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## **Electoral Law Summary**

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

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# **SUMMARY OF ELECTORAL LAW CONSULTATION PAPER**

- 1 This is a summary of our consultation paper which reviews UK electoral law and makes provisional proposals or asks questions about its reform. A full list of these appears in the Appendix.

## **CHAPTER 1 INTRODUCTION**

- 2 The electoral law reform project is part of the Law Commission for England and Wales' Eleventh Programme of Law Reform, which it has undertaken jointly with the Scottish Law Commission and the Law Commission for Northern Ireland. Chapter 1 outlines the devolutionary framework for the law of elections and referendums (together, "electoral law"). We will adapt to any changes to that framework during the life of the project, as well as any ongoing changes in electoral law.
- 3 We set out the list of electoral events within scope. This includes elections to public office and national and local referendums (including parish and community polls). Our terms of reference are also set out, which exclude: the franchise; electoral boundaries; national campaign, party, and broadcast regulation; voting systems; and fundamental change to institutions. Even within areas of law that are technically within scope, the Law Commissions of the UK, as independent, non-political bodies, cannot make judgements of political policy. Our focus is on technical law reform. At the end of chapter 1 is a glossary of terms used in the consultation paper.

## **CHAPTER 2 THE LEGISLATIVE STRUCTURE**

- 4 Electoral law is complex, voluminous and fragmented. More than 25 statutes and many more pieces of secondary legislation govern elections. Some of their content is repeated, almost word for word, from the "classical" law which is contained in the Representation of the People Act 1983 ("the 1983 Act"), which governs UK Parliamentary elections and some aspects of local government elections in England, Wales and Scotland.
- 5 After 1997, many more types of election and local referendums were created, while recourse to national referendums grew. Each type of election or referendum is generally governed by its bespoke legislation. We describe this feature of the legislative framework as "election-specificity".
- 6 All of the newly created elections use a voting system other than first past the post, which the classical law contained in the 1983 Act was designed for. Accordingly, some of the classical law had to be adapted to account for the different voting system. We call efforts to adapt a classical rule to a new voting system "transpositions". The transpositions of classical law have not been consistent, even for elections which use the same voting system. This greatly contributes to the problems of volume and complexity.

- 7 This poses problems not only for those consulting the law, but also for implementing new or changed policies. Introducing a new election requires replicating every aspect of the existing electoral law, while introducing new policy requires many different pieces of legislation for each election type. This is undesirable when, in fact, a large number of rules are shared by all elections.
- 8 Our provisional proposal is that the electoral law should be centrally set out for all elections, with fundamental or constitutional matters contained in primary legislation, and detailed rules on the conduct of elections contained in secondary legislation. Chapter 2 makes two provisional proposals concerning the rationalisation of electoral laws into a single and consistent framework, maintaining within it the existing differences that are due to use of a particular voting system, or certain policies.
- 9 The remaining chapters consider particular aspects of electoral law across all elections in the UK, with chapter 14 focussing in particular on the law of referendums, national or local.

### **CHAPTER 3 MANAGEMENT AND OVERSIGHT**

- 10 Chapter 3 considers the structure for overseeing elections, setting out four provisional proposals and asking two questions.
- 11 Running elections divides into two tasks: maintaining a register of electors, which is a permanent task, and overseeing elections, which arises if an election is due. The law allocates these to registration and returning officers respectively. In Northern Ireland, the Chief Electoral Officer is the central person who is registration officer and returning officer for all elections. In Great Britain, registration and returning officers are local government officials, so that electoral administration may be said to be decentralised.
- 12 We outline in this chapter some of the provisions associated with making this structure work, such as the powers and duties to share information between returning and registration officers, the crime of breach of official duty which enforces compliance by them with electoral law when conducting elections, and powers to correct “procedural” errors. Elections must be conducted according to electoral law, but they cannot be legally challenged for breach of election law unless that breach was fundamental or affected the result of the election.
- 13 For Parliamentary elections in England and Wales, the law names local dignitaries (such as the sheriff of a county or mayor or council chairman) as returning officers, but their only legal role is to receive the writ which triggers the election, and to declare the result and return the writ. Every other (and administratively very significant) aspect of running an election is performed by an “acting” returning officer, who is the registration officer within the constituency. This additional layer of complexity is redundant and confusing, and we provisionally propose to abolish the legal notion of a purely ceremonial returning officer. The returning officer should be the person actually responsible for running the election.

- 14 For most elections in Great Britain, management of the poll is overseen by more than one returning officer, because of the size of the electoral area in question. One of those is in a senior position for the entire election, and we call these “directing” returning officers, because most have a power of direction in law over the local returning officers who oversee the poll over a subdivision of the area or constituency. The framing of the power of direction in law varies from one election to the next. In the context of combination of polls, where one of the combined poll’s returning officer is the lead officer, there is some confusion over the role and status of directions by the directing officer to the lead officer.
- 15 Given the piecemeal structure of registration and returning officers, and in Great Britain the decentralised nature of the task of running elections, a key question has been how to achieve consistency in standards of electoral administration. In response, the Electoral Commission publishes performance standards which have legal status; they can lead to naming and shaming and, in some elections, reduction in fees and charges payable to the officer. In addition, it publishes guidance which has no legal force.
- 16 In our provisional view, the law governing management should be restated and centrally expressed for all elections. This should spell out, in particular, the duties and powers of regional returning officers at elections managed by more than one returning officer. We also ask what the proper role of powers of direction is in the context of combined polls led by another returning officer.
- 17 To facilitate the running of the poll, electoral areas (constituencies, wards or divisions) are broken down into administrative areas in which polling will take place. In the legislation, these are called “polling districts”. Within them is a polling place. This is not defined in the legislation, and can be a part of the polling district or a building within it. The law provides that if no polling place is designated, the polling place is deemed to be the polling district as a whole. The periodic review and alteration of parliamentary polling districts and places is carried out, in Great Britain, by the local authority council. The significance of polling places is that the returning officer must locate polling stations within the designated polling place. In Northern Ireland, the polling districts are simply the local government wards.
- 18 It seems to us that the designation and review of polling districts is an administrative matter which, we provisionally propose should be the responsibility of the returning officer rather than local authority councils, whose members are themselves elected. At present, appeals against designation and review decisions go to the Electoral Commission; it has been suggested to us that the Local Government Boundary Commissions might be better placed to deal with these. They have greater institutional knowledge and expertise in making decisions in relation to dividing geographical areas. We welcome views on how well the present route of appeal works, how it might be improved, and whether another forum is more suitable, but are not at present convinced that a change in the law is necessary. We ask consultees whether appeals against designations of administrative areas should be to the Electoral Commission or the Local Government Boundary Commissions.

## **CHAPTER 4 THE REGISTRATION OF ELECTORS**

- 19 Chapter 4 outlines the law governing the franchise, electoral residence, and registration, which is a key element of electoral administration as it governs entitlement to vote at any election or referendum. We set out eleven provisional proposals and ask three questions regarding the registration of electors.

### **Franchise**

- 20 The law setting out the franchise is rather complicated. The two basic franchises are those for parliamentary and local government elections, which are adopted by other elections' discrete legislation. The European Parliamentary franchise is different, because it includes certain EU nationals. The legal incapacities from voting in different elections are separately stated, while the incapacity of peers of the realm with a seat in the House of Lords to vote in UK elections is not stated in primary legislation. Reform of the franchise is outside the scope of this project, but we provisionally propose that the full law should be centrally restated for all UK elections, in primary legislation.

### **Residence**

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

- 24 The courts have also established the possibility of a second residence in principle, so that it is established that students, for example, can be registered in halls of accommodation. But little guidance is given to registration officers as to how to decide whether a second home amounts to a second electoral residence, risking inconsistent practice in different parts of the UK.
- 25 We think the law should be restated simply and clearly, furthermore pointing to the factors registration officers should consider to make consistent decisions as to whether a person is resident, and entitled to be registered in respect of a particular place. Equally, someone may have two connections to different areas, which we propose should be made clear in legislation. In relation to second residence, we ask whether the law should lay down factors to be considered, and whether applicants should make a declaration in support of their claim to be registered in respect of a second residence.
- 26 Where an elector is resident in more than one place, they have an opportunity to vote in both places, which is their right. But at national elections which occur at both places at the same time, they cannot do so without committing an offence. If they are a postal voter, under the current law, they will be sent postal voting papers, however, and may inadvertently commit the offence. We therefore ask whether such electors should be asked to designate one home as the one from which they vote at national elections.

#### **Registration generally**

- 27 The point of registration can be simply stated: it definitively establishes the right to vote, and at which elections. Registers must be comprehensive and complete – so as to capture a true picture of those entitled to vote. Registration officers must proactively maintain their registers, and have associated powers and duties to access databases and share information. They must also react to information provided by electors through the canvass and process individual applications to register. Finally, there must be transparency – so that the public can be confident that no one is wrongly registered, which is an opportunity to commit voting fraud.
- 28 However, the detailed law governing the function of registration officers and the registration process is extremely complex. It has been amended numerous times in recent years, which have seen major policy shifts from “household” registration through a yearly canvass, to “rolling” registration (which allowed for year-round registration by individual application), to the current individual electoral system, which furthermore differs between Northern Ireland and Great Britain. The recently introduced system in Great Britain has resulted in significant changes in the law, from the introduction of online registration to widening the powers of registration officers pro-actively to access other sources of information to establish residence.

- 29 There are in law five registers, although in practice they are combined onto one dataset contained in an “electoral management system”, software operated by the registration officer. Similarly, the law conceives of the registers as physical documents, a revised version of which is published yearly, with monthly notices of alterations. These must be publicised, and entries on the register take effect on publication. For upcoming elections, an effective deadline for registering in time to vote is provided for by making special provision for publishing a notice of alteration ahead of the poll. The provisions here are so confusing, involving consideration of both the 1983 Act and secondary legislation, that for many years until 2013 the deadline for registration was incorrectly thought to be 11 days by electoral experts. It is in fact, 12 days.
- 30 We provisionally propose that the provisions of the 1983 Act on maintaining, and public access to, the register should be simplified and restated. Primary legislation should contain core registration principles and the duties and powers of a registration officer. Secondary legislation should set out the detailed administrative rules, including those on applications to be registered and the determination of such applications.
- 31 Resident EU citizens are entitled to vote at EU Parliamentary elections, but are entered, in law, in a distinct register. Here there is a special requirement of a declaration stating, in particular, that the elector will exercise their right to vote in the UK only, and not their home state. This is to avoid double voting in two countries for the same institution. However, there are potentially practical problems in administering the declaration, which can last only one year. In our provisional view the declarations should last for so long as the elector is registered, or for a maximum of five years.
- 32 The law of registration in Northern Ireland operates a different system of individual electoral registration, which has been in place since 2002. The canvass must by law be conducted only once every ten years, while applicants must provide a signature, date of birth and national insurance number in order to be registered – which are then used to check the identity of applicants for a postal vote and the propriety of postal votes cast.
- 33 The principal aim of law reform in this context is to restate the law within a simpler, more modern framework. Primary legislation should contain core principles, the powers and duties of registration officers, and transparency requirements.
- 34 In our provisional view, the law should conceive of a single register, the details of which determine which elections an elector is entitled to vote at. A deadline for applying to be registered in time to vote at the election should be fixed by law. The register should apply to any future elections, provided the legislation provides that one of the existing franchises should be used.

- 35 We also see the merit of registration officers' data being capable of being exported to, and their software interacting with, other officers' software. We provisionally propose that this should be done through minimum specifications or some certification requirement for electoral management systems. This is so that, if possible and desirable in the future, polling station registers can be updated digitally and in real time, potentially allowing for electors to vote at a polling station of choice, not the one allocated to them based on where they live.

## **CHAPTER 5 MANNER OF VOTING**

- 36 Our chapter on the manner of voting considers the secret ballot: first, the principle and operation of voter secrecy, and secondly, the question of designing and legislating for the content of ballot papers. In this chapter, we set out six provisional proposals.

### **The secret ballot**

- 37 The secret ballot is the cornerstone of voting in the UK. It was introduced in 1872 to protect against influence and corruption: with voters voting in the privacy of the voting booth, no wrongdoer could check whether their bribe, influence or intimidation had been effective. In order to ensure that there was a way of investigating wrongful voting, secrecy was qualified. Judges could trace a particular ballot paper to the person who cast it. This system remains in place today, and the corresponding number list (on which polling station staff record the number of the issued ballot paper against the elector's number) is the way judges can "trace" a ballot paper to determine a legal challenge, or investigate whether a crime (such as personation) has been committed.
- 38 Article 3 of the First Protocol to the European Convention on Human Rights, and similar EU law rules pertaining to elections to the European Parliament, oblige the UK to hold free and secret elections. These rules are not in our view intended to force a particular conception of the secret ballot on the UK. Absolute secrecy is adopted in most member states, and means secrecy for fraudsters as well as genuine electors. Qualified secrecy, in place in the UK since 1872, intends that legitimate voters can vote secretly, but allows for judicial vote tracing to unearth fraud. Vote tracing is rarely used in the UK. In our provisional view, the secrecy safeguards should be bolstered. In particular:
- (1) Secrecy should only be unlocked by judges. For UK Parliamentary elections, there is a vestigial power of the House of Commons to order the inspection of ballot papers and corresponding number lists, which is in our view an anachronism. We provisionally propose that this should be abolished.
  - (2) Safeguards should guarantee the secrecy of how a person voted even if they innocently cast an invalid vote.
  - (3) The obligation to store sealed packets of ballot papers and corresponding number lists should expressly be to do so securely, and furthermore corresponding number lists should be stored separately from ballot papers.

- 39 In order to bolster secrecy, section 66 of the 1983 Act lays down requirements to keep how a particular elector voted secret. These fall on three groups of people:
- (1) At polling stations, candidates and their polling agents, administrators, and observers must maintain and aid the secrecy of voting, and must not communicate before the poll is closed any information as to the name or number on the register of anyone who voted.
  - (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) At the count, those attending must not ascertain ballot paper numbers (printed on the back of ballot papers) or communicate information obtained at the count as to the candidate for whom any vote is given on any particular ballot paper.
  - (4) At sessions during which postal votes are opened, similar duties of secrecy apply, in particular prohibiting communicating how a vote was given on any particular ballot paper.
- 40 An issue with these secrecy provisions, most of which date back to 1872, is that technology (in the form of mobile photography) has overtaken it. Meanwhile, in the postal voting context, no duty is imposed on the wider public to keep how an elector voted secret. We therefore provisionally propose expressly prohibiting the taking of photographs in polling stations and extending secrecy requirements to information obtained when a person completed their postal vote.

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

- 41 At present, ballot papers are in a form prescribed, mostly in secondary legislation. Historically, different designs have been used, which may cause confusion in electors. For example, electors in Northern Ireland accustomed to using STV, once had to cast their vote by marking a number on the left hand side column of the ballot paper for elections to the Northern Ireland Assembly. Ballot papers for UK Parliamentary elections had to be marked with a cross on the right hand side column, while the left hand side column listed candidates with numbers. In more recent times, there has been a shift towards professionally designed, user-tested forms of ballot papers, evidenced by recent changes in the prescribed forms as part of a review by the UK Government.
- 42 In our provisional view, the form of ballot papers should continue to be prescribed in secondary legislation. In order to improve the experience of voters and the effectiveness of ballot papers, general principles should be enacted so that the existing duty of the Secretary of State to consult the Electoral Commission on changes to electoral law should specifically refer, in the context of prescribed ballot papers, to adherence with those principles. They are:
- (1) internal consistency, which is concerned with preserving presentational equality between candidates;
  - (2) clarity, which is concerned with the voter user-friendliness of the form; and

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

## **CHAPTER 6 ABSENT VOTING**

- 43 Chapter 6 considers the law governing absent voting in the UK. An absent vote is a way of voting without presenting oneself at a polling station on polling day. It is done through a postal vote, which is available on demand in Great Britain, or by appointing a proxy. Proxy voting in Great Britain, and absent voting generally in Northern Ireland, is available only on prescribed legal grounds, such as absence for work or illness. Postal voting, in particular, is a means of promoting access to the poll, and questions of entitlement to a postal vote and the balance between access and security from fraud, are political policy issues which it is not proper for this reform project to consider. In this chapter, we set out eight provisional proposals, and ask one question.
- 44 Our focus is simplification and modernisation. The law on absent voting is extremely complicated, and is set out in a mixture of primary and secondary legislation which are distinct from the sets of rules that set out the core laws on the conduct of elections and the detailed election rules. We cannot reproduce a succinct outline of the law here, though it can be found in our consultation paper.

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

- 45 The law governing entitlement to an absent vote is set out in the Representation of the People Act 2000 (for Great Britain) and the Representation of the People Act 1985 (Northern Ireland), and is supplemented in each jurisdiction of the UK by regulations made by Secretaries of State. These govern certain elections, chiefly UK Parliamentary and local government elections, and pieces of election-specific secondary legislation copy their provisions for the particular elections they govern.
- 46 One of the issues with this legislative approach is that the laws envisage applications, and records of absent voters maintained by registration officers, which relate to a particular election. Indeed the 2000 Act grants electors a choice whether to be an absent voter, over a period, for a UK parliamentary or a local election or both. In practice, the electoral management systems used by registration officers keep a single set of records for all elections, which are able (though we suspect imperfectly) to reflect the possibility of that choice. Pieces of election-specific legislation relating to other elections make inconsistent provision for incorporating such records into the newer election's legally distinct absent voters' record, and for combining records at elections whose polls are combined. We doubt that this is a problem in practice. Electors are treated as applying to be an absent voter for all elections in the future (if they apply for an absent vote over a period), or falling on a specific day (if they apply to be an absent voter for that day).
- 47 We provisionally consider that a holistic framework should govern entitlements to an absent vote in primary legislation. Absent voter status, and a single absent voters register, would apply to any and all elections. This would greatly simplify the legislation, and reflect practice.

- 48 Secondary legislation would contain the detailed provisions on the administration of postal voter status. In particular, we consider that applications for an absent vote should substantially adhere to forms prescribed by the legislation. Presently “personal identifiers”, which are used to check the legitimacy of postal votes, must be provided in a certain form, so that we do not think this is a significant step. One of those identifiers, a signature, may be waived under the current law. However, no guidance is given as to how the registration officer should make the decision to grant a waiver, which risks inconsistent practice. In our view, applications for a waiver from the requirement for signature should be attested by stipulated persons, as applications to become a proxy currently must be.
- 49 A special scheme exists in Northern Ireland, but has never been brought into force, to enable certain voters to vote at a “special polling station”. We provisionally consider that this legislation is redundant and should be repealed.

### **The postal voter process**

- 50 The detailed legal rules governing the postal voting process, through which postal voters are issued with voting papers and cast a vote, are contained in secondary legislation which prescribes the process in significant detail. Yet an election rule, contained in a different part of the secondary legislation or, for UK Parliamentary elections, the 1983 Act, stipulates when a postal vote is validly cast. In Great Britain, that means return by hand or post, reaching the returning officer before the close of poll, of a duly completed ballot paper and postal voting statement containing the correct personal identifiers (signature and date of birth), which must be verified by the returning officer against those provided in the application for a postal vote. In Northern Ireland, postal votes may not be returned by hand.
- 51 Postal voting packs are issued to postal voters to the address shown on the postal voters list, and on receipt detailed rules govern the verification of personal identifiers. Detailed provisions allow, in Great Britain, for reconciling mismatched postal voting statements and postal ballot papers, cancelling postal votes and even retrieving one from a postal ballot box. In our provisional view, the election-specific rules should be replaced with a single sets of provisions for Great Britain and Northern Ireland respectively. They should set out the powers and responsibilities of the returning officer generally rather than seeking to prescribe the process in exhaustive detail.

### **Postal vote fraud**

- 52 Verification of personal identifiers provides only limited protection against postal vote fraud, which has been a cause for public concern, particularly since 2004 in England. Evidence of actual fraud is rather thin, and is limited to a few instances emanating from court actions, and a few allegations. However, the public perception of fraud, even if it is misplaced, can be damaging. It undermines confidence in electoral outcomes.

- 53 Applications to vote by post or proxy, and postal vote packs, may be handled by any person, provided they reach the registration or returning officer respectively. Consequently, persons affiliated to political parties or candidates campaigning for elections may handle these documents, in a legitimate attempt to promote participation in the poll. Any misuse of those, tampering, personation or the like, is an electoral offence which can be prosecuted in the criminal courts and is a ground for annulment of the election by the election court.
- 54 The Electoral Commission, in a recent report on fraud, has recommended that campaigners should not handle completed postal voting applications or any postal voting packs. It proposes to introduce this requirement by updating its code of conduct for campaigners, which has no legal force. If that is not agreed by the main parties, it would recommend legislative action.
- 55 We can see a case for regulation by law, rather than voluntary code of conduct, of campaigner handling of completed absent voting applications and of postal votes. The secret ballot provides a protection against fraud in the in-person voting context which is not available in postal voting. The public perception of fraud is damaging, as is the risk of degrading standards by campaigners who perceive fraud by opponents to be effective, and to go on unpunished. On the other hand, there are practical problems in defining who is and who is not a campaigner, and there is a competing public interest in allowing campaigners to promote participation in the poll. We have therefore decided to ask consultees whether the law should regulate involvement by campaigners in certain activities relating to completed absent voting applications and postal votes.

## **CHAPTER 7 NOTICE OF ELECTION AND NOMINATIONS**

- 56 The first stage of an election runs from publication of a notice of election to close of nominations, which finally identifies the candidates. Only if there are more candidates than vacancies will there be a poll. If there is to be one, nominations determine the names and other details to appear on the ballot paper. The rules governing notice to nominations are contained in discrete “election rules”, which are specific to each election. We set out six provisional proposals to reform these rules in chapter 7.
- 57 The classical rules for UK Parliamentary and local government elections differ slightly. The former are more ceremonial and formal, requiring, for instance, personal delivery (and attendance at the place of nominations) by the candidate and certain other persons, and personal attendance by the returning officer at proceedings. The rules governing local government nominations are slightly more relaxed.
- 58 Each piece of election-specific legislation copies one approach or another, and furthermore, the classical rules must be transposed in elections using the party list system so that it is *parties* who stand for election.

- 59 A candidate is nominated by a nomination form, properly subscribed and accompanied by payment of a deposit (at those elections where either are required). The nomination paper need not emanate from the candidate, who must separately consent to the nomination, declaring that he is not disqualified from election, and providing certificates of authorisation from a party nominating officer if standing on behalf of a registered political party, and authority to use a party emblem. At UK Parliamentary elections, a separate “home address form” is required.
- 60 In law, subscribers assent to a nomination *paper*, and may not subscribe to more than one paper. A defective subscriber thus taints the paper as a whole and another must be delivered, containing wholly new subscribers. Given that as many as 330 subscribers are required for nomination at London Mayoral elections, this can be an onerous requirement. In practice, returning officers inspect nomination papers informally in order to avoid the drastic consequences of a defective paper. Some candidates ensure that more than one set of nomination papers are delivered, to ensure success.
- 61 Our provisional proposals seek to simplify and rationalise the current law into a single set of rules, which take account of differences due to voting system. A single nomination paper should be required, emanating from the candidate. It should contain all requisite details, including those relating to party affiliation. Subscribers should assent to the candidate, not the paper, so that a defective subscriber can be replaced, instead of tainting the whole paper and every other subscriber. At party list elections, the nomination paper must emanate from the party nominating officer, and contain the consents of list candidates. Nomination papers should be able to be delivered by hand, by post or electronically.
- 62 The powers of the returning officer in relation to nomination papers are limited to examining the formal validity of the nomination paper: defective particulars or subscribers. There are two exceptions, however. The first is that serving prisoners are disqualified from *nomination* under the Representation of the People Act 1981, and unlike all other disqualifications, there is a power to reject the nomination on that ground, after following a prescribed process. In practice, only notorious prisoners are likely to have their nomination rejected. Our provisional view is that this power is an anachronism and should be abolished; however the underlying disqualification should remain.
- 63 The second exception is based largely on case law, and relates to sham nominations. Most of the case law on the subject has been overtaken by developments in the law governing party registration and authorised party descriptions at elections. However, there remain examples of sham nominations which can arise: someone standing under a fake name impersonating a real candidate, or a fictitious person (such as a mannequin). However the case law in our view gives little guidance to returning officers as to how to deal with these examples. The power should concentrate on the nomination being a fiction or device liable to confuse or mislead electors, or obstructing their exercise of the franchise. In addition, it should extend to offensive or obscene particulars in the nomination paper. In our provisional view, returning officers should have an express power to reject sham nominations.

## **CHAPTER 8 THE POLLING PROCESS**

- 64 Chapter 8 considers the law concerning the polling process on polling day, as well as how the law deals with events that occur during polling which frustrate the poll. In this chapter, we set out 15 provisional proposals, and ask one question.

### **Polling**

- 65 After nominations, a range of notices are required by law, which we provisionally consider should be replaced by a single polling notice signifying the need for a poll and finally settling the candidates at election. Various rules relating to the logistics of polling and regulation of polling can be more simply and clearly stated. In particular:
- (1) the rules on appointing poll clerks should extend to all those appointed to work in the election, so that they must not have had any involvement in the election campaign in question.
  - (2) The power to use school rooms for polling should be clarified so that the returning officer selects and is in control of the premises required, and need only compensate the school for direct costs of providing the premises.
  - (3) Only essential equipment such as ballot papers, boxes, registers and key lists should be stipulated in the rules, with the returning officer under a general duty to furnish polling stations with the equipment required for the legal and effective conduct of the poll.
  - (4) Presiding officers should have the power to remove from polling stations persons not entitled to be there. The procedure for returning officers to issue authorisations to use force should be abolished.
- 66 The polling procedure itself is prescribed in election rules. It is useful to distinguish between three kinds of voting procedure. The ordinary voting procedure is that which most people recognise – voting individually and in secret, without any kind of assistance. The tendered voting procedure exists for those who appear from the polling station register not to be entitled to vote, for example because they are recorded as having already voted. A tendered ballot paper must be issued to them, which cannot be counted by the returning officer but may be counted by an election court. Thirdly, the assisted voting procedure compromises some secrecy in order to ensure access for disabled voters. We describe the detailed operation of these procedures in the chapter.
- 67 As to the ordinary polling procedure, we note some differences across elections. In our provisional view, a single set of polling rules should apply to all elections. These should be simplified so that they prescribe only the essential elements of conducting a lawful poll. We also propose removing the requirement for voters to show the official mark on their ballot paper to polling clerks, which emanates from historical concerns dating back to 1872 about an inefficient fraud called the “Tasmanian dodge”.

- 68 Entitlement to vote at a polling station is based on the polling station registers and absent voters lists. Presiding officers are not entitled to question in substance the right to vote, but may ask certain questions which are prescribed in the legislation for each election. We provisionally consider that secondary legislation should set out the point which questions as to entitlement to a ballot paper may elicit, but leave the precise wording to guidance.
- 69 Equal access for disabled voters to polling is an important policy in the polling context. This manifests itself not only in the assisted voting procedure, but also in enabling as many electors as possible to vote using the standard procedure, which maintains secrecy. This is done by ensuring that large size ballot papers are available in polling stations, and by requiring use of a tactile voting device which can help blind and visually impaired electors to vote unassisted. However the description of the device is excessively detailed at some elections. In our view there should be a single formulation of the required characteristics of the equipment to be used to help disabled voters vote unassisted.
- 70 As to the assisted voting procedure, we provisionally consider that presiding officers should be able to permit voters to vote with the assistance of a companion without requiring a written declaration. We do not consider that there should be a limit on the number of persons able to assist disabled voters, or alternatively propose that the limit should not apply to family members.

#### **Supervening events frustrating the poll**

- 71 Election rules deal with two kinds of events which might frustrate the poll. The first is rioting and open violence, which can lead to presiding officers suspending 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. The law here is very complicated and differs as between parliamentary and local government elections. At the former, different rules apply depending on whether the deceased candidate is affiliated with a party, or is independent, which reflects the importance of party politics at these and other legislative elections. The law also deals inconsistently with the question at elections which use the party list.
- 72 In our view, the law is complex and untidy. We provisionally propose to retain the current provision for parliamentary elections, including the distinction between the deaths of party and independent candidates. We ask consultees whether this approach should be extended to local government elections, so that the death of an independent candidate should not result in abandoning the poll. As to party list elections, we provisionally consider a single set of rules should govern, so that the death of a list candidate should not affect the poll going ahead.
- 73 Death and rioting are not the only conceivable events that might frustrate the poll, however. A more general power to deal with supervening events which obstruct or frustrate the poll is desirable, provided a significant portion of electors are affected. We provisionally propose that returning officers should have that power, subject to instruction by the Electoral Commission in the case of national disruptions.

## **CHAPTER 9 THE COUNT AND DECLARATION OF THE RESULT**

- 74 Upon the conclusion of the poll, the immediate task is to determine the result, declare the winners, and ensure an orderly democratic transition to the newly elected body or office. In this chapter, we outline classical rules on the count, before considering some of the transpositions of them to other elections. We set out six provisional proposals and ask one question.
- 75 In contrast to other areas of the law, the classical election rules governing the count are not detailed. Six election rules deal with the logistics and timing of the count (making provision for counting to commence as soon as practicable, and laying down a power to pause the count overnight), provide for who may attend (in particular, for counting agents appointed by candidates to scrutinise the count), lay down a requirement for verification of the ballot papers received from a polling station against the number of ballot papers allocated to it, provide the grounds on which ballot papers can be rejected, which is centred on whether the intention of the voter is clear, and lay down a process for determining and announcing the result.
- 76 This approach is replicated at other elections (except for those using the single transferable vote, or STV). For elections which use the party list, a difficulty in transposition arises regarding who may attend the count and appointing counting agents. There are some differences due to policy, although some appear to be purely the result of different drafting approaches. In our provisional view, a single standard set of rules should govern the count, which caters for differences due to voting system and management system for the election.
- 77 These rules should empower returning officers to determine the earliest time at which is practicable to start a count, and to pause one overnight, subject to the special duty to commence the count for UK Parliamentary elections within four hours.
- 78 As to elections using STV (Scottish local government elections and elections in Northern Ireland other than those to the UK Parliament), we note the extremely complicated set of rules, which is due to the voting system in use. In our view, save for the differences in the “transfer value” of votes, which is calculated slightly differently in each jurisdiction, the same detailed rules should govern STV counts.
- 79 Two types of elections are counted electronically: Greater London Authority elections and Scottish local government elections. However, the election rules for each take a different approach. The GLA election rules are re-written with electronic counting in mind. The Scottish local government election rules are written more simply, with a general provision enabling the returning officer to count electronically. In our provisional view, the standard set of counting rules for elections should be written as technologically neutrally as possible, but apply to manual counting. A single subset should govern electronic counting. Which elections are subject to electronic counting should be determined by statutory instrument.

- 80 We see the case for some analogue, in the electronic counting context, for the classical provisions promoting transparency at the manual count by enabling candidates and agents to scrutinise proceedings. In our current view that can be done by requiring returning officers to demonstrate the effectiveness of their equipment to party representatives, or through a certification requirement set out in law. We ask consultees whether these are desirable courses of action.

## **CHAPTER 10 TIMETABLES AND COMBINATION OF POLLS**

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

### **Electoral timetables**

- 82 Each set of election rules contains an administrative timetable. These contain most of the steps covered by election rules, from notice to nomination, ending with polling day. They do not contain deadlines for absent voting or registration, which are covered elsewhere in the electoral legislation.
- 83 In general, an incidence rule determines when polling day takes place. The legislative timetable then calculates the administrative timetable by calculating back from polling day. It is truly an administrative timetable.
- 84 The exception is UK Parliamentary election timetables, which are historically both an administrative timetable and also contain an incidence rule. The first step in the timetable – the dissolution of Parliament (for general elections) or the warrant for the writ of by-election (for by-elections) – determines when polling day takes place. For general elections that is now done by the Fixed-term Parliaments Act 2011. For by-elections, the complex legislative timetable is arranged so that the returning officer can choose a Thursday occurring on days 23 to 27 after the warrant for by-election is issued, so that the timetable remains both an administrative one and an incidence rule.
- 85 In our provisional view, the UK Parliamentary election timetable should be re-oriented so that it counts back from polling day which is given by the 2011 Act. For by-elections, a separate incidence rule should be enacted which reflects the current law, save that it should expressly state that the polling day is on the last Thursday occurring between days 23 and 27 after the warrant for the writ of by-election. That writ should be capable of electronic communication.
- 86 The above is based on a 25 day timetable. Although most elections run a 25 day timetable, two types of elections do not: GLA elections are run under a 30 day timetable to allow for the production of a booklet containing Mayoral candidates addresses, while elections occurring in Scotland only are run according to a 28 to 35 day timetable.

- 87 In our provisional view, a standard timetable should govern all UK elections. We can see two options for standardisation which least disturb the current arrangements: a 25 day timetable or a 28 day timetable. For the former option, it can be said to disturb the lowest number of elections' timetables. For the latter, it affords more time for all elections, while preserving the current timelines for producing the booklet at GLA elections. It would only minimally affect Scotland-only elections.
- 88 We provisionally propose that the standard timetable should be 28 days in length and contain the key milestones in electoral administration for all elections.

### **Combination of polls**

- 89 The combination of polls is notoriously complex even within electoral law. The key to understanding the subject is to distinguish between the coincidence of elections' polling days and the question whether coinciding polls should be taken together, or administratively "combined".
- 90 We do not propose to state the current law, which is very complex. In outline:
- (1) Every election is conducted by its returning officer according to its election rules.
  - (2) Incidence rules govern when elections should occur. By their application, elections will sometimes coincide, meaning their polls will happen on the same day.
  - (3) The area of law called the "combination of polls", properly understood, deals with the following circumstances:
    - (a) two or more elections coincide in the same area; and
    - (b) without more, each returning officer must conduct each poll according to its own election rules.
- 91 The law on the combination of polls considers three distinct issues:
- (1) The combinability of particular polls: some must be combined and others may be. For yet others, nothing is said about combination, meaning there can be no combination – the default position is as we described in (3)(b) above.
  - (2) The management issue: where polls are combined, which of the returning officers for the combined elections takes the lead role, and for which functions.
  - (3) The combined conduct rules issue: where polls are combined, and irrespective of whether it is the lead or the other returning officer who is performing a particular function in relation to the poll, what adaptations to the ordinary election rules are made to deal with the fact that the polls are combined.

- 92 The answer to these questions is given in a complex array of election specific provisions, yielding inconsistent results which we outline in the consultation paper. For example, if a Welsh Assembly general election coincides with ordinary elections for both Police and Crime Commissioners and local government elections the current law is that:
- (1) the Welsh Assembly and the local government polls must be combined;
  - (2) the PCC and local government polls must be combined; but
  - (3) the Welsh Assembly and PCC polls may not be combined.
- 93 If these elections were to coincide, as was going to be the case in 2016 until polling day for local government elections was deferred, the legal position would be a nonsense.
- 94 Our provisional proposal is that the law governing combination of coinciding polls should be in a single set of rules. The default position should be that any coinciding polls must be combined, meaning that the conduct rules must address the fact of their coincidence and cannot ignore it. If more than three polls coincide, we ask whether the returning officer should have a power to defer a fourth coinciding poll in the interests of voters and good administration, and what safeguards should apply to the exercise of that power. A single set of adaptations should provide for situations where a poll involves several ballot papers.

## **CHAPTER 11 ELECTORAL OFFENCES**

- 95 Elections are regulated by criminal offences which particularly govern their conduct. These are set out in the 1983 Act and repeated in election-specific legislation. Some general criminal offences are relevant in the electoral law context, but electoral offences are particularly important because they target serious electoral offending and candidates and their agents. Those offences which are labelled a “corrupt” or “illegal” practice have special significance:
- (1) they vitiate the validity of an election if an election petition is brought (which is discussed in chapter 13); and
  - (2) they have special consequences for the offender:
    - (a) if the offender is the winning candidate, as well as being guilty of a crime, he or she must vacate the elected post, and a new election must be held;
    - (b) on conviction the offender is disqualified from election for a period of 3 years (for illegal practice) or 5 years (for corrupt practice);
- 96 A person convicted of personation or certain voting offences is additionally disqualified from being registered and voting at any election for a disqualification period.
- 97 In our provisional view, a single set of electoral offences should be set out in primary legislation which should apply to all elections. Some of the complex or outdated drafting should be simplified. We particularly discuss the older or “classical” offences.

- 98 First, the corrupt practices of bribery, treating and undue influence should be simplified. The mental element in bribery, we provisionally propose, should be an intention to procure or prevent the casting of a vote at the election. The electoral offence of treating, which is rooted in Victorian problems of electoral largesse stirring up intimidating mobs, should be abolished and the behaviour it captures prosecuted as bribery where appropriate.
- 99 As to undue influence, we analyse its component elements. In our view, they are:
- (1) Pressure and duress: to include any means of intimidation, whether it involves physical violence or the threat of it, or some other compelling threat.
  - (2) Trickery: to cover devices and contrivances such as publishing a document masquerading as a rival campaign's.
  - (3) Abuse of a position of influence: where a special relationship of power and dependence exists between the person exerting the influence and the voter.
- 100 Our provisional view is that the offence should be restated to cover the first two components above. As to the third, and in particular as to the reference to "temporal or spiritual injury", we ask whether the law should regulate the abuse of influence, religious or otherwise, by a person over a voter which does not amount to an existing offence.
- 101 As to the classical illegal practices, we ask questions about three in particular.
- (1) Printed campaign materials must be "imprinted" with details of, among others, the person causing it to be published. Is the current power to make provision concerning imprinting of "other" (including online) material sufficient, or is it desirable and feasible, within the remit of this project, to recommend regulation of online material?
  - (2) 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?
  - (3) Should the offence of falsely stating that another candidate has withdrawn be retained?
- 102 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 has resulted in harsher sentences and carries a maximum sentence of ten years' custody. There may be less practical experience in Scotland of that offence in an electoral context, and it may be thought that there are evidential and conceptual difficulties in proving the offence in Scots law. In any event, we wonder whether there is a case for longer custodial sentences for the commission of serious electoral offences. We therefore ask consultees whether an increased sentence of ten years' custody should be available in such cases as an alternative to conspiracy to defraud.

## CHAPTER 12 REGULATION OF CAMPAIGN EXPENDITURE

- 103 In this chapter, we consider the regulation of campaign expenditure, which has grown complex over time. We set out five provisional proposals for reform of this area.
- 104 The law regulates spending at elections in the following way.
- (1) Responsibility for election spending falls to the candidate's election agent. An agent must be appointed and, with limited exceptions, no other person may incur expenses to promote or procure the election of a candidate. Third parties may spend money up to a specified limit.
  - (2) Expense limits are prescribed by law as fixed ceilings or formulas. The election agent must complete and deliver to the returning officer a return and declaration of expenses signed by the candidate.
  - (3) Breaches by candidates or their agents of expenditure regulations (whether to do with expense limits or accuracy of the returns reporting spending) are corrupt or illegal practices, bringing into play criminal sentences, disqualifying the candidate and agent from involvement in elections for a defined period, and constituting grounds for the invalidity of the election if challenged by election petition. This places the onus of complying with the regulation on candidates and their election agents.
- 105 The election agent is thus a key mechanism for pursuing the policies of channelling spending, limiting expenses, and ensuring that they are reported.
- 106 However the law, which is contained in the 1983 Act and replicated in election-specific provisions, is extremely complex. The scheme of the Act is not obvious even to lawyers. It should be restated to start with the definition of expenditure which is subject to limits, then define the additional kinds of expenditure which must be channelled through the agent, or which must be reported. In our provisional view, the provisions regulating campaign expenditure should be centrally stated for all elections, with a single schedule containing prescribed expense limits and guidance as to expenditure and donations.
- 107 The regulation of campaign spending should be capable of being followed by candidates. Certain limits, for example those for spending at local government elections or UK Parliamentary general elections, are expressed as formulas such that the precise limit can only be established if the candidate or agent knows the number of registered electors on the day of notice of election. It is not for this project to set expense limits, but we provisionally propose that expenditure limits which are calculated according to a formula should be declared by the returning officer along with the notice of election.
- 108 At present, the law governing expense returns which report expenses is confusing. In our provisional view, returning officer should receive a single expense return by the agent and candidate, including any authorised spending.

## CHAPTER 13 LEGAL CHALLENGE

- 109 The law governing legal challenge is extremely complex, the product of historical developments in the 19th century. It has some features which are unique to the “election court”, a special tribunal presided over by judges (and experienced lawyers in the case of local election courts in England and Wales and Northern Ireland, while sheriffs hear local election petitions in Scotland). Chapter 13 outlines the detail of the law here, dividing its subject matter chiefly between the jurisdiction of the court (or the grounds for reviewing elections), and procedure.

### Jurisdiction of the court

- 110 The election court reviews the *validity* of the election, but may also *correct* the result. In relation to the latter, it does so through a process called a “scrutiny”, after the name of proceedings before the House of Commons’ election petition committees. It is an adversarial process which can use vote tracing to challenge, before the courts, the propriety of any one vote, discard it, or count a tendered vote. However, a so-called doctrine of “votes thrown away” enables the court to decide that votes for a candidate who is disqualified do not count, so that the next candidate may be elected, and the result thus corrected. However, disqualification of a candidate is generally a ground for annulling the election, which seems a fairer result since it gives voters, particularly those to whom party affiliation is important, a chance to vote for a properly qualified replacement candidate. We provisionally propose to abolish the doctrine.
- 111 As to the *validity* of an election, an election can be annulled on one of three grounds:
- (1) a breach of electoral law during the conduct of the election which was either:
    - (a) fundamental; or
    - (b) materially affected the result of the election;
  - (2) corrupt or illegal practices committed either:
    - (a) by the winning candidate personally or through that candidate’s agents; or
    - (b) by anyone else, to the benefit of the winning candidate, where such practices were so widespread that they could reasonably be supposed to have affected the result; or
  - (3) the winning candidate was at the time of the election disqualified from office.

- 112 However these grounds are not at all obvious on the face of the legislation, and the above outline is the result of consideration of case law, with some issues still a matter for debate. The effect of giving an incorrect home address in a nomination paper, for example, and of formal defects in the paper generally, is unclear. The material time at which disqualification “bites” so as to be a ground for annulment, is also not beyond doubt. The 1983 Act provisions refer to the time of *election*, but at least one case has annulled the election of a candidate for disqualification at the time of *nomination*, which had been cured by the time of the election. Finally, there are problems transposing the above grounds to elections using the party list system, particularly those that relate to corrupt or illegal practices. This is because it is largely parties who stand for election, not individual candidates.
- 113 In our provisional view, the law governing challenging elections should be set out in primary legislation governing all elections. The grounds for correcting the outcome or invalidating elections should be restated and positively set out. As to some of the particular problems we encountered:
- (1) Defects in nomination, other than purely formal defects, should invalidate the election if they amount to a breach of election law which was committed knowingly or can reasonably be supposed to have affected the result of the election.
  - (2) Disqualification at the time of election should be stated to be a ground for invalidating the election for all elections. We ask consultees whether the election court should have a power to consider whether a disqualification has lapsed and, if so, whether it is proper to disregard it, mirroring the power of the Commons under section 6 of the House of Commons Disqualification Act 1975.
  - (3) At elections using the party list voting system, the court should be able to annul the election as a whole, or that of a list candidate, because corrupt or illegal practices were committed attributable to the candidate party or individual, or for extensive corruption.

### **Procedure**

- 114 The procedure governing election petitions is set out in the 1983 Act and election-specific legislation, and is supplemented by procedural rules in each jurisdiction in the UK. It is very complex, and in places outdated. The original scheme was that bespoke election proceedings would be a “one stop shop” for policing elections, so that the election court used to have both a civil and a criminal law jurisdiction. It had inquisitorial features, charged with rooting out corruption. The petition proceedings were designed with finality in mind, with no right of appeal but allowing stating a case to a higher court on a point of law.

- 115 In reality these are private proceedings before judges which use a procedure that is very formal, rigid, and outdated. There is no process for filtering out unmeritorious petitions, for example. Time limits are rigid and mandatory, with no discretion to extend – but those which are contained in secondary legislation may be disregarded on the basis of article 6 of the European Convention on Human Rights, as was the case in *Miller v Bull* [2009] EWHC 2640 (QB), [2010] 1 WLR 1861. An election court – even one staffed by two High Court judges as was the case in *Woolas v Parliamentary Election Court* [2010] EWHC 3169 (Admin); [2011] 2 WLR 1362 – is subject to the judicial review jurisdiction of the High Court. The applicability of judicial review to the decisions of Scottish election courts appears to be untested.
- 116 The cost of bringing election petitions is an issue, with the availability of protective costs or expenses orders to cap the costs of challenge in no way beyond doubt. A less costly way of informally checking whether a breach of election law affected the result of the election emerged recently in case law.
- 117 Our suggested solution to this problem is twofold. First, we propose to bring the challenge system within the ordinary court structure in the UK, recognising that these are private civil proceedings which should be subject to the ordinary procedure of the courts. Legal challenges should be heard in the ordinary court system in the UK, with a single right of appeal on a point of law. Local election petitions in England and Wales should be heard by expert lawyers sitting as deputy judges. Challenges should be governed by simpler, modern and less formal rules of procedure allowing judges to achieve justice in the case while having regard to the balance between access to justice and certainty of electoral outcomes.
- 118 Secondly, we propose to reflect the public interest in free and fair elections. Returning officers should have standing to bring petitions, including a preliminary application to test whether an admitted breach affected the result. We also provisionally propose that there should be a means of ensuring sufficient representation of the public interest in elections within that judicial process. The obvious candidate to be public interest petitioner would be the Electoral Commission, although we consider in our paper the threshold for bringing a petition, and whether satisfaction of that threshold should be a matter for the public interest petitioner or an independent expert. In that context, we ask a series of questions for consultation:
- (1) Should there be a public interest petitioner with standing to bring election petitions?
  - (2) What should the threshold criteria be for bringing a petition in the public interest?
  - (3) How, if at all, should the law tackle the issue of individuals getting a “free ride” by challenging elections through the public interest petitioner?
  - (4) Should the decision to bring a public interest petition be subject to independent and expert assessment of the merits of the case, or left entirely at the discretion of the petitioner?

- 119 Finally, we envisage informal complaints, which do not seek to affect the outcome or validity of an election. The important issue here is that voters complaints are heard, and any lessons learned by electoral administrators. In our provisional view, there should be an informal means of reviewing complaints about elections which do not aim to overturn the result. The options here include involvement of ombudsmen, review by adjacent or regional returning officers, or consideration by the Electoral Commission.

#### **CHAPTER 14 REFERENDUMS**

- 120 Chapter 14 considers national referendums, local government referendums and parish polls. We set out six provisional proposals, and ask two consultation questions.
- 121 A national referendum is a poll of the electorate at national level which asks a question on a particular issue or issues. They are part of the electoral landscape and use the infrastructure for electoral administration with some modifications. Local referendums conducted under statute are examples of direct local democracy. There are three types of local referendums, described below. Parish polls are a means by which decisions within the competence of a parish or community council may instead be taken by the parish electorate. In some cases they are referendums in all but name; since the range of decisions that may be taken include, for example, the election of a council chairman or a co-option to the council, they can have strong resemblance to an election.

#### **The existing legislative framework for national referendums**

- 122 Part VII of the Political Parties, Elections and Referendums Act 2000 (“the 2000 Act”) makes provision for national referendums. It applies to referendums held either throughout the UK, or in any of England, Northern Ireland, Scotland, Wales or in a region in England. Primary legislation is always required to instigate a national referendum. Along with providing for a referendum to be held on a particular question, the “instigating Act” (as we call it for brevity) sets out detailed conduct rules for the referendum.
- 123 The current approach is inefficient. At present, referendum law is on the whole contained in the instigating Act, even if it concerns basic elements of referendum administration. This presents administrators with a large volume of new rules, legislatures with an unnecessary workload, and presents an unnecessary risk of a legislative slip. It seems to us to be desirable to produce a set of generic referendum conduct rules that could simply be applied with minimal adaptation to a specific referendum. This would reduce the current complexity of the law, speed up the legislative process and make the conduct rules accessible in advance.
- 124 We provisionally propose that the primary legislation governing electoral registration, absent voting, core polling rules, and electoral offences should extend to national referendums where appropriate. Secondary legislation should set out the detailed conduct rules, which should mirror those governing elections, save for necessary modifications.

### **Local referendums**

- 125 There are three types of local referendums in England and Wales. Each is conducted under statute, with an Act setting out the process for instigating such a referendum, rules as to their incidence as well as identifying the franchise by stating that entitlement to vote at the referendums is based on appearing on the local government register. The detailed conduct rules are set out for each kind of referendum in separate statutory instruments
- 126 The three species of referendums are:
- (1) referendums on local governance changes under the Local Government Act 2000 (these referendums can also take place in Wales). The most common example is a change to elected mayors. These may be instigated by the local authority, the Secretary of State, or by a petition reaching a certain threshold of the electorate.
  - (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”). The electorate can thereby adopt neighbourhood plans, development orders or a community right to build order which will govern planning law in their community.
- 127 All of these referendums share the characteristic that the result of the referendum is binding and must be implemented by the local authority in question, or is binding by operation of law.

### ***Legal framework governing local referendums***

- 128 The law governing local referendums has evolved in a piecemeal way. As concerns local referendums conducted under statute, four distinct pieces of secondary legislation govern the three species of referendums on local governance (in England and Wales respectively), council tax increase and neighbourhood development orders. These are largely based on the law governing local government elections, albeit with necessary (though not fully consistent) adaptations due to the fact that they relate to referendums.
- 129 At present, materially identical laws are needlessly replicated across different pieces of legislation. Our main provisional reform proposal is that a single set of provisions should govern the mechanisms by which local referendums, which may be required by existing enactments, are undertaken. There should be a single set of conduct rules and challenge provisions governing these elections. This would eliminate inconsistencies in the detail of the rules where they are not justified by the nature of the referendum in question.

### ***Legal challenge***

- 130 We provisionally consider that a single set of grounds should be enunciated as to challenging local referendums, which are in line with those governing challenging elections, save in one respect. Since there is no candidate, the commission by anyone of a corrupt and illegal practice cannot serve to annul the validity of the referendum in the same way that conduct by or attributable to a candidate vitiates his or her election. The only ground that is intelligible in the referendum context is that of “extensive” corruption at the referendum which may reasonably be supposed to have affected the outcome. The court will still be able to review, and to annul, referendums for corruption which tended to favour the eventual result.
- 131 We ask consultees whether neighbourhood planning order referendums should be an exception to the general rule that local referendums are to be challenged before the court with jurisdiction to hear challenges to elections. If they should, we are nevertheless minded to state the grounds to which the Administrative Court should have regard when hearing a judicial review claim. At present, no guidance whatsoever is available to a court.

### **Parish polls**

- 132 Parish polls are local citizen-initiated polls that occur in English parishes and Welsh communities, the smallest tier of local councils in England and Wales. They are unlike the local referendums considered above in that they are a form of direct decision by the local electorate on matters before the parish or community council. The outcome of a parish poll thus has the same standing as a council resolution. It may therefore be reversed by subsequent resolution of the council.

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

- 133 Since parish and community councils may elect a chairman, and provision is made for appointing councillors, and they do so by making resolutions at parish meetings, these matters may properly be the subject matter of a poll. Accordingly, the 1987 rules envisage that polls may be asked on two kinds of question. The first is about the election of a chairman of the parish council, or any other appointment to office. In effect, this is an election by the parish or community’s electorate to the chairmanship of the parish council or other office.
- 134 The second, and more common, type of poll, asks a question on any issue arising for decision by the parish council. Although nowhere expressly stated, the question cannot lie outside the proper range of decision making by a parish council, or be devoid of practical application.

### ***The particular complexity of parish polls***

- 135 The first matter of difficulty is whether such polls ask the electorate about an issue, and are thus properly referendums, or whether they seek to appoint someone to an office, and are as such akin to an election. The current rules envisage that in at least one respect, parish polls are elections: if they are concerned with the “election of the chairman of a parish or community council” or “the appointment to any other office”. In that case, they are conducted according to rules akin to those governing parish council elections. In our view, there is no reason in principle why such polls, if properly demanded at parish meetings, cannot be conducted according to the rules governing parish and council elections within the standard framework governing elections, subject to there being no nomination stage: the candidates for election should be stipulated at the meeting that decides to have a poll. We would welcome consultees’ views as to the range of appointments which can be put to the electorate.
- 136 The second matter of difficulty arises with respect to parish polls on an issue before the council, which are true referendums. We ask consultees whether the scope of the issues which can be put to a parish poll should be defined so as to restrict parish polls to issues of parish concern.
- 137 Our provisional view is that parish polls should be run according to the standard conduct rules governing local referendums (where the poll asks a question) and the standard rules governing elections (where the poll concerns an appointment), save for a modification to omit the nominations stage.

## **APPENDIX A SUMMARY OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS**

This appendix brings together all of the provisional proposals and consultation questions contained in the consultation paper. We particularly invite consultees to comment on all or some of these, as appropriate. This will greatly assist us in formulating our recommendations for reform.

### **CHAPTER 2: LEGISLATIVE FRAMEWORK**

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

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

### **CHAPTER 3: MANAGEMENT AND OVERSIGHT**

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

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

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

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

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

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

## **CHAPTER 4: THE REGISTRATION OF ELECTORS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **CHAPTER 6: ABSENT VOTING**

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

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

**Provisional proposal 6-3:** Registration officers should be under an obligation to determine absent voting applications and to establish and maintain an entry in the register recording absent voter status, which can be used to produce absent voting lists.

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

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

**Provisional proposal 6-6:** At the time of election, requests for a waiver of the requirement to provide a signature as a personal identifier should be attested, as proxy applications currently must be.

**Question 6-7:** Should electoral law prohibit, by making it an offence, the involvement by campaigners in any of the following:

- (1) assisting in the completion of postal or proxy voting applications;
- (2) handling completed postal or proxy voting applications;
- (3) handling another person's ballot paper;
- (4) observing a voter marking a postal ballot paper;
- (5) asking or encouraging a voter to give them any completed ballot paper, postal voting statement or ballot paper envelope;
- (6) if asked by a voter to take a completed postal voting pack on their behalf, failing to post it or take it directly to the office of the Returning Officer or to a polling station immediately;
- (7) handling completed postal voting packs at all?

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

**Provisional proposal 6-9:** These rules should set out the powers and responsibilities of returning officers regarding issuing, receiving, reissuing and cancelling postal votes generally rather than seeking to prescribe the process in detail.

## **CHAPTER 7: NOTICE OF ELECTION AND NOMINATIONS**

**Provisional proposal 7-1:** A single nomination paper, emanating from the candidate, and containing all the requisite details including their name and address, subscribers if required, party affiliation and authorisations should replace the current mixture of forms and authorisations which are required to nominate a candidate for election.

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

**Provisional proposal 7-3:** The nomination paper should be adapted for party list elections to reflect the fact that parties are the candidates; their nomination must be by the party's nomination officer and should contain the requisite consents by list candidates.

**Provisional proposal 7-4:** Subscribers, where required, should be taken legally to assent to a nomination, not a paper, so that they may subscribe a subsequent paper nominating the same candidate if the first was defective.

**Provisional proposal 7-5:** Returning officers should no longer inquire into and reject the nomination of a candidate who is a serving prisoner. The substantive disqualification under the Representation of the People Act 1981 will be unaffected.

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

## **CHAPTER 8: THE POLLING PROCESS**

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

**Provisional proposal 8-2:** The same forms of poll cards should be prescribed for all elections, including parish and community polls, subject to a requirement of substantial adherence to the form.

**Provisional proposal 8-3:** As part of their duty of neutrality, returning officer should not appoint in any capacity – including for the purposes of postal voting – persons who have had any involvement (whether locally or otherwise) in the election campaign in question.

**Provisional proposal 8-4:** The power to use school rooms should be clarified so that the returning officer is able to select and be in control of the premises required, and so that the duty to compensate the school for costs does not extend beyond the direct costs of providing the premises.

**Provisional proposal 8-5:** The law should specifically require that returning officers furnish particular pieces of essential equipment for a poll, including ballot papers, ballot boxes, registers and key lists. For the rest, returning officers should be under a general duty to furnish polling stations with the equipment required for the legal and effective conduct of the poll.

**Provisional proposal 8-6:** Presiding officers should have the power to use, or authorise the use by polling station staff of, reasonable force to remove from a polling station a person not entitled to be there. The procedure for returning officers to issue authorisations to use force should be abolished.

**Provisional proposal 8-7:** A single set of polling rules should apply to all elections, simplified so that they prescribe only the essential elements of conducting a lawful poll, including: the powers to regulate and restrict entry, hours of polling, the right to vote, the standard, assisted, and tendered polling processes, and securing an audit trail.

**Provisional proposal 8-8:** Polling rules should set out general requirements for a legal poll which the returning officer should adhere to. These should no longer include a requirement for voters to show the official mark on their ballot paper to polling station staff.

**Provisional proposal 8-9:** The right to ask voters questions as to their entitlement to vote should be preserved, but secondary legislation should only prescribe the point they may elicit, and leave suggested wording to guidance.

**Provisional proposal 8-10:** Voting with the assistance of a companion should not involve formal declarations, but should be permitted by the presiding officer where a voter appears to be unable to vote without assistance. There should no longer be a limit on the number of disabled voters a person may assist; alternatively, the limit should not apply to family members, who should include grandparents and (adult) grandchildren.

**Provisional proposal 8-11:** The requirement to provide equipment to assist visually impaired voters to vote unaided should be retained. There should be a single formulation, applying to all elections, of the required characteristics of the equipment.

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

**Provisional proposal 8-13:** At elections using the party list voting system, the death of an individual independent candidate should not affect the poll unless he or she gains enough votes for election, in which case he or she should be passed over for the purpose of allocation of the seat; the death of a list candidate should not affect the poll.

**Question 8-14:** We ask consultees whether, at local government elections, the death of an independent candidate should or should not result in the abandonment of the poll.

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

**Provisional proposal 8-16:** Returning officers should have power to alter the application of electoral law in order to prevent or mitigate the obstruction or frustration of the poll by a supervening event affecting a significant portion of electors in their area, subject to instruction by the Electoral Commission in the case of national disruptions. Presiding officers should only have a corresponding power in circumstances where they are unable to communicate with their returning officer.

## **CHAPTER 9: THE COUNT AND DETERMINATION OF THE RESULT**

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

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

**Provisional proposal 9-3:** The rules should empower returning officers to determine the earliest time at which it is practicable to start a count, and to pause one overnight, subject to the duty to commence counting at UK Parliamentary elections within four hours and the requirement to report any failure to do so.

**Provisional proposal 9-4:** Candidates may be represented at the count by their election agents or counting agents, who should be able to scrutinise the count in the way the law currently envisages. At party list elections, parties may appoint counting agents. Election agents and counting agents should be able to act on a candidate's behalf at the count, save that a recount may only be requested by a candidate, an election agent or a counting agent specifically authorised to do so in the absence of the candidate or election agent.

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

**Provisional proposal 9-6:** A standard set of counting rules and subset of counting rules for electronic counting should apply to all elections. Which elections are subject to electronic counting should be determined by statutory instrument.

**Question 9-7:** Should electronic counting systems be subject to a certification requirement, a requirement of a prior demonstration to political parties and/or the Electoral Commission, or should there be no change in the current law?

## **CHAPTER 10: TIMETABLES AND COMBINATION OF POLLS**

**Provisional proposal 10-1:** The UK Parliamentary election timetable should be oriented so that steps count back from polling day.

**Provisional proposal 10-2:** A separate rule should state that, for by-elections, polling day is on the last Thursday occurring between days 23 and 27 after the warrant for the writ of by-election is issued. (this is based on the current 25 day timetable length).

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

**Provisional proposal 10-4:** A standard legislative timetable should apply to all UK elections, containing the key milestones in electoral administration, including the deadlines for registration and absent voting.

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

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

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

**Question 10-8:** Should the returning officer have a power to defer a fourth coinciding poll in the interests of voters and good electoral administration? What safeguards might sensibly apply to the exercise of the power?

**Provisional proposal 10-9:** The lead returning officer and their functions should be determined by a single set of rules according to the existing hierarchy for mandatory combinations, with some discretionarily combinable functions.

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

## **CHAPTER 11: ELECTORAL OFFENCES**

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

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

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

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

**Question 11-5:** Should the law regulate the exercise of abuse of influence, religious or otherwise, by a person over a voter which does not amount to an existing electoral offence?

**Question 11-6:** Is the current power to make provision concerning imprinting of “other” (including online) material sufficient, or is it desirable and feasible, within the remit of this project, to recommend regulation of online material?

**Question 11-7:** Should the illegal practice of disturbing election meetings apply only to candidates and those supporting them, and no longer be predicated on the “lawfulness” of the meeting?

**Question 11-8:** Should the offence of falsely stating that another candidate has withdrawn be retained?

**Question 11-9:** Should an increased sentence of ten years’ custody be available in cases of serious electoral fraud as an alternative to recourse to the common law offence of conspiracy to defraud?

## **CHAPTER 12: REGULATION OF CAMPAIGN EXPENDITURE**

**Provisional proposal 12-1:** Returning officers should publicise and make available for inspection expenses returns (as well as publicising non-receipt of a return). Secondary legislation should prescribe in detail the process for that publicity and inspection, paving the way for publication online.

**Provisional proposal 12-2:** Provisions governing the regulation of campaign expenditure should be centrally set out for all elections.

**Provisional proposal 12-3:** A single schedule should contain prescribed expense limits and guidance to candidates as to expenditure and donations.

**Provisional proposal 12-4:** Expenditure limits which are calculated according to a formula should be declared by the returning officer for the constituency or electoral area in a notice accompanying, or immediately following, the notice of election.

**Provisional proposal 12-5:** Returning officers should receive a single set of documents containing the return of expenses and declarations by the agent and the candidate. These should include any statement by an authorised person containing the particulars currently required to be sent to the returning officer by section 75(2) of the 1983 Act.

### **CHAPTER 13: LEGAL CHALLENGE**

**Provisional proposal 13-1:** The doctrine of “votes thrown away” should be abolished.

**Provisional proposal 13-2:** The law governing challenging elections should be set out in primary legislation governing all elections.

**Provisional proposal 13-3:** Defects in nomination, other than purely formal defects, should invalidate the election if they amount to a breach of election law which was committed knowingly or can reasonably be supposed to have affected the result of the election.

**Provisional proposal 13-4:** The grounds for correcting the outcome or invalidating elections should be restated and positively set out.

**Provisional proposal 13-5:** Disqualification at the time of election should be stated to be a ground for invalidating the election for all elections.

**Question 13-6:** Should the election court have a power to consider whether a disqualification has lapsed and, if so, whether it is proper to disregard it, mirroring the power under section 6 of the House of Commons Disqualification Act 1975?

**Provisional proposal 13-7:** At elections using the party list voting system, the court should be able to annul the election as a whole, or that of a list candidate, because corrupt or illegal practices were committed attributable to the candidate party or individual, or for extensive corruption.

**Provisional proposal 13-8:** Legal challenges should be heard in the ordinary court system in the UK, with a single right of appeal on a point of law.

**Provisional proposal 13-9:** Local election petitions in England and Wales should be heard by expert lawyers sitting as deputy judges.

**Provisional proposal 13-10:** Challenges should be governed by simpler, modern and less formal rules of procedure allowing judges to achieve justice in the case while having regard to the balance between access and certainty.

**Provisional proposal 13-11:** Returning officers should have standing to bring petitions, including a preliminary application to test whether an admitted breach affected the result.

**Provisional proposal 13-12:** There should be a means of ensuring sufficient representation of the public interest in elections within that judicial process.

**Question 13-13:** Should there be a public interest petitioner with standing to bring election petitions?

**Question 13-14:** What should the threshold criteria be for bringing a petition in the public interest?

**Question 13-15:** How, if at all, should the law tackle the issue of individuals getting a “free ride” by challenging elections through the public interest petitioner?

**Question 13-16:** Should the decision to bring a public interest petition be subject to independent and expert assessment of the merits of the case, or left entirely at the discretion of the petitioner?

**Provisional proposal 13-17:** There should be an informal means of reviewing complaints about elections which do not aim to overturn the result.

## **CHAPTER 14: REFERENDUMS**

**Provisional proposal 14-1:** Primary legislation governing electoral registers, entitlement to absent voting, core polling rules and electoral offences should be expressed to extend to national referendums where appropriate.

**Provisional proposal 14-2:** Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring that governing elections, save for necessary modifications.

**Provisional proposal 14-3:** A single legislative framework should govern the detailed conduct of local referendums, subject to the primary legislation governing their instigation.

**Provisional proposal 14-4:** The grounds of challenge governing elections should apply to local referendums, save that only extensive corrupt or illegal practice shall be a ground for annulling the referendum.

**Question 14-5:** Should challenge to neighbourhood planning referendums continue to be by judicial review only?

**Provisional proposal 14-6:** A parish poll pertaining to an appointment should be governed by the conduct rules governing elections, omitting the nomination stage.

**Provisional proposal 14-7:** A parish poll pertaining to an issue should be governed by the conduct rules for local referendums.

**Question 14-8:** Should the scope of issues before a parish council which can be put to a poll be defined so as to restrict parish polls to issues of parish concern?