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# Electoral Law

## A joint final report

HC145  
SG/2020/35

Law Com No 389

Scot Law Com No 256



## **Law Commission of England and Wales**

Law Commission No 389

## **Scottish Law Commission**

Scottish Law Commission No 256

# **Electoral Law**

## **A joint final report**

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The text of this report is available at

<http://www.lawcom.gov.uk/project/electoral-law>

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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.

<b>The 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.
<b>An 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 or office.
<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.
<b>An 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>Greater London Authority (GLA)</b>	The Greater London Authority consists of the Mayor of London and the 25 member London Assembly. The Mayor is elected using the <b>supplementary vote</b> system. There are two types of member of the London Assembly. Constituency members are elected by constituencies within London during the <b>first past the post</b> system. London members are elected on a London-wide basis using the <b>party list</b> system.

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

<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 the UK Parliament, Scottish Parliament, Welsh Parliament, or Northern Ireland Assembly.
<b>Principal areas</b>	The term used in legislation to refer to counties, districts, boroughs and county boroughs in England and Wales.
<b>Proxy voting</b>	Casting a vote through a “proxy” appointed to cast the vote in person or by post on an elector’s behalf.
<b>Registered political party</b>	A political party that is registered by the <b>Electoral Commission</b> under the Political Parties, Elections and Referendums Act 2000.
<b>Registration officer</b>	An official of a local authority charged with maintaining a register of people residing in the local authority area, who are qualified to vote at elections held in the area.
<b>Returning officer</b>	The official charged with conducting an election in a particular area and making a “return” of the result. Currently in England and Wales the returning officer for Parliamentary elections is a dignitary such as the sheriff of a county and most of the returning officer’s functions are discharged by an acting returning officer.
<b>Secondary legislation</b>	Legislation in the form of Regulations made under law-making powers conferred (usually) upon the Secretary of State or Ministers.

<b>The single transferable vote (STV)</b>	A voting system under which voters cast votes for more than one candidate, ranked in order of preference. The successful candidates are those whose vote reaches a 'quota' determined by the size of the electorate and the number of positions to be filled. The counting of voters proceeds in stages. At each stage the lowest scoring candidate is eliminated and votes cast for that candidate are transferred to the candidate marked next in order of preference on the ballot paper. Where a candidate's vote reaches the quota at any stage, a proportion of the votes cast for that candidate are transferred to the candidate marked next in order of preference on the ballot paper. The process is repeated until all the seats are filled.
<b>The supplementary vote</b>	A voting system under which voters cast a first and second preference vote; if no candidate secures more than half of the first preference votes, the second preference votes are taken into account.
<b>Tendered ballot paper or tendered vote</b>	A ballot paper or vote cast by a voter who appears to have already voted in person or through a proxy or to be on the <b>postal voting</b> list. If the voter denies having voted or having applied for a postal vote, they must be issued with a ballot paper which is to be kept separately once marked. An <b>election court</b> can order the vote to be counted if satisfied it is valid.
<b>Verification</b>	The process of reconciling the number of ballot papers received from a polling station at the count with the number of papers issued to the polling station in question.
<b>Vote tracing</b>	Using the <b>corresponding number list</b> to trace the ballot paper issued to a particular voter. This can generally only be done by order of an election court where voting irregularities are suspected.
<b>Voting system</b>	The system for identifying the successful candidate[s] on the basis of the votes cast; examples include <b>first past the post</b> , the <b>party list system</b> , the <b>single transferable vote</b> and the <b>supplementary vote</b> .
<b>Warrant for a writ of by-election</b>	The step taken by the Speaker of the House of Commons to cause the Clerk of the Crown in Chancery to issue a <b>writ of by-election</b> to the <b>returning officer</b> .
<b>Writ of election or by-election</b>	A Royal document communicating to the <b>returning officer</b> the calling of a general election or by-election.



# Electoral Law: a joint final report

*To the Right Honourable Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice and the Scottish Ministers*

## Chapter 1: Introduction

- 1.1 This is the final report of the Law Commission of England and Wales and the Scottish Law Commission on electoral law in the UK. It follows a consultation paper published in December 2014 and an interim report published in February 2016.
- 1.2 As our interim report noted, the response to our consultation paper revealed considerable support and an urgent need for technical reform of electoral law. Such reform will streamline the rules governing the conduct of elections and challenges to them, removing inefficiencies and saving costs. Since the publication of our interim report calls for reform of electoral law have continued, including from the House of Commons Public Administration and Constitutional Affairs Committee, which recently described the consolidation and simplification of electoral law as a “serious priority”.<sup>1</sup>

### OUTLINE OF THIS REPORT

- 1.3 Electoral law in the UK has become complex, voluminous and fragmented. There is an enormous amount of primary and secondary<sup>2</sup> legislative material governing elections and referendums. And yet, as we explain in chapter 2 of this report, a significant amount of that material repeats the classical law contained in the Representation of the People Acts 1983 and 2000. That includes some out of date and complex provisions which are in need of restating in more modern, simple language, or to take account of modern conditions and technology. In some cases, the law is very detailed in its prescription, while in others no statutory guidance is given on important questions such as whether a person resides for the purpose of electoral registration at two addresses, or when a returning officer may refuse a nomination paper which they think is a sham nomination.
- 1.4 The aims of the recommendations in this report 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. To that end we recommend a holistic legislative framework, split over primary and secondary legislation. That framework would avoid

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<sup>1</sup> Electoral law: the Urgent Need for Review, Report of the Public Administration and Constitutional Affairs Committee (2017-19) HC 244, p 5.

<sup>2</sup> Our interim report cited 17 pieces of primary legislation and 27 pieces of secondary legislation, a number which has only increased since 2016. See Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, p 5, available at [http://www.lawcom.gov.uk/app/uploads/2016/02/electoral\\_law\\_interim\\_report.pdf](http://www.lawcom.gov.uk/app/uploads/2016/02/electoral_law_interim_report.pdf).

the labyrinthine complexity that presents itself in the current law, by dealing together with legal norms that are shared across the electoral landscape, and drilling down into detail in secondary legislation. We recommend laws that reflect modern conditions, particularly in how electoral administrators hold registration and absent voting data. These laws should be expressed in more accessible language, not least where they lay down electoral offences and describe the system for challenging elections.

- 1.5 This final report aims to provide a sufficient overview of electoral laws to enable the reader to understand our recommendations, along with the principal themes from the consultation which preceded the publication of our interim report. More detail can be found in our consultation paper and the supporting research papers, and our interim report.<sup>3</sup> Our approach in this report has been to amend previous recommendations where developments since the publication of the interim report mean that the original recommendation is no longer appropriate. We have also amended some recommendations to make them clearer. We do not make any entirely new recommendations.
- 1.6 Chapter 2 considers the legislative framework governing elections, setting out our recommendations for rationalising the law governing elections and referendums. Subsequent chapters 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 (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, including our recommendations for the reform of the offences of undue influence and the extension of the imprint requirements to online material (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).

## THE STAGES OF THE PROJECT

- 1.7 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 by the Law Commission of England and Wales on 15 June 2012, followed by a scoping report published on 11 December 2012. Following references from the UK Government to the Law Commissions of England and Wales, Scotland and Northern Ireland, 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 were set out in our consultation paper, published in December 2014.<sup>4</sup> Our proposals attracted significant support from consultees and, given the

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<sup>3</sup> These can be found at <https://www.lawcom.gov.uk/project/electoral-law/>.

<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, available at [http://www.lawcom.gov.uk/app/uploads/2015/03/cp218\\_electoral\\_law.pdf](http://www.lawcom.gov.uk/app/uploads/2015/03/cp218_electoral_law.pdf).

weight and calibre of the responses, helped improve our proposals for reform. This stage concluded with the publication of an interim report, published in February 2016.

- (3) The final stage envisaged our publishing a final report and draft Bill to give effect to our final recommendations. Our interim report noted the continuing process of devolution, giving rise to a need for separate legislation by the devolved legislatures. We say more on this topic later in this chapter.
- 1.8 Following the publication of our interim report, the project entered a review period prescribed by our terms of reference, with a view to securing Government approval to progress to the third stage (which involved significant Bill drafting work). In due course, however, it became clear that work on exiting the European Union, and the accompanying unprecedented pressure on parliamentary business, meant that no comprehensive draft reform Bill would be introduced in the short term.
- 1.9 The Law Commission of England and Wales subsequently worked with the Cabinet Office, the Electoral Commission and the Association of Electoral Administrators (“AEA”) to consider alternative approaches to implement some of our recommendations. One approach which was eventually explored in some detail was to consider whether one or two statutory instruments could set out the conduct rules for electoral events presently governed by secondary legislation (which is all elections other than Parliamentary elections and local referendums). This was with a view to giving effect to some of our recommendations for reform, so far as that was possible using existing powers in primary legislation.
- 1.10 The exercise produced one advanced draft set of conduct rules governing three polls whose rules are subject to the affirmative resolution procedure for parliamentary approval, and included some work on a companion set of rules to be made by statutory instrument subject to the negative resolution procedure. It was decided in 2019, with the agreement of the Cabinet Office, that the priority should be to move on to producing the present final report. The drafts will be available to the Governments should they decide to pursue the production of standard elections rules as part of any implementation of this report.
- 1.11 This, our final report, contains our final recommendations to be laid before Parliament, the Scottish Parliament, and the National Assembly for Wales, soon to be renamed the Welsh Parliament or Senedd Cymru.<sup>5</sup> It reflects, in places, on what has been learned through the work on drafting standard elections rules, and we occasionally refer to some of our specimen drafting to illustrate points made in this report. That specimen drafting is available on our website. We hope this will help readers to see for themselves what a single standard set of conduct rules governing multiple elections (and their combination with other electoral events) might look like.

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<sup>5</sup> Senedd and Elections (Wales) Act 2020, s 2. This report generally uses the new terminology.

## TERMS OF REFERENCE

1.12 We concluded following 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.

## ELECTIONS AND REFERENDUMS WITHIN SCOPE

1.13 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) Scottish Parliamentary elections;
- (3) Welsh Parliamentary elections;
- (4) local government elections in England and Wales, including:
  - (a) principal area local authority elections; and
  - (b) parish, town and community council elections;
- (5) local government elections in Scotland,
- (6) Greater London Authority elections (to the London Assembly and of the London Mayor);
- (7) mayoral elections in England and Wales;

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

- (8) combined authority mayoral elections in England and Wales; and
- (9) Police and Crime Commissioner elections in England and Wales.

1.14 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

1.15 Electoral law has continued to develop throughout the life of this project. This final report makes recommendations based on the current law, while taking account of impending changes.

1.16 The challenges faced by electoral law have also continued to evolve. These include regulating online advertising, disinformation and online intimidation. Many of these problems are not limited to electoral law, and are not properly within the scope of this report. Several have been considered by other bodies; by way of example, the Committee on Standards in Public Life published a report on the intimidation of those in public life, in particular candidates and campaigners in 2017.<sup>7</sup> Some of the recommendations made in that report have been considered by the Government in its response to the report and in the Cabinet Office's Protecting the Debate consultation and subsequent report.<sup>8</sup>

1.17 The way in which election campaigns are conducted has also evolved since the beginning of this project, with a significant increase in the proportion of the campaign which is conducted online. This has given rise to concerns about transparency of the sources of advertising material, and the methods by which it is targeted at individual voters. The current rules requiring campaign material to state who published it only apply to printed material, and we recommend in chapter 11 of this report extending these requirements to online material.

1.18 Some of these challenges emerged after the publication of our consultation paper, and are not addressed by it. Without further consultation we are reluctant to make new recommendations here. We hope however that implementing our recommendations to modernise the framework of electoral law will mean that making changes to the law will be a less protracted and complicated process. As a result, electoral law will be able to respond faster to societal and technological developments.

1.19 The other area in which there have been developments is the balance between security from fraud and access to the poll, a policy question which in our view is a

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<sup>7</sup> Intimidation in Public Life, Report of the Committee on Standards in Public Life (December 2017) Cm 9543.

<sup>8</sup> Cabinet Office, *Protecting the Debate: Intimidation, Influence and Information* (July 2018) and Cabinet Office, *Response to Protecting the Debate: Intimidation, Influence and Information* (May 2019).

matter for governments and parliaments. Since our interim report the Government has conducted a number of trials of voter identification at the poll, and intends to roll out the policy nationally. Following the 2015 Tower Hamlets election petition (discussed further in chapter 11) Sir (now Lord) Pickles was asked by the Government to consider what changes were necessary to make the electoral system more secure. The resulting report on electoral fraud was published in August 2016,<sup>9</sup> and is discussed in various places throughout this report.

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

- 1.20 The reform of electoral law was formerly a tripartite law reform project, undertaken by all three UK Law Commissions. Earlier stages of the project benefitted greatly from the work of the Northern Ireland Law Commission. That organisation became non-operational in 2015, due to budgetary pressures within the Department of Justice. The Chair of the Northern Ireland Law Commission, the Honourable Mr Justice Maguire, signed the 2016 interim report on the strength of the recent involvement of the Northern Ireland Law Commission. He has not been able to do so for this final report, and as a result its recommendations are confined to Great Britain. We continue to refer to the electoral law of Northern Ireland where this informs our recommendations.
- 1.21 As we have mentioned, our interim report noted the continuing process of devolution since the project began, giving rise to a need for separate legislation by the devolved legislatures. The interim report envisaged that our draft Bill (had it been produced) could serve as a template for the devolved legislatures, subject to any changes required by them. Since the interim report legislative competence in relation to certain elections has been further devolved by the Scotland Act 2016 and the Wales Act 2017. At the time of publication of this report the Welsh and Scottish Parliaments are considering bills to be enacted under these powers, which would introduce a variety of reforms to electoral law for those elections for which they have competence.<sup>10</sup> We return to this topic in slightly more detail in chapter 2.
- 1.22 The conception that we had at the outset of the project, of a single Act of the United Kingdom Parliament governing all elections within the scope of the project, has therefore become outdated. We do not recommend a single Act but remain of the view that consistency of approach is valuable; one of the problems for those administering elections at present is the discrepancies that exist between the rules governing different elections, which are most problematic when such elections coincide in the same area. It is likely that UK Parliamentary elections governed by Westminster legislation will continue to coincide with elections for which legislative competence is devolved. We would encourage the legislatures to cooperate so as to avoid devolution throwing up fresh sets of discrepancies where they are avoidable.

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<sup>9</sup> Sir Eric Pickles, *Securing the ballot: review into electoral fraud* (August 2016).

<sup>10</sup> We note in particular the Scottish Elections (Reform) Bill, Scottish Elections (Franchise and Representation) Bill, and the Local Government and Elections (Wales) Bill, as well as the recently passed Senedd and Elections (Wales) Act 2020 and the Referendums (Scotland) Act 2020.

## ACKNOWLEDGMENTS

- 1.23 We are grateful to the following members of the joint project team who worked on this report: at the Law Commission of England and Wales, Henni Ouahes (team head), Sarah Smith (team lawyer) and Liam Evans (research assistant), and, at the Scottish Law Commission, Gillian Swanson (project manager). This project, including our consultation paper and interim report, benefited extensively from meetings with individuals and organisations whose experience and expertise significantly contributed to our understanding of a complex and technical area of law, and to our thinking on how it might be simplified. We are extremely grateful to them all for giving us their time and expertise so generously. Space precludes us from naming them all,<sup>11</sup> but we would like in particular to thank the following organisations and their staff for their time and efforts over the years: the AEA, the Electoral Commission, the Chief Electoral Officer for Northern Ireland, the Electoral Management Board for Scotland (“EMB”), the Scottish Assessors’ Association (“SAA”), the Society of Local Authority Chief Executives (“SOLACE”) and the Society of Local Authority Lawyers and Administrators in Scotland (“SOLAR”). We also wish to thank the national agents of the main political parties and lawyers who act for and advise them, in particular David Allworthy, Piers Coleman, Alan Mabbutt OBE, Scott Martin, Gerald Shamash and Andrew Stedman, to name only some.
- 1.24 Finally, we would like to record our special thanks to electoral administrators who invited our staff to see for ourselves how various electoral processes, from registration and absent voting to polling and the count, take place on the ground: George Cooper (deputy returning officer at the London Borough of Haringey), Laura Locke (then deputy returning officer at Huntingdon Borough Council and now deputy Chief Executive at the AEA), and Peter Stanyon (deputy returning officer at the London Borough of Enfield and now Chief Executive at the AEA). We also wish to thank John Turner, former Chief Executive of the AEA, for his steadfast support for electoral law reform and for arranging for us to see first-hand some of the processes that are governed by the laws which are the subject of this report.

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<sup>11</sup> A full list of consultees and consultation events is contained in our interim report at Appendices B and C; see Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com. A list of members of our Advisory Group is contained in our consultation paper at Appendix B (see Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20).

## Chapter 2: Legislative framework

### INTRODUCTION

- 2.1 UK electoral law is structured in an “election-specific” way. The legislation containing electoral laws is tied to, and expressed to apply to, particular elections or referendums. In reality, the legislation governing UK Parliamentary elections – which we describe as the “classical” electoral law – sets out a template on which the legislation governing all other electoral events is based. But the experience of voters at polling stations is largely uniform, no matter the election or referendum they vote at. What changes for voters, in essence, is the ballot paper and its contents. A corpus of consistent “core polling rules” therefore exists across all polls, which although identical in content is repeated in each piece of event-specific legislation.
- 2.2 Moreover, there is a permanent structure for running polls in the UK – a structure for registering electors, for maintaining and updating entries on the register, and for keeping and updating records of absent (postal and proxy) voters. So far, there has been no substantive departure whatsoever from the “structural” provisions governing registration and absent voting, no matter which poll is involved, across the UK. And yet, from a technical point of view, the election-specific legislation replicates these common structural provisions, often using extremely opaque and inaccessible drafting.
- 2.3 This approach, which our consultation paper showed was not the result of deliberate policy choices but rather an accident of history, results in a legal framework that our consultation paper described as “complex, voluminous, and fragmented”. More than 25 statutes and many more pieces of secondary legislation govern electoral events.
- 2.4 A large volume of legislation is arranged in a piecemeal structure, even though the content is largely identical. Only the occasional departure is made from the classical rules, not all of which are justified by a material difference such as the voting system in use. In fact, much of the complexity of the legislation – particularly that in secondary legislation – exists purely in order to ensure that there is, in effect, no departure from the classical core polling rules, or from the structural provisions governing electoral registration and absent voting.
- 2.5 This chapter reiterates our core and overarching approach to reform of electoral law: 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. These two proposals in our consultation paper received the most responses, and nearly unanimous support from those who responded to them.
- 2.6 The overarching recommendations in this chapter inform many of the recommendations made in subsequent chapters, such as absent voting in chapter 6, nominations in chapter 7, polling rules in chapter 8, and the count in chapter 9.

## HOW DID ELECTORAL LAW BECOME SO COMPLEX?

- 2.7 Our consultation paper set out the history of the legislative framework governing elections. It noted that, when the Representation of the People Act 1983 (“the 1983 Act”) was enacted, its provisions governed all elections in the UK other than European Parliamentary elections. The Representation of the People Act 1985 governed absent voting and a number of other matters. It and the 1983 Act set out the “classical” electoral law governing nearly all polls in the UK, all of which used one voting system – first past the post.
- 2.8 That classical law furthermore adhered to a policy of detailed prescription. Polls must be conducted according to legal prescriptions that aim, where possible, to deal exhaustively with the conduct of the poll. The intention is that, so far as possible, returning officers are not to make subjective or qualitative assessments at key stages of polling – such as on the right to stand for election, or the right to cast a vote on polling day. Administrators are therefore, where appropriate, guided by hard and detailed rules. The advantage of this approach is that it shields returning officers and their staff from the perception of partiality in the charged atmosphere of elections. The disadvantage is that it makes for long and detailed rule books which need regular updating.
- 2.9 After 1999, however, many more types of election and local referendums were introduced to the statute book as a consequence of the then Labour Government’s policies of devolution in Scotland, Northern Ireland and Wales, localism in England, and the creation of the Greater London Authority. Recourse to national referendums also grew, while in due course a number of local referendums were created. Each type of election or referendum was governed by its bespoke piece of secondary legislation setting out its own election or referendum rules.
- 2.10 The number of sources of electoral laws therefore grew with each newly introduced poll. But two crucial factors contributed to the complexity and volume of laws. First, the new legislation continued the policy of detailed prescription in the classical law. Secondly all of the newly created elections used a voting system other than first past the post, which the classical law in the 1983 Act was designed for.<sup>12</sup> Some of the classical law had to be adapted to account for the different voting system in use. Our consultation paper called efforts to adapt a classical rule to a new voting system “transpositions”. We noted that some of the transpositions of first past the post rules to different voting systems were not consistent, despite using the same “new” voting system.

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<sup>12</sup> Three new types of voting systems emerged, the supplementary vote, the party list, and the single transferable vote (or STV). A number of elections used a mix of the party list and first past the post, which is called the “additional member system” or AMS. This is sometimes treated as a distinct voting system, which technically it is not – it is an amalgam of two or, in the case of Greater London Authority elections, three voting systems.

- 2.11 Our analysis in the consultation paper, which was endorsed by most consultees, was that the reason why electoral law was “complex, voluminous and fragmented” is a combination of the following:
- (1) an election-specific approach to legislation;
  - (2) a policy of detailed prescription in electoral law; and
  - (3) the introduction of a number of new types of poll, all of which used a different voting system.<sup>13</sup>
- 2.12 We proposed that electoral laws should instead be set out in a single, consistent legislative framework which was “holistic” or pan-electoral, instead of election-specific. Our provisional view was that primary legislation should 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 of polling would be governed by secondary legislation. Beyond that, performance standards and guidance published by the Electoral Commission would continue to assist electoral administrators and participants in the electoral process in their conduct.<sup>14</sup>

## **RATIONALISING FRAGMENTED LEGISLATION INTO A SINGLE CONSISTENT LEGISLATIVE FRAMEWORK GOVERNING ALL ELECTIONS**

- 2.13 Our first proposal was addressed by 47 consultees, nearly all of whom agreed that existing election-specific laws should be set out within a single consistent legislative framework. Many expressed strong agreement with this key proposal, and indeed many, such as the national branch of the Association of Electoral Administrators (“AEA”), have long argued for it.
- 2.14 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 key barriers to participation by voters and, in particular, to standing as independent candidates.
- 2.15 Two points of discussion arose in consultees’ responses. The first concerned what the balance should be as between primary and secondary legislation, and the second concerned the developments in devolution across the UK and their implications for our proposed rationalised legislative framework.

### **The balance between primary and secondary legislation**

- 2.16 One of the ways in which election laws diverge is their location 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

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<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 2.4 to 2.15.

<sup>14</sup> As above, paras 2.24 to 2.35.

legislation. For other elections, very little is in primary legislation and secondary legislation contains nearly all the laws governing them.

- 2.17 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>15</sup> On the other hand, the process of amending primary legislation by a new Act is cumbersome where the amendment relates to a purely technical or administrative aspect of electoral law. Secondary legislation (usually in the form of regulations) is made, typically by Ministers, under powers conferred by Parliament in primary legislation. Regulations are relatively straightforward to make and to amend.
- 2.18 Primary legislation is therefore the right place for important rules of law which Ministers should not be able to depart from without the fullest Parliamentary scrutiny. This view reflects that of the House of Lords Delegated Powers and Regulatory Reform Committee, namely that “substantial changes to electoral law” should be reserved to primary legislation.<sup>16</sup> Rules on matters of detail, which may need to be adapted to changes in circumstances, are better placed in secondary legislation.
- 2.19 A detailed articulation of which provisions should be in primary legislation and which should be in secondary legislation is best undertaken when the work of drafting an electoral Bill is under way. However, in our consultation paper, we identified, at an abstract level, certain topics which we considered to be “important” or fundamental aspects of electoral law which should be in primary legislation. We remain of the view that these are:
- (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) fundamental provisions on elections such as:
    - (a) the relationship between nominations, polling and the count;
    - (b) the election timetable;

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<sup>15</sup> Unless the Act confers a power to the Government to amend the Act in particular ways by secondary legislation.

<sup>16</sup> Committee on Delegated Powers and Deregulation’s 37th Report for the 1999-2000 Parliamentary session, (1999-2000) HL 130, para 36.

- (c) important 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>17</sup>

2.20 These headline-level provisions are concerned with electoral laws which have constitutional importance or which are fundamental to the system for organising and running polls in the UK. They include matters such as the franchise, the use of a voting system, and legal challenge to elections. They also include the principles that voting should be by ballot and in secret; article 3 of the First Protocol to the European Convention on Human Rights requires contracting parties to hold free elections at reasonable intervals “by secret ballot”. We would also add electoral law offences to the list, given their central role in regulating the electoral campaign and policing the conduct of both the public and campaigners at elections and referendums.

2.21 We also consider that a provision can be described as fundamental if it relates to an important and long-standing feature of electoral law. For example, the notion that a person’s entry on the register absolutely governs their right to vote at a polling station, and that this is established in advance, is fundamental to electoral law – it is not the only conceivable answer to the issue of how to establish entitlement to vote, but it has been the UK’s answer for a century and a half. For these reasons, we consider that all of those matters ought to be dealt with in primary legislation.

2.22 Consultees broadly agreed with our list of provisions which should be included in primary legislation.

2.23 The national branch of the AEA suggested that a distinction is drawn between high-level matters and principles which reflect electoral policy, and the detailed rules relating to electoral registration and the conduct of elections, which are suitable for inclusion in secondary legislation.

2.24 Similarly, the Electoral Commission considered the rationale for our proposed legislative hierarchy to be sound. It expressed a hope that one of the results of implementing our recommendation would be that detailed rules were moved lower down the hierarchy, to secondary legislation or Electoral Commission guidance, so as to allow greater flexibility.

2.25 One consultee, Sir Howard Bernstein (then returning officer of Manchester City Council) saw “the special status that the legislature appears to have deliberately afforded to the legislation governing UK parliamentary elections” as a potential difficulty for our proposed breakdown between primary and secondary legislation. He doubted that this special status was an “accident of history” and argued instead that it reflected a political policy decision that even the detailed administrative rules governing elections to the UK Parliament should be subject, on account of their

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<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 2.30 to 2.34.

particular constitutional importance, to the full parliamentary scrutiny that primary legislation entails.

- 2.26 In our interim report we took this point very seriously, but explained that the way in which our consultation paper had 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.
- 2.27 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.
- 2.28 By way of example, until the Representation of the People Act 2000 (“the 2000 Act”) was passed, there was no high-level statement describing how an elector might cast their vote in the UK. To establish the position prior to that, it was necessary to read together a number of provisions, including provisions in the 1983 Act on identification of polling districts, the Parliamentary elections rules (which set out that the poll is to be taken by ballot)<sup>18</sup> and the provisions on issue and receipt of postal votes contained in secondary legislation. By contrast, Schedule 4 to the 2000 Act, does set out how an elector may vote; either at the polling station, or by post or by proxy (even though the schedule is entitled “Absent Voting”).<sup>19</sup> But this legislative provision only applies to parliamentary and local government elections; its application to other elections is dependent on election-specific statutory instruments either instructing the reader to treat those elections as local government elections, or repeating the 2000 Act provision in the relevant instrument. A curious result is that the fundamental provision that voting is by ballot, at an allotted polling station, or by post or proxy by prior application, is contained in primary legislation for some elections (such as local government elections) and in secondary legislation for others (such as Police and Crime Commissioner elections).<sup>20</sup>
- 2.29 It is not our intention to shift important matters from primary to secondary 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 secondary legislation, which are also subject to Parliamentary scrutiny.<sup>21</sup>

### **Rationalising election law within the devolutionary framework**

- 2.30 The evolving devolutionary picture was raised by several consultees. It was also raised at our meetings with national agents of political parties. We suggested in our consultation paper that reformed electoral law should be set out in the fewest possible

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<sup>18</sup> Representation of the People Act 1983, sch 1, r 18.

<sup>19</sup> Representation of the People Act 2000, sch 4, para 2.

<sup>20</sup> Police and Crime Commissioner Elections Order 2012 SI No 1917, art 11 and sch 2.

<sup>21</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 2.10 to 2.16.

pieces of legislation consistent with the devolutionary structure. It was clear to us that the devolutionary picture was likely to change during the life of this project. We acknowledged in the consultation paper and our interim report that a single Act of the UK Parliament might not be feasible and that separate primary legislation for the different jurisdictions in the UK might be necessary.<sup>22</sup> We do so again now.

- 2.31 We summarise below the legislative competence of the Scottish and Welsh Parliaments this area. For completeness we note that the Northern Ireland Assembly has no legislative competence in respect of elections.<sup>23</sup>

### Devolved competence in Scotland

- 2.32 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. The Scotland Act 2016, which was a Bill in Parliament at the time our interim report was published, now implements the Smith Commission's proposal for full legislative competence of the Scottish Parliament over its own elections as well as local government elections in Scotland.<sup>24</sup> The Scottish Parliament has nearly full legislative competence over both local government elections in Scotland and Scottish Parliamentary elections, with only certain aspects of the incidence and combination of polls reserved to the UK Parliament.<sup>25</sup>
- 2.33 Also reserved to the UK Parliament is the digital service for online applications to register that may be introduced by UK Ministers, and certain parts of the Political Parties, Elections and Referendums Act 2000, notably the registration of political parties and control of donations to registered parties.<sup>26</sup>
- 2.34 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 Act 2016 introduced a new section 12 into

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<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, para 2.31. Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 2.19. See further para 2.40 below regarding legislative consent motions.

<sup>23</sup> Elections to the UK Parliament, Northern Ireland Assembly, and local government (district council) elections are excepted from the competence of the Assembly. See Northern Ireland Act 1998, ss 34(4) and 84, and sch 2, paras 2 and 12.

<sup>24</sup> The Smith Commission, Report of the Smith Commission for further devolution of powers to the Scottish Parliament (November 2014), available at <https://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/> (last visited 3 March 2020); 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 3 March 2020).

<sup>25</sup> Scotland Act 2016, ss 3 to 9, particularly ss 3(4), 4(1), 4(2) and 5. Combination of polls is discussed in chapter 10.

<sup>26</sup> Scotland Act 2016, s 3(4).

the Scotland Act 1998 which provides Scottish Ministers with the power to make provision about elections, including:

- (1) the conduct of elections for membership of the Parliament;<sup>27</sup>
- (2) the challenge of such an election and the consequences of irregularities; and
- (3) the return of members of the Parliament otherwise than at an election.<sup>28</sup>

2.35 In addition, the Scottish Parliament has power to modify certain sections of the Scotland Act 1998, which include section 12 itself. Therefore, where we recommend that rules that are currently in secondary legislation should be in primary legislation, it is the Scottish Parliament that has the power to implement our recommendations, and it is to the Scottish Government that our recommendations are addressed.

### Devolved competence in Wales

2.36 The devolution settlement over electoral law in Wales is contained in Part 1 and Part 2 of Schedule 7A of the Government of Wales Act 2006 (“the 2006 Act”). It used to be based on a “conferred powers” model, meaning that the National Assembly for Wales could only legislate within the specific competences conferred to it in the 2006 Act, but the Wales Act 2017 has followed the “reserved powers” approach in use for Scotland. The effect is that the Assembly<sup>29</sup> has legislative competence over its own elections, local government elections in Wales, and (mayoral) referendums under Part 2 of the Local Government Act 2000, subject to similar limitations to those in Scotland – the incidence, and combination of certain polls, the online registration facility and the subject matter of parts of the Political Parties, Elections and Referendums Act 2000.<sup>30</sup>

### Consultees’ views on devolution and rationalising electoral laws

2.37 The Electoral Commission’s support for our proposed legislative framework, with consistent rules governing all elections, was subject to achieving these aims within the evolving devolutionary picture. The Electoral Commission doubted the feasibility of UK-wide legislation governing elections competence over which was devolved.

2.38 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.”

2.39 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

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<sup>27</sup> This includes registering electors and limiting candidates’ expenditure.

<sup>28</sup> Scotland Act 2016, s 4(1).

<sup>29</sup> Soon to be renamed the Welsh Parliament or Senedd Cymru: see para 1.11 above.

<sup>30</sup> Government of Wales Act 2006, sch 7A, Part 2 (Specific Reservations) Reservation, Head B1.

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.

### **Devolution and our recommended legislative framework**

- 2.40 The Scottish and Welsh Parliaments have almost full legislative competence over the conduct of and challenge to their respective devolved elections. By virtue of the Sewel convention,<sup>31</sup> the UK Parliament will not normally legislate for devolved matters without the concurrence of the devolved legislatures. As we noted in our interim report, our reformed legislative framework must necessarily reflect this constitutional arrangement. It is not for us to speculate about (or make recommendations as to) the passing of legislative consent motions in the devolved legislatures so that electoral laws are contained in a single, UK piece of legislation. The legislatures in Holyrood and Cardiff Bay have recently passed legislation governing their own elections and referendums, and other Bills are under consideration.<sup>32</sup>
- 2.41 We are therefore proceeding on the assumption that, if the UK, Scottish and Welsh Governments accept our recommendations, each Government would introduce primary legislation governing electoral events within the legislative competences of the respective parliaments. The Secretary of State, the Scottish Ministers and the Welsh Ministers would respectively make provision by way of secondary legislation for the elections covered by each piece of primary legislation.
- 2.42 The result would be that an Act of the UK Parliament, and secondary legislation made under it, would govern UK-wide elections, elections in England, and any aspects of elections in Scotland or Wales for which legislative competence is not devolved.<sup>33</sup> Separate Acts of the Scottish and Welsh Parliaments would govern elections within Scotland and Wales respectively as regards matters within the two legislatures' competences.

### **Conclusion on a rationalised electoral law framework**

- 2.43 Our consultation paper noted that the fragmented and piecemeal legislative framework poses problems not only for those referring to 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 introduces risk to the legality of electoral outcomes. 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

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<sup>31</sup> The Scotland Act 2016, s 2, amended s 28 of the Scotland Act 1998 to put the Sewel convention into statutory form in relation to matters devolved to the Scottish Parliament. The Wales Act 2017 similarly amended the Government of Wales Act 2006 to include the Sewel Convention at s 107(6).

<sup>32</sup> The Scottish Parliament has passed the Referendums (Scotland) Act 2020, and is currently considering the Scottish Elections (Reform) Bill and the Scottish Elections (Franchise and Representation) Bill. In Wales, the Senedd recently passed the Senedd and Elections (Wales) Act, and the Local Government and Elections (Wales) Bill was introduced on 18 November 2019.

<sup>33</sup> While this report does not make recommendations in relation to the law of Northern Ireland, we note here that it would be consistent with the current devolutionary position for that Act also to govern elections in Northern Ireland, along with secondary legislation made by the Secretary of State for Northern Ireland.

power to do so had long before been introduced, but only for elections governed by particular legislation.

- 2.44 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, even though that policy was approved by the fullest process of legislative scrutiny available – amending primary legislation in 2013. Instead of applying across the board, each piece of election-specific legislation then had to be amended – and opened to scrutiny by MPs who had already voted on the amendment in 2013. Meanwhile, those who wish to ascertain the law governing elections need to consult separate pieces of legislation, sometimes containing puzzling discrepancies. Finally, the volume of the legislation is unnecessarily swollen by needless repetition.<sup>34</sup>
- 2.45 All of this is, in the final analysis, unnecessary complexity. The reader should be able to consult one main source of the law governing elections (subject, of course, to devolution in Scotland and Wales, where the reader may need to consult a different statute). Policies need only be developed once, drafted once, and scrutinised once. Core polling rules and the structural provisions on registration and absent voting should be expressed as applying to all existing elections, and apply to any new elections introduced by the legislature later.
- 2.46 We are therefore minded to maintain the recommendation in our interim report, given the level of support for our key overarching aim of setting out electoral laws in a holistic or pan-electoral law. That aim is subject to the devolutionary framework, meaning that references to a single Act should be read as referring to, in all likelihood, an Act of the UK Parliament, a Scotland-only Act (governing devolved elections in Scotland), and a Wales-only Act (governing devolved elections in Wales).

#### **Recommendation 1.**

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

#### **Electoral laws should be consistent across elections, subject to differentiation due to the voting system or some other justifiable principle or policy**

- 2.48 A necessary concomitant of our first proposal to rationalise electoral law was to make its content as consistent across all elections as possible. We identified two principles which could legitimately cause election law to differ from one election to another.
- 2.49 The first was the need to adapt the law to the use of a particular voting system. Much of our concern in the consultation paper was to derive consistent “transpositions” of classical election laws for each voting system in use in the UK.

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<sup>34</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 2.2.

- 2.50 The second principle was that a deliberate policy reason should exist to justify the difference. While particular divergences in policy may be justified for particular elections, many of the divergences in election laws identified in our consultation paper in fact appeared to us to be caused by inconsistent approaches to adaptation to the use of a new voting system, or accidents of drafting.
- 2.51 Nearly all of the 46 consultees who responded to this provisional proposal agreed with it.
- 2.52 A number of key stakeholders, including the Electoral Commission, the Society of Local Authority Chief Executives and Senior Managers (“SOLACE”) endorsed our aim of reducing the amount of election-by-election divergence to those which are necessary and justified by the voting system or a policy choice. Scott Martin (Scottish National Party) noted that divergences of policy existed in Scotland because of deliberate political choices by the Scottish Government and Parliament.
- 2.53 We remain of the view that it is important to analyse electoral laws and the differences in each rule book and seek to derive, as far as possible, a general and consistent set of rules for elections, and to articulate in a consistent way the adaptations to the common rules that are appropriate or required by the use of any particular voting system. Of course, there will be considered departures from standard policies for particular elections. This will especially be the case as priorities and policy preferences diverge in each of the three legislatures in the UK with competence to make electoral law.
- 2.54 We note, however, that some form of devolved competence over particular elections has been in place since 1999, and a significant amount of electoral law in Scotland and Wales has been devolved since 2016; nonetheless, the experience of voters, and the structural rules on registration and absent voting, have remained highly uniform. This may in part be because electoral administrators in Scotland and Wales are inevitably tasked with running UK wide elections (such as UK parliamentary elections) in accordance with the 1983 Act (and, as relates to absent voting, the Representation of the People Act 2000), potentially in combination with elections for which legislative competence is devolved. Divergence between the legislation governing these various elections may make the task of electoral administrators in Scotland and Wales unduly complicated.<sup>35</sup>

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<sup>35</sup> In practice, unintended divergence can be managed through cooperation between governments and stakeholders as policy develops and legislation is drafted; we note by way of example the working partnership between Governments, the Electoral Commission, the Association of Electoral Administrators and the Scottish Assessors’ Association in developing proposals for reform of the annual canvas.

2.55 We think it is time that the 1983 Act is replaced by a holistic, simpler piece of primary legislation, under which secondary legislation governing the detail of particular polls is made. The Scottish and Welsh legislatures can decide, as they do now, which parts of the UK statute they replicate or adopt. What would emerge under this framework is much more satisfactory than the out-of-date and labyrinthine framework under which everyone, from voter to administrator, and from campaigner to civil servant, is bound to struggle with. We are therefore minded to maintain our recommendation in the interim report.

### **Recommendation 2.**

2.56 Electoral laws should be consistent across elections, subject to differentiation due to the voting system or some other justifiable principle or policy.

## **OUR SPECIMEN DRAFT STANDARD ELECTIONS RULES**

2.57 We have published on our website specimen drafting illustrating how elections rules governing three polls in England (and their combination with other polls) might be brought together.<sup>36</sup> These are polls whose current conduct rules are subject to the same affirmative procedure of scrutiny in Parliament. The draft is not finalised and cannot be introduced without further work by Government, but we are publishing specimen drafting in order for stakeholders to see what a single set of conduct rules governing multiple polls might look like. The recommendations in this chapter are aimed largely at primary legislation under which secondary legislation would deal with the detail. We did not suggest in the interim report that detailed conduct rules should also be set out in a pan-electoral or holistic manner – it is perfectly intelligible to continue to have bespoke detailed election-specific rules. But there is an advantage in setting out, in a single place, the shared or common parts of the rulebook. Our specimen drafting seeks to do that; in doing so, it reduces one species of complexity that arises out of the volume of legislation and its fragmented sources. But it does introduce some extra detail – and thus another form of complexity – in order to deal adequately with different types of poll.

2.58 One of the reasons why we have published the specimen drafting is to illustrate one of the challenges of expressing electoral law holistically. As we note above, electoral law seeks to be detailed in its prescription. As a result, the level of prescription does occasionally mean that our specimen drafting is lengthy and detailed. The existing powers to make secondary legislation limit the extent to which delegated legislation can set out rules that are radically simpler. This is because the Secretary of State is required to apply the classical rules (Parliamentary elections rules in schedule 1 to the 1983 Act) subject to adaptations, alterations and exceptions.<sup>37</sup> Our specimen drafting nonetheless sought sensibly to opt for less detailed prescription where one rulebook omitted a piece of detail which was included in another. In that case, the duty to refer to the Electoral Commission's guidance (which is a perfectly proper place for election-

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<sup>36</sup> Available at <https://www.lawcom.gov.uk/project/electoral-law/>.

<sup>37</sup> Representation of the People Act 1983, s 36(2).

specific detail based on experience and best practice), and powers of direction were adequate to deal with particular scenarios, such as requiring a local returning officer to publish the notice of election in their electoral area.

- 2.59 Our experience of drafting within the existing, restrictive powers in the 1983 Act suggests that there is a limit to how simple they can be made to be. Transferring some of the detailed administrative provisions to guidance, or relying on administrative good sense backed by powers of direction, can help to simplify elections rules further. This is particularly the case if these rules are to be expressed in a standard and holistic way to more than one type of election. Departing from the classical approach of exhaustive, detailed prescription is plainly an important policy decision which will need to be considered by Governments in due course on a consensus-building basis with electoral administrators, the Electoral Commission, parties and groups representing voters.

## 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. This chapter considers the legislative framework governing the oversight and management of elections by returning officers. Electoral registration is considered in the next chapter.
- 3.2 In Great Britain electoral administration is generally decentralised: registration and returning officers are local government officials. There is a greater degree of centralisation in Scotland, where at local government elections the Electoral Management Board for Scotland may issue directions, and if they do so those directions must be followed by returning officers. The Scottish Government intends to extend that approach to Scottish Parliamentary elections.<sup>38</sup> This approach aims to deliver greater consistency of approach, planning and administration across all of Scotland. In Northern Ireland electoral administration is centralised, with the Chief Electoral Officer acting as both registration and returning officer. We note however that fundamental institutional reform, such as the centralisation of electoral oversight and management functions, is outside the terms of reference of this project.
- 3.3 Our consultation paper described the law governing the management of UK polls as piecemeal and sometimes unclear. We took the view that a simple and across-the-board statement of the powers and duties of returning officers would ensure consistency in voters' experiences across elections.<sup>39</sup>
- 3.4 Those who responded to our consultation paper expressed overwhelming support for clarification of the framework governing the management and oversight of elections.<sup>40</sup> Our interim report made four recommendations relating to the role of ceremonial returning officers in England and Wales, consistency of expression of the powers of the returning officer (including powers of direction of regional returning officers), and the designation and review of polling districts (the areas within which polling takes place).

### CEREMONIAL AND “ACTING” RETURNING OFFICERS IN ENGLAND AND WALES

- 3.5 For UK Parliamentary elections in England and Wales,<sup>41</sup> section 24 of the Representation of the People Act 1983 (“the 1983 Act”) designates local dignitaries (such as the sheriff of a county or a mayor or council chairman) as returning officers.

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<sup>38</sup> Scottish Elections (Reform) Bill, cl 25.

<sup>39</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 3.42 to 3.46.

<sup>40</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 3.13.

<sup>41</sup> The “ceremonial” returning officer role does not exist in Scotland or Northern Ireland.

In reality, their only legal role is to receive the writ which triggers the election, declare the result and return the writ (functions reserved to them by section 28(2) of the 1983 Act). Section 28(1) of the 1983 Act provides that the returning officer's other duties (which include all the administratively significant aspects of running an election) are performed by an "acting" returning officer. In England and Wales the acting returning officer is also the registration officer within the constituency. In both our consultation paper and interim report we took the view that this additional layer of complexity is redundant and confusing.<sup>42</sup>

3.6 In our consultation paper we provisionally proposed that the role of the purely ceremonial returning officer should be abolished. We expressed the view that the returning officer should be the person responsible for running the election. In our interim report we noted that proposal received almost unanimous support. We also noted the view of a small number of consultees that the pageantry and ceremonial nature of declarations of results on live television were valuable to the public. For example, Sir Alan Mabbutt OBE (Conservative Party) disagreed with our proposal on the basis that it "[did] not enhance the election process for electors and removes history to no purpose".<sup>43</sup>

3.7 Our interim report concluded at paragraph 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.

3.8 This recommendation would not prevent the oral declaration of the result by local dignitaries. It removes the fictitious notion that the writ is addressed to and returned by local dignitaries, when they have no responsibility for running the election.

3.9 If the UK Government's policy is to preserve the pageantry of election declarations in England and Wales, secondary legislation could be introduced requiring the returning officer to delegate the declaration of the result to others.

3.10 We therefore maintain the recommendation. We note here that where references are made in this report to "the returning officer" these should be read, in practice, as

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<sup>42</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, and Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 3.3.

<sup>43</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 3.3 to 3.8. We note these comments are repeated in the Conservative Party's evidence to the Public Administration and Constitutional Affairs Committee's Electoral Law Inquiry; <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/electoral-law/written/102694.pdf> (last visited 3 March 2020).

references to the person who is currently in law the “acting” returning officer for parliamentary elections in England and Wales.

### **Recommendation 3.**

- 3.11 The person who in the current law 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**

- 3.12 Returning officers are responsible for the lawful administration of elections. As we note in chapter 2, the legislative framework governing elections is set out in an election-specific way. This is also true of how elections are managed. The 1983 Act makes provision for identifying returning officers for parliamentary and local government elections respectively. It also sets out these officers’ duty to conduct elections. That provision is replicated, with some adaptations, for other types of elections. Our consultation paper proposed, and consultees overwhelmingly supported, setting out in one place the powers and duties that are common to all elections. These should be set out in a single piece of legislation (emanating from each of the UK’s legislatures as regards the polls they have competence over), rather than be repeated in separate pieces of legislation each applying to a particular election.<sup>44</sup>
- 3.13 At parliamentary elections it is the returning officer’s “general duty ... to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by ... parliamentary election rules.”<sup>45</sup> That duty is mirrored in provisions applying to local government elections in England and Wales, Greater London Authority elections and other election-specific measures. Returning officers are required to follow the relevant elections rules, and are moreover generally required to take all steps to conduct the election lawfully.
- 3.14 In our interim report we noted that consistency in standards of electoral administration is an ongoing concern to those involved in electoral administration.<sup>46</sup> 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, the Electoral Commission publishes non-binding guidance.

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<sup>44</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 3.9 to 3.17.

<sup>45</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 3.13 to 3.16 and the Representation of the People Act 1983, s 23(2).

<sup>46</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 3.10.

- 3.15 Nearly all consultees who responded to our proposal (38 out of 39) agreed that electoral law should set out the powers and duties of returning officers for all elections.<sup>47</sup> We remain of that view.

#### **Recommendation 4.**

- 3.16 Electoral law should set out the powers and duties of returning officers for all elections within the legislative competence of the parliaments within the United Kingdom.

### **POWERS OF DIRECTION**

- 3.17 Most types of election in Great Britain take place over large electoral areas. To ensure elections can be run properly they are managed by more than one returning officer, with a senior officer overseeing the entire election. We refer to these senior officers as “directing” returning officers. In all elections apart from UK Parliamentary elections and local government elections in England and Wales the “directing” returning officer has a power of direction over local returning officers. A local returning officer is required to follow any directions issued by the “directing” returning officer.<sup>48</sup>
- 3.18 In Northern Ireland all returning officers are subject to the direction of the Chief Electoral officer by virtue of being members of the Chief Electoral Officer’s staff. In the case of Scottish local government elections, returning officers must follow the directions of the Electoral Management Board. Since the publication of our interim report the Scottish Elections (Reform) Bill has been introduced in the Scottish Parliament. The Bill would extend the power of direction currently held by the Electoral Management Board for Scotland to Scottish Parliamentary elections.<sup>49</sup>
- 3.19 At present the laws governing Welsh and Scottish Parliamentary elections do not grant powers of direction to one officer over another. Instead, they confine themselves to defining the different areas of responsibility of regional and constituency returning officers.<sup>50</sup> The former administer the contest in each region, while the latter run the poll in their constituency. The rules place both returning officers under a duty to cooperate with each other.
- 3.20 In our consultation paper we provisionally proposed that the functions, duties and powers of direction of directing returning officers at elections managed by more than one returning officer should be spelled out in law. Of the 38 consultees who responded, 37 supported that proposal, with the other consultee not offering a firm

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<sup>47</sup> As above, para 3.13.

<sup>48</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 3.22.

<sup>49</sup> Scottish Elections (Reform) Bill, cl 25, inserting s 4A into the Local Electoral Administration (Scotland) Act 2011.

<sup>50</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 3.24.

view.<sup>51</sup> We also asked about the proper scope of powers of direction when polls are combined. In responding, a number of consultees offered views on the limits, or the proper exercise, of powers of direction.

- 3.21 The Electoral Commission and national branch of the Association of Electoral Administrators (“AEA”) expressed the view that securing consistency should be the primary aim of any reform. The national branch of the AEA, whose response was endorsed by a significant number of respondents, also 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.”
- 3.22 The Scottish Assessors Association noted that non-statutory bodies, such as itself, help deliver consistency alongside the statutory Electoral Management Board for Scotland. Although Scottish consultees were generally very supportive of the role played by the Electoral Management Board, we did not think it fell within the scope of this project to recommend a UK-wide shift to a central directing body for all elections.
- 3.23 Our interim report concluded that the proper role of powers of direction is a relatively simple matter. 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 consistency, given that the officers are running the same election. The directing or regional returning officer’s task is to give such directions as are necessary to deliver consistent administration 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.
- 3.24 We therefore concluded that powers of direction should relate to anything the directing returning officer considers necessary for the proper running of the election of which they are in overall charge. 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 any direction, but remains in charge of delivering the local poll.
- 3.25 We considered 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 prescribe that the local or lead returning officer should decide whether to combine ballot boxes for two or more coinciding polls, rather than the directing officer. What was 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.<sup>52</sup>

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<sup>51</sup> As above, para 3.23.

<sup>52</sup> As above, paras 3.38 to 3.41.

## Cooperation between directing officers and local returning officers

- 3.26 When responding to our consultation question a significant number of consultees stressed the importance of cooperation between local returning officers and directing returning officers when they administer polls. The national branch of the AEA explained that cooperation between directing returning officers and local returning officers at an early stage would “allow sufficient time for the returning officer/s to plan and implement the directions issued.” That was reiterated by the Electoral Commission.
- 3.27 We agree that the duty to cooperate is an important means of achieving consistency across elections. However, in our interim report we concluded against a legal duty to consult local returning officers as that might cast doubt on the validity of any direction issued by a directing returning officer. We remain of the view that the duty of returning or registration officers to cooperate should be spelled out along with powers of direction, but should not involve an express duty to consult.<sup>53</sup>

### Recommendation 5.

- 3.28 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.

## An example of powers of direction: our specimen drafting

- 3.29 Our specimen drafting, which we describe in chapter 2, contains draft statutory provisions giving Police and Crime Commissioner returning officers (“PAROs”) and combined authority returning officers (“CAROs”) a general power of direction. The current elections rules governing those elections each articulate the power of direction in different statutory language. Our drafting demonstrates how recommendation 5 could be implemented, by setting out general rules as to when PAROs and CAROs may issue directions to local returning officers. In particular, it provides that a PARO or CARO may issue a direction:
- (1) requiring a local returning officer to provide any information the local returning officer has or is entitled to have;
  - (2) requiring a local returning officer to take specified steps in preparation for the election;
  - (3) in the case of a combined authority mayoral election, requiring that the ballot papers must be printed by the CARO; or

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<sup>53</sup> As above, para 3.41.

- (4) requiring that the count of votes should be conducted at a central location.<sup>54</sup>
- 3.30 Our specimen drafting also includes a general requirement for returning officers to have regard to Electoral Commission guidance.<sup>55</sup>

## **ADMINISTRATIVE AREAS**

- 3.31 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 part of the polling district or a building within it. 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.
- 3.32 Our consultation paper and interim report considered two issues relating to administrative areas: Firstly, who should be responsible for the designation and review of polling districts? Secondly, who should determine appeals against designations?

### **Designation and review of polling districts**

- 3.33 At present the periodic review and alteration of parliamentary polling districts and places is carried out, in Great Britain, by the council of the local authority. In Northern Ireland, parliamentary polling districts are designated and kept under review by the Secretary of State, after consulting the Electoral Commission. The Chief Electoral Officer must review polling places every five years.<sup>56</sup>
- 3.34 In our consultation paper we took the provisional view that the designation and review of polling districts is an administrative matter concerned with the effective organisation of polls. We questioned why this administrative task was undertaken by local authority members, who are political actors, since in all other respects the returning officer is responsible for administering the poll. We provisionally proposed that the designation and review of polling districts should be the responsibility of returning officers.<sup>57</sup>
- 3.35 Our provisional proposal was supported by 32 of 36 consultees. A number of consultees stressed the importance of communication between returning officers and local political parties. For example, the national branch of the AEA expressed the view that returning officers should consult local political parties and then invite comments on any final proposals.<sup>58</sup> A few consultees who disagreed with our proposal did so because in their view decisions as to the location of local polling stations and the

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<sup>54</sup> Specimen drafting, reg 7. Available at <https://www.lawcom.gov.uk/project/electoral-law/>.

<sup>55</sup> Specimen drafting, reg 6(3).

<sup>56</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 3.47 to 3.51.

<sup>57</sup> As above, para 3.55.

<sup>58</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 3.44 and 3.45.

geography of polling districts may always be seen to be politically motivated. Giving the task to returning officers may place them under political pressure.<sup>59</sup>

- 3.36 While we took the risk of politicising the role of returning officers very seriously, we noted in our interim report that designation and review of administrative areas was a public process, subject to independent and effective appeal on clear grounds. We therefore concluded that the designation and review of polling districts are a matter of electoral administration and should be made by returning officers, as opposed to local councils who may make those decisions based on partisan considerations. We remain of that view.<sup>60</sup>

### Appeals against designations of administrative areas

- 3.37 At present, the Electoral Commission is responsible for deciding appeals against designation and review decisions made by local councils. In our consultation paper we noted a suggestion made to us that the Local Government Boundary Commission has greater institutional knowledge and expertise in making decisions in relation to dividing geographical areas.<sup>61</sup> In view of that suggestion we asked consultees whether appeals against designations of administrative areas should continue to be decided by the Electoral Commission or, alternatively, be decided by the Local Government Boundary Commission.
- 3.38 The opinion of consultees was finely split. Fourteen consultees were of the opinion the Electoral Commission should retain responsibility for hearing appeals, whilst 13 thought responsibility should be transferred to local boundary commissions. Seven consultees did not express a preference.<sup>62</sup>
- 3.39 The Electoral Commission 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.
- 3.40 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”.

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<sup>59</sup> As above, paras 3.48 to 3.51.

<sup>60</sup> As above, para 3.52.

<sup>61</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 3.56.

<sup>62</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 3.53 to 3.59.

3.41 We remain of the view that the designation and review of polling districts is not a sub-species of boundary reviews. Boundary reviews establish geographical areas which have democratic representation. Reviews of administrative areas aim to make polling convenient for voters. The only overlap is that both exercises involve geographical boundaries. The most important aspect of the current framework is that there is a single UK-wide body that establishes best practice through appeal decisions. We therefore continue to take the view that the current law correctly identifies the Electoral Commission as the body with responsibility for hearing appeals.<sup>63</sup>

**Recommendation 6.**

3.42 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.

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<sup>63</sup> As above, para 3.58.

# Chapter 4: The registration of electors

## INTRODUCTION

- 4.1 The registration of electors is the permanent, year-round electoral function which is carried out in the UK by an official called the “electoral registration officer”. Being entered in the electoral register conclusively governs entitlement to vote on polling day. The requirement to register in order to vote is therefore an aspect of the electoral franchise.
- 4.2 This chapter starts by considering the franchise, before moving on to consider how the law on residence and “notional” residence could be simplified. It then discusses our recommendations on registration generally, before concluding with our recommendations on the issue of registration at a second residence. The law under these headings is complex and voluminous; a summary with citations is available in our consultation paper.<sup>64</sup> We give a brief overview of the law here.
- 4.3 We maintain the recommendations we made in our interim report, but the material in this chapter is arranged slightly differently from the interim report, and as a result the sequence of recommendations differs from that in the interim report.<sup>65</sup>

## FRANCHISE

- 4.4 The law setting out the franchises and entitlement to vote for different elections is layered, fragmented and complicated.<sup>66</sup> While reform of the franchise is a political and constitutional matter, and therefore outside the scope of this project,<sup>67</sup> our consultation paper proposed that the franchises should be restated in full for all UK elections, in primary legislation. That proposal attracted unanimous support from consultees.
- 4.5 Some consultees pointed out that the restatement must reflect the different franchises within the UK’s devolution settlement. We entirely agree. Insofar as legislative competence over the franchise for an election lies with one or other of the devolved legislatures, the franchise is likely to be contained in a devolved statute. We view that

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<sup>64</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, Chapter 4.

<sup>65</sup> We have brought forward what was recommendation 4-7 earlier in the chapter, and in our new numbering (which runs from recommendations 1 to 107) it is recommendation 9. We have also moved recommendations 4-3 to 4-6 to the end of the chapter, now numbered 16 to 19. Other recommendations have been renumbered accordingly.

<sup>66</sup> A summary of the franchises at different types of election can be found in 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 4.10.

<sup>67</sup> Law Commission, Electoral Law in the United Kingdom, A Scoping Report (11 December 2012) [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/electoral\\_law\\_scoping\\_report.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/electoral_law_scoping_report.pdf). It is noted that the Scottish Elections (Franchise and Representation) Bill proposes to extend the franchise in relation to Scottish local government and Scottish Parliament elections.

as entirely compatible with the recommendation in our interim report.<sup>68</sup> We reiterate that recommendation below, while confining its scope to Great Britain.

### **Recommendation 7.**

- 4.6 The franchises for all elections should be set out in primary legislation.

## **RESIDENCE**

- 4.7 The 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” to that area. Defining residence is difficult, however, and the law is very complex. It can be difficult to capture untypical cases of residence, like inhabiting a houseboat or “couch surfing”. Cases of temporary absence for work or other reasons can pose problems. Finally, some people have more than one residence, and the law says nothing to assist registration officers to decide whether they are entitled to be registered in respect of a second residence.
- 4.8 Where the usual test for residence cannot be met by an elector, the law resorts to a concept of “notional residence”. Such electors are called “special category” electors, and include: “merchant seamen”, patients in mental hospitals (other than detained offenders and prisoners on remand), remand prisoners, service voters, overseas electors, and homeless persons.<sup>69</sup> 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.
- 4.9 The detail of the law is complex and is set out in our consultation paper.<sup>70</sup> 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 a person’s accommodation should not determine whether they are resident. 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.
- 4.10 Of the 35 consultees who addressed this proposal specifically, 34 agreed with it. There was a strong consensus among stakeholders that the law on residence was unduly complex.<sup>71</sup>

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<sup>68</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 4.3.

<sup>69</sup> The Scottish Elections (Franchise and Representation) Bill would add prisoners serving sentences of 12 months or less to this list in respect of Scottish Parliamentary and Scottish local government elections; the Senedd and Elections (Wales) Act 2020 will add children aged 16-18 who are looked after by a local authority, or kept in secure accommodation in respect of local government elections in Wales.

<sup>70</sup> For further detail, see Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.12 to 4.72.

<sup>71</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 4.8 to 4.11.

4.11 Any restatement of the law in this area will require careful drafting. We did not detect disagreement in the consultation responses with our summation of the current law in the consultation paper. There was, however, universal agreement that the provisions of the 1983 Act are almost impenetrable. Our interim report therefore recommended proceeding, assuredly but cautiously, to restate the current law in primary legislation.<sup>72</sup> We repeat that recommendation here.

#### **Recommendation 8.**

4.12 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.

#### **Special category electors**

4.13 Our consultation paper proposed that entitlement to be a special category elector should be governed by primary legislation, requiring 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. All but one of the 31 consultees who submitted a response to this proposal agreed with it.<sup>73</sup>

4.14 Following comments from consultees, including the southern branch of the Association of Electoral Administrators ("AEA"), our interim report clarified that we did not mean that a single form should be used for all electors. Such a form would be unworkably long. The key reform issue is that the law should set out a single legal regime for dealing with these cases of "notional" residence, as it was explained in our consultation paper.<sup>74</sup> There may be different forms for different electors, but they should in our view be based on the same regime of a declaration of a local connection, and subject to the same provisions and administrative requirements.<sup>75</sup> We maintain our recommendation.

#### **Recommendation 9.**

4.15 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.

4.16 Our interim report made a number of recommendations about second residence. We have moved discussion of these recommendations to paragraphs 4.48 to 4.73 below.

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<sup>72</sup> As above, para 4.11.

<sup>73</sup> As above, para 4.53.

<sup>74</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, 4.90 and 4.91.

<sup>75</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 4.53.

## REGISTRATION GENERALLY

- 4.17 Electoral registration definitively establishes an individual's right to vote at any given election. Electoral registers must be complete and accurate 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.
- 4.18 As our consultation paper outlined, the detailed law governing the function of registration officers and the registration process is extremely complex.<sup>76</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 “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 and then in Great Britain.<sup>77</sup>
- 4.19 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 onto 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 alterations in advance 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 applying for registration was incorrectly thought to be 11 days before the poll. It is, in fact, 12 days.<sup>78</sup>
- 4.20 At the time of writing our interim report, the electoral community was focused on implementing the new system of individual electoral registration introduced by the Electoral Registration and Administration Act 2013 (“the 2013 Act”). That system 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. Its effectiveness is currently being considered by the Electoral Registration and Administration Act 2013 House of Lords Committee, which is conducting post-legislative scrutiny of the 2013 Act.
- 4.21 The implementation of individual electoral registration also prompted reforms to the annual canvass process, with the aims of making the process less prescriptive and

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<sup>76</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>77</sup> 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.

<sup>78</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 4.145; Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 4.57.

capable of being tailored to the needs of a local area.<sup>79</sup> Secondary legislation was recently made in respect of the UK Parliamentary register and the local government register in England.<sup>80</sup> The Scottish Government and Welsh Government have brought forward their own statutory instruments applying the reforms to local government registers in Scotland and Wales, insofar as they relate to devolved matters.<sup>81</sup>

- 4.22 In our consultation paper our focus was to restate the law within a simpler, more modern framework. The registration provisions in the 1983 Act are some of the least accessible in electoral law. 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.

### **Simplifying and restating the provisions on maintaining and accessing the register**

- 4.23 Our consultation paper proposed that the 1983 Act's provisions on maintaining and accessing the register should be simplified and restated. There was unanimous support among the 31 consultees who addressed the proposal, although the support of Scott Martin (Scottish National Party) was conditional upon the legislation being enacted in accordance with devolved competence. (This, as we noted above, we do not dissent from. All of the recommendations in this chapter are subject to the respective competences of the Scottish and Welsh Parliaments.)

### **Primary legislation should contain core registration principles**

- 4.24 Our consultation paper provisionally proposed that primary legislation should contain core registration principles. In our view, those included 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.<sup>82</sup> All 30 consultees who responded to this proposal agreed with it, although two qualified their agreement.
- 4.25 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.<sup>83</sup> We consider this with the next proposal.

### **The deadline for registration**

- 4.26 Our consultation paper proposed that the deadline for registration should be expressed as a number of days in advance of a poll. The proposal was unanimously

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<sup>79</sup> Welsh, Scottish and UK Governments, *Reform of the Annual Canvass: Statement of Policy* (September 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/833308/Reform-of-the-Annual-Canvass-Statement-of-Policy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/833308/Reform-of-the-Annual-Canvass-Statement-of-Policy.pdf) (last visited 3 March 2020).

<sup>80</sup> Representation of the People (Annual Canvass) (Amendment) Regulations 2019 SI No 1451.

<sup>81</sup> The Representation of the People (Annual Canvass) (Amendment) (Wales) Regulations 2020 WSI 2020 No 50, came into force on 22 January 2020. The Representation of the People (Annual Canvass) Amendment (Scotland) Order 2020 SSI No 62 came into force on 3 March 2020.

<sup>82</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.189 and 4.190.

<sup>83</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 4.62.

supported by the 33 consultees who provided a response, with many adding observations of their own.<sup>84</sup>

- 4.27 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>85</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>86</sup> In our interim report we did not think it right that the deadline for registration, in practice an important aspect of the franchise, should be located entirely in secondary legislation.
- 4.28 However, we took 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. Our interim report therefore modified our proposal so as to retain the power of the Secretary of State to make regulations to fix the deadline at a point between 12 and five days before the poll. In our view this best reflects the current law, but also achieves our reform objective of having a clearly stated, clearly derived deadline for registration in a standard timetable for UK elections.<sup>87</sup> We maintain the recommendation below.

### **A single electoral register in law**

- 4.29 Our consultation paper proposed that 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. This is intended to replace the current description in statute of five electoral registers, which are envisioned as physical documents. All 31 consultees who submitted a response to this proposal agreed with it, though Scott Martin (Scottish National Party) observed that the proposal did not sit well with devolved legislative competence.<sup>88</sup> Importantly, no one thought that the law should continue to conceive of five legally distinct registers. Our view continues to be that 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. Our interim report maintained the proposal, whilst envisaging that the obligation may have to have more than one statutory source.<sup>89</sup> We repeat the recommendation below.

### **Secondary legislation to contain detailed administrative rules on registration**

- 4.30 Our consultation paper proposed that 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. All 32 consultees

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<sup>84</sup> As above, paras 4.63 to 4.65.

<sup>85</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>86</sup> See above, para 4.19. 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 postdate the fifth day before the poll.

<sup>87</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 4.64 and 4.65.

<sup>88</sup> As above, para 4.66.

<sup>89</sup> As above, para 4.66.

who provided a response to this proposal agreed with it, and we maintain our recommendation.

4.31 Several consultees, however, remarked particularly on the law relating to access to the full register and the 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 during the consultation period, we gathered that 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.<sup>90</sup> We note consultees’ views here, but we consider the issue of the open register, and how it is described to electors, to be a matter for Government.

### **Our technical recommendations aimed at restating the law on electoral registration**

4.32 There was 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 in which electoral area. The law should conceive of a single register that can be used for any election or referendum; depending on the franchise selected, the register will be able to produce a set of polling station registers containing the details of electors who are entitled to vote at that 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 window during which the deadline for registration should fall 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.

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<sup>90</sup> As above, para 4.67.

4.33 As we noted above, we repeat the recommendations made in our interim report here.

**Recommendation 10.**

4.34 The 1983 Act's provisions on maintaining and accessing the register of electors should be simplified and restated.

**Recommendation 11.**

4.35 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 12.**

4.36 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 13.**

4.37 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 14.**

4.38 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.

## SPECIFIC PROBLEMS IN ELECTORAL REGISTRATION

4.39 Our review of the law in this area threw up three specific problems in electoral registration law. We explore these and our suggested solutions below. The recommendations we have made in two of these areas are aimed at proposing new rules, rather than restating or rearranging the current complex laws.

### **Making registration systems capable of exporting data to and interacting with each other**

- 4.40 Electoral law requires electors who vote in person to do so at particular polling stations. It does not offer electors a choice to vote at another polling station which might suit them best. Allowing electors to choose their polling station without opening the door to multiple voting would require (amongst other things) a digital polling station register which is capable of being updated during the course of polling.<sup>91</sup> In many elections, producing a digital online register will first require registration data from different registration officers, whose electoral management systems may not currently be compatible with one another.<sup>92</sup>
- 4.41 Our consultation paper proposed that registration officers' systems for managing registration data should be capable, in the long term, of exporting data to and interacting with other officers' software. We suggested this could be done through minimum specifications or a certification requirement laid down in secondary legislation.<sup>93</sup>
- 4.42 Of the 31 consultees who submitted a response to this proposal, 26 agreed with it. The consultees who disagreed did so, broadly speaking, because they thought legislation on this topic was either unnecessary or not feasible.<sup>94</sup> Our interim report noted that some administrators we had met suggested that there was already a facility for data to "cross" from one system to another. We concluded that it would be feasible, over the long term, for the law to manage a transition so that all registration officers' systems can do so.
- 4.43 We continue to think that this recommendation could pave the way to innovations in how polling might be made more convenient for voters, for example, by giving voters a choice as to which polling station to vote at, or by procuring "super" polling stations in major transport hubs. A digital polling station register capable of updating in real time would, provided it is secure from external interference, prevent double voting.

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<sup>91</sup> We note that academic researchers are exploring the possibility of using distributed ledger technology to update and present electoral registers.

<sup>92</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 4.197.

<sup>93</sup> As above, para 4.197.

<sup>94</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 4.68 and 4.69.

- 4.44 We therefore repeat the recommendation from our interim report below, which would enable future governments to consider innovative policy in an area of electoral law that has not changed since 1872 – namely, restricting voters to pre-assigned polling stations.

#### **Recommendation 15.**

- 4.45 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.

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

- 4.46 Our consultation paper noted a particular problem in the context of resident EU citizens' entitlement to vote at EU Parliamentary elections. To vote in those elections EU citizens are required to make a declaration stating that they 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. There are however practical problems in administering the declaration, which only lasts a year. These were noted by the Electoral Commission following the 2015 EU Parliamentary elections, and similar problems occurred again in the 2019 EU Parliamentary elections, where many EU citizens found they were unable to vote.<sup>95</sup>
- 4.47 Our interim report therefore recommended that the declaration should have effect for the duration of the elector's entry on the register subject to a limit of five years.<sup>96</sup> The publication of our interim report preceded the 2016 EU referendum. Given that the UK left the EU on 31 January 2020, we do not consider it necessary to repeat the recommendation made in our interim report.

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

- 4.48 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>97</sup> However, 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 who is resident in two local government areas may vote at elections in both of those areas – even if polling is on the same day. But it is an offence to vote in two areas in the same national election or referendum.<sup>98</sup>

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<sup>95</sup> See the Electoral Commission's report on the May 2019 EU Parliamentary elections (October 2019), available at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/european-parliamentary-elections/report-may-2019-european-parliamentary-elections-and-local-elections> (last visited 3 March 2020).

<sup>96</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 4.71 to 4.74.

<sup>97</sup> *Fox v Stirk* [1970] 2 QB 463.

<sup>98</sup> Representation of the People Act 1983, s 61(2).

- 4.49 In Scotland, draft legislation is before the Scottish Parliament which, if implemented, would restrict electors to voting in only one local authority area at any polls for local government elections held on the same day.<sup>99</sup> It would still be possible for an individual to be on the electoral register for more than one local authority area.
- 4.50 Our consultation paper noted two key risks in relation to registration at a second residence. The first was the risk of inconsistent decision-making by registration officers in different areas. Such inconsistency is troubling partly because it may give rise to a perception of political bias in decision-making by registration officers. The second risk involves electors unwittingly voting twice at the same election if they are sent postal ballot papers for both of their registered addresses.
- 4.51 In order to mitigate these risks, 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 in assessing whether a person was resident in a place. 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. The responses to our proposals and our conclusions are set out below.

#### **Acknowledging in legislation the possibility of satisfying the residence test in more than one place**

- 4.52 Of the 32 consultees who addressed this proposal specifically, 30 agreed that legislation should acknowledge the possibility of a second residence.<sup>100</sup>
- 4.53 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

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<sup>99</sup> The Scottish Elections (Reform) Bill, s 5.

<sup>100</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 4.15 to 4.18.

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.

- 4.54 In our interim report we came to the view that deciding whether voting in more than one area should be permitted is a matter of political not legal judgement. It is not for us to weigh Mr Martin’s 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 therefore proceeded on the basis of the current case law, which it is open to the legislatures of the UK to change.<sup>101</sup>
- 4.55 Leaving aside this issue of principle, our proposal that legislation should acknowledge the current possibility of registration at a second residence was generally well received. Our concern was to secure consistency of decision-making by registration officers, by providing adequate and proper guidance through legislation. That led us to recommend in our interim report that statute should acknowledge the possibility of satisfying the residence test in more than one place. We repeat our recommendation below (while reiterating that residence in more than one area does not mean being able to vote twice in the same poll).

#### **Recommendation 16.**

- 4.56 Primary legislation should explicitly acknowledge the possibility of satisfying the residence test in more than once place.

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

- 4.57 After giving an overview of the case-law both in Scotland and in England and Wales,<sup>102</sup> our consultation paper suggested that the following factors are relevant to

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<sup>101</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 4.19 to 4.21. We note that any change would have to reflect the scenario in which a voter might apply to be registered at a new address after moving, while still being registered at a previous address, but with no intention of remaining registered at both addresses.

<sup>102</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.35 to 4.43.

determining whether a person is resident in 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.<sup>103</sup>

4.58 We asked consultees whether the law should lay down these factors. Of the 32 consultees who specifically answered this question, 26 thought the law should lay down the factors to be considered when establishing a second residence.<sup>104</sup> 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.

4.59 The Electoral Commission broadly agreed with our suggested factors, save that it thought the first ((1) at paragraph 4.57 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.

4.60 We continue to consider that primary legislation can help registration officers to achieve greater consistency. The answers to our questions revealed, however, a cautious approach among many stakeholders, several of whom wanted to see the draft clauses to make sure they were practicable. Our interim report was sympathetic to those concerns, noting that finalisation of the detail would be a matter of Bill drafting. We nevertheless suggest below a list of factors that could be used as a starting point when considering what factors might be covered in legislation.

4.61 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.

- (1) 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.
- (2) 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

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<sup>103</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 4.80.

<sup>104</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 4.24 to 4.26.

once for a relatively brief period, it will not qualify as a residence. A clear example would be short-term rental of holiday accommodation.

- (3) 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.
- (4) 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. If a person only has a timeshare interest in a property for a small number of weeks a year, or lets out the property for most of the year, that would be unlikely to be sufficient to found occupation of it as a residence.
- (5) 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.
- (6) 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.
- (7) 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.<sup>105</sup>

#### **Recommendation 17.**

4.62 The law should lay down factors to be considered by registration officers when determining second residence applications, such as those set out in paragraph 4.61 of this Report.

#### **Should electors applying to be registered in respect of a second home be required to make a declaration supporting their application?**

4.63 Of the 33 consultees who answered this question, 23 consultees did so affirmatively.<sup>106</sup> That is not to say that they did not raise difficulties with requiring such a declaration. The Electoral Commission was concerned that a requirement for electors to give evidence of their annual duration of occupation at the second home is

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<sup>105</sup> As above, paras 4.30 to 4.37.

<sup>106</sup> As above, paras 4.38 to 4.43.

unworkable. It also objected on the same ground to the idea (mooted in our consultation paper)<sup>107</sup> 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.

- 4.64 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. The Scotland and Northern Ireland branch of the AEA, as well as the Scottish Assessors Association, foresaw practical difficulties in the administration of such a scheme. Sir Howard Bernstein (Manchester CC) was concerned that it would create an additional barrier to registration which would particularly affect some groups whom it is hard to persuade to register, such as students. The eastern branch of the AEA also noted that the creation of such a scheme would inevitably put further pressures on administrative resources.
- 4.65 We are not persuaded that the idea is wrong in principle. It is justifiable to ask someone who applies to be registered in respect of a second place to give reasons in support of that application. 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.
- 4.67 Notwithstanding the above, and the support for our provisional proposal, we were persuaded in the interim report that there would be practical problems with its implementation. We therefore concluded it would be 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 limited our recommendation to requiring applicants for registration to indicate whether they seek to be registered at the address in question while remaining registered at another.<sup>108</sup> We repeat that recommendation below.

#### **Recommendation 18.**

- 4.66 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?**

- 4.68 As noted at paragraph 4.50 above, many electors registered in two places will elect to vote by post in one or both areas. This results in a potential risk of multiple voting, whether intentionally or inadvertently. Accordingly, we sought consultees' views on

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<sup>107</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 4.82 and 4.83.

<sup>108</sup> We note that the existing form already asks applicants whether they live at another address to the one specified on the form. See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/711618/R\\_register\\_to\\_vote\\_if\\_you\\_re\\_living\\_in\\_England\\_or\\_Wales.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711618/R_register_to_vote_if_you_re_living_in_England_or_Wales.pdf) (last visited 3 March 2020).

whether electors should be asked to designate, when registering a second home, one residence as the one at which they will vote at national elections.

- 4.69 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. Consultees' responses raised a number of potential difficulties with implementing such a change.<sup>109</sup> Amongst others, it would require information to be shared between different registration officers' systems, and would create timing issues (for example, there would have to be a cut-off date for nominating a primary residence for national elections).
- 4.70 Our interim report accepted that requiring a designation of a primary residence would have significant practical implications. Policing it would require different registration officers' systems to identify that two entries related to the same person, which might not be possible if a person was registered under different names, for example.
- 4.71 In the longer term, however, this will be part of a reformed system in which new applicants to be registered in respect of a second home are required to reveal that fact. New data matching techniques could also assist. Finally, we note that registration officers are required under the current law to communicate with colleagues elsewhere when applicants move house and reveal their old registered address. The number of people moving house is likely to be much larger than those wishing to be registered in respect of a second home. Nevertheless, our interim report took the point that caution and fine-tuning is advisable in this context.<sup>110</sup>
- 4.72 We recommend that such a provision be introduced but recognise that its implementation will require further policy development between stakeholders and Governments.<sup>111</sup> In practice it will also require close collaboration between registration officers in different parts of Great Britain.

**Recommendation 19.**

- 4.73 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.

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<sup>109</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 4.46 to 4.52.

<sup>110</sup> As above, para 4.52.

<sup>111</sup> As noted above, at para 4.49, there is draft legislation before the Scottish Parliament which, if implemented, would restrict electors to voting in only one local authority area at any polls held for local government elections on the same day. It would still be possible however for an individual to be registered in more than one local authority area.

# Chapter 5: Manner of voting

## INTRODUCTION

5.1 Voting in the UK is traditionally done by marking a ballot paper in person (or through a proxy) at a polling station to which electors are assigned based on their registered address. The elector (or their proxy) may also vote by post. In this chapter we consider the mechanics of the ballot system. We consider, first, the secret ballot in principle and operation and, secondly, the question of designing and legislating for the content of ballot papers.

## THE SECRET BALLOT

5.2 The secret ballot has been the cornerstone of voting in the UK since 1872. Requiring votes to be cast in the privacy of the polling booth helps protect against influence and corruption, by preventing attempts to verify how a vote was cast. The court however retains a power to trace particular ballot papers, which is designed to enable the detection of fraud.<sup>112</sup> This is made possible by the corresponding number list (on which polling station staff record the number of the issued ballot paper against the elector's number).<sup>113</sup>

5.3 Legislation seeks to preserve secrecy in two ways; first, it lays down requirements to keep how a particular elector voted secret and, second, it contains several criminal offences designed to prevent or contain any breaches of secrecy. To ensure voter secrecy, section 66 of the Representation of the People Act 1983 ("the 1983 Act") places duties on various actors in the election process. These are summarised below, and in greater detail in our consultation paper.<sup>114</sup>

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

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<sup>112</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 5.8.

<sup>113</sup> As above, para 5.6.

<sup>114</sup> As above, para 5.13.

- 5.4 At sessions during which postal votes are opened, similar duties of secrecy apply, in particular prohibiting the communication of how a vote was given on any particular ballot paper.

### Applying the secrecy provision in the modern context

- 5.5 In both our consultation paper and interim report we noted that the secrecy provisions are under potential threats from technology in the form of mobile phone photography.<sup>115</sup> The law does not currently prohibit the taking of photographs in polling stations, though the Electoral Commission advises voters against it.<sup>116</sup> We explained that returning officers can permit local and national newspapers to film and photograph polling stations before polling begins and film candidates as they cast their ballots.
- 5.6 We provisionally proposed that it should be an offence to take a photograph in a polling station, whether of one's marked ballot paper or of anything else. Our initial view was that this was the best way to uphold the integrity of the secret ballot.<sup>117</sup> In our interim report we noted that 35 out of 40 consultees agreed with our provisional proposal but that a significant number of consultees, including the Electoral Commission, had doubts about the enforceability of an offence prohibiting all photography at polling stations.<sup>118</sup> The News Media Association disagreed with our proposal, maintaining that media presence in polling stations is desirable and should continue. They suggested that "returning officers and polling station staff should 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".<sup>119</sup>
- 5.7 In the light of consultee responses, we maintained our provisional proposal that section 66 of the 1983 Act should extend to the taking of photographs at polling stations, subject to the qualification that electors may seek the presiding officer's permission to take a photograph. Our proposal would permit presiding officers to allow photographs of the polling station as a whole, a blank ballot paper, or press photography of a candidate voting.
- 5.8 Since the publication of our interim report, the review by Sir (now Lord) Pickles into electoral fraud has also expressed concern about the use of mobile phone photography in polling stations. The report recommends that "the taking of pictures and use of cameras (including camera phones) in polling stations should be made illegal in order to prevent voters being intimidated into recording how they voted and to

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<sup>115</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 5.14 to 5.16 and Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 5.6.

<sup>116</sup> Electoral Commission, *Media handbook: UK Parliamentary general election (UKPGE)* (December 2019) p 39, available at <https://www.electoralcommission.org.uk/sites/default/files/2019-11/UKPGE%202019%20Media%20Handbook%20GB.pdf> (last visited 3 March 2020).

<sup>117</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 5.15.

<sup>118</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 5.7 to 5.11.

<sup>119</sup> As above, para 5.12.

preserve the secrecy of the ballot”.<sup>120</sup> That recommendation is not qualified in the way in which we describe above. We nonetheless remain of the view that some discretion on the part of the presiding officer is necessary. In addition to facilitating media coverage of elections, a discretion to allow mobile phone photography could facilitate unassisted voting by blind and partially sighted voters, for example by allowing them to use software to view the ballot paper in larger print on their mobile phone.<sup>121</sup> Allowing a presiding officer to permit photography in certain circumstances achieves an acceptable balance between secrecy and the public interest in press coverage of the democratic process.

- 5.9 In our consultation paper we also noted a disparity in the protection of secrecy between in-person and postal voting. Section 66(3) of the 1983 Act, which applies to the general public, only protects information obtained in a polling station. To fill this gap, we provisionally proposed that the same offences should apply to postal voting as to voting in person.<sup>122</sup> That proposal was supported by 35 out of 40 consultees,<sup>123</sup> and has subsequently been repeated by Sir Eric Pickles.<sup>124</sup> We remain of the view that this gap should be filled and maintain the recommendation from our interim report below.

#### **Recommendation 20.**

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

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

- 5.11 In our consultation paper we noted that there is no written rule that expressly requires registration officers to securely store the sealed packets containing ballot papers and corresponding number lists. We also expressed the view that secure storage is an important aspect of safeguarding public trust in the secrecy of the ballot. To that end we provisionally proposed that there should be a legal rule requiring returning officers to store documents securely.<sup>125</sup> Of the 36 consultees who responded to this question, 35 agreed with our proposal, with a number of electoral administrators surprised to find that no legal rule expressly required secure storage.<sup>126</sup> We remain of the opinion

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<sup>120</sup> Sir Eric Pickles, *Securing the ballot: review into electoral fraud* (August 2016), recommendation 3.

<sup>121</sup> For further discussion of the accessibility of the poll for voters with disabilities, see paras 8.49 to 8.66.

<sup>122</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 5.14 and 5.16.

<sup>123</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 5.7.

<sup>124</sup> Sir Eric Pickles, *Securing the ballot: review into electoral fraud* (August 2016), recommendation 18.

<sup>125</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 5.7 and 5.41.

<sup>126</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 5.15 and 5.16.

that voter confidence in secrecy would be increased if there was an explicit rule requiring the secure storage of documents.

- 5.12 In our consultation paper we also provisionally proposed that sealed packets containing corresponding number lists should be stored separately from sealed packets containing ballot papers and in a different person's custody. This would further protect secrecy, as physical access to both locations would be needed in order to establish how any voter cast their vote. We tentatively suggested that the Electoral Commission, which does not currently have any custody responsibilities, could be a suitable custodian of corresponding number lists.<sup>127</sup>
- 5.13 The response to this provisional proposal was mixed. Of the 34 consultees who responded, 13 fully agreed, six disagreed with the proposal in full and 14 disagreed that corresponding number lists and ballot papers should be in a different person's custody.<sup>128</sup> In response to our proposal the Electoral Commission informed us that it did not feel well placed to take on a new role as custodian of corresponding number lists. Scepticism about the utility of this additional security measure was reiterated by a number of other consultees, who took the view that a central body in charge of keeping corresponding number lists may have difficulty dealing with the sheer volume of documents entrusted to it.
- 5.14 Those responses persuaded us that the legal requirement to store the documents securely is adequate to safeguard voter secrecy. We remain of that opinion and do not recommend any requirement of separate storage. We note however that the definition of "securely" may require further definition in secondary legislation.

#### **Recommendation 21.**

- 5.15 The obligation to store sealed packets after the count should specify that they should be stored securely.

#### **Qualified secrecy**

- 5.16 In the UK the secrecy of the ballot is not absolute. The courts have the power to order the inspection or production of sealed packets containing ballot papers and the corresponding number list, if satisfied that this is required in order to institute or maintain a prosecution for an offence or to bring an election petition. An election court considering the validity and correctness of an election also has a general power to order inspection of sealed packets. This is known as vote tracing. In our consultation paper we considered at length whether qualified secrecy was compatible with article 3 of the First Protocol to the European Convention on Human Rights (the "Convention") and EU law. We concluded that article 3 of the First Protocol does not require absolute voter secrecy (which would exclude judicial vote tracing), and therefore that

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<sup>127</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 5.42 and 5.43.

<sup>128</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 5.21 to 5.27.

the current system of qualified secrecy does not infringe either the Convention or EU law.<sup>129</sup>

- 5.17 The 1983 Act sets out important limits on vote tracing. It provides that the way a particular voter voted should not be disclosed until it has been proved the vote was given and the vote has been declared invalid by a competent court. We provisionally proposed that these safeguards should extend to someone whose vote is invalid, but who acted in good faith.<sup>130</sup> We expect most such cases to arise from voter mistakes. Our aim was to ensure that innocent voters, even if their vote is technically invalid, do not have the way they voted disclosed.
- 5.18 At UK Parliamentary elections the House of Commons has a power to make the same orders as courts can make, subject to the same duty not to disclose the vote of certain persons. Unlike the vote tracing power of the courts, this is not conditional on the commencement of criminal or petition proceedings. The House of Commons has rarely used this power and it appears to be a vestige of a jurisdiction that in practice was long ago transferred to the judiciary.<sup>131</sup> We provisionally proposed that the vote tracing powers of the House of Commons should be abolished. We reiterate that we see no reason to doubt that the House of Commons would exercise this power responsibly. However, we take the view that granting the courts exclusive power to unlock voter secrecy accords with current practice and is more consonant with the principles underpinning the European Convention on Human Rights and the separation of powers.<sup>132</sup>
- 5.19 Of the 33 consultees who responded to our provisional proposal, 31 agreed both that the House of Commons' vote tracing power should be abolished and that a voter's vote should not be disclosed if it was innocently invalid. One consultee questioned the need for either of these reforms and another doubted the wisdom of protecting "innocently invalid" votes from disclosure.<sup>133</sup>
- 5.20 The News Media Association expressed concern that our proposal would mean courts could only disclose how a particular voter voted where it could be demonstrated they had acted dishonestly.<sup>134</sup> This could prevent members of the Association from reporting cases where voters had been coerced into voting a particular way or had had their votes interfered with, but were not necessarily dishonest themselves.

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<sup>129</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 5.19 to 5.25.

<sup>130</sup> As above, para 5.40.

<sup>131</sup> As above, para 5.38.

<sup>132</sup> As above, para 5.39.

<sup>133</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 5.29 to 5.31.

<sup>134</sup> As above, para 5.32.

- 5.21 As we said in the interim report, we do not intend “innocently invalid” votes to include votes cast as a result of fraud, impersonation or any other electoral offence; a court would be able to disclose those votes.<sup>135</sup> We repeat the recommendation made in our interim report.

### **Recommendation 22.**

- 5.22 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.

### **Voter identification at the poll**

- 5.23 In our consultation paper we concluded that it was not within the scope of this project to suggest the adoption of alternative or additional measures to combat personation such as a requirement for photographic identification at the poll. On the one hand, such a requirement may reduce the risk of personation and fraud. On the other, it is a potential obstacle to access to the poll, particularly for members of disadvantaged groups. We remain of the view that we took then: it is for Government to weigh the balance between security from fraud and access to the poll as a matter of policy.<sup>136</sup>
- 5.24 Since our interim report, UK Government policy has developed; in 2018 and 2019 voter identification pilots took place in several local government elections. Both the Electoral Commission and Cabinet Office have conducted a review of those pilots.<sup>137</sup> The UK Government has subsequently announced its plans to introduce voter identification at UK Parliamentary elections in Great Britain and local elections in England.<sup>138</sup>

## **BALLOT PAPER DESIGN AND CONTENT**

- 5.25 In our consultation paper and interim report, we noted that most ballot papers are in a form prescribed by secondary legislation. We further noted that the current practice is

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<sup>135</sup> As above, para 5.33.

<sup>136</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 5.29.

<sup>137</sup> Electoral Commission, *May 2018 voter identification pilot schemes* (July 2019), available at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/voter-identification-pilots/may-2018-voter-identification-pilot-schemes> (last visited 3 March 2020) and Electoral Commission, *May 2019 voter identification pilot schemes* (July 2019), available at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/voter-identification-pilots/may-2019-voter-identification-pilot-schemes> (last visited 3 March 2020) and Cabinet Office, *Electoral integrity project – local elections 2018 – evaluation* (July 2018), available at <https://www.gov.uk/government/publications/electoral-integrity-project-local-elections-2018-evaluation> (last visited 3 March 2020) and Cabinet Office, *Evaluation of voter ID pilots 2019* (July 2019), available at <https://www.gov.uk/government/publications/evaluation-of-voter-id-pilots-2019> (last visited 3 March 2020).

<sup>138</sup> Prime Minister’s Office, *The Queen’s speech December 2019 – background briefing notes* (December 2019) p 126, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/853886/Queen\\_s\\_Speech\\_December\\_2019\\_-\\_background\\_briefing\\_notes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf) (last visited 3 March 2020).

for ballot papers to be professionally designed and user-tested. Our consultation paper made two provisional proposals aimed at improving the experience of voters and the effectiveness of ballot papers.<sup>139</sup>

- 5.26 Our first provisional proposal was that the form and content of ballot papers and other materials supplied to voters should continue to be prescribed in secondary legislation. We took the view that this achieved the correct balance between flexibility for administrators and consistency for voters. Of the 37 consultees who addressed that proposal, 30 agreed with it. Four consultees disagreed, two consultees commented without providing a firm view and one consultee was undecided. Those who disagreed fell into two camps. Some argued that ballot paper forms should be set in primary legislation. A greater number of consultees, including the Electoral Commission, argued that forms should be prescribed by the Commission itself.<sup>140</sup>
- 5.27 We concluded that prescribing ballot papers in primary legislation would make forms too inflexible, making them incapable of adaptation without amending primary legislation. We thought it right in principle, however, that the ballot paper template should be fixed by law. This accords with a long-established tradition in the UK that the ballot paper template is prescribed by law and subject only to cosmetic and minor adaptation by returning officers.<sup>141</sup> We remain of the view that a transfer of the power to prescribe ballot papers and other election notices and forms to the Electoral Commission would fundamentally alter the institutional landscape of elections, and is therefore outside the scope of this project.
- 5.28 Our second provisional proposal was that the existing duty of the Secretary of State to consult the Electoral Commission on the prescribed ballot paper form should be executed by reference to three general principles that we believed would improve the experience of voters:<sup>142</sup>
- (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.
- 5.29 A total of 37 consultees responded to that proposal. Thirty-two agreed with it, two disagreed, one consultee was unsure and one commented but offered no firm view. Scott Martin (Scottish National Party) doubted the need for principles to be stated in

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<sup>139</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 5.60 to 5.62.

<sup>140</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 5.39 and 5.46 to 5.51.

<sup>141</sup> As above, paras 5.52 to 5.54.

<sup>142</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 5.59 and Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 5.37.

legislation, questioning how the principle of consistency as between elections would fit with devolution.<sup>143</sup>

5.30 We continue to attach importance to the Electoral Commission's uniquely UK-wide role, as we did in the interim report.<sup>144</sup> Our recommendations are not inconsistent with devolution of the relevant regulation-making powers; we hope that those who exercise them will co-operate so as to observe our third principle, in the interests in particular of voters voting at combined polls. We remain of the view that the duty to consult the Electoral Commission should be performed by reference to our recommended principles, subject to one amendment that we recommended in the interim report.

### Promoting access by voters with disabilities

5.31 In response to our consultation paper a number of disability rights groups, including the Royal National Institute of Blind People and Mencap, expressed concern that ballot papers can be confusing for voters with disabilities. Diverse Cymru raised similar concerns and expressed the view that no single form of ballot paper could suit every voter.

5.32 After careful consideration of those responses, we amended our second provisional proposal above to include accessibility for voters with disabilities as an aspect of the principle of clarity.<sup>145</sup> The policy goal is that ballot papers should be as easy to understand and use for as many people as possible; this includes those with disabilities, but also those with poor literacy or English language ability.

5.33 Since the publication of our interim report the Electoral Commission have published two reports assessing the experience of voters, including voters with disabilities, at the 2017 general election, which stressed that the UK Government should make changes to election forms so that they can be more easily understood.<sup>146</sup> We remain of the view that accessibility for voters with disabilities should be a key concern in designing ballot papers and forms. We maintain our recommendations.

#### **Recommendation 23.**

5.34 The form and content of ballot papers should continue to be prescribed in secondary legislation.

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<sup>143</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 5.39.

<sup>144</sup> As above, para 5.55.

<sup>145</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 5.42 to 5.44 and 5.55.

<sup>146</sup> Electoral Commission, *Elections for everyone: Experiences of people with disabilities at the 8 June 2017 UK Parliamentary general election* (November 2017) para 2.7, available at [https://www.electoralcommission.org.uk/sites/default/files/pdf\\_file/Accessibility-report-call-for-evidence.pdf](https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Accessibility-report-call-for-evidence.pdf) (last visited 3 March 2020) and Electoral Commission, *Elections for everyone* (May 2019), available at <https://www.electoralcommission.org.uk/report-elections-everyone> (last visited 3 March 2020).

**Recommendation 24.**

5.35 There should be a duty to consult the Electoral Commission on prescribed ballot paper form and content by reference to the principles of:

- (1) clarity, including for voters with disabilities;
- (2) internal consistency; and
- (3) general consistency with other elections.

## Chapter 6: Absent voting

### INTRODUCTION

- 6.1 An absent vote is a way of voting without the voter attending at a polling station on polling day. It is done through a postal vote or by appointing a proxy to vote on one's behalf. Postal voting is available on demand in Great Britain, while proxy voting, and absent voting generally in Northern Ireland, are available only on certain grounds. These include inability to attend at the polling station due to work or illness.
- 6.2 Our consultation paper outlined the law on absent voting. The law is complex and found in a mixture of primary and secondary legislation which is distinct from the sets of rules that contain the core provisions on the conduct of elections and the detailed elections rules.<sup>147</sup> This chapter is divided 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 voter status”. 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.
- 6.3 In our interim report we noted that questions of entitlement to a postal vote and the balance between access to voting and security from fraud were matters of Government policy and not for bodies such as the Law Commissions.<sup>148</sup> We note that since the publication of our interim report, Sir (now Lord) Pickles has published his report *Securing the ballot: review into electoral fraud* (“the Pickles Report”) and in the December 2019 Queen’s Speech the Government announced its intention to make changes to the postal and proxy voting processes.<sup>149</sup>

### ABSENT VOTING ENTITLEMENT

- 6.4 In Great Britain the law governing entitlement to an absent vote is contained in the Representation of the People Act 2000 (“the 2000 Act”) while, in Northern Ireland, the Representation of the People Act 1985 (“the 1985 Act”), which used to apply to the UK as a whole, is still in force. Both statutes are supplemented by election-specific

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<sup>147</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>148</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.91.

<sup>149</sup> Sir (now Lord) Pickles, *Securing the ballot: report of Sir Eric Pickles’ review into electoral fraud* (August 2016) and Cabinet Office and Prime Minister’s Office, *The Queen’s speech December 2019 - background briefing notes* (December 2019) p 126.

secondary legislation.<sup>150</sup> The 2000 Act applies to UK Parliamentary elections, local government elections in England and Wales, elections to the Greater London Authority, mayoral and combined authority mayoral elections in England and Wales and local government elections in Scotland. 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 elsewhere of provisions of the 2000 Act.

- 6.5 One of the difficulties with the current legislative approach is that it envisages separate records of postal voters being kept under each separate piece of legislation. 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 covered by them, leading to a number of complications described in our consultation paper.<sup>151</sup> Our preferred approach, expressed in our consultation paper, was for a holistic legal framework in primary legislation governing entitlement to an absent vote, with secondary legislation governing the law on the administration of postal voter status.<sup>152</sup> All 39 consultees who responded expressed agreement with that approach.<sup>153</sup> We continue to take the view that a single legislative framework governing entitlement to an absent vote, and secondary legislation containing the law on the administration of postal voter status, would reduce complexity. We repeat our recommendation here.

#### **Recommendation 25.**

- 6.6 Primary legislation should set out the criteria of entitlement to an absent vote. Secondary legislation should contain the law on the administration of postal voter status.

- 6.7 A further issue that we identified in our consultation paper was the provision in the 2000 Act that enables an elector to apply for an absent vote at either a parliamentary or local government election, or both.<sup>154</sup> We noted that this did not match current practice. Many registration officers' postal vote application forms, and even the Electoral Commission's own template application form, present electors with a simple choice whether to be a postal voter for all elections and referendums for a period (a

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<sup>150</sup> See, for example, the Representation of the People (England and Wales) Regulations 2001 SI No 341.

<sup>151</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.

<sup>152</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.32 and 6.33. We note that the Referendums (Scotland) Act 2020 sch 1, part 3, contains detailed provisions on postal voting, including on the issue and receipt of ballot papers.

<sup>153</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.5.

<sup>154</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 6.9 and 6.21 to 6.24.

“periodic” absent vote) or on a particular polling day (a “specific” absent vote).<sup>155</sup> We could not conceive of a reason why an elector would choose to cast an absent vote at one election, but to vote in person in another election held in the same place on the same day.

- 6.8 We provisionally proposed abolishing the choice currently given by the legislation on absent voting to be an absent voter only at particular types of election.<sup>156</sup> This would not remove an elector’s ability only to opt for an absent vote on a particular election day. Of the 39 consultees who responded, 34 agreed with our proposal. The other five agreed only partially.<sup>157</sup> Many consultees expressed general support for our proposal and stressed the importance of removing confusion in the current system. Consultees noted that our proposal would remove the “unnecessary work” for electoral administrators created by the current rules. However, the Electoral Commission disagreed with our proposal, expressing the view 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.
- 6.9 We nevertheless concluded in our interim report that our proposal simplifies the elector’s choice both as to what form of absent vote to seek (postal or proxy) and whether to be an absent voter indefinitely or only on a particular election day. It also removes the risk of voters inadvertently obtaining absent votes for only some of the polls held on a particular occasion, which has happened.<sup>158</sup> A further benefit is that it simplifies the law underpinning absent voting and the task of electoral administrators. For the reasons more fully set out in our interim report,<sup>159</sup> we maintain our recommendation.

#### **Recommendation 26.**

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

#### **Absent voting records**

- 6.11 Under the 2000 Act registration officers are required to keep a record of both postal voters and proxy voters whose application for an absent vote (whether for a fixed or indefinite period) has been granted. The registration officer uses those records to

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<sup>155</sup> In the Pickles Report it was recommended that those registered to postal vote should reapply every three years. That recommendation was supported by the Government in the December 2019 Queen’s Speech: Sir Eric Pickles, *Securing the ballot: report of Sir Eric Pickles’ review into electoral fraud* (August 2016) p 27 and Prime Minister’s Office, *The Queen’s speech December 2019 - background briefing notes* (December 2019) p 126.

<sup>156</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 6.33.

<sup>157</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.8.

<sup>158</sup> See para 6.21 below.

<sup>159</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 6.12 to 6.14.

produce a “postal voters list” and “proxy voters list” before an election. The 2000 Act requires lists to be kept for parliamentary and local government electors, while identical provision is made in measures governing non-2000 Act elections. The postal voters list and proxy voter lists govern entitlement to an absent vote; an elector can only cast an absent vote if they appear on one of those lists.

- 6.12 In our consultation paper we noted that in practice returning officers do not keep physical copies of postal voters lists or proxy voters lists; instead software is used to record absent voting status, and the period over which or polling day to which it applies. We provisionally proposed that the law should require registration officers to record absent voter status in such a way that absent voters lists can be produced at future elections. We noted that to our knowledge our proposal would not change current electoral practice.<sup>160</sup>
- 6.13 That proposal received unanimous support from 34 consultees. That led us to reiterate the proposal as a recommendation in our interim report.<sup>161</sup> We remain of the view that the law should reflect current electoral practice, and on that basis, repeat our recommendation here.

#### **Recommendation 27.**

- 6.14 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.

#### **Restrictions on proxy voting**

- 6.15 Some consultees 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.<sup>162</sup> Currently the law provides that an individual can act as proxy for two electors who are not close relatives (as defined), but for an unlimited number of close relatives. In our interim report we took the view that altering the basis of entitlement to an absent vote is a political question for Governments and Parliaments.<sup>163</sup> We continue to take that view. However, we note that since the publication of our interim report both the Pickles Report and the Government, in the 2019 Queen’s Speech, have indicated that the number of voters for whom a person can act as a proxy should be limited to two, regardless of their relationship.<sup>164</sup>

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<sup>160</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 6.34.

<sup>161</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.15.

<sup>162</sup> As above, para 6.16.

<sup>163</sup> As above, para 6.17.

<sup>164</sup> Sir Eric Pickles, *Securing the ballot: report of Sir Eric Pickles’ review into electoral fraud* (August 2016) p 32 and Prime Minister’s Office, *The Queen’s speech December 2019 - background briefing notes* (December 2019) p 126.

## ADMINISTRATION OF ABSENT VOTER STATUS

6.16 In our consultation paper we outlined the law and current problems in the administration of absent voter status, considering three issues.<sup>165</sup> They were as follows:

- (1) whether the provision made in Northern Ireland legislation, which has never been brought into force, providing for certain voters to vote at a “special polling station” should be removed from the statute book;
- (2) whether the form of postal or proxy voting applications should be prescribed by law; and
- (3) whether there should be legal guidance on how registration officers should go about exercising their power to dispense with the requirement for signed application for a postal or proxy vote.

6.17 We address those issues in turn below.

### Special polling stations in Northern Ireland

6.18 In Northern Ireland the Secretary of State may bring a scheme for special polling stations into force if considered necessary to prevent abuse of the system of postal voting. Under the provisions of schedule 1 to the 1985 Act, a person may apply to vote at a special polling station under the same conditions as govern an absent vote for a specific election. A successful applicant would then be allocated a special polling station by the Chief Electoral Officer and could only vote in person at that polling station. Schedule 1 has never been brought into force.

6.19 In our consultation paper we noted that some aspects of those provisions are out of date; they envisage the use of counterfoils rather than a corresponding number list, for example. We took the view that the scheme had little relevance in the modern context and should be removed from the statute book.<sup>166</sup> Of the 16 consultees who responded to that proposal, 15 supported it, including the Chief Electoral Officer for Northern Ireland. Our interim report therefore recommended the abolition of the special polling station procedure. For the reasons explained in chapter 1,<sup>167</sup> the Northern Ireland Law Commission has not been able to participate in the preparation of this final report. Consequently, this report’s recommendations are confined to Great Britain, and we do not repeat the recommendation made in the interim report.

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<sup>165</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.

<sup>166</sup> As above, para 6.70.

<sup>167</sup> See above, para 1.20.

## The form of absent voter applications

- 6.20 No postal or proxy voting application form is currently prescribed by law. However, the 2000 Act and the Representation of the People (England and Wales) Regulations 2001 (the “2001 Regulations”) provide that applications must contain the elector’s full name, registration address and the address to which the ballot paper should be sent. In addition, the applicant must provide personal identifiers (in Great Britain, the elector’s signature and date of birth). The personal identifiers must be provided in a prescribed format so that they can be scanned and verified by registration officers.
- 6.21 In both our consultation paper and interim report we noted that the ability of campaigners to use their own bespoke forms has resulted in difficulties in the past. For example, in the May 2011 referendum on the parliamentary voting system the Yes campaign sent voters a bespoke form. This form pertained only to postal voting at the referendum, yet the referendum coincided (and was combined) with some local government elections. Voters who used the bespoke form did not also obtain a postal vote for the local government elections combined with the referendum.<sup>168</sup>
- 6.22 We provisionally proposed that absent voting applications should substantially adhere to prescribed forms set out in secondary legislation. We noted that the requirement to provide personal identifiers is subject to strict requirements as to form, and therefore took the view it would not be a great leap to prescribe the entire form.<sup>169</sup> The responses to our provisional proposal were mixed. Of 35 consultees, 27 expressed agreement, three gave qualified agreement, four disagreed and one did not express a firm view.<sup>170</sup>
- 6.23 A number of consultees thought that so long as a voter had provided all the required information, they should be treated as having made a valid application. We noted however that an absent voting application must already contain personal identifiers in respect of which there are formal requirements (such as a signature).<sup>171</sup> We concluded that voters would be better served by a well-designed, user-tested prescribed form, rather than for strict formal requirements (such as the signature box) to exist but their existence to be concealed by the absence of a fully prescribed form.<sup>172</sup> We remain of that view and consider that our recommendation would not prohibit parties or campaign groups from customising the prescribed form, provided they substantially adhere to it.
- 6.24 The Electoral Commission did not agree that the form should be prescribed in secondary legislation. Consistently with its general position, it 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”.

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<sup>168</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 6.72 and Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.19.

<sup>169</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 6.73.

<sup>170</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.24.

<sup>171</sup> As above, para 6.27.

<sup>172</sup> As above, para 6.28.

However, as we indicated in our interim report and chapter 5 of this report, we continue to take the view that such forms should be prescribed in secondary legislation.<sup>173</sup>

- 6.25 In our consultation paper we explained that the requirement of substantial adherence to prescribed forms is not overly rigid and ensures campaigners have a degree of flexibility when designing forms.<sup>174</sup> Most consultees supported our proposal that absent voting applications should substantially adhere to prescribed forms. A few argued that a different standard was appropriate. Those consultees were split, with some arguing for greater flexibility and others arguing that applications should adhere exactly to a prescribed form.<sup>175</sup>
- 6.26 In our interim report we accepted that “substantially adhere” involves some uncertainty, but concluded it is less uncertain than the current term in use elsewhere in the law (use of a form to the “like effect”).<sup>176</sup> We reiterate that under our recommendation voters would not be penalised for a minor departure from the prescribed form, provided their personal identifiers can be scanned and their postal votes verified. We maintain our recommendation here.
- 6.27 Our specimen drafting work,<sup>177</sup> involved further consideration with Parliamentary Counsel of how best to express a requirement of “substantial adherence” to the form. We concluded that this is best captured by stipulating that the prescribed form should be used, subject to any modifications which are necessary or appropriate in the circumstances.

#### **Recommendation 28.**

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

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<sup>173</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 6.29 and 6.30 and paras 5.25 and 5.26 above. We also recommend in chapter 8 that prescribed forms of poll card should be used. See paras 8.7 to 8.12 below.

<sup>174</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 6.76.

<sup>175</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 6.31 to 6.33 and paras 5.26 to 5.30 above.

<sup>176</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.35.

<sup>177</sup> See paras 2.57 to 2.59 above. Available at <https://www.lawcom.gov.uk/project/electoral-law/>.

## Waiver of the requirement to provide a signature for postal vote application forms

- 6.29 Registration officers in Great Britain may dispense with the requirement that applications for a postal or proxy vote include the elector's signature.<sup>178</sup> Registration officers may do so if satisfied that the applicant is, by reason of any disability or inability to read or write, unable either to provide a signature or to sign their name in a consistent and distinctive way.<sup>179</sup> The legislation gives no instruction on how registration officers should go about deciding whether there is a good reason for waiving the signature requirement.
- 6.30 Our consultation paper provisionally proposed that requests for the waiver of the requirement to provide a signature as a personal identifier should be attested.<sup>180</sup> The proposal would align the rules regarding waiver of a signature with those currently applying to applications for a proxy vote. An application for a proxy vote on the grounds of blindness or other disability must be attested by one of a number of listed healthcare professionals.<sup>181</sup> We proposed that the same attestation procedure should apply to applications to waive the signature requirement. Thirty-six consultees responded to the proposal. Twenty-nine agreed, five expressed qualified agreement and two disagreed.<sup>182</sup>
- 6.31 A number of consultees who agreed emphasised the importance of protecting the absent vote application process against fraud.<sup>183</sup> In contrast, one consultee who disagreed argued that our proposal would make it harder for legitimate requests for a waiver to be made in exchange for a "very minor deterrent" against fraud.<sup>184</sup> Other consultees considered that the list of persons who may attest an application to waive the signature requirement should be broader than the list of persons who may attest a proxy application, with some noting that voters may not always have access to a health professional to attest the application.<sup>185</sup>
- 6.32 We take seriously the importance of ensuring access to the poll and the effect our proposal would have on voters with disabilities. However, we continue to take the view expressed in our interim report that the list of healthcare professionals in schedule 1 of the 2001 Regulations, which includes a registered social worker or care worker, is

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<sup>178</sup> In Northern Ireland a person's signature must match the signature given at the point of applying to become a registered elector. 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. In our interim report we quoted the Northern Ireland Electoral Office as follows: "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". See Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.48.

<sup>179</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 6.46.

<sup>180</sup> As above, paras 6.77 to 6.78.

<sup>181</sup> As above, para 6.55.

<sup>182</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.36.

<sup>183</sup> As above, para 6.37.

<sup>184</sup> As above, para 6.38.

<sup>185</sup> As above, paras 6.41 and 6.42.

significantly broad. Expanding the list of individuals who can attest proxy vote applications is and will remain a matter of policy for governments exercising their regulation-making powers.<sup>186</sup> We maintain our recommendation.

**Recommendation 29.**

- 6.33 Requests for a waiver of the requirement to provide a signature as a personal identifier should be attested, as proxy applications currently must be.

**THE POSTAL VOTING PROCESS**

- 6.34 The postal voting process is currently governed either by the three sets of registration regulations covering England and Wales, Scotland and Northern Ireland or by schedules to discrete election-specific provisions. In substance, their content is identical. The law itself is detailed and complex. Part V of the 2001 Regulations which govern postal voting in Scotland and England and Wales contains 31 regulations, some of them very lengthy. Moreover, these regulations need to be read with the relevant elections rules, with other parts of the 2001 Regulations (including prescribed forms), and with schedule 4 of the 2000 Act.<sup>187</sup>
- 6.35 To simplify the framework governing the postal voting process we provisionally proposed that there should be a single set of rules in Great Britain and Northern Ireland.<sup>188</sup> Our proposal gained the unanimous support of 35 consultees, with one noting the need for consistency with devolved legislative competence.<sup>189</sup> That led us to confirm our proposal as a recommendation, to which we still adhere.
- 6.36 In our consultation paper we further noted that the current rules contained detailed provisions seeking to govern postal voting in minute detail, almost guiding every action of administrators dealing with postal votes. We provisionally proposed that the postal voting process should be governed by legislation setting down the outcomes which are required, for example the verification of postal voting, and that returning officers should be left to decide how best to manage the postal voting process according to guidance and best practice.<sup>190</sup>
- 6.37 All but one of the 35 consultees who addressed our proposal agreed with it; the objection raised was that a prescribed process avoided the need for returning officers

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<sup>186</sup> As above, para 6.44.

<sup>187</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 6.80.

<sup>188</sup> As above, paras 6.132 and 6.133.

<sup>189</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.53.

<sup>190</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 6.133.

to exercise discretion.<sup>191</sup> In our interim report we agreed that detailed prescription, minimising the scope for discretion on the part of returning officers – and consequent controversy – were important aims of electoral law. Nonetheless we concluded that the step-by-step detail contained in the 2001 Regulations concerning the issue and receipt of postal votes is excessive and no longer necessary given the considerable experience of returning officers and staff of the postal voting process. We remain of the opinion that a step-by-step description of the process is best left to guidance, best practice or training documents for electoral administrators.<sup>192</sup> We maintain the recommendation, now confined in scope to Great Britain.

### **Recommendation 30.**

6.38 A uniform set of rules should govern the postal voting process in Great Britain.

### **Recommendation 31.**

6.39 The uniform set of rules envisaged by Recommendation 30 should set out the 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**

6.40 In our interim report we adhered to the view expressed in our consultation paper that it was not for the Law Commissions of the UK, as non-political expert law reform institutions, to make proposals on matters of a fundamentally constitutional or political nature. 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>193</sup> A few consultees disagreed with this conclusion, expressing the view that postal voting on demand has led to increased instances of fraud and undermines the integrity of the poll.<sup>194</sup> Nevertheless, we remain of the view that the Law Commissions are not best suited to decide such an important point of public policy, which would remove the preferred way to vote of a significant portion of the electorate.

6.41 We note here that the Pickles Report considered the question of postal vote fraud. Some respondents to the review had considered postal voting to be the UK's "main electoral vulnerability" and to provide the "best" opportunity for electoral fraud. Despite these comments, the report concluded that postal voting on demand encourages

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<sup>191</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.54. The interim report also referred (at paras 6.58 and 6.59) to a consultee's suggestion that the provision for retrieving postal ballot papers from ballot boxes be abolished. We still consider that to be a matter for Governments.

<sup>192</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.55.

<sup>193</sup> As above, para 6.60.

<sup>194</sup> As above, paras 6.61 to 6.62.

many legitimate electors to use their vote effectively and engage with the democratic process, and that abolishing it would be disproportionate.<sup>195</sup>

### Regulating campaigners' handling of postal votes

- 6.42 The provisions on applications for an absent vote offer a great deal of scope for third party involvement in the process, including the collection of completed application forms for delivery to the registration officer. This can be a cause for concern where the third party has a strong interest in the outcome of the election – for example, a political party, or a group of politically affiliated campaigners. The 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.<sup>196</sup>
- 6.43 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. We also noted the risk that if candidates perceived rivals to be getting away with postal voting fraud, this might lead to a candidate approaching the next election with less integrity, and ultimately a general lowering of standards.<sup>197</sup> Current legislation does not deal with campaigners' handling of postal voting paperwork. Instead, standards are set out in the Electoral Commission's voluntary code of conduct. The code is agreed with the political parties represented in the UK, Scottish and Welsh Parliaments. However, the code is voluntary and has no legal force.
- 6.44 Under the current scheme of electoral offences 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.<sup>198</sup> However, we asked consultees whether electoral law should be wider and prohibit, by making it an offence, the involvement of 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;

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<sup>195</sup> Sir Eric Pickles, *Securing the ballot: report of Sir Eric Pickles' review into electoral fraud* (August 2016) p 22.

<sup>196</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 6.118.

<sup>197</sup> As above, paras 6.122 and 6.123.

<sup>198</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.67.

- (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.
- 6.45 Of the 38 consultees who provided a response, 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, considering there should be no special regulation of campaigners.<sup>199</sup>
- 6.46 In our interim report we noted the strong support for regulation, targeted at campaigners, to prohibit the handling of completed absent voting applications and postal votes. However, as even some who supported such regulation in principle acknowledged, and those who rejected it emphasised, further regulation presents some real challenges. 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 dishonest ones; and
  - (3) regulation would be an overreaction in the light of the available data on fraud.<sup>200</sup>
- 6.47 The importance of ensuring access to the poll was generally acknowledged by consultees.<sup>201</sup> These concerns, and on occasions objections, led us to conclude we could not recommend legal regulation of any of the activities mentioned in our consultation paper and repeated above. We thought that the risk of vulnerable voters being exploited by corrupt campaigners was best addressed by better and clearer drafting of existing electoral offences, notably undue influence. We address this in chapter 11 of this report.
- 6.48 We noted however that the policy question of whether any adjustment should be made to the balance between access to polls and security from fraud remained a matter for Government and the legislature.<sup>202</sup> Since the publication of our interim report Government policy on this question has developed. The Pickles Report recommended that political campaigners and activists (other than family members and designated carers) should be prohibited from handling completed postal votes and postal vote envelopes, and that Electoral Commission guidance on this matter should

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<sup>199</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com paras 6.70 to 6.87.

<sup>200</sup> As above, para 6.89. The Electoral Commission publish data annually about the number, type and outcome of cases of electoral fraud reported to police forces. In its most recent report on the 2018 elections the Electoral Commission stated, “there is no evidence of large-scale electoral fraud relating to the 2018 local elections”. That report is available online at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/electoral-fraud-data> (last visited 3 March 2020).

<sup>201</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 6.80.

<sup>202</sup> As above, para 6.91.

be given the force of legislation.<sup>203</sup> The UK Government announced its intention to prohibit campaign handling of postal votes in the December 2019 Queen's Speech.<sup>204</sup>

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<sup>203</sup> Sir Eric Pickles, *Securing the ballot: report of Sir Eric Pickles' review into electoral fraud* (August 2016) p 26.

<sup>204</sup> Prime Minister's Office, *The Queen's speech December 2019 - background briefing notes* (December 2019) p 126.

# 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 here; more detail can be found in our consultation paper.<sup>205</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, the personal delivery of nomination papers (and attendance at the place for receipt of nominations) by or on behalf of the candidate, as well as personal attendance by the returning officer at the proceedings. The rules governing local government nominations are more relaxed. Each set of election-specific rules copies one approach or the other. For party list elections the rules have to be adapted to reflect the fact that it is *parties* who primarily stand for election.
- 7.3 A candidate is nominated through a nomination form, which is, in some elections, accompanied by payment of a deposit. In many elections nominations must be supported by a certain number of “subscribers”, meaning subscribers’ signatures and electoral numbers must also be included within the nomination form. The nomination paper need not emanate from the candidate, who must separately consent to the nomination, declaring that he or she is not disqualified. In some elections, the candidate must also provide a separate home address form, which enables a candidate to prevent his or her home address from being made public. If standing on behalf of a registered political party, a candidate must provide a certificate of authorisation from a party nominating officer and seek authority to use a party emblem.
- 7.4 In law, subscribers subscribe a nomination *paper*, and may not subscribe more than one paper. A single subscriber who does not meet the requirements for being a subscriber taints the paper as a whole, and a new one must be prepared, with completely new subscribers. Given that as many as 330 subscribers are required for nomination at London Mayoral elections, this can be an onerous requirement.<sup>206</sup> In practice, returning officers frequently inspect nomination papers informally in order to avoid the drastic consequences of a defective paper.<sup>207</sup> Some candidates deliver

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<sup>205</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.

<sup>206</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 3 r 7(1).

<sup>207</sup> In *R (Wilson) v Dover District Council* [2016] EWHC 2556 (Admin) (decided after the publication of our interim report), a prospective candidate applied for judicial review of the failure of a returning officer to conduct this type of informal check, arguing that he had a legitimate expectation that the returning officer would give him an opportunity to remedy any deficiencies in the nomination paper before formally refusing it.

more than one set of nomination papers as a precaution, and sometimes to demonstrate the extent of their local support.

## THE NOMINATION PAPER

### A single set of papers

- 7.5 Our consultation paper proposed that there should be 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. This should replace the current mixture of forms and authorisations which are required to nominate a candidate for election.<sup>208</sup> Of the 42 consultees who submitted a response to the proposal, 36 agreed with the substance of our proposal, which was aimed at rationalising the multitude of forms and the nuances in election-specific rules across different elections.<sup>209</sup>
- 7.6 Some, including the Electoral Commission, thought that reform should help to guide returning officers when informally checking draft nomination papers.<sup>210</sup> Not only do we agree, we consider that a reformed law on nominations will remove the need for good administrative practice to include this kind of informal check. It is only necessary because, strictly speaking, once a nomination paper is lodged a returning officer may only accept or reject it, not point out flaws which can be remedied. Such flaws make the entire nomination paper, including the valid subscribers to it, unusable.
- 7.7 Our proposal involved a change in the law for elections in Northern Ireland, and for the election of constituency candidates to the Welsh Parliament where – unlike at other elections – not only must the party authorise the use of a party emblem, but it selects the emblem as well. In our view, that should only be the case where the party itself stands. The Chief Electoral Officer for Northern Ireland did not agree that in Northern Ireland the party emblem should be selected by the candidate, as opposed to the party.<sup>211</sup> He said that “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”.
- 7.8 If the consistent policy in the UK were that parties select their candidate’s use of party authorisation and emblem, we 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 legal requirement is that the ballot paper should contain a registered party emblem. Whoever selects it, the returning officer will need to ensure it is registered. While a returning officer may well rely on a party to use the correct

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Mr Justice Cranston refused the application, finding no basis in law or in fact for such a legitimate expectation.

<sup>208</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 7.50.

<sup>209</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 7.15.

<sup>210</sup> As above, para 7.16.

<sup>211</sup> As above, para 7.21.

emblem and description, we cannot see why the officer may not give equal weight to that party's authorisation of a candidate to use the same. We remain of the view that, for consistency, all papers in relation to the nomination should be provided by the candidate to the returning officer. We maintain the recommendation in our interim report, though note that for the reasons discussed in chapter 1, its scope is now confined to Great Britain.

- 7.9 At the time of our interim report, the use of a separate home address form (which allows candidates to indicate that their address should not be made available to the public) was confined to UK Parliamentary and Police and Crime Commissioner elections. Since our interim report, secondary legislation has provided that a separate home address form may be used at local government elections in England, Northern Ireland Assembly elections, mayoral and combined authority mayoral elections and elections to the Greater London Authority ("GLA").<sup>212</sup> The changes have been introduced following a report into intimidation in public life by the Committee on Standards in Public Life.<sup>213</sup> Our recommendation is compatible with this development in policy; candidates for the elections outlined above will still be able to indicate a preference not to disclose a home address.

#### **Recommendation 32.**

- 7.10 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.

#### **Delivery of nomination papers**

- 7.11 The nomination paper, consent to nomination and certificate of authorisation must be "delivered", and any deposit paid, at the time and place fixed by the returning officer in the notice of election. The parliamentary model of nominations clearly envisages that candidates will physically deliver nomination papers to the returning officer, who must be present. Delivery must be by hand, either personally by the candidate or by their proposer, seconder, or election agent (if appointed).
- 7.12 The position in relation to local government elections is not as clear. The returning officer is not required to be present, and delivery need not be made by specified persons. It used to be accepted in practice that delivery could be made by post at

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<sup>212</sup> See for example the Greater London Authority Elections (Amendment) Rules 2019 SI 2019 No 1426. We understand that the Scottish Government is also reviewing the rules on requiring candidates' addresses to be on the ballot papers for local government elections in Scotland.

<sup>213</sup> Intimidation in Public Life, Report of the Committee on Standards in Public Life (December 2017) Cm 9543, p 17.

local government elections, but an Electoral Commission circular in 2013 took the view that delivery for those elections also required personal delivery.<sup>214</sup>

- 7.13 Our consultation paper considered whether delivery of nomination papers should be required to be by hand, and concluded that it should not. We proposed that the nomination paper should be capable of being delivered by hand, by post, or by electronic mail.<sup>215</sup> A total of 38 consultees responded to this proposal, of whom 32 agreed with it.<sup>216</sup> The national branch of the Association of Electoral Administrators (“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.
- 7.14 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. Other consultees expressed concern about the added risk that a more liberal delivery regime would create.<sup>217</sup> They raised the possibility that the change would alter the balance of responsibility between the candidate and the returning officer, opening the process to the risk of IT failure and exposing the returning officer to allegations of bias or malpractice in the event of system failure.
- 7.15 Our interim report acknowledged that legislation must make clear that use of alternative delivery methods would only be effective if the nomination paper is received by the returning officer in time.<sup>218</sup> Guidance to candidates and to electoral administrators can ensure that candidates take appropriate steps to ensure their chosen method of delivery will work. A risk-averse candidate may want to continue to deliver the nomination papers in person. Other candidates, however, particularly those who cannot attend in person, should not be hampered in putting their candidacy forward.
- 7.16 We concluded that primary legislation should require delivery of nomination papers, and that delivery should be defined in secondary legislation to include delivery by post in accordance with the returning officer’s instructions, and by electronic means as permitted by that legislation. The secondary legislation can address the safeguards against loss, and the capacity of electoral administrators to accept nominations by email or some other system.

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<sup>214</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 7.25 and 7.27; Electoral Commission Bulletin Issue 61 (England and Wales), 27 November 2013.

<sup>215</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 7.53 to 7.58.

<sup>216</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 7.23.

<sup>217</sup> As above, para 7.25.

<sup>218</sup> As above, para 7.26.

- 7.17 As society does more of its business online, we remain persuaded that the law must enable the electoral process to keep up to date with societal trends without the need for fresh primary legislation. We repeat the recommendation made in our interim report below.

### **Recommendation 33.**

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

### **Adaptations for party lists**

- 7.19 Our research paper on nominations considers election-specific differences in detail.<sup>219</sup> In relation to nominations, the chief driver of differences in the rules is whether the party list system is used or not. However, even within those rules that relate to party list elections (EU Parliamentary elections, London members of the London Assembly,<sup>220</sup> regional members of the Scottish Parliament and members of the Welsh Parliament), there are differences.
- 7.20 Our view is that the nomination rules for party list elections ought to be consistent. In particular the rules should reflect that it is the party which stands for election, through list candidates. This would mean that when adapting the classical grounds for rejecting nominations to party list elections, defects in the party's nomination ought to mean it and its list candidates are rejected. Defects in the details of particular list candidates should result in entries for those candidates being deleted from the list.
- 7.21 Our consultation paper also proposed that nominations should be by the party's nominating officer and should contain the requisite consents by list candidates.<sup>221</sup> Of the 35 consultees who provided a response to this proposal, 34 agreed with it.<sup>222</sup>

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<sup>219</sup> Research Paper on Notice of Election and Nomination, [https://s3-eu-west-2.amazonaws.com/lawcom-production-11jsxou24uy7q/uploads/2015/03/Electoral-Law\\_Notice-of-Election-to-Nominations\\_Research.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-production-11jsxou24uy7q/uploads/2015/03/Electoral-Law_Notice-of-Election-to-Nominations_Research.pdf)

<sup>220</sup> There are two types of members of the London Assembly; "constituency members", elected by constituencies within London using the first past the post system, and "London members", elected on a London-wide basis by a party list system. The Greater London Authority is made up of members of the London Assembly and the Mayor of London.

<sup>221</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, p 151.

<sup>222</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 7.28.

7.22 Our interim report modified our recommendation slightly to make clear that the nomination paper need not necessarily contain the consents by list candidates on a single copy of the form, but could instead be accompanied by those consents. This was to avoid the same copy having to be signed by all candidates, which could prove difficult if there are a number of candidates spread over a wide geographical area. We repeat our recommendation below.

#### **Recommendation 34.**

7.23 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.

#### **Subscribing to a nomination, not a paper**

7.24 As outlined above, nominations for many elections require the support of a certain number of subscribers. Currently subscribers assent to a nomination *paper*, not a nomination. If a single subscriber does not meet the requirements, the whole paper is unusable, and a fresh one is required with different subscribers. That could be particularly problematic for elections where a large number of subscribers are required; as mentioned above, at GLA elections a mayoral candidate's nomination paper must be supported by 330 subscribers.<sup>223</sup> Our consultation paper proposed that subscribers should be taken legally to assent to a nomination, not a paper. This would mean they could subscribe a subsequent paper nominating the same candidate if the first was defective.<sup>224</sup>

7.25 Of the 37 consultees who responded to this proposal, 35 agreed with our analysis and proposal.<sup>225</sup> They included a large number of electoral administrators. The national branch of the AEA added it would welcome guidance for candidates on this matter, to "ensure that [candidates] do not entirely duplicate the initial nomination paper for their second nomination paper as the same error may be repeated."

7.26 The London branch of the AEA suggested that an option be provided for a candidate to submit more assentors than required (up to a stipulated maximum) so that if an assentor fails, they could be substituted by another without the need for a new paper. We thought this a sensible suggestion which could be implemented through the design of prescribed nomination forms.

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<sup>223</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 3 r 7(1).

<sup>224</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 7.49 and p 151.

<sup>225</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 7.31.

7.27 Our main concern, however, is to achieve a situation in which if one in ten subscribers is not qualified the other nine are not prevented from subscribing a fresh nomination paper.<sup>226</sup> We repeat our recommendation below.

### **Recommendation 35.**

7.28 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**

7.29 The function of nominations is administrative: progressing from a putative candidacy to one that appears on the ballot paper. Candidates must be satisfied that they are qualified and not disqualified for election; part of the process seeks to ensure that they are warned of the disqualifications and the seriousness of standing for election. In general the powers of the returning officer in relation to nomination papers are limited to examining the formal validity of the nomination *paper* (for example, looking for defective particulars). It is for the court to review the substantive validity of the nomination itself.<sup>227</sup>

7.30 The reasons for this were explored in *R (De Beer and others) v Returning Officer for the London Borough of Harrow*.<sup>228</sup> In that case the High Court considered a challenge to the rejection by the returning officer of the nomination papers of 60 Liberal Democrat candidates for election to Harrow Borough Council, on the ground that the party description in the papers was not the one authorised by the party nominating officer's certificate. Scott Baker J dismissed a claim for judicial review of the returning officer's decision:

It is, in my judgment, important to keep in mind the role of the returning officer in the election process. He is in a sense the referee. He is there to see fair play and to ensure that the rules are complied with. As a matter of policy, it seems to me, the fewer occasions on which he is called upon to exercise questions of judgment and thereby lay himself open to criticism by one or more of the candidates the better. This is particularly pertinent if the exercise of judgment were to go outside issues that can readily be resolved by looking at a document or documents, and which involves weighing up facts or surrounding circumstances.

7.31 There are, however, two exceptions to the general rule that the powers of the returning officer are limited to examining the formal validity of the nomination paper. The first is that serving prisoners are disqualified from nomination under the Representation of the People Act 1981 ("the 1981 Act"). Unlike all other

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<sup>226</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 7.34 and 7.35.

<sup>227</sup> In relation to UK Parliamentary elections, see Representation of the People Act 1983, sch 1 rr 12(5) and 12(6).

<sup>228</sup> [2002] EWHC 670 (Admin); [2002] ACD 83.

disqualifications, there is a requirement to reject the nomination on that ground, following a prescribed process. The second exemption is based largely on case law, and relates to sham nominations. These exceptions are discussed further below.

### **The exception for disqualifications of serving prisoners**

- 7.32 Our consultation paper proposed that returning officers should no longer inquire into and reject the nomination of a candidate who is a serving prisoner.<sup>229</sup> We did not propose to change the substantive disqualification under the Representation of the People Act 1981. Of the 34 consultees who responded to this proposal, 30 agreed.<sup>230</sup> The main reason for agreement was that this disqualification stood out in electoral law as the only one which returning officers were required to investigate.
- 7.33 The Electoral Commission agreed with our proposal, but supported a wholesale change in the returning officer's role as to disqualification.<sup>231</sup> It argued that consideration be given to allowing objections to nominations on the grounds that a candidate is disqualified and requiring a returning officer, if satisfied that this is the case, to hold a nomination to be invalid. The Electoral Commission considered this would help ensure the integrity of the process, as it would avoid the situation where an obviously disqualified candidate is able to stand for election.
- 7.34 The point about preserving the integrity of the election is an important one. Since the publication of our interim report we have seen a growing concern about the intimidation of candidates, many of whom have suffered from increasing levels of online and offline abuse. Seeking nomination as a candidate at an election is a possible tool for the perpetrators of abuse to continue to target another candidate, increasing the public profile of the abuser. Such a perpetrator may be a person who is in fact disqualified from election. This will become increasingly common if the Government's new offence of intimidation of candidates and campaigners results in a greater number of individuals being disqualified from standing for office.<sup>232</sup>
- 7.35 The position currently is that even if a returning officer is aware that a perpetrator of abuse is subject to a disqualification, the returning officer is not able to reject their nomination. The potential invalidity of the election if the disqualified candidate wins is little deterrent to a candidate who has no expectation of winning and merely wishes to participate in the campaign to increase their public profile. Voters might find it strange that despite a candidate being ineligible for taking office, the law still permits him or her to participate in the electoral process as a candidate.
- 7.36 Nonetheless, we continue to be of the view that the important principle here is that of consistency. The 1981 Act disqualification of serving prisoners is an anomaly; a candidate may be a teenager who will not be 18 years of age on the day of the election, be a peer entitled to sit in the House of Lords, or hold a disqualifying office.

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<sup>229</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 7.61 to 7.64.

<sup>230</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 7.36.

<sup>231</sup> As above, para 7.40.

<sup>232</sup> For further discussion of the Government's proposals, see chapter 11.

None of these grounds for disqualification, even if obvious, allow the returning officer to reject a nomination paper.

- 7.37 With the exception of disqualifications for serving prisoners, the current policy is to prevent a returning officer from having to explore the many and complicated substantive disqualifications from election, and preserve them from perceptions and accusations of political partiality. A change to this policy is outside the scope of this project, but could be considered by others as part of the issue of intimidation of candidates. So long as the present policy continues, we are persuaded that the better approach is to make the returning officer's role consistent. We repeat our recommendation below.

#### **Recommendation 36.**

- 7.38 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.

#### **Commonly used names**

- 7.39 Our work on our specimen drafting<sup>233</sup> drew our attention to a deficiency in the current rules regarding commonly used names. A candidate who commonly uses a surname or forename which is different from any other surname or forename they have may include that commonly used name on the nomination paper.<sup>234</sup> It will then appear on the ballot paper, together with their actual name. For example, a candidate commonly known as "Liz", rather than "Elizabeth", could choose to appear as "Liz". However, Electoral Commission guidance is that the requirement that the commonly used name be "different" to their actual name means that a candidate cannot apply this rule so as to use their commonly used given name on the ballot paper.<sup>235</sup>
- 7.40 This can be problematic where a candidate commonly uses a middle forename. The Electoral Commission and the Association of Electoral Administrators have agreed that the law needs updating to allow candidates who are commonly known by a middle name to use that middle name on the ballot paper.<sup>236</sup> The Government has

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<sup>233</sup> See paras 2.57 to 2.59 above.

<sup>234</sup> See for example Representation of the People Act 1983, sch 1 r 6(2A), the wording of which is used for other elections.

<sup>235</sup> Electoral Commission, Part C - Administering the poll, UK Parliamentary elections in Great Britain: guidance for (Acting) Returning Officers (November 2018) paras 3.46 to 3.58. The consequence of this is that, for example, a candidate named Elizabeth Catherine Jones but commonly known as Elizabeth Jones could not use "Elizabeth Jones" as her commonly used name, while she could use "Liz Jones" if that was the name by which she was commonly known. More problematically, if she was commonly known by her middle name Catherine Jones, she could not appear as "Catherine Jones" on the ballot paper.

<sup>236</sup> Association of Electoral Administrators, *Elections and Individual Electoral Registration - The challenge of 2015* (July 2015), pp.112-116, available at <https://www.aea-elections.co.uk/wp-content/uploads/2015/07/aea-report-elections-and-ier-challenge-of-2015.pdf> (last visited 3 March 2020); Electoral Commission, *May 2015 UK elections: Report on the administration of the 7 May 2015 elections, including the UK Parliamentary general election* (July 2015) para 3.119, available at

also stated that it broadly supports the recommendations made by the Electoral Commission and AEA, and is looking for an opportunity to amend the relevant legislation.<sup>237</sup>

- 7.41 Our specimen drafting contains a potential drafting solution. It provides that if a candidate commonly uses a forename “in addition to or instead of any other forename the candidate has”, this commonly used name may be stated on the nomination paper.<sup>238</sup>

### Sham nominations

- 7.42 There has emerged over time a power of the returning officer to reject “sham” nominations. For example, in the High Court decision in *Sanders v Chichester*<sup>239</sup> a Mr Huggett stood as a “literal democrat” (saying he stood for the true meaning of democracy). He polled over 10,000 votes, while the Liberal Democrat candidate lost by 700 votes. The High Court held that the returning officer’s right to refuse a nomination paper for “not being as required by law” included the right to refuse a paper that gives particulars that contravene laws other than electoral laws, including a general principle that the law treats sham documents as “nullities”.

- 7.43 The problem in that case (candidates using misleading descriptions) has largely been addressed by limiting candidates to the description “independent” or a registered description monitored by the Electoral Commission. Our consultation paper noted that that leaves outstanding two potential problem cases:

- (1) the spoiler candidate who imitates not a party name but a candidate’s or another well-known person’s name (for example, in one case, a candidate standing for election in the then Prime Minister’s constituency changed his own name, apparently legally, to “Margaret Thatcher”).<sup>240</sup>
- (2) the fictitious candidate (one example being the use by a person of the name she had given to a tailor’s mannequin in order to nominate a candidate for local government elections in Aberdeen).

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[https://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0006/190959/UKPGE-report-May-2015-1.pdf](https://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/190959/UKPGE-report-May-2015-1.pdf) (last visited 3 March 2020).

<sup>237</sup> Cabinet Office, *The UK Government’s Response to the reports of the Electoral Commission, the Association of Electoral Administrators and the Royal National Institute for the Blind on the 2015 UK Parliamentary General Election* (September 2016) para 10.1, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/549689/uk\\_governments\\_response\\_to\\_the\\_electoral\\_commission\\_and\\_association\\_of\\_electoral\\_administrators\\_reports.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/549689/uk_governments_response_to_the_electoral_commission_and_association_of_electoral_administrators_reports.pdf) (last visited 3 March 2020).

<sup>238</sup> Specimen drafting, sch 1 r 6(6). In our example at fn 235 above, this would enable “Elizabeth Catherine Jones” to appear as “Catherine Jones” on the ballot paper, if this was how she was commonly known.

<sup>239</sup> (1995) 139 SJLB 15, not fully reported but transcript available in B Posner and L Footner, Schofield’s Election Law, Appendix E: Part 3 Election Case Reports 1990 – 1999, E3-002.

<sup>240</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 7.37.

- 7.44 We provisionally proposed that returning officers should have an express power to reject nominations on the grounds that:
- (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.<sup>241</sup>
- 7.45 Of the 35 consultees who addressed this proposal, 32 agreed.<sup>242</sup> Many advised caution, arguing that returning officers would need to act with great care in deciding whether a nomination was a sham. We were not surprised that consultees were wary, given the risk of perceived partiality in the exercise of the power to reject sham nominations. The crucial point, however, is that this power already exists as a matter of law. At present, neither statute nor secondary legislation offers any guidance on how to exercise the power. Instead a returning officer must read cases, some dating back to the 19<sup>th</sup> century, when the grounds for rejecting nominations were entirely different.
- 7.46 Our interim report concluded that stating the nature and extent of the power in statute was more desirable than saying nothing. Nonetheless, we agreed that the power should be carefully and practically expressed. We thought that the drafting should no longer refer to “obscenity” or “offence”. Instead the focus of the power would be on nominations which are “a fiction or device liable to confuse or mislead electors, or to obstruct their exercise of the franchise”.
- 7.47 This would catch the two problem areas of the spoiler candidate (like the independent “Margaret Thatcher” standing in the Prime Minister’s constituency) and the fictitious candidate (like the mannequin).<sup>243</sup> Since our interim report, our view that this area of law requires clarification has been echoed by Sir (now Lord) Pickles. His report on electoral fraud has recommended that “the procedures around candidate nominations should be reviewed to consider the prevention of sham nominations and ensuring that nominations are validly made”.<sup>244</sup>

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<sup>241</sup> As above, para 7.71.

<sup>242</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 7.44.

<sup>243</sup> As above, para 7.52.

<sup>244</sup> Sir Eric Pickles, *Securing the ballot: review into electoral fraud* (August 2016), pp 41 to 42.

7.48 In our specimen drafting work we considered how to translate our recommendation into draft rules. Rule 11(3) of our specimen drafting provides that a returning officer may hold a person’s nomination paper invalid on the grounds that –

- (a) the particulars of the candidate on the nomination paper are not as required by law,
- (b) the nomination paper is not subscribed as required by rule 8,
- (c) the candidate is not a natural person, or
- (d) the candidate has changed his or her name [for the purposes of the candidature or any other candidature at a relevant election],<sup>245</sup> and –
  - (i) the name is likely to mislead or confuse electors at the election,
  - (ii) the name appears to function as a party description, or
  - (iii) the name is obscene or offensive.

7.49 The requirement for a candidate to be a “natural person” addresses the problem of the fictitious candidate, while sub-paragraph (i) would capture the “Margaret Thatcher” example. When drafting instructions to counsel we came across a third potential problem; the candidate who changes his or her name to a political slogan (for example, “Anti Austerity”, or “Stop [name of another candidate]”). This would be prevented by sub-paragraph (ii). We are departing from our interim recommendation in recommending that the legislation should permit a returning officer to reject a nomination if a candidate’s new name is offensive or obscene, in order to make the power consistent with the power of the Electoral Commission to refuse to register an emblem or party description.<sup>246</sup>

7.50 We discussed above the orthodoxy that the returning officer is not expected to investigate the substantive validity of a nomination, but instead is confined to reviewing the formal validity of the paper itself. If Government decided that the orthodoxy should no longer prevail, and that the returning officer should have a greater role in investigating the validity of nominations, it would be possible to include additional drafting under rule 11(3) above, or its equivalent. This could provide, for example, that a returning officer could hold a person’s nomination paper to be invalid if the candidate were manifestly disqualified.

7.51 We remain of the view that the law in this area is confusing for returning officers and should be set out in legislation. In our view, the reference in the recommendation in

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<sup>245</sup> The words “for the purposes of the candidature or any other candidature” are designed to prevent a returning officer rejecting a name when it has long been a person’s true name. It may be a finely balanced judgement for the returning officer, but our view is that this drafting is required to distinguish between scenarios where someone is trying to abuse the system and someone is trying to participate in the political process using their actual name. The definition of “relevant election” in our specimen drafting is slightly too narrow (as the specimen drafting applies only to England and Wales), and would have to be expanded in order for this provision to function properly.

<sup>246</sup> Those powers can be found in ss 28A(2) and 29(2) of the Political Parties, Elections and Referendums Act 2000.

our interim report to nominations designed to “confuse or mislead” electors, is broad enough to encompass the case where a candidate changes their name to a political slogan. We therefore repeat that recommendation below, with an additional reference to the candidate’s name being obscene or offensive.

**Recommendation 37.**

7.52 Returning officers should have an express power to reject nominations that use a candidate’s name which is designed to confuse or mislead electors or to obstruct the exercise of the franchise, or is obscene or offensive.

## Chapter 8: The polling process

- 8.1 The law governing the polling process is almost entirely contained in discrete sets of election rules. While these occasionally vary on points of detail, there is nevertheless a remarkably uniform way of regulating polling, with only minor differences attributable to different voting systems. What follows should be read in the light of our proposals, made in chapter 2, that election law should be set out in one place for all elections, subject to adaptations due to policy or voting system. Our specimen drafting represents a concrete example of how this could be done in relation to a number of the matters discussed in this chapter.
- 8.2 This chapter considers the rules on polling, starting with those concerned with informing the public, followed by the logistics of the poll, polling day administration, and the duties on close of polls. We then consider the laws dealing with events which frustrate the poll: riots and violence, and the death of a candidate during polling.

### VOTER INFORMATION AND OTHER PUBLIC NOTICES

#### Polling notices

- 8.3 After nominations, a range of notices are required by law to be published by the returning officer. These include the following:
- (1) a statement of the persons nominated at a parliamentary election, accompanied by a notice of poll; these notices mark the end of nomination and the beginning of the polling phase;<sup>247</sup> and
  - (2) a notice of the locations of polling stations.
- 8.4 Strictly, the law requires these to be displayed in a conspicuous place, but typically they are also published online.
- 8.5 Our consultation paper took the view that the variety of notices (between which there are subtle differences at different elections) should be replaced by a single polling notice. This would mark the end of nominations and inform the public and candidates of the need for a poll. The substance of the notice would stay the same. We proposed that this notice should be in a prescribed form, communicated to the candidates and published by the returning officer.
- 8.6 Out of 37 consultees who provided a response to the proposal, 35 agreed.<sup>248</sup> Diverse Cymru, a disability charity, argued that “polling notices should be required to be posted in an offline, public format and place where notices are primarily posted online”, to avoid the risk of excluding voters. The Electoral Commission welcomed the

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<sup>247</sup> Local government election rules, among others, have historically required a later separate notice of poll, in order to allow candidates to stand in more than one ward and then withdraw from all but one after the close of nominations. It is no longer possible to withdraw after close of nominations, and so there is now no need for a separate notice.

<sup>248</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com. paras 8.4 and 8.5.

simplification, but disagreed with our proposal that the polling notice should be in a prescribed form. On further reflection, we concluded that prescribing the form that the notice should take was not necessary, so long as the notice contained all the information required by law (the details of those nominated, the date of the poll and details of the polling stations to be used). We remain of the view that we took in the interim report and repeat the recommendation below.

## Poll cards

- 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 methods of voting – in person, postal or proxy. In effect, they are used to remind the elector of their voting status. At some elections, the prescribed form has to be used, which includes the elector’s name, address and electoral number, the date and hours of the poll and the location of the polling station. At others a form “of like effect” can be used instead. Oddly, a poll card is only sent at parish and community council elections if the council requests it.<sup>249</sup>
- 8.8 Our consultation paper sought to standardise the position across elections, by proposing that all poll cards should be in a prescribed form subject to a requirement of “substantial adherence” to the form, and should be required for all elections, including parish and community council elections.
- 8.9 Of the 37 consultees who addressed the proposal, 36 agreed with it in full.<sup>250</sup> The Electoral Commission’s general stance was that forms like the poll card should not be prescribed in legislation, but instead should be designed by a body such as itself. It emphasised the importance of flexibility, and queried whether the phrase “substantial adherence” was more or less flexible than the phrase currently used in legislation (“to like effect”).
- 8.10 Our interim report explained our preference for the term “substantial adherence”, which in our view is stricter and clearer than “like effect”. Poll cards convey crucial information to voters in a clear and familiar way. We explained that arguably the phrase “to like effect” permits a returning officer to send the same information in a completely different format, for example, a letter. We did not think this was appropriate. Returning officers should, however, be able to adapt the standard form to insert additional relevant information.<sup>251</sup>
- 8.11 During our work on the specimen drafting, we considered with Parliamentary Counsel how to reflect our preference for “substantial adherence” in the draft.<sup>252</sup> We concluded that this is best captured by saying that the prescribed form should be used, subject to any modifications which are necessary or appropriate in the circumstances.

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<sup>249</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 8.3.

<sup>250</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.8 to 8.11.

<sup>251</sup> As above, para 8.10.

<sup>252</sup> Available at <https://www.lawcom.gov.uk/project/electoral-law/>.

8.12 Our interim report also expressed our view that polling cards should be used for parish and community council elections. Although these are often uncontested, we do not think it is right that the parish or community council (made up of incumbents) should be able to choose whether a poll card should be sent. If Parliament considers a discretion should remain, our view is that the returning officer is the appropriate person to have it. We repeat the recommendation from our interim report below.

**Recommendation 38.**

8.13 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 39.**

8.14 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

8.15 Our consultation paper noted that each and every set of election rules makes provision for the poll; they essentially duplicate each other.<sup>253</sup> The various rules relating to the logistics and regulation of polling could also be more clearly stated. This section addresses four particular areas of the rules in turn:

- (1) the political neutrality of administrators;
- (2) the selection and control of polling stations;
- (3) the requirements to furnish particular pieces of equipment for the poll; and
- (4) the presiding officer's ability to authorise the use of force within the polling station.

### Political neutrality of electoral administrators

8.16 Every set of election rules obliges the returning officer to "appoint and pay a presiding officer" for each polling station, together with "such clerks as may be necessary for the purposes of the election". The returning officer may not, however, appoint any person who has been employed by or on behalf of a candidate in or about the election. Our

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<sup>253</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 8.1.

consultation paper explained that it is unclear whether this restriction applies to staff working at the count, or to postal voting staff.<sup>254</sup>

- 8.17 We took the view that all election staff should be transparently neutral and not active in a candidate's campaign, and that this should be made clear in the legislation. Our consultation paper therefore proposed 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. Thirty-five consultees responded to the proposal, of whom 34 agreed with it.<sup>255</sup>
- 8.18 Our interim report took the view that the current law attempts to prevent the 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 should not be able to appoint campaigners to help run elections. We repeat the recommendation below.

#### **Recommendation 40.**

- 8.19 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.

### **Selection and control of polling stations**

- 8.20 The election rules allow a returning officer to use any room in a school for the purposes of a poll, free of charge. "School" is defined by reference to the public educational systems in each of England and Wales, Scotland and Northern Ireland. Our consultation paper took the view that the parameters of the power were ill-defined and likely to cause disagreements. For example, it is not clear whether the returning officer can demand the use of a particular room if the school would prefer to offer another one. The returning officer must make good any damage done, and pay any expenses incurred by the school "by reason of [the room] being used for the purpose of taking the poll", but it is not clear how far that provision extends.<sup>256</sup>
- 8.21 Our consultation paper proposed that returning officers should have a power to select and be in control of school premises required for polling, subject to a duty to compensate the direct costs of providing the premises. All 33 consultees who responded to this proposal agreed with it. Many consultees related difficulties they had had in obtaining premises, noting that schools were reluctant for their premises to be used, and that greater clarity in the law would be helpful.<sup>257</sup>

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<sup>254</sup> Electoral Law (2014) Law Commission Consultation Paper No 218, paras 8.14 to 8.16.

<sup>255</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.14 to 8.17.

<sup>256</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.17 and 8.18.

<sup>257</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.19 to 8.22.

8.22 After careful reflection, our interim report maintained our proposal, subject to the following.<sup>258</sup> We thought statute should define the premises subject to this power, which are currently premises maintained by local authorities. However, the Secretary of State, Scottish Ministers and Welsh Ministers should have a power to add other specific categories of premises maintained at public expense. This will enable them to update the types of premises which can be used for polling to reflect the changing status of schools and educational establishments. The key point is that such public buildings are known to the local community and make ideal sites for polling stations.

#### **Recommendation 41.**

8.23 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.

#### **Equipment for the poll**

8.24 The returning officer is under express and implied duties to equip polling stations with particular materials; for example, the number of ballot boxes and ballot papers the returning officer thinks necessary.<sup>259</sup> Compliance with other election rules clearly requires equipment which is not specified. In fact, the Electoral Commission guidance's checklist of polling station materials runs to 27 items.<sup>260</sup> Our consultation paper questioned the usefulness of legislation prescribing exhaustively with what equipment the returning officer needs to furnish a polling station.

8.25 Our consultation paper therefore proposed that the law should specifically require returning officers to furnish essential equipment for a poll, including ballot papers, ballot boxes, registers and key lists, such as the lists of voters and ballot paper numbers.<sup>261</sup> 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.<sup>262</sup>

8.26 This proposal attracted strong support; 34 out of 35 consultees agreed with it.<sup>263</sup> Generally consultees backed the approach, with the Electoral Commission adding that "minimum requirements and additional items could be contained in guidance for each election". No one suggested that the law should continue to prescribe specified

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<sup>258</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, above, para 8.23.

<sup>259</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.19 to 8.22.

<sup>260</sup> Electoral Commission, *Guidance for UK Parliamentary Elections: Part C*, paras 6.8 and 6.9.

<sup>261</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 8.25.

<sup>262</sup> As above, para 8.26.

<sup>263</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.24 and 8.25.

equipment, or all the equipment necessary to conduct a poll. Our interim report therefore recommended as we had proposed in the consultation paper.

- 8.27 Since the publication of our interim report, we have explored with counsel how the general duty could be expressed in law. Rule 29 of our specimen drafting states that as well as providing for certain specific items, the officer should provide “such other equipment or facilities that the relevant officer thinks are necessary for the proper and effective conduct of the poll”. We believe that this approach represents an improvement on the existing law, and repeat our recommendation below.

#### **Recommendation 42.**

- 8.28 The law should specifically require that returning officers provide 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 provide polling stations with the equipment required for the legal and effective conduct of the poll.

#### **The use of force**

- 8.29 The presiding officer has a duty to keep order at the polling station.<sup>264</sup> The presiding officer may order the removal of a person, by a constable or a person authorised in writing by the returning officer, for misconduct or refusal to “obey a lawful order”. It is not clear what orders can lawfully be given. The power to remove is subject to an express limitation that no voter otherwise entitled to vote there shall be prevented from doing so. The wording of the UK Parliamentary election rule, reproduced in other election rules, dates back to 1872 and seems inappropriate today. Our consultation paper expressed our doubt that returning officers nowadays use written authorisations to remove people from polling stations.
- 8.30 We proposed instead that 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. We did not think that presiding officers should have a power of arrest; the appropriate response in most cases would be to call the police.
- 8.31 The majority of consultees who responded to this proposal agreed with it (33 out of 35).<sup>265</sup> Careful consideration of responses however revealed varying degrees of agreement. Many consultees were uncomfortable with the idea that presiding officers should be able to use force, and thought that was best left to the police. We were persuaded by the responses to our proposal. Our interim report recommended that presiding officers should only have a power to direct a police officer to remove a

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<sup>264</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.

<sup>265</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.26 to 8.30.

person from a polling station, so long as that person has had an opportunity to vote, if entitled to do so.<sup>266</sup>

8.32 Rule 34 of our specimen drafting illustrates how a provision implementing this recommendation could be drafted. We repeat our recommendation below.

#### **Recommendation 43.**

8.33 The procedure for returning officers to issue authorisations to use force should be abolished, leaving only a power of the presiding officer 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 that they have been given an opportunity to vote, if entitled to do so).

## **THE POLLING PROCEDURE**

### **Polling rules**

8.34 There are minor differences of detail across elections, but in general the rules are shared across all elections. Our consultation paper concluded that the rules generally provided for three types of voting procedure:

- (1) the “ordinary” voting procedure – voting unaccompanied and unobserved, to preserve secrecy;
- (2) the assisted voting procedure, which compromises some secrecy in order to assist voters with disabilities; and
- (3) the tendered voting procedure, for those apparently not entitled to vote (for example, if the voter is recorded as already having voted, or as having a postal vote). Such voters can cast a tendered vote, which can only be counted by an election court.<sup>267</sup>

8.35 Our consultation paper concluded that 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. These would include 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.

8.36 There was unanimous support for this proposal among the 36 consultees who addressed it.<sup>268</sup> We repeat our recommendation below.

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<sup>266</sup> We have amended our recommendation to clarify that only persons entitled to vote need be given that opportunity.

<sup>267</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.34 to 8.49.

<sup>268</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 8.33.

## Folding and showing the back of the ballot paper

- 8.37 One of the questions on which electoral rules differ is whether voters should be told to fold ballot papers after use. This instruction does not appear for Greater London Authority elections, because the papers are counted mechanically, and folding them risks slowing down the machines. Given our aim to standardise the polling rules, our consultation paper considered the justification for asking voters to fold ballot papers in other elections. The explanation dates back to the Ballot Act 1872, which attempted to prevent an inefficient fraud called the “Tasmanian dodge”.<sup>269</sup> The Tasmanian dodge could be prevented by requiring a voter to show the unique identifying mark on the ballot paper; but that led to a risk that the voter’s choice of candidate could be inadvertently revealed. Folding the ballot paper preserved voter secrecy. We concluded that the Tasmanian dodge should not be a concern of the modern law, and proposed that the general rules we refer to above at paragraph 8.35 should no longer include a requirement for voters to show the unique identifying mark on their ballot paper to polling station staff prior to putting the paper in the ballot box.
- 8.38 Consultees were generally supportive of this proposal, with 30 out of 35 agreeing with it.<sup>270</sup> Some remained concerned about the possibilities of the Tasmanian dodge. Others noted that the unique identifying mark plays a valuable role in building public confidence in the electoral process, as it addresses fears of “ballot paper stuffing” (one person completing multiple ballot papers).
- 8.39 We therefore decided to amend our proposal to include a power for the presiding officer to require voters to show the unique identifying mark on their ballot paper to polling station staff. We repeat that recommendation below.

## Entitlement to vote and prescribed questions

- 8.40 Before handing a ballot paper to a voter, the presiding officer is entitled to ask a number of questions as set out in the election rules.<sup>271</sup> If a person fails to answer a question satisfactorily, that person may not be issued with a ballot paper. The full list of questions can run to six, and is repeated, with adaptations, in each set of election rules. No other questions may be asked, with the result that the presiding officer is unable to ask some sensible questions. For example, where a voter is not on the register, a presiding officer might wish to ask where that voter used to live, to see whether they are still registered at the old address and should be directed to vote at another polling station. Even if a presiding officer suspects that the answers given to the questions are false, the presiding officer cannot prevent a person from voting.

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<sup>269</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.41 and 8.42. In brief, this involved a voter being persuaded to give the appearance of voting by placing a piece of paper superficially resembling a ballot paper into the ballot box, and to bring the blank ballot paper out of the polling station. That ballot paper would then be marked by or under the supervision of the perpetrator of the scheme, and given to another complicit voter, who would return with a further blank ballot paper, enabling the process to be repeated.

<sup>270</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.35 to 8.39.

<sup>271</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.

- 8.41 We took the view in our consultation paper that the asking of questions still played a valuable role.<sup>272</sup> Questioning by a presiding officer could still assist, for example, to deter impersonators, or remind proxies of the limits on how many electors they may vote for.<sup>273</sup> We thought however that there was no longer a need for the law to set out detailed prescribed questions.
- 8.42 Instead, our proposal was that secondary legislation should set out the point that the questioning was intended to elicit, leaving suggested wording to guidance.
- 8.43 Thirty-eight consultees addressed this proposal, 30 of whom agreed with it.<sup>274</sup> The key question was whether prescribing every question word for word in legislation was necessary to guard against bad practice. Five consultees thought it was necessary, largely to ensure consistency across electoral areas. Some expressed concerns that vulnerable voters were currently being wrongly turned away at the poll.
- 8.44 After careful reflection, our interim report concluded that some form of secondary legislation might be thought adequate to guide polling staff. We repeat the recommendation below.

#### **Recommendation 44.**

- 8.45 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 45.**

- 8.46 Polling rules should set out general requirements for a legal poll which the returning officers and their staff must adhere to, and set out their powers. These should include a power to require voters to show the unique identifying mark on their ballot paper to polling station staff.

#### **Recommendation 46.**

- 8.47 Primary legislation should outline polling clerks' rights to ask voters questions as to their entitlement to vote. Secondary legislation should prescribe how the right should be exercised, including the point that the questioning is designed to elicit.

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<sup>272</sup> Electoral Law (2014) Law Commission Consultation Paper No 218, paras 8.70 and 8.71.

<sup>273</sup> We touch on the differences between proxies and companions at para 8.52 below.

<sup>274</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.41 to 8.49.

## EQUAL ACCESS FOR VOTERS WITH DISABILITIES

- 8.48 Equal access for voters with disabilities to polling is an important policy in electoral law. The law on absent voting seeks to provide choices for voters with disabilities who might have difficulty voting in person. Where voters with disabilities choose to vote in person, the law tries to enable them to use the standard voting procedure, which maximises voter secrecy. This is currently done through ensuring that large size sample ballot papers are displayed in polling stations, and by requiring the provision of a tactile voting device, which can assist blind and visually impaired electors to vote without assistance. If these are not sufficient, a voter may use the assisted voting procedure, and vote with the aid of a companion or the presiding officer.
- 8.49 Since our interim report, two reports have considered how best to improve access to the poll for voters with disabilities. In May 2019 the Electoral Commission published a report on the experience of voters with disabilities during the 2017 parliamentary election.<sup>275</sup> The Cabinet Office also launched a call for evidence after that election, and published the results and Government response in August 2018.<sup>276</sup> That response lists several “actions”, directed at the Electoral Commission, returning officers and the Accessibility of Elections Working Group.<sup>277</sup> It also recommends that Government should reconsider the law regarding companions to further ensure carers and family members are able to support people with disabilities.<sup>278</sup>

### Voting with the assistance of a companion

- 8.50 Voters may vote with the assistance of the presiding officer or a companion if they are unable to vote unaided because of blindness or other disability, or declare orally that they are unable to read.
- 8.51 Voters who wish to vote with the assistance of a companion must make an oral or written declaration as to their disability and inability to vote without assistance. Companions must make a written declaration that they are a qualified person, and that they have not previously assisted more than one voter with disabilities to vote at the election. To qualify as a companion a person must be entitled to vote as an elector at the election, or be a family member (the parent, sibling, spouse, civil partner or child of the voter). A companion must also be at least 18 years old.<sup>279</sup>
- 8.52 Our consultation paper noted that the restriction on the number of voters a companion could support was anomalous, given that there was no corresponding restriction for

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<sup>275</sup> Electoral Commission, *Elections for Everyone* (November 2017).

<sup>276</sup> Cabinet Office, *Call for Evidence: Access to Elections, Government Response* (August 2018).

<sup>277</sup> The Government response explains the Accessibility of Elections Working Group includes representatives from leading charities (Mencap, Rethink Mental Illness, RNIB, Scope and United Response), the NHS, the Royal College of Psychiatrists, the Society of Local Authority Chief Executives and key electoral stakeholders (the Electoral Commission, the Association of Electoral Administrators and the Scottish Assessors Association).

<sup>278</sup> Cabinet Office, *Call for Evidence: Access to Elections, Government Response* (August 2018), p 33.

<sup>279</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.77 to 8.80.

proxy voting.<sup>280</sup> A particular companion may only assist two voters, whether or not they are related. A person may vote as proxy for two voters to whom they are not related and any number of defined family members.

- 8.53 We foresaw that the restriction on the number of voters a companion could support could hamper genuine assistants, such as members of staff at a care home assisting multiple residents. We also speculated that the written declaration was more of an administrative hurdle than a helpful check against deception. We proposed that formal declarations should no longer be required, but that a presiding officer should permit voters to vote with the assistance of a companion where the voter appears unable to vote without assistance. There should no longer be a limit on the number of voters with disabilities a person could assist; alternatively, the limit should not apply to family members. We also thought the definition of “family member” should be expanded to include grandparents and adult grandchildren.
- 8.54 Thirty-three of the 39 consultees who responded on this issue supported removing the current declaration requirement.<sup>281</sup> Nine consultees opposed a limit on how many persons with disabilities any one person may assist. Thirteen preferred to retain the qualified limit that exists for proxy voting, meaning family members are excluded from the limit.
- 8.55 Some consultees thought that the current arrangements posed difficulties for voters with disabilities. Mencap UK supported removing the need for a declaration, saying it would “undoubtedly help people with a learning disability, a significant number of whom may well need support on the day”. Others disagreed, arguing that the declaration played an important role in ensuring the integrity of elections, and that modifying or simplifying the declaration was a better alternative.
- 8.56 Opinions on whether there should be a limit on the number of voters a companion may assist were also split. Eight were in favour of no limit, with Diverse Cymru commenting:
- 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.
- 8.57 The Electoral Commission also thought that the law should no longer limit the number of voters whom a companion may assist. In its view the existing list of family members should also be abolished or, if not, extended to include grandparents and adult grandchildren. Thirteen consultees preferred the retention of a limit which did not apply to family members. The national branch of the Association of Electoral Administrators (“AEA”), for example, whose response was supported by many other electoral administrators, had concerns about abolishing the limit, noting that it could “give rise to the opportunity for electoral malpractices in some areas”.

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<sup>280</sup> Electoral Law (2014) Law Commission Consultation Paper No 218, paras 6.59, 8.81 and 8.86.

<sup>281</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.57 to 8.70.

- 8.58 Our interim report noted that resolving these debates ultimately depends upon balancing the need to promote access to the poll for voters with disabilities and the need to safeguard polling from fraud.<sup>282</sup> Assisted voting involves the sacrifice of some secrecy of the vote (which is the main tool for preventing corruption) in order to promote access. In our view finding the correct balance is a task for Governments and Parliaments. We concluded that the only solution open to us was to align the current situation more closely with that for proxy voting. That means not counting family members as part of the limit on voters who may be given assistance. We also recommended removing the requirement for formal written declarations.
- 8.59 Since our interim report, Sir (now Lord) Pickles has also considered the balance between security and access to the poll, in particular in relation to proxy votes. He concluded that the number of close relatives for whom a person can act as a proxy should be reduced to two.<sup>283</sup> The UK Government has signalled its willingness to accept this recommendation, stating in the background briefing papers to the December 2019 Queen’s Speech that it intends to limit the number of people a voter may act for as proxy to two electors, regardless of their relationship. The paper also notes however that the Government intends to allow “a wider range of people (for example, carers who would not be entitled to vote in the election) to be able to assist voters with disabilities in a ‘companion’ role”.<sup>284</sup>
- 8.60 The recommendation made in our interim report was made partly to bring the requirements for proxy voting and for assisted voting into line. Our approach has always been that, if and insofar as electoral policy changes, we will take it into account in conducting this project.<sup>285</sup> Given that Government policy has now changed, we have amended our recommendation accordingly. In particular, we are not repeating the part of the recommendation which removed the limit on the number of voters a family member may assist as a companion. We repeat the rest of the recommendation, with one addition. On further reflection, we consider that cohabitants should also be included on the list of family members.<sup>286</sup>

### The requirement to provide equipment

- 8.61 The view we took in the consultation paper was that the law should continue to give voters the opportunity to use the ordinary voting procedure, which is the most secret and most secure, wherever possible. We therefore proposed that the law should continue to require every polling station to have equipment to help blind or partially

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<sup>282</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.71 and 8.73.

<sup>283</sup> Sir Eric Pickles, *Securing the ballot: review into electoral fraud* (August 2016), recommendation 28, available at <https://www.gov.uk/government/publications/securing-the-ballot-review-into-electoral-fraud> (last visited 3 March 2020).

<sup>284</sup> Prime Minister’s Office, *The Queen’s speech December 2019 - background briefing notes* (December 2019) p 126, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/853886/Queen\\_s\\_Speech\\_December\\_2019\\_-\\_background\\_briefing\\_notes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf) (last visited 3 March 2020).

<sup>285</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 1.8.

<sup>286</sup> Not having drafted a bill to accompany this report, we do not suggest a definition of “cohabitant” here. We note however that existing definitions can be found in the Family Law Act 1996, s 62, and the Family Law (Scotland) Act 2006, s 25.

sighted electors to vote without assistance. In our view, the specific requirement in the Representation of the People (England and Wales) Regulations 2001 to make tactile voting devices available at polling stations was too detailed, as it gives a very exact description of a very specific device.<sup>287</sup> We thought a more general requirement would be appropriate, with descriptions of particular equipment being left to guidance. We also proposed moving away from the terminology of “device” to allow the law to keep up with technological solutions.<sup>288</sup>

- 8.62 Our proposals attracted high levels of support; 37 of the 38 consultees who responded were in favour of them.<sup>289</sup> Many responses had the same theme – the device enabling blind and visually impaired voters to vote without assistance should not be described in detail. Both the RNIB and the Electoral Commission suggested that the detail can be left to guidance, which can be formulated in consultation with third sector organisations.
- 8.63 Our view remains that a reformed law on polling should make clear the position that voters primarily vote unaided. Returning officers should be required by law to provide each polling station with a facility enabling a blind or partially sighted voter to vote by themselves. We remain of the view that any satisfactory and approved piece of equipment should be capable of being used at any election, and do not think that detailed descriptions of existing devices in secondary legislation are necessary. This also has the benefit of accommodating the use of new and improved technology or devices as they are developed. We therefore repeat our recommendation below.
- 8.64 Since the publication of our interim report, there has been a judicial review of the secondary legislation permitting the use of the tactile voting device.<sup>290</sup> The claimant successfully argued that the tactile voting device described above does not fall within the scope of the enabling section of the Representation of the People Act 1983, as it does not permit an elector to vote without assistance; in order to be able to use the device, a blind person is reliant on the returning officer reading out the order of candidates.

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<sup>287</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.87 to 8.90. Similar provision is made in other statutory instruments including the Representation of the People (Scotland) Regulations 2001, SI No 497, reg 12.

<sup>288</sup> Rule 29(5)(f) of our specimen drafting refers to “*equipment or facilities* for enabling voters who are blind or partially sighted to vote without any need for assistance from the presiding officer or any companion” (emphasis added).

<sup>289</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.74 to 8.77.

<sup>290</sup> *R (Andrews) v Minister for the Cabinet Office* [2019] EWHC 1126 (Admin).

- 8.65 In response, the Government has announced its intention to legislate “requiring returning officers to provide equipment to support voters with sight loss and other disabilities who find it difficult to vote”.<sup>291</sup>

#### **Recommendation 47.**

- 8.66 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 definition of “family member” should be expanded to include grandparents, (adult) grandchildren and cohabitants.

#### **Recommendation 48.**

- 8.67 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.

### **EVENTS FRUSTRATING THE POLL**

- 8.68 Election rules deal with two types of events which might frustrate the poll. The first is rioting and open violence; in that case, the presiding officer must 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 deal with that issue first.

#### **Death of a candidate**

- 8.69 What should be done when a candidate dies after nominations close but before the poll? The law’s response differs as between elections.
- (1) At parliamentary elections, if the deceased is a party candidate, the poll is abandoned to enable the party to nominate a replacement. If the deceased is an independent candidate, the poll normally proceeds, voters being informed of the death.
  - (2) At local government elections, the death of any candidate triggers abandonment of the poll and a new election for which nominations re-open, although existing candidates remain nominated.<sup>292</sup>
  - (3) At party list elections, parties stand for election (taking seats through individual candidates in list order) and individuals stand as independents. The system is

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<sup>291</sup> Prime Minister’s Office, The Queen’s speech December 2019 - background briefing notes (December 2019) p 126  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/853886/Queen\\_s\\_Speech\\_December\\_2019\\_-\\_background\\_briefing\\_notes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf) (last visited 3 March 2020).

<sup>292</sup> This is not the approach taken in local government elections in Scotland or Northern Ireland, which follow the parliamentary model described in (1) above.

used for the election of regional members of the Scottish Parliament, the Senedd, and London members of the Greater London Assembly. The approach across these elections is inconsistent, and summarised in our consultation paper.<sup>293</sup>

### Distinction between party and independent candidates

- 8.70 The first question our consultation paper considered was the different treatment of party and independent candidates.<sup>294</sup> We concluded that the different treatment was justified; the primacy of party affiliation in the eyes of most voters at parliamentary elections is a political reality which the law should take into account. Accordingly, we proposed that the current provision, including the distinction between the death of party and independent candidates, should be retained for parliamentary elections.
- 8.71 Thirty-five consultees responded to this question, of whom 27 agreed that the distinction should be retained.<sup>295</sup> Some thought that the rule unfairly advantaged party candidates, pointing out that in some cases independent candidates might form part of a larger campaign that could provide a substitute candidate. We agree that this example calls into question the basis for distinguishing between party and independent candidates. Our interim report concluded however that, since in those cases there is no party organisation, there is no mechanism for selecting a replacement candidate. Therefore, the only 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 the poll. We remain of that view and repeat our recommendation below.

### Approach to party list elections

- 8.72 Our consultation paper proposed that for 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 that case, the candidate with the next largest number of votes would be allocated the seat that the independent candidate would otherwise have filled. We proposed that the death of a list candidate should not affect the poll provided that a replacement party candidate could be identified.
- 8.73 Thirty-two of the 36 consultees who responded to this question agreed with it.<sup>296</sup> One issue that arose was the distinction 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. Our interim report noted that care would need to be taken over the detail of the rules as to party lists, but ultimately restated our default position: the death of a list candidate should not affect the poll so long as another list candidate is able to be elected. We repeat the recommendation from our interim report below.

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<sup>293</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.100 to 8.102.

<sup>294</sup> As above, paras 8.104 and 8.105.

<sup>295</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.81 to 8.84.

<sup>296</sup> As above, paras 8.85 to 8.87.

## Local government elections

- 8.74 Our consultation paper then considered whether the distinction drawn between party and independent candidates should be extended to local government elections.<sup>297</sup> There the situation is more complicated, particularly given that there are currently different rules for Scotland and Northern Ireland on the one hand and England and Wales on the other. We started from the position that, ideally, divergent election rules should be assimilated, subject to a policy reason for differentiating, and asked consultees whether they thought the death of an independent candidate should or should not result in the abandonment of the poll.
- 8.75 Nine consultees thought the death of an independent candidate for local government election (and those using that model) should result in the poll being abandoned (which would mean no change to the law in England and Wales, but would change the law governing local elections in Scotland and Northern Ireland).<sup>298</sup> Twenty-one consultees thought however that the death of an independent should not result in the adjournment of the poll.<sup>299</sup>
- 8.76 Our interim report noted that this was a difficult issue. On balance, we were not satisfied that the arguments presented by consultees justified a change in the law. 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 to their supporters. We therefore recommended that at local government elections in England and Wales,<sup>300</sup> the death of an independent candidate should continue to result in the abandonment of the poll. We maintain the recommendation from our interim report below.

### **Recommendation 49.**

- 8.77 The distinction between the death of party and independent candidates should be retained as regards parliamentary elections.

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<sup>297</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.106 to 8.111.

<sup>298</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.88 to 8.92.

<sup>299</sup> As above, paras 8.93 to 8.96.

<sup>300</sup> We did not recommend a change to local government elections in Scotland or Northern Ireland, both of which use the single transferrable vote system. The use of this voting system reduces the unfairness to voters when their first preference candidate dies, as votes cast for second and lower preference candidates still count towards the result of an election. We are of the view that changing the policy on the impact of the death of a candidate is a matter for the Scottish Government and the UK Government (as regards Northern Ireland).

### **Recommendation 50.**

- 8.78 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 purposes of the allocation of the seat; the death of a list candidate should not affect the poll provided a replacement party candidate can be identified.

### **Recommendation 51.**

- 8.79 At local government elections in England and Wales, the death of an independent candidate should continue to result in the abandonment of the poll.

## **Emergencies**

- 8.80 Apart from the death of a candidate, the only event which electoral law envisages interrupting the poll is rioting or open violence, in which situation the presiding officer must adjourn polling until the following day. Our consultation paper attributed this to the violent atmosphere surrounding elections when the Victorian reforms of electoral administration were introduced.<sup>301</sup> It is of course conceivable that other major events, such as terrorism or a natural disaster, might disrupt polling. Examples include the volcanic ash clouds which disrupted aviation and threatened to leave voters at the May 2010 general election stranded abroad, and the flooding in the south-east during the 2016 EU referendum. Our consultation paper and interim report used the term “supervening events”. On reflection we believe a more familiar label for these types of event would simply be “emergencies”, which is the term used in this report and in our recommendation, below.
- 8.81 Our consultation paper outlined two jurisdictions’ approaches. In Canada, the power to postpone the poll generally arises in “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>302</sup>
- 8.82 Our consultation paper took the view that riot and violence do not require distinct treatment. Our preference at that point was to follow the Canadian approach, and have a generally worded power, rather than a list of specific situations which could be found lacking in circumstances not foreseen by the drafter.

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<sup>301</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.112 to 8.114.

<sup>302</sup> Commonwealth Electoral Act 1918, ss 240A and 241, and 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.

- 8.83 We also thought that the power to make decisions should sit more centrally; since Victorian times it has become far easier for the presiding officer to contact the returning officer, who is the more natural person to make decisions in an emergency. For similar reasons, in the case of an event which disturbed polling at a national level, we thought the law should provide for a role for the Electoral Commission in coordinating a response.
- 8.84 Our consultation paper therefore proposed that the existing rule should be abolished. Instead it should be replaced with a power to alter the application of electoral law, in order to prevent or mitigate the obstruction or frustration of the poll by an emergency affecting a significant portion of electors in their area; we envisaged that the power might be used, among other things, to extend or relocate polling. We proposed that the power should be vested in returning officers, but in cases of national disruptions should be exercised subject to instruction by the Electoral Commission. We thought presiding officers should only have a corresponding power in circumstances where they are unable to communicate with their returning officer.

#### Abolishing the rule on rioting and open violence

- 8.85 A total of 35 consultees addressed the proposal to abolish the presiding officer's duty to adjourn the poll in circumstances of rioting and open violence; 31 agreed with it. Four consultees disagreed or were unsure. The SDLP for example noted the important role of the police in ensuring peaceful access to polling stations. In our interim report we agreed, and noted that the current law simply obliges the presiding officer to adjourn. In reality the first response should be coordination between the returning officer and the police to see if it is possible to ensure peaceful travel to and from the polling station.

#### A power to alter the application of electoral law

- 8.86 In total, 35 consultees submitted a response to our proposal, of whom:
- (1) 18 agreed completely;
  - (2) 33 in total agreed with the first part of the proposal, that returning officers should have the power to alter the application of electoral law to mitigate the obstruction or frustration of the poll by an emergency affecting a significant portion of electors in their area;
  - (3) 31 agreed with the second part, that this power should be subject to instruction by the Electoral Commission in the case of national disruptions; and
  - (4) 20 agreed with the third part, that the presiding officer should only have a corresponding power when unable to communicate with the returning officer.
- 8.87 Consultees gave thoughtful and nuanced responses to this question, which are set out and considered more fully in our interim report.<sup>303</sup> Several were concerned to clarify the threshold for qualifying events. Our preference was for a threshold of polling being "significantly affected". We thought that many events could be handled without

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<sup>303</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 8.105 to 8.113.

use of the emergency power, and did not envisage it being used when less disruptive measures were at hand.

- 8.88 The national branch of the AEA supported our proposal except for the third component, objecting to any formal ongoing role for the presiding officer on the grounds that “the power is too widely drawn and could result in undue pressure being applied to a presiding officer and/or inconsistency in its application”. The response also noted that in practice situations where the presiding officer would be unable to contact a returning officer would be very rare.<sup>304</sup>
- 8.89 Our interim report repeated our view that the current law is unsatisfactory.<sup>305</sup> It only addresses one event, rioting and open violence, and does so in an outdated way, obliging the presiding officer to adjourn the poll (without reference to the returning officer).
- 8.90 Finding a better course was not easy, however. After carefully considering the responses to our consultation, we concluded that there should be a power to suspend, adjourn and/or relocate polling in the event of a qualifying emergency. Contrary to our provisional view set out in the consultation paper, we thought that in order to increase certainty, the law should follow the Australian model and list possible events which could trigger the use of the power. There should however be a residual category for miscellaneous events affecting the safety of voters or causing difficulties in the physical conduct of voting. In effect this amounts to a non-exhaustive list of emergencies.
- 8.91 Taking into account the views of consultees, we concluded that such a power should not be conferred on the presiding officer, but should instead be given to the returning officer. We also thought that the power should be made subject to the returning officer’s duty to take every reasonable and lawful measure to conduct polling effectively. In practice, difficulties in polling arise regularly and can usually be dealt with pragmatically without delaying the poll. It may also be advisable to impose conditions or limits on the exercise of a power by a single returning officer in one area or constituency.
- 8.92 For emergencies at national elections disturbing polling over more than one area, we remained of the view that the power should be subject to instruction by the Electoral Commission, which would take precedence over any other directions (eg from directing returning officers). This would avoid inconsistent responses by different returning officers, which could confuse voters, and ensure a uniform approach. We repeat the recommendations from our interim report below.

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<sup>304</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 8.113.

<sup>305</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 8.114 to 8.116.

**Recommendation 52.**

8.93 The existing rule, requiring the presiding officer to adjourn a poll in cases of rioting or open violence, should be abolished.

**Recommendation 53.**

8.94 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 a poll by an emergency affecting a significant portion of electors in their area.

**Recommendation 54.**

8.95 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

- 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 concluded that counting votes in elections in the UK is governed by a number of key principles.<sup>306</sup>
- (1) *Ensuring outcomes are swiftly determined and certain.* The UK's political tradition in general seeks a speedy progression from the poll to final determination of its outcome.
  - (2) *Accuracy and the audit trail.* The result should be an accurate reflection of the votes cast in polling stations, and the paperwork received at the count – notably the ballot papers (used, unused, spoiled and tendered) – must match that sent to the polling stations before the election.
  - (3) *Transparent neutrality.* The counting process must be impartial, and seen to be so. The law therefore provides for processes to be observed by candidates and observers.
  - (4) *Maintaining voter secrecy.* It must not be possible for those observing the count to identify how a particular elector voted.
- 9.2 Despite these common principles, the law in this area suffers from the same structural problem as much of the rest of electoral law; the classical election rules are repeated in election-specific rules. This is despite the practice of the count being largely consistent across elections. This chapter starts with our proposals for the classical rules on the count, and then considers what adaptations are required when applying them to other elections. We focus on two sets of adaptations; those required for elections using the single transferable vote (“STV”) and those for elections where votes are counted electronically.

### THE CLASSICAL POLLING RULES

- 9.3 These rules apply to first past the post elections. They deal with the logistics and timing of the count, including: who can attend; verification and the count itself; the grounds on which ballot papers can be rejected; and how to determine and announce the result. They are generally less detailed than those rules concerning nomination or the poll, with the result that Electoral Commission guidance plays a greater role in these areas.<sup>307</sup>

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<sup>306</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 9.1.

<sup>307</sup> As above, para 9.4.

## Standardising polling rules

- 9.4 Our first proposal was simply that a single standard set of rules should govern the count at all elections. Of the 37 consultees who responded to this proposal, 36 agreed with it.<sup>308</sup> Our view remains that there is a need for consistency here, driven primarily by the near identical character of the current election rules governing the count. Our specimen drafting demonstrates how some of these rules could be standardised.
- 9.5 Our second proposal was that the standard counting rules should cater for differences between elections as regards their voting system and how their counts are managed. A total of 35 consultees submitted a response to this proposal, 34 of whom agreed with it.<sup>309</sup> Some consultees rightly pointed out that any standard set of rules should be consistent with the UK's devolutionary framework. We agree. Our interim report notes however, that the existing legislation governing Scottish local government elections suggests that devolved competence has not led to substantive divergence in the law's approach to electoral counts.<sup>310</sup> We do not believe that there will be so many respects in which the law will need to diverge that a single set of rules will not be feasible.

### Recommendation 55.

- 9.6 A single standard set of rules in primary legislation should govern the count at all elections.

### Recommendation 56.

- 9.7 The standard counting rules should cater for differences between elections as regards their voting system and how their counts are managed.

## Timing of the count

- 9.8 Currently the returning officer must make arrangements for counting the votes "as soon as practicable after the close of the poll".<sup>311</sup> This does not require the votes to be counted on the same day, although it used to be customary to do so; when the close of polls was extended in 1969 from 7pm to 10pm, it was accepted this would lead to more counting taking place on the following day. Usually, non-working days are excluded from the period during which counting takes place. This means a returning officer need not continue the count on a Saturday or Sunday if counting is not finished by then.

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<sup>308</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 9.4 to 9.7.

<sup>309</sup> As above, paras 9.8 to 9.10.

<sup>310</sup> As above, para 9.10.

<sup>311</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 9.11 to 9.16.

- 9.9 Special provisions apply in relation to UK Parliamentary general elections. For those elections, reasonable steps must be taken to commence the count within four hours of the close of polls. A returning officer unable to comply with that requirement must report the time that counting started and the reason for the delay to the Electoral Commission.<sup>312</sup> Non-working days are not excluded from the timetable, so counting at the weekend may take place if necessary.<sup>313</sup>
- 9.10 Once it has started, returning officers should generally carry on counting continuously. However, if counting agents agree, the returning officer may “exclude the hours between 7 in the evening and 9 in the morning”. The rule is out of date; polls once closed at 4pm, but now polling will still be in progress at 7pm. Our consultation paper queried whether counting agents should be able to veto the decision of the returning officer to pause counting overnight, which is largely an administrative one, taken on the basis of the number of staff and other resources available to the returning officer.<sup>314</sup>
- 9.11 Our consultation paper proposed that 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. A total of 38 consultees responded to this proposal, 29 of whom agreed with it in its entirety.<sup>315</sup> Many consultees, in particular those who disagreed, expressed reservations about the tradition of overnight counting, and the legal duty to commence counting within four hours, at UK Parliamentary elections. Administrators in particular highlighted the difficulty in conducting a count immediately after the end of polling, noting that lack of sleep often led to mistakes in the latter stages of the count. Our interim report noted the strong arguments for and against conducting overnight counts.<sup>316</sup>
- 9.13 In our interim report we took the view that the relatively recent introduction of the duty in UK Parliamentary elections to continue to an overnight count was a strong policy signal that swift declaration of outcomes is particularly important for UK Parliamentary elections. Revisiting that policy or extending it to other legislatures was, we concluded, a matter for Government and not for the Law Commissions. We remain of that view and repeat the recommendation made in our interim report.

#### **Recommendation 57.**

- 9.12 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.

<sup>312</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 9.13.

<sup>313</sup> As above, para 9.12.

<sup>314</sup> As above, para 9.16.

<sup>315</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 9.11 to 9.22.

<sup>316</sup> As above, para 9.22.

## Representation at the count

- 9.14 One of the ways in which the law ensures that the count is neutral, and transparently so, is by permitting candidates and election agents to nominate counting agents to supervise the count.<sup>317</sup> The returning officer can limit their number, provided that the limit is the same for each candidate. The limit is calculated to ensure there are sufficient counting agents for each member of counting staff to be supervised by an agent.
- 9.15 In general, election rules refer to any one or a combination of the candidate, their election agents or counting agents when setting out rules designed to bolster the transparency of the count.<sup>318</sup> For example, in relation to the ability to pause the count overnight, the rule spells out that “the agreement of a candidate or his election agent shall be as effective as the agreement of his counting agents”. In other places there is a clear demarcation between the role of counting agents (who oversee the count of the number of ballot papers) and election agents (who oversee the comparison of ballot paper accounts with the verified number).
- 9.16 Our provisional view in the consultation paper was that, generally, all of a candidate’s agents should be able to act on behalf of the candidate. The only exception was the ability to request a recount, which it seemed to us sensible to restrict to the candidate, their election agent, or a counting agent specifically authorised by either of them.<sup>319</sup>
- 9.17 The rules on counting agents generally operate similarly for elections using the party list system. The chief difference at these elections is that parties, as well as independent non-party candidates, stand for election. A simple adaptation to the rules means that each party is entitled to nominate representatives to scrutinise the count and adjudications, and to request recounts.<sup>320</sup> The transpositions in election-specific rules are less straightforward, however, so that at European Parliamentary elections each list candidate may choose one person to attend the local count and the central calculation with them.
- 9.18 In addition to counting agents, the following people must be admitted to the count venue:
- (1) the returning officer and staff;
  - (2) the candidates, their election agents, and one more nominee; and
  - (3) electoral observers appointed by the Electoral Commission.

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<sup>317</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 9.5.

<sup>318</sup> As above, paras 9.58 to 9.62.

<sup>319</sup> As above, para 9.60.

<sup>320</sup> As above, para 9.42.

- 9.19 The returning officer also has a discretion to admit others to attend – for example, media representatives or police officers.<sup>321</sup>
- 9.20 Our consultation paper proposed that candidates should continue to be represented at the count by 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 the candidate, an election agent or counting agent specifically authorised to do so in the absence of the candidate or election agent.
- 9.21 Of the 37 consultees who responded to this proposal, 35 agreed with it.<sup>322</sup> The Electoral Commission correctly pointed out that the proposal reflects rather than alters current practice. We agree, but mention that the recommendation of a uniform rule does eliminate some peculiar inconsistencies in the rules applying to elections using the party list. We repeat our recommendation below.

#### **Recommendation 58.**

- 9.22 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 the candidate, an election agent or a counting agent specifically authorised to do so in the absence of the candidate or election agent.

### **ELECTIONS USING THE SINGLE TRANSFERABLE VOTE SYSTEM**

- 9.23 Four types of elections in the UK use the STV system. In Northern Ireland, local government elections, European Parliamentary elections and Northern Ireland Assembly elections use STV, as do local government elections in Scotland. The counting rules governing STV are significantly more detailed than rules governing other types of election, because the counting system is intrinsically more complex than any other used in the UK.
- 9.24 Our consultation paper and research paper explain in detail the procedure used in STV counts.<sup>323</sup> In brief, candidates are elected if the number of votes cast for them meets a quota, based on the number of vacant seats and the total number of valid votes cast. The key point to note for these purposes is that STV counts occur in stages; each stage is marked either by a candidate reaching the quota, or a low-

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<sup>321</sup> Electoral Law (2014) Law Commission Consultation Paper No 218, paras 9.6 to 9.8 and 9.55 to 9.57.

<sup>322</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 9.23 to 9.27.

<sup>323</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 9.64 to 9.76, and Research Paper on Manner of Voting, ([https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/Electoral-Law\\_Manner-of-Voting\\_Research.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/Electoral-Law_Manner-of-Voting_Research.pdf))

scoring candidate being eliminated and the next preference votes on their ballot papers being examined and allocated, until all the seats are filled.

- 9.25 This means that recounting from the start is a serious and time-consuming task, and the classical election rules have to be adapted accordingly. In STV elections in Northern Ireland, votes are counted manually.<sup>324</sup> There is a duty to record data at each stage, including a comparison between the total number of votes recorded for all candidates, plus the total number of non-transferable votes, and the recorded total of valid first preference votes. These figures should match at each stage. Recounts can only be requested for a particular stage; the returning officer must comply with any request for a recount of the latest completed stage of the count.
- 9.26 Scottish local government elections are subject to the classical rule that returning officers can refuse a request for a recount if it is unreasonable.<sup>325</sup> This is because Scottish local government elections are counted electronically, and so the rules do not require the recording of data at each stage. Instead the returning officer provides data relating to each stage in the final declaration. Our consultation paper noted, however, that at local government elections in Scotland the returning officer may choose to count manually. If this is done, there are no rules equivalent to those in Northern Ireland making clear that only the latest stage may be recounted following any request.
- 9.27 While the classical counting rules do not provide detailed guidance on how the count must be carried out, STV counting rules are carefully drafted to guide administrators through the count by requiring it to be in stages, involving the division of transferrable ballot papers into parcels and sub-parcels, and setting out the count and transfer values at each stage. Our consultation paper provisionally proposed that save for the existing differences in the transfer value, the same detailed rules should govern all STV counts.
- 9.28 Of the 35 consultees who responded to this proposal, 34 agreed with it.<sup>326</sup> In our interim report we made this proposal a recommendation, with one clarification. We thought that primary legislation should contain the fundamental rules governing the STV count which are shared with other elections. The detailed and lengthy rules required by the intricacy of the STV system should be retained, but located in secondary legislation. We repeat that recommendation below.
- 9.29 Since the publication of our interim report, the Local Government (Wales) Bill has been introduced into the Senedd. Amongst other reforms, the Bill proposes that principal councils should be able to decide to use the STV system rather than first past the post, should two-thirds of the total number of councillors support the change.<sup>327</sup> If the policy of Governments and Parliaments is to permit greater flexibility in the selection of voting system used for the same types of election, having a generic

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<sup>324</sup> Electoral Law (2014) Law Commission Consultation Paper No 218, paras 9.67 and 9.68.

<sup>325</sup> As above, para 9.69.

<sup>326</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 9.29 to 9.31.

<sup>327</sup> Local Government and Elections (Wales) Bill, cl 5, available at <http://www.assembly.wales/laid%20documents/pri-ld12877/pri-ld12877-e.pdf> (last visited 3 March 2020).

set of rules and adaptations to polling rules for different voting systems will facilitate this choice.

#### **Recommendation 59.**

- 9.30 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.

## **ELECTRONIC COUNTING**

### **Standardising the rules**

- 9.31 Two species of election are counted electronically in the UK, using devices that scan ballot papers on both sides, identify doubtful votes, and record and count votes electronically. These are Greater London Authority (“GLA”) and Scottish local government elections. The rules for each adopt a different approach.
- 9.32 The GLA elections rules are drafted throughout with a view to the electronic method of counting. The Greater London returning officer (“GLRO”) decides whether to use electronic counting; constituency returning officers (“CROs”) must use it unless they have obtained the GLRO’s written consent to manual counting. Technical assistants are appointed by the CROs and are entitled to attend the count. The rules include a table of modifications in the case of a manual count being performed. For example, the references to technical assistants are omitted.
- 9.33 In contrast, the Scottish local government election rules have one rule, generally empowering the officer to discharge any functions under the election rules by electronic means, and to interpret the rules accordingly. Other rules are designed with electronic counting in mind; for example, ballot papers are not required to be mixed before counting. If, however, the returning officer decides to count manually, these requirements are brought back in.
- 9.34 Our consultation paper noted that the current election-specific approach means that there are two sets of rules for each type of election counted electronically.<sup>328</sup> Continuing with this approach would mean drafting new rules for any other election which decided to use electronic counting. It also has the disadvantage that the rules for manual counting at those elections may not be sufficiently detailed. To repeat the example given in paragraph 9.26 above, in Scottish local government elections, if the returning officer decides to count manually, the standard rule governing recounts applies. That means the entire count must be restarted. That would be disproportionate in the case of an STV count.
- 9.35 The provisional proposal made in our consultation paper was that a standard set of rules should govern counts generally, and should differentiate between different voting systems and structures for managing counting. The standard rules should be

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<sup>328</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 9.88 to 9.90.

expressed as neutrally as possible, but should be framed to apply to the default, manual method of counting. In addition, there should be a standard subset of rules and adaptations for electronic counting. Whether electronic or manual counting should be used for a particular species of election should be determined by statutory instrument.<sup>329</sup>

9.36 A total of 36 consultees responded to this proposal, of whom 34 agreed.<sup>330</sup> Some consultees thought that returning officers or local councils should be able to choose whether to count electronically. In our view, the default position is that the count should be conducted manually. The manual count has the advantage that it promotes scrutiny by candidates and agents. Electronic counting is harder for candidates and agents to interrogate on the day; confidence in the system has to be secured in a different way. We therefore came to the view that at the least, secondary legislation should be required to permit its use. How to enhance trust in electronic counting is explored further below.

9.37 Our view remains that a standard set of counting rules, with a subset of rules for electronic counting, should apply to all elections. Once these generic rules are in place, it should be reasonably straightforward for future Governments and Parliaments to decide whether or not to use electronic counting for a particular species of election, without having to rewrite the entire rulebook. We repeat our recommendation to this effect below.

### Certification requirements

9.38 We turn now to how the law should secure confidence in the electronic counting system. Our consultation paper explained our view that there is a need for analogues, in the electronic counting context, for the classical rules that are designed to ensure that the count proceeds transparently.<sup>331</sup> Simply observing machines in operation at the count is not a sufficient replacement for those rules. Instead, confidence of participants has to be sought and obtained earlier, when the electronic counting system is selected and developed. Our consultation paper posited three possibilities:

- (1) a certification requirement for electronic counting systems, based on standards and specifications;
- (2) a requirement for returning officers, in advance of an election, to demonstrate the effectiveness of their electronic counting equipment to representatives of the main political parties and the Electoral Commission; or
- (3) leaving the choice of the electronic system to returning officers.

9.39 Thirty-four consultees answered this question, giving a diverse range of responses.<sup>332</sup> Three argued for no change to the law, while 16 supported both prior demonstration

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<sup>329</sup> Electoral Law (2014) Law Commission Consultation Paper No 218, paras 9.91 and 9.92.

<sup>330</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 9.32 to 9.41.

<sup>331</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 9.93 and 9.94.

<sup>332</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 9.43 to 9.57.

and certification. Nine preferred a certification requirement to one of prior demonstration. The Electoral Commission for example recalled it had previously recommended a certification scheme to provide independent quality assurance of electronic counting. In contrast, five consultees preferred a requirement of prior demonstration over one of certification.

- 9.40 Our interim report noted the overwhelming support for the principle that the law should seek to provide equal confidence in electronic as in manual counting systems.<sup>333</sup> However, from consultees' responses it became clear that to reconcile this with the general principle that elections in England and Wales are run by a local returning officer is not straightforward. Requiring prior demonstration by each officer would cause logistical problems and risk inconsistency. The same difficulty does not arise in relation to Scottish local government elections and GLA elections, which are subject to directions by the Electoral Management Board for Scotland and the GLRO respectively.
- 9.41 Given the diverse views about how best to build trust in electronic counting systems, our interim report limited our recommendation to empowering Governments to make regulations ensuring there is sufficient scrutiny by political parties and the Electoral Commission of an electronic counting system. This could include requiring prior demonstration, certification, or both. We maintain our recommendation here.

**Recommendation 60.**

- 9.42 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 61.**

- 9.43 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.

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<sup>333</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 9.58 to 9.62.

# 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 different elections in the same area that fall on the same day, typically referred to as the “combination of polls”.

## ELECTORAL TIMETABLES

### Incidence of elections

10.2 We refer to “incidence rules” to mean the legal rules that govern when an election is triggered, and when polling day takes place. In general, incidence rules distinguish between:

- (1) ordinary (general) elections, referring to regular interval elections of the whole or part of the body to be elected;
- (2) extraordinary (general) elections, to refer to unplanned or irregular elections of the entire elected body;<sup>334</sup> and
- (3) casual or by-elections, to refer to irregular elections of individual elected members, rather than the entire body.

10.3 Incidence rules are part of the rules that constitute the institution in question; they therefore belong to local government law, or constitutional law, rather than being purely questions of electoral law.

### UK Parliamentary elections

10.4 Historically, the elections rules governing UK Parliamentary elections contained the “incidence rule” for those elections, determining polling day by reference to the dissolution of Parliament. Alongside the incidence rule, the election rules also contained an administrative timetable. The timetable governed the administration of the election and included deadlines for, amongst other matters, notice of the election and the close of nominations. Again, those deadlines were calculated by reference to the dissolution of Parliament, or date of receipt of the writ of election by the returning officer.<sup>335</sup>

10.5 Now the Fixed-term Parliaments Act 2011 (“the 2011 Act”) contains an incidence rule which sets out the date of UK Parliamentary elections. The 2011 Act triggers general elections and determines polling day. As a result, the election timetable no longer

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<sup>334</sup> These headings fit elections relating to legislatures better than local government elections, which have no concept of extraordinary (general) elections.

<sup>335</sup> For more detail see Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 10.6 to 10.10.

determines polling day and is, in effect, an administrative timetable only. Polling day is inserted into the timetable by the incidence rule provided in the 2011 Act.<sup>336</sup>

- 10.6 In the 2019 UK Parliamentary election, polling day was determined by a different incidence rule, as the Early Parliamentary General Election Act 2019 provided that the election would take place on 12 December 2019.<sup>337</sup> The approach to the timetable remained the same, however. The incidence rule determined polling day, and the election rules determined the administrative timetable. This approach is consistent with the approach at all other elections, where the incidence rule and administrative timetable are independent of each other.

### Orientation of timetables

- 10.7 Despite the 2011 Act, the general election timetable continues to be oriented differently from other election timetables. Deadlines are calculated by reference to either:
- (1) the date of dissolution of Parliament according to the Fixed-term Parliaments Act 2011 (in the case of polling day and the close of nominations); or
  - (2) the date of receipt of the writ of election by the returning officer (in the case of notice of election).
- 10.8 This means the timetable is structured so it counts forward from those dates, not backward from polling day like every other election's timetable. For example, the elections rules provide that, at UK Parliamentary elections, the deadline for the delivery of nomination papers is no later than 4pm on the sixth day after the dissolution of Parliament. In contrast, at elections to the Senedd, for example, the deadline for the delivery of nomination papers is no later than the nineteenth day before polling day.<sup>338</sup>

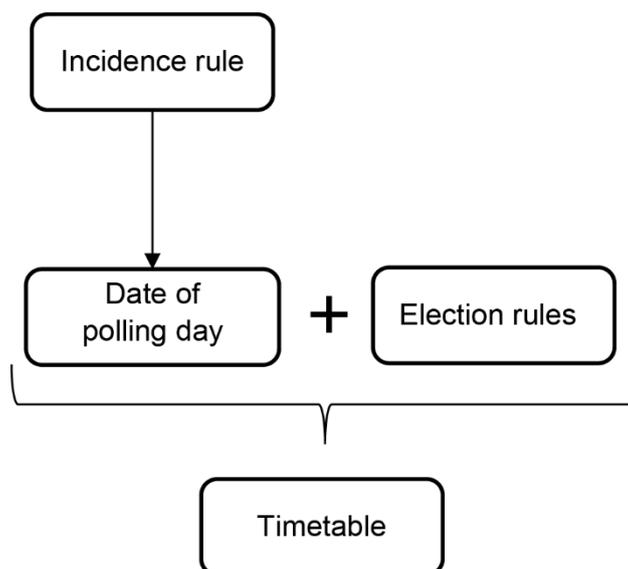
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<sup>336</sup> We note here that it is possible that the 2011 Act will be amended or repealed in future. Section 7 of the 2011 Act states that its operation will be reviewed in 2020 by a committee, which may make recommendations for the Act's repeal or amendment. The Conservative Party manifesto also included a commitment to repeal the 2011 Act.

<sup>337</sup> Early Parliamentary General Election Act 2019, s 1(1) and (2). These provide that the December 2019 election date is to be treated as though appointed by the 1911 Act, so as to enable the 2011 Act (unless repealed or amended) to govern the incidence of future elections.

<sup>338</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236 sch 5 r 1.

10.9 The more usual approach, counting backwards from the date of polling day, can be illustrated in simple diagrammatic form:



10.10 The different orientation of the timetables leads to a practical difference: at UK Parliamentary elections the notice of election is published 22 days, and dissolution occurs 25 days, before polling day.<sup>339</sup> At all other elections timetables run back from polling day (which is day 0) to notice of election (which in most cases is day 25 before polling day). This means that compared to other election timetables, the UK Parliamentary election timetable allows for a shorter period between the notice of election and close of nominations.<sup>340</sup>

### Re-orienting the UK Parliamentary election timetable

10.11 UK Parliamentary elections have special constitutional significance, being elections to the supreme legislative authority in the UK. In our consultation paper we expressed the view that it was not for our project to review the rules that constitute Parliament, including the convention that elections are prefaced by the issue of writ of election, or the background processes leading to its issue.

10.12 Nonetheless, we took the view that, to achieve consistency across elections, the timetable for UK Parliamentary elections, like all other elections, should be organised by reference to polling day.<sup>341</sup> We provisionally proposed that the UK Parliamentary election timetable should be oriented so that it counts back from polling day. We envisaged that reference could continue to be made to the writ and royal proclamation, but as steps to be taken prior to the notice of election.<sup>342</sup>

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<sup>339</sup> The deadlines for publishing notices of election are usually expressed as “not later” than a particular time, meaning it is possible for the notice of election to be published earlier. See, in relation to UK Parliamentary elections, Representation of the People Act 1983, sch 1 r 1.

<sup>340</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.15.

<sup>341</sup> As above, para 10.20.

<sup>342</sup> As above, para 10.26(3).

10.13 Our provisional proposal received the unanimous support of the 31 consultees who provided a response, including the Electoral Commission and Association of Electoral Administrators.<sup>343</sup> We continue to take the view that consistency across all election timetables is desirable and repeat our recommendation here.

#### **Recommendation 62.**

10.14 The UK Parliamentary election timetable should be oriented so that steps in it are counted backwards from polling day.

### **Timetable at UK Parliamentary by-elections**

10.15 The 2011 Act does not contain an incidence rule for UK Parliamentary by-elections, and the legislative timetable continues to fix polling day by reference to the issue of the warrant for the writ of by-election. Assuming the returning officer receives the writ of by-election the day after the issue of the warrant for the writ, the timetable permits the returning officer to set polling day between days 23 and 27 after it is issued. In our consultation paper we noted the expectation, unexpressed in law, that a Thursday will be chosen and the deadlines will be worked back from that day.<sup>344</sup>

10.16 We provisionally proposed that a separate incidence rule should set polling day for by-elections, on the last Thursday between days 23 and 27 after the warrant for the writ of by-election is issued (based on the current 25 day timetable).<sup>345</sup> Like our recommendation regarding the UK Parliamentary timetable, this would achieve consistency across elections and decouple the incidence rule from the administrative timetable. Of the 30 consultees who addressed our provisional proposal, 26 agreed with it, three offered no firm view and one preferred the date of the by-election to be stated in the writ of by-election.<sup>346</sup>

10.17 A number of consultees thought that our proposal would further legally entrench the policy that polling day should be held on a Thursday. In our interim report we noted that was not our intention, but that Thursday is the stated polling day for general elections under the 2011 Act. Only at Parliamentary by-elections may another weekday be used as polling day. A couple of consultees went further and suggested we should recommend, or at least facilitate the possibility of, weekend voting. We remain of the view that it is not proper for the Law Commissions to recommend such a fundamental alteration to polling arrangements.<sup>347</sup>

10.18 We maintain our recommendation here, but draw attention to the fact it is based on our proposed 28 day standard timetable for UK elections, discussed further below.

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<sup>343</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 10.7 and 10.8.

<sup>344</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.18.

<sup>345</sup> As above, para 10.25.

<sup>346</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 10.9.

<sup>347</sup> As above, paras 10.10 to 10.12.

This means polling day would take place between days 26 and 30 after the warrant for the writ of by-election is issued, as opposed to between days 23 and 27 (as currently provided).

### **Recommendation 63.**

10.19 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.

### **Electronic communication of the writ of election**

10.20 Under the current timetable for UK Parliamentary elections the returning officer must issue the notice of election no later than the second day after receipt of the writ. This is a tight deadline. To alleviate administrative problems and reduce delay we provisionally proposed that the writ of election should be capable of communication by electronic means.<sup>348</sup>

10.21 Of the 29 consultees who addressed our proposal, 28 agreed. The single consultee who disagreed expressed the view that the writ should not be transmitted *solely* by electronic means. We repeat here that we envisage electronic communication as an additional means of communicating the writ to the returning officer. The point is that the progress of the election is not delayed by some operational failure to communicate the writ, the formal trigger for the election.<sup>349</sup> For that reason, we repeat our recommendation here.

### **Recommendation 64.**

10.22 The writ should be capable of communication by electronic means, in addition to physical delivery.

### **Standardising the legislative timetable at UK elections**

10.23 The legislative timetable for each election is currently set out in each election's election rules. For the elections we cover in this project, therefore, there are 12 timetables for elections. Each legislative timetable contains deadlines for the following stages:

- (1) publication of the notice of election;
- (2) delivery of nomination papers;

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<sup>348</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.27.

<sup>349</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 10.17.

- (3) withdrawals of candidature;
- (4) objections to nominations;
- (5) publication of the statement of persons nominated; and
- (6) polling day.

10.24 The content of the current timetable is anachronistic. It was settled in 1872, and as a result, the deadline for registration as an elector and the deadline for making or altering absent voting arrangements are not included. The classical deadlines were settled when registration was by canvass well in advance of scheduled polls. Moreover, postal voting was not introduced until 1918, and only became prevalent after its availability on demand was introduced in 2000.<sup>350</sup>

10.25 In our consultation paper we took the view that voters, administrators and campaigners would be better able to manage deadlines if there were a standard timetable for all elections in the UK.<sup>351</sup> We made a provisional proposal to that effect, expressly including deadlines for registration and absent voting. This proposal is consistent with our overarching proposal for a standard legal framework and set of polling rules at all UK elections, set out in the fewest possible pieces of legislation consistent with the devolutionary structure. All 32 consultees who responded to our proposal supported it.<sup>352</sup>

10.26 In their response the national branch of the Association of Electoral Administrators (“AEA”) added that deadlines should permit returning officers to publish the notice of election early, particularly in the case of parish or community council elections. That point was also 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. Our interim report agreed with those responses.<sup>353</sup>

10.28 We remain of the view that the standard legislative timetable for elections should be UK-wide. We repeat our recommendation here, save that its scope is now confined to Great Britain, for the reasons discussed in chapter 1.<sup>354</sup>

#### **Recommendation 65.**

10.27 A standard legislative timetable should apply to all elections in Great Britain, containing the key milestones in electoral administration, including the deadlines for registration and absent voting.

<sup>350</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.31.

<sup>351</sup> As above, para 10.40.

<sup>352</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 10.19.

<sup>353</sup> As above, paras 10.20 and 10.21.

<sup>354</sup> See para 1.20 above.

## Length of elections timetables

10.29 The lengths of legislative timetables for elections can be grouped into three categories:

- (1) a 25 day timetable for UK and EU Parliamentary elections, elections to the Senedd, Northern Ireland Assembly elections, local government and parish council elections, mayoral, combined authority mayoral and Police and Crime Commissioner elections in England and Wales, and local elections in Northern Ireland;
- (2) a 30 day timetable for Greater London Authority (“GLA”) elections; and
- (3) a 28 to 35 day timetable for local government elections in Scotland and elections to the Scottish Parliament.

10.30 The majority of timetables are clustered around the 25 day mark. The two types of elections occurring only in Scotland stand out with their 28 to 35 day timetable.<sup>355</sup> This longer timetable allows more time for the issue, and therefore the return, of postal votes.<sup>356</sup>

10.31 GLA elections’ timetables are 30 days to allow for the creation of a leaflet publicising candidates for Mayor of London, which is sent out to every registered elector. It should be noted that mayoral and combined authority mayoral elections in England and Wales – where a booklet must also be produced – are nevertheless run on a standard 25 day timetable.

10.32 In our consultation paper we considered the advantages and disadvantages of both a 25 day standard timetable and 28 day standard timetable.<sup>357</sup> We noted that the former appeared to be the emerging norm for elections timetables. Moreover, a 25 day standard timetable would require change to the lowest number of elections’ timetables to achieve standardisation. But after careful consideration we took the view that a longer timetable would lighten administrative burdens and would be sufficient to accommodate those elections where the timetable is currently longer than 25 days (GLA elections and Scottish Parliamentary and local government elections).<sup>358</sup> We

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<sup>355</sup> The date of publishing the notice of election is fixed at the returning officer’s discretion on any day between day 35 and day 28 before polling day. This does not affect any other deadline in the timetable. These timetables’ express acknowledgement of the returning officer’s option to publish the notice of election earlier may be related to the geography of some Scottish electoral areas. (We note that at other elections, the notice of election may be published earlier than the deadline stipulated in the timetable.)

<sup>356</sup> Scott Martin (Scottish National Party) helpfully pointed out that the longer timetable for Scottish Parliamentary and local government elections was introduced in 2011 to allow more time for the issuing of postal voting packs, by fixing the deadline for nominations on day 23 before the poll, rather than day 16. This was a recommendation by the Gould Report in 2007: see R Gould, *Scottish elections 2007: the independent review of the Scottish Parliamentary and local government elections 3 May 2007* (October 2007), pp 68 and 117, available at [https://www.electoralcommission.org.uk/sites/default/files/electoral\\_commission\\_pdf\\_file/Scottish-Election-Report-A-Final-For-Web.pdf](https://www.electoralcommission.org.uk/sites/default/files/electoral_commission_pdf_file/Scottish-Election-Report-A-Final-For-Web.pdf) (last visited 3 March 2020). No consultee in Scotland objected to our proposed 28 day timetable, which provided for a deadline for nominations on day 22 before polling day.

<sup>357</sup> As above, paras 10.43 to 10.48.

<sup>358</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 10.45 to 10.47.

therefore provisionally proposed that the UK-wide standard legislative timetable should be 28 days long, taking into account the different deadlines set for absent voting at elections in Great Britain and Northern Ireland.

10.33 Our proposed 28 day timetable would operate as follows:

Notice of election	Close of nominations	Polling notice	Late registration of electors	Late registration as absent voter		Polling day
				Postal vote	Proxy vote	
Day 28.	Day 22.	Day 21.	Day 11.	GB: day 11. NI: day 14.	GB: day 6. NI: day 14.	Day 0.

10.34 Of the 31 consultees who responded to our proposal, 27 consultees agreed. Two consultees disagreed, while two (including the Electoral Commission) did not offer a firm view.<sup>359</sup> A number of consultees thought that for most elections our proposal would represent an extension of the timetable and thus be beneficial for electoral administrators. The Electoral Commission’s report on the 2015 UK Parliamentary elections noted the potential “benefit for electors”, but did not clarify whether they thought the timetable should be extended.<sup>360</sup> A couple of consultees expressed the view that a longer timetable was appropriate for some elections. Specifically, one consultee 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 elections (involving in practice sending a booklet to 5.8 million registered electors).<sup>361</sup>

10.35 Our proposal for a standard 28 day timetable coupled with the Government’s removal at those elections of a “withdrawal period” two days after close of nomination,<sup>362</sup> effectively gives GLA returning officers the same period of time to produce booklets that they 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.

<sup>359</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 10.27.

<sup>360</sup> Electoral Commission, *Report on the administration of the 7 May 2015 elections, including the UK Parliamentary general election* (July 2015), available at [https://www.electoralcommission.org.uk/sites/default/files/pdf\\_file/UKPGE-report-May-2015-1.pdf](https://www.electoralcommission.org.uk/sites/default/files/pdf_file/UKPGE-report-May-2015-1.pdf) (last visited 3 March 2020) p 41.

<sup>361</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 10.33.

<sup>362</sup> Greater London Authority Elections Rules 2007 SI No 3541, as amended by the Greater London Authority Elections (Amendment) Rules 2016 SI No 24, r 6(1)(b).

10.36 We note that since the publication of our interim report, the AEA has referred to the disadvantages of the current timetable in relation to overseas voters. For obvious reasons, ballot papers cannot be issued until nominations have closed and candidates are confirmed. This leaves only four weeks for ballot papers to be printed, despatched overseas and returned in time for the count.<sup>363</sup> The AEA has urged the UK Government to consider the way in which overseas electors can cast their votes, or change the election timetable.

10.37 We remain of the view that, as a matter of electoral administration, a longer timetable is better. An option which does not reduce the effective length of the longer timetables,<sup>364</sup> while marginally increasing others, is to be preferred. We repeat our recommendation here.

#### **Recommendation 66.**

10.38 The standard legislative timetable at all elections in Great Britain should be 28 days in length.

### **COMBINATION OF POLLS**

10.39 The law on combination of polls is a bewildering and complex array of overlapping provisions with multiple pieces of legislation applying to the same combined poll. To understand combination, it is necessary to distinguish between two separate concepts: coincidence of elections and combination of polls. Elections or referendums coincide if two or more polls are set to take place on the same day, in the same area. Where two polls coincide, rules may require or enable the polls to be “taken together”. This is known as combination. Where polls are combined certain aspects of electoral administration are fused for those polls.

10.40 The law on combination of polls considers three distinct issues:

- (1) The combinability of particular polls: some must be combined (mandatory combination) and others may be (discretionary combination). For yet others, nothing is said about combination, meaning there can be no combination. The default position where polls cannot be combined is that each returning officer must conduct each poll according to its own election rules.
- (2) The management issue: where polls are combined, which of the returning officers for the combined elections take the lead role, and for which functions.

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<sup>363</sup> The Association of Electoral Administrators, *The Electoral Landscape in 2019: An AEA Position Statement* (September 2019), paras 3.19 to 3.20, available at <https://www.aea-elections.co.uk/wp-content/uploads/2019/09/aea-post-election-report-2019.pdf> (last accessed 6 December 2019).

<sup>364</sup> Analysis of the longer GLA and Scotland-only timetables shows that a 28 day timetable is able almost perfectly to preserve the advantages of these longer timetables, while extending 25 day timetables only minimally. See Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.47.

- (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 elections rules are made to deal with the fact that the polls are combined.<sup>365</sup>

10.41 As noted above, the answer to these questions is given in a complex array of election-specific provisions that are difficult for electoral administrators to navigate. In our consultation paper we took the view that it was desirable to have a single set of rules that would provide a streamlined and clear framework governing the combination of polls.<sup>366</sup> We made a provisional proposal to that effect. Of the 30 consultees who responded to our proposal, 28 agreed. This included the AEA and the Electoral Commission. We repeat here that the single set of rules would implement our overarching proposal for a standard legal framework and set of polling rules at all UK elections, set out in the fewest possible pieces of legislation consistent with the devolutionary structure.<sup>367</sup>

10.42 A few consultees expressed the view that coinciding polls should be avoided, or stopped completely. In our interim report we made clear that our project has taken the law governing the incidence of elections, and electoral cycles, as a given. Our proposal seeks to rationalise the law in the event of coincidence, so that it properly and consistently tackles the issue of legal governance of coinciding polls in two different elections.

10.43 We continue to take the view that the current law is in need of rationalisation and should be consistent across elections. For that reason, we maintain our recommendation, substituting a reference to a uniform set of rules.<sup>368</sup>

#### **Recommendation 67.**

10.44 The law governing combination of coinciding polls should be in a uniform set of rules for all elections.

### **Combinability**

10.45 In our consultation paper, we noted that incidence rules for general or ordinary elections can be set so as to prevent undesirable and burdensome coincidences. For example, the Scottish Elections (Dates) Act 2016 changed the dates of the 2020 Scottish Parliament election (and the 2021 Scottish local government elections) so as to avoid a clash between the Scottish Parliament election and the UK General Election, both of which were due to take place in 2020. The date of the Scottish local government elections then had to be moved to avoid a clash with the new date for the Scottish Parliament election. However, incidence rules cannot absolutely prevent the

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<sup>365</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 10.38.

<sup>366</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.107.

<sup>367</sup> See para 10.25 above.

<sup>368</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 10.46 to 10.49.

possibility of elections occurring on the same day in the case of early general elections, by-elections or elections to fill vacancies.

10.46 We expressed the view that the law on combinability should be twofold:

- (1) The default position should be that any coinciding polls should be combined.
- (2) Any of the current prohibited combinations, if the prohibition is due to a policy objection based on political disjunction or voter confusion, should not result in the polls coinciding “uncombined”. Rather this should result in the delaying of one of the elections by a period of 21 days.<sup>369</sup>

10.47 We made a provisional proposal that any elections coinciding in the same area on the same day must be combined. Of the 29 consultees who responded, 26 consultees agreed, two disagreed, and one was unsure. The Electoral Commission expressed support for our proposal, taking the view that it would be preferable if coinciding non-combined polls were held on different days rather than on the same day but run separately.<sup>370</sup>

10.48 One consultee who disagreed commented that our proposal could lead to administrative difficulties and could lead to voter confusion if different voting systems were used at the combined polls. However, in our interim report we took the view that combination was preferable to the current position at polls where combination is not mandatory. Where polls coincide but are not combined, the law effectively fails to regulate the multi-poll situation. Our proposal ensures that electoral law always takes account of the possibility of coincidence.<sup>371</sup> For that reason we repeat our recommendation here.

#### **Recommendation 68.**

10.49 Any elections coinciding in the same area on the same day must be combined.

10.50 In our consultation paper we noted that one policy objection to combining polls is that the law imposes no upper limit on the number of combinations.<sup>372</sup> As a result, there is the potential for three or more polls to coincide, particularly in England and Wales. Although this situation will rarely arise, we noted that the administrative difficulties for returning officers would be significant if it did. To assist us in formulating a recommendation, we asked consultees whether the returning officer should have a power to defer a fourth coinciding poll in the interests of voters and good electoral administration and, if so, what safeguards should apply to that power.

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<sup>369</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>370</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 10.51 and 10.53.

<sup>371</sup> As above, paras 10.56 and 10.57.

<sup>372</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.112.

- 10.51 Of the 30 consultees who responded to the question, 14 expressed outright support. Seven supported a power to defer, but gave a different upper limit. Eight consultees disagreed with giving the returning officer a power to defer at all. One consultee did not offer a firm view.<sup>373</sup>
- 10.52 The national branch of the AEA, whose response was endorsed by six other consultees, proposed a different scheme. It argued that “the current hierarchy of polls should be clearly set out in legislation” and that a returning officer should have discretion to defer a fifth poll (though not a sixth, as under the current rules there are no circumstances where legislation would allow six elections to be combined). In contrast, the Senators of the College of Justice suggested that a returning officer should have the power to defer a third coinciding poll, as a combination of more than two polls has the “potential for voter confusion”.<sup>374</sup>
- 10.53 The Electoral Commission thought that returning officers should not be given a new power to defer coinciding polls. Instead, it should be for policymakers and legislators 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 the practical impact on voters, campaigners and returning officers. Two other consultees expressed similar concerns. We agree that any power of the returning officer to defer polls is no substitute for proper planning of the election calendar by Government institutions to prevent unhelpful or excessive coincidence.<sup>375</sup>
- 10.54 However, in our interim report we noted that there may be unforeseen circumstances, irrespective of careful planning, that may mean that one or more casual elections or local referendums join the planned elections on the calendar, such as if a by-election is triggered. For that reason, we recommended that returning officers should have a power to defer a fourth election provided it is not a general or an ordinary election or a national referendum, in the interests of good electoral administration. The poll which is deferred should be determined in secondary legislation, which may rule out the deferral of any particular election or referendum, such as a UK Parliamentary by-election. Secondary legislation would also set out the safeguards subject to which this power would be exercised, and the length of the deferral.<sup>376</sup>

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<sup>373</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 10.59.

<sup>374</sup> As above, paras 10.61 and 10.62.

<sup>375</sup> As above, paras 10.67 and 10.71.

<sup>376</sup> As above, paras 10.72 and 10.73.

10.55 We remain of the view that there should be a stop-gap in law to deal with an unexpectedly high number of coinciding polls. For that reason we repeat our recommendation here.

#### **Recommendation 69.**

10.56 If four or more polls coincide, the returning officer should have a power to defer a poll if he or she concludes that the polls cannot be properly administered 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.

### **Management of combinations**

10.57 Where two or more polls are combined, the question arises how they are to be managed by the elections' respective returning officers. The law's answer is to select a returning officer to take the lead in running the combined functions, such as equipping polling stations and verifying ballot papers, in the area of overlap between the two elections. We refer to this person as the "lead returning officer". The way the law identifies the lead returning officer depends on whether combination is mandatory or discretionary.

- (1) Where the combination is mandatory, the law sets out a hierarchy of returning officers to take the lead in managing the combined polls.
- (2) Where the combination is discretionary, the returning officers agree who should take the lead role.

10.58 Recommendation 68 above effectively removes the distinction between mandatory and discretionary combinations, and so the question arises whether under our proposed reforms the law should set down a hierarchy to determine the lead returning officer, or whether that should be a matter for agreement between returning officers.

10.59 In our consultation paper we noted that the current policy appears to be that certain returning officers should take the lead over others. For that reason, we took the view that the hierarchy should remain. We provisionally proposed 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.<sup>377</sup> Our proposal envisaged the possibility of a returning officer having a discretion to combine certain functions. All 27 of the consultees who responded to our proposal agreed with it, with one consultee noting the difficulties arising from the separate legislative responsibility of the devolved legislatures.<sup>378</sup>

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<sup>377</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.117.

<sup>378</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 10.74.

10.60 One consultee agreed with our proposal but expressed the view that the “selection of the lead returning officer should be a matter for the Electoral Commission.” We note that 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.<sup>379</sup> We maintain our recommendation.

### **Recommendation 70.**

10.61 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.

### **Combined conduct rules**

10.62 Another issue arising at combined polls is how election rules should govern the combined polls – what we referred to above as the “combined conduct rules” issue.<sup>380</sup> The current combined conduct rules set out modifications to the ordinary elections rules where a poll is combined with another. Both the elections rules and the combined conduct rules are election-specific.

10.63 In our consultation paper we expressed the view that standard polling rules should be drafted with combination in mind, so that if there is a combined poll the law provides a single solution to the coordination problem. This would simplify the current framework whereby combined conduct rules are contained in election-specific provisions, and avoid the need for extensive amendments to make comparatively small changes. As a result, we provisionally proposed that a single set of adaptations should provide for situations where a poll involves several ballot papers.

10.64 We envisaged, but did not specifically recommend, that the standard polling rules would include the following:

- (1) a requirement to distinguish ballot papers by colour;
- (2) a power to combine ballot boxes at the polling station;
- (3) a power to combine polling notices and poll cards in view of the combined poll;  
and

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<sup>379</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 10.76 and 10.77.

<sup>380</sup> See para 10.40(3) above. This is a problem faced in many jurisdictions, but the legal response to it varies. For example, in the Republic of Ireland, s 165 of the Electoral Act 1992 provides that where two or more polls take place on the same day, the polls “shall be taken at the same time, at the same places and in the same manner”. In practice ministerial orders on an election-specific basis make provision for matters such as the identification of returning officers, polling information cards, postal voting and the counting of votes. See for example the Electoral Act 1992 (Section 165) Regulations, SI 2019 No 214, relating to polls taking place on 24 May 2019.

(4) a power to combine corresponding number lists.<sup>381</sup>

10.65 Of the 28 consultees who responded to our proposal, 26 agreed with it. One disagreed and one expressed doubt. The consultee who disagreed said that “local discretion” should still apply. We do not agree. Electoral law generally gives detailed legal guidance on how to conduct a poll and we see no reason why the law 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, ballot papers should be distinguished by colour, but returning officers should be given a discretion whether or not, for example, to combine ballot boxes or polling notices and poll cards. Granting lead returning officers the appropriate discretions in the appropriate contexts would, we think, work well. The current law’s granting of “local discretion”, where combination is discretionary or not permitted, is a false comfort, because it fails to regulate unavoidable multi-poll situations.<sup>382</sup>

#### How our specimen drafting deals with combination

10.66 Our specimen drafting illustrates how conduct rules can holistically contain the combination rule that at all elections involving more than one poll, ballot papers must be distinguished by colour. It provides:

19 – (1) The ballot of every voter must consist of a ballot paper which is in the form set out in the Appendix and printed according to the directions specified in the Appendix...

(3) Each ballot paper must—...

(d) be of a different colour from the ballot papers used at any combined poll.<sup>383</sup>

10.67 Our specimen drafting also illustrates how a returning officer might be given a discretion as to whether to combine ballot boxes:

29 – (3) At a combined poll, the same ballot box may be used for the poll at the election and the poll at any other relevant election or referendum, if the person who, by virtue of regulation 4 of the Combination Regulations, is to discharge the function conferred by this rule, thinks it is appropriate.

10.68 This approach, as our specimen drafting illustrates, removes the need for entirely separate conduct rules governing combined polls, by addressing the exigencies of multiple poll situations within the standard conduct rules. There is, of course, a trade-off in that a returning officer running a standalone poll is asked to read a set of rules, parts of which do not apply to the poll with which they are concerned. We consider that this is an acceptable trade-off for the reduction in the number of sources, risks of error, and volume of electoral law.

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<sup>381</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 10.119.

<sup>382</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 10.82.

<sup>383</sup> Available at <https://www.lawcom.gov.uk/project/electoral-law/>.

10.69 We remain of the view that adapting the standard conduct rules to deal with the exigencies of combined polls is both achievable and desirable. We therefore repeat our recommendation here.

**Recommendation 71.**

10.70 A unified set of adaptations should provide for situations where a poll involves several ballot papers.

# Chapter 11: Electoral offences

## INTRODUCTION

- 11.1 Electoral conduct is regulated by specific criminal offences. These are set out in the Representation of the People Act 1983 (“the 1983 Act”) and, since the 1983 Act does not cover every type of election, are repeated in each election-specific legislative measure. Some general criminal offences are relevant in the electoral law context, but the special “electoral offences” that this chapter covers are important because they specifically target serious electoral offending by candidates and their agents.<sup>384</sup> Those which are labelled as “corrupt” or “illegal” practices also operate as grounds for invalidating an election pursuant to an election petition, and their commission disqualifies a person from standing for election for a period of 5 or 3 years respectively.<sup>385</sup> We noted in our consultation paper the importance of these offences being clearly drafted, so that they are understood by participants in the election process, as well as by the police and prosecuting authorities who must enforce them.<sup>386</sup>
- 11.2 We took the view in our consultation paper that fundamental change to the scheme of offences should not be the focus of our project. Instead we made proposals to rationalise, modernise and simplify the existing offences.<sup>387</sup> Since our interim report was published there have been a number of developments in this area, driven primarily by rising concern about intimidation at elections, and the way in which the existing offences interact with new digital campaigning techniques. Developments worth highlighting are Sir (now Lord) Pickles’ report into electoral fraud (“the Pickles Report”),<sup>388</sup> the report of the Committee on Standards in Public Life (“CSPL”) on intimidation,<sup>389</sup> the subsequent Government consultation on Intimidation, Influence and Information,<sup>390</sup> and the report of the Public Administration and Constitutional Affairs Committee on the urgent need for review of electoral law,<sup>391</sup> which all make recommendations about the offences that should regulate elections. They all demonstrate a growing consensus that the existing electoral offences require updating and clarification.

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<sup>384</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.1.

<sup>385</sup> As above, paras 11.3 and 11.4.

<sup>386</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>387</sup> As above, para 11.25.

<sup>388</sup> Sir Eric Pickles, *Securing the ballot: review into electoral fraud* (August 2016).

<sup>389</sup> Intimidation in Public Life, Report of the Committee on Standards in Public Life (December 2017) Cm 9543.

<sup>390</sup> Cabinet Office, *Protecting the Debate: Intimidation, Influence and Information* (July 2018) and *Response to Protecting the Debate: Intimidation, Influence and Information* (May 2019).

<sup>391</sup> Electoral law: the Urgent Need for Review, Report of the Public Administration and Constitutional Affairs Committee (2017-19) HC 244.

- 11.3 In addition to offences committed by candidates and agents, electoral legislation lays down a range of voting offences, for example pretending to be another person in order to cast a vote in their name (“personation”) and forms of postal voting fraud. Voting offences are not the focus of this chapter, though we go on to recommend that serious electoral fraud offences, including those of postal voting fraud, should be the subject of higher criminal penalties.<sup>392</sup>
- 11.4 One significant decision on electoral offences in recent years has been the Tower Hamlets electoral petition.<sup>393</sup> The petitioners challenged Lutfur Rahman’s election as Mayor of the borough on the basis that he was, personally and by his agents, guilty of corrupt and illegal practices. The challenge was upheld and his election annulled. Commissioner Mawrey QC found that Mr Rahman was personally guilty of making false statements about an opposition candidate, and was guilty by his agents of personation, postal voting fraud, bribery and a number of other offences. He also found that undue influence had been exerted in a letter signed by 101 imams exhorting readers to vote for Mr Rahman, amounting to a threat to inflict spiritual injury. Complaints about the conduct of Mr Rahman’s supporters outside polling stations were not, however, found to have “crossed the line” so as to amount to the offence of undue influence, even though Commissioner Mawrey QC took the view that that conduct did amount to intimidation. References to particular parts of the decision are made in this chapter where they are relevant to our discussion of the relevant offences.

## THE LEGISLATIVE FRAMEWORK FOR ELECTORAL OFFENCES

- 11.5 The law governing electoral offences is set out principally in Part 2 of the 1983 Act as respects UK Parliamentary elections. Part 2 also governs local government elections in England and Wales, and elections to the Greater London Authority. For other elections, discrete legislative measures refer to the 1983 Act and apply some or all of its provisions, with or without modifications.<sup>394</sup>
- 11.6 One of the chief problems with the legislation concerning electoral offences is that it uses complex and outdated drafting, much of it unchanged from the Corrupt and Illegal Practices Prevention Act 1883. The fact that the 1983 Act offences are repeated in each discrete election-specific measure moreover suggests they are intended to be (as they once were) of general application. Our interim report therefore recommended that electoral offences should be drafted more simply, and should be set out in a single set of provisions applying to all elections.<sup>395</sup>

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<sup>392</sup> See paras 11.85 and 11.87 below.

<sup>393</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB).

<sup>394</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 11.1.

<sup>395</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.5, 11.11 and 11.12.

## “CORRUPT AND ILLEGAL PRACTICES”

11.7 Offences which are labelled a “corrupt” or “illegal” practice have special significance:

- (1) they vitiate the election if a successful 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).<sup>396</sup>

11.8 Corrupt and illegal practices therefore 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>397</sup>

11.9 The principal difference between corrupt and illegal practices is the length of the potential disqualification; 5 years for a corrupt practice, and 3 years for an illegal practice. For some illegal practices, it is also possible to obtain “relief” from the courts. The court has a discretion to exempt an innocent act, omission, payment or employment from being an illegal practice if it is shown that it arose from inadvertence, accidental miscalculation or some other reasonable cause, and “did not arise from any want of good faith”.

11.10 While this approach 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. 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. Our interim report saw this as a call for better labelling of corrupt and illegal practices, as opposed to a substantive overhaul; the interim report recorded our view that a modern drafter could use clearer labels than the existing ones.<sup>398</sup>

11.11 Our interim report made 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.<sup>399</sup> The first of these was that there should be a single set of electoral offences

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<sup>396</sup> A person convicted of personation and certain other voting offences is also disqualified from being registered and voting at any election for a disqualification period.

<sup>397</sup> See chapter 13 at paras 13.11 to 13.23 for discussion of the grounds on which an election may be challenged. 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.

<sup>398</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.7 to 11.9.

<sup>399</sup> As above, para 11.10.

set out in one place in primary legislation, which applied to all elections.<sup>400</sup> We repeat that recommendation below. Some consultees pointed out that this proposal would have to reflect the devolutionary position in the UK. We agree; the offence-creating legislation will need to reflect devolved legislative competence.<sup>401</sup>

### **Recommendation 72.**

11.12 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 19th 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.

11.14 These proscriptions continue in the form of corrupt practices of bribery, treating and undue influence, to which we now turn. We consider first the overlapping offences of bribery and treating and secondly the various prohibitions that the 1983 Act groups under the heading of undue influence.

### **Bribery and treating**

11.15 Electoral bribery under section 113 of the 1983 Act proscribes the giving or receiving of a bribe, defined (in summary) as money or employment offered or received with the intention of inducing a change in voting behaviour or the return of a candidate. Treating under section 114 is the offence of corruptly giving or providing meat, drink or “provision” to others with the intention of influencing voting behaviour.<sup>402</sup>

11.16 The mental element in bribery, our consultation paper proposed, should be an intention to procure or prevent the casting of a vote at the election. Thirty-five consultees submitted a response to this proposal, and all supported it.<sup>403</sup> Richard

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<sup>400</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.11 and 11.12.

<sup>401</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.12. We note that the Referendums (Scotland) Act 2020, s 35 and sch 6 make provision for offences in relation to referendums in Scotland.

<sup>402</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.31 to 11.44.

<sup>403</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.16.

Mawrey QC, in his response, 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] that ... present at Tower Hamlets. We must avoid going back to an over-simplified view of bribery as being confined to money paid to individual voters".<sup>404</sup>

11.17 We agree and do not envisage our simplification of the offence resulting in its scope being narrowed. We therefore maintain our recommendation that the offence of bribery should be restated in a more modern, simpler form.<sup>405</sup>

11.18 Our interim report also recommended that the electoral offence of treating should be abolished and the behaviour it captures prosecuted as bribery where appropriate. All but one of the 35 consultees who responded to this question in our consultation paper agreed.<sup>406</sup> The problems with treating were also noted by Commissioner Mawrey QC in the Tower Hamlets election petition case; he suggested that serious consideration should be given "to amalgamating treating – surely an obsolescent if not obsolete concept in the modern world – with the overall offence of bribery".<sup>407</sup>

11.19 Our interim report noted that Gerald Shamash, an experienced electoral lawyer, had expressed scepticism to us that treating could or should be subsumed under bribery.<sup>408</sup> The Electoral Commission had supported the provisional proposal, but cautioned against substantive change, stressing the need to continue to prohibit and to deter the behaviour at which the offence of treating is targeted.<sup>409</sup>

11.20 We are proposing simplification rather than major substantive change. In summary, the current offence of bribery under section 113 of the 1983 Act is limited to inducements in the form of money or employment; the offence of treating relates more widely to the provision of "meat, drink, entertainment or provision". Although the concern of the Victorians was the practice of plying mobs with food and drink to create intimidating crowds, that concern was not fully reflected in the drafting of the offence. To "treat" a single person, irrespective of whether anyone else is treated, is a breach of section 114 of the 1983 Act.

11.21 We remain of the view that a simpler, clearer way to cover improper conduct currently comprised in the offence of treating is to widen the bribery offence to cover inducements other than money or employment that are given or offered with intent to procure or prevent the casting of a vote.<sup>410</sup>

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<sup>404</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.17 and *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>405</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.18.

<sup>406</sup> As above, para 11.19.

<sup>407</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 670.

<sup>408</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.22.

<sup>409</sup> As above, para 11.20.

<sup>410</sup> As above, para 11.22.

11.22 In consequence of the decision not to ask us to produce a draft Bill, we have not considered points of detailed drafting. Subject to that, we consider that the conduct element of electoral bribery could be modelled on that of the general offence of bribery contrary to the Bribery Act 2010, which extends to the whole of the UK. Its relevant conduct elements in summary are: (1) offering, promising or giving a financial or other advantage to another person (with the intention of inducing any person to act improperly in particular ways or to reward a person for doing so); and (2) seeking or accepting a financial or other advantage as an inducement or reward for such improper action.

#### **Recommendation 73.**

11.23 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 74.**

11.24 The electoral offence of treating should be abolished and the behaviour that it captures should where appropriate be prosecuted as bribery.

### **Undue influence**

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

- (1) if he, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or
- (2) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents, or intends to impede or prevent, the free exercise of the franchise of an elector or proxy for an elector, or so compels, induces or prevails upon, or intends so to compel, induce or prevail upon an elector or proxy for an elector either to vote or to refrain from voting.

11.26 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>411</sup>

11.27 Our consultation paper 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 retaining the third component of the offence was justifiable. Following our consultation we concluded that the three components should all be retained and should be restated as offences of intimidation, deception and improper pressure.<sup>412</sup>

11.28 Since our interim report the reform of the section 115 offence of undue influence has been the subject of recommendations by Sir Eric Pickles, which have led to a Government commitment to reform the offence. Below we discuss the Government's plans, before considering in more detail some of the issues raised by consultees and by developments since our interim report. We conclude by considering how the offence should be redrafted.

#### Government plans to reform undue influence

11.29 In 2018 the Government consulted on whether the offence of undue influence should be reformed, and if so, which elements of the offence should be retained.<sup>413</sup> In its published response following the consultation it explained that the redefined offence would be "aimed squarely at protecting voters from undue influences to vote in a certain way", and would encompass the following components:

- (1) physical acts of violence or threats of violence;
- (2) non-physical acts inflicting or threatening to inflict damage, harm or loss;
- (3) actions of duress;
- (4) actions of trickery;
- (5) acts which are intended to cause harm;
- (6) direct and indirect acts which cause the elector harm;
- (7) offences committed by or on behalf of a perpetrator in relation to acts that cause the elector harm; and
- (8) acts which are carried out before and after the election.<sup>414</sup>

11.30 The response also indicated the Government's intention to retain temporal or spiritual injury as elements of the redrafted offence. The offence will also expressly include

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<sup>411</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.

<sup>412</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.26 to 11.62.

<sup>413</sup> UK Government, *Protecting the Debate: Intimidation, Influence and Information* (July 2018) section 2.

<sup>414</sup> UK Government, *Response to Protecting the Debate: Intimidation, Influence and Information* (May 2019) p 29.

“intimidation, including (but not limited to) intimidation inside and outside a polling station”.<sup>415</sup>

11.31 In our view our proposed restatement encompasses the eight elements, but also provides a helpful way of understanding and categorising them. For example, in our view “intimidation” would capture points (1) to (3) and (5) to (7) of the above list. Point (4) equates to our proposed offence of deception. The reference to spiritual injury indicates that the Government intends to retain the element of the current offence that we prefer to describe as improper pressure and discuss separately below.<sup>416</sup>

### **Pressure, duress and trickery: our proposals in consultation**

11.32 Our consultation paper provisionally proposed that the first two components of undue influence identified in paragraph 11.25 should respectively be restated as offences of pressure, duress and trickery. All 37 consultees who provided a response to this proposal agreed with it.<sup>417</sup> A common theme repeated by consultees was that the drafting of the offence should be precise enough to enable a successful prosecution.<sup>418</sup> In our interim report we made a recommendation broadly in accordance with our provisional proposal, concluding that pressure and duress could appropriately be categorised as “intimidation” and trickery as “deception”. Our proposal regarding deception had been uncontroversial; we discuss next an issue raised in relation to our proposal of an offence of intimidation, before turning to the question of abuse of influence or “improper pressure”, on which we had not made a provisional proposal but had asked consultees whether this component of the section 115 offence should be retained.

### **Intimidation: an argument for “lowering the bar”?**

11.33 Richard Mawrey QC argued that the proposed offences should be widely drawn, and that duress (as we had termed it) 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”.<sup>419</sup> This followed his findings in the Tower Hamlets petition, in which he observed:

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>420</sup>

11.34 This concern was noted in the Pickles Report, which recommended that “[a] lower test of ‘intimidation’ than the one currently set in the Representation of the People Act 1983 should be introduced”.<sup>421</sup> As noted at paragraph 11.30 above, in response the

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<sup>415</sup> As above, p 30.

<sup>416</sup> See paras 11.50 to 11.59 below.

<sup>417</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.26 to 11.35.

<sup>418</sup> As above, para 11.28.

<sup>419</sup> As above, para 11.32.

<sup>420</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 623.

<sup>421</sup> Sir Eric Pickles, *Securing the ballot: review into electoral fraud* (August 2016) pp 8 and 9.

Government has stated its intention to include “intimidation including (but not limited to) intimidation inside and outside a polling station”. The Government’s response to that consultation notes that intimidation:

is already implicitly included in the Representation of the People Act 1983 offence of undue influence. However, for intimidation to be captured it has to reach the level of conduct described in the offence, for example violence or threats of violence and duress.

11.35 The Government proposes that, in order to constitute intimidation, behaviour “would not need to amount to physical force, violence or restraint but would include behaviour which could reasonably be classed as intimidating”. The Government does not intend to define harm, duress or intimidation within electoral law, given that these terms are not currently defined in the criminal law. Instead these terms will be “left to be construed according to their ordinary meaning and as conduct that a prosecutor could be expected to identify”.<sup>422</sup>

11.36 Our interim report explained our reservations about lowering the threshold of conduct amounting to intimidation under the current offence of undue influence.<sup>423</sup> The current offence covers the direct or indirect infliction or threat of force, violence, restraint, damage or harm to affect voting behaviour, as well as impeding or preventing the free exercise of the franchise by what would today be called duress. We were concerned that a new prohibition, difficult to define, 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 have to avoid penalising mere political fervour and the desirable promotion of participation and canvassing of voters. We took the view that a more clearly defined offence of improper pressure (the third component identified in paragraph 11.27 above) would sufficiently criminalise intimidation by means falling short of threats of violence or harm.

11.37 If “intimidation” is to be given a wider scope than in the current section 115, we agree with the Government’s view that the term cannot usefully be further defined in statute. Our recommendation in respect of the “improper pressure” component of our recommended new offence was that pressure should be improper if it involved a threat to do something unlawful or a reasonable person would regard it as improperly infringing the free exercise of the franchise. It would be possible similarly to provide that conduct is intimidating if a reasonable person would so regard it; that is a matter of drafting on which we do not express a view.

#### **Abuse of influence: our consultation question**

11.38 Our consultation paper suggested that a third component of the current offence of undue influence targets the abuse of a position of influence, making particular reference to religious influence by its reference to the threat of “spiritual harm”. We

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<sup>422</sup> Cabinet Office, *Response to Protecting the Debate: Intimidation, Influence and Information* (May 2019) p 29.

<sup>423</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.35.

asked whether the law should regulate the exercise of abuse of influence, religious or otherwise, by a person over a voter which falls short of duress or trickery.<sup>424</sup>

11.39 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.<sup>425</sup> Three consultees disagreed, while two consultees were unsure. Some consultees expressed concern as to how easy such an offence would be to prove and successfully prosecute. The Metropolitan Police, for example, considered that a new offence should not be introduced, because it is too difficult to define what is or is not abuse of influence.<sup>426</sup>

11.40 Although a majority of consultees thought the abuse of influence over voters (religious or otherwise) should be regulated by electoral law, it was 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, which thought 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.<sup>427</sup>

11.41 Whilst we saw some merit in this view, and considered that it would largely address consultees' concerns about the enforceability of an abuse of a position of influence offence, we expressed reservations in our interim report about leaving the protection of particularly vulnerable voters to an undue influence offence which only expressly covered intimidation and deception. We saw this as a particular concern for voters with mental impairments such as dementia.

#### Should the new offence expressly target threats of spiritual injury?

11.42 One consultee, David Boothroyd (councillor on Westminster County Council), 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>428</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

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<sup>424</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.49 to 11.53.

<sup>425</sup> As above, paras 11.36 to 11.46.

<sup>426</sup> As above, para 11.43.

<sup>427</sup> As above, para 11.44.

<sup>428</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.

such an interpretation was being made by a Protestant judiciary guided by a unionist government.<sup>429</sup>

11.43 However, in the Tower Hamlets election case, which was decided after the conclusion of our consultation period, Commissioner Mawrey QC found that undue influence by threat of spiritual injury continued to have 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>430</sup> at that time and the attitudes of the faithful Muslims of Tower Hamlets.<sup>431</sup>

11.44 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>432</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>433</sup> He summarised his view of the scope of section 115 thus:

There 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’.<sup>434</sup> (emphasis added).

11.45 Commissioner Mawrey QC 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. In his response to our consultation, he strongly supported the continued inclusion of abuse of religious influence in a redrafted undue influence offence. That concern was later echoed in the Pickles Report, which recommended that the undue influence offence retain a specific reference to “spiritual/religious influence”, for the following reasons.

Although the Law Commissions’ aim in redrafting undue influence is intended to promote better understanding of the offence, the loss of a specific reference to religious / spiritual influence could reduce understanding by those in positions of religious authority of the need to express political views in a responsible way (so as not to distort the will of voters), and could increase reluctance on the part of those who police electoral fraud to act on abuses. The potential for spiritual leaders, through their pronouncements, to abuse the convictions of religious voters is unique

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<sup>429</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.47.

<sup>430</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>431</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 562.

<sup>432</sup> Commissioner Mawrey QC observes in his judgment that the letter was also shared widely on social media.

<sup>433</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), para 549.

<sup>434</sup> As above, para 158.

and does not exist in relation to statements by other authorities such as the media, business or other special interest groups whose statements seek to persuade people to vote for a particular candidate. The latter's statements can be readily dismissed by any voter as opinion, whereas those of spiritual leaders may cause religious voters to believe they have no real choice in how they should vote.<sup>435</sup>

11.46 In response the Government stated that "the existing offence of spiritual interference should be maintained".<sup>436</sup> We return to this in our discussion of reform recommendations below.

### Reforming the offence of undue influence

11.47 We remain of the view that the undue influence offence is poorly expressed in legislation. The conduct which is criminal and the accompanying mental element are not clearly set out. The aim of safeguarding voters from intimidation, deception 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.

### Intimidation

11.48 Our interim report recommended recasting the intimidation aspect of the offence as involving the performance 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, and so on, with the intention of preventing or influencing voting.<sup>437</sup> As noted at paragraph 11.30 above, the Government additionally proposes to include "intimidation" as a self-standing form of the offence.

### Deception

11.49 As we have remarked above, our proposal to retain an offence relating to trickery was uncontroversial. We maintain the recommendation in our interim report that deception should remain an electoral offence. We add that in our view the new offence should maintain the policy enshrined in section 115 of the 1983 Act that the offence should extend to any "fraudulent device or contrivance" engaged in with the intention of affecting voting (though expressed in more modern language). In other words, the offence should continue to be capable of being committed without proof that any voter was in fact deceived.

### Improper pressure

#### Improper threats

11.50 Undue influence also extends to threats 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

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<sup>435</sup> Sir Eric Pickles, *Securing the ballot: review into electoral fraud* (August 2016) p 45.

<sup>436</sup> Cabinet office, *Government response to Sir Eric Pickles' review of electoral fraud* (December 2016) p 21; see also para 11.30 above.

<sup>437</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.54.

employer or landlord may be within his or her strict legal rights in terminating a contract of employment or a lease. Nevertheless, election law seeks to prevent such improper pressure being applied to voters, currently by proscribing the threat or infliction of any damage, harm or loss.<sup>438</sup>

### Religious and other influence

- 11.51 In our view there is a continued case for proscribing interventions by people with influence over others, including religious figures, intended to manipulate voting behaviour. But, plainly, not every religious pronouncement is objectionable. Commissioner Mawrey QC'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. It is not, however, clear where section 115 of the 1983 Act draws that line.
- 11.52 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 and the Human Rights Act 1998.<sup>439</sup> Religious leaders' freedom to express the tenets of their faith includes expressing a view on the compatibility with those tenets of the policies of political parties. Limitations on freedom of expression and on the manifestation of religious beliefs must be prescribed by law, and be necessary in a democratic society.
- 11.53 Accepting that misuses of religious influence ought to be capable of being covered by an electoral offence, the next question is whether the law should refer to such influence specifically. Our interim report recommended that it should simply be a potential form of improper pressure for the purposes of the recommendation summarised at paragraph 11.27 above. We remain of that view.
- 11.54 We referred above, at paragraph 11.45, to Sir Eric Pickles' view that the potential for spiritual leaders to abuse the convictions of religious voters is unique, and that the absence of a reference to "religious/spiritual influence could reduce understanding by religious leaders of the need to express views in a responsible way". We are not persuaded that, as a general proposition, the level of influence which can be exerted by religious leaders is unique; it can be shared by charismatic leaders of groups of various sorts. We believe that the best approach to proscribing improper pressure is to focus attention on the form of pressure applied rather than the nature of the relationship within which it is applied.<sup>440</sup> We remain of the view expressed in our

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<sup>438</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.55.

<sup>439</sup> We note that following the *Tower Hamlets* case, a judicial review brought by Mr Rahman challenged the finding of the election court that he was guilty of undue influence by way of spiritual injury, on the grounds that it violated his rights under article 9 (freedom of religion) of the European Convention on Human Rights. The Divisional Court granted permission on that ground following an oral hearing on 26 January 2016, but the case did not proceed. See the discussion at para 9 of *R (Rahman) v Local Government Election Court* [2017] EWHC 1413.

<sup>440</sup> A 19<sup>th</sup> century case framed the enquiry as whether power was used "to excite superstitious fears or pious hopes, to inspire ... despair or confidence...": Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 11.49.

interim report, that it would be impossible to devise a comprehensive catalogue of such relationships and fear that instancing one particular type of relationship in statute has the potential to distort the application of the provision.

11.55 It is certainly important that religious leaders understand the scope of any revised offence of undue influence, but in our view that does not necessarily require a specific reference to religious influence in legislation. Understanding of the application of the offence to religious leaders and others could be promoted by Electoral Commission guidance.

### **Conclusion on improper pressure**

11.56 Our interim report concluded that a restated undue influence offence should seek generally to proscribe “improper” pressure (even if falling short of doing or threatening something which is itself illegal) with a view to preventing, in particular, two forms of improper pressure. First, threats of harm which do not involve illegality but are nevertheless improper if they are made in order to influence voting; and second, the improper use of influence or authority so as to manipulate voting.

11.57 We did (and do) not consider it practicable to create a catalogue of relationships capable of giving rise to improper pressure, nor a catalogue of improper forms of pressure. We recommend instead that the law should 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.

11.58 We continue to consider that the introduction of a “reasonable person” test will enable campaigners, the police, prosecutors and courts to distinguish proper campaigning (which includes persuading, warning, arguing, all of which involve pressure) from improper infringements of the free exercise of the franchise (which aim to eliminate or restrict the choice of the voter).<sup>441</sup>

11.59 We conclude that the offence of undue influence should be redrafted to cover intimidation, deception<sup>442</sup> and other improper pressure. Improper pressure should comprise two limbs: the commission or threat of commission of an illegal act, and pressure which a reasonable person would regard as improperly impeding the free exercise of the franchise.

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<sup>441</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.59 and 11.60.

<sup>442</sup> We prefer the term “deception” to trickery or use of a “fraudulent device”.

### **Recommendation 75.**

11.60 Undue influence should be restated as offences of intimidation, deception and improper pressure. Pressure is improper if:

- (1) it involves the commission or threat of commission of an illegal act; or
- (2) a reasonable person would regard it as improperly impeding the free exercise of the franchise.

### **Consent to prosecution**

11.61 The reformed offence of undue influence will involve making judgements about what is and is not improper pressure. Prosecutorial discretion will therefore remain an important tool in determining the cases which it is appropriate to bring before the courts. There is however a risk in England and Wales that the undue influence offence may be privately prosecuted in circumstances where the pressure complained of was entirely proper.<sup>443</sup>

11.62 A requirement of consent to prosecution is not a feature of current electoral law. We nonetheless considered whether the Director of Public Prosecutions' consent should be necessary for the prosecution of any of our recommended electoral offences. Our interim report concluded that such a requirement should apply to our recommended offences insofar as they involve using pressure which a reasonable person would regard as improper.<sup>444</sup> This is because of the risks that inappropriate prosecutions could stigmatise communications that in fact are legitimate exercises of religious freedom or free speech, or be used to sabotage a political campaign. Even an ill-founded prosecution, with its attendant publicity, could seriously hamper a candidate's campaign.

### **Recommendation 76.**

11.63 In England and Wales prosecutions pursuant to Recommendation 75(2) should only be brought by or with the consent of the Director of Public Prosecutions.

### **Imprinting online material**

11.64 Currently printed campaign material must be labelled (or "imprinted") with the name of the person who causes it to be published and certain other information. If not, the

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<sup>443</sup> The same concerns do not arise in Scotland, where private prosecutions are exceptionally rare and can only be brought if authorised by statute or a court order. See Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.61. The concerns do arise in Northern Ireland and the interim report made the same recommendation for Northern Ireland as for England and Wales.

<sup>444</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.62 to 11.66. In practice the consent of the Director of Public Prosecutions could be given by a Crown Prosecutor, under s 1(7) of the Prosecution of Offences Act 1985.

person is guilty of an offence and, in the case of candidates and agents, an illegal practice.<sup>445</sup> Our consultation paper asked whether it was desirable or feasible to extend this system of regulation to online material. Of the 34 responses to that consultation question, 22 supported regulation of online material. Other consultees expressed concerns that regulation of online material was undesirable or not feasible.<sup>446</sup>

11.65 An argument commonly 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 rules regulating 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.<sup>447</sup>

11.66 Our interim report considered in detail the views of consultees on the feasibility of extending the imprint requirements, and concluded that regulation was possible. We therefore recommended that the imprint requirement should be extended to online campaign material which may reasonably be regarded as intending to procure or promote any particular result, subject to a reasonable practicability defence.<sup>448</sup>

11.67 Our suggested restriction of the imprint requirement (to material intended to procure or promote a particular result in an election or referendum) drew from the experience of regulating online material in Scotland. The Scottish Independence Referendum Act 2013 introduced regulation of online material for the first time.<sup>449</sup> The requirement was subject to a defence of reasonable practicability. The provision was however criticised for being over-broad, as it caught any material “wholly or mainly relating to the referendum”.<sup>450</sup> In our interim report we took the view that the imprint requirement should instead use the definition of “campaign material” used by the 1983 Act; that is, material intended to promote or procure a particular outcome.<sup>451</sup> That approach has now been adopted by the Referendums (Scotland) Act 2020, which is discussed further in chapter 14. That Act reproduces the regulation of online material from the

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<sup>445</sup> Representation of the People Act 1983, s 110.

<sup>446</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.68 to 11.74.

<sup>447</sup> As above, para 11.70.

<sup>448</sup> As above, paras 11.75 and 11.76, and recommendation 11-6 at p 156.

<sup>449</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 11.59.

<sup>450</sup> Electoral Commission, *Report on the Scottish Independence Referendum held on 18 September 2014* (December 2014), available at [https://www.electoralcommission.org.uk/sites/default/files/pdf\\_file/Scottish-independence-referendum-report.pdf](https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Scottish-independence-referendum-report.pdf), para 5.138 (last visited 3 March 2020).

<sup>451</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.76.

2013 Act, but in the case of non-printed material, restricts its application to cases where:

the publication can reasonably be regarded as being done with a view to promoting or procuring a particular outcome in the referendum.<sup>452</sup>

11.68 The Bill originally included a defence of reasonable practicability, which was removed from the draft by way of a Scottish Government amendment. The Electoral Commission did not believe the defence was necessary, as, following its work with social media companies, it considered it “absolutely practical in all forms of digital campaigning for there to be imprint information”.<sup>453</sup> The Electoral Commission also noted that including the exception would mean there was “no incentive for the social media companies to include the imprint”. We note that a similar regime operates in Canada, without the defence.<sup>454</sup>

11.69 A further amendment to what is now the Referendums (Scotland) Act 2020 excluded from the imprint requirement material published online by an individual other than a permitted participant in the referendum, which expresses the individual’s personal opinion and is published on the individual’s own behalf on a non-commercial basis.<sup>455</sup> This reflects a suggestion by the Electoral Commission.<sup>456</sup>

11.70 We remain of the view that the imprint requirement should apply to online material, but no longer consider it appropriate specifically to recommend a reasonable practicability defence. We first made this recommendation in early 2016, when the use of social media to publish election material was very much in its infancy. We believe the law in this area should reflect the regulatory experience acquired since 2016. We are therefore removing that part of our recommendation, in order to leave it for governments, working with stakeholders, to determine the right policy. The policy might include an exception for statements of personal opinion by individuals acting on a non-commercial basis; we express no view on this.

11.71 Since our interim report, and particularly since the 2017 general election, concerns around the transparency of digital advertising have increased. Support for the extension of the imprint requirement to online material has been expressed by the Electoral Commission,<sup>457</sup> CSPL,<sup>458</sup> and the Digital, Culture, Media and Sport

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<sup>452</sup> Referendums (Scotland) Act 2020, sch 3 paras 28(1)(b) and (2).

<sup>453</sup> FCC 18 September 2019, col 1; see also Electoral Commission, *Written Evidence to the Finance and Constitution Committee: Referendums (Scotland) Bill* (August 2019) para 30.

<sup>454</sup> Canada Elections Act, SC 2000, c 9, s 320.

<sup>455</sup> Referendums (Scotland) Act 2020, sch 3 para 28(3).

<sup>456</sup> See the letter from Michael Russell MSP, Cabinet Secretary for Government Business and Constitutional Relations, to the Convener of the Finance and Constitution Committee (14 November 2019), available at [https://www.parliament.scot/S5\\_Finance/General%20Documents/20191114-\\_Letter\\_from\\_Mike\\_Russell\\_to\\_Bruce\\_Crawford.pdf](https://www.parliament.scot/S5_Finance/General%20Documents/20191114-_Letter_from_Mike_Russell_to_Bruce_Crawford.pdf) (last visited 3 March 2020).

<sup>457</sup> Electoral Commission, *Digital campaigning: increasing transparency for voters* (June 2018) para 31.

<sup>458</sup> Intimidation in Public Life, Report of the Committee on Standards in Public Life (December 2017) Cm 9543, p 61.

Committee.<sup>459</sup> The Government is now developing technical proposals for a digital imprint regime.<sup>460</sup> For completeness, we repeat the recommendation from our interim report here, omitting the recommendation of a reasonable practicability defence.

### **Recommendation 77.**

11.72 The imprint requirement should extend to online campaign material which may reasonably be regarded as intending to procure or promote any particular result.

## **OTHER ILLEGAL PRACTICES TARGETING CAMPAIGN CONDUCT**

11.73 Our consultation paper and interim report considered two other illegal practices. We considered:

- (1) 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
- (2) whether the offence of falsely stating that another candidate has withdrawn should be retained.

### **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?**

11.74 It is currently an illegal practice under section 97 of the 1983 Act to disturb a “lawful public meeting” held in a place where an election is imminent. A key ingredient of the crime is that the meeting must be lawful. The textbooks do not make it clear what makes a meeting unlawful, other than the meeting amounting to an obstruction of the highway in breach of a public park byelaw. In our consultation paper, we took the view that the “lawfulness” of the meeting was irrelevant, and that the general criminal law contained in the Public Meeting Act 1908 was sufficient to regulate the conduct of the general public.<sup>461</sup>

11.75 Of the 31 consultees who answered this question, 19 agreed that the illegal practice should only apply to candidates and those supporting them. Twenty-two consultees agreed with the second part of the question, that the illegal practice of disturbing election meetings should no longer be predicated on the lawfulness of the meeting.<sup>462</sup>

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<sup>459</sup> Disinformation and “fake news”, Final Report of the Digital, Culture, Media and Sport Committee (2017-19) HC 1791.

<sup>460</sup> UK Government, *The Online Harms White Paper: Government Response to the Committee’s Twelfth Report* (September 2019), p 3, available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/2501/2501.pdf> (last visited 3 March 2020).

<sup>461</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.62 to 11.65.

<sup>462</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.82 and 11.83.

11.76 Some consultees argued that this offence should be abolished completely. SOLAR (whose response was endorsed by the Electoral Management Board for Scotland) thought that the offence was unnecessary, and that disturbances of meetings were better dealt with under the general criminal law.<sup>463</sup> However, this would mean that candidates or their supporters would no longer be subject to the public law consequences of committing an illegal practice, outlined above.<sup>464</sup> A general criminal offence would not be as effective a means of holding candidates and their supporters accountable for unfair campaign practices.

11.77 Other consultees thought that the offence should no longer be predicated on the meeting being “lawful”, but argued against the restriction of the offence to candidates and their supporters. They argued that the disturbance of an election meeting by anyone is a serious matter with the potential to frustrate the democratic process.<sup>465</sup>

11.78 We remain of the view expressed in our interim report that the general criminal offence under section 1 of the Public Meeting Act 1908 suffices to criminalise the disturbance of meetings by, for example, pressure groups. A pressure group might, for example, disrupt a meeting for the purpose of promoting a particular candidate. If the group does so 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 were therefore not persuaded by these objections.

11.79 We recommend that the public in general should remain criminally liable for any breach of the Public Meeting Act 1908, while a candidate and their supporters should be both criminally liable and liable to disqualification under a reformed electoral offence that is not predicated on the lawfulness of the meeting.<sup>466</sup>

### **Should the offence of falsely stating that another candidate has withdrawn be retained?**

11.80 Section 106(5) of the 1983 Act makes it an illegal practice, before or during an election, to state falsely that a candidate has withdrawn from the election, for the purpose of promoting or procuring the election of another candidate.<sup>467</sup> Our consultation paper asked whether the offence should be retained.

11.81 Of the 34 consultees who answered this particular question, 29 considered that candidates should not be permitted to state falsely that another candidate had withdrawn. Consultees were more divided on whether it was better to regulate this conduct through our restatement of undue influence by deception, or to retain a separate offence. Our interim report expressed our view that if a deliberately false statement was effective to convince voters that a candidate had withdrawn, it would

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<sup>463</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.85.

<sup>464</sup> See paras 11.8 and 11.9 above.

<sup>465</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.86.

<sup>466</sup> As above, para 11.87.

<sup>467</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.66 to 11.69.

amount to undue influence by deception. We therefore concluded that it was unnecessary to maintain a separate overlapping offence.<sup>468</sup>

11.82 On further consideration of the offence of undue influence by deception, we concluded earlier in this chapter that that offence should continue not to be predicated on any person being deceived; in other words it should remain a “conduct” rather than a “result” offence.<sup>469</sup> This fortifies us in the view that a separate offence of making a false statement that a candidate has withdrawn is otiose and we maintain the recommendation that it should not be retained.

#### **Recommendation 78.**

11.83 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 79.**

11.84 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**

11.85 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>470</sup> In our consultation paper, we asked consultees whether an increased sentence of ten years’ custody should be available for cases of serious electoral fraud, as an alternative to prosecution for conspiracy to defraud.<sup>471</sup> Of the 32 consultees who provided a response to this consultation question, 29 agreed that an increased sentence should be available.<sup>472</sup> The Electoral Commission supported increased sentences to provide appropriate deterrents, but thought further consideration should be given to the meaning of “serious electoral fraud”.

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<sup>468</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.88 to 11.92.

<sup>469</sup> See para 11.49 above.

<sup>470</sup> There appears to be less practical experience in Scotland of this offence in an electoral context, and there may be evidential and conceptual difficulties in proving the offence in Scots law.

<sup>471</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.

<sup>472</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 11.94 to 11.96.

11.86 Our interim report explained we used that term 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.<sup>473</sup> We do not consider it necessary to use that term in legislation. We recommended 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.<sup>474</sup> We are still of the same view and maintain that recommendation here.

#### **Recommendation 80.**

11.87 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.

### **INTIMIDATION OF CANDIDATES AND CAMPAIGNERS**

11.88 As we note above, the law has long recognised that voters require protection from threatening behaviour, and has sought to provide this protection through the offence of undue influence. In recent years however there has been greater focus on the need for protecting those in public life from intimidatory and abusive behaviour, including candidates, campaigners, and office-holders.<sup>475</sup> CSPL's review noted that the "scale and intensity of intimidation is now shaping public life in ways which are a serious issue", and that electoral law is "out of date".<sup>476</sup>

11.89 CSPL's report focussed particularly on the protection of Parliamentary candidates. It concluded that existing criminal offences were adequate to cover the full range of cases of intimidation under its consideration, but recommended that in some cases there ought to be electoral law sanctions attached to these criminal offences, to mark the seriousness of the threat posed to the democratic process. In particular CSPL wished to capture intimidatory behaviour directed towards an individual specifically in their capacity as a Parliamentary candidate or campaigner, which is intended to influence the result of the election.<sup>477</sup>

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<sup>473</sup> We refer to widespread concern about postal voting fraud in paras 6.42 and 6.43 above.

<sup>474</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 11.97.

<sup>475</sup> In November 2018 the Law Commission published its scoping paper *Offensive and Abusive Communications Online*, noting the online abuse received by MPs including Diane Abbott, Jess Phillips and Stella Creasey. See Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (2019) Law Com 281, paras 3.59, 3.79 and 3.78.

<sup>476</sup> Intimidation in Public Life, Report of the Committee on Standards in Public Life (December 2017) Cm 9543. p 13.

<sup>477</sup> Intimidation in Public Life, Report of the Committee on Standards in Public Life (December 2017) Cm 9543. (December 2017) Cm 9543 pp 60 and 61.

11.90 The Government consulted on that proposal between July and October 2018, and published its response in May 2019. It explained that it intends to develop:

a new electoral offence of intimidation of candidates and campaigners by the means of applying electoral sanctions to existing offences of intimidatory behaviour, including, but not limited to, the offences identified by the Committee in its report.<sup>478</sup>

11.91 The new offence would be a corrupt practice, and would apply to a specific list of existing intimidatory offences.<sup>479</sup> If convicted, an offender would be disqualified from standing for election for five years, but would not lose the right to vote. This reflects the existing law, where only persons convicted of certain offences such as personation or postal voting offences are disqualified from voting for a period.<sup>480</sup> Similarly to other corrupt practices, the new offence would also be punishable by imprisonment (one year, in this case) or a fine, or both. Existing criminal sanctions for the underlying offence would also continue to apply.

11.92 The Public Administration and Constitutional Affairs Committee has subsequently indicated its support for the new offence, in its report on the need for review of electoral law. It has also recommended that “the creation of electoral offences of intimidation of candidates and campaigners” should be included in this report.<sup>481</sup> Our consultation and interim report sought to update and clarify the existing scheme of offences, and so did not consider whether there ought to be new electoral law sanctions for the intimidation of candidates and campaigners. Without further consultation with the public we are reluctant to make new recommendations in this report for the creation of new electoral offences.

11.93 We note however that the Government’s current proposal is similar to one discussed in our consultation paper.<sup>482</sup> There we noted that an alternative to the existing scheme could be to use general criminal offences to regulate elections. In addition to those offences an ancillary order would be made available to the criminal courts to disqualify candidates in the same way that conviction of a corrupt or illegal practice currently does. The link between the underlying offence and the electoral sanction would have to be made clear. Such a scheme would require a radical reworking of the current law. Many electoral offences, such as personation, voting offences and so on, apply only in the electoral context and would need to be retained. The offences labelled corrupt and illegal practices also operate as grounds to annul an election pursuant to an election petition, as discussed in chapter 13.

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<sup>478</sup> Cabinet Office, *Response to Protecting the Debate: Intimidation, Influence and Information* (May 2019) p 18.

<sup>479</sup> These would include assault, destroying or damaging property, threats to kill, harassment, public order offences, and sending communications which are indecent, obscene or menacing, or with an intent to cause distress and anxiety.

<sup>480</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 11.14(2)(c).

<sup>481</sup> Electoral law: the Urgent Need for Review, Report of the Public Administration and Constitutional Affairs Committee (2017-19) HC 244, para 65.

<sup>482</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 11.23.

11.94 The responses from consultees to the suggestion in our consultation paper of an alternative scheme persuaded us to modernise and rationalise the existing electoral offences, rather than devise a new scheme, as described above. This of course does not prevent Government from choosing to adopt the alternative approach of attaching electoral sanctions to criminal offences forming part of the general criminal law.

## Chapter 12: Regulation of campaign expenditure

- 12.1 This chapter considers the regulation of campaign expenditure. Our consultation paper revealed a general consensus that the law here has grown complex, and is in need of clarification and simplification. We consider first our core reform recommendations relating to the legislative framework for the regulation of campaign expenditure (recommendations 12-1 and 12-2 in our interim report), before turning to our recommendation concerning expense limits calculated by a formula (recommendation 12-3), and finally our recommendations for simplifying the provisions on expenses returns (recommendations 12-4 and 12-5).<sup>483</sup>
- 12.2 Our recommendations relate only to the “local” or constituency-level campaign run on behalf of a particular candidate. It was concluded following the scoping phase of this project that the regulation of the national campaigns conducted by political parties (or indeed the separate legal treatment of national campaigns) was too politically sensitive a topic for non-political law reform bodies such as the Law Commissions to address. Nonetheless, a holistic reform of the law of campaign expenditure would ideally address both types of campaign.
- 12.3 The boundaries between the two campaigns are sometimes hard to determine and have been the source of some difficulty since the publication of our interim report. This chapter concludes by considering new problems in campaign regulation that have emerged recently, including a discussion of the 2018 Supreme Court decision in *Mackinlay*<sup>484</sup> and the challenges posed by increasing use of digital advertising in campaigns.

### CORE CAMPAIGN REGULATION

- 12.4 Electoral 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 by way of 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 election agents of expenditure regulations (whether to do with expense limits or the accuracy of the returns reporting spending) are criminal offences, and therefore punishable by criminal sentences. They are also corrupt and illegal practices, meaning that they can

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<sup>483</sup> This mirrors the structure of our interim report. See Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 12.1.

<sup>484</sup> *R v Mackinlay and others* [2018] UKSC 42, [2019] AC 387 interpreting the Representation of the People Act 1983, s 90C.

result in the disqualification of the candidate and agent from involvement in elections for a defined period. Finally, they can also constitute a ground for invalidating an election if challenged by election petition.

- 12.5 The election agent system is thus a key mechanism for pursuing the policies of channelling election spending, limiting expenses, and ensuring that they are reported.
- 12.6 Our principal reform aim was to retain electoral law's approach to regulating campaign spending, but to set it out more clearly in primary legislation. 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 Act is not obvious even to lawyers.
- 12.7 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 election agent, or which must be reported.<sup>485</sup>
- 12.8 Our consultation paper made two provisional proposals:
- (1) that provisions governing the regulation of campaign expenditure should be set out centrally for all elections (provisional proposal 12-2); and
  - (2) that a single schedule to the legislation should contain prescribed expense limits and guidance to candidates as to expenditure and donations (provisional proposal 12-3).
- 12.9 Both provisional proposals met with unanimous agreement from consultees.<sup>486</sup> We therefore recommended that provisions governing the regulation of campaign expenditure should be in a single code set out for all elections, subject to devolved legislative competence.
- 12.10 Since our interim report, the Electoral Commission has prepared and consulted on draft statutory codes of practice on election expenses for both candidates and parties. These have been submitted to the Minister for the Cabinet Office and will be subject to Parliamentary approval before coming into force.<sup>487</sup>

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<sup>485</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 12.54 and 12.55.

<sup>486</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 12.5 and 12.6.

<sup>487</sup> These codes will apply to elections to the UK Parliament, Northern Ireland Assembly and local councils in England. The Electoral Commission has recently consulted on a draft code for elections to the Senedd. Ss 8 and 9 of the Scottish Elections (Reform) Bill provide that the Electoral Commission may prepare a code of practice on expenditure of candidates at Scottish parliamentary elections and Scottish local government elections.

12.11 These codes are a significant step towards increasing understanding of the regulation of campaign finance, but are inevitably constrained by the existing law. In our view therefore, the recommendations in our interim report remain appropriate and we substantially repeat them below.

#### **Recommendation 81.**

12.12 Legislation governing the regulation of campaign expenditure should be in a single code set out for all elections, subject to devolved legislative competence.

#### **Recommendation 82.**

12.13 A single schedule to the legislation should contain the prescribed expense limits and rules governing expenditure and donations.

### **EXPENSE LIMITS CALCULATED BY A FORMULA**

12.14 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, election agent or member of the public knows the number of registered electors on the day that notice of election is published. 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.<sup>488</sup> Of the 33 consultees who submitted a response to this provisional proposal, 26 agreed with it.<sup>489</sup> Three expressed only conditional agreement, one consultee disagreed and three consultees did not express a firm view.

12.15 Whilst there was broad support for this provisional proposal, a number of electoral administrators expressed some reluctance about taking responsibility for declaring the amount of an expenditure limit. The London branch of the Association of Electoral Administrators (“AEA”) was concerned about who would be responsible for miscalculations and some members of the eastern branch of the AEA thought that being responsible for the calculation opened returning officers up to the risk of challenge.<sup>490</sup> The Society of Local Authority Lawyers and Administrators in Scotland (“SOLAR”) and the Electoral Management Board for Scotland had similar concerns.

12.16 We agree that it would be unsatisfactory if returning officers became subject to legal responsibility for the accuracy of expenditure returns. Nevertheless, all candidates must operate subject to the same expenditure limit in any particular constituency. This

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<sup>488</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.

<sup>489</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 12.8 to 12.18.

<sup>490</sup> As above, paras 12.14 and 12.15.

consistency is not necessarily achieved at the moment; as the Electoral Commission pointed out, some candidates calculate the expenditure limit wrongly at present.<sup>491</sup>

12.17 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; applying the formula should then be straightforward. We were not persuaded in our interim report that the risk of getting the calculation wrong is great.<sup>492</sup> Our view remains that, on balance, there are significant benefits to candidates, and ultimately to the electorate, in having accessible, clear and consistent expense limits.

### **Recommendation 83.**

12.18 Expenditure limits which are calculated according to a formula should be declared by the returning officer for the constituency or electoral area in a notice accompanying, or immediately following, the notice of election.

## **SIMPLIFYING THE PROVISIONS ON EXPENSES RETURNS**

12.19 At present, the law governing expenses returns and declarations is apt to confuse, with section 75 of the 1983 Act requiring certain authorised persons to submit a separate expenses return to the returning officer.<sup>493</sup> Our provisional view was that the returning officer should receive a single expenses return, submitted by the election agent and candidate, including any authorised spending.

12.20 There was almost unanimous agreement with our provisional proposal on this issue. All but one of the 33 consultees who provided a response to this provisional proposal supported it.<sup>494</sup>

12.21 One consultee did not express a firm view, but requested clarification as to the effect of this provisional proposal, asking whether this would entail combining the existing return of election expenses with the return of candidate's expenses.

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<sup>491</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 12.17.

<sup>492</sup> As above, para 12.18.

<sup>493</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 12.69 to 12.71; Representation of the People Act 1983, s 75.

<sup>494</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 12.23.

12.22 In our interim report we clarified that we did not intend to suggest that these two returns would be combined so that only one figure need be submitted. The two returns would still be recorded separately but submitted together as a single set of documents.<sup>495</sup> We remain of that view and repeat our recommendation below.

#### **Recommendation 84.**

12.23 Returning officers should receive a single set of documents containing the return of expenses and declarations by the election 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.

12.24 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. Our provisional view was that this duty should continue, subject to the detail of the process being in secondary legislation, so that when a facility exists for publishing expenses online, it can be used.<sup>496</sup> Of the 35 consultees who submitted a response to this provisional proposal, 32 agreed with it. One consultee expressed only conditional agreement, while two consultees disagreed.<sup>497</sup>

12.25 A number of consultees argued that the Electoral Commission should be responsible for publishing returns instead of returning officers.<sup>498</sup> Our interim report concluded that 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 the non-receipt of an expenses return from any candidate.<sup>499</sup>

12.26 The process for submitting expenses returns remains a paper-based one, and so we maintain the recommendation made in our interim report.

#### **Recommendation 85.**

12.27 Returning officers should publicise and make available for inspection expenses returns (as well as publishing non-receipt of a return). Secondary legislation should prescribe in detail the process for that publicity and inspection, paving the way for publication online.

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<sup>495</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 12.26 and 12.27.

<sup>496</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.

<sup>497</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 12.28 to 12.40.

<sup>498</sup> As above, para 12.31.

<sup>499</sup> As above, para 12.34.

## LOCATION OF ELECTION AGENTS' OFFICES

12.28 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 stipulated that election agents, and sub-agents, must have an election office address in the relevant constituency, or an adjoining constituency. There were two policy reasons for this: enabling speedy communication between election agents and returning officers, and facilitating proceedings if the election agent were to be sued. Neither of these policy reasons remain valid today, for reasons explored in our interim report.<sup>500</sup>

12.29 We agree with the consultee who expressed the view those provisions are an anachronism which it is no longer necessary to retain.<sup>501</sup> Election agents should be able to situate their offices anywhere in the United Kingdom.<sup>502</sup>

## POWERS AND SANCTIONS FOR CANDIDATE EXPENSES OFFENCES

12.30 The Electoral Commission has recently made a number of suggestions for reform of the regulation of campaign expenditure, at both the national and local levels. In relation to the national campaign, the Electoral Commission wishes to be able to impose greater fines; currently, the limit is £20,000, which it believes is increasingly seen as simply "the cost of doing business".<sup>503</sup> The Electoral Commission has pointed to the example of the Information Commissioner's Office ("ICO"), which is capable of imposing fines of hundreds of thousands of pounds. Other reforms sought by the Electoral Commission include the power to compel campaign suppliers, including social media companies, to disclose information to enable better regulation.<sup>504</sup>

12.31 A suggestion by the Electoral Commission which we considered in our interim report was to extend the Commission's existing powers of regulation.<sup>505</sup> At present the Commission's power to investigate candidate spending and impose sanctions for offences only extends to national campaigning under the 2000 Act. The local campaign is regulated through criminal offences, prosecuted by the Crown Prosecution Service or the Crown Office and Procurator Fiscal Service. While the Electoral Commission was in favour of expanding its powers of regulation to

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<sup>500</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 12.49 to 12.53.

<sup>501</sup> As above, para 12.49.

<sup>502</sup> As above, para 12.53.

<sup>503</sup> Electoral Commission, *Reforming Electoral Law* (2019), available at [https://www.electoralcommission.org.uk/sites/default/files/pdf\\_file/Reforming-electoral-law-PACAC-booklet.pdf](https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Reforming-electoral-law-PACAC-booklet.pdf) (last visited 3 March 2020).

<sup>504</sup> T Hawthorn, "Giving voters greater confidence", *Reining in the Political 'Wild West': Campaign Rules for the 21st Century* (February 2019), available at <https://www.electoral-reform.org.uk/latest-news-and-research/publications/reining-in-the-political-wild-west-campaign-rules-for-the-21st-century/#sub-section-3> (last visited 3 March 2020).

<sup>505</sup> We note that the All-Party Parliamentary Group on Electoral Campaigning Transparency has recently recommended that the Electoral Commission should have greater regulatory powers: see *Defending our democracy in a digital age* (January 2020), pp 29, 36 and 37.

encompass the local campaign, it was concerned about the potential implications, stating:

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.<sup>506</sup>

12.32 The Electoral Commission's preference was therefore that it should initially only have investigative and sanctions powers for offences relating to campaign spending and donations rules at major national elections. The Electoral Commission's view remains that the unavailability of civil sanctions for the local campaign is problematic, for the following reasons.

- (1) If criminal prosecution is the only enforcement approach available, this creates a "cliff-edge" for candidates; either they are prosecuted, or no regulatory action is taken. This is arguably unfair.
- (2) There is a risk of an enforcement "gap". Some breaches of the candidate rules are relatively minor, and referral for criminal prosecution is unlikely to be in the public interest. If minor breaches of the rules are seen to go unpunished, there is a risk this will decrease voter confidence in the regulation of elections.<sup>507</sup>

12.33 Our interim report concluded 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. Those consequences include losing his or her seat and being disqualified for a period of three years from holding public office. We remain of the view that civil sanctions do not produce this effect and cannot replace corrupt and illegal practices.<sup>508</sup>

12.34 We consider however that there may be a role for civil sanctions in addition to, rather than instead of, the current scheme of offences. They could be used as a more proportionate response to less serious breaches; for example, those committed by smaller and less well-resourced parties, or for the first time. We note that the current law already permits a criminal court to grant relief from the imposition of a disqualification, recognising that some offences are less significant than others.<sup>509</sup>

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<sup>506</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 12.42 to 12.44.

<sup>507</sup> Electoral Commission, *Written Evidence to Public Administration and Constitutional Affairs Committee Electoral law inquiry* (April 2019) paras 45 to 48.

<sup>508</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 12.44.

<sup>509</sup> Representation of the People Act 1983, s 75ZB(5).

## NEW CHALLENGES IN CAMPAIGN REGULATION

12.35 There have been a number of developments in campaign regulation since the publication of our interim report. As we note above, the distinction between the local and the national campaign has been the source of some of these. Technological developments have also played a part, as more campaigning is conducted digitally; in the 2017 general election and Northern Ireland Assembly elections, digital advertising accounted for 42.8% of campaigners' total reported advertising spend.<sup>510</sup>

### Online campaigning

12.36 Another development in online advertising has been the increased use of micro-targeting, defined by the ICO as “a form of online targeted advertising that analyses personal data to identify the interests of a specific audience or individual in order to influence their actions”.<sup>511</sup> Since our interim report was published, the use of this technique for political purposes has become more widespread.

### Regulatory responses outside electoral law: data protection and platform responsibility

12.37 The ICO has completed a formal investigation into the use of data for political purposes, and in particular the use of micro-targeting during the EU referendum.<sup>512</sup> It found that political parties and campaigns have followed commercial organisations in using sophisticated marketing techniques to target voters. The ICO subsequently consulted on a draft framework code of practice for the use of data in political campaigning.

12.38 Part of the responsibility lies with social media platforms, many of which are taking steps to increase the transparency of political advertising they display. Some of this is driven by increased regulation in other jurisdictions (for example, the Canadian Elections Modernization Act, passed in late 2018). We are aware that platform regulation is also under active consideration by the Government.<sup>513</sup> Ultimately the new challenges posed to elections by technology come under the purview of a number of different actors, including the ICO, the Electoral Commission and Government.

### Concern about blurring the line between national and constituency expenditure

12.39 The emerging micro-targeting of voters by political campaigns does, however, have implications for electoral law. The first relates to the uncertainty as to whether an item of advertising expenditure falls under local or constituency-level limitations on election expenses, and must therefore be declared in expenses returns. While reports of micro-advertising suggest they target voters who share particular views, concerns or

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<sup>510</sup> Electoral Commission, *Digital campaigning – increasing transparency for voters* (June 2018).

<sup>511</sup> Information Commissioners' Office website, <https://ico.org.uk/your-data-matters/be-data-aware/social-media-privacy-settings/microtargeting/> (last visited 3 March 2020).

<sup>512</sup> Information Commissioner's Office, *Investigation into the use of data analytics in political campaigns: a report to Parliament* (November 2018).

<sup>513</sup> UK Government, *Online Harms White Paper* (April 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/793360/Online\\_Harms\\_White\\_Paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf) (last visited 3 March 2020).

characteristics, the same techniques could target voters with political messages relating to local issues. As the Electoral Commission noted in a report in 2018:

Other concerns have been raised about the transparency of spending on and targeting of digital political advertising as well. The UK's election rules set spending limits to stop campaigners being able to spend so much more money than their opponents that they would gain an unfair advantage. As part of this, campaigners must report how much they have spent to produce and send targeted messages to voters using digital channels. This includes messages targeted at specific groups of people in a particular constituency.<sup>514</sup>

### Concern about tracing micro-targeted adverts back to a campaign

12.40 The second implication of micro-targeting for electoral law is to do with the labelling or “imprinting” requirements that apply to hard copy communications. Printed material must carry the name of the person who published it, and the person on whose behalf it is published (in practice, the candidate). The 1983 Act empowers the Secretary of State to extend, with modifications, the imprinting requirements to “any other material”, which in our consultation paper we thought included online material.<sup>515</sup> That requirement was first extended to online material in the 2014 Scottish independence referendum, and has subsequently been extended to all Scottish referendums by the Referendums (Scotland) Act 2020.<sup>516</sup>

12.41 Without knowing who is responsible for material, it is difficult to tell when an offence has been committed, or to enforce the campaign expenditure rules. Being able to track the origin of campaign material is also important for voters, as it enables them to assess its credibility. Our consultation paper and interim report considered whether the law should require online material to be imprinted, and concluded that the extension of the current provisions was both feasible and desirable. We have repeated the recommendation made in our interim report in chapter 11 (now numbered recommendation 77). We are pleased to note that the Government is preparing technical proposals for the implementation of a digital imprint regime.<sup>517</sup>

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<sup>514</sup> The Electoral Commission, *Digital campaigning – increasing transparency for voters* (June 2018) p 11, para 45.

<sup>515</sup> Representation of the People Act 1983, s 110(2)(b) and (7). Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.55 to 11.61.

<sup>516</sup> While not a legal requirement, Electoral Commission guidance to campaigners involved in the EU referendum states it is good practice to include an imprint on online material. See Electoral Commission, *Campaigning and registering for EU Referendum campaigners* (February 2016), p 14, available at [https://www.electoralcommission.org.uk/sites/default/files/pdf\\_file/Campaigning-and-registering-for-EU-referendum-campaigners.pdf](https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Campaigning-and-registering-for-EU-referendum-campaigners.pdf) (last visited 3 March 2020).

<sup>517</sup> UK Government, *The Online Harms White Paper: Government Response to the Committee's Twelfth Report* (September 2019), p 3, available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/2501/2501.pdf> (last visited 3 March 2020).

## Notional expenditure and the responsibilities of election agents

- 12.42 Another problem which has arisen from the boundary between local and national expenditure is that of how to account for support given by a national campaign to a local one. A frequently used example is that of “campaign buses”, which transport party members and staff around the country, promoting the national campaign but also providing support to local candidates along the way.
- 12.43 This boundary issue led in July 2018 to the Supreme Court case of *R v Mackinlay*, which clarified the interpretation of the rules governing “notional expenditure”.<sup>518</sup> Notional expenditure is the term used to account for property, goods, services or facilities provided for the use of an election candidate free of charge or at a discount. Such expenditure must be declared in a candidate’s expenses return. The Supreme Court found that there is no requirement that the provision of these benefits has to be authorised by the candidate or his election agent.
- 12.44 The ruling has been criticised by several political parties, arguing that the lack of a requirement for authorisation makes accounting for expenditure uncertain and difficult for campaigners and election agents.<sup>519</sup> In response the Electoral Commission has issued additional guidance in the form of a fact-sheet, stressing that the legislation requires the candidate or agent to “make use of” the benefit provided by a third party, and that this requires active engagement by the candidate or election agent.<sup>520</sup> Nonetheless, concerns remain. The Public Administration and Constitutional Affairs Committee’s report into electoral law recommends that “the Government should consult stakeholders on how the law on notional spending can be clarified but reform should only be taken forwards on the basis of clear consensus”.<sup>521</sup>
- 12.45 The decision has also given rise to a concern in some quarters that the responsibilities of election agents are unduly onerous, to the extent that people might be put off from being agents.<sup>522</sup> As we explained above and in our previous publications, the role of the election agent is crucial to electoral law’s regulation of campaign spending and conduct.<sup>523</sup>
- 12.46 We take very seriously the concern that people may be put off from becoming election agents. Given the centrality of that office to the regulation of election campaigns, and

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<sup>518</sup> *R v Mackinlay and others* [2018] UKSC 42, [2019] AC 387 interpreting the Representation of the People Act 1983, s 90C.

<sup>519</sup> Conservative Party, *Written Evidence to Public Administration and Constitutional Affairs Committee Electoral law inquiry* (June 2019) paras 18 to 24; Labour Party, *Written Evidence to Public Administration and Constitutional Affairs Committee Electoral law inquiry* (June 2019) p 2.

<sup>520</sup> The Electoral Commission, *Notional spending: How does it work for candidates and agents*, available at [https://www.electoralcommission.org.uk/sites/default/files/pdf\\_file/Notional-Spending-Factsheet-2019.pdf](https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Notional-Spending-Factsheet-2019.pdf) (last visited 3 March 2020).

<sup>521</sup> Electoral law: the Urgent Need for Review, Report of the Public Administration and Constitutional Affairs Committee (2017-19) HC 244, para 16.

<sup>522</sup> As above, para 8.

<sup>523</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 12.3; Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 12.4.

the strict demands on the election agent, it is imperative that the law is stated as simply and straightforwardly as possible. As we put it in the consultation paper:

In order for this scheme effectively to govern the conduct of candidates and election agents, the law must be capable of being accessed, understood and applied by candidates and their election agent, including those who do not have experience of electoral campaign laws. Put simply, from a basic rule of law viewpoint, the law must be clear enough to achieve its policy aim of ensuring that candidates' conduct conforms to its requirements.<sup>524</sup>

- 12.47 The current law in Part 2 of the 1983 Act, and schedule 4 to that Act, which has been the subject of frequent successive amendment, should be restated in simpler and more modern language. This underpins recommendations 81 and 82 above which we hope will be taken forward.
- 12.48 It may be that clarifying the application of expenditure control legislation at the national campaign level also requires some clarification or restatement of the interaction between the local and the national campaign. Campaign buses, and a myriad other modern campaign tools, tend to be run and accounted for at national campaign level. For them to be subject to control at the local campaign expenditure level may be a trap for the unwary election agent. The same may be true of the emerging use of micro-advertising. Clearer law and guidance at the "constituency" or 1983 Act level will provide some assistance, but it may be that a holistic consideration of modern campaign laws, both local and national, is required to provide campaigners (and enforcement agencies) with much-needed certainty and clarity.
- 12.49 The regulation of national campaigns is expressly excluded from the scope of the terms of reference for this project. However, now that the specific issue of when expenditure funded at national level falls to be taken into account at constituency level has come to prominence and is thought to be problematic, this may be a topic which the Law Commissions could address in a future project, if there were a wish for us to do so. This would, of course, be subject to agreement on suitable terms of reference.

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<sup>524</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 12.5.

# Chapter 13: Legal challenge

## INTRODUCTION

- 13.1 The system for challenging elections has been recently described by the Public Administration and Constitutional Affairs Committee of the House of Commons as “archaic, too complicated and not fit for purpose”.<sup>525</sup> The law governing legal challenges to elections is the product of historical developments in the 19th century. It has several features which are unique to the “election court”, a special tribunal presided over by judges. The system relies on individuals to bring cases, which can cost many thousands of pounds. The procedural rules are old-fashioned and inflexible, meaning that meritorious cases can be thrown out, and ill-founded cases take up large amounts of court time. The overall result is that correcting mistakes and bad practice at elections is far more difficult than it should be.
- 13.2 Our consultation paper sought to outline the current law governing legal challenge of elections and demonstrated the respects in which it is complex, unclear, and out of date.<sup>526</sup> It made 17 provisional proposals and asked five consultation questions, covering two topics. 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.
- 13.3 The response to our consultation, which we outlined in our interim report, revealed a virtual consensus among consultees that the law on challenging elections is in need of modernisation and simplification. To that end, our interim report made 13 recommendations for reform.
- 13.4 This support has continued unabated, reflected by the Sir (now Lord) Pickles’ Report on electoral fraud (“the Pickles Report”), publications of the Electoral Commission, and the recent report of the Public Administration and Constitutional Affairs Committee.<sup>527</sup> There has also been some valuable empirical work done on the incidence of electoral petitions. That work demonstrates that far from it becoming an obsolete procedure, the overall number of electoral petitions (particularly local

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<sup>525</sup> Electoral law: the Urgent Need for Review, Report of the Public Administration and Constitutional Affairs Committee (2017-19) HC 244.

<sup>526</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, ch 13.

<sup>527</sup> Sir Eric Pickles, *Securing the ballot: report of Sir Eric Pickles’ review into electoral fraud* (August 2016) and (for example) Electoral Commission, *Written Evidence to Public Administration and Constitutional Affairs Committee Electoral law inquiry* (April 2019) para 68, and Electoral law: the Urgent Need for Review, Report of the Public Administration and Constitutional Affairs Committee (2017-19) HC 244.

government petitions) has increased markedly since the 1960s,<sup>528</sup> underlining the need for the process to be simplified and modernised.

- 13.5 Like our interim report, this chapter looks first at the grounds on which the validity and result of elections can be reviewed, and secondly the procedure governing legal challenge. In doing so, we seek to outline the basis for the recommendations we make. These are the same as those we made in our interim report, though the order and numbering of our recommendations has changed.

## THE GROUNDS OF CHALLENGE

- 13.6 An election court can hold an election to have been invalid, or correct the result declared by the returning officer. We discuss the grounds for invalidating elections later in this chapter. Election courts usually *correct* the result using a process known as a “scrutiny”. This is a procedure which dates from when electoral petitions were heard by Parliament, rather than the courts.<sup>529</sup> It uses vote tracing to examine the propriety of individual votes; the court can then decide whether to discard a vote or let it stand.

### The doctrine of “votes thrown away”

- 13.7 There is another way to correct the result of an election, one which struck us as an aberration. The doctrine of “votes thrown away” means that an election court can decide that votes for a disqualified candidate do not count, with the result that the next candidate is then elected. This doctrine is not expressly set out in statute, but was a practice of the pre-1868 committees of the House of Commons which heard election petitions.<sup>530</sup>
- 13.8 Both our consultation paper and interim report, however, noted that the disqualification of a candidate is a ground for declaring their election invalid. That would result in a new election being called, allowing the electorate to select a properly qualified candidate who is a member of their favoured political party. Some 31 out of 34 consultees agreed that invalidating the election, and calling a new one, was fairer than invalidating every vote for the disqualified candidate.

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<sup>528</sup> Caroline Morris and Stuart Wilks-Heeg, “Reports of my death have been greatly exaggerated: the continuing role and relevance of election petitions in challenging election results in the UK” (2019) 18(1) *Election Law Journal* 31.

<sup>529</sup> Indeed, the legal basis for the modern scrutiny is the statutory invocation, in section 157(2) of the Representation of the People Act 1983, of the “principles, practices and rules on which committees of the House of Commons used to act in dealing with election petitions”.

<sup>530</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.

13.9 We continue to be of the view that the doctrine of “votes thrown away” is outdated, unnecessary and should be abolished.<sup>531</sup>

### **Recommendation 86.**

13.10 The doctrine of “votes thrown away” should be abolished.

### **Positively stating the grounds for challenging an election in legislation**

13.11 Identifying the grounds on which an election can be challenged is difficult. They are not obvious on the face of the legislation, and a reader is forced to rely on case law, the interpretation of which is disputed.<sup>532</sup> This is unsatisfactory, given the central role that election petitions play in ensuring compliance with electoral law.

13.12 On our analysis, the validity of 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.

13.13 Interpretation of the grounds has continued to evolve since the publication of our interim report, as demonstrated by the case of *Parkinson v Lewis*,<sup>533</sup> discussed further below.

### **The role of agents**

13.14 Part of the regulatory approach of electoral law to campaign behaviour is to hold a candidate responsible for all the acts and omissions of their agents, which is why a corrupt or illegal practice engaged in by a candidate’s agent (ground 2(a) above) will invalidate an election. The private law principles of agency are not applicable, and electoral law’s notion of agency, which continues to be relevant by virtue of section

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<sup>531</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.6 to 13.12.

<sup>532</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.29 and 13.30.

<sup>533</sup> [2016] EWHC 725 (QB).

157(2) of the Representation of the People Act 1983 (“the 1983 Act”), was described in the earliest cases as “a stringent, harsh and hard law; it makes a man responsible who has directly forbidden a thing to be done, when that thing is done by a subordinate agent”. In providing that guilt of agents impugns the public law validity of the candidate’s election, the corrupt and illegal practices scheme, when it was established in 1883, sought to incentivise compliance with its regulations. Thus, if a candidate or their election agent has embraced a person as part of their campaign and engaged them to support their candidacy, they will be responsible for that person’s actions irrespective of notions of actual or ostensible authority.

13.15 The law on agency is considered in more detail in our research paper on legal challenge to elections and the judgments of Commissioner Mawrey QC in the Slough and Woking election petitions of 2008 and 2012 respectively.<sup>534</sup>

### **Parkinson v Lewis**

13.16 Since our interim report the first ground of challenge mentioned above (breach of electoral law) has been considered in *Parkinson v Lewis*.<sup>535</sup> The petition arose from a local election of councillors to Winsford Town Council in Cheshire. An unsuccessful candidate argued that defects in the nomination papers of three successful candidates meant that the election was invalid. Two of the successful candidates responded to the petition, arguing the election should not be invalidated because it had been conducted substantially in accordance with electoral law, and the breach had not affected its result. In making this argument they relied on section 48 of the 1983 Act (the source of the first ground, above). The judge disagreed. He focussed on the wording of subsection (1), which provides:

No local government election shall be declared invalid by reason of any act or omission of the returning officer *or any other person in breach of his official duty in connection with the election or otherwise* of [elections] rules ... if ... (a) the election was so conducted as to be substantially in accordance with the law as to elections and (b) the act or omission did not affect its result.<sup>536</sup> (emphasis added)

13.17 The judge reasoned that the phrase “in breach of his official duty” limited the application of the phrase “or any other person” to those with such a duty. In our consultation paper, and our background research paper, we had come to a different view, namely that the saving of elections from invalidity effected by section 23(3) applied also to breaches of the elections rules by a candidate.<sup>537</sup> We considered that the provision applied to breaches by “any other person... of the [elections rules]”. This is consistent with the history of antecedent provisions.<sup>538</sup> We remain of the view that

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<sup>534</sup> Research paper on Legal Challenge to Elections, paras 1.98 to 1.99; available at <https://www.lawcom.gov.uk/project/electoral-law/>, *Simmons v Khan* [2008] EWHC B4 (QB) (unreported) at [56] to [59]; *Ali v Bashir* [2013] EWHC 2572 (QB) (unreported) at [71] to [76].

<sup>535</sup> *Parkinson v Lewis* [2016] EWHC 725 (QB).

<sup>536</sup> Representation of the People Act 1983, s 48(1). The wording of that section, which applies to local government elections, is in substance identical to that of section 23(3), which applies to Parliamentary elections. Our consultation paper referred to section 23, and we do so in this report.

<sup>537</sup> See para 13.12 above. The section 23 test is the equivalent test for Parliamentary elections. Research paper on Legal Challenge to Elections, para 1.59.

<sup>538</sup> Ballot Act 1872, s 13.

our original interpretation of this provision was correct.<sup>539</sup> Our reading is consistent with the general policy of the section, which is that an otherwise sound poll should be capable of being saved from being invalidated on technical grounds. Special considerations apply, however, in the area of nomination papers, which we explore below.

13.18 The discussion in *Parkinson v Lewis* of the scope of section 48 of the 1983 Act reinforces our view, expressed in our consultation paper and interim report, that the grounds for invalidating or correcting the outcome of elections should be restated and positively set out in legislation. That view was unanimously shared by consultees, who also agreed that the law on challenging elections should be set out in primary legislation, governing all elections.<sup>540</sup>

13.19 Consultees also expressed unanimous support for our proposal that a standard and consistent set of adaptations to those grounds should be used for elections which use the party list system, such as Scottish or Welsh Parliamentary elections.<sup>541</sup> This is because there are problems transposing the classical grounds for challenging elections, particularly those that relate to corrupt or illegal practices, when parties, and not only individuals, stand for election.

### **Distinguishing between the civil and criminal aspects of corrupt and illegal practices**

13.20 In chapter 11 we noted that corrupt and illegal practices serve a dual purpose as both criminal offences and grounds for invalidating an election.<sup>542</sup> Since our interim report the High Court has considered whether this dual role is compatible with the right to a fair trial under article 6 of the European Convention on Human Rights.<sup>543</sup> Mr Rahman sought permission for judicial review of the election court's decision<sup>544</sup> that he was personally guilty of the illegal practice of making false statements about candidates and the corrupt practices of bribery and undue influence. He argued that these findings contravened the principle that everyone charged with a criminal offence should be presumed innocent until proven guilty. The Divisional Court declined permission for judicial review, noting that the 1983 Act establishes two concurrent but distinct jurisdictions, and distinguishes clearly between civil proceedings on an election petition and criminal proceedings. Nonetheless it added:

... we agree with the Applicant that the statutory language used in the 1983 Act, which refers to “personal guilt”, “conviction” and “offence” does carry with it

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<sup>539</sup> In particular, it seems to us that the word “of” in the phrase “of rules ...” must connect back to the word “breach”, in the same way as does the word “of” in the earlier phrase “of his official duty ...”. This indicates to us that the subject-matter of the subsection extends to breaches of official duty in connection with an election and to breaches of elections rules committed otherwise than in breach of official duty; any other interpretation fails to give effect to the word “otherwise” in the subsection. But we acknowledge that the drafting is obscure.

<sup>540</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.16 and 13.31.

<sup>541</sup> As above, para 13.48.

<sup>542</sup> See para 11.8 above.

<sup>543</sup> *R (Rahman) v Local Government Election Court* [2017] EWHC 1413 (Admin).

<sup>544</sup> *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB), discussed in chapter 11 of this report.

connotations of criminal guilt, and we note such terminology may be infelicitous when applied to election proceedings which are clearly civil in nature.

13.21 We agree that primary legislation replacing the 1983 Act could improve on its structure and language to distinguish more clearly between the role of corrupt and illegal practices in election petitions and criminal proceedings. One possibility might be to reorder the presentation of the criminal offence and the public law ground for annulling the election. The 1983 Act currently starts with the criminal offence; for example, section 115 states that a person shall be “guilty” of the corrupt practice of undue influence if certain conditions are met. Later sections set out the public law consequences of the offence; for example, section 159 states that if a candidate is “reported by an election court personally guilty”, his or her election shall be void.

13.22 Instead, a new statutory framework could be ordered as follows, with provisions:

- (1) setting out the conduct which will vitiate an election;
- (2) providing that an individual guilty of the conduct commits a criminal offence;
- (3) setting out the circumstances in which a person’s election is void on the grounds of the vitiating conduct of the person or their agents; and
- (4) setting out the disqualification that flows from a finding of vitiating conduct by a candidate or agent.

13.23 That framework would address the concern of the Divisional Court as the word “guilty” would not appear in the vitiating ground. The drafting would nonetheless have to be careful to ensure that the current standard and burden of proof are not affected. Recommendations 87 and 88 below do not exclude a scheme along these lines. However, as we did not consult on the issue, we do not expand the recommendations we made in our interim report.

**Recommendation 87.**

13.24 The law governing challenging elections should be set out in primary legislation governing all elections.

**Recommendation 88.**

13.25 The grounds for correcting the outcome or invalidating elections should be restated and positively set out.

### Recommendation 89.

13.26 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.

### Defects in nomination papers

13.27 Our outline statement above of the grounds for invalidating elections belies some complex and nuanced points which were raised in our consultation paper. One of these is the interaction between rules which prescribe the formalities and content of nomination papers, when a returning officer may reject a nomination paper, and the grounds upon which an election may be annulled.

13.28 Since our interim report, the question of defective nomination papers has arisen again in *Parkinson v Lewis*, considered above. In *Parkinson v Lewis* the impugned nomination papers were defective since some of the subscribers did not live in the local ward. The judge held that that defect invalidated the election. In reaching that decision the judge relied on *R v An Election Court ex parte Sheppard*.<sup>545</sup> In *Sheppard* the High Court held that the candidate's election was invalid because the address given in the nomination paper was not his true home address. Our consultation paper noted the summary nature of the court's reasoning in *Sheppard*, and concluded that the simple assertion that a bad nomination paper invalidates an election is too simplistic an analysis.<sup>546</sup>

13.29 In our view there are grounds to distinguish the facts in *Parkinson v Lewis* from those in *Sheppard*. There is a long-established principle that an incorrect address on a nomination paper is a ground for annulling a winning candidate's election.<sup>547</sup> That principle is defensible as the inclusion of a candidate's home address provides information to voters; in particular it informs electors whether the candidate has a local connection. In contrast, in our view requiring a candidate to pay a deposit and enlist subscribers is a formality, which fulfils what we described in our research paper on Notice of Election to Nominations as a "cautionary function".<sup>548</sup> By that we meant it marks the seriousness of the occasion of candidacy and helps to filter out frivolous candidacies. Deficiencies regarding subscribers do not undermine the vote of the electorate who have voted the candidate into office.<sup>549</sup>

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<sup>545</sup> *R v An Election Court ex parte Sheppard* [1975] 1 WLR 1319.

<sup>546</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 13.35.

<sup>547</sup> Research Paper on Notice of Election to Nominations, paras 1.49 and 1.50, available at <https://www.lawcom.gov.uk/project/electoral-law/>.

<sup>548</sup> As above, paras 1.19 to 1.20.

<sup>549</sup> We accept that it can be argued that the requirement for local subscribers is a substantive one, in that it amounts to a demonstration of local support. But it has to be borne in mind that subscriber details do not appear on ballot papers but only in the statement of persons standing nominated, which few voters see, and

13.30 For those reasons we are minded to repeat the proposals made in both our consultation paper and interim report. We think that mere formalities, such as a bad subscriber, would not invalidate the election so long as the candidate did not knowingly submit a defective nomination paper (which, as a corrupt practice contrary to section 65A of the 1983 Act, is a separate ground of challenge).<sup>550</sup> Some 34 out of 36 consultees agreed with our proposal, which we refined in the light of the consultation response.<sup>551</sup> We maintain that recommendation.

#### **Recommendation 90.**

13.31 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.

#### **How should disqualification affect the result of the election?**

13.32 A disqualified candidate who stands knowing of their 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 because they are disqualified for the elected office in question. The material time at which the disqualification must “bite” is not uncontroversial. 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.<sup>552</sup>

13.33 Our provisional view in the consultation paper was that the material time at which disqualification “bites” should be the election, not the day nomination papers were submitted. In most cases, candidates will know about disqualifications (and will have stated that they are not subject to any at the time they deliver their nomination paper). In the few cases where a candidate is unwittingly disqualified at the time of their nomination, we provisionally considered that their election should only be annulled if the disqualification subsisted at the time of election. We also asked whether election courts should have a power, mirroring that of the House of Commons under section 6 of the House of Commons Disqualification Act 1975, to disregard a disqualification that has expired, if it is proper to do so.<sup>553</sup>

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that the fact of local support at the nomination stage has to be set in the context of the level of support demonstrated at the ensuing poll.

<sup>550</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 Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.23 to 13.29.

<sup>551</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.24 to 13.29.

<sup>552</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.67 and 13.68.

<sup>553</sup> As above, paras 13.105 to 13.107.

13.34 An overwhelming majority of consultees agreed that the date of the election is the material date at which disqualification should be assessed, and favoured giving election courts the power to disregard disqualifications which have lapsed.<sup>554</sup> But there were notable reservations. The Electoral Commission, in particular, stressed that a review of disqualifications making clear which applied at the time of election, and which are aimed at preventing a candidate from even standing, was required. We had raised this option at consultation, but explained that it was outside the scope of our project. It may be that Government decides that some disqualifications – such as holding politically restricted posts in local government – should prevent candidates from standing for election.<sup>555</sup> Subject to such decisions, however, we considered that the default position for all elections should be that it is the time of election which is crucial. We also considered that the election court should have a power to disregard a lapsed disqualification, if it thinks it proper to do so, mirroring the provision in section 6 of the House of Commons Disqualification Act 1975.<sup>556</sup> We maintain those recommendations.

#### **Recommendation 91.**

13.35 Disqualification at the time of election should be a ground for invalidating all elections.

#### **Recommendation 92.**

13.36 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.

### **THE PROCEDURE FOR BRINGING AN ELECTION PETITION**

13.37 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 complex and, in many places, outdated. The original scheme was that election proceedings would be a “one stop shop” for policing elections, so the election court used to have both a civil and a criminal law jurisdiction. It had inquisitorial features to assist with rooting out corruption. Proceedings were designed with finality in mind, with no right of appeal, but allowing a case to be stated to a higher court on a point of law.

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<sup>554</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.32 to 13.42.

<sup>555</sup> We note that Part 4 of the recently passed Senedd and Elections (Wales) Act 2020 distinguishes disqualifications which take effect at nomination and those taking effect at the time of election.

<sup>556</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.43 and 13.46.

13.38 Our consultation paper outlined the complex laws governing the election petition procedure.<sup>557</sup> It noted that petitions were in reality private proceedings before judges which use a procedure that is very formal, inflexible and outdated. For example, both the Election Petition Rules 1960 (“the 1960 Rules”) and Chapter 69 of the Rules of the Court of Session retain references to sections of the 1983 Act, repealed 19 years ago.<sup>558</sup> Other key problems are listed below.

- (1) The lack of a mechanism to filter out unmeritorious petitions. These take up court time and result in unnecessary expense being incurred by all parties. For example, in *Richards v Devenish*<sup>559</sup> the petitioner made a series of arguments described by the judge as “wholly unfounded” and “far-fetched”, including allegations of vote tampering, election rigging and adjudication errors. Exploration of these issues nonetheless took up a two-day hearing.
- (2) The grounds of a petition may not be amended once submitted. This can be problematic given that election petitions have to be brought within 21 days. While there is an interest in all parties being aware of the case against them at an early stage, we considered the lack of judicial discretion to allow amendment to be problematic here.
- (3) Electoral petitions are expensive; in practice the minimum amount required for security for costs for challenges to parliamentary elections in England and Wales is £5,000.<sup>560</sup> It is not clear that the court is able to put in place protective costs or protective expenses orders to cap the cost of challenge.

13.39 Our consultation paper proposed replacing the current procedural rules with simpler, modern and less formal rules.<sup>561</sup>

13.40 All but one of the 35 consultees who responded to this proposal agreed. Our interim report took the view that judges should have up-to-date tools to determine election cases expeditiously and justly. We remain of that view.<sup>562</sup>

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<sup>557</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, available at [http://www.lawcom.gov.uk/app/uploads/2015/03/cp218\\_electoral\\_law.pdf](http://www.lawcom.gov.uk/app/uploads/2015/03/cp218_electoral_law.pdf).

<sup>558</sup> Election Petition Rules 1960 SI No 543 rr 14 and 16; Act of Sederunt (Rules of the Court of Session 1994) 1994 SI No 1443 rr 69.20 to 69.27. Sections 148 to 153 of Part III of the 1983 Act were repealed by para 1 of sch 22 to the Political Parties, Elections and Referendums Act 2000. Section 158(3) of that Act provides that none of the repeals of Part III have effect in relation to local government elections in Scotland. The procedural rules governing the latter are in the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 (SI 1999 No 929 (S.65)), ch 3, pt XI.

<sup>559</sup> [2017] EWHC 37 (QB).

<sup>560</sup> Representation of the People Act 1983, s 136. The maximum limit also applies in Scotland, and the Rules of the Court of Session provide security for expenses is to be set by the Lord Ordinary or vacation judge.

<sup>561</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>562</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.73 to 13.82.

### Recommendation 93.

13.41 Challenges should be governed 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.

13.42 The structural separation between the election court and the rest of the court system also has unfortunate consequences. Two problems are as follows.

- (1) An election court – even one staffed by two High Court judges as was the case in *Woolas v Parliamentary Election Court*<sup>563</sup> – 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 has not been tested.
- (2) Once an election court’s determination and report have been made, it is “*functus officio*” (meaning its authority is exhausted and it can make no further orders). This means it is unable to alter a costs order, or use powers to make orders for costs against non-parties as the High Court can.<sup>564</sup>

13.43 Our favoured option for reform, which was welcomed by the majority of consultees and the senior judiciary in England and Wales, was to bring the election challenge system within the ordinary civil procedure structure in the UK.<sup>565</sup> In our interim report we recommended that election challenges should be subject to the ordinary procedural rules 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. These recommendations were repeated in the Pickles Report.<sup>566</sup>

13.44 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”.<sup>567</sup>

13.45 After further consideration we have concluded that the changes we recommend are less necessary in Scotland than in the remainder of the UK. As such we are confining our recommendation that legal challenges should be heard in the ordinary court

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<sup>563</sup> [2010] EWHC 3169 (Admin); [2011] 2 WLR 1362.

<sup>564</sup> *R (on the application of Conservative and Unionist Party) v Election Commissioner* [2010] EWCA Civ 1332; [2011] PTSR 416.

<sup>565</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.53 to 13.65.

<sup>566</sup> Sir Eric Pickles, *Securing the ballot: report of Sir Eric Pickles’ review into electoral fraud* (August 2016) Recommendation 30: “The system for challenging elections should be brought into the ordinary civil procedure and a single right of appeal should be available on both points of law and fact”.

<sup>567</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.61 and 13.62.

system to England and Wales.<sup>568</sup> We note that the Senators of the College of Justice are of the view that the current procedural rules in Scotland – which are more up to date than the 1960 Rules in England and Wales – can be reviewed to address some of the points driving our recommendation for England and Wales.<sup>569</sup>

13.46 Our consultation paper also provisionally proposed that local election petitions in England and Wales should be heard by expert lawyers sitting as deputy judges. Of the 28 consultees who responded specifically to this proposal, 25 agreed with it.<sup>570</sup> Our main concern in making that proposal was to preserve the valuable and rare expertise among the few persons who hear election cases in England and Wales. We were persuaded, following consultation responses including responses from such experts, that it was sufficient to provide that, in England and Wales, the election court shall be the High Court. It would then be for the senior judiciary to determine the constitution of the courts, so that in appropriate cases a deputy judge might hear a case, while in others two High Court judges might be required.<sup>571</sup>

#### **Recommendation 94.**

13.47 Legal challenges should be heard in the ordinary court system in England and Wales, with a single right of appeal to the Court of Appeal.

#### **Recommendation 95.**

13.48 Election petitions in England and Wales should be heard by the High Court; judges, including deputy judges, should be authorised to hear election petitions by the senior judiciary.

### **A public interest petitioner?**

13.49 Our recommendations above reflect the fact that election challenges are private court proceedings, requiring financial commitment and risk by the challenging party. Our consultation paper however argued that the public interest in challenging elections should be recognised, and asked some questions about the possibility of a public interest petitioning body.<sup>572</sup> The response to our consultation was in favour of the principle of having a public interest petitioner. Consultees disagreed considerably,

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<sup>568</sup> The recommendation in our interim report also extended to Northern Ireland. As explained at para 1.19, the scope of this final report is confined to Great Britain, and the scope of this recommendation has been limited accordingly.

<sup>569</sup> In Scotland, the Scottish Civil Justice Council prepares draft rules of procedure for the civil courts and advises the Lord President on the development of the civil justice system in Scotland.

<sup>570</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.66 to 13.72.

<sup>571</sup> As above, para 13.70

<sup>572</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.

however, when it came to the practicalities of what cases it should be responsible for. There was also concern that the process would be a significant strain on public resources if the process became the first port of call for legal challenge. Some consultees were also wary of the risk that any such body would be seen as politically motivated when bringing petitions in the public interest.<sup>573</sup>

13.50 Despite support for the principle of a public interest petitioner, and the uncomfortable position of relying on private actors to test the validity and outcome of elections – at great financial cost and risk – we were not persuaded to recommend that there should be a public interest petitioner. The practical difficulties involved in introducing the concept – notably the question of who should be given that function, and how they might avoid having their political neutrality called into question - were grounds for caution.<sup>574</sup>

### **Protective costs orders or protective expenses orders**

13.51 While we did not recommend the establishment of a public interest petitioner, we did however make other recommendations designed to reflect the public interest in free and fair elections.

13.52 We noted that private individuals should not have to risk financial ruin to test the legality of elections, and pointed to the availability of protective costs orders, or the Scottish equivalent, protective expenses orders, in ordinary civil procedure. These are a procedural tool, available in some 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.<sup>575</sup>

13.53 To alleviate the problem of costs faced by petitioners, we recommended that the availability of protective costs orders or protective expenses orders in election petitions be put beyond doubt.<sup>576</sup> We continue to believe that that would be desirable and repeat our recommendation below.

#### **Recommendation 96.**

13.54 The power of courts hearing election challenges to make protective costs orders or protective expenses orders should if necessary be acknowledged in primary legislation.

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<sup>573</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.96 to 13.135.

<sup>574</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.136 and 13.137.

<sup>575</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.144 and 13.145.

<sup>576</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 13.137.

## Returning officers should have standing to bring petitions

13.55 Under the current law, the returning officer is only ever a respondent to petitions if the petition complains of the officer's conduct. In reality, however, returning officers have an interest in ensuring that the election they conducted was lawful. If they suspect, after declaring the result, that an irregularity has occurred, they are powerless to intervene and have to take a passive role, awaiting a candidate or elector formally challenging the election.<sup>577</sup>

13.56 Our consultation paper therefore proposed 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. We also proposed that the returning officer should be able to bring a preliminary application, to test whether a breach of electoral law affected the election. This recommendation was strongly supported by consultees; of the 36 who responded, 34 supported it.<sup>578</sup> We acknowledged the risk that returning officers might be seen to succumb to external pressure when bringing a petition or a preliminary application to test the effect of a breach. But we thought that judicial scrutiny of challenges brought by officers was a protection against unmeritorious claims, while the continuing right of candidates and voters to bring their own challenges (and for the court to comment on a decision of the returning officer not to bring one), was a sufficient safeguard. We maintain the view we expressed in the interim report.

### Recommendation 97.

13.57 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.

## Informal complaints

13.58 Finally, we envisaged 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.<sup>579</sup> The important issue here is that voters' complaints are heard, and lessons are learned by electoral administrators.

13.59 This provisional proposal attracted widespread support from consultees.<sup>580</sup> Of the 36 consultees who responded, 34 agreed with it, including the Electoral Commission. There was less agreement about who should be responsible for hearing these complaints; some consultees favoured an Ombudsman, while others supported the

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<sup>577</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.169 to 13.171.

<sup>578</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.85 to 13.92.

<sup>579</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 13.192 to 13.196.

<sup>580</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 13.139 to 13.144.

use of a scheme whereby adjacent returning officers consider complaints, or the Electoral Commission. We concluded that it should be the UK's Ombudsmen with responsibility for local government, a recommendation supported by the UK Ombudsmen's joint response.<sup>581</sup> We remain of the view that ombudsmen should be able to investigate complaints about electoral administration which do not aim to overturn the result.

**Recommendation 98.**

13.60 Electors' complaints about the administration of elections (which do not aim to overturn the result) should be investigated by the Local Government and Social Care Ombudsman in England, the Scottish Public Services Ombudsman, and the Public Services Ombudsman for Wales.

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<sup>581</sup> The recommendation in our interim report also extended to Northern Ireland. As explained at para 1.20, the scope of this final report is confined to Great Britain, and the scope of this recommendation has been limited accordingly.

# Chapter 14: Referendums

## INTRODUCTION

- 14.1 This chapter covers national referendums, local government referendums and parish polls. It summarises the legislation currently governing these and sets out how our recommendations for electoral law should affect that legislation.
- 14.2 A national referendum is a poll of the electorate at a national (or regional) level which asks a question on a particular issue or issues. We noted in our consultation paper that national referendums have been used on multiple occasions since 1973 to decide matters of constitutional importance, in particular devolution.<sup>582</sup> We also noted that they are part of the electoral landscape and use the infrastructure of electoral administration with some modifications.<sup>583</sup>
- 14.3 Local referendums conducted under statute are examples of direct local democracy. There are three types of local referendums in England and Wales, concerned with local governance (such as the introduction of mayoral elections), increases in council tax and local planning decisions.<sup>584</sup>
- 14.4 The differences between elections and referendums include the fact that referendums involve deciding questions or issues rather than electing people to office and that they do not occur at regular intervals, but are instead triggered by an instigating event. As a matter of their administration, however, referendums raise similar questions to elections: what is the franchise? who is entitled to vote? what will appear on the ballot paper? who will campaign for one outcome or another? how is campaign spending and other conduct to be regulated? who runs the poll? Some of these questions are answered by reference to the classical electoral law governing elections; answering others requires substantial modification of that law.
- 14.5 Parish polls are a means by which decisions within the competence of a parish or community council may instead be taken by the parish electorate.<sup>585</sup> In cases where the parish poll relates to a specific issue they are referendums in all but name. However, since the range of decisions that may be taken at a parish poll include the election of a council chairman or a co-option to the council, some parish polls can have a strong resemblance to an election.
- 14.6 Our consultation paper considered both whether the rules governing elections could be extended to referendums and whether the framework for each different type of

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<sup>582</sup> There have been thirteen national referendums since 1973.

<sup>583</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.2.

<sup>584</sup> We declined to extend the scope of our recommendations to other types of poll, business improvement district polls and so-called “advisory” polls. See Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 14.28 and 14.29.

<sup>585</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 14.99 to 14.116.

referendum could be simplified in any way.<sup>586</sup> The consultation paper made six provisional proposals and asked two consultation questions.

- 14.7 Our provisional proposals were aimed at extending the core provisions of electoral law (such as registration and absent voting) so that they would apply to referendums, and producing a permanent general legislative framework governing national and local referendums respectively. The responses to our consultation, which are outlined in our interim report, revealed a consensus in favour of all but one of our provisional proposals.<sup>587</sup> To that end our interim report made eight recommendations for reform. We maintain those recommendations here.

### Developments since the consultation paper

- 14.8 Our interim report was published shortly before the referendum on the UK's membership of the European Union. We have considered the recommendations made in our interim report carefully to see whether they should be updated in the light of the experience of that referendum. We remain of the view that the law relating to referendums would benefit greatly from the simplification and rationalisation our recommendations would produce.
- 14.9 We note in particular that the Electoral Commission in its report on the EU referendum agreed with our view that there should be general provision for the conduct of referendums.<sup>588</sup> We also note that the Scottish Government has taken steps in this direction; the Referendums (Scotland) Act 2020 ("the 2020 Act") is discussed further below.

### NATIONAL REFERENDUMS

- 14.10 Part VII of the Political Parties, Elections and Referendums Act 2000 ("the 2000 Act") makes provision for national referendums. National referendums can only be instigated by primary legislation, which we refer to as "instigating Acts".
- 14.11 The 2000 Act applies to referendums held under such Acts of the UK Parliament occurring either throughout the UK, or in any of England, Northern Ireland, Scotland, Wales or in a region in England.
- 14.12 Whilst the 2000 Act makes provision to regulate the conduct of referendums under an instigating Act, such as spending rules, instigating Acts often modify how these generic provisions apply to a particular referendum.<sup>589</sup>

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<sup>586</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.

<sup>587</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 14.6, 14.14, 14.35 and 14.39.

<sup>588</sup> The Electoral Commission, *Report on the 23 June 2016 referendum on the UK's membership of the European Union* (September 2016) p 7.

<sup>589</sup> The Electoral Commission has argued that the improvements made to regulatory controls for the 2016 referendum should be imported into the 2000 Act, which would avoid having to repeat them in the instigating acts for future referendums: Electoral Commission, *Report on the 23 June 2016 referendum on the UK's membership of the European Union* (September 2016) p 7, available at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past->

- 14.13 In addition, most of the detailed law covering the administration of the referendum is contained either in the instigating Act, or in regulations made under it. This includes rules relating to, for example, electoral registration, absent voting, offences and the core rules governing polling and the count.<sup>590</sup>
- 14.14 The instigating Act also sets out the grounds on which a referendum may be challenged.<sup>591</sup> Since the publication of our interim report, the Court of Appeal has considered whether there is a residual common law power to challenge referendums.<sup>592</sup> Lord Justice Hickinbottom did not find it necessary to determine the point, but found that where the instigating Act sets out the circumstances in which the court may interfere with a referendum result, there must be a “strong presumption” that Parliament did not intend the court to interfere on other grounds.
- 14.15 Our consultation paper noted that in practice instigating Acts import and adopt provisions of election legislation, notably the 1983 Act, with adaptations to take account of the different nature of a referendum.<sup>593</sup>
- 14.16 The same approach is taken to the conduct rules governing a national referendum. These often follow the template set by classical election rules, again with necessary adaptations.<sup>594</sup> In our consultation paper we noted that that approach was inefficient and presented administrators with a large volume of new rules, legislatures with an unnecessary workload and gives rise to an unnecessary risk of a legislative slip.<sup>595</sup>
- 14.17 To deal with those issues we provisionally proposed that primary legislation governing electoral registration, absent voting, core polling rules and electoral offences should extend to national referendums where appropriate.
- 14.18 We also provisionally proposed that detailed conduct rules should be set out in secondary legislation which should mirror those governing elections, save for necessary modifications.<sup>596</sup> This approach would ensure that any instigating Act would not unnecessarily reproduce rules that are set out elsewhere. We, in effect, proposed that the 2000 Act’s standing regulation of referendums should be enlarged to encompass the rules governing the conduct of the referendum.

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[elections-and-referendums/eu-referendum/report-23-june-2016-referendum-uks-membership-european-union](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/54111/elections-and-referendums/eu-referendum/report-23-june-2016-referendum-uks-membership-european-union) (last visited 3 March 2020).

<sup>590</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.50.

<sup>591</sup> As above, para 14.39 and 14.76 to 14.81.

<sup>592</sup> *R (on the application of Wilson) v Prime Minister* [2019] EWCA Civ 304, [2019] 1 WLR 4174.

<sup>593</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.24.

<sup>594</sup> As above, para 14.43.

<sup>595</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.50.

<sup>596</sup> As above, paras 14.49 to 14.56.

## The Referendums (Scotland) Act 2020

- 14.19 The Scottish Parliament can initiate a referendum on an issue within its legislative competence, by passing an instigating Act. Part VII of the 2000 Act does not apply to such referendums, meaning that the instigating Act of the Scottish Parliament had to reproduce these provisions, as well as other parts of electoral law such as those governing offences.
- 14.20 The 2020 Act addresses this problem by reproducing much of Part VII the 2000 Act and applying its provisions to referendums held under Acts of the Scottish Parliament.<sup>597</sup>
- 14.21 The 2020 Act goes further than the 2000 Act, however, in reproducing much material that has in the past been set out in an instigating Act, and providing that this will apply to all referendums to which the Act applies. For example, the Act includes provisions regulating absent voting and electoral offences, as well as conduct rules.

## Our recommendations on the framework for conducting national referendums

- 14.22 Consultees expressed unanimous support for our proposals.<sup>598</sup> Since the publication of our interim report the Electoral Commission has continued to express support for our recommendations.<sup>599</sup>
- 14.23 While the 2020 Act suggests that producing a generic framework for the conduct of referendums is practicable, we remain of the view that core electoral laws which are invariably extended to referendums by instigating Acts, such as the provisions regarding the registers, the absent voting framework, and offences, should be applied as a matter of course.
- 14.24 We also consider that the conduct rules should be set out in legislation and that detailed rules should be in secondary legislation, although we note that locating the conduct rules within primary or secondary legislation is of course a matter for the legislature.<sup>600</sup> This is in line with our view, expressed in chapter 2, that the detailed administration process for elections should be contained in secondary legislation.<sup>601</sup>
- 14.25 We continue to take the view that our recommendations would eliminate identical provisions being replicated across different pieces of legislation.

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<sup>597</sup> Referendums (Scotland) Bill: Revised Explanatory Notes, (2019) SP Bill 46A, para 7.

<sup>598</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 14.6 to 14.9.

<sup>599</sup> Electoral Commission, *Report on the 23 June 2016 referendum on the UK's membership of the European Union* (September 2016) p 10, available at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/report-23-june-2016-referendum-uks-membership-european-union> (last visited 3 March 2020).

<sup>600</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 14.12.

<sup>601</sup> See para 2.18 above.

14.26 Our recommendations would also enable administrators and the chief counting officer properly to plan for, and execute, referendums before an instigating Act becomes law.<sup>602</sup>

**Recommendation 99.**

14.27 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 100.**

14.28 Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring those governing elections, save for necessary modifications.

## **LOCAL REFERENDUMS**

14.29 There are three types of local referendums in England and Wales. Each is conducted under statute, with an Act setting out the process for instigating such a referendum, rules as to their incidence and the scope of the franchise. Each Act provides 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.

14.30 The three types of local referendums are:

- (1) referendums on local governance changes under the Local Government Act 2000 (these referendums can also take place in Wales). The most common example is provision for elected mayors. These referendums may be instigated by the local authority, the Secretary of State, or by a petition subscribed by a specified proportion of the electorate.
- (2) referendums approving excessive rises in council tax in England under the Local Government Finance Act 1992 (“council tax referendums”); and
- (3) referendums approving neighbourhood planning orders in England under the Town and Country Planning Act 1990 (“neighbourhood planning referendums”). Electors can thereby adopt neighbourhood plans, development orders or a community right to build order which will govern planning law in their community.

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<sup>602</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.56.

14.31 These referendums share the characteristic that the result of the referendum is legally binding and must be implemented by the local authority in question.

### Legal framework

14.32 Our consultation paper outlined the distinct pieces of legislation applicable to the three types of local referendums.<sup>603</sup> The applicable primary legislation sets out the process for instigating a referendum and identifies the franchise by basing entitlement to vote on being entered in the local government electoral register.

14.33 The conduct rules governing local referendums are set out in four discrete pieces of secondary legislation.<sup>604</sup> They follow closely the template of conduct rules for local government elections, save for adaptations to account for the difference between a local referendum and an election.

14.34 In both our consultation paper and interim report we took the view that the current framework has led to unnecessary duplication of the same rules across different pieces of legislation.<sup>605</sup> Our consultation paper provisionally proposed that a single set of provisions should govern the mechanisms for running referendums, the conduct rules and challenge provisions. The instigating act would incorporate those conduct rules and challenge provisions for the particular referendum.<sup>606</sup> That proposal received the unanimous support of 33 responding consultees.<sup>607</sup>

14.35 We remain of the view that there should be a single legislative framework governing the administration of local referendums, and repeat our recommendation below.

### Recommendation 101.

14.36 A single legislative framework should govern the detailed conduct of local referendums, subject to the primary legislation governing their instigation.

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<sup>603</sup> As above, paras 14.59 to 14.61 and footnotes therein.

<sup>604</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.83. One of the four statutory instruments governing local referendums is the Local Authorities (Conduct of Referendums) Wales Regulations 2008 SI 2008 No 1848, concerning referendums held under Part 2 of the Local Government Act 2000 (arrangements in respect of executives etc) in Wales. While we know of no such referendums having been called in Wales, and are not aware of any executive Mayor role being created as a result, both a Mayoral referendum and an ensuing Mayoral election would be within the devolved competence of the Senedd under the Government of Wales Act 2006, as amended by the Wales Act 2017. See the 2006 Act, sch 7A, Part 2 (Specific Reservations) Reservation, Head B1 para 23 (which only reserves the combination of such polls with polls at elections or referendums that are outside the legislative competence of the Senedd).

<sup>605</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.96, and Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 14.12.

<sup>606</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.96.

<sup>607</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 14.14.

## Legal challenge of local referendums

- 14.37 Our view in both our consultation paper and the interim report was that local referendum results should be open to challenge on a single set of grounds, which are in line with those governing challenging elections, save in one respect. Since there is no candidate, the commission by anyone of a corrupt and illegal practice cannot serve to annul the validity of the referendum in the same way that such conduct by or attributable to a candidate vitiates his or her election.
- 14.38 Our consultation paper explained that 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 should thus be able to review, and to annul, referendums on the basis of corruption which tended to favour the eventual result.<sup>608</sup> A provisional proposal to that effect in the consultation paper met with unanimous approval from consultees.<sup>609</sup>
- 14.39 Our interim report reiterated that in the referendum context there are no candidates. For that reason the commission of a corrupt or illegal practice by an individual cannot serve to vitiate the validity of a referendum in the same way that conduct by or attributable to a candidate vitiates his or her election.
- 14.41 We remain of the view, expressed in our interim report, that a single set of grounds for challenging local referendums would aid in eliminating inconsistencies in the detail of the rules applying to elections and referendums where they are not justified by the nature of the referendum in question.<sup>610</sup>

### Recommendation 102.

- 14.40 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 reasonably be supposed to have affected its outcome.

## Neighbourhood planning referendums

- 14.42 In our consultation paper we noted that neighbourhood planning referendums could only be challenged by way of judicial review, and not before an election court.<sup>611</sup> This distinguishes them from other local referendums. The explanation is that, in the planning context, judicial review is generally available to deal with all the issues arising out of disputes about neighbourhood plans, which may not be restricted to the

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<sup>608</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 14.77 to 14.79 and 14.97. For more information on legal challenge see chapter 13.

<sup>609</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, para 14.15.

<sup>610</sup> As above, para 14.12.

<sup>611</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.82.

conduct of a poll. We asked consultees whether challenge should continue to be by judicial review only.<sup>612</sup>

14.43 A majority of 20 out of 25 consultees were of the view that judicial review should be the sole mechanism for challenging the result of neighbourhood planning referendums.<sup>613</sup> In our interim report we therefore recommended that neighbourhood planning referendums should continue to be challenged by judicial review. But we also recommended that the Administrative Court should, when hearing judicial reviews of the conduct of a neighbourhood planning referendum, be directed to the standard grounds of annulling or correcting the results of other local referendums.<sup>614</sup> We repeat that recommendation here.

### **Recommendation 103.**

14.44 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**

14.45 Parish polls are local citizen-initiated polls that occur in English parishes and Welsh communities, the most local tier of local government 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.

14.46 Both the Welsh and the UK Governments in the past have consulted on the possibility of modernising the rules applying to parish polls.<sup>615</sup> In November 2019 the Local Government and Elections (Wales) Bill was introduced in the National Assembly for Wales. The Bill provides for the abolition of community polls and introduces a petition system. Our discussion in this section considers the law as it stands.

### **Purpose of parish polls**

14.47 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 Parish and Community Meetings (Polls) Rules 1987 (“the 1987 rules”). In effect, this is an election by the parish or community’s electorate to the

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<sup>612</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 14.19 to 14.24.

<sup>613</sup> As above, para 14.20.

<sup>614</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.98.

<sup>615</sup> UK Government, *Parish Polls: Consultation on the Government’s intentions to modernise parish poll regulations* (December 2014) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/381894/Parish\\_Poll\\_Consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/381894/Parish_Poll_Consultation.pdf) (last visited 3 March 2020).

chairmanship of the council or another office. In that case, the poll is conducted according to rules akin to those governing parish and community council elections. Our consultation paper explained our view that such polls, if properly demanded at parish meetings, could be conducted according to the rules governing parish and community council elections within the standard framework governing elections.<sup>616</sup> Instead of having a nomination stage, however, the candidates for election should be stipulated at the meeting that decides to have a poll.

14.48 The second, and more common, type of poll asks a question on any issue arising for decision by the parish or community council. In such a case, the poll is akin to a referendum on a local issue. Although this is not expressly stated in legislation, the question cannot lie outside the proper range of decision making by a parish or community council, or be devoid of practical application.<sup>617</sup>

### **Our recommendations**

14.49 The rules governing the conduct of parish and community polls date from 1987 and are thus out of step with the rest of electoral administration law.<sup>618</sup> Our provisional view in our consultation paper was that parish polls should be run according to the standard conduct rules governing local referendums (where the poll asks residents a question) and the standard rules governing elections (where the poll concerns an appointment), save for a modification to omit the nomination stage.

14.50 These proposals received almost unanimous support from consultees. Of 21 consultees, 19 agreed that the parish polls should be run according to the standard conduct rules governing elections where the poll concerns an appointment.<sup>619</sup> Our proposal that polls asking a question should be governed by the same conduct rules as local referendums received a similar level of support, with 20 out of 22 consultees agreeing with it. Our interim report recommended accordingly.<sup>620</sup>

14.51 Our final question concerned the proper scope of questions to be put to a parish or community poll. Section 9 of the Local Government Act 1972 states that parish meetings are for the purpose of “discussing parish affairs and exercising any functions conferred on such meetings by any enactment”. We therefore took the view in our consultation paper that a reasonable interpretation is that the question at a parish poll must concern “parish or community affairs”.

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<sup>616</sup> Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, para 14.117.

<sup>617</sup> As above, para 14.118.

<sup>618</sup> As above, paras 14.119 and 14.120.

<sup>619</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 14.35 to 14.38.

<sup>620</sup> As above, paras 14.39 to 14.44.

14.52 Of the 22 consultees who responded to this proposal, 18 agreed that there should be rules restricting the scope of issues in a parish poll to issues of parish concern.<sup>621</sup> We remain of the view that parish polls should be restricted to questions concerning “parish or community affairs”. We repeat the recommendation from our interim report here.

**Recommendation 104.**

14.53 A parish or community poll pertaining to an appointment should be governed by the conduct rules governing elections, omitting the nomination stage.

**Recommendation 105.**

14.54 A parish or community poll pertaining to an issue should be governed by the conduct rules for local referendums.

**Recommendation 106.**

14.55 The scope of the issues which can be put to a parish or community poll should be defined.

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<sup>621</sup> Electoral Law: A Joint Interim Report (2016) Law Com; Scot Law Com; NI Law Com, paras 14.45 to 14.50.

## Chapter 15: Recommendations

### Recommendation 1.

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

**Paragraph 2.47**

### Recommendation 2.

- 15.2 Electoral laws should be consistent across elections, subject to differentiation due to the voting system or some other justifiable principle or policy.

**Paragraph 2.56**

### Recommendation 3.

- 15.3 The person who in the current law 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.

**Paragraph 3.11**

### Recommendation 4.

- 15.4 Electoral law should set out the powers and duties of returning officers for all elections within the legislative competence of the parliaments within the United Kingdom.

**Paragraph 3.16**

**Recommendation 5.**

15.5 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.

**Paragraph 3.28**

**Recommendation 6.**

15.6 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.

**Paragraph 3.42**

**Recommendation 7.**

15.7 The franchises for all elections should be set out in primary legislation.

**Paragraph 4.6**

**Recommendation 8.**

15.8 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.

**Paragraph 4.12**

**Recommendation 9.**

15.9 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.

**Paragraph 4.15**

**Recommendation 10.**

15.10 The 1983 Act’s provisions on maintaining and accessing the register of electors should be simplified and restated.

**Paragraph 4.34**

**Recommendation 11.**

15.11 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.

**Paragraph 4.35**

**Recommendation 12.**

15.12 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.

**Paragraph 4.36**

**Recommendation 13.**

15.13 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.

**Paragraph 4.37**

**Recommendation 14.**

15.14 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.

**Paragraph 4.38**

**Recommendation 15.**

15.15 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.

**Paragraph 4.45**

**Recommendation 16.**

15.16 Primary legislation should explicitly acknowledge the possibility of satisfying the residence test in more than once place.

**Paragraph 4.56**

**Recommendation 17.**

15.17 The law should lay down factors to be considered by registration officers when determining second residence applications, such as those set out in paragraph 4.61 of this Report.

**Paragraph 4.62**

**Recommendation 18.**

15.18 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.

**Paragraph 4.66**

**Recommendation 19.**

15.19 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.

**Paragraph 4.73**

**Recommendation 20.**

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

**Paragraph 5.10**

**Recommendation 21.**

15.21 The obligation to store sealed packets after the count should specify that they should be stored securely.

**Paragraph 5.15**

**Recommendation 22.**

15.22 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.

**Paragraph 5.22**

**Recommendation 23.**

15.23 The form and content of ballot papers should continue to be prescribed in secondary legislation.

**Paragraph 5.34**

**Recommendation 24.**

15.24 There should be a duty to consult the Electoral Commission on prescribed ballot paper form and content by reference to the principles of:

- (1) clarity, including for voters with disabilities;
- (2) internal consistency; and
- (3) general consistency with other elections.

**Paragraph 5.35**

**Recommendation 25.**

15.25 Primary legislation should set out the criteria of entitlement to an absent vote. Secondary legislation should contain the law on the administration of postal voter status.

**Paragraph 6.6**

**Recommendation 26.**

15.26 The law governing absent voting should apply to all types of elections, and applications to become an absent voter should not be capable of being made selectively for particular types of elections.

**Paragraph 6.10**

**Recommendation 27.**

15.27 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.

**Paragraph 6.14**

**Recommendation 28.**

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

**Paragraph 6.28**

**Recommendation 29.**

15.29 Requests for a waiver of the requirement to provide a signature as a personal identifier should be attested, as proxy applications currently must be.

**Paragraph 6.33**

**Recommendation 30.**

15.30 A uniform set of rules should govern the postal voting process in Great Britain.

**Paragraph 6.38**

**Recommendation 31.**

15.31 The uniform set of rules envisaged by Recommendation 30 should set out the responsibilities of returning officers regarding issuing, receiving, reissuing and cancelling postal votes generally rather than seeking to prescribe the process in detail.

**Paragraph 6.39**

**Recommendation 32.**

15.32 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.

**Paragraph 7.10**

**Recommendation 33.**

15.33 The nomination paper should be capable of being delivered by hand and by such other means as are provided by secondary legislation, which may include post and electronic means of communication.

**Paragraph 7.18**

**Recommendation 34.**

15.34 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.

**Paragraph 7.23**

**Recommendation 35.**

15.35 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.

**Paragraph 7.28**

**Recommendation 36.**

15.36 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.

**Paragraph 7.38**

**Recommendation 37.**

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

**Paragraph 7.52**

**Recommendation 38.**

15.38 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.

**Paragraph 8.13**

**Recommendation 39.**

15.39 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.

**Paragraph 8.14**

**Recommendation 40.**

15.40 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.

**Paragraph 8.19**

**Recommendation 41.**

15.41 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.

**Paragraph 8.23**

**Recommendation 42.**

15.42 The law should specifically require that returning officers provide 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 provide polling stations with the equipment required for the legal and effective conduct of the poll.

**Paragraph 8.28**

**Recommendation 43.**

15.43 The procedure for returning officers to issue authorisations to use force should be abolished, leaving only a power of the presiding officer 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 that they have been given an opportunity to vote, if entitled to do so).

**Paragraph 8.33**

**Recommendation 44.**

15.44 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.

**Paragraph 8.45**

**Recommendation 45.**

15.45 Polling rules should set out general requirements for a legal poll which the returning officers and their staff must adhere to, and set out their powers. These should include a power to require voters to show the unique identifying mark on their ballot paper to polling station staff.

**Paragraph 8.46**

**Recommendation 46.**

15.46 Primary legislation should outline polling clerks' rights to ask voters questions as to their entitlement to vote. Secondary legislation should prescribe how the right should be exercised, including the point that the questioning is designed to elicit.

**Paragraph 8.47**

**Recommendation 47.**

15.47 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 definition of "family member" should be expanded to include grandparents, (adult) grandchildren and cohabitants.

**Paragraph 8.66**

**Recommendation 48.**

15.48 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.

**Paragraph 8.67**

**Recommendation 49.**

15.49 The distinction between the death of party and independent candidates should be retained as regards parliamentary elections.

**Paragraph 8.77**

**Recommendation 50.**

15.50 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 purposes of the allocation of the seat; the death of a list candidate should not affect the poll provided a replacement party candidate can be identified.

**Paragraph 8.78**

**Recommendation 51.**

15.51 At local government elections in England and Wales, the death of an independent candidate should continue to result in the abandonment of the poll.

**Paragraph 8.79**

**Recommendation 52.**

15.52 The existing rule, requiring the presiding officer to adjourn a poll in cases of rioting or open violence, should be abolished.

**Paragraph 8.93**

**Recommendation 53.**

15.53 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 a poll by an emergency affecting a significant portion of electors in their area.

**Paragraph 8.94**

**Recommendation 54.**

15.54 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.

**Paragraph 8.95**

**Recommendation 55.**

15.55 A single standard set of rules in primary legislation should govern the count at all elections.

**Paragraph 9.6**

**Recommendation 56.**

15.56 The standard counting rules should cater for differences between elections as regards their voting system and how their counts are managed.

**Paragraph 9.7**

**Recommendation 57.**

15.57 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.

**Paragraph 9.12**

**Recommendation 58.**

15.58 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 the candidate, an election agent or a counting agent specifically authorised to do so in the absence of the candidate or election agent.

**Paragraph 9.22**

**Recommendation 59.**

15.59 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.

**Paragraph 9.30**

**Recommendation 60.**

15.60 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.

**Paragraph 9.42**

**Recommendation 61.**

15.61 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.

**Paragraph 9.43**

**Recommendation 62.**

15.62 The UK Parliamentary election timetable should be oriented so that steps in it are counted backwards from polling day.

**Paragraph 10.14**

**Recommendation 63.**

15.63 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.

**Paragraph 10.19**

**Recommendation 64.**

15.64 The writ should be capable of communication by electronic means, in addition to physical delivery.

**Paragraph 10.22**

**Recommendation 65.**

15.65 A standard legislative timetable should apply to all elections in Great Britain, containing the key milestones in electoral administration, including the deadlines for registration and absent voting.

**Paragraph 10.28**

**Recommendation 66.**

15.66 The standard legislative timetable at all elections in Great Britain should be 28 days in length.

**Paragraph 10.38**

**Recommendation 67.**

15.67 The law governing combination of coinciding polls should be in a uniform set of rules for all elections.

**Paragraph 10.44**

**Recommendation 68.**

15.68 Any elections coinciding in the same area on the same day must be combined.

**Paragraph 10.49**

**Recommendation 69.**

15.69 If four or more polls coincide, the returning officer should have a power to defer a poll if he or she concludes that the polls cannot be properly administered 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.

**Paragraph 10.56**

**Recommendation 70.**

15.70 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.

**Paragraph 10.61**

**Recommendation 71.**

15.71 A unified set of adaptations should provide for situations where a poll involves several ballot papers.

**Paragraph 10.70**

**Recommendation 72.**

15.72 A single set of electoral offences should be set out in primary legislation which should apply to all elections.

**Paragraph 11.12**

**Recommendation 73.**

15.73 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.

**Paragraph 11.23**

**Recommendation 74.**

15.74 The electoral offence of treating should be abolished and the behaviour that it captures should where appropriate be prosecuted as bribery.

**Paragraph 11.24**

**Recommendation 75.**

15.75 Undue influence should be restated as offences of intimidation, deception and improper pressure. Pressure is improper if:

- (1) it involves the commission or threat of commission of an illegal act; or
- (2) a reasonable person would regard it as improperly impeding the free exercise of the franchise.

**Paragraph 11.60**

**Recommendation 76.**

15.76 In England and Wales prosecutions pursuant to Recommendation 75(2) should only be brought by or with the consent of the Director of Public Prosecutions.

**Paragraph 11.63**

**Recommendation 77.**

15.77 The imprint requirement should extend to online campaign material which may reasonably be regarded as intending to procure or promote any particular result.

**Paragraph 11.72**

**Recommendation 78.**

15.78 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.

**Paragraph 11.83**

**Recommendation 79.**

15.79 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.

**Paragraph 11.84**

**Recommendation 80.**

15.80 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.

**Paragraph 11.87**

**Recommendation 81.**

15.81 Legislation governing the regulation of campaign expenditure should be in a single code set out for all elections, subject to devolved legislative competence.

**Paragraph 12.12**

**Recommendation 82.**

15.82 A single schedule to the legislation should contain the prescribed expense limits and rules governing expenditure and donations.

**Paragraph 12.13**

**Recommendation 83.**

15.83 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.

**Paragraph 12.18**

**Recommendation 84.**

15.84 Returning officers should receive a single set of documents containing the return of expenses and declarations by the election 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.

**Paragraph 12.23**

**Recommendation 85.**

15.85 Returning officers should publicise and make available for inspection expenses returns (as well as publishing non-receipt of a return). Secondary legislation should prescribe in detail the process for that publicity and inspection, paving the way for publication online.

**Paragraph 12.27**

**Recommendation 86.**

15.86 The doctrine of “votes thrown away” should be abolished.

**Paragraph 13.10**

**Recommendation 87.**

15.87 The law governing challenging elections should be set out in primary legislation governing all elections.

**Paragraph 13.24**

**Recommendation 88.**

15.88 The grounds for correcting the outcome or invalidating elections should be restated and positively set out.

**Paragraph 13.25**

**Recommendation 89.**

15.89 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.

**Paragraph 13.26**

**Recommendation 90.**

15.90 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.

**Paragraph 13.31**

**Recommendation 91.**

15.91 Disqualification at the time of election should be a ground for invalidating all elections.

**Paragraph 13.35**

**Recommendation 92.**

15.92 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.

**Paragraph 13.36**

**Recommendation 93.**

15.93 Challenges should be governed 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.

**Paragraph 13.41**

**Recommendation 94.**

15.94 Legal challenges should be heard in the ordinary court system in England and Wales, with a single right of appeal to the Court of Appeal.

**Paragraph 13.47**

**Recommendation 95.**

15.95 Election petitions in England and Wales should be heard by the High Court; judges, including deputy judges, should be authorised to hear election petitions by the senior judiciary.

**Paragraph 13.48**

**Recommendation 96.**

15.96 The power of courts hearing election challenges to make protective costs orders or protective expenses orders should if necessary be acknowledged in primary legislation.

**Paragraph 13.54**

**Recommendation 97.**

15.97 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.

**Paragraph 13.57**

**Recommendation 98.**

15.98 Electors' complaints about the administration of elections (which do not aim to overturn the result) should be investigated by the Local Government and Social Care Ombudsman in England, the Scottish Public Services Ombudsman, and the Public Services Ombudsman for Wales.

**Paragraph 13.60**

**Recommendation 99.**

15.99 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.

**Paragraph 14.27**

**Recommendation 100.**

15.100 Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring those governing elections, save for necessary modifications.

**Paragraph 14.28**

**Recommendation 101.**

15.101 A single legislative framework should govern the detailed conduct of local referendums, subject to the primary legislation governing their instigation.

**Paragraph 14.36**

**Recommendation 102.**

15.102 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 reasonably be supposed to have affected its outcome.

**Paragraph 14.40**

**Recommendation 103.**

15.103 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.

**Paragraph 14.44**

**Recommendation 104.**

15.104 A parish or community poll pertaining to an appointment should be governed by the conduct rules governing elections, omitting the nomination stage.

**Paragraph 14.53**

**Recommendation 105.**

15.105 A parish or community poll pertaining to an issue should be governed by the conduct rules for local referendums.

**Paragraph 14.54**

**Recommendation 106.**

15.106 The scope of the issues which can be put to a parish or community poll should be defined.

**Paragraph 14.55**

(signed)

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