

# SUMMARY OF INTERIM REPORT ON UK ELECTORAL LAW

## BACKGROUND AND INTRODUCTION

- 1 The electoral law reform project originated in the Law Commission for England and Wales' Eleventh Programme of Law Reform. Its scope, determined in 2012, extends to electoral administration law, offences and legal challenges. It excludes reform of the franchise, voting systems, electoral boundaries, national campaign, party, and broadcast regulation, and fundamental change to institutions.
- 2 After references were made by the UK and Scottish Government, the three Law Commissions in the UK engaged in substantive reform work, resulting in the publication of our consultation paper, *Electoral Law in the UK*<sup>1</sup>. That paper made or asked 114 proposals or questions concerning the reform of electoral law. There followed a public consultation. 74 individuals or organisations responded to our consultation in writing, with others participating in our consultation events. Our interim report reviews the response to our consultation paper on UK electoral law and sets out our interim recommendations for reform. A glossary, which also appears in the report, can be found at the end of this summary.
- 3 The response has been overwhelmingly positive, with many proposals attracting unanimous or near-unanimous support. Key stakeholders in the electoral community stressed the need for sensible, rational reform of our complex electoral laws. There is now a review stage for Government to decide whether to go on to the next stage: the production of a draft Bill and final report.
- 4 A detailed account of the current law is contained in our consultation paper, which runs to some 357 pages. This summary outlines our recommendations in the interim report, attempting to summarise the thinking behind them. It focuses on the wider aims of the reform project: the rationalisation of electoral law into a new, rational and modern legislative framework. Some recommendations are not discussed in detail if they are of a technical nature. Many such recommendations are born of the aim of rationalising inconsistent electoral laws, modernising out of date laws, or correcting apparent errors or infelicities in the current law. The reasons in support of these recommendations are given in detail in our consultation paper and interim report.

## Policy, law reform and devolution

- 5 Chapter 1 of the interim report outlines the scope of the project and the list of electoral events within its scope. Our reform work must be based on the current law, while being sufficiently flexible to adapt to ongoing changes in policy.
- 6 One area where there has been development during the life of the project is the devolutionary framework concerning elections. We are bound to make recommendations subject to that emergent devolutionary framework. It has

<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).

become clear that UK-wide electoral reform will require separate legislation to be enacted by the devolved legislatures. The future shape of the project, as far as Scotland-only legislation is concerned, now falls to be considered by the Scottish Government as part of the review stage. In due course the Welsh Government will also consider the position for election law devolved to the Welsh Assembly.

- 7 The Law Commissions' immediate aim is to publish a report and a draft Bill for the United Kingdom Parliament in 2017 in order to allow sufficient time for implementation before the scheduled UK general election in May 2020. The proposed draft UK Bill would set out a new general structure or framework which could be used for all elections and referendums in the jurisdictions of the UK. This would represent a move away from the current unworkable mass of election-specific legislation towards a more principled way in which to organise electoral law. It would in turn enable more efficient, less time and resource intensive development of electoral policy by Government.
- 8 A UK draft 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 changes required by them; for example, a Scotland-only Bill would provide for the different franchise in Scotland.

## **CHAPTER 2: THE LEGISLATIVE STRUCTURE**

- 9 Electoral law is complex, voluminous and fragmented. After 1997, many more types of election and local referendums were created, while recourse to national referendums grew. Each type of election or referendum is generally governed by its bespoke legislation. We describe this feature of the legislative framework as "election-specificity".
- 10 More than 17 statutes and some 30 pieces of secondary legislation govern the area of electoral law that is considered by this reform project. Some of their content is repeated, almost word for word, from the "classical" law which is contained in the Representation of the People Act 1983 ("the 1983 Act"), which governs UK Parliamentary elections and some aspects of local government elections in England, Wales and Scotland.
- 11 All of the newly created elections use a voting system other than first past the post, for which the classical law contained in the 1983 Act was designed. Accordingly, some of the classical law had to be adapted to account for the different voting system. We call efforts to adapt a classical rule to a new voting system "transpositions". These have not been consistent, even for elections which use the same voting system. This greatly contributes to the problems of volume and complexity.

- 12 This poses problems not only for those consulting the law, but also for implementing new or changed policies. Introducing a new election requires replicating every aspect of the existing electoral law, while introducing new policy requires many different pieces of legislation for each election type. This is undesirable when, in fact, a large number of rules are shared by all elections. It is not a good and efficient use of Government and Parliamentary resources to draft, and to scrutinise the same change of policy, or new policy, in up to 19 pieces of primary and secondary legislation. Nor is it helpful to those who use electoral law to have such a plethora of sources, and the inevitable differences that creep into the detail of electoral administration of particular electoral events.
- 13 Our view is that electoral law should be governed by a rational and holistic framework governing all existing elections. Any new elections – or referendum – would be able to make use of the existing electoral law infrastructure, once certain policy decisions are made, such as the franchise to be employed. Any changes in electoral policy would require just one instance of legislative amendment, not several. Chapter 2 makes two recommendations to that effect which we set out below. It is important to note, however, that the approach behind these recommendations underpins recommendations made in other chapters where the election-specific arrangement of electoral law causes particular problems. Rationalising the legislative framework is the key reform aim, and will allow a reforming Act to achieve considerable savings in terms of detail and volume of laws on the conduct of elections in chapters 7, 8, 9 (on nominations, polling and the count) and chapter 10 (on the combination of polls, where the current approach introduces significant complexity).

**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**

- 14 Running elections divides into three principal tasks. The first two – maintaining a register of electors and absent voting records – are undertaken by registration officers and are considered in chapters 4 and 6 respectively. The third task, running elections, falls to returning officers. Since this reform project does not consider fundamental institutional questions, its task is to clarify and to simplify the law governing the variety of returning officers in the UK.
- 15 One source of complexity is the legal notion that, at Parliamentary elections in England and Wales, local dignitaries (such as the sheriff of a county or mayor or council chairman) are returning officers. In reality their only role is to receive the writ which triggers the election, and to 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. This additional layer of complexity is redundant and confusing; in our view the returning officer should be the person actually responsible for running the election. If the policy is to retain the role of ceremonial returning

officers in declaring elections orally, it can be given effect in secondary legislation.

**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.

- 16 This is the first step in having a simpler, and election-wide expression of the powers and duties of returning officers. The next involves the multiplicity of officials involved in running some elections. In Great Britain, returning officers are local government officials. But most elections span more than one local government area. Management of the poll is thus overseen by more than one returning officer, one of whom is in a senior position over the whole election. We call these “directing” returning officers, because most have a power of direction in law over the local returning officers who oversee the poll over a subdivision of the area or constituency. The framing of the power of direction in law varies from one election to the next. In the context of combination of polls, where one of the combined poll’s returning officer is the “lead” officer, we identified some confusion over the role and status of directions by the directing officer to the lead officer.
- 17 Our view is that the law governing the running of elections should be restated and consistently expressed in legislation for all elections, subject to the competence of the UK’s legislatures. These should spell out, in particular, the duties and powers of regional returning officers at elections managed by more than one returning officer.

**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.

- 18 To facilitate the running of the poll, electoral areas (constituencies, wards or divisions) are broken down into administrative areas in which polling will take place. In the legislation, these are called “polling districts”. Within them is a “polling place” – a term not defined in the legislation, but understood to be the building in which the polling station is located. The legal significance of polling places is that the returning officer must locate polling stations within the designated polling place.

- 19 The periodic review and alteration of parliamentary polling districts and places is carried out, in Great Britain, by the local authority council, who are themselves elected and political actors. After consultation, we maintain the view in our consultation paper that this administrative task, the aim of which is to make polling convenient for voters, should be the responsibility of returning officers, rather than elected councillors. We also conclude that appeals from polling district reviews should continue to be heard by the Electoral Commission.

**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**

- 20 The law concerning electoral registration has changed substantially since 1983. As policy developed from household registration by annual canvass, through year-round “rolling” registration, to our current system of individual electoral registration, the electoral registration section of the 1983 Act has grown extremely complex. Our primary reform aim is to re-state the current law so that it is simpler to understand and to apply. This starts with a statement of the franchise.

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

- 21 Next is the legal concept of residence, which connects a person who has the franchise to a geographical area in which he or she may exercise it. Defining residence in legislation is difficult. In our view the law should continue to set out the factors that registration officers must consider to establish residence. Meanwhile, there is scope for considerable simplification of the law on “notional” residence, tying so-called “special category” electors such as merchant seamen or service voters to a place, even though they do not actually reside there. We consider that a single legal notion of declaration of local connection should govern these.

**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 4-7:** 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.

- 22 The law governing the registration process is a complex mixture of primary and secondary legislation. It is rooted in an outdated concept of a physical electoral register, compiled once a year, with monthly alterations by a paper process. The complexities of the current arrangements have resulted in the deadline for “late” registration in Great Britain being wrongly thought to be 11 days before the election, instead of 12. Moreover, there are in law five distinct electoral registers. In practice the five registers are combined onto one dataset contained in an “electoral management system”, a piece of software operated by the registration officer.
- 23 The point of registration can be simply stated: it definitively establishes the right to vote, and the elections at which the elector may vote. We consider that the legal treatment of the electoral register is ripe for simplification. There should be a single register in law, capable of reflecting which franchise the elector enjoys. Subject to this, the current law should be restated more simply. Primary legislation should contain core principles, the powers and duties of registration officers, and transparency requirements. Secondary legislation can supply the detail, as required. A number of our recommendations pertain to our aim of simplifying the law on electoral registration.

**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 5 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.

- 24 Other recommendations in this chapter arise from specific problems which we encountered in our review of the current law.
- 25 The first concerns future-proofing. We see the merit of a legal requirement for registration officers’ data being capable of being exported to, and their software interacting with, other registration officers’ software. This would have a range of uses. If, at some point in the future, technology were devised to allow polling station registers to be updated digitally and in real time, it would allow electors to vote at a polling station of choice, not the one allocated to them based on where they live.

**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.

- 26 The second concerns the issue, which was reported as a problem in 2013, of EU citizens' declaration of an intent to vote in the UK lasting only one year. We could see no reason in EU law why this should not be extended for the term of the EU Parliament.

**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.

### **Recommendations as to second residence**

- 27 Finally, we make a set of recommendations concerning the legal treatment of second electoral residences. The courts have established the possibility of a second residence in principle. Students, for example, can be registered in halls of accommodation as well as the parental home. Other examples include a second home required for an elector's career. No legislative guidance is given to registration officers as to how to decide whether a second home amounts to a second electoral residence, risking inconsistent practice in different parts of the UK. Our view is that such guidance is desirable and feasible, and we outline the factors tending to establish a second residence in chapter 4 of our interim report.<sup>2</sup> Key to our recommendations are the principle that the law should lay down some factors to be considered for *second* residence cases, and that applicants for registration in respect of a second residence should state that fact.
- 28 Where an elector is resident in more than one place, they have an opportunity to vote at local elections in both places, which is their right. But at national elections which occur at both places at the same time, they cannot vote in both places without committing an offence. If they are a postal voter, under the current law, they will be sent postal voting papers in respect of both residences, however, and may inadvertently commit the offence. Our view is that such an elector should be required to designate one residence as the one for which they will cast votes at "national" elections, to avoid the risk of double voting.

**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.

<sup>2</sup> See the draft Interim Report, paras 4.28 to 4.37.

**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.

## **CHAPTER 5: MANNER OF VOTING**

- 29 This chapter considers the law concerning the secret ballot and the legal provisions concerning ballot papers.
- 30 The principle and operation of voter secrecy is long established. A side-effect is that the master provision on preserving secrecy, section 66 of the 1983 Act, is out of date with modern developments: principally these are the availability of mobile phone photography at polling stations, and extending the protection of voter secrecy to information obtained when an elector completes a postal vote outside a polling station. Our first recommendation seeks to plug that gap.

**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.

- 31 Our next recommendations concern the UK's long-established version of the secret ballot, which provides voters with secrecy while allowing for judicial vote tracing to uncover fraud. Clarification is required here to ensure that the UK clearly and demonstrably complies with article 3 of the First Protocol to the European Convention on Human Rights, and similar EU law rules requiring elections to the European Parliament to be free and secret. Qualified secrecy, in place in the UK since 1872, intends that legitimate voters can vote secretly, while allowing for judicial vote tracing to counteract and unearth fraud. At 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. It was used only once, and only because the court-supervised vote tracing process could not address the problem in question. Our recommendations here tidy up laws that have been largely unchanged since 1872.

**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.

### **Ballot paper design and content**

- 32 At present, ballot papers are in a form prescribed in secondary legislation (or annexed to the 1983 Act, subject to amendment by the Secretary of State). The increase in the number of electoral events, and the variety of voting systems in use in the UK, led to some criticism regarding the consistency and clarity of prescribed ballot paper forms. In more recent times, there has been a 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.
- 33 Reflecting these recent trends, our view is that the form of ballot papers should continue to be prescribed in secondary legislation. In order to improve the experience of voters and the effectiveness of ballot papers, general principles should be enacted so that the existing duty of the Secretary of State to consult the Electoral Commission on changes to electoral law should specifically refer, in the context of prescribed ballot papers, to adherence with those principles. They are:
- (1) internal consistency, which is concerned with preserving presentational equality between candidates;
  - (2) clarity, which is concerned with the voter user-friendliness of the form; and
  - (3) general consistency, which considers consistency of design across elections and fostering consistent voting habits.

**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**

- 34 The law on absent voting (by post or proxy) is extremely complicated, and is set out in a mixture of primary and secondary legislation distinct from core laws and election rules governing conduct of an election. Our focus is on its simplification and modernisation. Questions of entitlement to a postal vote and the balance between access to voting and security from fraud, are political policy issues which the Law Commissions do not consider; in particular the different policy between Northern Ireland and Great Britain must be preserved.

### **Entitlement to an absent vote and absent voting records**

- 35 Part of the reason for the complexity is that the legal frameworks for absent voting are election-specific: the law envisages applications, and records of absent voters maintained by registration officers, which relate the election(s) governed by a particular piece of legislation. The Representation of the People Act 2000 Act governs UK parliamentary and local government election in England and Wales. Other pieces of secondary legislation govern absent voting for other elections. These make awkward and inconsistent attempts at incorporating absent voting records under other elections' legislative frameworks. Similarly, any new referendum legislation must attempt to "import" absent voting records for existing elections.
- 36 The notion that absent voting applications can be made for specific elections has led to some administrative problems, and at the May 2011 Alternative Vote referendum caused voters real problems where, contrary to their expectation, they had an absent vote only for the referendum and not coinciding local government elections.
- 37 In our view, primary legislation should holistically govern entitlements to an absent vote. Absent voting status and records would apply to any and all elections. The question for the voter is simply whether they want to vote by post or proxy on a particular election day, or for a period. This approach would greatly simplify the legislation, and avoid difficulties encountered in practice under the current fragmented legislative regime.

**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.

- 38 Presently "personal identifiers", which are used to verify the legitimacy of postal votes, must be provided in a certain form, but the absent voting application itself is not prescribed. In our view, it would be consistent with other parts of electoral law, and not a significant departure from the current position, if applications for an absent vote should be required substantially to adhere to forms prescribed in secondary legislation.
- 39 One of the personal identifiers, a signature, may be waived under the current law. However, no guidance is given as to how the registration officer should make the decision to grant a waiver, which risks inconsistent practice. In our view, applications for a waiver from the requirement for signature should be attested by stipulated persons, as applications to become a proxy currently must be.

**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.

- 40 A special scheme exists in Northern Ireland, which has never been brought into force, to enable certain voters to vote at a “special polling station”. We conclude that this legislation is redundant, is in any event unworkable given later developments in electoral law, and should be repealed as a tidying up measure.

**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.

- 41 Finally, the detailed legal rules governing the postal voting process, through which postal voters are issued with voting papers and cast a vote, are contained in secondary legislation. In our view, there is no longer a need to prescribe the process in significant, step-by step detail, and there is scope for significantly simplifying these by setting out the powers and duties of returning officers concerning the issuing and receipt of postal voting papers.

**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.

### **Campaign handling of postal votes**

- 42 Our consultation paper set out a case for regulation by law, rather than voluntary code of conduct, of handling by election campaigners of electors’ completed absent voting applications and postal votes. The secret ballot provides a protection against fraud in the in-person voting context which is not available in postal voting. The public perception of fraud is damaging, as is the risk of degrading standards by campaigners who perceive fraud by opponents to be effective, and to go on unpunished. On the other hand, we could also see practical problems in defining who is and who is not a campaigner, and in promoting participation in the poll, which campaigners can do at no cost to the public purse. We therefore asked the public whether the law should regulate involvement by campaigners in certain activities relating to completed absent voting applications and postal votes.

- 43 After consultation, and despite strong support for the principle of regulation by law of campaigner handling of absent voting papers, we were left with significant doubts, in particular over the following objections:

- (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.

44 We therefore do not make a recommendation that campaigner handling of postal votes should be regulated by law, noting that setting the balance between access to the poll and security from fraud is a matter for Government and Parliament. We also noted that Sir Eric Pickles MP has been tasked with investigating the issue of electoral fraud and the response to it.

## CHAPTER 7: NOTICE OF ELECTION AND NOMINATIONS

45 The law concerning the first stage of an election – from publication of a notice of election to close of nominations which finally identifies the candidates – is set out in discrete election rules. It is thus voluminous and fragmented across different provisions. The classical rules for UK Parliamentary and local government elections differ slightly. These rules are “transposed” to elections using the party list system, where *parties* stand for election, sometimes inconsistently. There is considerable duplication and complexity, which in our view would be eliminated by a holistic, pan-electoral statement of the law governing notice to nomination, with adaptations for party-list elections that are consistent. Our recommendations are primarily intended to secure a simple, and general statement of the law governing nomination.

**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.

46 Our next recommendations concern the returning officer’s power to reject nomination papers. The officer is generally restricted to examining the formal validity of the nomination paper: defective particulars or subscribers. There are two exceptions, however. The first is that serving prisoners are disqualified from *nomination* under the Representation of the People Act 1981, and unlike all other disqualifications, the returning officer has a power to reject the nomination on that ground, after following a prescribed process. In practice, only notorious prisoners are likely to have their nomination rejected. Our view is that this power is an anachronism and should be abolished; of course, the underlying disqualification will remain.

**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.

- 47 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 (such as the recent example of a mannequin being nominated for election). It is in our view desirable that legislation should give guidance, based on the existing case law, to returning officers as to how to deal with these examples.

**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**

- 48 Discrete election rules also regulate the polling process on polling day. Here again, our reform work concentrates on deriving a general statement of the law governing the polling process for all elections, streamlining and simplifying the law. At present, election-specific rules diverge, notably where an election uses the party list system in whole or in part. The first set of recommendations concern preparation for and the organisation of polling day. They largely involve technical restatement and simplification of rules that are consistently shared across all electoral events in the UK.

**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).

- 49 The next set of recommendations concern the voting procedure itself. There are minor differences of detail across elections, but in general the rules are shared across all elections. In our view, 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. The current law contains a requirement for voters to show the unique identifying 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”. In our view this should be replaced by a power to require the mark to be shown.

**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.

- 50 All election rules contain detailed, and in some cases quite complex, prescribed questions that polling staff may put to voters if they suspect there is something amiss. Originally, these were a prelude to oaths which, in the 19th Century, might be taken very seriously and in any event were backed by serious criminal offences concerning oath-breaking. This is no longer the case, and at best the questions may serve to put off a would-be impersonator. In our view, there is no longer a case for setting out, in primary legislation, the precise questions to be put to voters.

**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.

- 51 Equal access for disabled voters to polling is an important policy in the polling context. This manifests itself not only in the assisted voting procedure, but also in enabling as many electors as possible to vote using the standard procedure, which maximises voter secrecy. 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. However the description of the device is excessively detailed for some elections. In our view there should be a single formulation of the required characteristics of the equipment to be used to help disabled voters vote unassisted, and a simplified assisted voting procedure.

**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.

#### **Supervening events which frustrate the poll**

- 52 Election rules deal with two kinds of events which might frustrate the poll. One 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. The law differs as between parliamentary and local government elections. At the former, different rules apply depending on whether the deceased candidate is affiliated with a party, or is independent, which reflects the importance of party politics at these and other legislative elections. The law also deals inconsistently with the question at elections which use the party list.
- 53 In our view, the current law on death of a candidate should be simplified, but retained. As to elections which use the party list system, a single set of rules should govern them, such that the death of a list candidate should not affect the poll from going ahead.

**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.

- 54 The other type of “supervening event” in the current law is rioting and open violence, which must lead to presiding officers suspending the poll until the next day. In our view this is unsatisfactory: with modern communications, a returning officer should be required to decide whether conditions at a polling station are unsafe, not the presiding officer. Furthermore, rioting is not the only conceivable event that might frustrate the poll. A more general power to deal with supervening events which obstruct or frustrate the poll is desirable, as is the case in other jurisdictions such as Australia or Canada. We consider that the test for using such a power is that a significant portion of electors are affected; the power should be the returning officer’s, subject to instruction by the Electoral Commission in the case of national disruptions.

**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

- 55 By contrast to other areas of the law, the classical election rules governing the count are not extensive. 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; who may attend (in particular, for counting agents appointed by candidates to scrutinise the count); the requirement for verification of the ballot papers received from a polling station against the number of ballot papers allocated to it; the grounds on which ballot papers can be rejected; and the process for determining and declaring the result.
- 56 Nevertheless, these rules are replicated in the discrete legislation governing each election. For elections which use the party list, a difficulty in transposition arises regarding who may attend the count and appointing counting agents. While some differences are due to policy, many appear to be purely the result of different drafting approaches.
- 57 Our recommendations are aimed at a single, standard statement of the law governing the count, with a consistent approach to the differences required by use of the party list voting system.

**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.

- 58 As to elections using the single transferable vote (STV) – Scottish local government elections and elections in Northern Ireland other than those to the UK Parliament – the law's approach is quite different. The counting rules are very detailed because STV itself is an intricate voting system. STV thus calls for some separate treatment in electoral law.

**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.

- 59 Our final set of recommendations deal with electronic counting. Two types of elections are counted electronically: Greater London Authority elections and Scottish local government elections. However, the election rules for each take a different approach. The GLA election rules are written with electronic counting in mind. The Scottish local government election rules are written more simply, with a general provision enabling the returning officer to count electronically.
- 60 Our view is that the standard set of counting rules for elections, while they apply to manual counting, should be written as technologically neutrally as possible. A single subset of the standard rules should make additional provision governing electronic counting. Which elections are subject to electronic counting should be determined by secondary legislation. As is the case at manual counts, there is a need in the electronic counting context for a provision for promoting transparency and trust in the electronic counting system. This should also be set out 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 OF POLLS

- 61 Chapter 10 considers the timetable according to which elections are run, as well as the law governing the administration of coinciding elections –referred to as the “combination of polls”.

### Electoral timetables

- 62 Each set of election rules contains an administrative timetable. These contain most of the steps covered by election rules, from notice to nomination, ending with polling day. They do not contain deadlines for absent voting or registration, which are covered elsewhere in the electoral legislation.
- 63 In general, what we call an “incidence rule” determines when polling day takes place. The legislative timetable then calculates the timetable by calculating back from polling day. In that case, it truly is an administrative timetable.
- 64 The exception is the UK Parliamentary election timetable, which historically is both an administrative timetable and an incidence rule. 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 reference to the Fixed-term Parliaments Act 2011. For by-elections, the complex legislative timetable is arranged so that the returning officer can choose a Thursday occurring on days 23 to 27 after the warrant for by-election is issued, so that the timetable remains both an administrative one and an incidence rule.
- 65 Our view is that the legal statement of the UK Parliamentary election timetable should be re-oriented so that the timetable counts back from polling day (which is given by the 2011 Act). For by-elections, a separate 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 26 and 30 after the warrant for the writ of by-election. (based on a 28 day timetable, as to which see further below) The writ should be capable of electronic communication.

**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.

- 66 The above is based on a 28 day timetable. At present, most elections use a 25 day timetable. GLA elections are run under a 30 day timetable to allow for the production of a booklet containing Mayoral candidates’ addresses, while Scottish parliamentary and local government are run according to a 28 to 35 day timetable.

- 67 Our view is that a standard timetable should govern all UK elections. In our consultation paper, we could see two options for standardisation which least disturb the current arrangements: a 25 day timetable and a 28 day timetable. The first option disturbs the lowest number of elections' timetables. The second affords more time for all elections, while preserving the current timelines for producing the booklet at GLA elections. It would also only minimally affect Scotland-only elections.
- 68 We recommend the second option for a standard timetable. A 28 day timetable should be set out in legislation, and should contain the key milestones in electoral administration for all elections.

**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.

### **Combination of polls**

- 69 The law governing the “combination of polls” is notoriously complex. The key to understanding the subject is to distinguish between the *coincidence* of elections' polling days and the question of whether coinciding polls should be taken together, or administratively “combined” – the “combination of polls” refers only to the latter, not the former. Thus, if the combination of two polls is said to be prohibited under the current law, it is important to note that the two polls will still go ahead, on the same day, before the same voters.
- 70 We do not propose to state the current law, which is very complex. In outline:
- (1) Every election is conducted by its returning officer according to its election rules.
  - (2) Incidence rules govern when elections should occur. By their application, elections will sometimes coincide, meaning their polls will happen on the same day.
  - (3) The area of law called the “combination of polls”, properly understood, deals with the following circumstances:
    - (a) two or more elections coincide in the same area; and
    - (b) without more, each returning officer must conduct each poll according to its own election rules.
- 71 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.
- 72 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. For example, if a Welsh Assembly general election coincides with ordinary elections for both Police and Crime Commissioners and local government elections the current law is that:
- (1) the Welsh Assembly and the local government polls must be combined;
  - (2) the PCC and local government polls must be combined; but
  - (3) the Welsh Assembly and PCC polls may not be combined.
- 73 If these elections were to coincide, as was going to be the case in 2016 until polling day for local government elections was deferred, the legal position would be a nonsense.
- 74 Our reform recommendation, therefore, is that the law governing the combination of coinciding polls should be in a single set of rules. The default position should be that any coinciding polls must be combined, meaning that the conduct rules must address the fact of their coincidence and cannot ignore it. A single set of adaptations should provide for situations where a poll involves several ballot papers. Finally, if four or more polls coincide, the returning officer should have a power, exercisable according to secondary legislation to defer one of the polls.

**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 the 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

- 75 This chapter concerns criminal offences applying only to elections. Some, called corrupt or illegal practices, also operate as grounds for invalidating an election at election petition, and their commission disqualifies a person from standing for election for a period of 3 or 5 years. It is important that these offences are clearly drafted so that they are understood by participants in the election process, who must adapt their conduct to them. It is also important that they are enforced and prosecuted, in order to detect and deter election fraud.
- 76 Many of the older offences, however, are opaquely drafted, since they date back to 1883 or even before. Furthermore, the offences set out in the 1983 Act are repeated in election-specific legislation.
- 77 Chapter 11 particularly considers the older or “classical” offences. In our view a uniform set of electoral offences should be set out in primary legislation which apply to all elections. Their complex or outdated drafting should be simplified. Most of our recommendations stem from these aims.

**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 11-7:** 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.

### Undue influence

- 78 We consider the corrupt practice of undue influence in significant detail in chapter 11 of our Interim Report. Section 115 of the 1983 Act draws the offence widely, and our view is that it must capture the following conduct:
- (1) Pressure and duress: to include any means of intimidation, whether it involves physical violence or the threat of it, or some other compelling threat.
  - (2) Deception: to cover devices and contrivances such as publishing a document masquerading as a rival campaign’s.

79 Another mischief caught by the offence of undue influence is the threatening of “spiritual” injury, which was most recently considered by Commissioner Mawrey in *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB). There, a cleric’s letter published in a Bengali local paper with an estimated readership of 20,000 was held to have crossed the line into “misuse of religion” for political purposes.

80 However, it is very difficult to express the line between “proper” and “improper” pressure. Voters are faced with all sorts of pressure during electoral campaigns. The conduct which is criminal in undue influence, and the accompanying mental element, are not clearly set out. In our view 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. The key to distinguishing between the application of proper and improper pressure is whether the pressure involves the commission of an illegal act (such as a crime or wrongful eviction), or the application of pressure which a reasonable person would regard as an improper infringement on the free exercise of the franchise. This is the line which is crossed in cases of undue “religious” influence.

**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.

81 Another recommendation which is not related to our aim of rationalisation and simplification is that relating to the “imprint offence” under section 110 of the 1983 Act. Our consultation paper asked whether the current provision concerning imprinting of online material in section 110 was sufficient, or whether it was desirable and feasible to recommend regulation of online material. In the light of the response to our question, our view is that it is desirable and feasible to do so – by combining the “reasonably practicable” defence in use at the 2014 referendum, with the narrower 1983 Act definition of “campaign material”.

**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.

82 Finally, chapter 11 notes that 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 has resulted in harsher sentences and carries a maximum sentence of ten years’ custody. 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.

- 83 Our consultation paper asked consultees whether an increased sentence of ten years' custody should be available in cases of serious electoral fraud, as an alternative to conspiracy to defraud. "Serious electoral fraud" refers 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 provide 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

- 84 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.
  - (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.
- 85 Our reform aim is to retain this approach, but to set it out more clearly in primary legislation. The law, which is contained in the 1983 Act and replicated in election-specific provisions, is extremely complex. The scheme of the Act is not obvious even to lawyers. It 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.

**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.

- 86 Certain expenditure limits, for example those for spending at local government elections or UK Parliamentary general elections, are expressed as formulas. The precise limit can only be established if the candidate, agent, or member of the public knows the number of registered electors on the day that notice of election is published. In our view such expense limits should be declared by the returning officer – who will also know whether his is a borough or county constituency – along with the notice of election.

**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.

- 87 At present, the law governing expenses returns and declarations is apt to confuse, with certain authorised persons required to submit a separate expenses return to the candidate's. In our view, returning officer should receive a single expense return, submitted by the agent and candidate, including any authorised spending.

**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.

- 88 Finally, the returning officer has a duty under section 88 of the 1983 Act to publicise the availability of expenses returns for inspection, and to publicise non-receipt of returns. In our view this duty should continue, subject to the detail process being in secondary legislation, so that when a facility exists for publishing expenses returns online, it can be used.

**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**

- 89 The law governing legal challenge is extremely complex, the product of historical developments in the 19th century. Chapter 13 divides the subject matter between the grounds for reviewing elections, and the procedure governing legal challenge.

#### **The grounds of challenge**

- 90 The election court reviews the *validity* of the election, but may also *correct* the result in a process called a “scrutiny”. This 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.
- 91 The so-called doctrine of “votes thrown away” enables an election court to decide that votes for a candidate who is disqualified do not count, so that the next candidate may be elected, and the result thus corrected. However, disqualification of a candidate is also generally a ground for annulling that

candidate's election. Invalidating such an election results in a new election being called, allowing the electorate to elect a properly qualified candidate who is affiliated with their preferred political party. This is a fairer outcome, and we consider that the "doctrine of votes thrown away" should be abolished.

<b>Recommendation 13-1:</b> The doctrine of "votes thrown away" should be abolished.
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92 The grounds for challenging elections are not positively set out in the 1983 Act. 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.

93 However these grounds are not at all obvious on the face of the legislation, and the above outline is the result of consideration of case law, with some issues still a matter for debate. The effect of giving an incorrect home address in a nomination paper, for example, and of formal defects in the nomination 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 local government election 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. Finally, there are problems transposing the above grounds to elections using 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.

94 In our view, the law on challenging elections should be set out in primary legislation governing all elections. The grounds for correcting the outcome or invalidating elections should be restated and positively set out. A standard and consistent set of adaptations to the "classical" grounds of challenge should be used for elections which use the party list system. Our recommendations here are aimed at a principled, clear and consistent set of grounds of challenge for all elections.

**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.

### **The procedure for bringing an election petition**

- 95 The procedure governing election petitions is set out in the 1983 Act and election-specific legislation, and is supplemented by procedural rules in each jurisdiction in the UK. It is very complex, and in many places outdated. The original scheme was that bespoke election proceedings would be a “one stop shop” for policing elections, so that the election court used to have both a civil and a criminal law jurisdiction. It had inquisitorial features, charged with rooting out corruption. The petition proceedings were designed with finality in mind, with no right of appeal but allowing stating a case to a higher court on a point of law.
- 96 In reality election petitions are private proceedings before judges which use a procedure that is very formal, rigid, and outdated. There is no process for filtering out unmeritorious petitions. Time limits are mandatory, with no discretion to extend – but those which are contained in secondary legislation may be disregarded on the basis of article 6 of the European Convention on Human Rights, as was the case in *Miller v Bull* [2009] EWHC 2640 (QB), [2010] 1 WLR 1861. An election court – even one staffed by two High Court judges as was the case in *Woolas v Parliamentary Election Court* [2010] EWHC 3169 (Admin); [2011] 2 WLR 1362 – is subject in England and Wales 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.
- 97 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.

- 98 Our approach to reform here, which was welcomed by the senior judiciary in England and Wales, is to bring the challenge system within the ordinary civil procedure structure in the UK. Election challenges should be subject to the ordinary procedure of the courts, which are updated over time; they should be heard in the ordinary court system in the UK, with a single right of appeal. This is preferable to the complex and outdated current arrangements.

**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.

- 99 The recommendations above recognised that election challenges are private court proceedings, requiring financial commitment and risk by the challenging party. Our consultation paper proposed, however, that the public interest in election petitions should be recognised, and asked some questions concerning a public interest petitioning body. The response to our consultation was in favour of the principle of public interest petitioning, but varied considerably as to the practicalities of what cases a public interest petitioner should take over. There was also concern that the public petitioner process would become a first port of call for legal challenge to elections, putting strain on the body's resources, as well as exposing that body to the risk of being perceived to be politically motivated when bringing petitions in the public interest. We therefore decided not to recommend that there should be a public interest petitioner.
- 100 Protective costs orders are a procedural tool, used in public law cases to promote challenges brought in the public interest by reducing, and fixing in advance, a claimant's exposure to pay the other parties' costs. Our view is that their availability in election cases should be made beyond doubt.
- 101 We also recommend that returning officers should have standing to bring an election petition where there has been an admitted breach of electoral law in running the election; they should not have to wait for others to bring one.

**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.

- 102 Finally, we envisage that informal complaints – those which do not seek to affect the outcome or validity of an election – should be formally recognised and addressed by election law. The important issue here is that voters’ complaints are heard, and lessons are learned by electoral administrators. After asking consultees who should consider such complaints, we conclude that it should be the UK’s ombudsmen with responsibility for local government.

**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**

- 103 Chapter 14 considers national referendums, local government referendums and parish polls.

##### **National referendums**

- 104 Part VII of the Political Parties, Elections and Referendums Act 2000 governs national referendums, but not their electoral administration. The primary legislation calling a referendum (the “instigating Act”), or secondary legislation made under it, must set out the detailed laws governing the conduct of the referendum, and incorporate the existing structure for conducting the poll, from the electoral register to the absent voting records. In our view this current approach of “reinventing the wheel” for referendums is unsatisfactory. It presents administrators with a large volume of new rules, legislatures with an unnecessary workload, and risks legislative error. It seems to us to be desirable to produce a set of generic referendum conduct rules that could simply be applied with minimal adaptation to a specific referendum. This would reduce the current complexity of the law, speed up the legislative process and make the conduct rules accessible in advance.

**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**

- 105 There are three types of local referendums in England and Wales (Mayoral, council tax and neighbourhood planning referendums). Each is conducted under statute, with an Act setting out the process for instigating such a referendum and rules as to their incidence, as well as identifying the franchise by stating that entitlement to vote at the referendums is based on appearing on the local government register. The detailed conduct rules are set out for each kind of referendum in separate statutory instruments
- 106 Similar problems arise here as in the law of elections. Four distinct pieces of secondary legislation govern the three species of local referendums, largely based on the law governing local government elections, albeit with necessary (though not entirely consistent) adaptations due to the fact that they relate to referendums. Materially identical rules are needlessly replicated across different pieces of legislation. Here again our reform aim is that a single set of provisions should govern the mechanisms by which local referendums are undertaken. There should be a single set of conduct rules and challenge provisions governing them. This would eliminate inconsistencies in the detail of the rules that are not justified by the nature of the referendum in question.

**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.

### ***Legal challenge***

- 107 We also consider that a single set of grounds should govern challenging local referendums. These will be identical to those governing challenging elections, save that – since there is no candidate – the commission by anyone of a corrupt and illegal practice cannot serve to annul the validity of the referendum in the same way that conduct by or attributable to a candidate vitiates his or her election. The only ground that is intelligible in the referendum context is that of “extensive” corruption at the referendum which may reasonably be supposed to have affected the outcome. The court will still be able to review, and to annul, referendums for corruption which tended to favour the eventual result. Individual corruption can still be punished through the criminal law.
- 108 We also conclude, after consultation, that challenges to neighbourhood planning referendums should be continue to be by judicial review before the Administrative Court, although the latter should have regard to the above grounds of challenge. At present no guidance is given in the law as to what grounds the Administrative Court should consider.

**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.

### **Parish polls**

- 109 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.

### ***Purpose of parish polls***

- 110 Parish and community councils may elect a chairman and appoint additional councillors by making resolutions at parish meetings. Such matters may be put to a parish poll under the 1987 rules. In effect, this is an election by the parish or community's electorate to the chairmanship of the parish council or another office. In that case, the poll is conducted according to rules akin to those governing parish council elections. In our view, there is no reason in principle why such polls, if properly demanded at parish meetings, cannot be conducted according to the rules governing parish and council elections within the standard framework governing elections, subject to there being no nomination stage: the candidates for election should be stipulated at the meeting that decides to have a poll.
- 111 The second, and more common, type of parish poll asks a question on any issue arising for decision by the parish council. In such a case, the poll is akin to a referendum on a parish issue. Although this is nowhere expressly stated, the question cannot lie outside the proper range of decision making by a parish council, or be devoid of practical application.
- 112 The rules governing the conduct of parish polls date from 1987 and are thus out of step with the rest of electoral administration law. Our view is that parish polls should be run according to the standard conduct rules governing local referendums (where the poll asks a question) and the standard rules governing elections (where the poll concerns an appointment), save for a modification to omit the nominations stage.

**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.