions should consider amending or clarifying the law to more clearly specify that the following activities (regardless of who carries them out) are offences under electoral law:

- (1) It should be an offence to compel someone to apply to vote by post or appoint a proxy (or to prevent them from

doing so) against their will.

(2) It should be an offence for anyone to alter an elector's completed absent vote application form.

(3) It should be an offence for anyone to take an elector's uncompleted postal ballot pack from them.

(4) It should be an offence for anyone to open (except for a lawful purpose e.g. for the Royal Mail to direct the envelope to the correct returning officer) or alter the contents of a completed postal ballot pack, including either the ballot paper or the postal voting statement, before it has been received by the returning officer ... .

We suggest that this approach would allow campaigners to continue to provide genuine assistance to voters where requested, but would also encourage them to take particular care to avoid committing an offence. It would also allow for further distinction to be drawn by prosecutors and the courts between people acting as campaigners and those acting as friends, carers or family members.

6.79 The Electoral Commission also raised the question of defining "campaigner" for the purposes of our proposal to ensure that the offences extended only to those persons they were intended to cover. This was a point made by other consultees, but not in our view an insuperable one. Electoral law already employs the concept of a candidate's "agent" in the context of corrupt and illegal practices. The question whether a person is an agent is one of fact for the election court. In addition, section 111 of the 1983 Act refers to promoting or procuring a candidate's election in the context of prohibiting paid canvassers.

6.80 A more difficult problem with the degree of regulation envisaged by our question is that it would prevent helpful assistance by honest campaigners, which is provided free of cost to the public purse. The importance of ensuring access to the poll was generally acknowledged by consultees. For example, the Scotland and Northern Ireland branch of the AEA thought it necessary to ensure housebound electors, whose only visitor may be someone from the political parties, were not disenfranchised. A similar point was made by Crawford Langley (Aberdeen CC). Other consultees added that the suggested offences would be difficult to detect.

6.81 The Labour Party opposed the special regulation of campaigners:

Apart from (4) [prohibiting the observing of completion of a postal vote] – which shouldn't be limited to campaigners - no. These are all matters best handled by the Electoral Commission code of conduct currently in operation. Apart from the difficulty of defining a campaigner, this will have the impact of criminalising hundreds of people who simply do a favour for a friend or neighbour.



- 6.82 Alan Mabbutt OBE (Conservative Party) expressed doubt about the validity of the principle underpinning the question, saying:

The whole tenor of this question assumes there is widespread fraud going on that would be prevented by telling campaigners they cannot assist in an important part of the electoral process. There is undoubtedly some fraud being carried out by a small number of people, but these suggestions would do little to help. If a person is prepared to ignore the law on fraud and undue influence they would ignore laws here.

- 6.83 Scott Martin (Scottish National Party) said that these matters should continue to be the subject of a non-statutory code and believed that the Electoral Commission was moving towards a position that would have the support of the major political parties.
- 6.84 Timothy Straker QC likewise doubted the feasibility of criminal offences, commenting that “the majority of these prospective offences are unenforceable and would bring the law and the process into disrepute”.

#### ROLE OF RETURNING OFFICERS

- 6.85 Diverse Cymru added that accessibility is bolstered by individual campaigners taking postal voting packs directly to the returning officer or polling station, although in no circumstances should a campaigner see the postal vote.
- 6.86 Of course, such a service might be provided at public expense. Crawford Langley, a returning officer, suggested that it might be worthwhile to formalise and publicise the arrangements which many returning officers make to send out a member of staff to guide a postal voter through the voting procedure and take the completed vote back. David Hughes (Gravesham BC), provides an example from his experience, as to how this could be achieved:

[W]e favour a co-operative working arrangement that has worked well for us in the past whereby our Elections Team have been able to provide pre-printed postcards for campaigners to give out to those interested in voting by post. The elector then fills out their name and address, and posts the card back directly to us. We are then able to send a pre-populated and barcoded postal voting application form to that elector by post. I would suggest that if offences are created as suggested, then any accompanying guidance should not preclude the type of pragmatic co-operative arrangement that I have just outlined.

- 6.87 A “special voting” scheme is in place in addition to postal voting in the Republic of Ireland for voters whose illness or disability means they are unable to vote in person.<sup>22</sup> Were such a scheme to exist in the UK, the objection to prohibiting campaigners from acting as intermediaries in the return of absent voting applications and postal votes would be weaker. However, recommending a new method of voting is not within the proper scope of this reform project. It raises a question of public resources which we are not best placed to address.

<sup>22</sup> Electoral Law Act 1992, ss 17, 78 to 84.

### **Our conclusions on regulation of campaign handling of postal votes**

- 6.88 There was strong support for regulation, targeted at campaigners, to prohibit handling of completed absent voting applications and postal votes. Consultees drew the line in different places but most were in support of the question in principle. In giving support, they emphasised vulnerability to, and public perception of, fraud, among other reasons.
- 6.89 However, as even some who supported regulation in principle acknowledged, and those who rejected it emphasised, there are some real problems with such regulation. They can be summarised as follows:
- (1) regulation would criminalise helpful and otherwise unavailable assistance for those voters who need it;
  - (2) regulation would be difficult to enforce, and breaches hard to detect – putting off honest campaigners without deterring the dishonest ones; and
  - (3) regulation would be an overreaction in the light of the available data on fraud.
- 6.90 These concerns, and on occasions objections, have led us to conclude that there should not be regulation of any of the activities mentioned in question 6-7 in our consultation paper. Against the current background, where postal votes count as long as they reach the returning officer (no matter how), and where disabled and elderly voters are not provided with public assistance to complete absent votes, we do not think that regulation through the criminal law is the answer. The concerns of consultees, such as Paul Gribble CBE (who feared that vulnerable voters might be exploited by some corrupt campaigners) and the Metropolitan Police (who could not satisfy complainants that they could not investigate matters in a code of conduct), are best addressed by better and clearer drafting of existing electoral offences, notably undue influence. We address this in chapter 11 of this paper.
- 6.91 The policy question of whether any adjustment should be made to the balance between access to polls and security from fraud remains a matter for Government and the legislature. We note that Sir Eric Pickles MP has been tasked with investigating the issue of electoral fraud and the response to it. As we noted in chapter 1 and elsewhere, our reforms will adapt to Government policy, if it should change.

# CHAPTER 7

## NOTICE OF ELECTION AND NOMINATIONS

### INTRODUCTION

- 7.1 An election officially starts with publication of a notice of election, after which the immediate task is to identify the candidates. If there are more candidates than vacancies there will be a poll. In the event there is a poll, the nominations process determines the names and other details to appear on the ballot paper. The importance of this task means there are detailed legal rules that govern it. We only give an outline of the law and the problems with it here. More detail can be found in chapter 7 of our consultation paper.<sup>1</sup>
- 7.2 The law is contained in discrete “election rules”, which are specific to each election. The classical rules for UK Parliamentary and local government elections differ slightly. The former are more ceremonial and formal, requiring, for instance, personal delivery of nomination papers (and attendance at the place for receipt of nominations) by the candidate and certain other persons, and personal attendance by the returning officer at the proceedings. The rules governing local government nominations are slightly more relaxed.
- 7.3 Each set of election-specific “election rules” copies one approach or another, while for party list elections the approaches must be to some extent adapted – or as we put it “transposed” – to reflect the fact that it is *parties* who primarily stand for election.
- 7.4 A candidate is nominated through a nomination form, properly subscribed and accompanied by payment of a deposit (at those elections where either are required). The nomination paper need not emanate from the candidate, who must separately consent to the nomination, declaring that he or she is not disqualified from election, and providing certificates of authorisation from a party nominating officer if standing on behalf of a registered political party and authority to use a party emblem. At UK Parliamentary elections, a separate “home address form” is required.
- 7.5 In law, subscribers assent to a nomination *paper*, and may not subscribe more than one paper. A single subscriber deemed not to meet the requirements for being a subscriber taints the paper as a whole and another must be delivered, containing wholly new subscribers. Given that as many as 330 subscribers are required for nomination at London Mayoral elections, this can be an onerous requirement. In practice, returning officers inspect nomination papers informally in order to avoid the drastic consequences of a defective paper. Some candidates hand in more than one set of nomination papers, to ensure success.
- 7.6 The powers of the returning officer in relation to nomination papers are limited to examining the formal validity of the nomination paper: defective particulars or subscribers who do not meet the requirements. There are two exceptions,

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 7.1 to 7.47.

however. The first is that serving prisoners are disqualified from *nomination* under the Representation of the People Act 1981 (the 1981 Act), and unlike all other disqualifications, there is a power to reject the nomination on that ground, after following a prescribed process.

- 7.7 The second exception is based largely on case law, and relates to sham nominations. Most of the case law on the subject has been overtaken by developments in the law governing party registration and authorised party descriptions at elections. However, there remain examples of sham nominations which can arise: someone standing under a false name impersonating a real candidate, or a fictitious person. However the case law in our view gives little guidance to returning officers as to how to deal with these examples.
- 7.8 Our consultation paper made six provisional proposals aimed at simplifying and rationalising the fragmented current law into a standard set of rules, which takes account of differences due to voting system. We also sought to modernise the manner of delivering nomination papers. Finally, we sought to clarify the grounds upon which nomination papers should be rejected by, first, removing the power to reject based on the 1981 Act disqualification, which we thought was an anomaly. Secondly, we proposed that the existing power to reject a sham nomination should be expressly set out in the law.
- 7.9 Before turning to the response to our specific proposals, we mention the issue of the need for, and the number of subscribers to nomination papers.

## **REVIEWING SUBSCRIBER REQUIREMENTS**

- 7.10 Many consultees urged us to review the subscriber requirements. In their joint response, the Society of Local Authority Lawyers in Scotland (SOLAR) and the Electoral Management Board for Scotland were not convinced of a continuing need to have subscribers. In Scotland only UK Parliamentary elections require subscribers. In England and Wales, every election has some kind of subscriber requirement.
- 7.11 The London branch of the Association of Electoral Administrators (AEA) highlighted the need for consistency in respect of the numbers of subscribers and deposits.
- 7.12 Others criticised the requirement of the same number of nominators at elections irrespective of the size of the electoral area in question. Some respondents involved in local government elections stated their dissatisfaction in having to provide the same number of nominators in local elections as those in UK parliamentary elections. Comparatively speaking, they believed this to be an overly onerous task that hindered the democratic process. Some electoral administrators echoed these comments.
- 7.13 Other electoral administrators were sceptical about the usefulness of subscribers. They prefer deposits, which, as a test of seriousness of a would-be candidate, are easier to administer. However, deposits raise their own problems. In the words of Alastair Whitelaw, who was an agent for the Scottish Green Party, “if they are intended as a deterrent to “frivolous” candidates they deter only frivolous poor ones”.

- 7.14 We can well see the lack of consistency, across the UK, and within England and Wales, in the requirement for subscribers, and the number required. We do not consider, however, that we are best placed substantively to review this issue. It is a matter purely of policy to determine what test of seriousness is required before a candidate is nominated.

## THE NOMINATION PAPER

**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 7-1)**

- 7.15 Of the 42 consultees who submitted a response to this proposal, 36 agreed with our central proposal, which was aimed at rationalising the multitude of forms and the nuances in election-specific rules across different elections. Unsurprisingly, a great number of these were electoral administrators or campaigners. Three consultees disagreed, and three consultees commented but did not express a firm view. Scott Martin (Scottish National Party) agreed subject to the possibility of the party authorisation being physically separate; it would be a retrograde step to require every nomination paper to be sent to a party's headquarters for completion.
- 7.16 Professor Bob Watt (University of Buckingham) and the Electoral Commission commented that reform should give guidance to returning officers with regard to the practice of perusing draft nomination papers. Not only do we agree, we consider that a reformed law on nominations will dispense with the need for good administrative practice to involve an "informal perusal", a description only mandated by the fact that, in the strict sense of the law, once lodged a returning officer may only accept or reject a nomination paper, not point out flaws to be remedied. The flaws mean that the entire nomination paper, including the subscribers to it, then becomes unusable.
- 7.17 We did not propose that a single form should be prescribed in law for all elections, which would cause problems for the home address form which is only required at UK Parliamentary elections. Rather, our proposal was for a single nomination requirement applying to elections where individuals stand (with the next proposal concerned with the requirements where parties primarily stand).
- 7.18 The Social Democratic and Labour Party's response agreed with our proposal:
- ... Authorisation to use a party emblem and the party affiliation of a candidate should continue to be confirmed by a certificate of authorisation from the party's registered nominating officer. As such we believe that a nomination paper, emanating from the candidate, including their name, address and subscribers, should suffice if accompanied by a certificate of authorisation from the party's registered nominating officer.
- 7.19 That was indeed our proposal, but it involves a change in the law for elections in Northern Ireland, and for the election of constituency candidates to the National Assembly for Wales, where – unlike other elections – not only must the party

authorise the use of a party emblem, it selects it as well. In our view, that should only be the case where the party itself stands.

7.20 Three consultees disagreed with our proposal. Of note, the Co-operative Party considered that the process would be slow and unworkable, particularly for local elections. We do not think that our proposal results in more onerous tasks for party nominating officers, who must issue a certificate of authorisation with any event. We are proposing that it is the candidate's task to include these in their nomination paper, rather than have them – along with the home address form and the party emblem request – reaching the returning officer separately. We considered that this would make the law clearer, and be simpler to administer for returning officers.

7.21 The Chief Electoral Officer for Northern Ireland did not agree with the consequence of our proposal, namely that at every election in Northern Ireland the party emblem was now to be selected by the candidate, as it is at other elections in the UK (apart from constituency elections to the Welsh Assembly). He said:

We are of the view that this needs further consideration. From our perspective, the current procedure gives the deputy returning officer confidence that the candidate has chosen the correct description and emblem as this can be checked against the authorisation provided by the party nominating officer.

7.22 If the consistent policy in the UK were that parties select their candidate's use of a party authorisation and emblem, the Law Commission would not be minded to discard it. But the policy appears to be the opposite, except in Northern Ireland. We could not find a justification for the difference. The position in Wales appears to be purely the result of a drafting error. In either case, the strict legal requirement is that the ballot paper contain a registered party emblem. Whoever selects it, the returning officer will need to ensure it is registered. To that end we are aware that the Electoral Commission has a facility for checking registered party emblems, as well as party authorisation. While we see that returning officers may well rely on a party to use the correct emblem and description, we cannot see why they may not give equal weight to that party's authorisation of a candidate to use the same. We are therefore not persuaded that our proposal should be reconsidered.

***Recommendation 7-1: A single set of nomination papers, 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.***

**The nomination paper should be capable of being delivered by hand, by post or by electronic mail. (Provisional proposal 7-2)**

7.23 A total of 38 consultees addressed themselves to this proposal, out of which 32 agreed with it. There was support for a more consistently modernised mode of delivery, for example from the Senators of the College of Justice. The national branch of the AEA, supported by several local branches and electoral administrators, agreed, but urged us to use a wider definition to indicate

alternative methods of electronic technology. In discussions with electoral administrators, many were worried that email delivery might lead to uncertainty, and that alternative ways of online delivery could be used.

- 7.24 Diverse Cymru's response focused on the benefits of a less personal delivery mechanism for wider access to electoral participation, considering that the status quo "can pose a barrier to increasing the diversity of candidates, as it may be difficult for people currently employed, people with childcare responsibilities, carers, and disabled people".
- 7.25 With a more liberal delivery mechanism comes added risk. Six consultees disagreed with our proposal, urging us to restrict the mode of delivery of nomination papers to personal delivery. They included several consultees from Scotland such as Crawford Langley (Aberdeen CC), the Scotland and Northern Ireland branch of the AEA and SOLAR and the Electoral Management Board for Scotland. Reservations about our proposal stemmed from the risks associated with the introduction of modernised methods of delivery. Concerns were related to the altering of the balance of responsibility between the candidate and the returning officer (notably that it is the candidate's responsibility to ensure timely delivery), opening the process to major IT system failure and exposing the returning officer to allegations of bias or malpractice where the system has failed. Some stated that the current rules reduce the risk of mischievous or frivolous nominations and remove any dispute about time of delivery — the receipt deadline being of paramount importance — whereas issues could arise from defective internet servers or non-delivery by courier.
- 7.26 Until a recent circular distributed by the Electoral Commission suggested that this did not constitute "delivery" of nomination papers in law, acceptance of nomination papers by post had routinely occurred at local government elections in England and Wales, and at those elections which use their election rules as a model. We have seen no reports that this resulted in sham nominations. Indeed, electoral administrators warned that requiring personal delivery of nomination papers for parish council elections in 2015, some of them in rural areas, would cause problems. We are not persuaded by the view that personal delivery of nomination papers should be required at all elections in the UK. We do take the point that the legislation must make clear that use of the post is only effective if the nomination paper is received by the returning officer in time. Guidance to candidates and to electoral administrators can ensure that they take appropriate steps to make postal delivery work. A risk averse candidate will want to continue to deliver nominations in person, but we do not consider that others, including those who are unable to attend in person, should be excluded from putting their candidacy forward.
- 7.27 As to use of electronic and online means of delivery, we take a similar view. We consider that primary legislation should require delivery of nomination papers, which should be defined to include delivery by post in accordance with the returning officer's instructions, and by electronic means as permitted by secondary legislation. That legislation can address the safeguards against loss, and the current capacity of electoral administrators to accept nominations by email or some other system. As society does more of its business online, we remain persuaded that the legislation must enable the electoral process to keep up with societal trends without the need for fresh primary legislation.

***Recommendation 7-2: The nomination paper should be capable of being delivered by hand and by such other means as provided by secondary legislation, which may include post and electronic means of communication.***

**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 7-3)**

- 7.28 Of the 35 consultees who specifically provided a response to this proposal, 34 agreed with it. Few had qualifications or additional comments. One consultee, Alastair Whitelaw (a campaigner for the Scottish Green Party) said that he had not experienced any problems when nominating party lists, having dealt with several Scottish and European Parliamentary elections as a nominating officer. The existing forms were not in his view inadequate.
- 7.29 Scott Martin (Scottish National Party) agreed subject to the proviso that party candidates did not all need to sign a single form; this could be problematic in Scottish parliamentary regions given the need for up to twelve signatures of people who might be dispersed over a wide area.
- 7.30 We do not think our proposal amounts to a change in the law as far as the common experience of party nominating officers is concerned. This proposal was put forward to make clear that the one adaptation required as part of the standard legal treatment of nomination is that at party list elections the parties stand. We are therefore minded to make the following recommendation.

***Recommendation 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 be accompanied by the requisite consents by list candidates.***

**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 7-4)**

- 7.31 In total, 37 consultees addressed themselves specifically to this proposal. Of them, 35 agreed with our analysis and proposal. They included a large number of electoral administrators. The national branch of the AEA added that it would welcome guidance for candidates on this matter, so as to "ensure that [candidates] do not entirely duplicate the initial nomination paper for their second nomination paper as the same error may be repeated". Two consultees commented, but did not offer a firm view.
- 7.32 There is a concern among electoral administrators that, in a show of local support, some parties submit several nomination papers in order to display more local backing than is strictly required when the statement of candidates standing nominated is published. We consider that this can be addressed in secondary legislation and guidance. The nomination process tests the seriousness of would-be candidates by requiring minimum local assent to his or her standing. It is not part of the campaigning process.



- 7.33 Diverse Cymru's preference was for a more flexible regime concerning the technical validity of a nomination; as a fallback, however, it supported our proposal as it would make it easier to remedy a fault with one or more of the subscribers to a nomination.
- 7.34 The London branch of the AEA suggested that the option for a candidate to submit more assentors than required (up to an agreed maximum) be provided so that if an assentor fails, "one of the spares is substituted for them".
- 7.35 This is in our view a sensible suggestion which could usefully be taken up in the design of prescribed nomination forms. Our main concern, however, is to achieve a situation in which if one out of ten subscribers is not qualified the other nine are not prevented from subscribing a fresh nomination paper.

***Recommendation 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 is defective.***

## **THE ROLE OF THE RETURNING OFFICER**

**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 7-5)**

- 7.36 A total of 34 consultees submitted a response to this proposal. Thirty consultees agreed, two consultees disagreed, one consultee was unsure and one consultee offered no firm view, but commented.
- 7.37 The main reason driving agreement was that this disqualification stood out in electoral law as the only one which returning officers are required to investigate. This proposal was therefore seen as bolstering the orthodox approach to the returning officer's role in nominations.
- 7.38 In our discussions with electoral administrators a question emerged as to how effective that requirement proved in practice. Unless the prisoner in question was well-known, it was unlikely that his or her nomination would be caught in time.
- 7.39 Some had reservations about the proposal. Alan Mabbutt OBE (Conservative Party) was not sure the change in the law was required, although he did not oppose it. The Senators of the College of Justice, accepting that reviewing the substantive disqualification was outside the scope of this project, commented that "[r]eturning officers should therefore simply apply the substantive law" in the Representation of the People Act 1983 (the 1983 Act).
- 7.40 The Electoral Commission agreed with our proposal, but supported a wholesale change in the returning officer's role as to disqualification. It argued that consideration be given to allowing objections to nominations on the grounds that a candidate is disqualified, and if satisfied that this is the case, requiring a returning officer to hold a nomination paper to be invalid (including the 1981 Act disqualification). The Electoral Commission considered that this would help ensure the integrity of the process, as it would help to avoid a situation where an obviously disqualified candidate is able to stand for election. Scott Martin

(Scottish National Party) also canvassed this possibility.

- 7.41 We remain of the view, which we outlined in the consultation paper, that the “orthodox” electoral law approach to the role of the returning officer in nominations is the preferable one. To ask returning officers to delve into the many and complicated substantive disqualifications from election could involve a major substantive inquiry and expose them to perceptions and accusations of political partiality.
- 7.42 Given that this is our view, we are persuaded by the response that the better approach is to make the returning officer’s role consistent. The 1981 Act disqualification should be policed like the other disqualifications, instead of asking returning officers to involve themselves in determining it.

***Recommendation 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.***

**Returning officers should have an express power to reject sham nominations. (Provisional proposal 7-6)**

- 7.43 In our consultation paper, we provisionally proposed that a returning officer should be able to 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.
- 7.44 A total of 35 consultees addressed themselves to our proposal. Some 32 consultees agreed. Many of the consultees, even in agreeing with our proposal, advised caution in stating the power, arguing that returning officers would need to act with great care in deciding whether a nomination was a sham.
- 7.45 The Electoral Commission pointed out that the proposed power was inconsistent with the general requirement for returning officers to take nominations at face value. It questioned the extent to which a returning officer would be able to investigate whether a nomination is a sham and questioned what burden of proof would require to be met.
- 7.46 Some agreed in principle, but stated that the “devil will be in the detail in relation to this matter”. Concern revolved around the actual wording of the power and whether it would properly address the balance between the determination of sham nominations while avoiding situations in which returning officers, inappropriately, are put in a position of subjectively assessing a candidate’s qualifications for office.
- 7.47 One consultee, who has recently successfully ousted a sham nomination, considered the time at which the power could be exercised to be significant, suggesting that it should “exist right up to polling day and that the individual submitting the sham nomination and any witness to the sham candidate’s signature ... should be liable for the returning officer’s expenses in taking

corrective action”.

- 7.48 When responding to our proposal on delivery of nomination papers, the joint response of SOLAR and the Electoral Management Board for Scotland suggested that requiring the provision of photographic evidence of identity would help to prevent shams.
- 7.49 The London branch of the AEA disagreed with our proposal, considering that it risks placing returning officers under undue pressure and opening them to legal challenge.
- 7.50 Dr Heather Green (University of Aberdeen) agreed with our proposal, but not the suggestion in our consultation paper as to its extent, considering that the power to reject “should be limited to thwarting attempts to interfere with the free exercise of the franchise”. Dr Green added that a power to reject based on “obscene or offensive particulars” may “involve subjective judgement on the political goals of the aspiring candidate”.
- 7.51 We are not surprised that consultees, even in agreeing with our proposal, urged caution. We anticipated some of the problems with a power to reject sham nominations, including the risk of perceived partiality in its application. The crucial point, however, is that this power currently exists as a matter of law, and has recently been used in Scotland. At present, a returning office is given no assistance by any provision whether in statute or secondary legislation. In order to establish the nature and extent of the power, they must read cases, some dating back to the 19th century when the grounds for rejecting nominations were entirely different. Our formulation of the power in paragraph 7.71 was based on our assessment of what the law is at present.
- 7.52 Given the response of consultees, we conclude as follows:
- (1) giving expression to the nature and extent of this power in statute is more desirable than saying nothing; and
  - (2) the power must be cautiously and practically expressed. We will no longer refer to “obscenity” or “offence” in the particulars of the nomination. The power will be based on the nomination being “a fiction or device liable to confuse or mislead electors, or to obstruct their exercise of the franchise”. This still catches the only two problem areas remaining in the law: the spoiler candidate (like the independent “Margaret Thatcher” standing in the then prime minister’s constituency) and the fictitious candidate (like the mannequin).
- 7.53 This power will not answer every question, and will have to be used subject to guidance provided by the Electoral Commission. It is likely that returning officers will continue to seek legal advice to ensure their approach is beyond reproach.

***Recommendation 7-6: Returning officers should have an express power to reject sham nominations which are designed to confuse or mislead electors, or to obstruct the exercise of the franchise.***

# CHAPTER 8

## THE POLLING PROCESS

### INTRODUCTION

- 8.1 This chapter considers the response to our proposals concerning the law on the polling process, which includes voter information and public notices, the logistics of polling, and supervening events which frustrate the poll.<sup>1</sup>

### VOTER INFORMATION AND PUBLIC NOTICES

- 8.2 After nominations, a range of notices are required by law. A poll card must be sent to voters as soon as practicable after the notice of election is given. After nominations close, a notice of poll accompanies the statement of persons standing nominated, along with a notice of the locations of polling stations. Strictly, the law requires these to be displayed in a conspicuous place, but typically they are also published online. Our consultation paper outlined the law concerning these notices, and made proposals to modernise and simplify it.<sup>2</sup>

**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 8-1)**

- 8.3 Our view was that the variety of notices (and subtle differences between them at different elections) should make way for a single polling notice marking the end of nominations and officially notifying the public and candidates of the need for a poll. In substance, it would contain the same required information as currently. We also thought that the law should require publication by any reasonable means.
- 8.4 Out of 37 consultees who provided a response to this proposal, 35 agreed. Diverse Cymru, a disability charity, stressed that online publication should not be the only way to publish, noting that whilst our proposal could “greatly assist in promoting public understanding of electoral processes and reduce barriers”, publishing notices online would exclude some voters. Diverse Cymru therefore argued that “polling notices should be required to be posted in an offline, public format and place where notices are primarily posted online”. Scott Martin (Scottish National Party) suggested that the prescribed information should include party emblems.
- 8.5 The Electoral Commission welcomed the simplification, but disagreed with a further requirement that our proposed single polling notice should be in a prescribed form. Ian White (Kettering BC) disagreed with our proposal, saying the statement of persons nominated should be abolished.

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, ch 8.

<sup>2</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, 7.4 to 7.6 and 8.2 to 8.13.

- 8.6 We remain of the view that, at the close of nominations, a notice must be published that contains all the relevant information required by law (the details of those nominated, the date of the poll and details of the polling stations to be used). It should be subject to the returning officer's general duty to publicise notices. We are persuaded that prescribing the form that this notice must take is not necessary here.

***Recommendation 8-1: A single polling notice should mark the end of nominations and the beginning of the poll, which the returning officer must communicate to candidates and publicise.***

**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 8-2)**

- 8.7 Poll cards are the only direct form of communication between the returning officer and his or her electorate. As such, the law requires them to be sent as soon as practicable. Different forms are prescribed for different kinds of voters — in person, postal, or proxy. In effect, these are reminders to the elector as to their voting status according to records. At some elections, the prescribed form has to be used, while at others a form to the “like effect” may be used. Curiously, a poll card must only be sent at parish and community council elections if the council requests it. Poll cards will need to be clearly designed so that they effectively communicate crucial information to the elector. Our proposal sought to standardise the position across all elections (including parish and community council elections). A poll card must be sent; it must substantially adhere to the prescribed form, meaning that it can be adapted but must be functionally similar.
- 8.8 Of the 37 consultees who addressed themselves to this proposal, 36 agreed in full. The southern branch of the Association of Electoral Administrators (AEA) in effect disagreed with our proposal, because it observed that “parish poll cards may need to be made exempt from this though as they are not always required”. It was, of course, our intention to propose a change of the law here, which led us to propose that poll cards should be used at *all* elections.
- 8.9 The Electoral Commission's general stance in its response was that forms like the poll card should not be prescribed in legislation. It thought they should be designed by a body such as the Electoral Commission. Subject to that, it agreed with our proposal. It emphasised the importance of flexibility to insert additional relevant information, and queried whether our term “substantial adherence” was more or less flexible than the term currently used in the legislation. The current law allows the use of a form to the “like effect” as the prescribed one.
- 8.10 We prefer the term “substantial adherence”, which we think is stricter and clearer than “like effect”. Given that poll cards convey crucial information to voters in what is hoped to be a tested, clear and well-presented way, we do not consider that a returning officer should be permitted, for example, simply to send a letter containing the same information. Returning officers should, however, be able to adapt the standard form to insert additional relevant information such as the contact details of the electoral registration officer and the returning officer.
- 8.11 Alastair Whitelaw (Scottish Green Party) noted that a common complaint from voters is that the poll card does not list nominated candidates or parties. But he

acknowledged that waiting until nominations have closed before issuing the poll card would present a significant practical problem. A separate point made to us by consultees was that many voters had forgotten about the poll card by the time they truly focused on the election.

- 8.12 We remain of the view that poll cards should be prescribed, differing depending on whether they are addressed to an in-person, proxy<sup>3</sup> or postal voter. The returning officer should substantially adhere to the form, enabling the making of local adaptations (such as a map showing where the polling station is located). A poll card should be sent for parish council elections. We take the point that these are often uncontested, but we see no basis for the parish council being able to decide whether a poll card is sent. If Parliament considers a discretion should remain, our view is that the returning officer is the appropriate person to have it.

***Recommendation 8-2: Prescribed forms of poll card should be used at all elections, including those for parish and community councils in England and Wales, subject to a requirement of substantial adherence to the prescribed form.***

#### **THE LOGISTICS OF POLLING**

- 8.13 Each and every discrete set of election rules makes prescription for the poll. These essentially duplicate each other. The various rules relating to the logistics and regulation of polling can be more simply and clearly stated. In particular:
- (1) the rules on appointing poll clerks should extend to all those appointed to work in the election, so that they must not have had any involvement in the election campaign in question;
  - (2) the power to use school rooms for polling should be clarified so that the returning officer selects and is in control of the premises required, and need only compensate the school for the direct costs of providing the premises;
  - (3) only essential equipment such as ballot papers, boxes, registers and key lists should be stipulated in the rules, with the returning officer under a general duty to furnish polling stations with the equipment required for the legal and effective conduct of the poll; and
  - (4) presiding officers should have the power to remove from polling stations persons not entitled to be there. The procedure for returning officers to issue authorisations to use force should be abolished.

**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 8-3)**

- 8.14 Thirty-five consultees addressed this proposal, 34 of them agreeing with it. A number of electoral administrators stressed that the proposal reflected current

<sup>3</sup> Including both the appointer of the proxy and the proxy. The point here is to remind everyone of their voting status while there is still time to make alternative arrangements.

practice.

- 8.15 Crawford Langley (Aberdeen CC) urged us to consider whether “previous political activity as a candidate or agent should be a bar to employment by the returning officer for a specified period”. There was also support for this proposal from those coming to it from the candidates’ point of view. The SDLP agreed that 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”.
- 8.16 The current law does not extend to postal voting, because when it was enacted in the 19th century, postal voting did not exist. We agree that the duty of neutrality should apply to the entire polling process and the count. As a matter of law, however, we consider that the proscription should concern the current campaign. Even so, returning officers may decide not to appoint someone who campaigned for a candidate or party at a previous election, but we do not think it pragmatic for the law to go beyond proscription of partisanship at the election in question.
- 8.17 One consultee disagreed with our proposal. Robin Potter (Liberal Democrat Councillor) argued that although returning officers must ensure neutrality, they should be able to exercise their judgement to appoint a person who had “minor involvement” in a campaign, if suitable. Mr Potter also noted that it may be the case that “few others” may be available.
- 8.18 The current law attempts to proscribe appointment of partisan administrative staff; it simply fails to do so for the entire modern polling process. We remain of the view that returning officers should have a duty of neutrality at the election, and specifically not to appoint campaigners to help run elections.

***Recommendation 8-3: Returning officers should be subject to a duty of neutrality. Furthermore, they 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.***

**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 8-4)**

- 8.19 All 33 consultees who submitted a response to this proposal agreed with it. The use and extent of the existing power has particularly concerned electoral administrators who have warned of dwindling availability of public buildings for polling.
- 8.20 The national branch of the AEA supported our proposal, adding that “the provision should extend to all premises that are maintained wholly or partly at the public expense and apply consistently across all elections, referendums etc. including for postal voting and counting as well as polling”.
- 8.21 A number of electoral administrators related the difficulty they had experienced in obtaining premises, and explained that schools, in particular, were reluctant for their premises to be used. Consultees generally agreed that greater clarity in the law would be helpful. Some urged us to widen the concept of which premises

were caught by the power. Currently it extends to any “room” the expense of which is “payable out of any rate”. Sir Howard Bernstein (Manchester CC) suggested this was too narrow. The Electoral Commission thought the wording should be updated and clarified. It also argued for stronger powers for the returning officer including to “select whatever premises are needed for the efficient conduct of the poll” including for postal voting purposes. A general duty of care should be imposed on returning officers under legislation (including a responsibility for safety and security). It argued that a consequence of this should be to empower returning officers to “require the closure of the whole premises for its normal activities, even if only part of the premises would be used for polling purposes”. The Electoral Commission also emphasised that the law related to the calculation of the cost for reimbursement of expenses needs to be clearer.

- 8.22 The southern branch of the AEA, unlike other consultees, thought that the full costs of running the election at the premises in question, including for example the cost of installing extra security or barriers, should be reimbursed by the returning officer. Our proposal was for only direct expenses, such as the cost of heating the polling place, to be recoverable.<sup>4</sup>
- 8.23 After careful reflection, we maintain our proposal, subject to the following. Statute should define the premises subject to this power, currently premises maintained by local authorities. However the Secretary of State and Scottish Ministers should have a power to add other premises which are maintained at public expense. This will enable them to update, subject to Parliamentary oversight, the types of public premises which may be used for polling to reflect increasingly diverse funding models, particularly the changing status of schools and educational establishments. A key point here is that such public buildings are known to the local community. They make ideal sites for polling stations.

***Recommendation 8-4: Returning officers should have a power to select and be in control of premises maintained at public expense for polling subject to a duty to compensate the direct costs of providing the premises; secondary legislation may supplement the definition of premises maintained at public expense.***

**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 8-5)**

- 8.24 A total of 35 consultees addressed this proposal. Nearly all of them (34) agreed with it. One consultee (Ian White of Kettering BC) was unsure what our proposal sought to achieve, considering that “these pieces of equipment are all provided as a matter of course in any case”. There is certainly a school of thought that electoral law should take a hands-off approach here, since electoral administrators know how to conduct a poll. Our proposal minimises the law’s prescription to the key equipment for a poll: ballot box, ballot papers, registers

<sup>4</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.14 to 8.26.



and the key lists required to undertake the poll.

- 8.25 Generally, consultees backed our approach. The Electoral Commission added that returning officers should be under a general legal duty to furnish and equip polling stations, but that “minimum requirements and additional items could be contained in guidance for each election”. This was echoed by several other consultees. No one suggested that the law should continue to prescribe other specified equipment, or all the equipment necessary to conduct the poll. We are therefore minded to recommend as we proposed.

***Recommendation 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.***

**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.<sup>5</sup> (Provisional proposal 8-6)**

- 8.26 Of the 35 consultees who submitted a response to this proposal, 33 agreed with our proposal. However, the detailed responses revealed that there were varying degrees of agreement. A total of 15 consultees agreed with our proposal without qualification, recognising the need to modernise the existing law.
- 8.27 Mark Heath (Southampton CC) thought our proposal should expressly empower the returning officer, as well as the presiding officer. He mentioned that some of the problems on polling day occur outside polling stations, and are not covered by these powers (although, we note, that they are covered by electoral law if they constitute threats or pressure, or force, amounting to undue influence).<sup>6</sup> In such circumstances control is the responsibility of the police, in application of general criminal law. In our view, this is the correct provision. We made no proposal to expand special provision for security at the polling station to public areas outside.
- 8.28 Many consultees, however, picked up on one issue: empowering presiding officers to use force. In total 19 consultees disagreed with this component of our proposal. The southern branch of the AEA had reservations about the power being given to presiding officers “due to the potential conflict and requirement to be security badge holder if you are removing electors by force”. They felt the matter should be left to the police.
- 8.29 Many consultees echoed the response of the national branch of the AEA, which expressed concerns in relation “to actually applying this proposal in practice should the circumstances arise”. Professor Bob Watt (University of Buckingham) suggested instead that presiding officers should have a power to “direct a

<sup>5</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.28 to 8.31. Only certain persons, including voters, polling staff, candidates and agents may enter a polling station.

Constable to remove a person not entitled to be in the Polling Station”.<sup>7</sup> Scott Martin (Scottish National Party) referred to the additional training of electoral officials that would be required, whereas police officers are already trained in the use of force.

- 8.30 We are persuaded by the responses to the proposal. We consider that it is sufficient for the law to acknowledge the presiding officer’s power to direct a police officer to remove a disruptive person from the polling station. Expressly empowering the use of force could place polling staff in danger and may lead to real or perceived misuse of the power by untrained individuals. We therefore make the limited recommendation below.

***Recommendation 8-6: The procedure for returning officers to issue authorisations to use force should be abolished, leaving only a power to direct a police officer to remove a person from the polling station who is not entitled to be there, or who is disruptive (provided they have been given an opportunity to vote).***

## **THE VOTING PROCEDURE**

- 8.31 The polling procedure itself is prescribed in election rules. It is useful to distinguish between three kinds of voting procedure. The ordinary voting procedure is that which most people recognise – voting individually and in secret, without any kind of assistance. The tendered voting procedure exists for those who appear from the polling station register not to be entitled to vote, for example because they are recorded as having already voted. A tendered ballot paper must be issued to them, which cannot be counted by the returning officer but may be counted by an election court. Thirdly, the assisted voting procedure compromises some secrecy in order to ensure access for disabled voters. We described the detailed operation of these procedures in chapter 8 of the consultation paper.

- 8.32 As to the ordinary polling procedure, we note some differences across elections. In our provisional view, a single set of polling rules should apply to all elections. These should be simplified so that they prescribe only the essential elements of conducting a lawful poll.

**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 8-7)**

- 8.33 There was unanimous support for this proposal among the 36 consultees who addressed it. We therefore recommend as we proposed.

<sup>6</sup> See chapter 11, paras 11.23 to 11.66.

<sup>7</sup> For example, someone who is not an elector allocated to that polling station, or a person appointed as personation agent representing a candidate.

***Recommendation 8-7: A single set of polling rules should apply to all elections, subject to the devolutionary framework. These should be simplified and 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.***

**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 8-8)**

- 8.34 This reflects our key aim of having simpler polling laws. The reference to the official mark should have been to the unique identifying [number and] mark, not the official mark. We proposed the removal of the requirement for voters to show the mark on their ballot paper to polling clerks, which emanates from historical concerns dating back to 1872 about an inefficient fraud called the “Tasmanian dodge”. This fraud involves a corrupt schemer sending suborned voters to polling stations with instructions to cast an imitation vote and bring back the blank ballot paper. The schemer then marks the true ballot paper and hands it to another voter who places it in the ballot box and brings out the ballot paper issued to them, perpetuating the scheme.<sup>8</sup>
- 8.35 A total of 35 consultees submitted a response to this proposal, 30 of whom agreed with it. The Electoral Commission agreed, but suggested there should still be a discretionary power for polling staff to ask voters to show the unique identifying mark on their ballot paper, and a corresponding obligation on the voter to comply if asked. It argued that this would empower returning officers to check ballot papers if they had any concerns about a particular ballot paper’s authenticity. The Electoral Commission also suggested that voters should be obliged to fold their ballot paper before placing the ballot paper in the ballot box for all elections.
- 8.36 Some suggested that enforcement of the legal requirement to show the official mark was “patchy in the extreme” as Ian Miller (Wyre Forest DC) put it, alluding to approaches being different in different parts of the UK.
- 8.37 Some disagreed with our proposal in principle. Professor Bob Watt (University of Buckingham) suggested the Tasmanian dodge was not an outmoded fraud and argued that the demonstration of the validating barcode on the paper continues to serve a purpose. This is because, he explained, “the removal of a paper from the polling station is still possible and modern photocopiers can produce excellent copies” — the official mark prevents people from producing their own ballot papers.
- 8.38 While the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and the Electoral Management Board for Scotland agreed with our proposal, stating that the requirement to show the mark “adds very little, if

<sup>8</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.37 to 8.43.

anything, to the security of the poll through prevention of possible fraud”, some electoral administrators from Scotland drew from the experience of the recent Scottish independence referendum and disagreed with our proposal. This was because, as Crawford Langley (Aberdeen CC) observed, there was a “misinformation campaign on social media” which suggested that papers without an official mark had been issued to voters to allow for substitution by polling staff.

- 8.39 The Scotland and Northern Ireland branch of the AEA, having correctly noted that our proposal should relate to the unique identifying mark (not the official mark), then commented that continuing to require the back of ballot papers to be shown before a vote is cast would give electoral administrators some way to reassure anyone questioning whether improper ballot papers are being counted.
- 8.40 On balance, we conclude that the present law – mandating the showing of the unique identifying mark – should be changed so that the presiding officer has a power to ask to see it. We do so for two reasons. First, as inefficient a fraud as the “Tasmanian dodge” is, it is still theoretically possible for it to occur. Of course, if a photocopier is used, any review of the ballot paper numbers at a scrutiny will detect the fraud. If the original form of the fraud is used, however, it is difficult to counteract once the ballot paper is cast. Secondly, as some consultees pointed out, the requirement for a unique identifying mark can be pointed to by electoral administrators to assuage concerns of ballot paper stuffing; it is an example of a safeguard that exists not only to prevent and deter frauds, but also to build public confidence in the electoral process and outcomes. We take the view that if presiding officers are empowered to ask to see the back of the ballot paper before it is cast, the returning officer will be able to direct that practice as a matter of course. We do not think the current legal requirement that the voter should show the back of the ballot paper to the presiding officer needs to remain in primary legislation.

***Recommendation 8-8: Polling rules should set out general requirements for a legal poll which the returning officer must adhere to, and set out his or her powers. These should include a power to require voters to show the unique identifying mark on their ballot paper to polling station staff.***

**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 8-9)**

- 8.41 Entitlement to vote at a polling station is based on the polling station registers and absent voters lists. Presiding officers are not entitled to question in substance the right to vote, but may ask certain questions which are prescribed in the legislation for each election. The list of questions is long and each type of election has its own. In our view this is unnecessary.<sup>9</sup>
- 8.42 Thirty-eight consultees addressed this proposal, 30 of whom agreed that secondary legislation should set out the point which questions polling staff may

<sup>9</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.45 to 8.47 and 8.69 to 8.71.

ask about entitlement to vote may elicit, and leave precise suggested wording to guidance.

- 8.43 A great number of electoral administrators were among those who supported this proposal. For example, the southern branch of the AEA commented that these questions are “useful and helpful”, but accepted having the suggested wording in guidance.
- 8.44 Many consultees cautioned against our proposal on the ground that it could lead to electoral administrators turning voters away. The SDLP, while it supported our proposal, echoed this concern. Electoral administrators have no power to question the right of a person to vote if they appear on the register. It is of utmost importance that poll clerks understand their role, which is a matter for training of the staff.
- 8.45 The key reform issue is whether prescribing, word for word, every possible question in legislation is necessary to guard against bad practice. The five consultees who disagreed with our proposal thought it was. Crawford Langley (Aberdeen CC), while understanding the rationale behind the proposed simplification of prescribed questions, stated that he was “reluctant to give polling staff a discretion as to what questions to ask”. He added that in providing a matrix of question and answer that a presiding officer can follow, the current law has “the twofold advantage of eliminating nuances due to personal inclinations towards timidity or officiousness and makes it clear to both staff and would-be voters that a specific statutory process with specific consequences has been embarked upon”.
- 8.46 Sir Howard Bernstein (Manchester CC) was of the same mind, and said that the questions are “an important safeguard” against the possibility of an “overly-zealous presiding officer confounding an elector’s desire to vote by asking an open-ended series of questions concerning eligibility”. Timothy Straker QC also disagreed with our proposal, commenting that questions asked in polling stations can lead to “controversy, particularly where English (or Welsh) is not universal”. In their joint response, SOLAR and the Electoral Management Board for Scotland stated that, while the current questions could be rationalised and their number reduced, they should continue to be prescribed; “wording should not be left to guidance since this voter-facing procedure should be consistent across electoral areas”.
- 8.47 We doubt that prescribing the precise questions will ensure that they are used by administrators any more than if they are in guidance (and reiterated, as they currently are, in the Electoral Commission’s handbook for polling staff). The key issue here is training. Polling staff have no right to turn a person away if they present at the polling station under a name which appears on the polling station register not to have voted already. They may ask questions formally asking the voter to confirm who they are and their address. They may not ask more questions concerning their right to vote.
- 8.48 The historical basis for the prescribed questions being in legislation was twofold. First, they used to be a prelude to formal oaths, the breaking of which could lead to serious criminal sanctions. This ceased to be the case long ago. Secondly, from 1872 until the end of the last century, legislation contained the sum total of

electoral guidance. There was no Electoral Commission guidance to assist polling staff. There is now.

- 8.49 Nevertheless, there is a concern, which has been expressed by consultees including Mencap UK and Disability Action Northern Ireland, that vulnerable voters are being wrongly turned away at the poll. Some form of secondary legislation may, in the long term, be thought adequate properly to guide polling staff. Having reviewed the response to our proposal, we have decided to recommend as follows.

***Recommendation 8-9: Primary legislation should outline polling clerks' right to ask voters questions as to their entitlement to vote. Polling clerks must exercise the right to ask questions in accordance with secondary legislation.***

### **EQUAL ACCESS FOR DISABLED VOTERS**

- 8.50 Equal access for disabled voters to polling is an important electoral law policy. In part, the law on absent voting seeks to provide choices for disabled voters who might have difficulty voting in person. However, should they choose to vote in person, electoral law, while it may be expressed unclearly, has a settled approach which we outlined in our consultation paper. First, it is concerned to enable as many electors as possible to vote using the standard voting procedure. This is done by ensuring that large size ballot papers are available in polling stations, and by requiring use of a tactile voting device which can help blind and visually impaired electors to vote unassisted.
- 8.51 If these are insufficient, there is provision for an assisted voting procedure whereby presiding officers or a companion may assist a disabled elector to vote. There, some secrecy is plainly sacrificed to promote access to the poll. Some formalities are required which are intended to provide an audit trail in the event of an investigation or legal challenge.

### **Wider accessibility concerns**

- 8.52 Consultees not only provided responses to proposals we made which are relevant to access for disabled voters; they also commented more generally on polling conditions and experiences of disabled voters. The Representation of the People Act (the 1983 Act) currently provides that documents given to voters or displayed in any place should be issued, where appropriate, in Braille, in languages other than English, in graphical representations, or any other means that make the information accessible "to persons who might not otherwise have reasonable access to the information". Easy read formats would be one means of making information accessible to people with a learning disability, who would not otherwise have reasonable access to that information. This applies to any document issued under the 1983 Act, such as poll cards or the notice of election, with the express exception of nomination and ballot papers. There has been some suggestion that implementation of this provision has been patchy, and that not every electoral administrator is aware of it. The lack of understanding extended to the voters.

8.53 Diverse Cymru stated that “many people are not aware that voting papers can be accessed in different formats, and instead assume that due to the secrecy of the poll there can be no adjustments to voting papers or alternative formats”. It stressed the need for communication to the general public of available support mechanisms and adjustments which may be made.

8.54 As to polling in particular, there were some suggestions that presiding officers and clerks are not aware of their powers and duties governing disabled voters. In its response, Mencap pointed out that in their experience “people with a learning disability have in some cases experienced discrimination... with staff asking about their capacity to understand and vote...”. It emphasised:

The law is clear that someone does not need to have the ‘mental capacity’ to make an informed decision in order to be able to vote... Secondary legislation should make clear that presiding officers cannot question a person’s mental capacity.

8.55 Disability Action Northern Ireland similarly stated that it had “been made aware of situations where people with a learning disability have been challenged in polling stations in relation to their capacity to vote”. It stressed that clear guidance in relation to this was required as “no person has a right to prevent someone voting in relation to their capacity”. Their experience was that “polling staff do not have enough knowledge on existing legislation”, leading to polling clerks (rather than presiding officers) assisting a voter, or the latter refusing to provide assistance on the flawed basis that they had no power to do so.

8.56 Dr Heather Green (University of Aberdeen) noted that the conception of disability, in electoral law, currently focusses entirely on physical impairment. She thought that after the abolition by statute of any common law rule of mental incapacity to vote,<sup>10</sup> there is “an urgent need to do more to express in legislation the sorts of support voters with mental impairments may be entitled to access to facilitate their participation”.

**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 8-10)**

8.57 Turning to our first relevant proposal, 33 out of 39 consultees supported removing the current declaration requirement. Nine consultees opposed a limit on how many disabled persons any one person may assist. Thirteen preferred to retain the qualified limit that exists for proxy voting, meaning that family members are excluded from the limit.<sup>11</sup> One consultee suggested charities’ staff should also be able to provide assistance without limit, while another thought those assisting (companions) should be required to provide identification at the poll.

<sup>10</sup> Electoral Administration Act 2006, s 73.

<sup>11</sup> These numbers do not reflect support for the principle that family members should not be included in any limit, if there is one, which was significantly greater.

- 8.58 There was strong support for our consultation paper's approach to the declarations which must be made under the current law. The Electoral Commission, who agreed with our proposal, said that there should be a "separate record" of people voting with the assistance of a companion, and "general restrictions on the qualifications to be a companion". The Electoral Commission suggested such restrictions could include a requirement to have attained voting age. The Electoral Commission added that the details of the voter and companion should be recorded, and the audit trail be delivered to the returning officer.
- 8.59 Disability Action Northern Ireland considered that the current arrangements are unduly restrictive while Mencap UK welcomed removing the need for a written declaration. Mencap stated that the proposal would "undoubtedly help people with a learning disability, a significant number of whom may well need support on the day". The organisation added:

It is important to highlight that people with a learning disability may not feel they need a companion until the day of polling itself. They may well have voted in previous elections unaided but on the day itself there may be challenges that arise which will mean the support of a companion becomes critical.

This might be for example, travel issues which might result in the voter arriving flustered or upset, there might be confusing or difficult conversations with campaigners, candidates and party members near the polling station and so on. These might have knock on effects to understanding the process clearly and therefore the support of a companion [is] much needed.

Allowing a companion to support them would be a very welcome move but safeguards should be considered too. The name of the person assisting should be noted to that any concerns that emerged later about coercion or exploitation could be investigated.

#### CONCERNS ABOUT REMOVING THE DECLARATION REQUIREMENT

- 8.60 The London branch of the AEA disagreed with our proposal, noting that although the declarations seem "bureaucratic", they provide an "appropriate audit trail to ensure that the integrity of the voting process is maintained". New Forest DC and the southern branch of the AEA thought the declaration requirement was a good deterrent to fraud. The latter added however that modifying or simplifying the form would be better than getting rid of it all together.
- 8.61 In their joint response, SOLAR and Electoral Management Board for Scotland also wondered whether simplification was the better option, noting that the risk of manipulating groups of voters, though perhaps limited, indicates that a record of assistance provided to a voter should be retained. It stated that aside from issues of capacity, "it is valid to have a safeguard in terms of an auditable record, controlled in polling stations". It also considered that "a limit in the number of voters that can be assisted should be removed".



8.62 Richard Mawrey QC, while he agreed with our proposal, suggested a much stricter control on the availability of the assisted procedure and access to the poll by families. He argued that “voters should not be allowed to be accompanied into the polling station unless they are so disabled as to require physical assistance”, adding that “family members should be made to wait outside while each member of the family votes”.

8.63 Timothy Straker QC thought that “voting with assistance is highly controversial and ought to be strictly controlled”. Professor Bob Watt (University of Buckingham) also disagreed with our proposal, saying that returning officers should have a duty “to provide assistance at public expense to voters living with a disability. It should not be up to disabled voters to provide their own assistance or have to arrange it”.

WHAT LIMIT, IF ANY, SHOULD THERE BE ON THE NUMBER OF VOTERS A COMPANION CAN ASSIST?

8.64 Opinions on allowing companions to help any number of electors were split. Eight consultees were in favour of no limit, including third sector organisations who are closer to disabled voters, such as Mencap. Diverse Cymru added:

It is important that a person who requires the assistance of a companion to vote can be supported by a person they trust to assist them in that process. This is important for both secrecy and ensuring that an individual’s voting preferences and instructions are followed.

In some cases, not only of care homes, but also in families with larger numbers of disabled members, neighbours supporting each other, or third sector support organisations many individuals may request to be accompanied and supported by the same person. This should be allowed, as trust in the voting process and support provided is key to supporting disabled people who wish to vote to vote.

We feel that there should be an explicit ban on campaigners supporting anyone to vote unless they are assisting a family member to avoid any potential abuse of this provision and to increase confidence in the electoral process.

8.65 The Electoral Commission stated that “the existing limit on the number of disabled voters a person may assist should be abolished”. It also considered the prescriptive list of family members who may assist more than two voters to be too restrictive. If this list is to be retained, the Electoral Commission stated that “it should be extended to include grandparents and (adult) grandchildren”.

8.66 The Royal National Institute of Blind People (RNIB) supported our proposal but communicated its concerns. One was that the current procedure can be read to restrict the ability of a companion to assist two voters at once, as will often happen in families. The RNIB gave the example of an elderly couple assisted by their son or daughter. It also had concerns about the qualifications to act as a companion:

We are concerned that... the criteria for defining an eligible companion [are] too narrow. We think a vision impaired individual

should not be prevented from choosing a non-relative as their trusted companion. The assumption that a relative is more trustworthy than a non-relative as a general rule is not always true.

Also, the age restriction could be a barrier to a vision impaired person, for example whose son or daughter is under 18, but who is familiar with assisting their parent with completing tasks, and who that voter wishes to be their companion and to assist them to cast their vote. It seems unreasonable to us that the law excludes a voter from being able to choose this type of companion.

We think the presiding officer should be required to facilitate the disabled voter to make a reasonable decision about the companion they've chosen to assist them, rather than be required to make the decision on their behalf.

- 8.67 The issue of whether the voter should have the primary responsibility of deciding whether their companion is able to help was touched on in the response by Crawford Langley (Aberdeen CC):

The declaration by a companion to a voter is outmoded and should be abolished. It is a more open question whether listing or a limit on the number of persons who can be assisted serves any useful purpose or whether the provision should be reversed by a presumption that a voter who needs assistance can have it with the presiding officer given a power to intervene where there is a suspicion that the voter is under duress. Furthermore, I have reason to suspect that the categories of person who may render assistance and for recording may be ignored in many cases.

- 8.68 Dr Heather Green (University of Aberdeen) thought having no limit may help residents of a care home being assisted by staff. The Labour Party noted that the possibility for an appropriate charity to assist several people should not be unnecessarily restricted.

*Limit of two voters (not applying to family members)*

- 8.69 Thirteen consultees preferred the retention of a limit which did not apply to family members. Sir Howard Bernstein (Manchester CC) recognised that this would align voting with the assistance of a companion with proxy voting.

- 8.70 The national branch of the AEA, whose response was supported by many other electoral administrators who provided responses, said:

The AEA supports the provisional proposal for companions to voters not having to complete formal declarations. However, it considers that there is still the need for the list of votes marked by companions. The list should record the details of the companion and voter so that there is a record should the need arise to refer to the list as a result of alleged electoral malpractice or an election petition.

The AEA has concerns on there no longer being a limit on the number of disabled voters a person may assist as such a relaxation

may give rise to the opportunity for electoral malpractices in some areas.

The AEA supports the provisional proposal to include grandparents and (adult) grandchildren to the family member list where such a limit would not apply.

- 8.71 Resolving these debates ultimately depends upon balancing the need to promote access to the poll for disabled voters and the need to safeguard polling from fraud. Assisted voting involves sacrificing some secrecy of the vote (which is the main tool for preventing corruption) in order to promote access. This is remarkably similar to the facility for proxy voting, where, upon demonstrating a good ground for seeking it, a voter may allow another to vote for them. There, because this involves granting someone multiple votes, a limit is imposed on the number of voters a proxy may act for.
- 8.72 Any greater liberalisation would require careful consideration of practicalities. One option suggested by a consultee was for recognised charities not to be subjected to the limit. Such charities might be able to give advance communication to the returning officer as to who their assigned “companions” are. We think such measures are best considered by Governments and Parliaments.
- 8.73 We are convinced that, on balance, the only solution open to us is more closely to align the position for companion-assisted voting with proxy voting. That means not counting family members as part of the limit on voters who may be given assistance. We do not think the law should require a formal written declaration by the companion. The presiding officer will remain able to offer assistance to a limitless number of electors, provided that he or she keeps an audit trail of assisted votes. The response to this and the next proposal show, in particular, that a clear understanding of the law is necessary by electoral administrators, along with clearer communication to the voter as to their options.

***Recommendation 8-10: Voting with the assistance of a companion should not involve formal written declarations, but should be permitted by the presiding officer where a voter appears to be unable to vote without assistance. The limit on the number of voters a companion may assist should not apply to family members, who should include grandparents and (adult) grandchildren.***

**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 8-11)**

- 8.74 Of the 38 consultees who addressed this proposal, 37 agreed with it. Many responses had the same theme — the device enabling blind and visually impaired voters to vote without assistance should not be described in detail. Several consultees, including the Greater London returning officer, thought this harmed competition in the market for voting aid equipment. The London branch of the AEA strongly urged that “the legislative wording should be adapted in order to allow more than one commercial supplier to provide such devices”. For Sir Howard Bernstein (Manchester CC), the description of the aid should be as

general as possible to allow the development of the most effective solutions and competition between suppliers.

- 8.75 Both the Electoral Commission and the RNIB suggested that the detail can be left to guidance which can be given in consultation with third sector organisations to arrive at the best solution. The Electoral Commission stressed the importance of ensuring that groups representing people with various disabilities are involved in “[devising] appropriate procedures regarding this aspect of specialist support but... this could be contained in guidance rather than legislation”. Diverse Cymru thought the legal requirement should be framed in a way that referred to the purpose of the device, rather than specifying technical details which would prevent more accessible new technologies being used.
- 8.76 The RNIB emphasised that, whatever the solution, taking into account the low level of understanding about vision impairment among polling staff (reinforced by RNIB’s 2014 voting accessibility survey and Scope’s series of ‘Polls Apart’ reports), it is “crucial that the use of specific references to vision impairment are made in both the primary and secondary legislation”.
- 8.77 A reformed law on polling should make clear that the position is that voters primarily vote unaided. The law should require returning officers to provide each polling station with a facility enabling a blind or partially sighted voter to vote by themselves. We do not think a detailed description of an existing device is required in secondary legislation.

***Recommendation 8-11: There should be a single formulation of the need for the returning officer to provide a facility in every polling station to assist visually impaired voters to vote unaided.***

#### **SUPERVENING EVENTS FRUSTRATING THE POLL**

- 8.78 Election rules deal with two kinds of events which might frustrate the poll. The first is rioting and open violence, upon the occurrence of which the presiding officer is empowered to suspend the poll until the next day. The second is the death of a candidate after nomination but before the close of polls, which can lead to abandoning the poll and calling a new one. We turn to this issue first.
- 8.79 A candidate who dies after nominations close but before the poll plainly cannot be elected. The law’s response to that death differs as between parliamentary and local government elections, while at party list elections no consistent response is given. At parliamentary elections, different rules apply depending on whether the deceased candidate is a party candidate or is independent. The poll proceeds despite the death of an independent candidate with notices informing voters of the death. The death of a party candidate causes the poll to be postponed to enable the party to nominate a replacement.
- 8.80 Our consultation paper provisionally proposed to retain the current distinction, at parliamentary elections, between the deaths of party and independent candidates.<sup>12</sup> We asked consultees whether this approach should be extended to

<sup>12</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.103 to 8.111.

local government elections, so that the death of an independent candidate should no longer result in abandoning the poll. As to party list elections, we provisionally considered that a single set of rules should apply, to the effect that the death of a list candidate should not affect the poll going ahead.

**The current provision, including the distinction between the death of party and independent candidates, should be retained as regards parliamentary elections. (Provisional proposal 8-12)**

- 8.81 Thirty-five consultees provided a response to this proposal, 27 agreeing that the distinction should be retained. For the Labour Party, the key was the rationale that an independent axiomatically cannot be replaced, whereas a party candidate can be replaced by another member of the party. Sir Howard Bernstein (Manchester CC) also added that this was potentially a political policy matter which had been settled by Parliament. One consultee, the Chief Electoral Officer for Northern Ireland, did not offer a firm view but nonetheless welcomed our consideration of the issue.
- 8.82 Seven consultees disagreed. Timothy Straker QC said the current law's distinction is "unreasonably unfair and denies an independent voice even if that independent voice is the choice of a large majority". This was echoed by the joint response submitted by SOLAR and the Electoral Management Board for Scotland, who said the distinction, "gives an unfair advantage to party candidates and their voters".
- 8.83 Ian Miller (Wyre Forest DC) questioned the assumption that there is no one who can credibly stand in the deceased independent's shoes: "there might be a spouse or other person closely associated with the individual who might gain sufficient support to be elected". Alastair Whitelaw (Scottish Green Party) also pointed out that independent candidates may represent organised campaigns and as such someone else from the campaign would be able to stand, while Crawford Langley (Aberdeen CC) said that "many independent candidates are recognised as representing [a] current local cause".
- 8.84 While most consultees supported our proposal of no change to the current law, some strong arguments were made by those who disagreed. The examples given, of a strong independent candidate running a local campaign who might have an identifiable replacement, call into question the basis for distinguishing between party and independent candidates. However since there is no party organisation, there is no mechanism for picking a replacement candidate. The only satisfactory answer is to reopen nominations for the election generally. On balance, we do not consider that the possibility of a deceased independent candidate representing a "local cause" justifies postponing a poll.

***Recommendation 8-12: The distinction between the death of party and independent candidates should be retained as regards parliamentary elections.***

**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. (Provisional proposal 8-13)**

8.85 A total of 36 consultees addressed this proposal, 32 of whom agreed with it. In their joint response, SOLAR and the Electoral Management Board for Scotland stressed the need for standardised rules for polls using the party list. Alastair Whitelaw (Scottish Green Party) also agreed, provided that the list has enough candidates to fill the places won in the poll. Scott Martin (Scottish National Party) thought it unlikely that the list would not have enough candidates.

8.86 Crawford Langley (Aberdeen CC) was more equivocal in his response:

A fundamental distinction must be drawn between European Parliamentary elections in Great Britain where the party list operates on a first past the post basis, and additional member systems where the allocation of seats to those on party lists depends on a calculation based on the allocation of other seats.

In the former case, since the votes are clearly for the party and neither voter choice nor allocation of previous seats can alter this, allocation of the seat to the next available candidate on the list should present no problems.

In the latter case, there are so many variables, which could affect the result, that it would seem cleaner to abandon the poll than to attempt to set out rules to cover every contingency – a deceased party candidate who was standing both as a constituency candidate and a list candidate (even worse if he dies between the announcement of the constituency result and the conclusion of the additional member count): a list with only one candidate on it (as can frequently happen with small parties).

8.87 We agree that particular care will need to be taken over the detail of the rules as to party lists. The default position, however, should be that the death of a list candidate should not affect the poll so long as there is another list candidate who is able to be elected, which our consultation paper noted will be the case at most elections, or a mechanism for replacing the deceased list candidate is created in the rare cases where the full list stands elected, but one of the candidates has died.<sup>13</sup>

***Recommendation 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 provided a replacement party candidate can be identified.***

<sup>13</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.101 to 8.111.

**At local government elections, should the death of an independent candidate result in the abandonment of the poll? (Consultation question 8-14)**

- 8.88 Nine consultees thought that the death of an independent candidate for local government election (and those using the local government election model) should result in the poll being abandoned — amounting to no change in the law governing England and Wales, but changing the law governing local elections in Scotland and Northern Ireland.
- 8.89 Mark Heath (Southampton CC) argued that the death of an independent candidate should result in the abandonment of the poll. Mr Heath noted that an independent may be standing on a “single-issue ticket” and argued that “such matters should not, in our view, be treated differently in the interests of democracy from the interests of those representing a registered political party, even in a local government poll”. If the poll was abandoned, this would enable a different independent candidate representing that issue to run.
- 8.90 Crawford Langley (Aberdeen CC) argued that it would be appropriate to abandon a poll conducted under the Single Transferable Vote System on the death of any candidate. Mr Langley observed that if a candidate dies after an STV poll has commenced, the votes cast for that deceased candidate will “have an effect on transfers and ultimately on the result of the election”.
- 8.91 The Chief Electoral Officer for Northern Ireland welcomed consideration of the law with regard to the parity of rules governing the death of party and independent candidates at elections using STV. In its response, the SDLP considered that where the death of an independent candidate takes place at local government elections “the poll should continue with that candidates’ votes distributed according to preference”.
- 8.92 In their joint response, SOLAR and the Electoral Management Board for Scotland stated that the poll should be adjourned in the event of the death of any candidate. Alastair Whitelaw (Scottish Green Party) stressed that organised local campaigns by independents might be frustrated if the parliamentary election approach was followed at local elections.
- 8.93 Twenty-one consultees thought that the death of an independent before the poll should not result in adjournment of the poll.
- 8.94 The Electoral Commission suggested that the death of an independent candidate at local government elections in England and Wales should not trigger a new election unless they gain enough votes to be elected. The national branch of the AEA, supported by many other consultees, also advocated a change in the law, considering that the poll should not be abandoned in the case of the death of an independent candidate.
- 8.95 Scott Martin (Scottish National Party), who confined his comments to elections in Scotland, thought that the death of an independent candidate should continue not to result in the abandonment of the poll at those elections.

8.96 Sir Howard Bernstein (Manchester CC) said:

It appears possible (although not entirely clear) that the rules relating to abandonment of the poll on the death of an independent candidate at a local government election reflect a political policy position (perhaps the view that in the context of a local government election there is not the same degree of primacy of party affiliation as at parliamentary elections). In the circumstances therefore, no view is given as to change in this area.

8.97 We have found this to be a difficult issue. On balance, we are not satisfied that a change in the law is justified based on the arguments presented by consultees. The more local the election, and the more traction local issues have with the electorate, the greater the likelihood is that not deferring the election after the death of an independent candidate will result in an injustice for the candidate's supporters among the electorate. As to STV elections, we will consider the finer points of detail at the next stage of our project; however we do not recommend a departure from the principle in the current law governing such elections that the death of a local government election candidate does not affect the ongoing poll. We do not think that the particular regard that may be had to tactical voting by campaigners should be relevant to the legal rule here.

***Recommendation 8-14: At local government elections in England and Wales, the death of an independent candidate should continue to result in the abandonment of the poll.***

**The existing rule, requiring the presiding officer to adjourn a poll in cases of rioting or open violence, should be abolished. (Provisional proposal 8-15)**

8.98 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>14</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.

8.99 We considered this provision too limited, since it applies only to one of many factual scenarios which might frustrate polling. For historical reasons, the responsibility is placed on the presiding officer. Nowadays that officer would look to the returning officer to make such a drastic decision, and would have the means to contact him or her immediately. We suggested that the power to adjourn the poll should be subsumed into a more general one which is the subject of the next proposal. A total of 35 consultees addressed the proposal to abolish the presiding officer's duty to adjourn, 31 of whom agreed with it.

8.100 In both the joint response submitted by SOLAR and the Electoral Management Board for Scotland as well as in the response submitted by the London branch of the AEA, it was stressed that such a power should be reserved to a returning officer. That officer, Mark Heath (Southampton CC) added, was "best placed to

<sup>14</sup> Representation of the People Act 1983, sch 1 para 42.



assess what happens next, and this should not be a decision of the presiding officer”.

- 8.101 Crawford Langley (Aberdeen CC) thought the power was “outmoded” but added that a power to abandon a poll should nonetheless be available where there are “substantial local or national circumstances which would affect the ability of voters to attend their polling stations”, such as a terrorist attack or natural disaster.
- 8.102 Four consultees disagreed or were unsure. Alastair Whitelaw (Scottish Green Party) could conceive of circumstances where a disruption required an adjournment but hoped these would be extremely rare. The SDLP pointed out that the role of the police in ensuring peaceful access to polling stations must not be understated. This is an important point: the current provision obliges the presiding officer to adjourn the poll. In reality the first response must be coordination between the returning officer and the police to ensure peaceful travel to and from the polling station, before a power to extend or delay polling should be exercised.
- 8.103 This proposal does not stand alone – it goes hand in hand with the next one. If rioting and violence break out, they would, under our proposed scheme, be tackled as part of a more general legal response to events which frustrate the poll. Our revised recommendation below makes that clearer.

**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 the returning officer. (Provisional proposal 8-16)**

- 8.104 Our proposal was for “supervening events” (and not just rioting) to be subject to a general power residing primarily in the returning officer to alter the application of electoral law to prevent or mitigate obstruction of the poll.
- 8.105 In total, 35 consultees submitted a response to our proposal. Of those, 18 agreed without any qualification whatsoever. Thirty-three consultees agreed with the first part of our proposal, namely that returning officers should have the power described above. Thirty-one consultees agreed with the second proposition: that this power should be subject to instruction by the Electoral Commission in the case of national disruptions. The third proposition, relating to the corresponding power of the presiding officer, obtained the support of only 20 consultees. One consultee, Timothy Straker QC, disagreed with the proposal altogether, saying that it would “put returning officers into the world of discretion and politics”.
- 8.106 Our consultation paper outlined two jurisdictions’ approaches. In Canada, the power is generally applied to “an emergency, an unusual or unforeseen circumstance or an error”. In Australia the qualifying events are listed: riot or open violence, storms, health hazards, fires and any reason related to the safety of

voters or difficulties in the physical conduct of the voting.<sup>15</sup>

- 8.107 The southern branch of the AEA preferred the Australian approach as being less open to interpretation and challenge. The Electoral Commission preferred the Canadian approach. It said that returning officers have local knowledge of their own areas. As for unforeseen national disruptions, the Electoral Commission considered that it could offer advice so that returning officers could “evaluate the situation in their own areas and then make an informed decision”. It added:

Currently returning officers, as part of their election planning, compile risk registers detailing the arrangements that they have in place for alternative polling and count venues should a polling place or count venue become unexpectedly unavailable due to unforeseen circumstances. These should be sufficient to deal with a local emergency. A prescribed list of supervening events which would justify the use of emergency powers is not supported.

- 8.108 The Association of Chief Police Officers Electoral Malpractice Portfolio (ACPO) welcomed the “proposal for the Electoral Commission to instruct where there is a national disturbance”, but suggested that “there may be a role for law enforcement agencies in this decision”. ACPO noted in particular that there may be classified security information not available to the Electoral Commission which could inform the decision.
- 8.109 In their joint response, SOLAR and the Electoral Management Board for Scotland pointed out that clarity will be required in relation to the extent of qualifying events, and that the detail of any eventual law will be important. On this, Alastair Whitelaw (Scottish Green Party) queried whether this “would include extending the voting hours if for instance unused ballot papers are damaged (e.g. by a water leak) and further supplies have to be brought in”.
- 8.110 The extent of qualifying events will depend on the threshold to be used. Our stated preference was for a threshold of polling being “significantly affected”. If water damage left almost no ballot papers for voters to complete, the returning officer could make a proportionate response to ensure electors can vote, including extending polling. We do not think an emergency power should prevent good current practice, however. At present returning officers will handle such emergencies within the framework of electoral law. A returning officer may ring presiding officers and determine who has the best capacity in terms of unused ballot papers, and ensure that these are transferred to the affected polling station without disturbing polling. We do not envisage an emergency power being used as a “crutch” when less disruptive measures are at hand.
- 8.111 The above accords with the view of Sir Howard Bernstein (Manchester CC), who suggested that a presiding officer should only be able to exercise the power where it proves impossible to contact the returning officer, determined by a “non-exhaustive list of particular steps that the presiding officer should take to attempt to communicate with the returning officer”. Sir Howard disagreed with the second

<sup>15</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.115 to 8.119.

proposition of our proposal; that the returning officer's exercise of the power should be subject to instruction by the Electoral Commission in the case of national disruptions, arguing that it would:

mark a significant departure from the principle of returning officer autonomy. It is suggested that returning officers may be best placed to determine the impact of national disruptions on their locality and to determine what preventative or mitigating steps to take (although perhaps with an obligation to take into account any guidance issued by the Electoral Commission).

- 8.112 Electoral Commission guidance, developed over time, will be very important here as it is elsewhere. Our proposal, however, for the Electoral Commission to have a formal legal role was motivated by one scenario in particular: a national disturbance affecting a significant portion of the UK during a UK-wide or nation-wide election. In that event, the risk of returning officers autonomously coming to conflicting conclusions about whether and how to exercise our proposed power, raises a strong argument for national coordination. Only in such a scenario are we proposing to reduce the local autonomy of the returning officer.
- 8.113 The national branch of the AEA supported our proposal except for its third component; it objected to any ongoing formal role in the presiding officer: "the power is too widely drawn and could result in undue pressure being applied to a presiding officer and/or inconsistency in its application". Practically speaking, the national branch of the AEA argued that "it is difficult to imagine a situation where it was not possible... to communicate with the returning officer given the advances in the use of mobile and similar technologies".

#### **Conclusions on supervening events**

- 8.114 The current law makes incomplete and outdated provision for dealing with one supervening event – rioting and open violence. In such a case, there is a duty, (not a power) on the presiding officer (without any reference to the returning officer) to adjourn the poll to the next day. We remain of the view that this is unsatisfactory.
- 8.115 Plotting a better course is by no means easy. In the light of the response to our proposals, we conclude that a power to suspend, adjourn and/or relocate polling in the event of a qualifying supervening event should be introduced. We consider that in order to increase certainty the law should list these events, so far as it is able, mirroring the Australian approach. As in Australia, provision must be made for other miscellaneous events affecting the safety of voters or causing difficulties in the physical conduct of the voting. We conclude that no power should be conferred by the law on the presiding officer; it should be vested in the returning officer. We also think that the power should be made subject to the returning officer taking every reasonable and lawful measure to conduct polling effectively.
- 8.116 For national disruptions affecting national elections – that is, elections taking place in more than one area, we remain of the view that the power should be exercised subject to instruction by the Electoral Commission. This is to avoid inconsistent responses by different returning officers to the same supervening event, which would rightly puzzle voters. We envisage that this part of the law will seldom, if ever, be used. However, we do think a principled and coherent

approach should be taken to the range of events which may disrupt the poll, in the unlikely case that it is needed.

***Recommendation 8-15: The existing rule, requiring the presiding officer to adjourn a poll in cases of rioting or open violence, should be abolished.***

***Recommendation 8-16: Returning officers should have power as a last resort 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.***

***Recommendation 8-17: If an event occurs that affects a significant portion of the UK at an election taking place over more than one electoral area, the above power should be exercised subject to instruction by the Electoral Commission.***

# CHAPTER 9

## THE COUNT AND DECLARATION OF THE RESULT

### INTRODUCTION

- 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 officeholder. Our consultation paper outlined the “classical” election rules governing the count of first past the post elections, before considering how they have been transposed in other elections’ rules. We set out six provisional proposals and asked one question.<sup>1</sup>
- 9.2 Our first four proposals focussed on a holistic approach to regulating election counts. The law governing the election count is not detailed, but it is election-specific. Six election rules deal with the logistics and timing of the count (making provision for counting to commence as soon as practicable, and laying down a power to pause the count overnight), provide for who may attend (in particular, for counting agents appointed by candidates to scrutinise the count), lay down a requirement for verification of the ballot papers received from a polling station against the number of ballot papers allocated to it, provide the grounds on which ballot papers can be rejected, which are centred on whether the intention of the voter is clear, and lay down a process for determining and announcing the result.
- 9.3 These rules are mostly replicated in each election’s discrete legislation. For elections which use the party list, a difficulty in transposition arises regarding who may attend the count and appointing counting agents. There are some differences due to policy, although others appear to be purely the result of different drafting approaches. Our main proposal was that a standard set of rules should govern the count, catering for differences due to voting system and management system for the election. In essence these 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 special duty to commence the count for UK Parliamentary elections within four hours.

### STANDARD POLLING RULES

#### **A single standard set of rules should govern the count at all elections. (Provisional proposal 9-1)**

- 9.4 Thirty-seven consultees addressed this proposal. Thirty-six agreed with it.
- 9.5 Scott Martin (Scottish National Party) preferred a set of rules specific to the election that was under way over a single body of rules, some of which would have no application to the election in hand.

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, ch 9.

- 9.6 A small number of consultees, like Robin Potter (Liberal Democrat Councillor), stressed that the law should continue to give returning officers room to use “different ways of counting multiple-seat elections, of which there are many and varied varieties in local elections”. Ian White (Kettering BC) also stressed the need for flexibility as to how they conduct the process within the single standard set of rules.
- 9.7 The need for consistency here is driven primarily by the near identical character of current election rules governing the count. They seek to promote, as the returning officer for Hackney BC recognised, “clarity for observers”; they guarantee access to the count by partisan and non-partisan observers, which helps to build consensus and promote neutrality and propriety. We recommend that there be a single set of counting rules contained in primary legislation, whilst accepting that the legislation will need to be enacted in accordance with devolved competence.

**The standard counting rules should cater for differences between elections as regards their voting system and how their counts are managed. (Provisional proposal 9-2)**

- 9.8 A total of 35 consultees submitted a response to this proposal. Thirty-four agreed with it.
- 9.9 As to this and the previous proposal, the Electoral Commission said:
- [These proposals] would provide greater simplicity and clarity for returning officers and candidates and their agents. We acknowledge the need, identified in the consultation paper, for a standard set of rules to account for justifiable differences in the administration of the count system to reflect different electoral systems but this should be consistent with the UK’s devolution framework.
- 9.10 Our proposal for a single standard set of rules plainly must be applied within the framework of devolved competences over electoral law. However, the existing legislation governing Scottish local government elections suggests that the devolved competence has not led to substantive divergence in the law’s approach to electoral counts. We do not think that the areas in which the rules will need to diverge will be so great as to make a single body of rules — to the extent compatible with devolution — unduly unwieldy.

**TIMING OF THE COUNT**

**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 9-3)**

- 9.11 A total of 38 consultees addressed this proposal. Most – 29 – agreed with it in its entirety. The Electoral Commission said the proposal made clear that returning officers are both responsible and accountable for important decisions about the effective administration of the count process.

- 9.12 In their joint response, the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and the Electoral Management Board for Scotland said that returning officers should have the flexibility to determine the earliest start time for counts because of the varied nature of the logistics of the counting of votes in different counting areas and at different types of poll.
- 9.13 A total of eight consultees disagreed with the proposal at least in some respects. The key issue here was the tradition of overnight counting in general, and the legal duty to commence counting within four hours at UK Parliamentary elections.
- 9.14 Liam Pennington commented on the current tradition for quick overnight counts to the effect that in some contexts and certain constituencies, particularly at combined polls, it is not desirable to bind the returning officer to conduct a swift count.
- 9.15 Crawford Langley (Aberdeen CC) focussed his response on the risks of proceeding to the count straight after a gruelling preparation for the poll, affirming that misadjudication could imperil the whole conduct of the polling process. Having once personally worked 37 hours without a break under such circumstances, he indicated that some of the most difficult decisions regarding the adjudication of doubtful votes were made, among others, in the last few hours of the count. He also emphasised that returning officers were personally responsible for the conduct of the election while being supported by a very small number of senior staff members during the count.
- 9.16 SOLACE urged us to review both the existing law on polling and the count, to reconsider the “current arrangements for elections to be held from 7am to 10pm on one day, with the consequent pressure (including statutory provisions) for counting to be conduct overnight and well into the early hours of the morning”. Alastair Whitelaw (Scottish Green Party) echoed these concerns, and argued that accuracy should take priority over speed.
- 9.17 Ian Miller (Wyre Forest DC), while supporting our proposal, had reservations about overnight counts:

[The] Commissions should challenge the legislation introduced in 2010 about start time of Parliamentary counts. There needs to be consideration of a range of different measures that would allow counting for all elections to be undertaken at sensible hours i.e. not proceeding through the night when the propensity of staff to make mistakes is likely to be highest (human beings are meant to sleep at night, not be working in highly pressured environments where accuracy is at a premium)...

As we saw in 2010, coalitions at Westminster do not form instantly and thus there is no reason why – for example – MPs should not take office one week after the day of the poll, thus removing the need for votes to be counted into the early hours of Friday. Indeed in 2015 Parliament does not sit until 18 May, undermining the need for an overnight count on 7/8 May. Counts could commence instead at 9am on a Friday. This would have the advantage that results would begin to filter through for the news bulletins at lunchtime and the full picture would most likely be known by the 6pm news or certainly by the late evening. This would improve engagement of the public in the results process (which at the moment is confined to a relatively small proportion who sit up watching television through the night)...

9.18 Robin Potter (Liberal Democrat Councillor) noted that overnight counts are particularly problematic “when some constituencies have far-flung electorates”.

9.19 Gifty Edila (Hackney BC) said:

Rules that require the count to take place shortly after close of poll, does not take cognisance of the European Working Time Directive and the sheer human ability to work 48 hours without sleep and rest. The proposal to empower presiding officers to determine the earliest time at which to start the count is supported and welcomed. We would propose that even the UK Parliamentary elections 4 hour rule should be reviewed and abolished.

9.20 Mark Heath (Southampton CC) added that in multiple polls, the need to pause more than once, and for longer than overnight should be recognised.

9.21 Scott Martin (Scottish National Party) did not comment directly on the proposal but observed that parliamentarians’ desire for an early declaration of the result was as strong at Holyrood as at Westminster. Members of the Scottish Parliament currently lacked the power to legislate for an overnight count, but the Electoral Management Board for Scotland’s support for overnight counting made such legislation unnecessary.

9.22 There are plainly strong arguments both for and against conducting overnight counts. For all elections but one, whether to adjourn to the next day will be a decision for the returning officer. At UK Parliamentary elections, that discretion is subject to one caveat: if the returning officer does not proceed continuously to an overnight count, he or she must report that fact and may suffer financial sanctions. We remain of the view that this is an indication of a strong policy by UK Parliament in 2010 that the UK Parliamentary elections merit separate attention, and that swift declaration of outcomes is particularly emphasised for the elections to the UK’s sovereign legislature. Revisiting it or extending it to other legislatures is in our view a matter for Government and not for us. Where that policy applies, returning officers must be given the resources to bring it about without sacrificing the accuracy and security of counts.



## REPRESENTATION AT THE COUNT

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 9-4)

- 9.23 This proposal focused on a central aspect of the law governing the count: securing faith and trust in the result by ensuring scrutiny by candidates. Of 37 consultees who addressed this proposal, 35 agreed with it.
- 9.24 The Electoral Commission noted that the proposal reflects rather than alters current practice. We agree, although the uniform proposal does eliminate some peculiar inconsistencies at elections using the party list.
- 9.25 Mark Heath (Southampton CC) added that the law should be clear about "the roles and responsibilities of all those players within a count, and this includes those representing candidates, parties, etc".
- 9.26 The southern branch of the Association of Electoral Administrators (AEA) noted that:
- The standing of sub agents has been overlooked with respect to the party list. We all felt that we would not accept a recount [request] from a counting agent but only a duly appointed sub agent in the absence of both the candidate and election agent.
- 9.27 The key requirement in our view is that the candidate or their election agent must make the request for a recount, unless they specifically authorise another. We consider that the above concern is met by our proposal. We therefore recommend as follows.

***Recommendation 9-1: A single standard set of rules in primary legislation should govern the count at all elections.***

***Recommendation 9-2: The standard counting rules should cater for differences between elections as regards their voting system and how their counts are managed.***

***Recommendation 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.***

***Recommendation 9-4: The rules should state that 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.***

## **STV COUNTS**

**Save for differences in the transfer value, the same detailed rules should govern all STV counts. (Provisional proposal 9-5)**

- 9.28 As to elections using the much more complicated single transferable vote (STV) system (Scottish local government elections and elections in Northern Ireland other than those to the UK Parliament), the law concerning the count is much more detailed. Our view in the consultation paper was that, save for the differences in the “transfer value” of votes, which is calculated slightly differently in Northern Ireland and Scotland, the same detailed rules should govern STV counts.<sup>2</sup>
- 9.29 34 of the 35 consultees who addressed this proposal agreed with it.
- 9.30 The McDougall Trust agreed with our proposal, provided differences in procedure make it a practical proposition. It noted a preference for the approach to transfer values in Northern Ireland, which it described as “part of a tried and tested canon of procedures”. Finally, it agreed with our preference for the Northern Irish approach to equality of votes, which reduces the likelihood of having to draw lots.
- 9.31 We do not think revisiting transfer values is a matter for the Law Commissions. The difference in formulae used in Northern Ireland and Scotland amounts to a qualitative difference in the voting system. Given the response, however, we are minded to convert our proposal into a recommendation, with one clarification. We consider that primary legislation should contain the fundamental rules governing the STV count which are shared with other elections. Unlike other elections, however, detailed and lengthy rules must prescribe the process for counting such elections, because of the intricacy of the voting system. These should be in secondary legislation.

***Recommendation 9-5: The standard rules in primary legislation should apply to STV counts so far as they are applicable; the detailed procedure for conducting an STV count should be in secondary legislation.***

<sup>2</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 9.63 to 9.78.

## **ELECTRONIC COUNTING**

**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. (Provisional proposal 9-6)**

- 9.32 Of the 36 consultees who provided a response to this proposal, 34 agreed with it. At present, both Greater London Authority (GLA) elections and Scottish local government elections are counted electronically. However, these elections' rules take a different approach. The GLA election rules are written with electronic counting in mind. If the Greater London Returning Officer (GLRO) decides to count manually, modifications to the ordinary rules apply. The Scottish local government election rules are written more simply, with a general provision enabling the returning officer to perform any functions in connection with the count electronically.
- 9.33 Our consultation paper took the view that the standard set of counting rules for elections should be written as technologically neutrally as possible. These would apply to manual counting. A single subset of rules should govern electronic counting. Which elections are subject to electronic counting should be determined by statutory instrument.
- 9.34 Crawford Langley (Aberdeen CC) argued that the current law permits returning officers to choose to count electronically.
- 9.35 Our eventual recommendations will make clear that, absent permission in secondary legislation to count electronically, counts are to be conducted manually. The primary reason for this is that candidates cannot scrutinise electronic counts in the same way as they can scrutinise manual counts, a matter which we consider further below.
- 9.36 The Electoral Commission, in support of the proposals, considered that they would simplify the different models of counting while delivering more consistency in practice:
- While we agree that a separate power to provide by statutory instrument which elections may be subject to electronic counting, we suggest that such secondary legislation should be subject to an affirmative Parliamentary procedure, so that legislators are given appropriate opportunities to debate and approve any change.
- 9.37 We are satisfied that the negative resolution procedure will offer sufficient and reasonable legislative scrutiny of a Ministerial decision to count any particular election electronically.
- 9.38 Jeff Jacobs (Greater London Authority) agreed with our proposal, assuming that GLA counts would continue to be electronic or manual, as decided by the GLRO.
- 9.39 The McDougall Trust also agreed with our proposal, noting however that "the electronic count results should fully replicate (and vice versa) the manual count results in accord with the rules set down in statutory instruments".

- 9.40 Alastair Whitelaw (Scottish Green Party) stated that the procurement of electronic systems would need to be stringently neutral, thereby assuring that selected companies would not be linked to any given political party. He added:

On previous occasions we have been told that software absolutely could *not* be audited because of “commercial confidentiality”. This is not a transparent system and is unacceptable.

- 9.41 Colin Everett (Flintshire CC) disagreed with our proposal, preferring that the local council should have the power to decide upon electronic counting instead of it originating from a statutory instrument that would, in turn, determine which elections are appropriate for electronic counting.

- 9.42 The classical rules include provisions aimed at promoting transparency at the manual count by enabling candidates and agents to scrutinise proceedings. Electronic counting reduces the effectiveness of “on the day” scrutiny by the candidates and agents. Confidence in the system being used must be secured in a different way. We are therefore not convinced that the law should change so that every returning officer may count electronically at his or her option. We consider that at the very least secondary legislation must be passed to enable its use. We now turn to the question of how the law should secure confidence in the electronic counting system.

**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? (Consultation question 9-7)**

- 9.43 A total of 34 consultees answered our question. The answers were diverse. Three consultees argued for no change in the law – that is, for it to be silent as to how to give candidates confidence in the electronic counting process.

- 9.44 A total of 16 consultees supported both prior demonstration and certification. One was the national branch of the AEA although it thought the issue of a certification requirement would need further examination. It added:

As part of good practice arrangements, the GLA already demonstrate the e-counting system to political parties and many local authorities already hold election agent briefings closer to the election. These will include details of the count arrangements and count methods along with the determination of doubtful papers.

- 9.45 The southern branch of the AEA and New Forest DC suggested that electronic counting systems be subject to certification requirements set down in statute for the purpose of country-wide uniformity. They asked whether there would be an appeal process for dissatisfied participants in a prior demonstration, and who would have the power to decide such an appeal. The southern branch of the AEA related a council’s experience of electronic counting in 2007:

In the pilot, Council had to pass a certification requirement which was verified by the Cabinet Office, the question would be who would sign off the certification requirement, or would it fall to the returning officer to ensure he or she were satisfied that the checks had been carried out as set out in the legislation?

- 9.46 Sir Howard Bernstein (Manchester CC), who found merit in both certification and prior demonstration, noted that they were not mutually exclusive and could coexist. The McDougall Trust said a certification requirement process should include a prior demonstration of the electronic counting system so as to “demonstrate transparency in the electronic counting system and to maintain confidence in the validity of the outcomes – thus allaying any impression that the results may have been produced by a ‘black box’ process”.
- 9.47 Alastair Whitelaw (Scottish Green Party), who shared misgivings about previous processes for the scrutiny of the electronic counting system, agreed with both the certification requirement and prior demonstration noting that “[i]t is essential that independent auditing of software is allowed”.
- 9.48 Dr Heather Green (University of Aberdeen) said that such requirements would increase public confidence in the count, and standardise and foster good practice. She added:

The breakdown of counting technology during the 2007 Scottish Parliament elections caused significant problems which could perhaps be prevented by the introduction of such a requirement.

- 9.49 Nine consultees preferred a certification requirement to a requirement of prior demonstration. The Electoral Commission recalled that it had previously recommended a certification scheme to provide independent quality assurance of electronic counting, which included supporting the use of electronic counting outside a pilot project:

It will be important to ensure that any accreditation and certification scheme has appropriate characteristics, including a set of requirements for e-counting covering usability, availability, security and transparency.

Buy-in from political parties and other stakeholders will be important, so any accreditation and certification scheme must be suitably transparent. This will include the publication of the e-counting requirements and of the certification process that will be undertaken as well as transparent reporting for each certified product outlining the results of the certification process.

...The Electoral Commission, together with the UK Electoral Advisory Board, could play a key role in providing a suitable level of oversight of any certification process.

- 9.50 The joint response of SOLAR and the Electoral Management Board for Scotland preferred a certification requirement by the Electoral Commission who in turn, should appoint a qualified independent person to provide the certification.

- 9.51 David Boothroyd (Labour councillor for Westminster CC), who was involved in assessing the electronic counting system in local elections in 2002 and 2006, recalled receiving diverging proposals which were difficult to assess:

For that reason I would prefer to see electronic counting systems certified by some national body (probably the Electoral Commission) as being proven to be reliable and fair.

- 9.52 Ian Miller (Wyre Forest DC) also expressed a preference for a certification requirement, undertaken centrally by the Electoral Commission; it then would certify a number of suitable electronic system providers from which a local selection would be made. He considered that central certification would be preferable, given that systems would only need to be approved once:

It is also not clear what would happen if the returning officer was satisfied with the system but local political parties were not – whose view would prevail and would there be time to organise any alternative?

- 9.53 The Labour Party thought that a certification requirement should be in legislation and that an additional demonstration requirement should be in Electoral Commission guidance.

- 9.54 By contrast, five consultees preferred a requirement of prior demonstration to one of certification. Alan Mabbutt OBE (Conservative Party) advocated “a demonstration to political parties to give confidence in the system”. Jeff Jacobs (Greater London Authority) was concerned that a certification requirement risked limiting the ability to take advantage of technological advances that would benefit electronic counting. In his experience, building trust with parties involved in an election by way of demonstration was essential. He therefore agreed with the prior demonstration requirement “provided that [it did] not increase the amount of proving work required of the GLRO in relation to such systems”.

- 9.55 Joyce White (West Dunbartonshire CC) disagreed with a requirement for certification. However, she had no objection to local political parties being invited to a test demonstration of the equipment in advance of the Count.

- 9.56 Crawford Langley (Aberdeen CC) supported prior demonstration to candidates and agents, but stated that the experience of nationally specified counting equipment for Scottish local government elections showed that “a national specification sits uneasily with the responsibility of the individual returning officer for the conduct of a particular count”. He pointed to the practical difficulty of electronic counting installations being set up a day or two before the count, with the result that “on the grounds of cost, any demonstration would, of necessity, be at the last minute”. He asked if “an objection by a candidate to what she sees at such a demonstration would have any effect on the choice of a system, particularly if that system has been used successfully in the past or elsewhere”?

- 9.57 Mark Heath (Southampton CC) suggested that a better approach would be to create “one or more electronic counting systems, either via the Government’s own IT or procurement service, or through a framework agreement” which amounted to effective certification of the electronic counting systems available to returning officers to use or not, as they see fit.

## Conclusions

- 9.58 There was overwhelming support for the principle that the law should seek to give equal confidence in electronic as in manual counting systems. Diverse views were expressed, however, as to best way of securing confidence in the electronic counting system.
- 9.59 Currently only Scottish local government elections and GLA elections are counted electronically. These are centrally run by the Electoral Management Board for Scotland and GLRO. A system of prior demonstration by such central administrators to political parties and the Electoral Commission is thus workable, and would remain so were an order made to count elections in Northern Ireland electronically, since these are run by the Chief Electoral Officer.
- 9.60 Prior demonstration is a less satisfactory option where the administration of elections is decentralised. Elections in England and Wales are run by a local returning officer. Requiring prior demonstration by each officer would cause logistical problems, and might lead to inconsistency. A more centralised approach – certification by an appropriate body such as the Electoral Commission or Government – would avoid such problems.
- 9.61 Furthermore, as some consultees warned us, the technology involved in electronic counting is fast moving, suggesting that measures taken in primary legislation might not be future-proof.
- 9.62 We therefore conclude that our recommendation should be limited to empowering the Secretary of State and Scottish Ministers to make regulations ensuring that there is sufficient scrutiny by political parties and the Electoral Commission of an electronic counting system, including requiring prior demonstration, certification by a particular body, or both. In the short term, we are satisfied that prior demonstration is adequate to deal with the current roster of elections which are counted electronically. If, in the longer term, electronic counting is more widely used across the UK, certification by an appropriate central body may be preferable to prior demonstration. Similarly, a Government run or approved scheme, as suggested by Mark Heath, would also be an option.

***Recommendation 9-6: A standard set of counting rules and subset of rules for electronic counting should apply to all elections. Which elections are subject to electronic counting should be determined by secondary legislation.***

***Recommendation 9-7: The secondary legislation above must also make provision ensuring sufficient scrutiny by political parties and the Electoral Commission, including but not limited to prior demonstration of the electronic counting system to them and/or certification of that system by a prescribed body.***

# CHAPTER 10

## TIMETABLES AND COMBINATION OF POLLS

### INTRODUCTION

- 10.1 In this chapter, we consider the timetable according to which elections are run, as well as the law governing the administration of coinciding elections – typically referred to as the “combination of polls”.<sup>1</sup>

### ELECTORAL TIMETABLES

- 10.2 Each set of election rules contains a timetable governing its administration. The timetables contain most of the steps covered by election rules, from notice of an election to the declaration of the result. They do not contain deadlines for absent voting or registration, for the historical reason that these are not governed by “election rules” but by separate regulations.
- 10.3 For all but one set of elections, an “incidence rule” determines when polling day takes place. The legislative timetable then calculates the administrative timetable by counting back from polling day. It is purely an administrative timetable.
- 10.4 The exception is the UK Parliamentary election timetable. Historically it was both an administrative timetable and an incidence rule – in other words it determined when polling day was, by reference to the writ of election. The first step in the timetable – the dissolution of Parliament (for general elections) or the warrant for the writ of by-election (for by-elections) – determines when polling day takes place. For general elections that is now done by the Fixed-term Parliaments Act 2011 (the 2011 Act). For by-elections, the complex legislative timetable is arranged so that the returning officer can choose a Thursday occurring on days 23 to 27<sup>2</sup> after the warrant for by-election is issued, so that the timetable remains both an administrative one and an incidence rule.
- 10.5 As regards UK Parliamentary elections, we provisionally proposed that the timetable should be re-oriented so that steps in it are counted backwards from polling day, that a separate incidence rule should fix the date of polling day by reference to the date of issue of the warrant for the writ of by-election and that the writ of election or by-election should be capable of being communicated electronically. As regards all elections, we provisionally proposed a standard 28-day timetable, involving an extension of the UK Parliamentary election timetable from its current 25 days to 28 days.
- 10.6 In our consultation paper, we explained our provisional view was that the UK Parliamentary election timetable should be re-oriented so that it counts back from polling day which is given by the 2011 Act.<sup>3</sup> For by-elections, a separate

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, ch 10.

<sup>2</sup> The days exclude weekends and bank holidays, so that it is possible for more than one of them to be a Thursday.

<sup>3</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 10.19 to 10.26.



incidence rule should be enacted which reflects the current law, save that it should expressly state that the polling day is on the last Thursday occurring between days 23 and 27 after the warrant for the writ of by-election. That writ should be capable of electronic communication. We now turn to the response to these proposals.

| Notice of election   | Close of nominations | Polling notice                 | Polling day  |
|--|----------------------|--------------------------------|--|
| Day 25 to 23, subject to receipt of writ*.<br><br>*based on a 25 day timetable: see further below. | 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 last Thursday 23 to 27 days after the issue of the warrant for the writ of by-election. |

**Table 1: Proposed reformed Parliamentary timetable (based on 25 days)**

**The UK Parliamentary election timetable should be oriented so that steps count back from polling day as shown in table 1 above. (Provisional proposal 10-1)**

- 10.7 There was unanimous support for this provisional proposal from the 31 consultees who provided a response to it. These included the national branch of the Association of Electoral Administrators (AEA), the regional branches of the AEA that responded to our consultation, and several electoral administrators who have to apply and understand the timetable. Gifty Edila (Hackney BC) thought that our proposal “would minimise the risk of miscalculating a date for any of the different steps”.
- 10.8 The Electoral Commission said that this, and the next proposals, “would be consistent with the method of calculating timetables for other elections, and would allow better alignment of voter/candidate facing deadlines and electoral administration processes where polls are combined or held on the same day”.

**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 10-2)**

- 10.9 Of the 30 consultees who addressed this provisional proposal, 26 agreed with it. Three consultees offered no firm view. Scott Martin (Scottish National Party) preferred that the date of the by-election be stated in the writ of by-election. One issue of contention with some, however, was the effect of our proposal to give further legal entrenchment to polling day occurring on a Thursday. Sir Howard Bernstein (Manchester CC) said that such a requirement “may be unduly restrictive in exceptional circumstances”. Sir Howard commented that there may be “rare occasions where holding the poll on that day would significantly impact on the delivery of the election”. He added:

It is suggested therefore that a Thursday be specified as being the day of the poll, except where the returning officer determines that

exceptional circumstances mean that the poll cannot be effectively delivered on that day and can be better delivered on another day within the 23 to 27 day window referred to above.

- 10.10 This view was echoed in comments made by Alastair Whitelaw (Scottish Green Party), who said that holding voting on other days (such as over a weekend), or over two days should be facilitated with “minimal additional secondary legislation”. The Labour Party suggested that there should be “separate consultation” on the day (or days) that should be used for polling.
- 10.11 Philip Coppel QC urged us to recommend weekend voting. He questioned the historical pedigree of voting on Thursdays as a matter of law.
- 10.12 Our purpose is not to further entrench in law that Thursday should be polling day. Whatever the historical position, Thursday is the stated polling day for General Elections under the 2011 Act. Only at parliamentary by-elections may another week day be used as polling day. Every other election in the UK appoints a Thursday as election day, subject to a ministerial power to order the election to take place on another day. Weekend voting was considered and rejected in March 2010 by the UK Government after a consultation.<sup>4</sup> The impact of weekend voting on voters, electoral administrators, media and political institutions will require careful policy consideration, study, and perhaps piloting. We do not think it is proper for the Law Commissions to recommend such a fundamental alteration to polling arrangements.

**The writ should be capable of communication by electronic means.  
(Provisional proposal 10-3)**

- 10.13 Of the 29 consultees who addressed it, 28 consultees agreed with our proposal.
- 10.14 The national branch of the AEA, whose response was supported by regional branches and electoral administrators, expressed unqualified support for this provisional proposal. Many noted that this would efficiently make use of established technology.
- 10.15 The Electoral Commission, which supported this proposal, also recommended that we consider whether it is necessary to require the issue of a writ, as changes introduced by the Fixed-term Parliaments Act mean that polling day is set in law. Ian Miller (Wyre Forest DC) also argued that the issue of a writ is no longer necessary. We consider this argument below.
- 10.16 Crawford Langley (Aberdeen CC) urged that the writ should not be transmitted *solely* by electronic means, but would support a proposal that the writ may be “transmitted by any means which will ensure that it is received by the returning officer to enable her to comply with the election timetable”.
- 10.17 Our proposal was that the writ be capable of electronic communication; it would be an additional means of communicating it to the returning officer. The point is that the progress of the election is not delayed by some operational failure to

<sup>4</sup> Election Day: Weekend Voting (March 2010) Cm 7835, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228797/7835.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228797/7835.pdf) (last visited 11 January 2016).

communicate the formal trigger for it. We are not persuaded that it is proper for this project to abolish the use of the writ. The need for a writ, and its royal character at general elections, is not a matter which we can question in a project about electoral administration law.

### **Legislative timetables generally**

- 10.18 Our consultation paper provisionally proposed that a standard timetable should govern all UK elections, offering two options for standardisation which least disturb the current arrangement: a 25 day timetable and a 28 day timetable. The former disturbs the lowest number of elections' timetables. The latter affords more time for all elections, while preserving the current timelines for producing the candidate information booklet at Greater London Authority (GLA) elections. It would only minimally affect Scotland-only elections. We stated our preference for a 28 day standard timetable, containing the key milestones in the administration of the election.<sup>5</sup>

### **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 10-4)**

- 10.19 All 32 consultees who responded to this proposal supported it. Scott Martin (Scottish National Party) agreed in principle, subject to the right of devolved legislatures to determine their own policy.
- 10.20 The national branch of the AEA, with whom the regional branches that responded and some electoral administrators agreed, added that the deadlines should remain "not later than" seeing as returning officers, in the case of local elections, may wish to publish the notice of election early, particularly in respect of parish or community council elections.
- 10.21 We agree. This was a point made to us by the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) at a consultation event which we attended, and by the Electoral Commission. Under our proposed 28 day timetable, returning officers would still be able to publish the notice earlier.<sup>6</sup>
- 10.22 The Electoral Commission supported our provisional proposal, but also urged that deadlines applying to voters use consistent timings. The Electoral Commission suggested that "midnight on the specified day would best reflect and meet legitimate customer service expectations".
- 10.23 This view was echoed by the Scottish Assessors Association, who also urged consistency, albeit suggesting a different deadline time. The precise hour in the day when deadlines occur will be a matter for Governments when making secondary legislation, but we agree these should be consistent across elections

<sup>5</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 10.28 to 10.52.

<sup>6</sup> At UK Parliamentary elections, however, no notice of election may be published before the writ. A technical issue will also arise with respect to spending limits worked out according to a formula referring to the number of registered electors on the day notice of election is given. These are not insurmountable, particularly given our recommendation for the expenses limits to be published by returning officers. See chapter 12, paras 12.8 to 12.18.

and steps within the timetable.

- 10.24 Matthew Box (Malvern Hills DC) had an ingenious suggestion as to the timing of the nominations process and its implications for the issuing of poll cards. Mr Box suggested that the nomination process should be brought forward for all elections, enabling electoral administrators to issue poll cards *after* the candidates are known so that the electorate, upon receipt of their poll card, can immediately confirm who is standing for that particular contest. Mr Box added that, whereas poll cards should provide the electorate with information about who is standing, currently they lack any “real information”; this, he suggested, risks losing the interest of many younger voters.
- 10.25 The main purpose of poll cards is to inform voters that there is an election going on, where they will be expected to vote, and how they are anticipated to vote (in person or by post or proxy). The policy is for poll cards to be sent out as soon as practicable, so that electors can be informed but also take action well before the deadlines for absent voting, registration and so on. We are therefore not convinced, as a matter of law, that poll cards should move down the chronology so that they postdate the close of nominations; however, good practice and policy may develop so as to keep voters better informed of the poll to counteract the difficulties suggested by Mr Box’s experience.

**The timetable should be 28 days in length. (Provisional proposal 10-5)**

- 10.26 We proposed that the 28 day standard timetable be aligned as follows:<sup>7</sup>

| 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<br>NI: 14                  | GB: 6<br>NI: 14 | 0           |

**Table 2: 28 day standard timetable**

- 10.27 Of the 31 consultees who responded to this particular provisional proposal, 27 consultees agreed. Two consultees disagreed. The Electoral Commission and Scott Martin (Scottish National Party) did not offer a firm view.
- 10.28 Sir Howard Bernstein (Manchester CC) acknowledged that “for most elections this would represent an extension of the timetable”, and thus be beneficial for electoral administrators.
- 10.29 In their joint response, SOLAR and the Electoral Management Board for Scotland supported the provisional proposal. However, they were concerned to ensure that

<sup>7</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 10.42 to 10.48.

“the legislation in setting the last date for publication of the notice of election allows an earlier date for such publication in order to allow a longer period for delivery of nomination papers, particularly for council elections in large authorities due to the high volume of candidates”.

- 10.30 That will be the case for every election apart from UK Parliamentary elections, where no notice of election can be published before the writ is received.
- 10.31 The Electoral Commission acknowledged the merits of an extended standardised timetable, but did not express a firm view as to which (28 days or 25 days) was preferable. It noted that legislation passed in 2013 changed the timetable for UK Parliamentary elections from 17 working days to 25 working days, and as such, the 2015 UK Parliamentary elections would be the first at which these timetable changes would apply. The Electoral Commission suggested that “the Law Commissions consider the experience of returning officers, campaigners and electors using the new timetable at the May 2015 elections before reaching firm conclusions”, concluding that it would “consider the impact of the new timetable in [their] own reporting on the May 2015 elections”. The Electoral Commission’s report on the May 2015 elections observed that the timetable changes had “benefits for electors”, but did not clarify whether the new timetable should be extended.<sup>8</sup>
- 10.32 Scott Martin (Scottish National Party) observed that the 28 day timetable introduced in Scotland in 2011 had led, from the point of view of campaigners, to a long election period, but this was partly due to the incidence of bank holidays and the Royal Wedding.
- 10.33 Robin Potter (Liberal Democrat Councillor) disagreed with our proposal, preferring a 42 day timetable. The other consultee who disagreed, Jeff Jacobs (Greater London Authority), expressed concern about the possibility of a shorter timetable, and argued that the timetable should be longer if a booklet requirement were to remain at GLA ordinary elections. Mr Jacobs observed that sending a booklet to 5.8 million registered electors in London including over 800,000 postal voters before they receive their postal voting papers is a huge task. He argued that even with the two extra working days that are gained by moving away from the local government nominations model, 28 days would carry a risk. Mr Jacobs observed that:

At Police and Crime Commissioners elections candidate “addresses” must be published online by the returning officer. My personal view is that were similar arrangements to apply to GLA elections, with the expensive and outdated requirement for the physical delivery of 5.8 million (or so) booklets removed, but “hard” copies of the booklet being available on request, then it would be possible to reduce the time to the 28 days proposed.

- 10.34 Our proposal for a standard 28 day timetable coupled with the removal at those elections of a “withdrawal period” two days after close of nomination, effectively

<sup>8</sup> Electoral Commission, *Report on the administration of the 7 May 2015 elections, including the UK Parliamentary general election* (July 2015)  
[http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0006/190959/UKPGE-report-May-2015-1.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/190959/UKPGE-report-May-2015-1.pdf) (last visited 11 January 2016) p 41.

gives the GLA returning officer the same period of time to produce than he had under the 30 day timetable in operation at the 2008 and 2012 GLA elections. It was thus carefully designed not to disadvantage the returning officer for that election, or the other elections run under timetables longer than the customary 25 days. Increasing the time for producing the booklet or making its physical delivery optional is a matter for governments.

10.35 Our proposal for a standardised timetable was concerned to ensure that the same deadlines fall on the same day, so that electoral administrators and campaigners are well aware of, and can plan for them. Ian Miller (Wyre Forest DC) noted that at the May 2015 elections the notice of election for UK Parliamentary and local government elections did not coincide, meaning that different versions of the electoral register (from which the expenses limit could be worked out) had to be communicated to candidates. Under our standard timetable that should be rare (requiring a delay in communication of the writ).

10.36 We are minded, in the light of these responses, to recommend as follows.

***Recommendation 10-1: The UK Parliamentary election timetable should be oriented so that the steps in it are counted backwards from polling day.***

***Recommendation 10-2: A separate rule should state that, for by-elections, polling day is on the last Thursday occurring between days 26 and 30 after the warrant for the writ of by-election is issued.***

***Recommendation 10-3: The writ should be capable of communication by electronic means, in addition to physical delivery.***

***Recommendation 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.***

***Recommendation 10-5: That timetable should be 28 days in length.***

## **THE COMBINATION OF POLLS**

10.37 The combination of polls is notoriously complex even by the standards of electoral law. Our consultation paper sought to distinguish between the coincidence of elections' polling days and the question whether coinciding polls should be taken together, or administratively "combined". We summarise the position as follows:

- (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.<sup>9</sup>

10.38 The law on the combination of polls considers three distinct issues:

- (1) The combinability of particular polls: some must be combined and others may be. For yet others, nothing is said about combination, meaning there can be no combination – the default position is as we described in (3)(b) above.
- (2) The management issue: where polls are combined, which of the returning officers for the combined elections takes the lead role, and for which functions.
- (3) The combined conduct rules issue: where polls are combined, and irrespective of whether it is the lead or the other returning officer who is performing a particular function in relation to the poll, what adaptations to the ordinary election rules are made to deal with the fact that the polls are combined.

10.39 The answer to these questions is given in a complex array of election-specific provisions, yielding inconsistent results which we outline in the consultation paper. In some cases, the provisions produce a nonsensical outcome. We gave the example of a Welsh Assembly general election coinciding with ordinary elections for both Police and Crime Commissioners (PCC) and local government elections. The combination rules produced the illogical answer 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.

10.40 Our reform proposals concerning the combination of polls must be considered against the background of our central proposal that a consistent set of election laws should apply to all elections. Many of the problems we encountered in the current law are cured by a streamlined electoral law framework, and this was reflected in our provisional proposals.<sup>10</sup>

<sup>9</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.53.

<sup>10</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, ch 10.

**The law governing combination of coinciding polls should be in a single set of rules for all elections. (Provisional proposal 10-6)**

- 10.41 Of the 30 consultees who responded to this particular proposal, 28 consultees agreed. This included the national branch of the AEA, the regional branches of the AEA that responded and electoral administrators, who bear the brunt of having to understand and apply combination rules.
- 10.42 The Electoral Commission also agreed, saying this proposal would “simplify the application of the rules” and “help to ensure more effective administration of polls” which coincide. It also urged us to develop our proposal to accommodate the prospect of further devolution in Scotland. We considered the issue in principle in chapter 2.<sup>11</sup>
- 10.43 Jeff Jacobs (GLA) reminded us to ensure that proper consideration is given to the particular scale of potential combinations of GLA elections with, for example, a general election.
- 10.44 Scott Martin (Scottish National Party) saw difficulty in reconciling this proposal with devolution arrangements. We consider that a coherent set of rules can be devised within the forthcoming arrangements.
- 10.45 Some consultees commented generally on the desirability of combining or coinciding polls. For example, Philip Hardy (Sandwell BC) stated that combined polls are “generally easier to administer and easier for the public”. Hardy also noted that “the issue of public money as it is cheaper does need to be taken in to account”.
- 10.46 However, a number of other consultees thought that coinciding polls should be avoided, or stopped completely. Ian Miller (Wyre Forest DC) encouraged the Law Commissions to “be bolder and recommend that electoral cycles should be changed in order to minimise combinations that will be required”. He argued that combination added complexity, even where identical rules were in place; combination “should thus be avoided to the maximum extent”. Mr Miller added:

The solution is to implement electoral cycles for all bodies that are based on 5 years. This could be organised so as to avoid any coincidence of elections to the devolved Parliaments and Assemblies with elections to the UK or EU Parliament.

Even if the current mixture of electoral cycles is retained, the Commissions should recommend removing choice for district councils in England about their electoral cycle. Every other elected body has a fixed term, whether of 4 or 5 years. It is time that the strategic and financial benefits of whole council elections became mandatory, and that district councils should have whole council elections once every 4 years.

- 10.47 These comments were echoed by the Society of Local Authority Chief Executives and Senior Managers (SOLACE), who said that electoral cycles should be aligned in order to minimise the occasions on which combination of elections

<sup>11</sup> See chapter 2, paras 2.18 to 2.24.



would be required.

- 10.48 Alastair Whitelaw (Scottish Green Party) went further and argued that as a matter of principle combined polls should not be permitted for “administrative reasons” and because “in practice campaigning for parliament tends to swamp interest in council elections”.
- 10.49 This project has taken the law governing the incidence of elections, and electoral cycles, as a given. The law governing these is part of the rules constituting the institutions in question. By and large, unhelpful coincidences (such as the one alluded to above, in Wales) are avoided by secondary legislation deferring one poll. In other cases, such as Scottish local and Parliamentary elections, a rule of law exists to prevent coincidence. Our proposal has been to rationalise the law in the event of a coincidence, so that the law properly and consistently tackles the issue of legal governance of coinciding polls in two different elections. That leaves the issue of excessive coincidence, which cannot be helped by existing systems; this chiefly concerns by-elections occurring on the same day as one or more planned election.<sup>12</sup> This led us to ask a question about deferring polls, which we consider further below.
- 10.50 In the light of the response to our proposal, we are minded to turn it into the following recommendation.

***Recommendation 10-6: The law governing combination of coinciding polls should be in a single set of rules for all elections.***

**Any elections coinciding in the same area on the same day must be combined. (Provisional proposal 10-7)**

- 10.51 Of the 29 consultees who responded to this proposal, 26 consultees agreed. Two consultees disagreed.
- 10.52 The national branch of the AEA agreed with our proposal but added that there must be “an upper limit on the number of polls being allowed to take place on any one day”. It argued that where the limit was already reached, “the further poll should be held on a separate day at a date to be fixed by the returning officer”.
- 10.53 The Electoral Commission also agreed, but added that “there is a question as to whether there is merit in having discretion as to whether or not certain parts of combined elections should be combined”, citing the example of existing discretion as to whether the issue and receipt of postal votes should be combined. It argued that where two polls are not to be combined, “they should be held on different days rather than be held on the same day but run separately”.
- 10.54 This was echoed in the joint response submitted by SOLAR and the Electoral Management Board for Scotland, noting that the proposal “should reflect a degree of discretion for returning officers to determine the best ways of organising, in the interests of the voters, the logistics of different polls being run on the same day”. It added that new rules should clearly set out which returning officer is responsible for the conduct of combined functions.

<sup>12</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 10.109 to 10.115.

- 10.55 However, Crawford Langley (Aberdeen CC) expressed doubt about the efficacy of our proposal, stating his concern that “the differences between a poll which is to be counted electronically and one which is not, in relation to ballot box design, retrieving papers put into the wrong box and count process and layout are such as to create more problems than benefits”.
- 10.56 Ian White (Kettering BC) disagreed with our proposal, commenting that it “could turn into an administrative nightmare, and if there are different voting systems it is not voter-friendly”.
- 10.57 If two (or more) elections using different voting systems or counting systems affecting the administration of the poll coincide, the current law governing combination can do nothing to prevent their occurring on the same day, before the same electorate, and run by the same people. Where the law does not require these polls be combined, the law effectively fails to regulate the multi-poll situation that will arise when polls coincide. Rather than amounting to “mandatory combination”, our proposal ensures that electoral law always takes account of the possibility of coincidence. Election rules should be drafted so that they address the possibility of more than one poll occurring on one day. In such a case the law should set out the right powers and discretions, and the right duties to allow the returning officer to deal with the situation he or she will inevitably face, and to make sure voters are offered the best service given that these elections coincide.
- 10.58 Given the response, while acknowledging that the detailed combination rules will need to be carefully drawn, we are minded to maintain our proposal.

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| <p><b><i>Recommendation 10-7: Any elections coinciding in the same area on the same day must be combined.</i></b></p> |
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**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? (Consultation question 10-8)**

- 10.59 Of the 30 consultees who responded to this question, 14 supported giving the returning officer a power to defer a fourth coinciding poll. Seven consultees gave a different upper limit, but supported a power to defer. Eight consultees disagreed with giving the returning officer a power to defer at all. One consultee provided a comment, but did not offer a firm view.
- 10.60 Jeff Jacobs (GLA) supported a limit of three coinciding polls, with power to defer a fourth, adding that for GLA elections special issues arose, given that they already involve three ballot papers. He noted that there “needs to be a limit on the number of polls that must take place on the same day and the returning officer needs to have the power to defer polls above this limit to another day”.
- 10.61 The national branch of the AEA, whose response was endorsed by six other consultees, proposed a different scheme. According to its response, for financial reasons, the returning officer could be “under extreme pressure from the local authority, public organisation or parish council and others to combine the poll, if the timing allows, no matter how many polls are already scheduled to take place on that day”. It added that principal area or parish by-elections and local referendums could also be taking place on the same day as scheduled local and national polls. It said:

As a result, the AEA would wish to see the proposed change to be at the discretion of the returning officer but with an upper limit on the number of polls being allowed to take place on any one day. On such a basis, if that limit had already been met or exceeded in relation to other polls taking place on a particular day, the further poll should be held on a separate day at a date to be fixed by the returning officer. The current hierarchy of polls should be clearly set out in legislation.

Given the likelihood of combined polls arising from the number of scheduled elections for 2019 and 2020, the AEA would suggest the following formula in relation to the upper limit on the number of polls being combined on any one day:

Up to 4 elections – No returning officer discretion

5 elections – Discretion of returning officer

6 elections – Cannot combine so no discretion for the returning officer

10.62 The Senators of the College of Justice suggested the limit on coinciding elections should be lower so that a returning officer has the power to defer a third coinciding poll, as a combination of more than two polls has the “potential for voter confusion”. The Senators noted that “the only safeguard would be the exercise of the returning officer’s judgement”.

10.63 Our consultation paper suggested that the deferral period might be three weeks, following the precedent of mandatory deferral of parish elections if they coincide with a general election.<sup>13</sup> The southern branch of the AEA, with whom New Forest DC agreed, stated that this was a “good additional power for the returning officer to use if required”. It added, however:

... It was discussed that the current deferral period of three weeks isn’t always adequate so could the period of deferral be looked at being extended within this project?

10.64 Sir Howard Bernstein (Manchester CC) supported a power to defer a fourth poll. As to the hierarchy which we alluded to in the consultation paper,<sup>14</sup> he suggested that “[a] sensible safeguard would be that only the coinciding poll(s) lower down a ‘hierarchy of non-deferral’ than the 3 highest ranking coinciding polls should be deferred”.

10.65 In their joint response, SOLAR and the Electoral Management Board for Scotland also considered that “legislation should set out the different types of poll which could be held on the same day, and identify them in order of priority so as to enable the returning officers to identify impartially the fourth coinciding poll, for

<sup>13</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.111.

<sup>14</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 10.73 to 10.74.

example, the number of electors affected by each poll”.

- 10.66 Some consultees also commented on what the safeguards surrounding the exercise of such a power should be. Ian White (Kettering BC) commented that “[w]here they are local polls this should be left to the returning officer’s discretion, where they are a mixture of local and national polls then the Electoral Commission should be consulted”. Robin Potter (Liberal Democrat Councillor) also considered that the Electoral Commission should provide the safeguard.
- 10.67 The Electoral Commission, however, responding that such a power should be bestowed on returning officers, did not agree that returning officers should be given a new power to defer coinciding polls. It commented:

As the Law Commissions’ consultation paper notes, such a change would be a significant extension of returning officers’ powers, the use of which could leave them open to pressure or suggestions of [partiality].

The date of future UK Parliamentary general elections is now fixed in legislation as the first Thursday in May every five years from May 2015 (subject to provisions allowing an earlier general election in specific conditions). As such, it is now possible for policy makers and legislators to anticipate the scale of possible coinciding polls which are scheduled to be held in any given year, and to take into account the impact on voters, campaigners and returning officers of decisions about the timing of elections. It should be for policymakers and legislators – rather than returning officers – to decide whether or not there should be a maximum limit on the number of polls which should be held on the same day, taking into account evidence about the practical impact of proposals on voters, campaigners and returning officers.

It may also be difficult in some circumstances to identify appropriately and consistently how many polls are likely to be held in any given year, for example: elections for local ward councillors and directly-elected Mayors are both local government elections, but require two separate polls; similarly, elections for constituency members and regional members of the Scottish Parliament involve two separate polls; some local elections, in particular to parish or community councils, may be scheduled for the first Thursday in May in a particular year but are not in fact contested, meaning that no poll is required in that specific area. By-elections or referendums (including local referendums on council tax increases or neighbourhood planning proposals) are less predictably scheduled, and may not be known until relatively close to the date of the poll. There may also be different numbers of polls taking place within any single electoral area: across a Police Area, for example, the pattern of local and parish council elections may vary between different local authorities, and there may also be Mayoral elections taking place which change the number of polls from area to area.

- 10.68 Timothy Straker QC rejected empowering returning officers to defer a poll

because it would grant “too big a discretion to returning officers”. Alan Mabbutt OBE (Conservative Party) expressed concern about the implications of deferring polls for voter engagement at the deferred poll, adding:

There is insufficient evidence as to what effect this would have on voter engagement, but in the past when parish polls were deferred the turnout was pitifully low suggesting voters were less engaged. I appreciate the administrative issues, but would prefer the polls to take place at the same time.

10.69 Furthermore, two electoral administrators who also disagreed, Ian Miller (Wyre Forest DC) and Crawford Langley (Aberdeen CC) considered that, if combined, a large number of coinciding polls should not pose significant problems for returning officers.

10.70 The London branch of the AEA also disagreed:

We do not believe this proposal is workable, for example, in the case of a GLA election, this would mean the returning officer having the ability to not combine a local casual vacancy election, which would not necessarily be appropriate. We believe this is a wider area of debate in that those bodies to whom elections are made (and their sponsoring government departments) need to understand the implications of [coinciding] polls and therefore consider within their own jurisdictions when their planned polls will normally occur. We also believe that referendums should not [coincide] with election polls, but administered on separate days.

10.71 There are plainly dangers with giving returning officers a power to defer a poll. A parish election might be severely affected, in terms of turnout or even the influence of national swings in opinion, by whether it is conducted with a general election or not. We agree with consultees; any power of the returning officer is no substitute for proper planning of the election calendar by Government institutions to prevent unhelpful or excessive coincidence. If, despite such attention, some unforeseen circumstances mean one or more casual elections or local referendums join the planned elections on the calendar, should the returning officer have any power to do something about it?

10.72 In our view, there should be a power to defer a fourth election provided it is not a general or an ordinary election, in the interests of good electoral administration. Which poll is deferred should be determined in secondary legislation, which we envisage will link these to the hierarchy used for the purposes of determining who the lead officer is for the purposes of combined polls (European Parliamentary elections, which are low in that hierarchy, will not be deferrable, however). The hierarchy may absolutely rule out the deferral of any particular election or referendum, such as a UK Parliamentary by-election. The secondary legislation made by the Secretary of State or Scottish Ministers will also set out the safeguards subject to which this power is to be exercised, and the length of the deferral.

10.73 We do not envisage that this is a power that will be regularly triggered, let alone exercised. However we are persuaded that, while difficult, there must be a stop-gap in the law to deal with an unexpectedly high number of coinciding polls.

***Recommendation 10-8: If four or more polls coincide, the returning officer should have a power to defer a poll if he or she concludes that he cannot properly administer the polls on the same day. This power should not apply to general or ordinary elections, or national referendums. The power should be exercised in accordance with secondary legislation.***

**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 10-9)**

10.74 All 27 of the consultees who responded to this proposal agreed with it. This included the national branch of the AEA, the regional branches that responded and electoral administrators. Scott Martin (Scottish National Party) agreed in principle but noted the difficulties arising from separate legislative responsibility.

10.75 The Electoral Commission added that “[p]olicy makers and legislators considering scheduling or allowing polls to be held on the same day and combined would, however, need to consider carefully how the functions of returning officers for the different polls should be determined in each instance”. It added:

We would also welcome consideration being given to whether the existing ‘hierarchy’ of returning officers is appropriate; for example, we wonder whether it is right that a regional returning officer for European Parliamentary elections is at the bottom of the list, below parish council elections.

10.76 The Labour Party commented that the “selection of the lead returning officer should be a matter for the Electoral Commission following consultation”.

10.77 Under our proposed reforms, the hierarchy will be set out in secondary legislation and be subject to the legally required consultation with the Electoral Commission, as well as the customary consultation with other bodies.

10.78 We did not consider recommending changing the existing hierarchy for mandatory combinations, which is set out in our consultation paper.<sup>15</sup> In our view, it is a matter for Government to decide whether or not to change that hierarchy, and if so, how best to do so. The position of the European Parliamentary regional returning officer, while it is striking at first blush, can be explained. The policy behind the hierarchy is, in our view, based on a combination of the perceived import of the election, together with how close the official is to the electorate in question. It would not make sense for regional returning officers, who occupy central positions remote from the local polls in their region to be identified as the “lead” returning officer. They are, however, “directing” returning officers and the scope of their powers in the context of coinciding elections needs to be addressed.

10.79 Given the unanimous agreement with this provisional proposal, we therefore recommend that 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.

***Recommendation 10-9: The lead returning officer and his or her functions should be governed by secondary legislation setting out the hierarchy of returning officers, the functions they must perform, and the functions which may be given to them by agreement.***

**A single set of adaptations should provide for situations where a poll involves several ballot papers. (Provisional proposal 10-10)**

- 10.80 Of the 28 consultees who responded to this provisional proposal, 26 agreed with it. One consultee disagreed and one expressed doubt.
- 10.81 Scott Martin (Scottish National Party) thought that the proposal would be difficult to implement within devolution. Here again, we consider that a consistent set of rules is nevertheless achievable and is desirable.
- 10.82 The consultee who disagreed, Robin Potter (Liberal Democrat Councillor), said that “local discretion” should still apply. We do not agree. Electoral law generally gives detailed legal guidance on how to conduct a poll. We cannot see a reason why it should not do so in the case of more than one poll on the same day. Our rationalisation of the current law is that, for all elections involving more than one poll, it should require ballot papers to be distinguished by colour, but gives lead returning officers a discretion whether or not, for example, to combine ballot boxes or polling notices and poll cards.<sup>16</sup> The right discretions in the right context would, we think, meet Mr Potter’s concern. The current law only does so, where combination is discretionary or not permitted, by failing at all to regulate the multi-poll situation.
- 10.83 In the light of the responses, therefore, we are minded to turn our proposal into the following recommendation.

***Recommendation 10-10: A single set of adaptations should provide for situations where a poll involves several ballot papers.***

<sup>15</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 10.73 to 10.74.

<sup>16</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 10.118 to 10.120.

# CHAPTER 11

## ELECTORAL OFFENCES

### INTRODUCTION

- 11.1 Electoral conduct is regulated by special criminal offences. These are set out in the Representation of the People Act 1983 (the 1983 Act) and repeated in election-specific legislation. Some general criminal offences are relevant in the electoral law context, but “electoral offences” are important because they specifically target serious electoral offending by candidates and their agents. In this chapter, we consider the responses to our consultation paper’s four provisional proposals and five consultation questions relating to electoral offences.<sup>1</sup>

### THE LEGISLATIVE FRAMEWORK FOR ELECTORAL OFFENCES

- 11.2 The law governing electoral offences is set out principally in Part 2 of the 1983 Act. This also governs local government elections in England and Wales, and elections to the Greater London Authority. Other discrete legislative measures govern other elections, which 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 party list system.
- 11.3 Offences which are labelled a “corrupt” or “illegal” practice have special significance:
- (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; and
    - (b) on conviction the offender is disqualified from election for a period of 3 years (for illegal practice) or 5 years (for corrupt practice).
- 11.4 A person convicted of personation and certain other voting offences is additionally disqualified from being registered and voting at any election for a disqualification period.
- 11.5 One of the chief problems with electoral offences is that they are complex, and repeated in each discrete election-specific measure. In our consultation paper, we considered that electoral offences should be set out in a single set of provisions applying to all elections.<sup>2</sup> We made our provisional proposals based on

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, ch 11.

<sup>2</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.24 and 11.25.



the retention of the current scheme of specially targeted electoral offences, and the classification of some of those offences as corrupt or illegal practices. We nonetheless asked for consultees' views as to whether this scheme should be retained.

#### THE PLACE OF "CORRUPT AND ILLEGAL PRACTICES" WITHIN THE SCHEME

- 11.6 Our consultation paper described the difference between "corrupt" and merely "illegal" practice, which in essence is the length of the disqualification from elections (3 years for an illegal practice or 5 years for a corrupt practice), and the possibility of obtaining "relief" from the courts (illegal practices only). As to corrupt and illegal practices taken together, they also differ from other electoral offences and general criminal offences in that they can result in the invalidation of an election if they are committed by, or can be attributed to, the winning candidate. In other words their commission has a public law consequence for the validity of the election.<sup>3</sup>
- 11.7 While this can result in complexity, and the labels "corrupt" and "illegal" can be confusing, most consultees did not think the current scheme should be abandoned, as opposed to clarified. In the words of the national branch of the Association of Electoral Administrators (AEA) "the current system is the better alternative".
- 11.8 The Electoral Commission, argued that the current scheme of electoral offences should not be retained, because it seems to "add unnecessary complexity to the law", appearing "to be outdated" and therefore liable to be misleading.
- 11.9 An objection to the adequacy of the labels corrupt and illegal may well have merit. A modern drafter can use clearer labels than the existing ones. We are not convinced that an overhaul is necessary. In the end, we consider that the Electoral Commission's suggestion here amounts to better labelling of corrupt and illegal practices, not their overhaul.
- 11.10 In the light of responses, therefore, we make recommendations for reform in this field that focus on simplification, modernisation and clarification of a scheme that has merit but has become ill-expressed and confusingly labelled over the years since it was introduced in 1883. We now turn to these in more detail.

#### **A single set of electoral offences should be set out in primary legislation which should apply to all elections. (Provisional proposal 11-1)**

- 11.11 Thirty-eight consultees provided a response to this provisional proposal, and there was unanimous agreement with it.
- 11.12 Some consultees pointed out that this proposal would have to reflect the devolutionary position in the UK. We agree, and the offences in primary legislation will only apply subject to devolutionary competence to legislate for them. In the light of the response to this proposal, we are minded to turn it into the following recommendation.

<sup>3</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.14 to 11.23 and 13.94 to 13.99.

***Recommendation 11-1: A single set of electoral offences should be set out in primary legislation which should apply to all elections.***

## **THE ELECTORAL OFFENCES**

### **The classical campaign corrupt practice offences: bribery, treating and undue influence**

- 11.13 The Victorians introduced offences in the 19<sup>th</sup> century as a response to contemporary problems; violence, 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 ensure that elections were truly expressions of the democratic will. 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 aggressive mobs on polling day); and intimidation and undue influence, which aimed to reduce the effect of the powerful and influential on the electorate. These proscriptions continue in the form of corrupt practices of bribery, treating and undue influence, to which we now turn.

### **Bribery and treating**

- 11.14 Electoral bribery under section 113 of the 1983 Act proscribes the giving and receiving of a bribe, widely defined to include money, loans, a place or employment. Treating under section 114 is the offence of corruptly giving or providing meat, drink or “provision” to others.<sup>4</sup>
- 11.15 The mental element in bribery, we provisionally proposed, should be an intention to procure or prevent the casting of a vote at the election. The electoral offence of treating, which is rooted in Victorian problems of electoral largesse stirring up intimidating mobs, should be abolished and the behaviour it captures prosecuted as bribery where appropriate.

### **The offence of bribery should be simplified, with its mental element stated as intention to procure or prevent the casting of a vote at an election. (Provisional proposal 11-2)**

- 11.16 Thirty-five consultees submitted a response to this provisional proposal, and all supported it.
- 11.17 Richard Mawrey QC agreed that the definition of bribery should be simplified, but stressed that any reformed version of the offence “...should continue to include the kind of misuse of public money to target groups of potential voters [like]

<sup>4</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.30 to 11.44.

that...present at Tower Hamlets.<sup>5</sup> We must avoid going back to an over-simplified view of bribery as being confined to money paid to individual voters”.

- 11.18 We agree and do not envisage our simplification of the offence resulting in the scope of the offence being narrowed.

***Recommendation 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 an election.***

**The electoral offence of treating should be abolished and the behaviour that it captures should, where appropriate, be prosecuted as bribery. (Provisional proposal 11-3)**

- 11.19 All but one of the 35 consultees who provided a response agreed.
- 11.20 The Electoral Commission supported this provisional proposal, but stressed the need to continue to prohibit and to deter the behaviour at which the offence of treating is targeted.
- 11.21 The offence of treating was recently considered by Commissioner Mawrey QC in the *Tower Hamlets* petition, which challenged the election in May 2014 of Lutfur Rahman as mayor of Tower Hamlets. Commissioner Mawrey QC found that Rahman’s agent had organised a dinner for some 600 influential constituents for “the sole purpose of promoting Mr Rahman and his Mayoral campaign” and “the guests did not pay for the meal”. Commissioner Mawrey QC observed that these two facts evidenced that the event “ticks the boxes for the offence of treating”. However, he considered that the event was “distant” from the election (being four months before it), and there was “no evidence that any of the guests who were not previously committed to Mr Rahman’s cause were persuaded by this hospitality, however lavish, to award him their vote”.<sup>6</sup> The Commissioner held that this did not constitute treating. In his judgment, Commissioner Mawrey QC called for serious consideration to be given “to amalgamating treating – surely an obsolescent if not obsolete concept in the modern world – with the overall offence of bribery”.<sup>7</sup>
- 11.22 In our conversations with Gerald Shamash, an experienced electoral lawyer, he expressed scepticism that treating could or should be subsumed under bribery. The Electoral Commission cautioned against substantive change. We do not think we are proposing one. Provision of food and drink to voters would only be an offence where it amounts to bribery. This would apply to instances of direct largesse because of the intent to procure (or prevent) the recipients’ votes. It is the wrongful intent that matters. The Victorian concern about plying riotous or violent mobs with food and drink as a catalyst for creating intimidating crowds never affected the drafting of the offence of treating. One may be guilty of treating

<sup>5</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), paras 125 to 138 and 460 to 512. In the *Tower Hamlets* petition, Commissioner Mawrey QC held that grants made by Tower Hamlets council, on behalf of the mayor, Lutfur Rahman, to various organisations constituted bribes, as the grants were made with the corrupt intention that those who belonged to or benefited from those organisations would be induced to vote for him.

<sup>6</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 523.

a single person, as well as several, in breach of section 114 of the 1983 Act. We remain convinced that a simpler, clearer way to cover the offence of treating is to make clear it is covered by the bribery offence.

***Recommendation 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**

11.23 Undue influence is a corrupt practice contrary to section 115(2) of the 1983 Act. A person is guilty of undue influence –

- (a) 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 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
- (b) 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 to refrain from voting.

11.24 Our consultation paper noted that the offence was widely drafted and in our view was best understood if broken down into three components:

- (1) pressure and duress: to include any means of intimidation, whether it involves physical violence or the threat of it;
- (2) trickery: to cover devices and contrivances such as publishing a document masquerading as a rival campaign's; and
- (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.<sup>8</sup>

11.25 We provisionally considered that the first two components should be restated more clearly in a newly drafted offence, since section 115 of the 1983 Act is very complicated. We also asked whether the third element of the offence was justifiable. We first discuss consultees' responses on each of those issues.

<sup>7</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 670.

<sup>8</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.45 to 11.53.

**Undue influence should be restated as offences of trickery, pressure and duress. (Provisional proposal 11-4)**

PRESSURE, DURESS AND TRICKERY

- 11.26 All of the 37 consultees who provided a response to this proposal agreed that undue influence should be restated as offences of trickery, pressure and duress.
- 11.27 Paul Gribble CBE expressed support for the retention of the offence in strong terms, noting that it is “very necessary”. The Electoral Commission also expressed support for our provisional proposal:

Section 115 (undue influence) perhaps contains the most complex drafting of all the electoral law offences and we support the Law Commissions’ work in simplifying and modernising it. We agree that this offence should cover pressure / duress and trickery. More detailed consideration will be needed to further define these aspects, whilst avoiding the complicated drafting that is currently used in the law.

- 11.28 The importance of ensuring that the offence is well defined was also stressed by a number of other consultees. Both the joint response of the Society of Local Authority Lawyers in Scotland (SOLAR) and the Electoral Management Board for Scotland, and that of Mark Heath (Southampton CC), stated that the offence needs to be defined with sufficient precision to enable a successful prosecution. This was echoed by the Labour Party which called for the offence to be expressed in “terms which can be identified and defined either within this legislation or by other legislation or by case law”.
- 11.29 The Senators of the College of Justice said that the offence of undue influence should be retained as it is “flexible and useful”, but did not offer a firm view as to whether the offence should be restated in the manner we proposed. A number of consultees, including Mark Heath and Richard Mawrey QC recommended that the offence should be widely drawn. For example, in their joint response, SOLAR and the Electoral Management Board for Scotland suggested the offence should be expressed “as broadly as possible to cover any measure by which a person influences another to vote for an outcome which they would not otherwise have supported”.
- 11.30 Scott Martin (Scottish National Party) thought pressure and duress insufficiently distinguishable to stand as separate forms of the offence, but supported a better definition of trickery.
- 11.31 When responding to our questions about regulating campaign handling of postal ballot papers and postal voting applications, the Electoral Commission thought that clarification and revision of existing offences would be preferable to an absolute bar on handling postal voting documents. Whilst we agree, we point out that one of the offences proposed by the Commission – “it should be an offence for anyone to take an elector’s uncompleted postal ballot pack from them” – is not in our view currently covered by the undue influence offence, which requires some form of force, threat or fraud. An offence of taking an uncompleted postal ballot pack would amount to regulation of campaign handling of postal voting, which the Electoral Commission opposed and which in chapter 6 we did not recommend.

- 11.32 Richard Mawrey QC argued that the proposed offences of trickery, pressure and duress should be widely drawn, and that duress should be defined to include any form of physical intimidation or harassment. He also stated that “aggressive buttonholing of voters outside polling stations should be criminalised”.
- 11.33 Richard Mawrey QC referred to *Sanders v Chichester* in his response.<sup>9</sup> *Sanders v Chichester* concerned the 1994 European elections in Devon and East Plymouth, where a Mr Huggett stood as a “literal democrat” (saying he stood for the true meaning of democracy) and polled over 10,000 votes. The Liberal Democrat candidate lost by 700 votes, and brought a judicial review claim to challenge the returning officer’s decision to accept Mr Huggett’s nomination paper, arguing that the description “Literal Democrat” was intended to confuse and mislead electors. However, the court held that the rules did not prohibit candidates from describing themselves “in a confusing way or indulging in spoiling tactics” (as per Dyson J), and therefore the Liberal Democrat candidate lost the challenge. Mr Mawrey argued that this was a “scandalous” result. Indeed, similar attempts in 1997 to run as “New Labour” were dealt with, we are told, by Gerald Shamash acting for the Labour Party, by way of injunction to prevent the commission of undue influence by trickery. Mr Shamash urged us to preserve the width of the offence.
- 11.34 Undue influence is broad enough to include intimidation, a form of pressure. Commissioner Mawrey QC observed in the *Tower Hamlets* petition:

The court is aware that electoral law is the subject of a current investigation by the Law Commission and that part of its remit is the re-defining and reclassification of electoral offences. In the view of this court, section 115(2) sets the bar much too high for dealing with intimidatory behaviour during the conduct of the poll.<sup>10</sup>

- 11.35 We have strong reservations about lowering the bar. Undue influence currently covers the direct or indirect infliction or threat of force, violence, restraint, damage or harm to induce or compel a vote or non-vote. Impeding or preventing the free exercise of the franchise by duress is also prohibited. A new, unprecedented, and difficult to define prohibition would have to be enacted in order to criminalise some of the behaviour found by the Commissioner to have taken place in Tower Hamlets. It would crucially have to avoid penalising mere political fervour and the desirable promotion of participation and canvassing of voters. We are of the view that a more clearly defined offence of undue influence would suffice to deter the use of voter intimidation as a campaign tactic. The police will, of course, have recourse to the general criminal law to deal with disorder outside polling stations, and will be able to have recourse to a restated electoral offence of undue influence to make sure the public can vote unimpeded and unthreatened.

<sup>9</sup> (1995) 139 SJLB 15, not fully reported but transcript available in P Gribble, *Schofield’s Election Law*, loose-leaf, 6th reissue vol 5 pp E99 and E114 to E115.

<sup>10</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 623.

**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? (Consultation question 11-5)**

- 11.36 The third limb of undue influence targets the abuse of a position of influence, making particular reference to religious influence in referring to the threat of “spiritual harm”. Does threatening harm in the afterlife have a place in the modern law? Should the law criminalise not only pressure, threats and so on, but also abuses of influence more generally?
- 11.37 Out of 36 consultees who answered our question, 31 thought that the law should regulate abuse of influence, religious or otherwise, by a person over a voter. Three consultees disagreed, while two consultees were unsure.
- 11.38 Some stressed the importance of preventing the abuse of positions of influence. Professor Bob Watt, who answered our question affirmatively, considered that candidates should be allowed to persuade voters to support them but that there was a line between fair and unfair pursuit of this practice.
- 11.39 Others suggested that there was a particular need for this regulation because abuse of spiritual influence was, in the words of Richard Mawrey QC, “becoming widespread”. He strongly supported continued inclusion of abuse of religious influence in a redrafted undue influence offence.
- 11.40 This was echoed by Crawford Langley (Aberdeen CC), who stated that there was anecdotal evidence that influence, customary, religious or familial in nature was widespread in certain sections of the population. He added that proof may be difficult. Scott Martin (Scottish National Party) referred to abuse in landlord-tenant relationships as well as in employer-employee relationships.
- 11.41 Some of the consultees who supported the broader regulation of the abuse of a position of influence contemplated by this consultation question, expressed concern about how easy such an offence would be to prove and successfully prosecute. Mark Heath (Southampton CC) noted that the redrafted offence would need to be sufficiently clear so as to enable prosecutions. Gifty Edila (Hackney BC) said that finding evidence for the successful prosecution of an offence of abuse of influence could be difficult.
- 11.42 For other consultees, such concerns were reason enough not to support the introduction of a separate offence. Timothy Straker QC commented that this is a “difficult matter”, and may not be “properly enforceable” given the diversity of people’s beliefs and the possible range of influences.
- 11.43 The Metropolitan Police also considered that a new offence should not be introduced, because it is too difficult to define what is or is not abuse of influence. The Metropolitan Police argued that, to reach a criminal standard, it should be necessary to prove that there was some kind of direct or implied threat or action carried out as a consequence of the victim voting (or not voting) in a certain way. The Metropolitan Police considered that legislation may better reflect the intended meaning of the offence if the explicit use of the term “threat” were included rather than just the much vaguer term “influence”.

- 11.44 In addition, although a majority of consultees answered this consultation question affirmatively, it is not entirely clear from the responses what abuses of influence ought in their view to be regulated that do not amount to an existing offence. This issue was stressed by the Electoral Commission:

[W]e wonder whether the exercise of abuse of influence, religious or otherwise, by a person over a voter would fall within the pressure / duress element of the proposed undue influence offence, rather than it requiring separate provision.

It seems to us that anyone abusing a position of influence to seek to persuade someone to vote or not vote would be placing pressure / duress on that person. Therefore, we are not currently persuaded of the need to create a specific new 'abuse of influence' offence but instead consider that this should form part of the pressure / duress component of the reformed undue influence offence.

- 11.45 This point was echoed by the response of the Senators of the College of Justice who stated that, if the concept of undue influence is retained:

behaviour such as wrongful abuse of authority (whether as a result of religion, family pressure etc) is covered, and can be prosecuted as an offence.

- 11.46 Whilst we see some merit in this view, and consider that it would largely address consultees' concerns about the enforceability of an abuse of a position of influence offence, we do have reservations about leaving the protection of particularly vulnerable voters to a trickery or duress offence. As Dr Heather Green (University of Aberdeen) points out:

This question raises the neglected issue of voters with mental impairments who may be especially susceptible to abuse of influence by carers or others. When the law was reformed in 2006 to remove the common law bar on voting with a mental incapacity, no corresponding provision was made to change the law on election offences to protect against this risk. Given the increasing population of older voters with dementia, who retain a right to vote, perhaps a new offence of abuse of influence could be phrased in a way that responded to this risk.

#### *Threatening spiritual injury*

- 11.47 One consultee, David Boothroyd, (councillor on Westminster CC), specifically objected to the inclusion of threat of spiritual injury within an undue influence offence, stating that:

In practice, with the sole exception of the current *Tower Hamlets* case,<sup>11</sup> spiritual intimidation has been confined to Roman Catholic clergy in Ireland acting in favour of Irish nationalist candidates, and it surely is not inappropriate to comment that such an interpretation was

<sup>11</sup> The *Tower Hamlets* case (*Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB)) was not concluded until after the end of this project's consultation period.



being made by a Protestant judiciary guided by a unionist government.

11.48 Undue influence by threat of spiritual injury was a 19th century attempt to catch abuses of authority by members of the clergy. Such cases were only brought in Ireland, where the influence of the Catholic clergy was considered to be stronger.

11.49 In the recent *Tower Hamlets* election petition, which was decided after the conclusion of our consultation period, Commissioner Mawrey QC found that undue influence by threatening spiritual injury had modern relevance:

Though it is true to say that the world has moved on considerably since 1892, there is little real difference between the attitudes of the faithful Roman Catholics of County Meath<sup>12</sup> at that time and the attitudes of the faithful Muslims of Tower Hamlets.<sup>13</sup>

11.50 Commissioner Mawrey QC held that a letter signed by 101 religious leaders and scholars, published in a Bengali language newspaper (with an estimated readership of 20,000)<sup>14</sup> six days before polling day, constituted undue influence by threat of spiritual injury. The letter included references to insults against a senior cleric, and to the Muslim community.<sup>15</sup>

11.51 Commissioner Mawrey QC summarised his view on the interpretation of the scope of section 115 thus:

[T]here is a line which should not be crossed between the free expression of political views and *the use of the power and influence of religious office to convince the faithful that it is their religious duty to vote for or against a particular candidate*. It does not matter whether the religious duty is expressed as a positive duty – ‘your allegiance to the faith demands that you vote for X’ – or a negative duty – ‘if you vote for Y you will be damned in this world and the next’. The mischief at which s 115 is directed is the *misuse* of religion for political purposes.<sup>16</sup> (emphasis added)

11.52 Commissioner Mawrey concluded that the letter crossed the line and constituted the misuse of religion for political purposes; an attempt to convince the faithful that it is their religious duty to vote for or against a particular candidate.

<sup>12</sup> Commissioner Mawrey QC was referring to two election petitions that invalidated the elections of candidates in County Meath on the grounds of undue influence by threat of spiritual injury. See *Northern Division of the County of Meath* (1892) 4 O’M & H 185 and *Southern Division of the County of Meath* (1892) 4 O’M & H 130.

<sup>13</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 562.

<sup>14</sup> Although Commissioner Mawrey QC observes in his judgment that it was also shared widely on social media.

<sup>15</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 549.

<sup>16</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 158.

## **Reforming the offence of undue influence**

- 11.53 The undue influence offence is poorly expressed in legislation. The conduct which is criminal and the accompanying mental element are not clearly set out. However, as the response to our proposal and question shows, the aim of safeguarding voters from intimidation, physical compulsion and improper pressure remains important. It is thus desirable that the offence should be redrafted and modernised so it can be understood by candidates and campaigners, by police officers called upon to investigate complaints, by prosecutors who must decide whether to prosecute, and by the courts.

### **CONDUCT WHICH IS CRIMINAL OR WRONGFUL UNDER THE LAW**

- 11.54 One of the ways to make the offence clearer is to express part of it as involving the commission or threat of an illegal act with the intent of causing voters to vote or not to vote at an election. That would cover various elements of section 115 of the 1983 Act: abduction, inflicting or threatening to inflict physical harm, etc, with the intention of preventing or influencing voting.

### **OTHER APPLICATIONS OF IMPROPER PRESSURE**

- 11.55 However, undue influence also extends to the application of pressure which may not involve the threat or commission of an illegal act. Examples include a threat to terminate an employment contract or a lease unless the employee or tenant votes in a particular way. An employer or landlord may be within his or her strict legal rights in terminating a contract of employment or a lease; election law nevertheless seeks to proscribe such improper pressure being applied to voters, currently by proscribing the threat or infliction of any damage, harm or loss. Deterring candidates from encouraging supporters to resort to improper pressure is also an important aim which our redrafted offence must reflect.

### **RELIGIOUS AND OTHER INFLUENCE**

- 11.56 Similarly, as the response to our consultation shows, there is a continued case for proscribing interventions by people with influence over others, including religious figures, intended to manipulate others into backing a particular candidate. But not every religious pronouncement is actionable. Commissioner Mawrey's judgment in *Tower Hamlets* made it clear that the clerics' letter had crossed a line and amounted to the misuse of religion for political purposes. What is common between the *Tower Hamlets* case and the Victorian cases finding undue spiritual influence is religious officials using their authority over the faithful in the electoral area improperly to deliver votes for a preferred candidate.
- 11.57 While Commissioner Mawrey was keen to stress that actionable undue influence by statements from religious figures involves crossing a line, it is not at all clear where section 115 of the 1983 Act draws that line. Modern day electorates are subjected to a range of opinions, pronouncements, admonishments, and warnings from various sections of the community. Plainly the political opinion of community or business leaders is not and should not be prohibited from being expressed. Similarly a member of the clergy may express political as well as religious views, and is protected in doing so by articles 9 and 10 of the European Convention on Human Rights. Limitations on freedom of expression and on the manifestation of religious beliefs must be prescribed by law, and be necessary in a democratic society.

#### FORMULATING OFFENCE OF IMPROPER PRESSURE

- 11.58 Undue influence in our view seeks generally to proscribe “improper” pressure (of a form short of that which is itself illegal pressure) with a view to preventing the improper use of religious or other influence or authority so as to manipulate voting. We have concluded that the offence of undue influence should be redrafted to cover intimidation, deception<sup>17</sup> and other *improper* pressure.
- 11.59 We do not consider it practicable to create a catalogue of relationships capable of giving rise to undue influence, nor a catalogue of improper forms of pressure. We propose instead to proscribe intentionally seeking to cause a voter to vote in a particular way or not at all by applying:
- (1) pressure involving the commission or threat of committing an illegal act; or
  - (2) pressure which a reasonable person would regard as improperly impeding the free exercise of the franchise.
- 11.60 We think that the introduction of a “reasonable person” test above will enable campaigners, the police, prosecutors and courts to distinguish proper campaigning (which includes persuading, warning, arguing, all of which involve pressure, which the voter must decide on) from improper infringements on the exercise of the franchise (which eliminate or restrict the choice of the voter). The precise form of the offence of improper pressure, mental element and maximum sentence will need to be carefully drawn, so as to be proportionate to the legitimate aim of safeguarding the free exercise of the franchise. The label “undue influence” may also be unhelpful. This is a difficult matter on which we will develop our thinking in time for our final report and draft Bill.
- 11.61 Nevertheless, the reformed offence of undue influence will involve the making of judgements about what is and is not improper pressure. It may be considered by some to be imprecise. Furthermore, in the charged electoral atmosphere, as the Association of Chief Police Officers pointed out in its response, complaints have been made at election time, only to be dropped after the election. Prosecutorial discretion will therefore remain an important tool in determining the cases which it is appropriate to bring before the courts. But there is a risk in England and Wales and Northern Ireland that the undue influence offence may be privately prosecuted in circumstances where the pressure complained of was entirely proper. In Scotland, private prosecutions are exceptionally rare. The High Court of Justiciary has power to authorise private prosecution at solemn level (that is, in serious cases) in the High Court. Private prosecution is incompetent in solemn procedure in the Sheriff Court. It is incompetent in summary procedure unless expressly authorised by statute.

#### CONSENT TO PROSECUTION

- 11.62 The matter of consent to prosecution has been considered by the Law Commission for England and Wales. In the Consents to Prosecution Report (1998) we considered the provisions that impose a requirement of the consent of the Attorney General or the Director of Public prosecutions (DPP) to the bringing

<sup>17</sup> We prefer the term “deception” to trickery or use of a “fraudulent device”.

of a prosecution for a particular offence.<sup>18</sup> We were concerned that such requirements impinged on the fundamental right of the citizen to bring a prosecution for a criminal offence and concluded that they should be confined to three categories of offence, two of which were

- (1) offences in the case of which it was very likely that a reasonable defendant would contend that a prosecution for the particular offence would violate his or her rights under the European Convention on Human Rights; and
- (2) offences in the case of which there was a high risk that the right of private prosecution will be abused and the institution of proceedings will cause irreparable harm.

11.63 These, we recommended, should be subject to a requirement of the consent of the DPP to a prosecution.<sup>19</sup>

11.64 We were concerned to deal with cases where the harm that derives from an inappropriate prosecution could not be adequately remedied by the power of the DPP to take over and discontinue a prosecution. They instanced a prosecution for misfeasance in public office brought against a councillor shortly before an election.<sup>20</sup>

11.65 In making these recommendations we were not seeking to cast doubt on the appropriateness of any criminal offences existing; we were, rather, concerned that mechanisms to prevent the bringing of inappropriate prosecutions should apply to offences the nature of which was such as to create a risk of abusive private prosecutions which would infringe human rights or the very bringing of which would cause harm that could not be remedied by the later discontinuance of the proceedings.

11.66 A requirement of consent to prosecution is not a feature of current electoral law. We have considered whether it should nevertheless apply to any of our recommended electoral offences. We have concluded, in accordance with our 1998 recommendations, that such a requirement should apply to our recommended offences insofar as they involve using pressure which a reasonable person would regard as improper. This is because of the twin risks of inappropriate prosecutions being brought seeking to stigmatise as improper pressure communications that in fact constitute legitimate exercises of religious freedom or free speech pursuant to articles 9 or 10 of the Human Rights Convention and (self-evidently) of their being brought in the run-up to an election; it is readily imaginable that the very bringing of such a prosecution, with its

<sup>18</sup> Consents to Prosecution Report (1998) Law Com No 255, available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc255\\_Consents\\_to\\_Prosecution.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc255_Consents_to_Prosecution.pdf) (last visited 11 January 2016).

<sup>19</sup> Consents to Prosecution Report (1998) Law Com No 255, paras 6.37 and 6.52. The third category comprised offences involving national security or some international element, which should be subject to a requirement of the consent of the Attorney General.

<sup>20</sup> Consents to Prosecution Report (1998) Law Com No 255, para 6.49.

attendant publicity, could seriously hamper a candidate's campaign. The same concerns do not arise in Scotland.<sup>21</sup>

***Recommendation 11-4: Undue influence should be restated as offences of intimidation, deception and improper pressure. Pressure will be improper if:***

***(a) it involves the commission or threat of commission of an illegal act; or***

***(b) a reasonable person would regard it as improperly infringing the free exercise of the franchise.***

***Recommendation 11-5: In England and Wales and Northern Ireland prosecutions pursuant to Recommendation 11-4 (b) should only be brought by or with the consent of the Director of Public Prosecutions.***

### **Illegal practices targeting campaign conduct**

11.67 Other classical offences are labelled illegal practices. In our consultation paper, we considered three in particular, and asked a series of consultation questions:

- (1) printed campaign material must be “imprinted” with details of, among others, the person causing it to be published. We asked whether the current power to make provision concerning imprinting of “other” (including online) material is sufficient, or whether it is desirable and feasible, within the remit of this project, to recommend regulation of online material;
- (2) secondly, we asked whether the illegal practice of disturbing election meetings should apply only to candidates and those supporting them, and no longer be predicated on the “lawfulness” of the meeting; and
- (3) thirdly, we asked whether the offence of falsely stating that another candidate has withdrawn should be retained.<sup>22</sup>

**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? (Consultation question 11-6)**

11.68 We received 34 responses to this particular consultation question. Twenty-two consultees supported regulation of online material as desirable and feasible. The views of the other consultees who replied to this question were split. A number thought such regulation undesirable, while others, seeing merit in it, did not think regulation was feasible. Four consultees considered regulation to be desirable, but were unsure about feasibility. Two consultees answered that regulation was desirable, but not feasible. One consultee said regulation was not desirable and another answered that it was not feasible, but did not mention desirability. Three

<sup>21</sup> On private prosecutions in Scotland, see para 11.61 above.

<sup>22</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.54 to 11.75.

consultees did not express a firm view either way, and provided comments only. Scott Martin (Scottish National Party) said that statutory guidance on compliance would be necessary.

- 11.69 The national branch of the AEA, whose response was supported by others, explained that “[t]he way people communicate and access information over recent years has changed and publicity and media campaigns have adapted to this change to capture this vast audience via digital sources”. It added:

With the present wide use of social media and the challenges and issues that can arise as a result in terms of the conduct of an election or referendum, there is a need for online material to be regulated.

- 11.70 A common argument put forward by consultees in favour of regulation of online material was that the law needs to keep up with the changing reality of campaign communication. The imprint offence exists to ensure that campaign material is on its face traceable to the candidate so that electoral offences and the regulation of campaign expenditure can be enforced. Consultees pointed out that this rationale applies with equal force to online material. The asymmetry in the regulation of printed material and online material was seen as unsatisfactory. This was the view of the Electoral Commission, for example.

- 11.71 The Senators of the College of Justice said that “some control over online information would be desirable”, while Paul Gribble CBE stated “[t]raceability of literature is very important”. The Labour Party said:

Our view is that any material including electronic material which is produced for the electoral benefit of candidates representing a political party or independent candidates should contain either the address or a link to an address where that Party or individual may be contacted in respect of any matters associated with the item in question. This should also apply if the item is designed to act against the election of any candidate or list of candidates.

#### IS REGULATING ONLINE CAMPAIGN MATERIAL FEASIBLE?

- 11.72 The Electoral Commission expressed concern about the feasibility of introducing online regulation. It stressed the importance of ensuring that the scope of any new imprint requirements is proportional, relating that imprint regulation of online material was introduced for the first time in the Scottish independence referendum in September 2014, but was “unintentionally wider than had been intended”. We observed, in our consultation paper, that the test under the Scottish Independence Referendum Act 2013 (the 2013 Act) was much broader than under the 1983 Act, as it regulated material “relating” to the referendum, regardless of whether or not it could be “reasonably regarded as intending to procure or promote any particular result”.<sup>23</sup> The 2013 Act therefore could be interpreted as regulating material that did not support any particular outcome, unlike the 1983 Act.

<sup>23</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.59 and 11.60. See also, Scottish Independence Referendum Act 2013, sch 4 para 27.

- 11.73 The Electoral Commission recognised this as a difficulty and observed, in their report on the Scottish independence referendum, that “[t]his caused some confusion amongst campaigners and the public about what did and did not require an imprint. For example, there were questions as to whether an individual’s personal Facebook and Twitter accounts should include an imprint”.<sup>24</sup> The question of what sort of material should be regulated was a vexing one for consultees, causing some to question whether regulation was feasible.
- 11.74 The Association of Chief Police Officers Electoral Malpractice Portfolio (ACPO) commented that imprint offences formed a large part of reported electoral offences but were, mainly, dealt with as a local resolution — not as a criminal conviction. ACPO supported the requirement for an imprint but could not “see any feasible means of ensuring online material is subject to the same regulations”. It questioned whether a website’s imprint declaration would cover social media.
- 11.75 We do not consider the hurdles noted by consultees as to the feasibility of an offence insurmountable. Indeed, the regulation of online material during the Scottish independence referendum campaign seemed to have been workable, notwithstanding the unintentionally wide scope of the regulation to material “relating” to the election, and not just material intended to procure or promote a particular result. After the referendum, the Electoral Commission reported:
- Our interpretation of these requirements was that campaigners who used Twitter or other forms of social media in a way that was focussed primarily on campaigning for an outcome at the referendum needed to ensure they had an imprint where it was practical for them to do so, such as on the homepage of their blog or Twitter profile. However, we considered that individual members of the public or organisations with a range of other interests and activities represented who were just expressing their views on an outcome would not need to do this. We believe it is important that any future changes to the rules do not unintentionally capture such activities.<sup>25</sup>
- 11.76 The approach of the Electoral Commission explained in their report, outlined above, seems a sensible and workable way to regulate online campaign material. As the Scottish independence referendum has shown, experience of regulating online material will aid the development of best practice. We consider therefore that an imprint requirement with the flexibility afforded by a “reasonably practicable” defence, applying to the narrower 1983 Act definition of “campaign material” could feasibly regulate online campaign material.

<sup>24</sup> Electoral Commission, *Report on the Scottish Independence Referendum held on 18 September 2014* (December 2014) [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0010/179812/Scottish-independence-referendum-report.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/179812/Scottish-independence-referendum-report.pdf), para 5.138 (last visited 6 January 2016).

<sup>25</sup> Electoral Commission, *Report on the Scottish Independence Referendum held on 18 September 2014* (December 2014) [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0010/179812/Scottish-independence-referendum-report.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/179812/Scottish-independence-referendum-report.pdf), para 5.139 (last visited 6 January 2016).

## LIABILITY OF PRINTERS AND PUBLISHERS

- 11.77 The News Media Association expressed concern about the liability of online publishers of campaign material, recommending that strong safeguards be in place. It considered that, as in print, the publisher's name should not be required as part of the imprint and that there should be a due diligence defence where compliance issues originated with the agent or candidate, and where the online publisher took all reasonable means to verify the information given. According to the News Media Association, such a defence would form the starting point of safeguards available to responsible online publishers. In addition, it stated that new legislation should acknowledge that it is practically impossible for publishers to retain control over how online material is used in a post-publication context, due to the "ease with which online material can be communicated, re-produced and altered". As such, stated the News Media Association, "[i]f liability is to attach to anyone for imprint failure in these circumstances, it ought not to be the publisher".
- 11.78 In recommending introducing an imprint offence for online campaign material, we do not intend to add any additional requirements or liability for online publishers than to those of print publishers under the current law. Therefore, the publisher's name would not be required as part of the imprint (only the promoter who caused it to be published, who is usually the candidate or election agent), and there would continue to be a due diligence defence for printers, publishers and promoters of the material. We also consider that a "reasonably practicable" defence, of the kind that was available in the Scottish independence referendum campaign, would provide the legislative recognition and protection requested by the News Media Association.
- 11.79 Both the Electoral Commission and the Labour Party questioned the need for the law to require the printer of hard copy material to state their name or address, given that these details are secondary to the question of who is responsible for the cost and content of the material. However we are not persuaded that there will not be some cases where the material is regulated and only the printer can identify who promoted and paid for it. We are not convinced that the law needs to change in this respect.

## CRIMINAL OFFENCE OR CIVIL SANCTION?

- 11.80 The Electoral Commission also commented that:

Although we produce guidance for them on the imprint requirements, monitoring compliance with these rules is a matter for the public, and breaches of the rules can only be sanctioned by criminal prosecution. There is a question as to whether it would be more proportionate to give us civil sanctions and investigatory powers for the candidate spending and donation rules generally, and for these imprint requirements in particular.

- 11.81 In the context of party and national campaign regulation, the special "corrupt and illegal practice" regime does not apply. In the context of a local election, the policy is that the law's requirements, if breached, can result in the nullity of the election. The onus is on the winning candidate to seek relief. Transferring the imprint offence from the criminal sphere to that of civil sanctions enforced by the Electoral Commission removes it as a ground for annulling elections. As a matter



of policy, Governments may conclude that in order to deter candidates who are not likely to win from breaching the imprint rules, the Commission's civil sanctions powers should extend to local elections. But they cannot replace the criminal offences entirely. We therefore are not persuaded by this suggestion.

**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? (Consultation question 11-7)**

- 11.82 Of the 31 consultees who answered this question, 22 consultees agreed that the illegal practice of disturbing election meetings should no longer be predicated on the lawfulness of the meeting, which is the second limb of the question.
- 11.83 As to the first limb of our question (restricting the illegal practice of disturbing election meetings to candidates and those supporting them) 19 consultees answered affirmatively. Three consultees answered negatively, saying that the illegal practice of disturbing election meetings should *not* only apply to candidates and those supporting them, but answered yes to the second part (believing that the illegal practice should no longer be predicated on the lawfulness of the meeting).
- 11.84 Six consultees answered both aspects of our question negatively, but for different reasons. Two argued that the offence should remain unchanged and four argued that it should be removed altogether. One consultee was unsure and another commented but did not offer a firm view.
- 11.85 Other consultees who argued that this offence should be abolished completely, including SOLAR and the Electoral Management Board for Scotland, Ian Miller (Wyre Forest DC) and Crawford Langley (Aberdeen CC) thought the offence "anachronistic" and disturbances to meetings better dealt with under the general criminal law. However, this would mean that candidates or their agents would no longer be subject to the public law consequences of committing an illegal practice, outlined above. A general criminal offence would not be as effective a means of holding candidates and their agents accountable for unfair campaign practices.
- 11.86 The Electoral Commission thought that the offence should no longer be predicated on the meeting being "lawful", but argued that the offence should continue to apply to but not be restricted to candidates and their supporters. The disturbance of an election meeting by anyone is "a serious matter as it frustrates the democratic process". Alastair Whitelaw (Scottish Green Party) echoed that view, pointing out that "vociferous pressure groups are equally likely, and perhaps nowadays are more likely, to disrupt meetings".
- 11.87 In our consultation paper, we thought that the general criminal offence under section 1 of the Public Meeting Act 1908 would suffice to criminalise the disturbance of meetings by, for example, pressure groups.<sup>26</sup> We remain of that view. Of course, a "vociferous pressure group" might, for example, disrupt a meeting for the purpose of promoting a particular candidate. If the group does so

<sup>26</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 11.64.

with the candidate's approval or support, that candidate will be responsible in election law for their actions as agents. A distinction between supporters of candidates and members of the general public may be difficult to make, but will be a question of fact for the court. We are therefore not persuaded by these objections: we propose that the public in general should be criminally liable under the Public Meeting Act 1908, while the candidate and agents should be both criminally liable and liable to disqualification under a reformed electoral offence.<sup>27</sup>

**Should the offence of falsely stating that another candidate has withdrawn be retained? (Consultation question 11-8)**

11.88 Of the 34 consultees who answered this particular question, 29 considered that candidates should not be permitted to falsely state that another candidate had withdrawn. Of these, 13 consultees thought that this should be regulated by our proposed restatement of undue influence by deception, while 16 said that the offence of falsely stating that another candidate has withdrawn should be retained independently. Three consultees said that the offence should not be retained, while two consultees did not offer a firm view.

11.89 There was thus broad agreement that falsely stating that another candidate has withdrawn should be prohibited by the criminal law. The question is whether this should be by way of an independent criminal offence, as is the case currently, or whether it should instead be covered by our proposed undue influence by deception offence. Alan Mabbutt OBE (Conservative Party) argued that the offence should be retained, noting that some electors would be deterred from travelling to the polling station if they thought their preferred candidate had withdrawn. Mr Mabbutt added that false rumours are much more liable to spread quickly and be believed on social media, observing:

Even prominent news organisation repeat tweets from random people as though they are Royal Proclamations.

11.90 Gifty Edila (Hackney BC) also stressed the relevance of social media to this offence, while Mark Heath (Southampton CC) thought that the offence "should be retained as a deterrent".

11.91 Other consultees considered that this "foul play" could be prohibited by the undue influence offence by deception.<sup>28</sup>

11.92 We take the point that, even if the public are better informed by modern media, there is still a substantial risk that false news could spread virally and be difficult to overturn, particularly on polling day. However we consider that, if a deliberately false statement was effective to convince voters that a candidate had withdrawn, it would almost certainly amount to undue influence by deception. We do not therefore think it necessary to maintain a separate overlapping offence.

<sup>27</sup> The provisions of this Act are replicated as respects Northern Ireland by the Public Order (Northern Ireland) Order 1987 SI 463, art 7.

<sup>28</sup> The only substantial difference between undue influence and the offence of falsely stating that another candidate has withdrawn is that the former is a corrupt practice (and so subject to more severe penalties, for example, a longer disqualification period) and the latter is an illegal practice.

***Recommendation 11-6: The imprint requirement should extend to online campaign material which may reasonably be regarded as intending to procure or promote any particular result, subject to a reasonable practicability defence.***

***Recommendation 11-7: The illegal practice of disturbing election meetings should apply only to candidates and those supporting them, and should no longer be predicated on the “lawfulness” of the meeting.***

***Recommendation 11-8: The offence of falsely stating that another candidate has withdrawn should not be retained; where such a statement is effective to convince voters that a candidate had withdrawn it should amount to undue influence by deception.***

## **COMBATING ELECTORAL MALPRACTICE**

- 11.93 The current regime of electoral offences can only result in a maximum sentence of 2 years’ custody. That has resulted in prosecutorial recourse in England and Wales to the offence of conspiracy to defraud, which carries a maximum sentence of ten years’ custody and has resulted in harsher sentences.<sup>29</sup> There may be less practical experience in Scotland of that offence in an electoral context, and it may be thought that there are evidential and conceptual difficulties in proving the offence in Scots law. In any event, in our consultation paper, we queried whether there is a case for longer custodial sentences for the commission of serious electoral offences.<sup>30</sup> We therefore asked consultees whether an increased sentence of ten years’ custody should be available in such cases as an alternative to prosecution for conspiracy to defraud.

### **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? (Consultation question 11-9)**

- 11.94 Of the 32 consultees who provided a response to this consultation question, 29 supported an increased sentence of ten years’ custody in cases of serious electoral fraud. Two consultees agreed in principle, but with certain qualifications. Two consultees offered comment only, without expressing a view either way.
- 11.95 Many consultees, including the national branch of the AEA, Timothy Straker QC, the Senators of the College of Justice, Dr Heather Green (University of Aberdeen), the Labour Party and Paul Gribble CBE agreed that an increased sentence should be available, and did not make any further comment. Professor Bob Watt (University of Buckingham) stated that “[t]he subversion of a democracy is a very serious crime and should be punished accordingly”. The joint response of SOLAR and the Electoral Management Board for Scotland thought an

<sup>29</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 by virtue of the Criminal Procedure (Scotland) Act 1995, s 3(3).

<sup>30</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.70 to 11.75.

increased maximum sentence would avoid “the need to have recourse to common law offences”.

- 11.96 The Electoral Commission supported increased sentences to provide appropriate deterrents, but expressed some reservations:

We understand that some cases where an allegation of an electoral offence has been made have not been prosecuted because the prosecuting body has considered that the penalties in the event of a conviction are not great enough to merit bringing a prosecution.

Therefore, we would support such an increased sentence in principle but further consideration would need to be given to when it would apply; it is not clear what ‘serious electoral fraud’ means.

- 11.97 We used the term “serious electoral fraud” to refer generally to serious electoral offences, such as corrupt practices, including the postal and proxy voting offences contained in section 62A of the 1983 Act. We do not consider it necessary to use that term in legislation. We propose that the maximum sentence for the offences we have in mind should be increased to ten years, not with a view to raising the levels of penalty for these offences across the board but to providing adequate sentencing powers in the most serious cases.

***Recommendation 11-9: A maximum sentence of ten years’ custody should 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

### INTRODUCTION

- 12.1 In this chapter, we consider our reform recommendations for the regulation of campaign expenditure, which has grown very complex over time. In our consultation paper, we set out five provisional proposals.<sup>1</sup> We will first consider our core reforms for the legislative framework of the regulation of campaign expenditure (provisional proposals 12-2 and 12-3 in our consultation paper), before turning to our reform recommendations for expense limits calculated by formula (provisional proposal 12-4), and finally for simplifying the provisions on expenses returns (provisional proposals 12-5 and 12-1).

### CENTRAL LEGISLATIVE EXPRESSION OF CORE CAMPAIGN REGULATION

- 12.2 The law regulates spending at elections in the following way:
- (1) Responsibility for election spending falls on 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. Third parties may spend money up to a specified limit;
  - (2) Expense limits are prescribed by law as fixed amounts or formulas. The election agent must complete and deliver to the returning officer a return and declaration of expenses signed by the candidate; and
  - (3) Breaches by candidates or their agents of expenditure regulations (whether to do with expense limits or accuracy of the returns reporting spending) are variously corrupt and 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.
- 12.3 The election agent is thus a key mechanism for pursuing the policies of channelling spending, limiting expenses, and ensuring that they are reported.
- 12.4 However the law, which is contained in the Representation of the People Act 1983 (the 1983 Act) and replicated in election-specific provisions, is extremely complex. The scheme of the 1983 Act is not obvious even to lawyers. We took the view in our consultation paper that the law should be restated to start with the definition of expenditure which is subject to limits, then define the additional kinds of expenditure which must be channelled through the agent, or which must be reported.<sup>2</sup> Additionally, we considered that the provisions regulating campaign

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, ch 12.

<sup>2</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 12.54.

expenditure should be centrally stated for all elections, with a single schedule containing prescribed expense limits and guidance as to expenditure and donations.

**Provisions governing the regulation of campaign expenditure should be centrally set out for all elections. (Provisional proposal 12-2);**

**A single schedule should contain prescribed expense limits and guidance to candidates as to expenditure and donations. (Provisional proposal 12-3)**

- 12.5 All 34 consultees who this provisional proposal 12-2 agreed with it.<sup>3</sup> Similarly all 32 consultees who responded to proposal 12-3 also agreed.
- 12.6 Alastair Whitelaw (Scottish Green Party) said that “clarity for end-users is vital”. He noted the difference in the legal regulation of constituency or local level expenses on the one hand and the regulation of national level expenses and donations. We agree; moreover the regulation of expenditure and donations at the national level is outside the scope of this reform project.

***Recommendation 12-1: Provisions governing the regulation of campaign expenditure should be in a single code set out for all elections, subject to devolved legislative competence.***

***Recommendation 12-2: A single schedule should contain prescribed expense limits and guidance to candidates as to expenditure and donations.***

#### **EXPENSE LIMITS CALCULATED BY FORMULA**

- 12.7 In our consultation paper, we maintained that the regulation of campaign spending should be capable of being understood and complied with by candidates.<sup>4</sup> Certain limits, for example those for spending at local government elections or UK Parliamentary general elections, are expressed as formulas such that the precise limit can only be established if the candidate or agent knows the number of registered electors on the day of notice of election. The determination of expense limits falls outside the scope of this project. Our consultation paper provisionally proposed that the monetary amount of expenditure limits which are calculated according to a formula should be declared by the returning officer along with the notice of election.

**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 12-4)**

- 12.8 Of the 33 consultees who submitted a response to this provisional proposal, 26 consultees agreed. Three consultees expressed only conditional agreement, one consultee disagreed and three consultees did not express a firm view.

<sup>3</sup> Subject in some cases to respecting devolved legislative competence, as we intend to do.

<sup>4</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 12.58 to 12.68.

12.9 The Electoral Commission, who supported this provisional proposal, stated that:

Evidence from previous elections, including the 2010 UKPGE, suggests that even when they are provided with this figure some have not been able to calculate the limit properly. Giving this responsibility to the returning officer should ensure that there is clarity about what the spending limit is at most of these elections and, therefore, reduce the potential for accidental non-compliance.

- 12.10 Alastair Whitelaw commented that the proposal would be “extremely useful”, and two returning officers, Crawford Langley (Aberdeen CC) and Ian White (Kettering BC), noted that this would reflect their current practice.
- 12.11 The southern branch of the Association of Electoral Administrators (AEA) and New Forest DC both commented that expenditure limits are easily communicated to candidates and thus could be easily published online for public use. They noted however that publishing such expenses limits in a printed form can become onerous and physically difficult to accommodate on notice boards.
- 12.12 We recognise that requiring returning officers to publish a high number of physical notices can be administratively onerous. It is our view that any duty to notify the public should include a power to notify them at large by publication online.<sup>5</sup>
- 12.13 One consultee, Ian Miller (Wyre Forest DC) called for a review of when a person becomes a candidate for the purpose of the regulation of election expenditure, saying that the current rules are confusing and could be manipulated by candidates to minimise their recorded expenditure. However, under the current law, 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 they become a candidate. This is because under section 118A of the 1983 Act, a person becomes a candidate when declared a candidate “by himself or by others”. This means that whether or not a person is a candidate is a question of fact, resulting in the possibility that persons may become candidates prior to their own declaration of their candidacy or to the beginning of the nomination period. It is not in our view possible for a person to circumvent the rules on expenses by spending money before becoming a candidate.<sup>6</sup>
- 12.14 Whilst there was broad support for this provisional proposal, a number of electoral administrators expressed some reluctance about taking responsibility for publishing the expenditure limit. The London branch of the AEA was concerned about who would be responsible for miscalculations under this proposal.
- 12.15 Similarly, the eastern branch of the AEA commented that there were differing opinions within the branch. Some members supported the proposal, believing it would assist independent candidates and new agents without being substantively onerous, whereas others believed the calculation of expenses opens up the risk

<sup>5</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 12.39.

<sup>6</sup> Representation of the People Act 1983, s 118A.

of challenge should the calculation be incorrect. It added:

Were this to be a requirement, it is unclear how useful the publication of a notice would be to the public and the preference would be for the information to be provided to candidate/agents and on request.

- 12.16 In their joint response, the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and the Electoral Management Board for Scotland commented that the proposal would render the returning officer responsible for not only the accuracy of the number of electors but also the accurate application of relevant formulas. It stated:

Returning officers should not be required to become involved in the accuracy of returns of election expenses which should otherwise remain the responsibility of candidates and their agents.

- 12.17 We agree that returning officers should not be legally responsible for the accuracy of expenditure returns. Nevertheless, candidates must be subject to the same expenditure limit in a particular constituency. This consistency is not necessarily achieved at the moment and, as the Electoral Commission points out, some candidates calculate the expenditure limit wrongly at present.

- 12.18 The main difficulty in applying the formula lies in knowing the number of electors to be used within it. That information is available to returning officers, and applying the formula should then be straightforward. We are not persuaded that the risk of getting it wrong is great. We consider that, on balance, there are significant benefits to candidates, and ultimately to the electorate, in having accessible, clear and consistent expense limits.

***Recommendation 12-3: 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.***

#### **Accessing the electoral register for the purpose of verifying donors**

- 12.19 The Co-operative Party raised an independent concern:

Political Parties that receive a donation exceeding £500 are required to check before accepting the donation that the donor is currently on the electoral register. Recent advice to electoral registration officers has required that the Party must request a full copy of the register in order to do that and – to ensure that the register is current – must make a new request in respect of each and any further donations. This process is cumbersome and excessive, and it would be much simpler if electoral registration officers were able just to confirm to parties that an individual is on the electoral register at the given address on that date, without needing to supply the full register.

- 12.20 The responsibility for checking the permissibility of a donor lies with the party's treasurer, and we consider that the work involved in meeting this responsibility should be done by the treasurer, not the returning officer. Electoral Commission guidance suggests that this is best achieved in the following way:



Parties are entitled to a free copy of the full electoral register. A new version of the electoral register is usually published on 1 December every year, and it is updated regularly. You should contact the electoral registration officer at the relevant local council for your copy, explaining that you are asking for it as a registered political party. You should also ask them to send you all the updates. You must check the register and updates carefully to make sure that the person is on the register on the date you enter into the loan, or on which you received the donation.<sup>7</sup>

- 12.21 We consider that the approach advocated by the Electoral Commission is sensible, and is not excessively burdensome. Returning officers should, as best practice, provide updates to the register (rather than providing the entire register repeatedly). However, we do not consider that there should be any additional legal obligations on returning officers.

### **SIMPLIFYING THE PROVISIONS ON EXPENSES RETURNS**

- 12.22 At present, the law governing expenses returns, which report expenses, is confusing. In our consultation paper, we considered that returning officers should publicise and make available for inspection expenses returns, and that secondary legislation should prescribe the process for that publicity and inspection, paving the way for online publication. We also considered that returning officers should receive a single expense return by the agent and candidate, including any authorised spending.<sup>8</sup>

**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. (Provisional proposal 12-5)**

- 12.23 There was almost unanimous agreement with this provisional proposal. All but one of the 33 consultees who provided a response to this provisional proposal supported it. One consultee did not express a firm view, but asked for clarification as to the effect of this provisional proposal.
- 12.24 The joint response of SOLAR and the Electoral Management Board for Scotland commented that the proposal would simplify the returns process of election expenses, as well as make it more understandable, the effect of which would be a reduction in the risk of errors in compliance with legal requirements.
- 12.25 Ian White (Kettering BC) agreed, “provided they are easy to understand for anyone choosing to inspect them, and state clearly what the maximum amounts that can be spent are”.

<sup>7</sup> Electoral Commission, *Permissibility Checks for Political Parties* (2010) [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0015/102282/sp-permissibility-rp.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0015/102282/sp-permissibility-rp.pdf), p 5 (last visited 11 January 2015).

<sup>8</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 12.36 to 12.41 and 12.69 to 12.71.

- 12.26 Alastair Whitelaw (Scottish Green Party), the only consultee who did not express a firm view, asked whether this would entail combining the existing return of election expenses with the return of candidate's expenses. We did not intend to suggest that these two returns would be combined so that only one figure need be submitted, but rather, that they would still be recorded separately but submitted together as a single set of documents.
- 12.27 Given the response, we are minded to recommend as we proposed.

***Recommendation 12-4: 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.***

**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 12-1)**

- 12.28 Of the 35 consultees who submitted a response to this provisional proposal, 32 agreed. One consultee expressed only conditional agreement, and two consultees disagreed.
- 12.29 Some of the consultees who expressed unconditional support for this provisional proposal nonetheless commented on the importance of ensuring online submission of expenses returns is available in the future. The national branch of the AEA, whose response was endorsed by a number of electoral administrators that submitted separate responses, commented that:

The AEA supports this provisional proposal and in addition would like to see an online facility for the submission of expenses returns in the near future. Consideration will need to be given as to how online publication will be effected and by whom.

- 12.30 Mark Heath (Southampton CC) echoed this, stressing the urgency of providing an online platform.
- 12.31 A number of consultees, both agreeing and disagreeing with this provisional proposal, considered that the Electoral Commission ought to be responsible for publishing expenditure returns. The southern branch of the AEA commented that:

We feel that the returning officer should not be the one who publicises these expenses as their main duty is to collect them. The publication should be done by the Electoral Commission as they are better placed to report on them nationally. The publication of these returns does have some potential for political backlash, which is another reason that it should be removed from the returning officer. Agree that the submissions should be online in the future.

- 12.32 Sir Howard Bernstein (Manchester CC) also commented that support would be given to a transition to online publication "with consideration of whether another

body (perhaps the Electoral Commission) should take responsibility for receiving expense[s] returns at that time”.

12.33 This was further echoed by Crawford Langley (Aberdeen CC) who noted that without the existence of an online platform, a practical alternative would be difficult to determine, as “the role of the returning officer in receiving and publicising expense[s] returns is somewhat anomalous since the returning officer has no locus in enforcing the expenses regime”. Scott Martin (Scottish National Party) suggested the Electoral Management Board for this role in Scotland.

12.34 Our consultation acknowledged that the law makes electoral administrators the medium through which compliance with election finance laws can be verified, even though, as some of the consultees point out above, the returning officer is not responsible for enforcing election finance rules.<sup>9</sup> We do not see any alternative, however. If, in future, the process moves from paper to a digital one, then it may be decided that the Electoral Commission should take over as host for this process. There are some difficulties with such an institutional change, as the Electoral Commission does not run elections, and so would have to collect the roster of candidates for every election in order to detect non-receipt of an expense return by any of them.

12.35 The News Media Association (NMA), raising an issue concerning the means of publication, stated that:

The NMA is very concerned about suggestions made in the consultation that the way should be paved for lifting the duty of councils to publish election notices in the local press. Independent research and consultations on this subject have repeatedly found that the public want and expect to find notices in these newspapers and their withdrawal would constitute a serious threat to local democracy.

12.36 Our consultation paper did not suggest that councils should not have to publish the availability of returns for inspection in the press, but expressed a view that any duty to notify the public of the availability of returns for inspection ought to include a power to notify them at large by publication online.<sup>10</sup> We stressed that we did not consider that we were in a position to recommend the transition from a paper-based publication to an online one. We reiterate that position here.

12.37 A small number of consultees raised the problem of candidates failing to provide expenses returns. Darren Whitney (Stratford-on-Avon DC) said that “[m]any candidates who do not get elected fail to return these especially at parish level”.

12.38 This concern was also repeated by Philip Hardy (Sandwell BC). Furthermore, David Boothroyd (Labour Councillor on Westminster CC) strongly supported returning officers publicising undelivered returns, stating that:

<sup>9</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 12.40.

<sup>10</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 12.39.

At the 2014 election in Westminster City Council, I asked to see the returns of election expenses a month after the deadline and discovered that a group of 30 candidates who shared a party agent had not submitted their returns. It would have been better if the returning officer had given notice of the non-return.

12.39 We sympathise with the difficulties faced by returning officers in ensuring that all election expenses returns are returned. Failure to provide a return of election expenses is an illegal practice,<sup>11</sup> but we acknowledge that there may be a lack of will or resources available to prosecute the high number of candidates that do not provide their expenses returns. Publicising non-returns does also “name and shame” candidates that fail to comply.

12.40 In the light of the response, we are minded to recommend as we proposed.

***Recommendation 12-5 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.***

12.41 Some consultees raised some issues about which we made no provisional proposal for reform.

#### POWERS AND SANCTIONS FOR CANDIDATE EXPENSES OFFENCES

12.42 The Electoral Commission has asked the Law Commissions to consider an additional, but related, issue:

Consideration should be given to extending the [Electoral] Commission’s investigatory powers and civil sanctions so they cover candidate spending and donation offences at all elections. At the moment the Commission only has investigatory powers and civil sanctions for the rules on national campaigning under the Political Parties, Elections and Referendums Act 2000 (PPERA). As we have already highlighted in meetings with the Law Commission, we would have concerns with any approach that applied these new powers and sanctions to candidate spending and donations offences at all elections by default.

At local government elections in England and Wales there can be up to 30,000 candidates standing in any one year. If we were to obtain new powers and sanctions for candidate offences at these elections it is likely that this would have significant resource implications for the Electoral Commission.

This could create a high risk that we will not be able to deal with allegations in a timely manner, which in turn could erode trust in the regulatory system. We therefore propose that there should be a staged approach to introducing these regulatory tools for different

<sup>11</sup> Representation of the People Act 1983, s 84.

sets of elections.

... We would only initially want to have powers and sanctions for offences relating to candidate spending and donations rules at major national elections. We would be concerned if there was expectation these new regulatory tools must be available to all elections regardless of an analysis of the relevant costs and benefits involved.

- 12.43 Providing the Electoral Commission with these powers and responsibilities would mirror the position at national level. It would help provide additional means of enforcement of expenses regulation by, for example, sanctioning local election candidates who fail to return their expenses returns. This would plug the evident enforcement gap that currently exists.
- 12.44 However, we consider that the primary legal deterrent should be through the criminal law. Where a failure to provide expenses returns, or a false statement on an expenses return, is attributable to a candidate, he or she will face the consequences of having committed an illegal practice, including losing his or her seat and being disqualified for a period of three years from holding public office. Civil sanctions do not provide this effect, and cannot replace corrupt and illegal practices.

#### EXPENSES RETURNS IN UNCONTESTED PARISH ELECTIONS

- 12.45 Cumbria Association of Local Councils raised a further issue relating to the requirement that candidates in non-contested parish elections must submit an expenses return. The Cumbria Association of Local Councils argued that this requirement is onerous and an unnecessary burden, relating that their experience is that “probably without exception candidates in an uncontested parish election will make a nil return”.
- 12.46 Whilst we sympathise with the view that the current process is administratively onerous, there is some purpose in requiring candidates to provide expenses returns, even in uncontested elections. Local elections do not happen in a vacuum. Political parties may, if not required to submit returns in an uncontested constituency, be given licence to spend as much as they possibly can in that constituency for the purpose of promoting their campaign generally, which may have effects in other constituencies.
- 12.47 Whilst this may perhaps be less of a potent concern with regard to parish council elections, particularly if there are a higher number of independent parish councillors, we do not consider that there is a strong enough justification to depart from the consistent position across other elections. Parish councillors may stand for election to other positions in local government, and it is important that the requirement to provide an expenses return in other local elections is not undermined by a loosened requirement for parish elections.
- 12.48 We stress that our reforms will make processing expenses returns less onerous for electoral administrators.

#### LOCATION OF ELECTION AGENT'S OFFICE ADDRESS

- 12.49 One consultee, John Cartwright, who had stood as a candidate in 21 local and parliamentary elections between 1994 and 2012, raised a further issue. Mr Cartwright related a difficulty he had experienced due to a “technicality” in the 1983 Act which requires an election agent’s office address to be in the relevant constituency, or in a constituency or borough bordering on that constituency. Mr Cartwright found this “anachronistic”.
- 12.50 Regulation of candidates’ expenses at elections was first introduced by the Victorians in the Corrupt and Illegal Practices Prevention Act 1883. The wording of section 69 of the 1983 Act is almost identical to the wording of section 26 of the Corrupt and Illegal Practices Prevention Act 1883, which first stipulated that election agents, and sub-agents, must have an election office address in the relevant constituency, or an adjoining constituency. The Corrupt and Illegal Practices Prevention Act 1883 also stipulated that any “claim, notice, writ, summons, or document” delivered to the election agent’s address was deemed to be served on him, and that:
- every such agent may in respect of any matter connected with the election in which he is acting be sued in any court having jurisdiction in the county or borough in which the said office or place is situate.<sup>12</sup>
- 12.51 In 1883, separate courts had jurisdiction over different local authority areas. This provision is essentially replicated in the 1983 Act,<sup>13</sup> despite the fact that court jurisdiction is no longer formally divided by local authority areas.
- 12.52 Therefore, requiring the office of an election agent to be in a particular constituency, or adjoining constituency, had two purposes, both of which are anachronistic. The first, as John Cartwright points out, is that it facilitates speedier communication between returning officers (and other election officials) and election agents. Next day postal delivery and the advent of electronic communication render this purpose redundant. The second is that if the election agent were to be sued, he or she would be subject to the court with jurisdiction over the contested constituency, or if the office is located in an adjoining constituency that falls within a different local authority’s jurisdiction, in the neighbouring court. This ensures convenience for the election agent, and others who may need to provide evidence to the proceedings (including the returning officer), as well as interested members of the public who were within the contested constituency, as they would not need to travel far to get to the court.
- 12.53 We agree that these provisions are unnecessarily replicated in the 1983 Act, and no longer have any modern application. Election agents should be able to situate their offices anywhere in the United Kingdom.

<sup>12</sup> Corrupt and Illegal Practices Prevention Act 1883, s 26(2).

<sup>13</sup> Representation of the People Act 1983, s 69(3).

# CHAPTER 13

## LEGAL CHALLENGE

### INTRODUCTION

- 13.1 The law governing legal challenge to elections is the product of historical developments in the 19th century. It has some features which are unique to the “election court”, a special tribunal presided over by judges.<sup>1</sup> Our consultation paper sought to outline the current law governing legal challenge of elections, which is complex, sometimes unclear, and in places out of date. It made 17 provisional proposals and asked five consultation questions, which divided into two rubrics. The first was the need for a clear, simple and general statement of the grounds for challenging elections. The second was to modernise the election petition procedure, review its place in the legal system, and ensure that it is up to the task of being the law’s main enforcement mechanism.

### THE GROUNDS FOR BRINGING A LEGAL CHALLENGE

- 13.2 The result of an election can only be challenged by election petition. Our consultation paper summarised the election court’s jurisdiction as follows. It reviews the *validity* of the election, but may also *correct* the result. In relation to the latter, it does so through a process called a “scrutiny”, after the name of proceedings before the House of Commons’ election petition committees. The scrutiny is an adversarial process which can use vote tracing to challenge, before the courts, the propriety of any one vote, discard it, or count a tendered vote.
- 13.3 As to the *validity* of an election, an election can be annulled on one of three grounds:
- (1) a breach of electoral law during the conduct of the election which was either:
    - (a) fundamental; or
    - (b) materially affected the result of the election;
  - (2) corrupt or illegal practices committed either:
    - (a) by the winning candidate personally or through that candidate’s agents; or
    - (b) 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
  - (3) the winning candidate was at the time of the election disqualified from office.

<sup>1</sup> High Court or Court of Session judges for “parliamentary” election petitions; experienced lawyers in the case of local election courts in England and Wales and Northern Ireland, or sheriffs principal for local election petitions in Scotland.

- 13.4 These grounds are not set out, expressly, in one provision. Rather they must be divined from different sections. Section 23 of the Representation of the People Act 1983 (the 1983 Act) concerns the returning officer's duty to conduct elections according to the law, but is also (obliquely) the source of the ground of "breach of electoral law" or administrative irregularity. Section 157(2) even more obliquely mentions scrutiny. By collating references in the 1983 Act, and considering the case law, one can derive a general statement on the grounds of challenge, although some issues of detail are a matter for debate. The effect of giving an incorrect home address in a nomination paper, for example, and of formal defects in the paper generally, is unclear. The material time at which disqualification "bites" so as to be a ground for annulment, is also not beyond doubt. The 1983 Act provisions refer to the time of *election*, but at least one case has annulled the election of a candidate for disqualification at the time of *nomination*, which had been cured by the time of the election.
- 13.5 The 1983 Act itself applies only to UK Parliamentary and local government elections. Other elections' bespoke legislation must repeat or adapt its provisions. Our consultation paper observed some problems when transposing the classical 1983 Act grounds to the party list system, particularly those that relate to corrupt or illegal practices. This is because it is largely parties who stand for election, not individual candidates.

**The doctrine of "votes thrown away" should be abolished. (Provisional proposal 13-1)**

- 13.6 Our first proposal concerned the interaction between the court's ability to *correct* a result, and to annul an election. Where a candidate is elected who was disqualified from election, the court may annul his or her election. The so-called doctrine of "votes thrown away" is a practice based on pre-1868 House of Commons election petition committees. Where a rival candidate gave notice of the disqualification, the practice involved the court setting aside votes cast for the disqualified candidate, and declaring as elected the candidate who came second in the election.
- 13.7 Our consultation paper outlined some problems with this ground. The disqualified candidate may publicly and honestly insist that they are not disqualified; deciding the question is beyond most voters; and passing over the candidate with the most votes possibly denies voters the opportunity to vote for a qualified candidate from their preferred political party. It seemed to us that justice was best served in such cases by annulling the election, and calling a new one.<sup>2</sup>
- 13.8 Of the 34 consultees who responded to this provisional proposal, 31 agreed with it. One consultee was ambivalent, while two consultees disagreed.
- 13.9 Several responses broadly supported the reasoning behind our proposal. The Electoral Commission stressed the importance of ensuring that voters' preferences are not frustrated by having their vote discarded.

<sup>2</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.17 to 13.20.



- 13.10 Mark Heath (Southampton CC) suggested that the public would expect a fresh election. The cost of a re-run election was raised by Ian White (Kettering BC), although he agreed with our proposal. He suggested the cost should not necessarily be borne out of public funds. However, Joyce White (West Dunbartonshire CC), who disagreed with our proposal, thought the doctrine of “votes thrown away” introduced certainty and avoids “unnecessary public expenditure”.
- 13.11 David Boothroyd (a councillor), who disagreed with our proposal, suggested that re-running elections would “make it impossible to resolve a situation where there is a political dispute about eligibility and a constituency insists on returning a manifestly ineligible candidate”.
- 13.12 We do not think that this situation is likely to occur in practice. If it did occur, a candidate who stood again for election knowing that they were disqualified would commit an illegal practice. Moreover, there are many grounds for annulling an election; none of them result in the next most popular candidate being declared elected. While there are certainly arguments in favour of the doctrine, we do not think avoiding costs defeats the argument that voters should be able to cast a vote for a qualified candidate. On balance, we remain of the view that the doctrine of “votes thrown away” is outdated and unnecessary given the court’s ability to annul an election.

***Recommendation 13-1: The doctrine of “votes thrown away” should be abolished.***

**The law governing challenging elections should be set out in primary legislation governing all elections. (Provisional proposal 13-2)**

- 13.13 One of our overarching reform aims is to rationalise electoral law into a single, consistent legal framework that governs all elections. An important aspect of this objective is determining what parts of electoral law should be within primary legislation, and which parts should be contained in secondary legislation. In our consultation paper, we considered that the law governing challenge to elections should be set out in primary legislation governing all elections.<sup>3</sup>

**CONSULTATION RESPONSES**

- 13.14 All 37 of the consultees who responded to this provisional proposal supported it.
- 13.15 The Electoral Commission considered that, as the law governing challenge of elections is “important”, it should be contained within primary legislation. However, it also noted that the ongoing changes to the devolution settlement in Scotland and Wales would influence the legal framework, observing that “it will be important to ensure that this reform is consistent with the devolution of electoral law in the UK”.
- 13.16 Other consultees considered the substantive principles of the law governing electoral challenge to be especially fundamental, and that they ought to be clearly

<sup>3</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.71 to 13.89.

set out in primary legislation. The joint response of the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and the Electoral Management Board for Scotland stressed the importance of clearly stipulating the grounds for, and outcomes of, challenges to elections; this is essential for the understanding and benefit of all stakeholders, including voters.

- 13.17 Ian Miller (Wyre Forest DC) raised a broader issue of principle, commenting that challenges to elections, or removals of disqualifications, should only be considered by a court. He added:

It should be an important principle that a challenge to an election, or removal of a disqualification, should be decided only by a court. The current provisions that give powers to the House of Commons, devolved Parliaments and Assemblies and the Privy Council should be removed as they contravene what should be a fundamental principle of the electoral process: namely that elected politicians should play no part in deciding the outcome of elections.

#### DISCUSSION

- 13.18 Whilst there was unanimous support for setting out the law governing legal challenge for all elections in primary legislation, two specific issues were addressed by consultees. The first concerns the inconsistencies in the legislation governing challenge as between different voting systems, specifically for party list elections. The second issue concerns the role of elected politicians in the electoral challenge process.
- 13.19 The law governing legal challenge is not only contained in separate pieces of election-specific legislation, but there are also differences in the rules governing elections using the party list voting system. We consider that primary legislation should set out consistent rules for challenging party list elections. For example, the jurisdiction to correct a result is inconsistently applied to different elections using the party list voting system. As we explained in our consultation paper, we consider that judges should also be able to undertake a scrutiny of party list elections, and correct the result where necessary.<sup>4</sup> We therefore consider that these kinds of unjustifiable inconsistencies ought to be removed.
- 13.20 As regards Ian Miller's concern about the role of elected politicians in challenging elections or the removal of disqualifications, it is important to note that these are two distinct roles that we will consider in turn.
- 13.21 With regard to the removal of disqualifications, under the current law, the House of Commons may by order direct that a member's disqualification at the time of his or her election be disregarded if the disqualification has been removed and it is otherwise proper to do so. As we outlined in our consultation paper, we consider the rules governing disqualifications of public office holders are not so much a matter of electoral law, as to do with the law governing the composition of

<sup>4</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.74 to 13.78.

the public office in question.<sup>5</sup> We remain convinced that to remove the power of the elected body to determine how the rules governing its membership should apply is beyond the scope of this review of electoral law.

- 13.22 The House of Commons currently has a power, in the case of UK Parliamentary elections, to make the same orders as the courts can make with regard to inspecting sealed documents and vote tracing. We examined this in the chapter on manner of voting above.<sup>6</sup> We provisionally proposed, and recommended, that this power be removed because, as we explained in our consultation paper, 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.<sup>7</sup>

***Recommendation 13-2: The law governing challenging elections should be set out in primary legislation governing all elections.***

**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 13-3)**

- 13.23 A candidate who submits a defective nomination paper, for example by submitting an incorrect home address, breaches electoral law. The returning officer cannot address this breach, because the officer may only refuse a nomination on defined, formal grounds. Our proposal referred to one ground upon which the court may invalidate an election: if the defect in nomination was deliberate, then the candidate will have committed a corrupt practice under section 65A of the 1983 Act. The election will therefore be void. The alternative ground is where the defect can reasonably be supposed to have affected the result of the election. We also considered that purely formal defects, such as an invalid subscriber, should not result in the annulment of the democratically chosen candidate's election.<sup>8</sup>

#### CONSULTATION RESPONSES

- 13.24 Of the 36 consultees who responded to this proposal, 34 agreed.
- 13.25 Two consultees suggested a different way forward. Timothy Straker QC, an expert electoral lawyer, considered that it would be problematic if the result of an election were to depend on evidence of someone knowingly submitting a defective nomination, adding that "if a defective nomination undermin[ed] the election, it should vitiate it".

<sup>5</sup> House of Commons Disqualification Act 1975, s 6(2). Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.58 to 13.63.

<sup>6</sup> See chapter 5, paras 5.29 to 5.34.

<sup>7</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 5.8 to 5.11 and 5.38 to 5.39.

<sup>8</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.41 to 13.44 and 13.90 to 13.93.

- 13.26 We are not proposing to change the law here: a knowing misstatement on nomination papers will invalidate the election because the candidate has committed a corrupt practice. In other cases, the criterion for whether a defective nomination “undermines” the election is whether it can reasonably be supposed to have affected the result.
- 13.27 The joint response of SOLAR and Electoral Management Board for Scotland agreed with our proposal, but added that defects in nomination which could invalidate an election should be those committed by the candidate or agent deliberately or “where they ought to have known such defects existed”.
- 13.28 We do not think that the section 65A offence should be extended to misstatements the candidate ought to have known about; no doubt a court will be able to draw inferences as to the candidate’s knowledge based on the circumstances. But the test, under the current law, is knowledge. Absent such knowledge, we prefer the test used by the ground of general corruption, of whether the breach of election law can reasonably be supposed to have affected the result. Proving the precise effect on an election of, for example, a false statement relating to the home address of a candidate, is almost impossible.
- 13.29 Although this area of the law on legal challenge remains very difficult, we remain of the view that a nuanced ground of challenge for defective nomination is preferable. We have amended our recommendation and clarified the two distinct grounds.

***Recommendation 13-3: Defects in nomination, other than purely formal defects, should invalidate the election if they can reasonably be supposed to have affected the result of the election; knowingly making a false statement or giving false particulars in the nomination form should continue to invalidate an election.***

**The grounds for correcting the outcome or invalidating elections should be restated and positively set out. (Provisional proposal 13-4)**

- 13.30 Currently, the extent of the election court’s jurisdiction is not obvious, even on a careful reading of the 1983 Act. Therefore, in our consultation paper, we provisionally proposed clarifying the jurisdiction of the election court.<sup>9</sup>

#### CONSULTATION RESPONSES

- 13.31 All 36 consultees who responded to this provisional proposal agreed with it. The Electoral Commission, whilst acknowledging that our proposal would be a “significant improvement”, raised two related issues. The first issue concerns an aspect of the detail of our proposed positive restatement of the grounds of challenge, which the Electoral Commission generally considered are “well-stated and appear comprehensive”. However, the Electoral Commission suggested that the precise formulation of the grounds needed further consideration, which we will undertake at the drafting stage.

<sup>9</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.94 to 13.99.

***Recommendation 13-4: The grounds for correcting the outcome or invalidating elections should be restated and positively set out.***

**Disqualifications**

- 13.32 Our remit in this project is to consider how, as a matter of electoral law, disqualifications should affect the legal validity of an election. We observed in our consultation paper that various aspects of the current law strike us as potentially unsatisfactory.<sup>10</sup> Electoral law does not currently state clearly the point in time at which disqualification “bites” so as to be a ground for annulment. There is some confusion as to whether the material time is the day the candidate was nominated, or the day the candidate was elected. Furthermore, the election court is not generally able to have regard to the ability of Members of Parliament to divest themselves of a disqualification and invoke the power of the House of Commons to disregard past disqualifications, despite the fact that it may have such regard in the case of newly elected Police and Crime Commissioners and members of the Northern Ireland Assembly.
- 13.33 We therefore considered that electoral law should expressly state 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. We also asked consultees whether the election court should have a discretion to disregard minor, technical and lapsed disqualifications, or to take into account the fact that the House of Commons has done so in a particular case.<sup>11</sup>

**Disqualification at the time of election should be stated to be a ground for invalidating the election for all elections. (Provisional proposal 13-5).**

- 13.34 A disqualified candidate who stands knowing of his or her disqualification commits a corrupt practice under section 65A of the 1983 Act. That is one ground for challenging their election. However, if they do not know of their disqualification, their election may also be challenged on the ground that they are not qualified to take office. The material time at which the disqualification must “bite” is not uncontroversial. We proposed that it should be the time of election.
- 13.35 Of the 36 consultees who responded to this proposal, 33 consultees agreed that disqualification at the time of election should be a ground for invalidating the election for all elections. One consultee expressed only conditional agreement, and two consultees, including the Electoral Commission, disagreed.
- 13.36 Crawford Langley (Aberdeen CC) agreed with the proposal, but urged us to consider the implications for additional member or STV polls of disqualifying a candidate on what may have become a technicality.

<sup>10</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.58 to 13.70 and 13.100 to 13.107.

<sup>11</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, consultation question 13-6, p 295.

- 13.37 Joyce White (West Dunbartonshire CC) maintained that candidates should still be required to declare that they are not disqualified at the time of nomination, stating that “this obliges the candidate to consider any disqualification issues well in advance of the poll”.
- 13.38 Some consultees considered that there should be a comprehensive review of disqualifications. The Electoral Commission (who disagreed with our proposal) stated that it would prefer the distinction between disqualifications “that bite at the time of election and those that bite at the time of nomination” to be set out in legislation rather than them being determined by the courts. This, in its opinion, would achieve “certainty as to when a disqualification applies for the purposes of overturning an election”. The Electoral Commission also stated that legislation should explicitly state which disqualifications apply on nomination and which only apply on election. On this matter, it added:
- This is not clearly stated in the current law. Although the law is not currently clear, its effect is that most disqualifications apply on nomination, which is not appropriate given that some disqualifications seem likely to have only been intended to prevent a candidate taking up office (rather than them being able to campaign as well).
- 13.39 This was echoed by the Labour Party; it considered that the law setting out disqualifying offices “should expressly state whether the disqualification is at the point of nomination, consent to nomination, election or taking office”.
- 13.40 Ian White (Kettering BC) urged that there should be a review of the law governing disqualifications in order to ensure “that the grounds for disqualifications remain proportionate”.
- 13.41 Alan Mabbutt OBE (Conservative Party), considered that “a person should be disqualified at the time of nomination unless the law specifically only applies the disqualification at the time of election”.
- 13.42 We agree that the law governing disqualifications would benefit from a full scale review. This is not within the scope of a review of electoral administration law. It is to do with the law constituting the elected office in question. In respect of each current disqualification, a policy question must be asked: “is such a person disqualified from *election only*, or also from standing for election”. Until such an exercise is undertaken, we take the view that the answer based on the current law is that a disqualification “bites” at the time of *election*, not nomination. But knowingly standing while disqualified will remain a ground for annulling an election.

**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? (Consultation question 13-6)**

- 13.43 Of the 31 consultees who responded to this question, 28 considered that the election court should indeed 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. Two consultees argued that the court should not have this power, and one consultee,

the Electoral Commission, did not express a firm view but nonetheless offered comment.

- 13.44 Many consultees thought it sensible to give candidates the opportunity to divest themselves of their disqualification. Sir Howard Bernstein (Manchester CC) thought that disqualification at the time of election should only be stated to be a ground for invalidating the election for all elections if the court has a power mirroring section 6 of the House of Commons Disqualification Act 1975.
- 13.45 Joyce White (West Dunbartonshire CC) considered that the election court should not have a power to consider whether a disqualification has lapsed or to disregard it, noting that “if the rules on disqualification are clear they should be strictly applied, otherwise that is unfair on candidates who follow the rules”.
- 13.46 We do not think this power will render the disqualification provisions moot. It will only be exercised where the court thinks it proper to disregard a lapsed disqualification, in circumstances where (in the event of a fresh election) the candidate who just won a popular mandate will be qualified to stand again. Given the support for our proposal and the answers in favour of giving the courts a power to pardon a disqualification, we recommend as follows:

***Recommendation 13-5: Disqualification at the time of election should be stated to be a ground for invalidating the election for all elections.***

***Recommendation 13-6: The election court should have a power to consider whether a disqualification has expired and, if so, whether it is proper to disregard it, mirroring the power under section 6 of the House of Commons Disqualification Act 1975.***

**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 13-7)**

- 13.47 At elections using the party list voting system it is parties, not candidates that stand for election. If an election court were to conclude that corrupt and illegal practices were designed to obtain the election of a party as whole, it would be an odd inconsistency if it did not result in the validity of the election being affected. In our consultation paper, we considered that where such practices are committed, the court should have the option of invalidating the entire election, or less drastically, that of a particular list candidate. This is the approach currently undertaken for elections to the Greater London Assembly.

#### DISCUSSION OF RESPONSES

- 13.48 All 36 consultees who responded to this provisional proposal agreed. Of the few consultees who made any additional comment, the main benefit outlined by this proposal was stressed to be the importance of flexibility. The Electoral Commission stated that it appeared to “represent an appropriately flexible approach to the scope of an election court’s powers”.

- 13.49 This would mean that the election court is able to address corrupt and illegal practice attributable to individual list candidates, without having to annul the entire election.

***Recommendation 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, on the grounds of corrupt or illegal practices attributable to the candidate party or individual, or for extensive corruption.***

## THE PROCEDURE FOR LEGAL CHALLENGE

- 13.50 The procedure governing election petitions is set out in the 1983 Act (for UK Parliamentary and local government elections). Other elections' bespoke legislation adopts or repeats these provisions. The 1983 Act is supplemented by procedural rules in each jurisdiction in the UK.<sup>12</sup> The election petition has some inquisitorial features, aimed at rooting out corruption. Petition proceedings finally determine legal challenges, with no right of appeal. A special case may, however, be stated to the High Court or the Inner House of the Court of Session on a point of law. An election court – even one staffed by two High Court judges as was the case in *Woolas v Parliamentary Election Court*<sup>13</sup> – is subject to the judicial review jurisdiction of the High Court. The applicability of judicial review to the decisions of Scottish election courts appears to be untested.
- 13.51 Our consultation paper outlined the complex laws governing the election petition procedure.<sup>14</sup> It noted that petitions were in reality private proceedings before judges which use a procedure that is very formal, inflexible, and outdated. There is no process for filtering out unmeritorious petitions, for example. Time limits are rigid and mandatory, with no discretion to extend – but those which are contained in secondary legislation may be disregarded on the basis of the right to a fair trial.<sup>15</sup> The cost of bringing election petitions is an issue, with the availability of protective costs or expenses orders to cap the costs of challenge in no way beyond doubt. A less costly way of informally checking whether a breach of election law affected the result of the election emerged recently in case law.<sup>16</sup>
- 13.52 Our paper made six proposals and asked four questions concerning the petition procedure. The first group of proposals concerns bringing the challenge system within the ordinary court structure in the UK, recognising that these are private civil proceedings which should be subject to the ordinary procedure of the courts. We proposed that legal challenges should be heard in the ordinary court system with a single right of appeal on a point of law. Challenges should be governed by

<sup>12</sup> Representation of the People Act 1983, Pt III; Election Petition Rules 1960 SI No 543; Act of Sederunt (Rules of the Court of Session) 1994 SI No 1443 (S 69); Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 SI No 929 (S 65), Pt XI; Election Petition Rules 1964 SR No 28.

<sup>13</sup> [2010] EWHC 3169 (Admin), [2012] QB 1

<sup>14</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.114 to 13.154.

<sup>15</sup> European Convention on Human Rights, art 6; *Miller v Bull* [2009] EWHC 2640 (QB), [2010] 1 WLR 1861.



simpler, modern and less formal rules of procedure allowing judges to achieve justice in the case while having regard to the balance between access to justice and certainty of electoral outcomes.

**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 13-8)**

- 13.53 We received 38 responses specifically to this proposal, and 34 agreed with it. Three consultees disagreed, while one was unsure that the ordinary courts had the expertise.
- 13.54 Some consultees agreed with the proposal without qualification. Some stressed the benefits of alignment with the ordinary civil courts. Others were keen to stress that certain important aspects of the existing system should be retained, such as the ability to sit locally.
- 13.55 The national branch of the Association of Electoral Administrators (AEA) agreed with us that the time limit of 21 days for bringing a petition should remain. Sir Howard Bernstein (Manchester CC), who also agreed, stressed that our proposed change should not undermine the clear policy behind the current strict and formal rules for petitions in the current system: securing the certainty of electoral outcomes.
- 13.56 The Electoral Commission particularly stressed the benefit of our proposal to allow unmeritorious petitions to be filtered out at an early stage (on a respondent's application). This was better than requiring a flawed petition to proceed to full trial. However, it believed appeal should not be restricted to a point of law. It noted that both errors of law and fact should be subject to rectification on appeal "in order to protect the interests of the losing party (there are severe consequences of being found to have committed an electoral offence by an election court) and to ensure that the election result is correct and commands public trust". Scott Martin (Scottish National Party) similarly argued that the grounds of appeal should be the same as in the ordinary court system.
- 13.57 No other consultee directly contested appeals being restricted to a point of law. The possibility of hearing appeals on the facts goes against the classical idea that the election court establishes the merits of a challenge with finality. Currently only a question of law can be stated to the High Court or the Inner House of the Court of Session. More recently, however, judicial review was held to be available (at least in England and Wales).<sup>16</sup> Judicial review is to some extent available for errors of fact – although courts will be cautious and give the primary fact-finder a significant degree of latitude before upsetting their impression of the facts of the case. Our proposal would eliminate the possibility of judicial review of an election challenge, since no judicial review of a senior court decision lies to the senior courts. One consultee (David Boothroyd, Labour Councillor) urged us to retain the availability of judicial review.

<sup>16</sup> *Gough v Sunday Local Newspapers (North) Limited* [2003] EWCA Civ 297, [2003] 1 WLR 1836.

<sup>17</sup> For the position in Scotland, see para 13.50 above.

- 13.58 One consultee, Professor Bob Watt (University of Buckingham), thought judicial review rather than a purely private law procedure was the best model for bringing election petitions in the first place. He noted that “there should be a single procedure supported by statute and regulations and with its own procedure in the White Book”.
- 13.59 Judicial review largely involves scrutiny of administrative decisions including exercises of discretion or judgement on established and often agreed facts. While some electoral cases may proceed on agreed and uncontroversial facts, most involve full trial of fact after an adversarial procedure. We would not integrate the petition procedure into judicial review (which moreover opens up several routes of appeal, including at the permission stage – as opposed to a single appeal as we propose).
- 13.60 Nonetheless, we are satisfied that there is no need to restrict appeals to a point of law. In general, appellate courts in the UK are entitled to hear appeals on questions of law and fact, although legislation may in some cases restrict a right of appeal to a point of law. Where an appeal is available on an issue of fact, the appellate court extends a substantial margin of respect to the findings of the first-instance court in relation to matters of credibility, reliability and impression.<sup>18</sup> If election petitions are heard in the High Courts or the Court of Session, finality and certainty of electoral outcomes, while an important principle in electoral challenges, does not justify a departure from the normal rule governing appeals from the courts.
- 13.61 In Scotland, the Senators of the College of Justice disagreed with our proposal to house the election court within the ordinary court system in Scotland. The Senators did see value in “reviewing the current powers and procedures of the electoral court and in clarifying the scope for appeal from the decisions of the electoral court by providing for a single appeal on a point of law to, in Scotland, the Inner House”.
- 13.62 In practice, Parliamentary election petitions are heard by Court of Session judges in Scotland, while local election petitions are heard by Sheriffs Principal. Our proposal would bring the legal position in line with the factual position, namely that members of the ordinary courts hear election challenges in Scotland. It would avoid the risk of collateral challenges to election court decisions by judicial review, even though the availability of judicial review in Scotland of election court decisions is untested. We are not convinced that continuing to treat the election court as distinct from the ordinary courts brings any concrete benefit to the Scottish public, candidates, returning officers or legal practitioners and the judiciary. It is in our view a legal technicality which can cause obfuscation and doubt in important legal proceedings.<sup>19</sup>

<sup>18</sup> *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577; *Cook v Thomas* [2010] EWCA Civ 227; *Thomas v Thomas* 1947 SC (HL) 45, [1947] AC 484; *McGraddie v McGraddie and another* [2013] UKSC 58, [2013] 1 WLR 2477; and *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600.

<sup>19</sup> The most recent election petition in Scotland, *Morrison and others v Carmichael and another* [2015] EC 90, involved the interpretation of section 106 of the 1983 Act; the court was able to determine preliminary issues in an opinion (2015 SLT 675) before hearing evidence, giving judgment and making a report in the case.

- 13.63 The judiciary for England and Wales was more receptive to our proposals. The response given on behalf of the President of the Queen’s Bench Division stated:

The proposal to transfer the election court’s jurisdiction to the High Court in England and Wales, and to bring the Election Petition Rules within the scope of the Civil Procedure Rules, would not only increase administrative efficiency, but more importantly is right in principle. The separation of the election court is...an anomaly, not least as it has all the powers of, and draws its judiciary from, the High Court.

- 13.64 Richard Mawrey QC, who has heard several local election petitions, fully endorsed “the absorption of election petitions into the mainstream legal system with designated judges at local court centres”. He added that “trial within the electoral area is obsolete and dangerous and should be abolished”. It is worth noting that in the recent Tower Hamlets election petition, Mr Mawrey QC exercised the discretion to sit in the High Court, instead of locally within Tower Hamlets.<sup>20</sup> This view is, however, at odds with the response of another experienced practitioner, and occasional election judge, Timothy Straker QC, who agreed with our proposal “subject to cases being heard locally”.
- 13.65 We consider that election challenges should be heard in such place as the court directs, whether that be the main court centre, a local court centre, or a special local venue as directed by the court.

***Recommendation 13-8: Legal challenges should be heard in the ordinary court system in the UK, with a single right of appeal to the Court of Appeal (in England and Wales, and Northern Ireland) and the Inner House of the Court of Session in Scotland.***

**Local election petitions in England and Wales should be heard by expert lawyers sitting as deputy judges. (Provisional proposal 13-9)**

- 13.66 Of the 28 consultees who responded specifically to this proposal, 25 agreed with our proposal as put. One consultee disagreed with our proposal, urging “common sense, not legal traps”.
- 13.67 Two consultees backed the principle behind our proposal but disagreed with the detail. The response given on behalf of the President of the Queen’s Bench Division stressed the importance of judicial flexibility as to the constitution of the election court. He added that if the jurisdiction was transferred to the High Court, “it [would] enable more efficient deployment of the judiciary by the Lord Chief Justice, or as is usual his nominee, both in respect of Parliamentary, European and local government petitions”. The President of the Queen’s Bench Division also noted:

<sup>20</sup> *Erlam and others v Rahman and another* [2015] EWHC 1215 (QB); the decision to move the trial outside the borough was made by Directions Order no 7, 19 December 2014.

This would obviate the need for, as the consultation suggests, specialist competitions for local government election commissioners by the Judicial Appointments Commission, which due to the potential utilisation of such judges would not be cost-effective. Transfer to the High Court would also ensure that petitions were properly able to be heard at the most appropriate venue throughout England and Wales.

- 13.68 Richard Mawrey QC echoed this, stating that “there is no need for a formalised system of deputy judges brought in to try election cases. A handful of specialised judges would suffice”.
- 13.69 The Electoral Commission did not think there was a rationale for distinguishing between “local” and “Parliamentary” elections when it comes to the forum for determining disputes. The law should be the same for all elections. It did however support petitions being capable of being heard by senior expert lawyers sitting as deputy judges at all elections.
- 13.70 Our concern, when formulating the proposal, was to preserve valuable and rare expertise among the few persons who sit and hear local election cases in England and Wales. We are persuaded by the responses overall, and in particular those emanating from such experts, that it suffices to provide, in England and Wales, that the election court shall be the High Court. A properly constituted High Court will have standing to determine any legal challenge to an election. It will be up to the senior judiciary to determine the constitution of the courts, so that in appropriate cases two high court judges should hear the case.
- 13.71 In relation to Scotland, we have taken very seriously the points made by Scottish consultees who included the Senators of the College of Justice. There was general support for our view that local election petitions should continue to be heard by Sheriffs Principal with a single right of appeal to the Inner House of the Court of Session. We are minded to maintain that view despite the Electoral Commission’s objection that local and national elections should be treated the same. There is a difference in that national elections elect persons who are in a position to make decisions that affect nation-wide legislation, and the makeup of the national executives. We note, however, that there is a general power of the sheriff to remit proceedings to the Outer House of the Court of Session where it is considered that the importance or difficulty of the proceedings makes it appropriate to do so.
- 13.72 As we noted above, we remain of the view that UK, EU and Scottish Parliamentary election challenges should be heard, within the ordinary court system, by the Outer House, with a single right of appeal to the Inner House of the Court of Session.

***Recommendation 13-9: Election petitions in England, Wales and Northern Ireland should be heard by the High Court; judges, including deputy judges, should be authorised to hear election petitions by the senior judiciary. Election petitions in Scotland should be heard by the Outer House of the Court of Session (for national elections) and by the Sheriff Principal (for local elections).***

**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 13-10)**

- 13.73 This proposal was aimed at replacing formal, rigid and sometimes out of date procedural rules with a simpler set of rules that fits into the UK's current civil procedure regime.<sup>21</sup> All but one of the 35 consultees who responded to this proposal agreed.
- 13.74 Professor Bob Watt (University of Buckingham) thought our proposal opaque, since all legal proceedings were formal. He highlighted the need for modernity and simplicity in the legal procedure. He considered the requirement of security for costs to be obsolete. By "less formal", we meant a more modern version of legal formality, as opposed to the current law's strict and problematic rigid formality.
- 13.75 The Electoral Commission agreed that the current procedural rules were out of date, contained errors, and were overly onerous and strict in their formal requirements. It supported the use of standard procedural rules (which are more modern and accessible) subject to a small number of specific electoral procedural provisions in primary legislation.
- 13.76 Security for costs must be given by the petitioner at the time of, or within three days of, filing a petition. This appears to be intended to deter frivolous petitions. However, as we pointed out in the consultation paper, the sums prescribed by the legislation are maximums, and the court may set a much lesser amount by way of security for costs. In a local election petition arising out of elections in Hackney, security for costs was set at £10. The petition was later found by the election commissioner to have been "vexatious", and the petitioner was ordered to pay the costs of the three elected councillors, of the returning officer, and of setting up the election court.<sup>22</sup>
- 13.77 Moreover, the operation of the current provisions is extremely cumbersome. Slade J, who struck a petition out in *Waghorn v Fry* [2015] EWHC 744 (QB) because no security for costs was given in time, raised the issue in this consultation that a petitioner wishing to pay less than maximum amounts must apply for a determination. In practice, Slade J said, the petitioner may not have been notified of a direction as to how much must be paid before the three day period has expired, since that direction may be given on the last day. She added:

The review of electoral law would provide a good opportunity to rectify the injustice which may be caused by the interaction of the current time within which security of costs in respect of a petition is to be paid and the time within which application is to be made for the amount to be fixed by a Master.

<sup>21</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.164 to 13.173.

<sup>22</sup> *Williams v Patrick & Ors* [2014] EWHC 4120 (QB).

- 13.78 In our view, orders for security for costs are adequately provided for in ordinary civil procedure rules in the UK, which would avoid the sort of problem raised by Slade J. In our view a power to strike out unmeritorious petitions is a more appropriate way of pursuing the objective of deterring frivolous petitions.
- 13.79 Generally, the need for a modern procedure was a recurring theme in the responses to chapter 13 of our consultation paper. Many considered it desirable to filter out unmeritorious challenges. Sir Howard Bernstein (Manchester CC) rightly pointed out the important policy of maintaining the certainty of electoral outcomes.
- 13.80 Our proposal was aimed at the fact that the current election petition procedure is almost exclusively concerned with formality. Either a petition is formally satisfactory or it is not. There is no way of remedying trivial defects in form, and equally no way of addressing total and obvious lack of merit at any stage prior to full trial and determination. As well as being extremely inefficient, this undermines the certainty of electoral outcomes. It has led to some tensions between the current law and judges' conceptions of justice as well as human rights. We highlighted some of these problems in our consultation paper.<sup>23</sup>
- 13.81 Furthermore, the formal rules are themselves opaque and difficult to find, scattered as they are between the 1983 Act and secondary legislation, some of which is out of date (such as the Election Petition Rules 1960), while the Northern Irish instrument is only available to those who have paper copies of the original and subsequent amending instruments.<sup>24</sup>
- 13.82 We therefore recommend that the detailed procedure governing election challenges should be contained within the ordinary rules governing civil procedure in each of the UK's three jurisdictions. These will have to make the proper provision for the expeditious and just administration of election challenges, within the framework of existing procedural rules. That will minimise the risk of bespoke electoral procedural laws becoming out of date or not keeping up with progress elsewhere in the administration of justice.

***Recommendation 13-10: Challenges should be governed in each UK jurisdiction by simple and modern rules of procedure. Judges should continue to have regard to the needs of justice, striking a balance between access to the court and certainty in electoral outcomes.***

<sup>23</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.121 to 13.154.

<sup>24</sup> Election Petition Rules 1960 SI No 543; in Scotland, the Act of Sederunt (Rules of the Court of Session) 1994 SI No 1443 (S 69) and Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 SI No 929 (S 65) Pt XI; in Northern Ireland, the Election Petition Rules 1964 SR No 28.

**Proposals and questions concerning the public interest aspect of legal challenges to elections**

- 13.83 Our next set of proposals and questions relates to how the challenge system should take account of the public interest in free and fair elections. As we noted in our consultation paper, there is an inherent tension between the private character of the petition process and the public importance of electoral outcomes. There are gaps in how the current system caters for the public interest in elections which are plugged pragmatically, or not at all.<sup>25</sup>
- 13.84 The principal difficulty is that a formal legal challenge requires substantial funding. A petitioner is exposed not only to his or her legal costs but also those of other parties if the petitioner loses the case. In addition, an error admitted by the returning officer after declaring the result can only be investigated, and its effect on the result established to the satisfaction of candidates, if someone brings a formal legal challenge.<sup>26</sup> If the result is affected, the returning officer has to wait for a petition to be brought, knowing he or she will have to pay the petitioner's costs.

**Returning officers should have standing to bring petitions, including a preliminary application to test whether an admitted breach affected the result. (Provisional proposal 13-11)**

- 13.85 Our view was that the returning officer should have standing to make a preliminary application to test whether an admitted breach affected the result. Of the 36 consultees who responded to this proposal, 34 agreed with it.
- 13.86 Many consultees stressed that the returning officer's right to bring petitions should be expressly restricted to breaches of electoral laws relating to the administration of the election. Alan Mabbutt OBE (Conservative Party) was concerned about pressure being put upon returning officers.
- 13.87 The joint response of SOLAR and the Electoral Management Board for Scotland considered that the returning officer's right to bring proceedings should not extend to breaches or irregularities committed by candidates or their agents, stating that "to do so would risk undermining the political neutrality and independence of the returning officer".
- 13.88 The Electoral Commission stressed that consideration should be given to whether it would be possible to ensure that returning officers are not placed "under inappropriate pressure not to initiate a petition where one might be merited".
- 13.89 Professor Bob Watt (University of Buckingham) thought that the returning officer's standing should be restricted to addressing breaches that are exclusively the fault

<sup>25</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.174 to 13.191.

<sup>26</sup> Either by way of a petition or an application to the county court (in England and Wales) by a would-be petitioner for inspection and recount of the votes: *Gough v Sunday Local Newspapers (North) Limited* [2003] EWCA Civ 297 [2003] 1 WLR 1836 at paras 41 to 50, by Lord Brown; based on Representation of the People Act 1983, sch 1 para 56.

of electoral administrators, as anything else would bring them into the political arena.

- 13.90 The eastern branch of the AEA commented that a more practical approach would be to require the returning officer to set out in a report whether they felt the election conformed to electoral law and where potential breaches of duty affecting the result may have occurred. From this report, “it would then be open to others to challenge if they felt it to be justified”.
- 13.91 Under our proposal, the returning officer would not be able to bring challenges based on the candidate’s or agent’s wrongdoing (a challenge based on what is in the current law a corrupt or illegal practice, or a disqualification). Their standing would be to bring challenges based on breach of election law concerning the administration of the poll or the registration of electors. Primarily this would be exercised to correct late and admitted (or uncontroversial) errors in the administration of the election, or with a view to establishing whether they were fundamental or affected the result. This would take place under proper court supervision, and in the right cases might be expedited and cost much less than current proceedings.
- 13.92 We recognise that in bringing such an action, or failing to do so, there is a danger of a returning officer succumbing or being seen to succumb to pressure. But we do not wish to overstate this concern. A challenge improperly brought would be ill advised, given the judicial scrutiny it would invite. Conversely, failing to bring an uncontroversial challenge to clear up the result, while undesirable, would not affect any candidate’s or voter’s ability to bring their own. The court will be able to consider, and comment on, the returning officer’s decision not to bring proceedings in a straightforward case, when considering the matter of costs.

***Recommendation 13-11: Returning officers should have standing to bring petitions relating to any breach of electoral law in administering the election; they should in particular be able to bring a preliminary application to test whether a putative breach affected the result.***

**There should be a means of ensuring sufficient representation of the public interest in elections within that judicial process. (Provisional proposal 13-12)**

- 13.93 This proposal, and the set of questions that follow it, concern a formal public interest petitioning process. In total, 36 consultees addressed our proposal, 35 of whom supported representation of the public interest in principle, including the Electoral Commission, the national and regional branches of the AEA and political parties.
- 13.94 One consultee disagreed on the grounds that “judges are able to take account of the public interest without the need for separate representation”. Once seized, the court has some ability to take account of the public interest, but this does not meet the point that judges cannot assist any party in bringing a challenge, nor order public funding of litigation. The role that judges can play is further considered below.
- 13.95 A variety of views as to how to give practical expression to this principle emerged from the answers to our questions.



**Should there be a public interest petitioner with standing to bring election petitions? (Consultation question 13-13)**

- 13.96 A majority of consultees (28 of 38 who addressed the question) considered that there should be a public interest petitioner with standing to bring election petitions. Many acknowledged the difficulties of creating such a role, which underlie our further questions. Some thought the public interest should be represented through existing legal institutions, others by a dedicated independent public body. Others were for restricting the public interest petition to challenges concerning the administration of the election. Scott Martin (Scottish National Party) suggested an extension of legal aid, based on a merits test, as an alternative.
- 13.97 Alan Mabbutt OBE (Conservative Party) had concerns, shared by others, that a public interest petitioner might be under pressure from a losing candidate to consider cases with no merit. One consultee was concerned about pressure from misinformed voters, referring to the number of issues raised during the September 2014 Scottish independence referendum.
- 13.98 Eight consultees thought there should not be a public interest petitioner. Timothy Straker QC thought the underlying issue “too political”.
- 13.99 The Senators of the College of Justice also rejected the concept of a bespoke public interest petitioning body.
- 13.100 David Boothroyd (Labour Councillor) stated that “the returning officer is the guardian of the public interest in ensuring that an election is properly carried out and the correct result is declared. There is no need for an additional person as a ‘public interest petitioner’”.
- 13.101 However, as pointed out by many consultees, there are significant dangers in allowing returning officers to petition “at large”, including about corrupt or illegal practice. As to concerns about bringing misguided or unmeritorious challenges, we consider that these issues are best considered when discussing the question of the threshold for a public interest challenge.
- 13.102 Even amongst those who were in favour of a public interest petitioner, no consensus (or, in our view, satisfactory suggestion) emerged as to who should perform the role. In the consultation paper we pointed out that only one of the existing electoral institutions has the necessary independence from Government and UK-wide profile to perform the role of public interest petitioner: the Electoral Commission. Some consultees who addressed the issue regarded the proposed role as a suitable one for the Electoral Commission, while others regarded the role as an unsuitable one for the Commission. As will be discussed below, the Commission itself made it clear in its response that it did not support taking on such a function, whether or not with the advice of an expert panel as we had suggested.
- 13.103 The Senators of the College of Justice were concerned that such a role would be incompatible with the Electoral Commission’s political neutrality; an independent body would probably have to be set up, with staff and investigatory powers, and funding would have to be found. The danger of “free-riding” would be likely to emerge (that is, allegations could be made which might trigger investigations and

expense although ultimately proving worthless, at no cost to the individual making the complaint but at cost to the public purse). The respondent to a petition might not have adequate sources of funding, leading to a breach of the principle of equality of arms.

**What should the threshold criteria be for bringing a petition in the public interest? (Consultation question 13-14)**

- 13.104 Our suggested threshold for bringing a petition in the public interest was as follows:

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.<sup>27</sup>

- 13.105 Of 28 consultees who responded to our question about a threshold, 18 supported the above threshold, though others proposed alternative thresholds.

- 13.106 The Electoral Commission also seemed to endorse our proposed threshold, considering that it should be relatively high, noting that “a public interest petition is only likely to be appropriate where there is significant risk that confidence in the integrity of an election would be damaged without the opportunity to openly consider the strength of evidence supporting allegations of fraud or errors in administration”.

- 13.107 Two consultees suggested that public interest petitioning should be restricted to electoral administration law.

- 13.108 To restrict a public interest petitioning process to electoral administration law would mean credible and evidenced allegations of corruption on behalf of the winning candidate could not be examined except by a privately brought petition. If it is accepted that there is a case for a public interest petitioner, we do not think it can exclude matters so serious and so likely to cause public concern and loss of trust in the electoral outcome. The gap we identified in the current system applies with more force, not less, when significant public concern emerges about corruption at the election.

**How, if at all, should the law tackle the issue of individuals getting a “free ride” by challenging elections through the public interest petitioner? (Consultation question 13-15)**

- 13.109 Of 27 consultees who responded to our question about “free-riding” specifically, 19, including the national branch of the AEA, considered that concerns about “free-riding” were satisfactorily met by a threshold test of merits. Others

considered it “axiomatic” that the public interest in challenging elections should be met at public expense.

- 13.110 Those who would restrict the process to administrative errors pointed out that the free-ride problem would then be less of a concern.
- 13.111 Five consultees took the view that the law should not tackle the “free-ride” problem at all. Ian Miller (Wyre Forest DC) said: “if there is a public interest in challenging an election, then it is axiomatic that this would be at the public’s expense”. The joint response of SOLAR and the Electoral Management Board for Scotland also pointed out that “if a public interest petitioner, paid for at public expense, is justified, it is immaterial whether individuals or parties benefit from the actions of such petitioner”.
- 13.112 The Electoral Commission, in its detailed response to our questions on the public interest petitioner, did not directly answer this question. It did however, make clear that the process we envisage would be at risk of becoming the “first option for those considering challenging the result of an election, rather than the last resort”.

**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? (Consultation question 13-16)**

- 13.113 In total, 30 consultees answered this question, 24 of whom preferred that the decision to bring forth a public interest petition be subject to independent and expert assessment of the merits of the case.
- 13.114 Paul Gribble CBE, former editor of Schofield’s Election Law, thought that independent assessment should occur under the aegis of a body other than the Electoral Commission, preferring “an independent expert assessment of the merits”.
- 13.115 Mark Heath (Southampton CC) highlighted the importance of the Electoral Commission being seen as the neutral arbiter of elections and noted that an expert panel advising the Commission would be able to consider whether a public interest petition was genuine. He added that “the decision to bring a public interest petition should... not [be] left entirely at the discretion of the petitioner”.
- 13.116 The national branch of the AEA, whose view was supported by many others, suggested that “there should be a panel of not less than three independent experts to undertake the assessment”. Professor Bob Watt (University of Buckingham) proposed that the panel be chaired by an independent member of the Electoral Commission and made up of retired or former returning officers and academics. He added that “if a petitioner wished to bring a case which had been rejected by the Panel, s/he ought to be free to do so”.

<sup>27</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 13.181.

- 13.117 The joint response by SOLAR and the Electoral Management Board for Scotland stated that “on the basis that the petitioner should be the Electoral Commission, independent and expert assessment of the merits of the case should be required to safeguard the neutrality and independence of the Commission”.
- 13.118 In its response, the Labour Party stated that there should be a case conference to determine whether there is public interest in bringing an election petition; this could be led by the Electoral Commission and include the returning officer, police and written statements from interested parties. According to the Labour Party “this would allow for people to make representations about possible petitions”.
- 13.119 Scott Martin (Scottish National Party) contemplated an assessment of merits by the legal aid authorities.
- 13.120 Other consultees preferred leaving the matter to the discretion of the public interest petitioner, but none of these consultees believed that the petitioner should be the Electoral Commission.
- 13.121 Crawford Langley (Aberdeen CC) recommended a procedure analogous to that for fatal accidents inquiries in Scotland, where the Procurator Fiscal represents the public interest.
- 13.122 The Senators of the College of Justice, who opposed a public interest petitioner, did not favour our suggestion of a panel to advise the Electoral Commission by assessing the merits of complaints. They pointed out that questions would arise as to whether the panel’s decisions would be subject to judicial review and as to who would be in control of any litigation brought following its advice. If the Electoral Commission had control of the litigation (necessarily including the power to compromise or abandon it) the Commission’s political neutrality was likely to be seen as still being an issue. For the panel to have control of the litigation would amount to having created an autonomous public body.
- 13.123 The Electoral Commission itself had great reservations about taking the role, for reasons which we anticipated in our consultation paper. Even if an expert from a panel of experts were appointed, it said “there could still be questions about our decision to appoint that person to investigate the matter in the first instance and also about whether that person was truly independent of us”.

#### ALTERNATIVE SUGGESTIONS

- 13.124 One consultee suggested that the returning officer should have the role of representing the public interest in ensuring that an election is properly carried out and the correct result is declared. However, as pointed out by many consultees, there are significant dangers in allowing returning officers to petition “at large”. This would risk compromising returning officers’ neutrality.
- 13.125 In a supplementary response, the Electoral Commission suggested that the challenge system be reoriented so that the primary enforcement mechanism should be the prosecution of criminal offences. First, a civil process should quickly and effectively determine whether breaches of electoral law occurred in the administration of the election. In that respect the public interest would be represented by the returning officer bringing petitions. Electors and candidates should also remain able to bring petitions. Secondly, the Commission suggested

a criminal process to deal with allegations that a candidate, agent or supporter has committed an electoral offence,<sup>28</sup> with investigation by the police, and public prosecutors representing the public interest at public expense. The Commission suggested that it be consulted as to whether a prosecution is in the public interest. If the elected candidate were found personally guilty of an electoral offence, he or she would be unseated by operation of law. If someone else were found guilty, a subsequent civil process would determine whether a successful candidate was responsible in law for their conduct.

- 13.126 This has difficulties, however. Placing the responsibility for enforcing the prohibition of corrupt and illegal practices squarely on public prosecutors prosecuting them as criminal offences would make enforcement of electoral law primarily a matter for state institutions. Individuals could not bring private challenges based on corrupt or illegal practice by or attributable to the candidate. While the Electoral Commission suggests that private prosecutions could still be brought by individuals, these have long ago stopped being the norm; and the Crown Prosecution Service (CPS) would have power to take a private prosecution over, and abandon it.<sup>29</sup> In Scotland a private prosecution is difficult to bring (requiring the individual to show that he or she has been personally wronged by the alleged offence) and therefore rare.
- 13.127 Another objection to the Electoral Commission's suggested approach is that it would undermine the certainty of outcomes at elections. Election petitions are subject to strict time limits. Under the current law, if no petition is brought within the time limit of 21 days after the election, a candidate knows that their election is unchallenged. Thereafter, they may only be unseated in one circumstance: if they are *personally* convicted of a corrupt or illegal practice at criminal proceedings.
- 13.128 Criminal prosecutions are subject to a time limit for prosecution of one year, extendable to two years in England and Wales. Under the Electoral Commission's alternative challenge scheme, these would become the primary mechanism for checking for corrupt or illegal practice. On the conviction of people other than the candidate for corrupt or illegal practice at the election, the question would remain unanswered whether the winning candidate was responsible for those acts as a matter of public law; the Electoral Commission propose further civil proceedings to determine that issue. We consider this unsatisfactory in two respects, however.
- 13.129 First, an elected candidate might be subject to a public law challenge in respect of the election potentially more than two years after the election. We do not think such an extended "window" for assessing the public law validity of an election is consistent with the important legal policy of ensuring elected officials have reasonable security in office to get on with their work.

<sup>28</sup> The Electoral Commission refers to an electoral offence here to include corrupt and illegal practices. Only the latter subset of electoral offences has the special quality that they result in the nullity of the election if the candidate committed them or is responsible for their commission.

<sup>29</sup> *R (on the application of Gujra) v Crown Prosecution Service* [2011] EWHC 472, (Admin) [2012] 1 WLR 254.

- 13.130 Secondly, after criminal convictions had been secured, the question of funding of the public law proceedings to determine whether the candidate was responsible for those acts would still subsist. The problem we identified in the consultation paper would merely have been deferred to a later point in time.
- 13.131 On the whole, we are not persuaded that the public interest issue justifies fundamentally re-shaping the system for enforcing election law. While the law certainly would benefit from clarification, we consider that private individuals should retain the ability to bring a public law challenge to the validity and correctness of an election.

#### RESOLVING CONSULTEES' OTHER CONCERNS

- 13.132 Quite separate from the institutional question of who would perform the public interest petitioning function, the response to the consultation also highlighted some difficulties with the public interest petitioning process we outlined in our consultation paper.
- 13.133 Several consultees thought it would cause delay in the trial of election challenges, while the merits of the case were assessed. Such delay was undesirable given that certainty of electoral outcomes is an important goal. Another objection was the potential for extreme political pressure involved, in some scenarios, in determining whether bringing an election petition was in the public interest. Finally, there was concern that the public interest petitioner would be the first port of call by any and all would-be petitioners, rather than a last resort to step in where a meritorious and significant challenge could not be brought by a private individual.
- 13.134 Gerald Shamash, a lawyer specialising in election law, suggested a way of allaying concerns about delay and improper recourse to the public petitioning process. A petition would be brought before the court, and only as part of a judicial process might the court stay (sist) proceedings, for a limited time, in order for a public interest petitioner to consider endorsing (and funding) the challenge.
- 13.135 We see considerable merit in a court-supervised process governing public interest petitions. The court would be in a position to consider, when deciding whether to stay the case, whether our proposed threshold for a public interest challenge was met. In addition, the court might consider the applicant's financial means, and the question of equality of arms between the parties. This form of public interest petitioner has the merit of reducing the risk of significant delay to legal challenges, and the attendant harm to certainty in elected office.

#### **Conclusion on the public interest petitioner**

- 13.136 We are not presently convinced that we should recommend that there should be a process for bringing public interest petitions. Even if a suitable institution were available to perform the role of public interest petitioning, it would need considerable resources to perform that role if, as some consultees noted, the public interest petitioning process became a first port of call for those challenging elections. Respondents would have to pay for their own legal costs while those challenging the election would have public funds. There is the question whether a decision to bring a public interest petition, to discontinue it, or to limit its scope, might be susceptible to judicial review, protracting proceedings and delaying a

resolution. More generally, there is a risk that whoever is the public interest petitioner will have their political neutrality called into question when making decisions that might affect the balance of local or national power.

- 13.137 Nevertheless, consultation responses have led us to conclude that the law should acknowledge the public interest in the lawfulness of elections within a private mechanism for bringing a legal challenge. Private individuals who bring a legal challenge which a court considers has merit, and should be heard in the public interest, should not risk financial ruin when doing so. Protective costs orders are the law's existing mechanism for limiting costs exposure in advance of public law proceedings. Their availability under the current law is not beyond doubt.<sup>30</sup> We recommend removing all doubt as to their availability by providing, in legislation if necessary, for courts to have powers to make protective costs (or expenses) orders.

***Recommendation 13-12: The power of courts hearing election challenges to make protective costs or expenses orders should if necessary be acknowledged in primary legislation.***

#### **How other reforms will help reflect the public interest in elections**

- 13.138 We note that the problems within the current law will be mitigated by our other recommendations for reform, in particular:

- (1) Clarifying and restating the grounds for bringing a legal challenge;
- (2) Aligning the procedures for challenging an election with the UK jurisdictions' modern civil procedure, which will bring:
  - (a) more flexibility as to the costs of bringing petitions, and recovering them from parties and (in some cases) non-parties;
  - (b) the removal of automatic orders for petitioners to provide security for costs and the potential availability of protective costs orders;
  - (c) the ability to filter out unmeritorious petitions through applications to strike out under the ordinary procedural rules, so as to concentrate the court's and parties' time and expense on the crucial issues in the case; and
- (3) Clarifying electoral offences so that they are more readily understood by the public and officials, and more apt to be investigated and prosecuted by the police and prosecutors.

<sup>30</sup> In *Erlam and others v Rahman and another* [2015] EWHC 1215 (QB), an application for a protective costs order was refused because satisfactory evidence of financial means of the applicants was not provided. In Scotland, the ability to grant similar orders, protective expenses orders, has not been tested in the context of election petitions.

**There should be an informal means of reviewing complaints about elections which do not aim to overturn the result. (Provisional proposal 13-17)**

- 13.139 We provisionally proposed that there should be an informal means of reviewing complaints about elections which did not seek to affect the outcome or validity of an election, and offered options in the various jurisdictions as to who should be the recipient of complaints: existing ombudsmen, returning officers for adjacent areas or regional returning officers, or the Electoral Commission. Of the 36 consultees who responded to this proposal, 34 agreed with it, including the Electoral Commission. Two consultees disagreed.
- 13.140 Several electoral administrators noted that complaints about the administration of elections are currently already dealt with directly by the returning officer. Nonetheless, they agreed that there should be a means of third party review of complaints. However, there was some disagreement as to whether the forum for hearing the complaint should be the ombudsman, the use of a scheme whereby adjacent returning officers consider complaints, or the regional officer at European Parliamentary elections (for complaints which are not against their service); or consideration by the Electoral Commission.
- 13.141 The national branch of the AEA considered that the Electoral Commission was the most appropriate forum, as the Commission has “wide experience of electoral administration”. The Electoral Commission itself stated that it would be content to take on the role, adding that if the Law Commissions were to confirm that this proposal should be further developed it “would be happy to consider how such a role could be developed alongside, or incorporated within, the Commission’s existing performance standards framework for electoral registration officers and returning officers”.
- 13.142 Other consultees considered that the independence of the ombudsman service rendered it a more appropriate forum for complaints. Some Scottish consultees, including SOLAR and the Electoral Management Board for Scotland, pointed out that in Scotland, electoral maladministration is already within the jurisdiction of the Scottish Public Services Ombudsman.<sup>31</sup>
- 13.143 The Local Government Ombudsman in England, the Scottish Public Services Ombudsman, the Public Service Ombudsman for Wales and the Northern Ireland Ombudsman (the UK Ombudsmen) in a joint response said that complaints should go to the Ombudsmen rather than the Electoral Commission or returning officers. This would “provide people with the reassurance of an independent consideration of their complaint where it has not been possible to resolve matters locally”. The UK Ombudsmen remarked that the proposal would be in line with current procedures, as most complaints pertaining to local authorities are under their jurisdiction. They commented that the Electoral Commission’s role as a regulator is very different to that of an ombudsman. It stated that “the primary purpose of an ombudsman is to remedy injustice that has been caused to an individual through the independent investigation of their complaint”. On the other hand, the role of a regulator is to ensure that systems are operating fairly and effectively. They added that “consideration by a regulator [like the Electoral

<sup>31</sup> Scottish Public Services Ombudsman Act 2002 s 3(1) and sch 2 para 56 as read with para 7.



Commission], whilst helping to identify systemic failings, may not provide the type of redress that the public want and need”. They also pointed out that the Electoral Commission, as a public body, is within the jurisdiction of the Ombudsmen “in relation to some aspects of its function”.

- 13.144 Maladministration is deliberately undefined in statute, but it is understood to encompass a wide range of administrative failure.<sup>32</sup> If a grievance is due to inaction, inattention, or poor administrative practice generally, then that is plainly a matter which is within the ombudsmen’s expertise. Complaints that are to do with the interpretation and application of electoral law by electoral administrators may be considered by the Electoral Commission when assessing whether returning officers meet its performance standards. But this is no substitute for a complaints mechanism, where the complainant’s grievance is investigated, resolved, and if appropriate, redress is given and lessons are learned. As the UK ombudsmen point out, those are the characteristics of the ombudsman process. On balance, we recommend as follows.

***Recommendation 13-13: Electors’ complaints about the administration of elections (which do not aim to overturn the result) should be investigated by the Local Government Ombudsman in England, the Scottish Public Services Ombudsman, the Public Service Ombudsman for Wales and the Northern Ireland Ombudsman.***

<sup>32</sup> The Parliamentary Commissioner Act 1967 s 5(1)(a); Local Government Act 1974, s 26(1). See JUSTICE, *Our Fettered Ombudsman* (1977) and the Parliamentary and Health Service Ombudsman, *Annual Report* (1993-94), para 7. See also, R Kirkham, “When is it Appropriate to Use the Ombudsman?” [2004] *Journal of Social Welfare and Family Law* 181.

# CHAPTER 14

## REFERENDUMS

### INTRODUCTION

- 14.1 Our consultation paper set out six provisional proposals, and asked two consultation questions as to the law governing national referendums, local referendums conducted under statute, and parish polls.<sup>1</sup> This chapter considers the response to our proposals and articulates our recommendations for reform.

### NATIONAL REFERENDUMS

- 14.2 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 of England. 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 called it) sets out detailed conduct rules for the referendum.
- 14.3 In our consultation paper we explained that the current approach is inefficient. At present, referendum law is on the whole contained in the instigating Act, even if it concerns the most basic elements of administering the poll. Whenever a referendum is to be called, the legislation instigating it must “reinvent the wheel” – making provision that, in essence, duplicates established electoral law, with some modification to accommodate the referendum taking place. This presents administrators with a large volume of new rules, and Government and Parliament with unnecessarily extensive bills to prepare and scrutinise.
- 14.4 It seemed to us to be desirable to produce a set of generic referendum conduct rules that could simply be applied with minimal adaptation in the instigating Act to the referendum it calls. This would reduce the current complexity of the law, speed up the legislative process and make the conduct rules accessible in advance by electoral administrators.
- 14.5 We therefore provisionally proposed, in our consultation paper, that the primary legislation governing electoral registration, absent voting, core polling rules, and electoral offences should extend to national referendums where appropriate. Secondary legislation should set out the detailed conduct rules, which should mirror those governing elections, save for necessary modifications.<sup>2</sup>

<sup>1</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, ch 14.

<sup>2</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 14.49 to 14.56.

**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 14-1)**

**Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring those governing elections, save for necessary modifications. (Provisional Proposal 14-2)**

14.6 All 37 consultees who responded to these proposals agreed with them. Several consultees emphasised the benefits of such a “pan-electoral” approach to national referendums.

14.7 The Electoral Commission said that there would be a number of benefits derived from implementing these proposals, noting that:

The legislation specific to each particular referendum need concentrate only on the substance of that referendum, the franchise, when it will be held and the referendum question or questions to be asked of voters... The legislative process instigating a referendum would be speedier, enabling a referendum to be held more quickly. [This would result in greater efficiency – the process of producing and consulting on specific rules for each referendum has a cost impact on Governments, Parliaments and consultees.]

14.8 Participants in the referendum would also benefit from the clarity and advance planning our proposals would allow.

14.9 Given the response to our proposals, we are minded to recommend as we proposed.

***Recommendation 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.***

***Recommendation 14-2: Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring that governing elections, save for necessary modifications.***

## **LOCAL REFERENDUMS**

14.10 Our consultation paper outlined the law governing the three types of local referendums conducted under statute in England and Wales. These are local governance (particularly mayoral) referendums, council tax referendums, and neighbourhood planning referendums. Primary legislation sets out the process for instigating a referendum and identifies the franchise by basing entitlement to vote at the referendums on entry in the local government electoral register. The detailed conduct rules are in discrete secondary legislation. 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.

14.11 Once primary legislation has made provision for how the referendums are instigated and campaigns identified, they are run according to very similar laws.

Yet there are four distinct pieces of secondary legislation governing the three species of referendums on local governance (in England and Wales respectively), on council tax increases and on 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.

14.12 At present, materially identical laws are needlessly replicated across different pieces of legislation. Our analysis was that a single set of provisions should govern the mechanisms for running referendums, the conduct rules and challenge provisions. This would eliminate inconsistencies in the detail of the rules where they are not justified by the nature of the referendum in question.<sup>3</sup>

14.13 As to challenging the outcome of referendums, we considered that a single set of grounds should be set out. These would be in line with those governing elections, save in one respect. Since there is no “candidate”, the commission by anyone of a corrupt or 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. 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.<sup>4</sup>

**A single legislative framework should govern the detailed conduct of local referendums, subject to the primary legislation governing their instigation. (Provisional proposal 14-3)**

14.14 All 33 consultees who responded to this proposal agreed with it.

**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. (Provisional proposal 14-4)**

14.15 Similarly, there was unanimous support for this proposal among the 33 consultees who responded to it.

14.16 The need for rationalising and centralising the conduct rules governing local referendums underpins many of the responses. As to these proposals, the Electoral Commission commented that the law on local referendums is not well known and has received little scrutiny. It also added:

The [Electoral] Commission is rarely asked to advise on local referendums, but what information we do provide normally relates to issues concerned with how local referendums are combined with elections happening on the same day.

14.17 With regard to legal challenge in particular, Sir Howard Bernstein (Manchester

<sup>3</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 14.95 to 14.96.

<sup>4</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 14.76 to 14.81 and paras 14.97 to 14.98.

CC) also commented that there should be consistency in the grounds of challenge for elections and referendums “with divergence only where justified due to the fundamental differences between elections and referenda (principally the lack of candidates in the case of the latter)”.

- 14.18 Given the response, we are minded to recommend as we proposed.

***Recommendation 14-3: A single legislative framework should govern the detailed conduct of local referendums in England and Wales, subject to the primary legislation governing their instigation.***

***Recommendation 14-4: The grounds of challenge governing elections should apply to local referendums, save that corrupt or illegal practices should only be a ground for annulling the referendum if they extensively prevailed and can be supposed to have affected its outcome.***

**Should challenge to neighbourhood planning referendums continue to be by judicial review only? (Provisional proposal 14-5)**

- 14.19 Neighbourhood planning referendums are subject to challenge by way of judicial review, rather than by petition before an election court. Our consultation paper suggested that this might be because, in the planning context, judicial review is a more consistent way to deal with issues arising out of neighbourhood plans. If this difference were to be retained, we suggested the reviewing court should be directed to the grounds for interfering with the validity of the result.
- 14.20 Of the 25 consultees who responded to this provisional proposal, 20 considered that challenge should continue to be by judicial review only. Three consultees disagreed and thought the petition process should apply.
- 14.21 The national branch of the Association of Electoral Administrators (AEA) (supported by responding regional AEA branches and some electoral administrators) agreed on the basis of the particular legislative framework surrounding planning matters, noting that the “AEA would support the proposal relating to the issues which the Administrative Court should have regard to when considering a judicial review claim”.
- 14.22 However, Mark Heath (Southampton CC) disagreed on the basis of consistency, seeing no reason for challenges to referendums not being heard by a court with jurisdiction over elections. He noted:

We do not see a justifiable policy or principle decision to depart from that rule of consistency and we feel that with a modernised approach to legal challenges, neighbourhood planning referendum challenges should be challengeable through the same process.

If that view is not shared, we do agree with the approach which states that the administrative court should have grounds stated to it to which it should have regard when hearing a judicial review claim.

- 14.23 Alastair Whitelaw (Scottish Green Party) said:

Judicial review seems a sledgehammer approach and another

instance where expense could well be a deterrent to raising a legitimate review. Perhaps a lower level but still independent method of adjudication is needed.

- 14.24 Bringing neighbourhood planning challenges under the election court mechanism would bring consistency within electoral law. But neighbourhood plans may be subject to challenge for non-electoral reasons. There may be wider issues to be considered, and the policy is that the forum for considering them is the Administrative Court by way of judicial review.<sup>5</sup> We therefore recommend that challenges relating to the conduct of neighbourhood planning referendums should continue to be by judicial review. We do, however, consider that the Administrative Court should be directed to the standardised grounds for annulling or correcting the result of the referendum.

***Recommendation 14-5: Neighbourhood planning referendums should continue to be challenged by judicial review, but the court should be directed to have regard to the standard grounds for challenging local referendums.***

#### **Other types of local referendums**

- 14.25 Two consultees raised issues about polls that were excluded from the scope of our reform project: business improvement district polls and local advisory polls.<sup>6</sup> The latter, in particular, relate to an exercise of the local authority's power to take a sounding of its population. Sometimes these soundings are conducted by the local returning officer, and as Alastair Whitelaw (Scottish Green Party) notes, some officers take the view that they can only use the edited register for the purpose of conducting these polls.

- 14.26 Sir Howard Bernstein (Manchester CC) said:

It is also suggested that this legislative framework should also be extended to ballots for Business Improvement Districts if the framework is to apply to the not dissimilar "business referendums" under the Neighbourhood Planning (Referendums) Regulations 2012.

- 14.27 Ian Miller (Wyre Forest DC) stated that:

... The Commissions need to clarify whether or not they intend that local advisory polls under section 116 of the Local Government Act 2003 would be brought within the same legislative regime. Section 116 gives councils discretion about all the arrangements for such a poll, including the hours of voting.

There are arguments in both directions ... . On balance, I feel the arguments are in favour of treating local advisory polls on the same basis as local referendums although there are a number of

<sup>5</sup> Town and Country Planning Act 1990, s 61N.

<sup>6</sup> Law Commission, *Electoral Law in the United Kingdom, A Scoping Report* (December 2012) [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/electoral\\_law\\_scoping\\_report.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/electoral_law_scoping_report.pdf), pp 86 to 89 (last visited 11 January 2016).

divergences that would probably be necessary (particularly around the result not being challengeable in the courts).

- 14.28 Business improvement district (BID) polls<sup>7</sup> and local advisory polls,<sup>8</sup> unlike the other local referendums we consider above, do not generally make use of common electoral concepts and the rules governing their conduct contain significant departures from classical electoral rules. For example, local advisory polls are not conducted according to a statutory scheme or conduct rules at all. Furthermore, local advisory polls, in particular, do not carry the same weight in terms of legal outcome as other local referendums. For this reason they were excluded from the scope of the project.<sup>9</sup>
- 14.29 Our proposals will extend to existing, binding referendums conducted under statute, in relation to which there is existing electoral law. It will be a matter for the Government whether to bring other polls under the same conduct regime, and to consider, in the case of advisory polls, whether to compel local authorities to use the standard conduct rules.

### **PARISH POLLS**

- 14.30 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. 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.

### **The particular complexity of parish polls**

- 14.31 In our consultation paper, we explained that the first issue 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.<sup>10</sup> The current rules 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”. In that case, they are conducted according to rules akin to those governing parish council elections. We considered that there is no reason in principle why such polls, if properly demanded at parish meetings, cannot be conducted according to the rules

<sup>7</sup> In England and Wales, these are governed by part 4 of the Local Government Act 2003 and, in Scotland, by the Planning etc. (Scotland) Act 2006 and Business Improvement Districts (Scotland) Regulations 2007 SSI No 202.

<sup>8</sup> Local Government Act 2003, s 116; we understand polls have been carried out in the past under other powers of local authorities, such as the Local Government Act 1972, s 141 and general expenditure powers in Local Government Act 1972, s 137 (for England and Wales); Local Government Act (Northern Ireland) 1972, s 115 (for Northern Ireland); and Local Government in Scotland Act 1973, s 87 (for Scotland).

<sup>9</sup> For further discussion, see Law Commission, *Electoral Law in the United Kingdom, A Scoping Report* (December 2012), [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/electoral\\_law\\_scoping\\_report.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/electoral_law_scoping_report.pdf), paras 5.53 to 5.55 (last visited 11 January 2016).

<sup>10</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.103.

governing parish and council elections within the standard framework governing elections, subject to there being no nomination stage: the candidates for election should be stipulated at the meeting that decides to have a poll.

- 14.32 The second order of difficulty arises with respect to parish polls on an issue before the council, which are true referendums. We asked consultees whether the scope of the issues which can be put to a parish poll should be defined, so as to restrict parish polls to issues of parish concern.<sup>11</sup>
- 14.33 In our consultation paper, we explained that our provisional view was 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.<sup>12</sup>
- 14.34 This is plainly an area of law in need of review, and both the UK and Welsh Governments are in the process of considering their policy in relation to them. Our proposals and these recommendations are based on the current law.

**A parish poll pertaining to an appointment should be governed by the conduct rules governing elections, omitting the nomination stage. (Provisional proposal 14-6)**

- 14.35 Of the 21 consultees who responded to this provisional proposal, 19 agreed with it. Two consultees disagreed.
- 14.36 The national branch of the AEA, whose response was supported by others, supported the proposal. The Electoral Commission said, with regard to this and the next proposal, that these “are a sensible way forward and consistent with the need to simplify, consolidate and modernise the rules for all polls”. Philip Hardy (Sandwell BC) fully supported the proposals, describing the current rules as “antiquated”.
- 14.37 Ian Miller (Wyre Forest DC), and Wyre Forest DC (who submitted an independent response) disagreed:

A different solution is required, which would avoid engaging election rules. The only such appointments that might at present be fall to be made by a parish poll are appointments that can (and arguably should) be decided by the parish council itself.

The legislation could be cast so that, where a parish council exists, a request for a poll from a parish meeting (if it satisfies the trigger) should be formally considered by the parish council. The parish councillors would decide whether or not to hold a poll.

<sup>11</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 14.118 to 14.120.

<sup>12</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 14.119 to 14.120.



However, in the case of an appointment, the legislation could provide that the matter is not to be the subject of a poll and the question must be decided by the parish council itself. Parish councillors should not be allowed to abrogate their responsibilities, such as appointing a chairman of the parish council or making other decisions on appointments such as co-options.

- 14.38 We do not consider that abolishing parish polls for electing a chairman etc. is within the range of reform options we can take. That decision is a matter of policy for the UK and Welsh Governments.

**A parish poll pertaining to an issue should be governed by the conduct rules for local referendums. (Provisional proposal 14-7)**

- 14.39 There were 22 responses to this provisional proposal, with 20 consultees in complete agreement with it. Two consultees were less firm in their agreement.

- 14.40 After we published our consultation paper, the Department for Communities and Local Government consulted about the modernisation of parish polls. One of the proposals was that, if the parish poll were to be combined with another election or referendum, the polling rules pertaining to that would apply; otherwise the returning officer would be free to conduct the poll according to another poll's conduct rules as he or she saw fit, save that absent voting would be available subject to the parish council's agreement.<sup>13</sup>

- 14.41 The national branch of the AEA, whose response was endorsed by others, supported our proposal:

A parish poll should be conducted along the basis of other polls in relation to rules and timetables. On that basis, the local election rules which allows for a 25 day timetable should be adopted.

This approach would allow time for the late registration of electors, postal and proxy voting along with the planning and conduct of the parish poll. It would also ensure a consistent timetable approach for all parish polls (whether with or without postal and proxy voting, the position as presently proposed given the discretion available to the parish council).

- 14.42 The national branch of the AEA did, however, express concern over the issue of the parish council's discretion concerning the availability of absent voting. We will develop our final recommendations in line with any change in Government policy on parish polls, and will pay particular attention to any residual matter of detail.

- 14.43 Ian Miller (Wyre Forest DC) said:

This depends on whether the issue being "decided" is actually a decision that has real impact, for example to spend money or to enter

<sup>13</sup> UK Government, *Parish Polls: Consultation on the Government's intentions to modernise parish poll regulations* (December 2014)  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/381894/Parish\\_Poll\\_Consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/381894/Parish_Poll_Consultation.pdf), para 2.7 (last visited 11 January 2016).

a contract; or is more advisory or declaratory in character, eg, opposing the closure of a local facility or opposing an application for planning permission.

It would seem a heavy burden indeed to require voting from 7am to 10pm if the poll is advisory or declaratory. In a very small parish, there might be only 100 to 200 voters and all those who intend to vote might have done so well before 10pm.

It would also arguably be inconsistent with the arrangements for principal authorities holding a local advisory poll under section 116 of the Local Government Act 2003. This gives them discretion about all the arrangements for such a poll, including the hours of voting....

The response therefore is that parish polls should be governed by the conduct rules for local referendums only if section 116 polls are treated in the same way.

It would be inappropriate that parish councils should be given less freedom to decide such issues than principal authorities.

(There is also a possible middle ground. Statutory parameters could be devised for parish polls that provide some flexibility while ensuring more appropriate arrangements for participation than are found in the current legislation. For example, they could provide that:

- 1) The hours of voting shall be not less than (say) 8 continuous hours, including the hours between 4pm and 8pm;
- 2) The hours of voting shall be set by the parish council where there is one or by the returning officer in the case of a parish that does not have a parish council;
- 3) If the hours of voting are not 7am to 10pm, then postal and proxy voting must be available;
- 4) If the hours of voting are 7am to 10pm, the returning officer shall include postal and proxy voting only with the agreement of the parish council (if there is one).

([Option] (3) [above] ensures that there should be no concern about the ability of local electors to participate where voting hours are fewer than 15, as they would be able to arrange a postal or proxy vote.)

We support aligning the timetable for parish polls so that they accord better with the timetable for elections.

- 14.44 The Government's review of parish polls is addressing the issues upon which such polls can be called, to prevent their misuse and the wasting of time and money. We will closely monitor these developments and tailor our final recommendations to reflect any new policy; if that is to reduce the regulation, or provide for less regulation of parish polls, we will accommodate that and work out the detailed provisions to make it fit and refer to a more holistic regulatory

framework governing local referendums. Based on the current law, however, it is our view that a single set of conduct rules for local referendums should extend to parish polls and, as such, postal and proxy voting would be available as standard.

**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? (Consultation question 14-8)**

14.45 Of the 22 consultees who responded, 18 responded affirmatively, two responded negatively and two consultees did not express a firm view.

14.46 A significant majority considered that the scope of issues before a parish council which can be put to a poll should be defined so as to restrict parish polls to issues of parish concern. This was also independently proposed in the UK Government's consultation paper published in December 2014:

Currently a parish poll may be demanded before the conclusion of a parish meeting on any question arising at the meeting. The question for the poll is decided at the meeting. Accordingly, a parish poll should only be held on a question which it is appropriate for a parish to consider. However, individuals have misused the current wide definition to call for polls on matters which were unrelated to the local area or the functions of a parish. For example, polls have been called on national policy issues which a parish council cannot change. This has resulted in inappropriate polls at substantial cost to local tax payers.

Once a poll has been demanded at a parish meeting the chairman of the meeting notifies their principal council. Following a number of parish polls on national political issues, guidance was issued recommending that parish chairmen advise their principal council if they do not feel the topic of the poll is a parish affair, and suggesting that the returning officer of the principal council could then refuse to hold a poll on this question.

It is necessary to ensure that polls are called on topics that were discussed at the meeting, affect those who live and work in the parish and relate to parish functions. Placing previous guidance into legislation and adding defining criteria aims to guarantee the electors' voices are protected but prevent tax payers' money from being wasted.<sup>14</sup>

14.47 The national branch of the AEA supported the Government's proposals, and offered suggestions of its own.

<sup>14</sup> UK Government, *Parish Polls: Consultation on the Government's intentions to modernise parish poll regulations* (December 2014) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/381894/Parish\\_Poll\\_Consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/381894/Parish_Poll_Consultation.pdf), paras 3.1 to 3.3 (last visited 11 January 2016). We also noted this issue in our consultation paper; Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 14.104 to 14.105 and 14.119 to 14.120.

- 14.48 Ian Miller (Wyre Forest DC) disagreed with the placing of any limitation, suggesting that it was difficult to provide for the wide range of questions that might be of local concern.
- 14.49 In our view, under the current law, a parish poll question cannot lie outside the proper range of decision making by a parish council, or be devoid of practical application.<sup>15</sup> Nevertheless, our view is that it would be helpful if the Government were to define the circumstances in which such a poll might be called. Given that this is a matter under review, we will make the general recommendation that legislation should define the issues of parish concern that may be put to a parish poll.
- 14.50 This is an area of the law which is plainly in the process of change. We welcome the UK Government's modernisation review and will work with them to find the proper place of parish polls within a more standardised regime for conducting local referendums. However, based on the current law, we are minded to make the following recommendations.

***Recommendation 14-6: A parish poll pertaining to an appointment should be governed by the conduct rules governing elections, omitting the nomination stage.***

***Recommendation 14-7: A parish poll pertaining to an issue should be governed by the conduct rules for local referendums.***

***Recommendation 14-8: The scope of parish issues which can be put to a poll should be defined.***

<sup>15</sup> *Bennett v Chappell* [1966] Ch 391 para 399. See Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.105.

# APPENDIX A

## LIST OF RECOMMENDATIONS

### CHAPTER 2: LEGISLATIVE FRAMEWORK

**Recommendation 2-1:** The current laws governing elections should be rationalised into a single, consistent legislative framework governing all elections (enacted in accordance with the UK legislatures' legislative competences).

**Recommendation 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

**Recommendation 3-1:** The person in the current law who is the acting returning officer at UK Parliamentary elections in England and Wales shall have all powers in respect of the election, but may be required by secondary legislation to delegate the oral declaration of the result to another person.

**Recommendation 3-2:** Electoral law should set out the powers and duties of returning officers for all elections within the legislative competence of the parliaments and governments within the United Kingdom.

**Recommendation 3-3:** The functions, duties, and powers of direction of regional returning officers at elections managed by more than one returning officer should be set out in primary legislation, along with the duty of officers to cooperate with others running the same poll. It should extend to the administration of the election in question. Secondary legislation may provide more detail as to the extent of powers of direction, including the effect on combined polls.

**Recommendation 3-4:** The designation and review of polling districts is an administrative matter which, in Great Britain, should be the responsibility of the returning officer rather than local authority councils. Appeals against such decisions should continue to be heard by the Electoral Commission.

### CHAPTER 4: THE REGISTRATION OF ELECTORS

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

**Recommendation 4-2:** The law on electoral residence, including factors to be considered by electoral registration officers, and on special category electors, should be restated clearly and simply in primary legislation.

**Recommendation 4-3:** Primary legislation should explicitly acknowledge the possibility of satisfying the residence test in more than one place.

**Recommendation 4-4:** The law should lay down the factors to be considered by registration officers when determining second residence applications.

**Recommendation 4-5:** Applicants for registration in respect of a second home should be required to state that fact. Secondary legislation may prescribe how registration officers should seek to acquire the information required to decide the application.

**Recommendation 4-6:** Electors applying to be registered in respect of a second home should be asked to designate which home they wish to be registered at to vote at national elections.

**Recommendation 4-7:** Primary legislation should deal with “special category” electors through a single regime providing for a declaration of local connection establishing a notional place of residence; other administrative requirements should be in secondary legislation.

**Recommendation 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.

**Recommendation 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 applying for registration.

**Recommendation 4-10:** The deadline for applying for registration should be expressed as a number of days in advance of a poll. It may be varied by the Secretary of State provided it falls between days 12 and five before the poll.

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

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

**Recommendation 4-13:** Secondary legislation may require registration officers’ systems for managing registration data to be capable of being exported to and interacting with other officers’ software, through minimum specifications or a certification requirement laid down in secondary legislation.

**Recommendation 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 subject to a limit of five years.

## **CHAPTER 5: MANNER OF VOTING**

**Recommendation 5-1:** The secrecy provisions currently in section 66 of the 1983 Act should extend to information obtained at completion of a postal vote and to prohibit the taking of photographs at a polling station without prior permission of the presiding officer.

**Recommendation 5-2:** The obligation to store sealed packets after the count should specify that they should be stored securely.

**Recommendation 5-3:** Secrecy should be unlocked only by court order, with safeguards against disclosure of how a person voted extended to an innocently invalid vote; however nothing in such safeguards should prevent public reporting of electoral fraud.

**Recommendation 5-4:** The form and content of ballot papers should continue to be prescribed in secondary legislation.

**Recommendation 5-5:** There should be a duty to consult the Electoral Commission on prescribed ballot paper form and content by reference to the principles of clarity (including for disabled voters), internal consistency and general consistency with other elections.

## **CHAPTER 6: ABSENT VOTING**

**Recommendation 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.

**Recommendation 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.

**Recommendation 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.

**Recommendation 6-4:** The special polling station procedure in Northern Ireland under schedule 1 to the Representation of the People Act 1985 should be abolished.

**Recommendation 6-5:** Absent voting applications should substantially adhere to prescribed forms set out in secondary legislation.

**Recommendation 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.

**Recommendation 6-7:** A uniform set of rules should govern the postal voting processes in Great Britain and Northern Ireland respectively; and

**Recommendation 6-8:** 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**

**Recommendation 7-1:** A single set of nomination papers, 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.

**Recommendation 7-2:** The nomination paper should be capable of being delivered by hand and by such other means as provided by secondary legislation, which may include post and electronic means of communication.

**Recommendation 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 be accompanied by the requisite consents by list candidates.

**Recommendation 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 is defective.

**Recommendation 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.

**Recommendation 7-6:** Returning officers should have an express power to reject sham nominations which are designed to confuse or mislead electors, or to obstruct the exercise of the franchise.

## **CHAPTER 8: THE POLLING PLACE**

**Recommendation 8-1:** A single polling notice should mark the end of nominations and the beginning of the poll, which the returning officer must communicate to candidates and publicise.

**Recommendation 8-2:** Prescribed forms of poll card should be used at all elections, including those for parish and community councils in England and Wales, subject to a requirement of substantial adherence to the prescribed form.

**Recommendation 8-3:** Returning officers should be subject to a duty of neutrality. Furthermore, they 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.

**Recommendation 8-4:** Returning officers should have a power to select and be in control of premises maintained at public expense for polling subject to a duty to compensate the direct costs of providing the premises; secondary legislation may supplement the definition of premises maintained at public expense.



**Recommendation 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.

**Recommendation 8-6:** The procedure for returning officers to issue authorisations to use force should be abolished, leaving only a power to direct a police officer to remove a person from the polling station who is not entitled to be there, or who is disruptive (provided they have been given an opportunity to vote).

**Recommendation 8-7:** A single set of polling rules should apply to all elections, subject to the devolutionary framework. These should be simplified and 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.

**Recommendation 8-8:** Polling rules should set out general requirements for a legal poll which the returning officer must adhere to, and set out his or her powers. These should include a power to require voters to show the unique identifying mark on their ballot paper to polling station staff.

**Recommendation 8-9:** Primary legislation should outline polling clerks' right to ask voters questions as to their entitlement to vote. Polling clerks must exercise the right to ask questions in accordance with secondary legislation.

**Recommendation 8-10:** Voting with the assistance of a companion should not involve formal written declarations, but should be permitted by the presiding officer where a voter appears to be unable to vote without assistance. The limit on the number of voters a companion may assist should not apply to family members, who should include grandparents and (adult) grandchildren.

**Recommendation 8-11:** There should be a single formulation of the need for the returning officer to provide a facility in every polling station to assist visually impaired voters to vote unaided.

**Recommendation 8-12:** The distinction between the death of party and independent candidates should be retained as regards parliamentary elections.

**Recommendation 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 provided a replacement party candidate can be identified.

**Recommendation 8-14:** At local government elections in England and Wales, the death of an independent candidate should continue to result in the abandonment of the poll.

**Recommendation 8-15:** The existing rule, requiring the presiding officer to adjourn a poll in cases of rioting or open violence, should be abolished.

**Recommendation 8-16:** Returning officers should have power as a last resort 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.

**Recommendation 8-17:** If an event occurs that affects a significant portion of the UK at an election taking place over more than one electoral area, the above power should be exercised subject to instruction by the Electoral Commission.

## **CHAPTER 9: THE COUNT**

**Recommendation 9-1:** A single standard set of rules in primary legislation should govern the count at all elections.

**Recommendation 9-2:** The standard counting rules should cater for differences between elections as regards their voting system and how their counts are managed.

**Recommendation 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.

**Recommendation 9-4:** The rules should state that 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.

**Recommendation 9-5:** The standard rules in primary legislation should apply to STV counts so far as they are applicable; the detailed procedure for conducting an STV count should be in secondary legislation.

**Recommendation 9-6:** A standard set of counting rules and subset of rules for electronic counting should apply to all elections. Which elections are subject to electronic counting should be determined by secondary legislation.

**Recommendation 9-7:** The secondary legislation above must also make provision ensuring sufficient scrutiny by political parties and the Electoral Commission, including but not limited to prior demonstration of the electronic counting system to them and/or certification of that system by a prescribed body.

## **CHAPTER 10: TIMETABLES AND COMBINATION**

**Recommendation 10-1:** The UK Parliamentary election timetable should be oriented so that the steps in it are counted backwards from polling day.

**Recommendation 10-2:** A separate rule should state that, for by-elections, polling day is on the last Thursday occurring between days 26 and 30 after the warrant for the writ of by-election is issued.

**Recommendation 10-3:** The writ should be capable of communication by electronic means, in addition to physical delivery.

**Recommendation 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.

**Recommendation 10-5:** That timetable should be 28 days in length.

**Recommendation 10-6:** The law governing combination of coinciding polls should be in a single set of rules for all elections.

**Recommendation 10-7:** Any elections coinciding in the same area on the same day must be combined.

**Recommendation 10-8:** If four or more polls coincide, the returning officer should have a power to defer a poll if he or she concludes that he cannot properly administer the polls on the same day. This power should not apply to general or ordinary elections, or national referendums. The power should be exercised in accordance with secondary legislation.

**Recommendation 10-9:** The lead returning officer and his or her functions should be governed by secondary legislation setting out the hierarchy of returning officers, the functions they must perform, and the functions which may be given to them by agreement.

**Recommendation 10-10:** A single set of adaptations should provide for situations where a poll involves several ballot papers.

## **CHAPTER 11: ELECTORAL OFFENCES**

**Recommendation 11-1:** A single set of electoral offences should be set out in primary legislation which should apply to all elections.

**Recommendation 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 an election.

**Recommendation 11-3:** The electoral offence of treating should be abolished and the behaviour that it captures should where appropriate be prosecuted as bribery.

**Recommendation 11-4:** Undue influence should be restated as offences of intimidation, deception and improper pressure. Pressure will be improper if:

- (a) it involves the commission or threat of commission of an illegal act; or
- (b) a reasonable person would regard it as improperly infringing the free exercise of the franchise.

**Recommendation 11-5:** In England and Wales and Northern Ireland prosecutions pursuant to Recommendation 11-4 (b) should only be brought by or with the consent of the Director of Public Prosecutions.

**Recommendation 11-6:** The imprint requirement should extend to online campaign material which may reasonably be regarded as intending to procure or promote any particular result, subject to a reasonable practicability defence.

**Recommendation 11-7:** The illegal practice of disturbing election meetings should apply only to candidates and those supporting them, and should no longer be predicated on the “lawfulness” of the meeting.

**Recommendation 11-8:** The offence of falsely stating that another candidate has withdrawn should not be retained; where such a statement is effective to convince voters that a candidate had withdrawn it should amount to undue influence by deception.

**Recommendation 11-9:** A maximum sentence of ten years’ custody should 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**

**Recommendation 12-1:** Provisions governing the regulation of campaign expenditure should be in a single code set out for all elections, subject to devolved legislative competence.

**Recommendation 12-2:** A single schedule should contain prescribed expense limits and guidance to candidates as to expenditure and donations.

**Recommendation 12-3:** 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.

**Recommendation 12-4:** 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.

**Recommendation 12-5:** 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.

## **CHAPTER 13: LEGAL CHALLENGE**

**Recommendation 13-1:** The doctrine of “votes thrown away” should be abolished.

**Recommendation 13-2:** The law governing challenging elections should be set out in primary legislation governing all elections.

**Recommendation 13-3:** Defects in nomination, other than purely formal defects, should invalidate the election if they can reasonably be supposed to have affected the result of the election; knowingly making a false statement or giving false particulars in the nomination form should continue to invalidate an election.

**Recommendation 13-4:** The grounds for correcting the outcome or invalidating elections should be restated and positively set out.

**Recommendation 13-5:** Disqualification at the time of election should be stated to be a ground for invalidating the election for all elections.

**Recommendation 13-6:** The election court should have a power to consider whether a disqualification has expired and, if so, whether it is proper to disregard it, mirroring the power under section 6 of the House of Commons Disqualification Act 1975.

**Recommendation 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, on the grounds of corrupt or illegal practices attributable to the candidate party or individual, or for extensive corruption.

**Recommendation 13-8:** Legal challenges should be heard in the ordinary court system in the UK, with a single right of appeal to the Court of Appeal (in England and Wales, and Northern Ireland) and the Inner House of the Court of Session in Scotland.

**Recommendation 13-9:** Election petitions in England, Wales and Northern Ireland should be heard by the High Court; judges, including deputy judges, should be authorised to hear election petitions by the senior judiciary. Election petitions in Scotland should be heard by the Outer House of the Court of Session (for national elections) and by the Sheriff Principal (for local elections).

**Recommendation 13-10:** Challenges should be governed in each UK jurisdiction by simple and modern rules of procedure. Judges should continue to have regard to the needs of justice, striking a balance between access to the court and certainty in electoral outcomes.

**Recommendation 13-11:** Returning officers should have standing to bring petitions relating to any breach of electoral law in administering the election; they should in particular be able to bring a preliminary application to test whether a putative breach affected the result.

**Recommendation 13-12:** The power of courts hearing election challenges to make protective costs or expenses orders should if necessary be acknowledged in primary legislation.

**Recommendation 13-13:** Electors' complaints about the administration of elections (which do not aim to overturn the result) should be investigated by the Local Government Ombudsman in England, the Scottish Public Services Ombudsman, the Public Service Ombudsman for Wales and the Northern Ireland Ombudsman.

## **CHAPTER 14: REFERENDUMS**

**Recommendation 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.

**Recommendation 14-2:** Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring those governing elections, save for necessary modifications.

**Recommendation 14-3:** A single legislative framework should govern the detailed conduct of local referendums in England and Wales, subject to the primary legislation governing their instigation.

**Recommendation 14-4:** The grounds of challenge governing elections should apply to local referendums, save that corrupt or illegal practices should only be a ground for annulling the referendum if they extensively prevailed and can be supposed to have affected its outcome.

**Recommendation 14-5:** Neighbourhood planning referendums should continue to be challenged by judicial review, but the court should be directed to have regard to the standard grounds for challenging local referendums.

**Recommendation 14-6:** A parish poll pertaining to an appointment should be governed by the conduct rules governing elections, omitting the nomination stage.

**Recommendation 14-7:** A parish poll pertaining to an issue should be governed by the conduct rules for local referendums.

**Recommendation 14-8:** The scope of parish issues which can be put to a poll should be defined.

## APPENDIX B

### LIST OF CONSULTEES

| Name   | Affiliation / Organisation                       |
|--|--|
| Association of Chief Police Officers Electoral Malpractice Portfolio | Police service                                   |
| Sir Howard Bernstein   | Manchester CC                                    |
| David Boothroyd  | Labour Councillor                                |
| Matthew Box  | Malvern Hills DC                                 |
| Jon Burden   | Hammersmith & Fulham branch of Liberal Democrats |
| Callcredit Information Group   | Credit reference agency                          |
| John Cartwright  | Local government and Parliamentary candidate     |
| Piers Coleman  | K & L Gates LLP                                  |
| George Cooper <sup>1</sup>   | Haringey BC                                      |
| Co-operative Party   | Political party                                  |
| Philip Coppel QC   | Cornerstone Chambers                             |
| Liam Costello  | Parish Councillor (Northampton)                  |
| Cumbria Association of Local Councils                                | Electoral Administrators                         |
| Alison Davidson  | The Moray Council                                |
| Disability Action Northern Ireland                                   | Non-Governmental Organisation                    |
| Diverse Cymru  | Charity  |
| Eastbourne Electoral Services  | Electoral administrators                         |
| Eastern Branch of the Association of Electoral Administrators        | Electoral administrator                          |
| Gifty Edila  | Hackney BC                                       |
| Electoral Commission   | Public body                                      |
| Electoral Office for Northern Ireland                                | Public body                                      |
| Colin Everett  | Flintshire CC                                    |
| Dr Heather Green   | Aberdeen University                              |
| Paul Gribble CBE   | Editor of Schofield's Election Law               |
| Philip Hardy   | Sandwell BC                                      |
| Mark Heath   | Southampton CC                                   |
| David Hughes   | Gravesham BC                                     |
| Jeff Jacobs  | Greater London Authority                         |
| Dr Toby James  | University of East Anglia                        |

<sup>1</sup> Due to an oversight, Mr Cooper's response is not referred to in the text of this report.

|  |   |
|--|---|
| Labour Party   | Political Party   |
| Crawford Langley   | Aberdeen CC   |
| Sir Brian Leveson (President of the Queen's Bench Division)  | Judiciary   |
| Local Government Boundary Commission   | Public body   |
| Local Government Boundary Commission for Scotland  | Public body   |
| Local Government Boundary Commission Wales   | Public body   |
| London Branch of the Association of Electoral Administrators   | Electoral administrators                                      |
| Alan Mabbutt OBE   | Conservative Party Nomination Officer                         |
| Richard Mawrey QC  | Local election commissioner;<br>Barrister, Henderson Chambers |
| McDougall Trust  | Charity   |
| Mencap UK  | Charity (Royal Mencap Society)                                |
| Metropolitan Police Service  | Public body   |
| Ian Miller   | Wyre Forest DC  |
| Dr Caroline Morris   | Queen Mary, University of London                              |
| National Branch of the Association of Electoral Administrators   | Electoral administrators                                      |
| New Forest District Council  | Electoral administrators                                      |
| News Media Association   | Private company (Newspaper Organisation Limited)              |
| Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO)   | Non-governmental organisation                                 |
| Ombudsmen joint response:<br>Local Government Ombudsman for England<br>Public Services Ombudsman for Wales<br>Scottish Public Services Ombudsman<br>Northern Ireland Ombudsman | Public bodies   |
| Liam Pennington  | Local government candidate                                    |
| Robin Potter   | Liberal Democrat Councillor                                   |
| Public Prosecution Service Belfast   | Public body   |
| Royal National Institute for Blind People (RNIB)   | Charity   |
| Scotland and Northern Ireland branch of the Association of Electoral Administrators  | Electoral administrators                                      |
| Scottish Assessors Association (SAA)   | Association   |
| Scottish Government  | Government  |



|  |  |
|--|--|
| Scottish National Party  | Political party  |
| Senators of the College of Justice   | Judiciary (Scotland)   |
| SDLP (Social Democratic and Labour Party)                                  | Political party  |
| Mrs Justice Slade  | Judiciary (High Court)   |
| Smartmatic   | Private company  |
| Society for Local Authority Chief Executives and Senior Managers in the UK | Electoral administrators   |
| Society of Local Authority Lawyers and Administrators in Scotland          | Electoral administrators   |
| Southern Branch of the Association of Electoral Administrators             | Electoral administrators   |
| Allyson Spicer   | Parish Councillor (Tunstall)                                     |
| Timothy Straker QC   | Local election commissioner;<br>Barrister, 4-5 Gray's Inn Square |
| Michael Thomas   | Individual   |
| Clare Tyson  | Local government candidate                                       |
| Professor Bob Watt   | University of Buckingham   |
| West Lancashire Borough Council  | Electoral administrators   |
| Ian White  | Kettering BC   |
| Joyce White  | West Dunbartonshire DC   |
| Alastair Whitelaw  | Individual response (Scottish Green Party)                       |
| Darren Whitney   | Stratford on Avon DC   |
| Elaine Woodward  | Individual   |
| Wyre Forest District Council   | Electoral Administrators   |

## APPENDIX C

### EVENTS ATTENDED DURING CONSULTATION

C.1 This appendix presents a list of events that the Law Commission attended during the consultation period (9 December 2014 to 31 March 2015).

| Date       | Event   | Location   |
|------------|---|------------|
| 9/12/2014  | Electoral Commission - National Assembly for Wales Political Party Panel                            | Cardiff    |
| 10/12/2014 | Capita – Preparing for Election’s Conference  | London     |
| 6/1/2015   | Meeting with Stephen Twigg MP   | London     |
| 22/1/2015  | Meeting with Metropolitan Police Service  | London     |
| 27/1/2015  | Electoral Commission - Scottish Parliament Political Party Panel                                    | Edinburgh  |
| 27/1/2015  | Electoral Commission – Northern Ireland Parliament Political Party Panel                            | Belfast    |
| 27/1/2015  | Meeting with Chief Electoral Officer for Northern Ireland   | Belfast    |
| 27/1/2015  | Meeting with Northern Ireland Electoral Commission  | Belfast    |
| 28/1/2015  | University College London – Constitution Unit Seminar on Electoral Law Reform                       | London     |
| 3/2/2015   | Association of Electoral Administrators Annual Conference   | Brighton   |
| 6/2/2015   | Electoral Commission and Police Service - Electoral Fraud Reduction and Prevention National Seminar | Birmingham |
| 10/2/2015  | Southern branch meeting of the Association of Electoral Administrators                              | New Forest |
| 13/2/2015  | Electoral Commission and Cabinet Office – Electoral Integrity Meeting                               | London     |
| 13/2/2015  | Meeting with Scottish National Party  | London     |
| 18/2/2015  | Meeting with Royal National Institute of Blind People (RNIB)  | London     |
| 20/2/2015  | Society of Local Authority Lawyers and Administrators in Scotland Elections Working Group Meeting   | Edinburgh  |
| 23/2/2015  | Association of Electoral Administrators Consultation Event  | London     |
| 25/2/2015  | Greater London Authority meeting  | London     |
| 3/3/2015   | Electoral Commission – UK Parliament Political Party Panel  | London     |
| 3/3/2015   | Office for Democratic Institutions and Human Rights (ODIHR) meeting                                 | London     |

|           |  |         |
|-----------|--|---------|
| 11/3/2015 | Lawyers in Local Government Elections Conference                 | London  |
| 25/3/2015 | Meeting with Welsh government                                    | Cardiff |
| 26/3/2015 | Meeting with President of the Queen's Bench Division (judiciary) | London  |