

Law Commission

Scoping Consultation Paper (15 June 2012)

ELECTORAL LAW IN THE UNITED KINGDOM

A SCOPING CONSULTATION PAPER

THE LAW COMMISSION: HOW WE CONSULT

About the Commission: The Law Commission was established by section 1 of the Law Commissions Act 1965. The purpose of the Law Commission is to promote the reform of the law.

The Law Commissioners are:

- The Rt Hon Lord Justice Munby (Chairman);
- Professor Elizabeth Cooke;
- Mr David Hertzell;
- Professor David Ormerod; and
- Frances Patterson QC.

The Chief Executive is Elaine Lorimer.

Topic: This consultation covers electoral law in the United Kingdom.

About the project: The project on electoral law reform consists of three phases. The first phase is an exercise to determine the scope of the project; the second involves developing substantive law reform proposals; and the third consists of completing a final report and draft Bill.

This paper marks the start of the project and aims to set out, for consultation, those areas of electoral law that shall be included in the substantive phase of the project. The scoping exercise is being conducted by the Law Commission in cooperation with the Scottish Law Commission and the Northern Ireland Law Commission.

Geographical scope: England and Wales, Northern Ireland and Scotland.

An impact assessment will be developed in the substantive phase of the project.

Duration of the consultation: 15 June 2012 to **17 September 2012**.

How to respond

Send your responses either –

By email to: public@lawcommission.gsi.gov.uk or

By post to: Henni Ouahes, Law Commission

Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0269 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, where possible, you also sent them to us electronically (in any commonly used format).

After the consultation: We plan to publish a scoping report at the end of 2012, which will make conclusions about what areas of electoral law should fall within the scope of the reform project.

Freedom of information: We will treat all responses as public documents. We may attribute comments and publish a list of respondents' names. If you wish to submit a confidential response, it is important to read our Freedom of Information Statement on the next page.

Availability: You can download this scoping consultation paper and other documents free of charge from our website at <http://www.lawcom.gov.uk> (See A–Z of projects > Electoral law).

CODE OF PRACTICE ON CONSULTATION

The Law Commission is a signatory to the Government's Code of Practice described below.

THE SEVEN CONSULTATION CRITERIA

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercise

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity and scope of impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

CONSULTATION CO-ORDINATOR

The Consultation Co-ordinator for this project is Phil Hodgson. You are invited to send comments to the Consultation Co-ordinator about the extent to which the criteria have been observed and any ways of improving the consultation process.

Contact: Phil Hodgson, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
Email: phil.hodgson@lawcommission.gsi.gov.uk

Full details of the Government's Code of Practice on Consultation are available on the BIS website at <http://www.bis.gov.uk/policies/better-regulation/consultation-guidance>.

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000, the Freedom of Information (Scotland) Act 2002 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

THE LAW COMMISSION

ELECTORAL LAW IN THE UNITED KINGDOM

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CHAPTER 1

INTRODUCTION

- 1.1 On 19 July 2011, the Law Commission published its Eleventh Programme of Law Reform, which includes a project to review electoral law in the UK. This project involves a major commitment from the Law Commission and the Government. Accordingly, the project has been structured in three stages, with a review point at the conclusion of each stage.
- (1) The first stage concerns the scope of the electoral law project. Commencing with this scoping consultation paper and the subsequent consultation period, it aims to conclude with a scoping report at the end of 2012.
 - (2) The second stage involves formulating substantive law reform proposals. We will publish a consultation paper, undertake a broad public consultation and report on our conclusions as to how electoral law should be reformed. This phase will extend from February 2013 to July 2015.
 - (3) The final stage will involve the production of a draft Bill or Bills to implement our conclusions at the second stage, and an accompanying final report, provided the government has substantially accepted the conclusions of the consultation report. The aim will be to complete this third and final stage before the end of February 2017.
- 1.2 It is necessary to consider electoral law on a UK basis. This scoping exercise is being conducted by the Law Commission in cooperation with the Scottish Law Commission and the Northern Ireland Law Commission. We hope that the next stage of the process will be undertaken as a tripartite joint project by all three law commissions, as this would be to the advantage of all three jurisdictions and would undoubtedly strengthen the project.

OUTLINE OF THE SCOPING CONSULTATION PAPER

- 1.3 Chapter 1 of this scoping consultation paper will introduce the electoral law project and the basis upon which we have approached the subject. Chapter 2 then considers the need for reform and overarching matters. Chapters 3 to 5 deal with discrete topics of electoral law, means of challenge and electoral offences, and referendums, respectively.
- 1.4 Questions as to the scope of the project are provided throughout the body of the text. While we specifically seek stakeholders' views on these particular questions, we also welcome responses to the scope of the project generally and key issues in electoral law in particular. The deadline for responses to the scoping consultation paper is 17 September 2012.

BREADTH OF ELECTORAL LAW

- 1.5 Electoral law is concerned with the rules that govern the running of elections for public office. At its most expansive, this field includes the rules that govern the incidence of elections, the extent and conditions of participation in them as voters and candidates, the drawing of boundaries for such participation, the methods of

voting and determining outcomes, and the means of challenging the result. This wider notion of electoral law intersects with other fields, such as the constitutive rules of legislative bodies and public offices. Underpinning electoral law is the fundamental principle of democratic representation.

- 1.6 A more focused concept of electoral law is the law relating to the organisation and administration of elections, from their incidence to their outcomes. This is often called electoral administration law, the purpose of which is to set out a system of transparent rules to facilitate the fair and effective administration of the electoral process. This more technical and administrative aspect of the law of elections is the focus of the electoral law project.

ELECTIONS AND REFERENDUMS COVERED

- 1.7 Elections are the means through which public officeholders are democratically elected and the source of legitimate authority in the performance of their functions, whether these are executive or legislative, local or national. Well-run elections provide definitive expressions of the democratic will for the term of office. Conversely, badly-run elections undermine public confidence in the electoral process and thus in its outcomes. The aim of the electoral law project is to provide a legal framework that promotes well-run elections, and reduces the risk of loss of public confidence that might result from poorly run elections.
- 1.8 Electoral law is about elections to public office. It is not concerned with elections outside the public sphere. Nor is it about public polls which have no legal effect. An election confers legal and often constitutional status on a person. As such, it calls for special and careful legal treatment. A question arises whether similar treatment should be given to referendums, which differ from elections in that they are about a single issue and may not be legally determinative. Nevertheless, the answers carry great moral and political weight by virtue of their democratic legitimacy. One reason for reviewing electoral law and referendum law together is therefore their common need for legal rules that transparently promote fair and effective administration.
- 1.9 A second reason for considering both elections and referendums is that they are run, broadly speaking, by the same persons and may in fact be run by the same people on the same day, as was the case in combined local government and referendum polls on 5 May 2011. Accordingly, this paper also asks whether national and local referendums conducted under statute should be included within the scope of the substantive law reform project. Our preliminary view is that we should consider all elections and referendums in the public sphere.
- 1.10 There is a long and growing list of elections,¹ which currently includes:
 - (1) UK Parliamentary elections;
 - (2) European Parliamentary elections;

¹ The inclusion of the law of the jurisdictions of Scotland and Northern Ireland will depend on decisions by the Scottish Law Commission, Northern Ireland Law Commission, and both devolved administrations.

- (3) Scottish Parliamentary elections;
- (4) Northern Ireland Assembly elections;
- (5) National Assembly for Wales elections;
- (6) Local government elections in England and Wales, including:
 - (a) Principal area local authority elections; and
 - (b) Parish and town councils and community council elections;
- (7) Local government elections in Scotland;
- (8) Local government elections in Northern Ireland;
- (9) Greater London Authority elections (to the London Assembly and London Mayor);
- (10) Mayoral elections in England and Wales;
- (11) Police and Crime Commissioner elections in England and Wales;
- (12) National Park Authority elections in Scotland;
- (13) Crofting Commission elections in Scotland; and
- (14) Health Boards elections in Scotland.

1.11 In addition, we believe referendums are within the scope of the project if they are:

- (1) National referendums held pursuant to the Political Parties Elections and Referendums Act 2000; and
- (2) Local referendums held under the Local Government Act 2000, the Local Government Finance Act 1992, the Town and Country Planning Act 1990 or the Local Government Act 1972.

Question 1:

Should the scope of the reform project include the elections and referendums listed in paragraphs 1.10 and 1.11?

JURISDICTIONAL AND DEVOLUTIONARY FRAMEWORK

1.12 Any review of the law on elections and referendums must be UK-wide. Parliamentary and European Parliamentary elections, as well as UK-wide referendums, by their very nature are subject to shared rules across jurisdictional borders. If, as we hope, this will be a tripartite law reform project undertaken by all three UK law commissions, it will concern all three legal jurisdictions of the UK leading to reforms of electoral law in Scotland, Northern Ireland and England and Wales. We therefore outline the devolutionary framework for electoral law.

1.13 The UK system of devolution is asymmetric, in that devolution differs in nature and extent in each of the countries to which it has been applied. We therefore consider electoral law under each country's settlement. When we do so we distinguish the legislative competence of devolved legislatures to make electoral laws from the executive competence of national executives to exercise statutory or other executive powers in the field of electoral law.

Scotland

1.14 The devolution settlement is governed by the Scotland Act 1998. It reserves to the UK Parliament responsibility for UK, Scottish and European Parliamentary elections and the franchise at local government elections.² The Scottish Parliament thus has legislative competence over local government elections in Scotland, except for the franchise. These are governed by the Local Governance (Scotland) Act 2004, which confers on the Scottish Ministers a power to make provision on the conduct of and challenge to local elections.

1.15 The treatment of elections in the devolution settlement for Scotland is undergoing change. Section 1 of the Scotland Act 2012, once in force, will transfer some executive competence relating to the administration of Scottish Parliamentary elections to the Scottish Ministers. The Secretary of State for Scotland currently has powers under the Scotland Act 1998 to make secondary legislation concerning the conduct of, and challenge to, elections to the Scottish Parliament. The Scotland Act 2012 transfers to Scottish Ministers order-making powers relating to matters that include:

- (1) supplying or dealing with the register;
- (2) limits on candidates' expenses; and
- (3) the combination of polls for Scottish Parliamentary elections with elections within the Scottish Parliament's legislative competence.

1.16 Not all executive competence over Scottish Parliamentary elections will be transferred. The Secretary of State for Scotland will retain a power to make regulations, for example on the register of electors, and the combination of Scottish Parliamentary elections with non-devolved elections. In exercising their respective powers under an amended Scotland Act 1998, the UK and Scottish executives will be under an obligation to consult each other.

1.17 It follows that the Scottish Parliament has legislative competence for elections in Scotland as regards local government elections but not the franchise. The Scottish Parliament has also legislated for elections in Scotland to public bodies within its general legislative competence, such as elections to Health Boards, National Park Authorities and the Crofting Commission. Some executive competence will be transferred to the Scottish Ministers as regards elections to the Scottish Parliament.

² Scotland Act 1998, sch 5 para B3.

Northern Ireland

- 1.18 The devolution settlement in Northern Ireland is governed by the Northern Ireland Act 1998. Elections to the UK Parliament, including the franchise specifically, are exceptions to the legislative competence of the Northern Ireland Assembly.³ European Parliamentary elections, elections to the Northern Ireland Assembly, and local government (district council) elections are also excepted matters.⁴
- 1.19 Section 34(4) of the Northern Ireland Act 1998 gives the Secretary of State wide powers to make orders governing elections to the Northern Ireland Assembly, including entitlement to vote and registration. Section 84 of the same Act enables the Crown by Order in Council to make provision with respect to elections to district councils (excluding the franchise).
- 1.20 It follows that the Northern Ireland Assembly has no legislative competence in respect of elections in its territory, and that the Northern Ireland Departments have no executive competence in respect of them.

Wales

- 1.21 The devolution settlement in Wales is set out in part 4 of the Government of Wales Act 2006. Chapter 1 of schedule 7 includes local government, including “electoral arrangements for local authorities”, within the legislative competence of the Assembly. However, the local government franchise is listed, along with “electoral registration and administration”, as an exception to that competence.⁵ Other than that, the National Assembly for Wales does not have any legislative competence over elections in Wales.
- 1.22 Executive competence remains with the UK Secretaries of State. Elections to the National Assembly for Wales are governed by sections 3 to 13 of the Government of Wales Act 2006. Section 13 gives the Secretary of State for Wales power to make regulations governing elections.

LAW REFORM AND POLICY

- 1.23 The Law Commission undertakes law reform. The project will take time and commitment from the law commissions, Government and stakeholders. Electoral law has been the subject of significant change since 1983. There is no sign of abatement in the pace of change as the UK government’s legislative programme for the life of the current Parliament is extensive. We attempt in this paper to keep in mind that programme, but would expect the scope of the substantive project to reflect that account must be taken of parallel changes in electoral law over the life of the project.

³ Northern Ireland Act 1998, sch 2 para 2.

⁴ Northern Ireland Act 1998, sch 2 para 12.

⁵ Government of Wales Act 2006, sch 7 para 12.

- 1.24 The purpose of this paper is to consider, among the range of topics spanned by electoral law, which should be within the scope of the reform project. The chief focus of the project is on rationalising, modernising and improving the fair and effective administration of elections. But within these topics, issues may emerge that have a constitutional or policy character. Care will need to be taken throughout the project to demarcate aspects of electoral administration law from those that are plainly part of electoral policy.

IMPACT ASSESSMENT

- 1.25 The Law Commission produces impact assessments on all its reform projects. We expect we will undertake an initial consideration of the impact of the reform project in the scoping report, which we will publish after the present consultation. To that end, we would be grateful if organisations and individuals were to provide us with available figures and estimates of both monetised and non-monetised costs of electoral administration under the current law.

CHAPTER 2

THE NEED FOR REFORM

- 2.1 This Chapter considers the reasons why electoral law needs to be reformed. We will discuss the historical evolution of the law and the way in which its development has contributed to modern concerns with the law.

THE EVOLUTION OF THE LAW

- 2.2 Before the 19th Century, electoral customs were reflected in statutes, for example dealing with the parliamentary franchise, or in the common law which dealt with officeholders, including elected officeholders at a municipal level. The subject of electoral law only emerges from the crucible of the 19th Century electoral reforms. The period between 1832 and 1928 marks a transition of the parliamentary franchise from a right of the privileged few to a basic right of citizens, lending the constitutional monarchy its democratic character. A by-product of the democratisation of the vote was the emergence of a system of administrative and conduct rules to ensure voting was free, fair and secret.

Victorian reform

- 2.3 The democratic transition saw the emergence of a set of rules that governed the running of elections to Parliament and municipal office. The most seminal measures included the following:
- (1) The Reform Act 1832 introduced the register of voters at the same time as extending the franchise and rationalising constituencies. Registration Acts refined the concept of electoral registration in 1843 and again in 1868, after the Representation of People Act 1867 had further extended the franchise.
 - (2) The Election Petitions and Corrupt Practices Act 1868 transferred authority to deal with disputed election results from the House of Commons to the judiciary. Disputed local elections were similarly to be adjudicated by an election court under the Corrupt Practices (Municipal Elections) Act 1872.
 - (3) The Ballot Act 1872 provided in the same year that voting at all elections should be by secret ballot, and laid down duties on the returning officer in particular to safeguard secrecy. But the Act is also important for dealing with the administration of parliamentary and municipal elections together, setting out the key notions and stages in organising an election. It made provision for the nomination of candidates, the conduct of polling day, the duties of returning officers, the division of electoral areas into polling districts, and the free use of public buildings and schools for the poll. It set out in a schedule detailed rules for parliamentary and municipal elections.
 - (4) The Corrupt Practices and Illegal Practices Prevention Act 1883 brought together existing and new electoral offences. Crucially, it regulated election expenses by channelling them through a single, mandatory election agent.

20th Century refinement and consolidation

- 2.4 The above measures engendered our modern notions of electoral administration. Many further provisions were made after 1883 that amended, refined or rationalised the existing legal structure. Some major advances were made in the 20th Century, such as the universal franchise, equality for female voters, a voting age of 18, more equal parliamentary constituencies, and the divorcing of the residence and registration requirements for the franchise from property qualifications. But these were concerned with substantive democratic and egalitarian aspects of the law rather than its administrative and legislative underpinnings. The essential structure of the law remained Victorian in origin.
- 2.5 The cost of the steady accretion to the body of electoral law was a proliferation of statutory material which grew intolerable. This led to the consolidation of the law on parliamentary and local government elections first in the Representation of the People Act 1949, and again in the Representation of the People Act 1983 ("the 1983 Act"). The 1983 Act contains the main body of laws governing UK Parliamentary elections and local government elections in England and Wales. But it is also important because legislation concerning other elections replicates its structure and provisions with some modifications, or uses it as a template. Many parts of modern electoral law in or derived from the 1983 Act would have been very familiar to Victorian election lawyers.

De-centralised administration subject to detailed rules

- 2.6 The now conventional model of electoral administration, which emerged from the Victorian reforms, is one that is de-centralised and subject to detailed prescription. Local office-holders were identified by statute as the persons on whose shoulders the responsibility to administer polls would fall. To ensure that elections were free from outside influence or subjective judgements, detailed rules were laid down governing the administration of the electoral process and the conduct of participants. These rules were not intended to have much, if any, flexibility in their application.
- 2.7 In terms of the administration of elections, an obvious benefit of this approach was institutional convenience. The task of delivering effective elections was distributed among ready-made local government structures, which was no revolutionary change from what went on before. The detailed and relatively inflexible character of the rules meant a measure of consistency was guaranteed without the need for central management. The rules were designed so far as possible to exclude discretion or questions of judgement.
- 2.8 The approach to regulating the conduct of participants in the electoral process was similarly through the prescription of detailed legal duties. These fell most onerously on the candidates and their election agents, who were deterred by the drastic consequences of rule-breaking. These included the nullity of the election, the disqualification for a period from participation in further elections, and criminal sanction. The enforcement of administrative and conduct rules was primarily left to candidates and voters through the judicial mechanism of the election petition. If any question of judgement arose, it would be for judges and not local administrators. The only form of governmental intervention might be in investigating and prosecuting crimes.

- 2.9 The Victorians thus achieved a form of electoral administration which did not depend on notions such as oversight by a central regulator or government body. This is much more a function of the range of options available to them at the time than a true policy choice. It was never considered that it might be appropriate for the government or the state positively to oversee the running of elections. Their role was to lay down, in advance, the detailed rules which a de-centralised administration was to follow, and which motivated, interested persons would enforce through a judicial process. The rules were placed in primary legislation and therefore only Parliament could amend or update them.

MODERN CONCERNS WITH THE LAW

- 2.10 The conventional model of electoral administration, which we have described above, remains highly relevant to electoral administrators and participants today. A model of de-centralised administration through prescriptive legislative rules provides important benefits, including certainty of rules and consistency of application. Placing rules in primary legislation means any change invites the fullest scrutiny of elected representatives. Yet as we will see further below, the law has been sharply criticised for its fragmentation and complexity. In order to understand the cause of these concerns, we turn to the factors that have complicated the operation of the conventional model of electoral administration.

The 1949 and 1983 consolidations

- 2.11 At the time of the first consolidation of electoral law in the Representation of the People Act 1949, the elections covered – parliamentary and local government elections – were the only types of elections to public office in England, Wales and Scotland. All employed the same voting system and therefore could share core rules as to candidacy, nominations and the like. Northern Ireland had a separate electoral regime, which has its own particular history, but the picture across the rest of the UK was uniform.
- 2.12 This essentially remained the case in 1983. European Parliamentary elections had by then arrived and were governed by separate measures, which applied aspects of the 1983 Act and copied conventional election rules. Those rules that were incompatible with the new elections, and later the different voting system, were modified or discarded.¹ Referendums, rare before 1949, had been held in the 1970s across the UK on the single European market, Northern Irish borders and devolved assemblies in Scotland and Wales. But they were seen as one-off national measures and not regular features of the electoral system.
- 2.13 By the time of the second consolidation in the 1983 Act, its rules continued to cover a broadly consistent electoral system in Great Britain. Elections used the same first-past-the-post voting system for which the classical Victorian rules were designed. The complexity of the provisions of the 1983 Act was a function of the passage of time since their inception. Changed societal values had required amendments of and additions to the rules. Thus a steady amount of new material emerged concerning, chiefly, postal voting and registration.

¹ The party list voting system was introduced after 1999.

Multiplicity of elections and election-specific legislative approach

- 2.14 The conventional model of electoral administration worked for a very long time, and the description of its origins as Victorian should not negate its strengths. It was not, however, designed to deal with a range of elections to disparate elected bodies using different voting systems. The electoral landscape changed dramatically after the 1983 consolidation and, in particular, after 1997. There is now more variety in the type of elections that can be held and in the voting systems used in those elections. There is also greater scope and tendency for two or more types of elections to be held and administered together, known as the combination of polls. Referendums have become more frequent and local referendums are set to be a more common occurrence in the future.
- 2.15 The driving forces behind the increase in the type of elections have been devolution and localism. The creation of devolved legislatures in Scotland, Wales and Northern Ireland created new sets of elections. These and local government elections in Scotland and Northern Ireland use different voting systems. A general trend towards more local democratic accountability has also been seen, or will see, elections to the Greater London Authority, and to offices of elected mayor and of Police and Crime Commissioners elsewhere in England and Wales.
- 2.16 None of the newer elections use the conventional voting system of first-past-the-post. Instead, they have employed more proportional voting systems such as the single transferable vote, the supplementary vote, or the additional member system. In the case of most of these elections, specific legislative measures were introduced to set out the rules that governed them. Generally speaking, these rules are based on their Parliamentary or local government election equivalents, making modifications as necessary. These provisions, by and large, are in primary or secondary legislation and are separate from the 1983 Act. A notable exception is elections to the Greater London Authority, which are dealt with by way of amendment to the 1983 Act. This required some very technical wording in order to deal with the new concepts that those elections introduced by virtue of the chosen voting system and the nature of the elected bodies concerned.
- 2.17 Once new elections, voting systems, referendums, and potential combinations are factored in, one can see that the electoral landscape has greatly expanded since 1983. The modern concern is that the law has grown complex and fragmented – that its rules are complicated and spread over many disparate sources. This is a result of the combination of, first, an election-specific approach to legislating for new elections and, second, doing so through detailed prescriptive rules.

Place of rules within legislative hierarchy

- 2.18 A result of the development of the conventional model for electoral administration is that no consistent principle appears to govern the place of electoral law provisions within the legislative hierarchy (primary Acts and secondary legislation). The 1983 Act divides its subject matter into three principal parts setting out fundamental electoral law concepts such as franchise and registration, the regulation of the campaign, and means of challenge. More detailed provision governing nomination and the administration of polls at UK Parliamentary elections is made in the Parliamentary Election Rules. For local government elections, which are also governed by the 1983 Act, the election rules are in

secondary legislation. For elections governed outside the realm of the 1983 Act, the provisions mirroring those in the body of the Act and in the election rules might all be contained in secondary legislation.

- 2.19 Furthermore, the dividing line between core provisions and those set out in election rules was settled when the predecessors to the 1983 Act were drafted. Many substantial changes and improvements to electoral administration have been made since 1883, for example to do with postal voting and rolling registration. These required extensive amendment to the body of the 1983 Act but detailed administrative rules are contained in regulations that govern a wide range of elections and are organised by jurisdiction, not election type.
- 2.20 The proper place of rules within the legislative hierarchy is part and parcel of simplifying and rationalising electoral law. Careful consideration will need to be given to issues, such as the propriety of placing rules governing UK Parliamentary elections in secondary legislation, resulting in amendment not being subject to the fullest parliamentary scrutiny. These are issues that can be fully considered at the substantive reform stage.

What the stakeholders say

- 2.21 The prevailing view among stakeholders seems to be that law reform in this area must be holistic and include consideration of the legislative framework for electoral administration. The Electoral Commission has called for comprehensive reform, describing the current arrangements for electoral administration in Great Britain as fragmented and unlikely to be considered a serious option if designing a new set of structures from scratch. In its preliminary view on the scope of the substantive project, the Commission states that the approach to reform should not be limited to consolidating existing provisions, and should instead develop a clearly defined modern legislative framework for electoral administration law. The Commission offers a suggestion as to what that framework might look like.²
- 2.22 The Association of Electoral Administrators has stated that a “thorough and systemic review of the electoral process in the UK is required that integrates with the development and implementation of the new individual electoral registration system”. It added that such a review should include:

Consultation to identify a model for the structure and delivery of electoral administration in the UK in the 21st century – with the aim of achieving agreed key outcomes and founded on agreed principles. This will need to reflect the diversity of the four nations of the UK. ...

The creation of a single Electoral Administration Act in accessible language setting out the high-level framework with the operational detail contained in secondary legislation. The key aim should be the

² Electoral Commission, *Preliminary Views on the Scope of the Law Commission Review of Electoral Administration Law* (November 2011) at pp 1 to 2, and 9 to 17, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/148425/Preliminary-views-on-project-scope.pdf (last visited 31 May 2012); Electoral Commission, *Report on the Administration of the 2010 UK General Election* (July 2010) at p 4; Electoral Commission, *Report on Electoral Administration in the United Kingdom* (August 2008) at p17.

simplification and consistency of rules across all elections. Except in cases of unforeseen emergencies, changes to election law should not be applicable to any elections within a six-month period from the date the legislation comes into effect.³

- 2.23 In its assessment of the May 2010 general election, the Office for Democratic Institutions and Human Rights noted the complex and fragmented nature of electoral law in the UK and that “no concerted effort has been made in recent years to review the entire legal framework for elections”. One of the key recommendations of their report was for such a review to be conducted in order to consolidate, simplify and modernise the law because it was felt that the existing framework was “not suitable to conduct a 21st century election”.⁴

CONCLUSION

- 2.24 The conventional model of electoral administration laid down detailed rules to be strictly observed by local administrators and electoral participants. This approach was designed in the 19th Century and remained apt for the electoral landscape over which the 1983 Act governed. The increase in types of elections and referendums was accompanied by election-specific legislative measures. These replicated some of the conventional rules in the 1983 Act and modified others, notably due to the use of different and varied voting systems. Crucially, the conventional approach to detailed prescription in the rules was retained for each election-specific measure. The scope for combination of polls expanded, while societal developments have meant that key concepts, such as registration and absent voting, have been the subject of continuous policy changes resulting in significant and many amendments to the legislation, and a separate secondary legislation regime. These developments resulted in a vast increase in volume, complexity and fragmentation of electoral law.
- 2.25 The complexity, fragmentation and volume of laws hampers the ability of the conventional model to operate effectively, since it relies on decentralised administrators and participants in the electoral process to be able to access, understand and apply the law. Electoral administration law is currently an intimidating subject for most, resulting in a consensus as to the need for reform. Our preliminary view is that the substantive project should consider the current legislative framework for electoral administration, including modifying the conventional approach to detailed prescription where flexibility might be required, reviewing the election-specific approach to electoral legislation, and considering the principled and consistent place of rules within the legislative hierarchy.

Question 2:

Should the scope of the reform project include, with a view to reducing the volume, complexity and fragmentation of the law, consideration of the current legislative framework for electoral administration including the place of rules within the legislative hierarchy?

³ Association of Electoral Administrators, *Beyond 2010 Report on the Future of Electoral Administration in the UK* (July 2010) at pp 3, 4 and 64.

⁴ Office for Democratic Institutions and Human Rights, *Report on the May 2010 UK General Election* (July 2010) at pp 4 to 5.

CHAPTER 3 ELECTIONS

- 3.1 This part of the scoping paper contains an outline of key topics within electoral law and our preliminary view as to their inclusion within the scope of the substantive review phase. We begin by addressing areas of electoral law that we consider to be core parameters for any electoral contest and which are thus of high democratic importance. We then consider the management and oversight of elections and the registration process. Subsequent sections consider discrete topics such as the rules governing candidates and the campaign, political parties and broadcasting, the manner of voting, polling day procedures, determining and declaring the result, election timetables and finally the issue of combining polls.

CORE ELECTORAL PARAMETERS

- 3.2 Some electoral rules are so fundamental to the running of an election that we regard them as core parameters for an electoral contest to exist. These parameters state who should have the capacity to vote (the franchise), the representative area in and for which people vote (boundaries), and the way in which votes are to be counted (voting systems). Our preliminary view is that the substantive reform of core electoral parameters is best left to democratic or cross-party consensus rather than a technical law reform project.

Franchise

- 3.3 The franchise is of fundamental constitutional importance. For all elections the franchise can be summarised as entitling persons to vote in a constituency or electoral area if on the date of the poll they: (a) are registered on the relevant register for that constituency or electoral area; (b) are not subject to any legal incapacity to vote; (c) hold the requisite citizenship; and (d) have reached voting age. There are three key and slightly different versions of the franchise for UK Parliamentary, local government and European Parliamentary elections. Other elections typically employ one of these forms of the franchise and then make adjustments as necessary.¹ It is important to distinguish the franchise requirement of registration from its administrative operation, which we propose to include within the scope of the reform project.

Boundaries

- 3.4 Electoral boundaries define the geographical areas that have separate representation in a legislature or other representative body. These areas are commonly called constituencies for elections to legislatures or electoral areas for local government and other elections. Two types of boundary commissions keep constituencies and electoral areas under review in each country within the UK. First, there are Boundary Commissions for England, Scotland, Wales and Northern Ireland that conduct five-year periodic reviews of parliamentary

¹ There are some exceptions. For example, entirely separate provision is made for the franchise in elections to the Crofting Commission in Scotland. See, Crofting Commission (Elections) (Scotland) Regulations 2001 SSI 2011 No 456, reg 4.

constituencies.² Second, local government electoral areas are reviewed by the Local Government Boundary Commissions for England, Wales and Scotland, and the Local Government Boundaries Commissioner for Northern Ireland.³

- 3.5 Our preliminary view is that the procedures for boundary changes are not within the scope of the electoral law reform project. Questions of community representation are fundamental to the democratic process and the mechanics of how boundaries are decided are best left to elected representatives or cross-party consensus. Nevertheless, the current provisions on boundaries may have to be consolidated into the eventual reformed legislative framework.

Voting systems

- 3.6 The majority of electoral events that occur in the UK today do so according to a voting system other than first-past-the-post. This is significant because the legislative scheme we have inherited is one that was crafted with first-past-the-post in mind. The result is that the legislative treatment of different voting systems produces inconsistency and complexity. While the substantive project will consider questions relating to the technical treatment in the law of different voting systems, we consider that changing the voting system of any election is a political choice which is outside the scope of the substantive project.

Table 1: Voting systems used in UK elections

Voting system	Type of election
First-past-the-post (FPTP)	UK Parliamentary elections Local government elections (England and Wales)
Supplementary Vote (SV)	Mayor of London elections Mayoral elections in England and Wales Police and Crime Commissioner elections
Single Transferable Vote (STV)	European Parliamentary elections (Northern Ireland) Local government elections (Northern Ireland) Local government elections (Scotland)
Additional Member System (AMS)	Scottish Parliamentary elections National Assembly for Wales elections London Assembly elections ⁴
Closed Party List System (CPLS)	European Parliamentary elections (England, Wales and Scotland)

Question 3:

Do you agree the scope of the project should exclude the franchise, electoral boundaries and voting systems?

² The Boundary Commissions are governed by the Parliamentary Constituencies Act 1986.

³ Local Democracy, Economic Development and Construction Act 2009, s 55 (for England); Local Government Act 1972, s 53 (for Wales); Local Government (Scotland) Act, s 12 (for Scotland); Local Government Act (Northern Ireland) 1972, s 50 (for Northern Ireland).

⁴ London Assembly Elections and Mayor of London elections have been split up for the purposes of clarity; however in law they are treated together as one election to the Greater London Authority.

MANAGEMENT AND OVERSIGHT

Electoral governance

- 3.7 Elections require some form of governance and an administrative framework. We provide an overview of these in this section. Those who study electoral systems across the world consider electoral governance has three aspects: rule making, application, and adjudication.⁵ At the apex of electoral systems, there may be an authority of some sort that has a final say over administrative matters pertaining to elections. An ultimate authority may be an independent electoral commission, a single public official or a government minister.⁶

Rule making, application and adjudication

- 3.8 In the UK, the three aspects of electoral governance are performed by various bodies in what is a largely decentralised electoral system. In all elections for which legislative competence is not devolved, the ultimate authority may be considered to be the Government Minister and department responsible for elections, currently the Cabinet Office for UK elections. That authority lies primarily in the sphere of rule-making, because the Minister has oversight of the legislative scheme of electoral administration law.
- 3.9 Rule making involves selecting and defining electoral rules. In Chapter 1, we noted the potentially broad ambit of electoral law. Legislative authority for electoral law generally rests with Parliament through primary legislation and the relevant Minister through secondary legislation and statutory orders, subject to parliamentary scrutiny. The Electoral Commission, an independent body, provides advice on electoral administration generally. The Boundary Commissions for England, Wales, Scotland and Northern Ireland are responsible for advising on boundary changes.
- 3.10 Rule application requires certain bodies actually to organise elections and to execute the election rules. This entails someone overseeing the registration of voters, the regulation of candidates and parties, voter interaction, conduct of the poll, determining the result, as well as general logistics and planning. This responsibility falls on two officers who are appointed under statute and drawn from local government: the electoral registration officer and the returning officer. In Northern Ireland a separate Electoral Office run by the Chief Electoral Officer undertakes the role of both officers, while in Scotland electoral registration and returning officers are coordinated by and subject to directions of the Electoral Management Board. Furthermore, the Electoral Commission also has responsibilities in this field, including party registration and campaign funding at a national level. As regards electoral administration other than the regulation of political parties, the Electoral Commission has responsibility for monitoring the performance of electoral registration and returning officers, issuing guidance to electoral participants, voter education and the delivery of national referendums (see Chapter 5).

⁵ S Mozaffar and A Schedler, 'The Comparative Study of Electoral Governance – Introduction' (2002) 23 *International Political Science Review* 5 at p 7.

⁶ L Massicotte, A Blais and A Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (2004) at p 83.

- 3.11 Rule adjudication is the final aspect of electoral governance and involves resolving disputes. This is performed by an independent judiciary by way of the election petition process before an election court (see Chapter 4).

The decentralised administration of elections

- 3.12 In Chapter 2 we introduced the current model of electoral administration through detailed prescriptive rules implemented by local officeholders. We also noted how the recent proliferation of elections and voting systems, allied with an election-specific approach to legislation, has put a strain on this model. The fundamentals of the electoral administration system were in place after 1883.⁷ Subsequent developments brought continuous incremental changes and the consolidation of vast statutory provisions but no fundamental reshaping of electoral governance.
- 3.13 The organisation and administration of elections in the UK thus remains decentralised. With the exception of Northern Ireland, the conduct of an election is administered by electoral registration and returning officers who perform their respective functions before and during an election. While the two roles are often in practice performed by the same person, they are legally separate.⁸ In this section we focus on the returning officer, the statutory officer whose function at election time is to organise and administer polls. We consider registration officers in more detail when discussing registration below, but for now note that theirs is a permanent administrative role. In practice, the registration officers' permanent staff in a local authority's "electoral services" department will be the most experienced electoral administrators on the ground. A benefit of decentralised administration by local registration and returning officers is that local factors and circumstances can be considered, particularly where there is a gap in the rules or an element of discretion as to electoral arrangements.
- 3.14 A potential downside is inconsistency. In 2007 the Committee on Standards in Public Life expressed concern about wide variations in standards of electoral administration in Great Britain between different local authorities.⁹ Local authorities may have varying levels of resources at their disposal, and electoral registration is funded without any dedicated budget or ring-fencing.¹⁰ Variation in the effectiveness of electoral arrangements from one authority to another is an inevitable consequence of decentralising electoral administration. As the Association of Electoral Administrators noted, there are "considerable inconsistencies in structural and staffing arrangements" within local authorities which may become more significant in the context of local government spending

⁷ C O'Leary, *The Elimination of Corrupt Practices in British Elections 1868-1911* (1962) at p 179.

⁸ Representation of the People Act 1983, s8. The electoral registration officer is appointed by the relevant local authority; although in Northern Ireland the Chief Electoral Officer is designated as the electoral registration officer under statute.

⁹ Eleventh Report of the Committee on Standards in Public Life (2007) Cm 7006 at paras 2.53, 2.54, 2.60 and 2.61.

¹⁰ Representation of the People Act 1983, s 54.

cuts and the sharing of Chief Executives.¹¹

The returning officer

- 3.15 For each type of election, legislation either identifies a person as the statutory officer, or provides the means for their identification. On the whole, these offices are bestowed on senior staff in local government, although the law makes clear that returning officers exercise functions that are separate and distinct from their roles within local authorities. For larger constituencies or electoral regions, specific local government areas are chosen and their relevant officer made responsible for the conduct of that election. Further, the law requires the relevant local authorities to place their staff and services at the disposal of these officers.
- 3.16 Jurisdiction is also important because England and Wales have retained ceremonial returning officers, whose duties are in fact performed by acting returning officers. In contrast, there is no such distinction in Scotland and Northern Ireland.

Ceremonial nature of the returning officer in England and Wales

- 3.17 Returning officers are figureheads for UK Parliamentary elections in England and Wales (either the sheriff of the county, the mayor or council chairman); their only real duties concern the receipt of the writ and the declaration of the result. For this reason, reference to the returning officer is taken as reference to the acting returning officer,¹² which is the same person appointed by the local authority as the electoral registration officer for any constituency or part of a constituency within or coterminous with the local government area.¹³ The ceremonial nature of returning officers in England and Wales is a product of history.¹⁴ While seemingly innocuous, it adds further complexity. In its interim report on the 2010 UK Parliamentary election, the Electoral Commission said of these “plainly redundant ceremonial positions” that they are “out of date and confusing”.¹⁵

Returning officers in elections with large constituencies

- 3.18 The approach adopted for constituencies¹⁶ that encompass multiple local authorities was for one local government officer out of a larger pool in that constituency to take the leading role. Accordingly, a system of regional control over returning officers was created as a necessary consequence of conducting new elections. This system is used for elections that take place in densely populated urban areas, like those to the Greater London Authority, or in

¹¹ Association of Electoral Administrators, *Beyond 2010 Report on the Future of Electoral Administration in the UK* (July 2010) at p 10.

¹² Representation of the People Act 1983, s 28.

¹³ Representation of the People Act 1983, s 8.

¹⁴ J Hostettler and B Block, *Voting in Britain: A History of the Parliamentary Franchise* (2001) at p 4; I Gladwin, *The Sheriff: The Man and His Office* (1984) at p 160; The Times, *The High Sheriff* (1961) at p 23.

¹⁵ Electoral Commission, *Interim Report on the 2010 UK Parliamentary General Election: Review of Problems at Polling Stations at Close of Poll on 6 May 2010* (May 2010) at p 32.

¹⁶ We use this term to describe the overall area for which a returning officer is responsible; its technical sense is different. Thus, Greater London is made up of several constituencies.

geographically wide constituencies, such as European Parliamentary elections. In the latter case, one of the local government returning officers is identified as the (lead) returning officer, with a power to direct other local returning officers within the same constituency.¹⁷ It follows that for these elections an element of central management and oversight exists under the aegis of the conventional decentralised returning officer model.

Changes to the decentralised system

- 3.19 The conventional model of electoral administration in the UK has been subject to substantial change. The decentralised approach to electoral administration has been modified in relation to national referendums, elections in Northern Ireland, and Scottish local government elections.

Approaches in Northern Ireland and Scotland

- 3.20 For all elections in Northern Ireland and for local elections in Scotland there is now a form of central management. In Northern Ireland, the Chief Electoral Officer is appointed by the Secretary of State for 5 year periods extendable to a maximum of 10 years.¹⁸ The main duties of the Chief Electoral Officer are to act as the electoral registration and returning officer for all elections in Northern Ireland and as an assessor for the country's two boundary commissions. The Chief Officer has the power to appoint supporting staff,¹⁹ and leads the Electoral Office for Northern Ireland. This office is a centralised body that provides administrative support for the provision of electoral services throughout the country. For most elections, area electoral officers are appointed to act as deputy registration and returning officers within their constituencies for elections to Parliament, the European Parliament and the Northern Ireland Assembly. For local government elections, clerks of district councils are appointed as deputy returning officers and perform functions as directed by the Chief Officer.²⁰ However, area electoral officers are responsible for managing the staff and budgets of their respective electoral areas. Further, the Electoral Office for Northern Ireland has a number of offices throughout Northern Ireland and acts as a single point of contact for voters seeking advice about electoral services.
- 3.21 In Scotland, the Electoral Management Board is a committee that is established under section 1 of the Local Electoral Administration (Scotland) Act 2011 for the purpose of co-ordinating the administration of local government elections in Scotland. Its functions include assisting local authorities in carrying out their duties with respect to local elections and promoting best practice by providing information, advice and training. However, the Convener of the Electoral Management Board has the power to give directions in writing to both electoral registration and returning officers about the exercise of their functions in relation to local elections. Before issuing such directions, the Convener must consult with

¹⁷ European Parliamentary Elections Regulations 2004 SI 2004 No 0293, reg 9.

¹⁸ Northern Ireland (Miscellaneous Provisions) Act 2006, s 8.

¹⁹ Electoral Law Act (Northern Ireland) 1962, s 15.

²⁰ See, Electoral Law (Northern Ireland) Order 1972, s 9; and Electoral Law Act (Northern Ireland) 1962, s 15(3).

other members of the Board and the Electoral Commission.²¹

- 3.22 The move towards some form of centralised oversight is broadly in line with what has occurred in some other countries. For example, the Australian Electoral Commission is responsible for conducting all federal elections and referendums and presides over a single joint register. Similarly, the Chief Electoral Officer in Canada is responsible for the direction of the administration of elections and maintains the register of qualified voters.²² The closest UK analogue has no such general formal role as overseer of all electoral administration.

The Electoral Commission

- 3.23 The Electoral Commission is generally described as the UK elections and referendums watchdog but its precise functions reveal a more complex picture. Originally established as an independent statutory body under the Political Parties, Referendums and Elections Act 2000, its Chair is the chief counting officer for national referendums, acting as a central administrative authority in national referendums, delegating and overseeing administrative duties at regional and local authority levels.²³
- 3.24 In relation to elections, the Commission had at its inception a largely advisory and fact-finding role, which has evolved significantly in a short time.²⁴ It now has two core regulatory functions in relation to elections. The first concerns political parties. The Electoral Commission is responsible for the registration of political parties and the maintenance of the register. It also assists political parties to meet their obligations with respect to their accounting requirements and obligations regarding the control of donations, monitoring and taking appropriate steps to secure compliance with controls on party financing.²⁵
- 3.25 The second function concerns wider electoral administration. Section 67 of the Electoral Administration Act 2006 gave the Commission power to set and publish performance standards for electoral registration officers, returning officers and referendum counting officers.²⁶ This power enables the Commission to require officers to provide reports on their level of performance against standards set by it, to publish assessments about their performance,²⁷ and to collect information on the costs of electoral services. These powers do not apply in Northern Ireland, where there is a separate Chief Electoral Officer, or for local government elections in Scotland which are legislatively devolved.

²¹ Local Electoral Administration (Scotland) Act 2011, ss 5 to 7.

²² L Massicotte, A Blais and A Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (2004) at p 66.

²³ Political Parties, Elections and Referendums Act 2000, ss 128 to 129.

²⁴ D Butler and I McLean, *Report to the Committee on Standards in Public Life: The Electoral Commission and the Redistribution of Seats* (2006) at p 20.

²⁵ Political Parties, Referendums and Elections Act 2000, ss 23 and 36.

²⁶ Electoral Administration Act 2006, ss 9A, 9B and 9C.

²⁷ Clause 17 of the Electoral Registration and Administration Bill 2012 would introduce a new section into the 1983 Act enabling the Secretary of State, upon a recommendation by the Electoral Commission, to withhold or reduce a returning officer's fee for reasons of poor performance.

- 3.26 The Electoral Commission's other powers include sending its own representatives and accrediting others to observe elections. It has a duty to publish reports on certain elections and referendums as well as to review electoral law issues generally. It also provides advice and guidance to electoral registration officers, returning officers, and registered parties. It plays a significant public information role, with responsibility for providing electoral information for the purpose of increasing voter participation.²⁸

Inclusion of management and oversight powers within scope of review

- 3.27 Assumptions as to government's role have changed since the original framework for electoral administration was established in the 19th Century. That role may no longer be limited to enacting detailed rules for local officials strictly to administer, and private parties to enforce through the courts. Instead, the prevailing social attitude today might envisage independent central oversight. There is a valid argument for such oversight in modern electoral law. However, our preliminary view is that this argument should be considered at a political level – it involves issues of large scale institutional design, with inevitable substantial resource implications.
- 3.28 The Electoral Commission has exercised powers to direct returning officers in combined election and referendum polls. In giving its preliminary views as to the scope of the reform project, the Commission suggests that consideration of powers in a central person to direct administrators in discharging their duties should be part of the reform project. This recommendation accompanies a general argument about the legislative framework for elections. The Commission states that the emergence of persons and organisations with statutory roles to ensure consistency and high standards means there is no longer a need to prescribe electoral administrative rules in as much detail as is currently the case.²⁹ It suggests a distribution of rules in accordance with importance within a scheme of primary and secondary legislation, with tertiary Codes of Practice to guide returning officers.
- 3.29 The Electoral Commission's proposal may stray into institutional reform if a general power of direction were given to a central person. Nevertheless, it serves to highlight that scaling down the complexity of the law may warrant different approaches to legislative detail and placement of rules within the hierarchy of primary and secondary legislation. The less detailed the rules are, the more need there may be for some oversight or guidance. The chief purpose of the substantive project will be to reduce complexity, cost, and the risk of administrative failings in a world where elections are more numerous than ever, and set only to increase in number. That may require some rules to be less detailed, or to allow for greater administrative flexibility in some areas of electoral law. Eliminating adjustments to the current framework for management and oversight of administrators from the scope of the project might unduly restrict our eventual reform options when seeking to simplify the law.

²⁸ Political Parties, Referendums and Elections Act 2000, ss 5 to 6F, 9A to 9C, 10(3) and 13.

Conclusion as to inclusion within the scope of reform project

- 3.30 We have seen that there are many different approaches to management and oversight of elections within the UK. In England and Wales, the decentralised returning officer model essentially persists, though we have noted that the model allows for some regional management for certain elections which take place over large or densely populated geographical areas. Furthermore, a key aim of the project is to consider the problem identified in Chapter 2 of complexity and fragmentation caused by the combination of election specificity and detailed prescription in the legislation. This may require some adjustment to management powers. Our preliminary view is that the scope of the project should include reviewing current management arrangements. That would exclude from the scope of the reform project reconsideration of the institutional framework for organising and administering elections, including institutional differences between the three jurisdictions of the UK.

Question 4:

Should the scope of the reform project include consideration of management and oversight of elections, but exclude fundamental change to the current institutional framework for electoral administration?

THE REGISTER OF ELECTORS

- 3.31 Registration is a mandatory precondition to being able to vote because the requirement to register is part of the franchise. As an electoral administrative mechanism it underpins many other functions of electoral administration law. In this section we provide a technical outline of registration with a view to explaining its inclusion within the scope of the substantive project. We focus first on the current law in Great Britain, before considering the different system in Northern Ireland and the proposed changes to the system in the rest of the UK.

Registration in Great Britain

- 3.32 Registration was introduced in 1832 when the franchise was extended by the Reform Act of that year. At its inception it was a mechanism for checking complex property qualifications for the franchise. Those qualifications having disappeared, it now serves multiple purposes. The overarching aim is to maintain a complete and accurate survey of electors for future polls. The register ought to include every eligible elector, and no other. A complete and accurate register assists with many more technical tasks, such as deriving lists of persons eligible to vote on polling day at a particular polling station, planning the logistics of polling day in advance, and taking questions of entitlement to vote away from polling day and

²⁹ Electoral Commission, *Preliminary Views on the Scope of the Law Commission Review of Electoral Administration Law* (November 2011) at pp 7 and 8, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/148425/Preliminary-views-on-project-scope.pdf (last visited 31 May 2012).

forward to the earlier administrative process of registration.³⁰

- 3.33 Viewed from an administrative angle, registration is the task of collecting relevant personal information from electors (name, address and nationality), and compiling that information onto registers. It is performed by electoral registration officers, who are local government officials. It involves conducting an annual canvass of households every year, and providing the facility for individual electors for the rest of the year to change their registration details. What exists in Britain, therefore, is a hybrid system combining the registration of households, and “rolling” individual registration by electors. The register is published by 1 December each year, and is subsequently supplemented by monthly updates made by publishing a notice of alteration.³¹
- 3.34 The register contains the name, address, and electoral number of electors. The law treats the register of parliamentary electors separately from that of local government electors. This is a function of the differences in the franchise for both. By adding registers of relevant citizens of the Union registered to vote at European Parliamentary elections, and of peers registered as European Parliamentary overseas electors, there are in law four registers of electors. In practice all four registers are combined and most think of the register of electors as a single document, which in law is the combined register of electors.³²
- 3.35 The data in the combined register is organised into separate parts for each parliamentary polling district in the UK. Within the register entries normally appear in street order, with a special category of “other electors” appearing at the end of the register. Letters entered against electors’ numbers indicate eligibility for one or more of the four registers, and which polling district they are assigned to.³³ The result is a document that can be broken down to generate a register for a particular polling station or combined to generate the overall register for a constituency or electoral area that crosses local authority boundaries.

Legislative approach

- 3.36 The administration of registration is continuous and permanent. It does not depend on elections being due, and requires constant maintenance. Unlike some of the other electoral law topics we cover, a core of legislative provisions underpins registration, with newer election-specific measures simply selecting, along with the choice of franchise, which of the four registers are to be used for conducting the relevant election.
- 3.37 The requirement that electors be registered to vote is part of the parliamentary and local government franchise in the opening sections of the 1983 Act, with equivalent provision for European Parliamentary elections made in the

³⁰ R Rose (ed), *International Encyclopaedia of Elections* (2000) at p 9.

³¹ Representation of the People Act 1983, ss 13A(2) and 13B(3).

³² European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations 2001 SI 2001 No 1184; Representation of the People Act 1985, s 3(6) and (7); Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, regs 13(2) and 42.

Representation of the People Act 1985.³⁴ Core provision for the registration process and registration officers is made elsewhere in part I of the 1983 Act,³⁵ while detailed regulations governing the administration of registration and the duties of registration officers are set out in secondary legislation. There are three sets of regulations, one for each jurisdiction in the UK.³⁶

Administrative framework and built-in flexibility

- 3.38 In Great Britain, registration is decentralised with little central oversight. Registration work is carried out by local government staff under the direction of the electoral registration officer, who is appointed by the council of the relevant local authority. The registration officer has overall responsibility for maintaining the local registers.³⁷
- 3.39 Registration officers are required by section 9A of the 1983 Act “to take all steps that are necessary for the purpose of complying with their duty to maintain the registers” for their area. The responsibility is stated simply as being to maintain the register, and the law does not expressly require its completeness and accuracy, though that is the modern understanding of the overarching aim of registration, and is a statutory objective for registration in Northern Ireland.³⁸ Statute does identify some steps that registration officers can take, which include sending the canvass form more than once, making house to house inquiries, inspecting records to which officers have legal access, and “making contact by such other means as the officer thinks appropriate with persons who do not have an entry in a register”.³⁹
- 3.40 While the law concerning registration is in general highly detailed, registration officers retain some flexibility as to how they go about maintaining the register. In a rural council, responsible for a large area whose population is sparse and relatively stable, the officer might rely principally (but not exclusively) on the postal service to send out canvass forms. Electors registered for a particular address after responding to the annual canvass may be “carried over” into the

³³ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, regs 38 to 42.

³⁴ Representation of the People Act 1985, ss 1 to 3.

³⁵ Representation of the People Act 1983, ss 1 and 2 (franchise), 4 to 18D, and 49 to 59.

³⁶ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341; Representation of the People (Scotland) Regulations 2001 SI 2001 No 0497 (substantially identical to those in SI 2001 No 0341); Representation of the People (Northern Ireland) Regulations 2008 SI 2008 No 1741.

³⁷ Representation of the People Act 1983, s 8(2). In Scotland an adjoining area’s registration officer may be appointed to act as registration officer in both areas.

³⁸ Electoral Commission, *Report on Great Britain’s Electoral Registers* (December 2011) at pp 9 to 10; Electoral Commission, *Report on Managing Electoral Registration in Great Britain: Guidance for Electoral Registration Officers* (February 2008), pt E at p 1; Representation of the People Act 1983, s 10ZB. See also the objectives in data matching schemes, Political Parties and Elections Act 2009, ss 31(8), 35(1), (2), (4), and 37; Electoral Registration Data Schemes Order 2011 SI 2011 No 1466.

³⁹ Representation of the People Act 1983, s 9A(2)(a) to (e).

following year's revised register even if they do not respond to the canvass that year.⁴⁰ To do otherwise might be prohibitively expensive. By contrast, in a densely populated urban area, the registration officer might choose to send staff to make direct enquiries at some or all residences and to make use of all the available tools to update the register. Such an officer may opt to use the power to "carry over" electors sparingly, if ever. This flexibility is a chief advantage of decentralisation.

Oversight of registration officers

- 3.41 There is limited formal oversight of how registration officers carry out their duties. The price for retaining local flexibility is the risk of inconsistency of standards across different local authorities. As we noted above when discussing management generally, standards of effective administration may vary across local authorities. One oversight mechanism in Great Britain is the Electoral Commission's power to set and publish performance standards for registration officers at most elections. It may direct officers to report their performance against these standards, and publish its own performance assessment.⁴¹ These have no intrinsic consequence beyond naming under-performing authorities.
- 3.42 A second mechanism lies in the Secretary of State's power, exercisable on recommendation of the Electoral Commission, to direct registration officers, individually or collectively, in respect of their arrangements for carrying out their functions under the 1983 Act. A general direction was recently made under section 52(1) of the 1983 Act to bring forward the canvass period so that it ends on 15 October 2012. There is no record, however, of a direction having been made to a particular registration officer.
- 3.43 A further mechanism exists in relation to specific decisions on entitlement to register. Private persons may challenge the decision of a registration officer and, ultimately, institute appeal proceedings to reverse their otherwise final decision. Regulations govern the objections procedure, in particular the form, content and availability for inspection of applications and objections, and the determining of objections on the papers or at a hearing.⁴² The hearings before the registration officer are quasi-judicial and appeals are to the county court (or sheriff in Scotland) with onward appeals to the Court of Appeal or, in Scotland, a registration appeals court made up of three Court of Session judges.

Legislative complexity

- 3.44 The foregoing is a summary of key parts of the law of registration which belies the volume of primary and secondary legislation. Quite apart from volume, there is also the issue of complexity. Developments in policy on registration, and the emergence of a different system in Northern Ireland, have led to major amendments being made to the 1983 Act over time. Its provisions under the

⁴⁰ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, reg 34. This defines the circumstances when the duty to remove a person's entry from the register under s 10A(6) of the Representation of the People Act 1983 does not apply.

⁴¹ Political Parties, Elections and Referendums Act 2000, ss 9A and 9B.

⁴² Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, regs 26 to 28 and 29.

headings of “entitlement to registration” and “registration of parliamentary and local government electors”, formerly sections 4 to 13, grew from spanning 10 sections to 25, with few of the original sections emerging unscathed from amendments in 2000 and 2006. As a result of successive amendment, the provisions have grown quite complex.

- 3.45 An illustration is given by the way the deadline for registration before an election is derived. The deadline is commonly stated to be 11 working days before polling day. That exact figure is not set out in statute but is instead made up of two component periods. First, an individual application for registration cannot be allowed without a hearing unless five clear working days have passed, and no objection was made. Second, the latest time for publication of the notice of alteration of the register for a pending election is five or six working days before polling day, at the registration officer’s discretion.⁴³ This means the deadline could be 11 or 12 days depending on the officer’s decision. Most electoral administrators operate on the assumption that the deadline will be 11 days, and it is not clear whether any registration officers use their discretion to contrary effect.

Residence requirement for registration and legislative ambiguity

- 3.46 The 1983 Act does not positively define residence, instead referring to factors that registration officers must have regard to when deciding the question whether a person is resident at a particular address for registration purposes.⁴⁴ Nor is an “address” defined, though in a case interpreting the law under the Representation of the People Act 1949 it was held that a person was not prevented from registering for elections because they lived in a tent or a car, or their occupation of a dwelling was unlawful.⁴⁵ The legislative treatment of residence has thus been identified as a source of ambiguity, particularly as regards the propriety of registering in two different locations.⁴⁶
- 3.47 That the law permits residence, and therefore registration, at more than one place is clear. Drawing the line between residence and passing presence proves more problematic. In *Fox v Stirk*, the Court of Appeal held that living in halls of residence for at least half of the year had a sufficient degree of permanence for university students to be resident for registration purposes. Lord Denning’s starting point was that a person could have two residences, for example a flat in London and a house in the country.⁴⁷ By contrast Scottish courts, while accepting that residence in more than one place is possible,⁴⁸ have taken a stricter approach. In one case it was held that renting a cottage for three or four months

⁴³ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, reg 29(4) (five day objection period).

⁴⁴ See, Representation of the People Act 1983, s 5.

⁴⁵ *Hipperson v Electoral Registration Officer for the District of Newbury* [1985] QB 1060 at p 1075.

⁴⁶ Electoral Commission, *Managing Electoral Registration in Great Britain: Guidance for Electoral Registration Officers* (February 2008) at pt B s 4; Association of Electoral Administrators, *Response to the Cabinet Office Request for Views on Specific Provisions of UK Electoral Legislation Requiring Amendment* (March 2011) at p 6.

⁴⁷ *Fox v Stirk, Ricketts v Cambridge* [1970] 2 QB 463 at p 475.

⁴⁸ *Dumble v Borders* 1980 SLT (Sh Ct) 60.

in the year made it a holiday home whose occupation was incidental to permanent residence at the family home.⁴⁹

- 3.48 It may be that no positive definition can finally state what connection between elector and community or area is sufficient to entitle them to vote there; however registration officers currently must make up their mind with little guidance, and only old judicial decisions to rely on. There is a risk of inconsistent decisions being made in different areas. Our preliminary view is that the substantive project should include consideration of whether residence should be positively defined, and if so what the definition should be.

Special category electors and administrative complexity

- 3.49 Social changes have put pressure on traditional notions of the register. The current system was initially designed for registering electors at particular residential addresses. Over time “special category” electors emerged for whom exceptional provision is made so that they can vote at an election despite not residing within the geographical boundaries it takes place in. Thus there is a facility for persons in various forms of government service overseas and their spouses to vote. Other categories include merchant seamen, patients in mental hospitals, prisoners on remand and the homeless. They are able to register to vote as parliamentary and local government electors.⁵⁰ British citizens living overseas may register as electors at UK Parliamentary and European Parliamentary elections.⁵¹ The facility to enable these people to register varies, but in general the mechanism is notional residence, backed by certain administrative requirements (such as declarations) overseen by registration officers.
- 3.50 Other electors, while actually resident, may be deterred from voting if their name and address appeared on the register. In Great Britain there is provision for electors, on satisfying the registration officer that household registration would risk their or others’ safety, to register anonymously, their interaction with electoral administration taking place through their electoral number only.⁵²
- 3.51 The rules on special category and anonymous electors are fairly voluminous, with the Electoral Commission’s guidance running to over 40 pages. They place a substantial administrative burden on registration officers and their staff. But they also present some certainty of treatment for difficult cases, and provide a rigid structure for decision-making. The substantive reform project will present an opportunity to rationalise and simplify these provisions.

Individual electoral registration

- 3.52 Concerns with the household registration system led to calls for a move to one where electors individually apply to be registered. The last UK Government legislated for individual electoral registration in the Political Parties and Elections

⁴⁹ *Scott v Phillips* 1974 SLT 32 at p 33.

⁵⁰ Representation of the People Act 1983, ss 6 to 7C and 14 to 17.

⁵¹ Representation of the People Act 1985, s 1.

⁵² Representation of the People Act 1983, s 9B.

Act 2009, and the current government has announced plans to bring forward its implementation so that it is in place for the 2015 general election.

The system in Northern Ireland

- 3.53 Individual electoral registration has been in place in Northern Ireland since 2002. Electoral fraud was a significant concern, one cause being the registration of people not resident at their given address. The Electoral Fraud (Northern Ireland) Act 2002 introduced individual electoral registration, requiring people registering to vote to provide their personal details including a national insurance number.
- 3.54 The Chief Electoral Officer for Northern Ireland is the electoral registration officer for all of Northern Ireland. Deputy registration officers, supervised by the Chief Officer, are responsible for registration matters within their constituencies. The Chief Officer issues a photographic electoral identity card on application by voters, which serves as a form of identification when casting a vote.
- 3.55 The move to individual electoral registration resulted in a number of separate legislative provisions both in the body of the 1983 Act and in regulations. Some of the main differences in Northern Ireland are as follows:
- (1) Applicants must provide identifying information as part of the application process, including their date of birth, signature, and national insurance number if they have one.
 - (2) Applicants may be asked for proof of identity and address. Northern Irish electors must have three months' continuous residence in the territory before they can register. The Chief Officer may ask an applicant to provide physical evidence of name and address, for example a birth certificate, driving licence or bank statement.
 - (3) More rigorous provision is made for the late registration window, in particular as to the range of supporting documentation that the registration officer may require of late applicants in order to establish their identity, age, nationality, address and length of residence.⁵³
- 3.56 In the longer term, subject to Northern Ireland-specific provision required by its unique circumstances, the UK Government has announced it intends to assimilate the Northern Irish system more closely with Great Britain's individual registration system when it is established.⁵⁴

The proposed system in Great Britain

- 3.57 On 30 June 2011, the Government published a White Paper announcing that it planned to accelerate the introduction of individual electoral registration, update

⁵³ Representation of the People Act 1983, ss 4(2) and 13BA; Representation of the People (Northern Ireland) Regulations 2008 SI 2008 1741, reg 25.

⁵⁴ HM Government, White Paper on Individual Electoral Registration (June 2011) Cm 8108 at p 14.

the means of registration, and consider reforms to registration generally.⁵⁵ Great Britain will move to a system which is closer to the Northern Ireland arrangements, although signatures are not likely to be required as identifiers. Instead individual registration will concentrate on requiring national insurance numbers, with other identification being required only where the latter cannot be provided. Registration officers will have to establish a link between the individual applicant and an address.

- 3.58 During pre-legislative scrutiny,⁵⁶ the discussion focussed on implementation and transition between now and 2015, concern that a similar or worse drop in registration levels will ensue as occurred in Northern Ireland in 2002, and various policy issues that ultimately amount to a debate about how best to promote accuracy and completeness.
- 3.59 The Electoral Registration and Administration Bill 2012 proposes a new individual electoral registration system. Extensive provision governing the transition from the current to the new system is made, including on data sharing and matching to simplify the transition for the majority of electors, the use of carry-over powers, the piloting of changes made to the annual canvass, and a temporary power by the Minister to issue guidance to registration officers.
- 3.60 The permanent change proposed by the Bill is that individual electors apply to register themselves and no other. The canvass will be a means of identifying incorrect entries in the register and individuals who are entitled to be registered but are not. Separate invitations to register will be sent to individuals appearing from the canvass or other means to be entitled to register. These and other changes will be made by amending the registration provisions of the 1983 Act, which as we noted have been the subject of several amendments in recent years.

Conclusion as to inclusion within the scope of reform project

- 3.61 There is extensive change already under way in this area of the law, and more is planned. Stakeholders and government are rightly concerned with getting key policy and operational issues right in the transition to individual electoral registration. Our preliminary view is that the substantive reform project must consider the technical aspects of registration holistically, taking a broad view of the subject matter once individual registration has been introduced. The project will provide an opportunity to consider how best to present electoral registration, with a view to simplifying and rationalising the law, reducing legislative complexity and ambiguity and simplifying the administration of the register.

Question 5:

Should the scope of the reform project include electoral registration, and if so, the meaning of residence?

⁵⁵ HM Government, White Paper on Individual Electoral Registration (June 2011) Cm 8108 at p 5.

⁵⁶ Political and Constitutional Reform Committee, Report on Individual Electoral Registration and Electoral Administration (2010-12) HC 1463; HM Government, Response to pre-legislative scrutiny and public consultation on Individual Electoral Registration and amendments to Electoral Administration law (February 2012) Cm 8245.

CANDIDATES AND THE CAMPAIGN

- 3.62 This section deals with candidates' participation in the electoral process. It is in two parts. The first deals with candidates' qualifications for office and the nomination process. It defines who can run for election and how they are selected. The second is concerned with regulation of campaign conduct.

Qualification and nomination

- 3.63 Electoral law must include consideration of what qualifies a person to be elected to office. That exercise inevitably occurs at the intersection with the body of laws that constitute legislatures and elected offices.
- 3.64 Electoral law lays down a process to determine candidacy at any given election. In the UK, candidates must be validly nominated after an election is triggered. The basic requirement for candidacy shared at all elections, with only a few exceptions for specialist bodies, relates to age and nationality. Candidates must be aged 18 or over and be UK, Irish or Commonwealth citizens. European Parliamentary election candidates may also be EU nationals. At elections to local government there are further qualifications which seek to restrict candidacy to those with ties to the relevant local authority area, by requiring, for example, registration as an elector within the authority in which the election takes place.
- 3.65 A number of grounds operate as legal disqualifications from taking office. We do not propose to set out the disqualifications in detail. They vary depending on elections because they derive from the constitutive rules of the elected offices. Among the most complicated are the rules on disqualification of MPs which are set out in schedule 1 to the House of Commons (Disqualification) Act 1975, and a number of other Acts and common law rules. Not all of them affect candidacy for office. For example, MPs are disqualified from the office of Police and Crime Commissioner. However, that does not prevent an MP from being a candidate for election as a commissioner and resigning the seat if elected.

The relationship between qualification and nomination of candidates

- 3.66 From an administrative standpoint the function of returning officers in the context of nominations is, with one exception, a formal one. They check the nomination papers are in accordance with the rules. If they are, the candidate is validly nominated. If they are not, the nomination is void. They are not assessing whether a candidate is in substance disqualified. This is in keeping with the general approach in electoral law of eliminating evaluative – and potentially controversial – issues from the administrative sphere.
- 3.67 The evaluative task falls on the candidate. A disqualified candidate's election may be void or voidable at proceedings before an election court, special proceedings before the Privy Council, High Court or Court of Session, or in the case of MPs through the House of Commons' own procedures under the House of Commons (Disqualification) Act 1975. Furthermore candidates, when consenting to nomination, must make a declaration that to the best of their knowledge and

belief, they are not disqualified from office.⁵⁷ It is a corrupt practice, and thus a criminal offence carrying a five year disqualification from elected office, knowingly to make a false declaration.⁵⁸ Candidates therefore have every incentive to satisfy themselves of their qualification for office.

- 3.68 The disqualification from membership of the House of Commons of any prisoners detained for more than a year for any offence is a special case. Such prisoners' nomination is void and the returning officer is entitled to decide that nomination papers are invalid on that ground. This is the only instance in which the officer's role involves substantively evaluating whether a candidate is disqualified.⁵⁹

Formalities of nomination

- 3.69 With the above exception, nomination of candidates remains a formal process. Its purpose is to crystallise the list of candidates at the election, ultimately resulting in their names being on the ballot paper. Nomination papers for UK Parliamentary elections must include a form signed by a proposing, seconding, and eight more "subscribers", all of whom must be registered electors. In addition, forms must be provided that concern the candidate's home address, consent to nomination, party authorisation, and any request to use a party emblem.
- 3.70 The general position is that formal requirements are strict, and defective nomination papers are void. For example, if one of the ten subscribers is not registered to vote at the election, they do not count and no subscribers beyond the first ten named may be considered. The deadline for submission of papers and paying the deposit, 4pm on the sixth working day after the proclamation of a new Parliament, is strict.
- 3.71 Candidates may attend the delivery of nominations and object to nomination papers within very tight deadlines, which cannot go beyond 5pm on the last day for nominations. A candidate is deemed to be validly nominated unless the returning officer holds otherwise. Nomination papers can only be held to be invalid on the ground that the particulars are not as required by law or the paper is not subscribed as required. The returning officer's duties do not go beyond seeing that the form of the nomination paper is correct on its face.⁶⁰

Differences across elections

- 3.72 While the approach to nominations at UK Parliamentary elections remains the template, there are some significant differences for other elections. At local government elections, for example, persons can declare themselves candidates

⁵⁷ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 8(3)(b); European Parliamentary Elections Rules, European Parliamentary Elections Regulations 2004 SI 2004 No 0293, sch 1 r 8(3); replicated in the election rules for other elections.

⁵⁸ Representation of the People Act 1983, s 65A (1A)(b).

⁵⁹ Representation of the People Act 1981, s 1; Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 12(2)(c). There is equivalent provision in the European Parliamentary Elections Rules, but only in respect of individual candidates. See European Parliamentary Elections Regulations 2004 SI 2004 No 0293, sch 1 r 13(3) and (4).

⁶⁰ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 12(2); *R v Election Court, ex parte Sheppard* [1975] 1 WLR 1319.

and be nominated for more than one ward, provided that on the deadline for nominations they withdraw their candidacy for all but one. At elections for principal authorities, ten subscribers' signatures are required; however at elections for parish or community council elections only two signatures are required. Individual candidates' nomination papers at European Parliamentary elections, on the other hand, are not required to be subscribed by electors.

- 3.73 At Scottish local government elections, a returning officer may correct minor errors in a nomination paper in the 24 hour period following the deadline for nomination papers. This includes obvious spelling errors and errors as to electoral numbers.⁶¹ This is in contrast to the lack of discretion elsewhere.
- 3.74 Where an election is conducted wholly or partly using a party list system, a different approach is taken to nominations. At European Parliamentary elections nomination papers are submitted nominating a registered political party, whose paper is accompanied by a list of the party's candidates. At Scottish Parliamentary elections, individual regional candidates must be nominated as such, but candidates on a regional party list are not nominated. The party is nominated by submitting a regional list in the prescribed form.⁶²
- 3.75 Our preliminary view is that consideration of the differences across elections is within the scope of the substantive project, which should rationalise the rules with a view to reducing legislative fragmentation and complexity. It should do so with a focus on the interactions of electoral administrators with candidates' qualifications, and on making the law clearer for candidates to understand.

Campaign conduct

- 3.76 The classical law governing candidates and the campaign is principally set out in part II of the 1983 Act. In keeping with the conventional approach from 1883 onwards, it lays down a detailed set of regulatory rules and places the onus of compliance with them on the candidate and the mandatory office of the election agent. Enforcement is through the criminal law or through the private legal process of the election petition. While electoral administrators are also given detailed administrative duties in the sphere of candidacy and the campaign, so far as possible these exclude evaluative questions.
- 3.77 Part II of the 1983 Act strictly speaking applies only to UK Parliamentary elections, local government elections in England and Wales and elections to the Greater London Authority. In relation to other elections, specific measures refer to the 1983 Act and apply some or all of its regulatory provisions, with or without modifications.

Defining the campaign

- 3.78 The legislative approach in the 1983 Act is substantially the same as its antecedents. It was designed at a time when the modern role of the political party as organiser of a centralised, national campaign had not fully emerged. A

⁶¹ Scottish Local Government Election Rules, Scottish Local Government Elections Order 2011 SSI 2011 No 339, sch 1 r 10.

⁶² Scottish Parliament (Elections etc) Order 2010 SI 2010 No 2999, r 6.

parliamentary campaign relates to a UK Parliamentary election; both exist at the local constituency level and the law regulating candidates' conduct is likewise geographically defined. As centralised, party-run campaigns gained prominence, there was a regulatory vacuum because in the eyes of the law the campaign was the constituency campaign.⁶³ Political parties are now regulated under the Political Parties, Elections and Referendums Act 2000, and as we note in the next section, that regulation is not thought to be part of the scope of the substantive reform project. In this paper we remain primarily concerned with the legal notion of the campaign within constituency boundaries rather than the "national" campaign run centrally by political parties.

Role of the election agent

- 3.79 The election agent was introduced by the Corrupt and Illegal Practices Act 1883 to solve the problem of corruption by forcing the selection by candidates of an election agent who was solely responsible for election expenses. That approach persists today and the election agent is the person responsible in law for the proper conduct of the campaign, through whom all election expenses are channelled.⁶⁴ No other person may incur expense to promote or procure the election of a candidate without the agent's authority, which would circumvent the regulation of campaign expenditure. Doing so is a criminal offence and a corrupt practice.⁶⁵
- 3.80 One of the election agent's main functions is to make sure the candidate does not exceed expense limits and can account for all regulated expenses. After the election, the agent must complete and deliver to the returning officer a return as to election expenses and a declaration in prescribed form, which must be signed by the candidate.⁶⁶ Failing to provide a return or declaration is an illegal practice, and knowingly making a false declaration a corrupt one. Both are criminal offences, grounds for invalidating an election, and carry disqualifications from elected office for three and five years respectively.

Expense limits

- 3.81 The type of expense subject to regulation is set out in legislation, which will also stipulate the expense limits. At a Parliamentary by-election the maximum is a fixed figure, currently £100,000. At a general election the maximum is calculated by adding to a fixed amount, currently £7,150, a further sum calculated by multiplying the number of entries in the register for the constituency by seven pence in county constituencies, and five pence in borough constituencies. The maximum for local government elections in England and Wales is similarly constructed from the fixed figure of £600 and a rate of five pence for every entry in the register.⁶⁷

⁶³ *R v Tronoh Mines Ltd* [1951] Cr App R 196; *Grieve v Douglas-Home* 1965 SC 315.

⁶⁴ With the exception of parish and community council elections. See Representation of the People Act 1983, s 71.

⁶⁵ Representation of the People Act 1983, s 75.

⁶⁶ Representation of the People Act 1983, ss 81 and 82.

⁶⁷ Representation of the People Act 1983, sch 4A s 76(2).

- 3.82 At first sight, the difference in rates being determined by the – often historical – character of a constituency is surprising. Whatever differences led to different rates being applied to county and borough constituencies, they are likely to be less pronounced in modern times. Indeed, the Electoral Commission guidance to candidates currently advises them to ask the returning officer what type of constituency they are running in.⁶⁸
- 3.83 Regulation lasts from the date of candidacy until the date of the poll. In this context a person becomes a candidate at a UK Parliamentary election on the date Parliament is dissolved if by that date they or others have declared their candidacy; on the date when candidature is actually declared, or when the candidate is nominated, whichever is the earlier. At a local election, a person becomes a candidate on the last day for publication of notice of the election if they or others have by that date declared their candidacy, when they or others declare their candidacy or when they are nominated, whichever is earlier.⁶⁹

The role of the returning officer in relation to expenses

- 3.84 Generally speaking, the returning officer and their staff have no role to play in advising candidates on their duties with respect to the campaign, or enforcing those duties. Officers and administrative staff will only intervene to ensure the performance of their own duties – for example to ask a candidate not to campaign at a polling station or to eject a disruptive candidate from the count.
- 3.85 In relation to expenses, however, the returning officer has a formal and limited role. Candidates must deliver to the officer an election expenses return and declaration within a stipulated period, which for UK Parliamentary elections is 35 days from the declaration of the result. Within a further ten days, the returning officer must publicise the availability of these returns for inspection. The publication must state if any return or declaration has not been received from any candidate. For UK Parliamentary elections and certain other elections, copies of returns and declarations must be delivered to the Electoral Commission including, if requested, the accompanying documents. The returning officer must retain and make available for inspection the documents for a period of two years from the date of receipt of the return.⁷⁰
- 3.86 The Association of Electoral Administrators has described the role of the returning officer and their staff in this context as “acting as intermediaries in the regulation of election finance”. It recommended that the government and the Electoral Commission consider developing an online facility for submission of candidates’ election expenses returns with provision for both candidate and agent to give secure approval of the final return.⁷¹

⁶⁸ For example, Electoral Commission, *Guidance for Candidates and Agents, 2010 UK Parliamentary General Elections in Great Britain* (2009), pt C p 68 para 2.11.

⁶⁹ Representation of the People Act 1983, s 118A. See also Fixed Term Parliaments Act 2011, s 76ZA for regulation of pre-candidacy expenses at Parliamentary elections.

⁷⁰ Representation of the People Act 1983, ss 87A and 88.

⁷¹ Association of Electoral Administrators, *Beyond 2010 Report on the Future of Electoral Administration in the UK* (July 2010) at pp 61 and 62.

Regulation of campaign conduct other than expenditure

- 3.87 The regulation of campaign conduct is not limited to expenses. The responsibilities of the candidate, their election and other agents also extend to their wider electoral conduct. Electoral law regulates that conduct through the electoral offences. This ranges from technical issues, such as the misuse of copies of the full register and absent voters list for a non-electoral purpose, to improper conduct affecting the integrity of the poll itself, such as bribing or treating voters, or exerting undue influence over them.
- 3.88 Electoral offences apply to persons generally, including the candidate and their agents. Some of these offences are classified as corrupt and illegal practices, which turns them into grounds for annulling an election, and for disqualifying candidates from office for a set period. We set out electoral offences in the table at Appendix B to this paper and discuss their classification in Chapter 4.
- 3.89 The electoral administrator's role in relation to offences by candidates and their agents, unlike that in relation to qualifications and expenses, is nonexistent. Like other citizens, if they suspect an electoral offence has been committed, they may alert the police but have no role, formal or substantive, in relation to electoral offences.

Conclusion as to inclusion within the scope of reform project

- 3.90 Our preliminary view is that the scope of the substantive project should include the rules governing candidates and the campaign, with a view to considering whether inconsistencies in the rules across all elections and fragmentation of the legislative provisions can be reduced or eliminated. However, we do not expect this to include a major overhaul of either the expenses or general conduct regulation of candidates; in particular, it is not for the project to set or change expense limits. Nor do we propose to revisit the case law that led to the separate treatment of national campaigns.

Question 6:

Should the scope of the reform project include consideration of the rules on candidates and the campaign?

POLITICAL PARTIES AND BROADCASTS

- 3.91 Political party registration, finance regulation and political broadcasts are areas that are politically sensitive and would require broad cross-party consensus before significant reform would be possible. Accordingly, our preliminary view is that these areas should not be a part of the electoral law project, though they may nevertheless require consolidation into the eventual legislative framework.

Political parties

- 3.92 The Political Parties, Elections and Referendums Act 2000 (“the 2000 Act”) provides for the registration of political parties and the regulation of their expenses and donations by the Electoral Commission. The definition of a “party” is not given an exhaustive meaning under the 2000 Act, merely being described as any organisation or person in section 40(1). However, it is implied from other provisions on registration that a political party will field candidates at elections.
- 3.93 The 2000 Act essentially makes party registration compulsory by prohibiting a person’s nomination in the name of an unregistered political party. Two political party registers must be kept by the Electoral Commission. The first is the Great Britain register that consists of those parties intending to contest “relevant elections” in England, Scotland or Wales, while the second is the Northern Ireland register for those parties planning on contesting “relevant elections” there. Registration rules require office-holders to be nominated for every party, a scheme to outline the arrangements for the party’s financial affairs, and the parties’ name, headquarters and constitution to be entered in the register.⁷²
- 3.94 Donations to political parties are restricted and must come from permissible donors. All donations that are above a prescribed figure, currently £7,500, must be reported on a quarterly basis as a general rule but on a weekly basis during election periods. Impermissible donations must be returned to their source and if the source cannot be identified then they must be sent to the Electoral Commission.⁷³
- 3.95 Loans are restricted in a similar way to donations. Registered political parties are restricted from dealing with unauthorised participants regarding “regulated transactions”. Similar reporting requirements apply as those for donations.⁷⁴
- 3.96 Stringent controls over campaign expenditure apply and the party’s registered treasurer performs a role that is analogous to the candidate’s agent. All campaign expenditure must be authorised by them and any campaign cost above £500 must be evidenced by an invoice or receipt. The financial limits on campaign expenditure differ based on the type of election.⁷⁵

Broadcasts

- 3.97 Rules on campaign publicity frame how candidates and political parties can use the media when reaching out to potential voters. Publicity covers a wide range of communication methods, including the use of canvassers, and local election publications. These are subject to the ordinary regulation of the local campaign which we mentioned above.
- 3.98 Public broadcasts and national campaign publicity are not captured by the regulation of the local campaign under the 1983 Act. Programmes by

⁷² Political Parties, Elections and Referendums Act 2000, ss 22 to 29.

⁷³ Political Parties, Elections and Referendums Act 2000, ss 54, 62, 63 and 57.

⁷⁴ Political Parties, Elections and Referendums Act 2000, ss 71F, 71H, 71I, 71M, 71Q and 71U.

⁷⁵ Political Parties, Elections and Referendums Act 2000, ss 76 and 79, and sch 9.

broadcasters as part of their normal services are exempted from the restrictions on election expenditure by unauthorised persons.⁷⁶ However, broadcasters are prohibited from including any party political broadcasts made by parties that are not registered under the 2000 Act.⁷⁷ The Office of Communications ensures that political broadcasts on behalf of registered parties are included in every licensed public television and national radio service. It can make rules for parties on whose behalf broadcasts are made.⁷⁸ Each broadcasting authority is also required to adopt a code of practice to regulate matters pertaining to the participation of candidates at UK Parliamentary elections.⁷⁹ All broadcasters are required to uphold due impartiality in matters of political controversy.⁸⁰

Conclusion as to inclusion within the scope of reform project

- 3.99 Our preliminary view is that any reform of the regulation of political parties and national publicity requires broad political consensus, so that such reform falls outside of the scope of the substantive reform project. There may, however, be a need to consolidate the current legal treatment of these topics into the eventual legislative framework.

Question 7:

Do you agree the scope of the project should exclude political party regulation and national campaign publicity?

MANNER OF VOTING

Voting at the polling station

- 3.100 Most people vote at an election by marking a ballot paper at a polling station on the day of an election. The administration of the poll is governed by an election's particular election rules. The law provides for the holding of a poll by ballot and specifies that ballot papers must accord to the directions and a template form, which is provided in an appendix to the relevant election rules.⁸¹

Detailed prescriptive approach to ballot papers

- 3.101 The current approach prescribes in detail the exact nature of the ballot paper, including the specific instructions for voters to appear on the ballot paper, its layout, and the font and size of the text. For example, the Parliamentary Election Rules state that no word is to be printed on the face of a ballot paper except the direction as to voting, the particulars of the candidates and any words forming

⁷⁶ Representation of the People Act 1983, s 75(1)(c).

⁷⁷ Political Parties, Elections and Referendums Act 2000, s 37.

⁷⁸ Communications Act 2003, s 333.

⁷⁹ Representation of the People Act 1983, s 93(1).

⁸⁰ Broadcasting Act 1990, s 6(1).

⁸¹ For example, the ballot paper in UK Parliamentary elections is prescribed by rule 19 and a template contained in the Appendix of forms of the Parliamentary Election Rules, Representation of the People Act 1983, sch 1. For principal area local elections in England and Wales the equivalent rule 16 and template are contained in the Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2.

part of emblems. The legislation also prescribes the exact placement of the horizontal and vertical lines on the ballot papers.⁸² The Electoral Commission argues the current law is “overly-restrictive and does not meet voters’ needs” and suggests a more flexible alternative. It suggests legislation should specify the key information with the precise format, wording and design determined by the Commission working with returning officers.⁸³

- 3.102 A detailed and inflexible approach can result in legislative errors. For example, changes to the rules for parties registering joint descriptions were introduced but were mistakenly not applied to the rules for using emblems. As a consequence, candidates who were using a joint description could not include a party emblem on the ballot paper.⁸⁴ Another example of the level of detail in prescription relates to the tactile voting device to be used by visually impaired voters. The device is described down to the smallest detail in secondary legislation.⁸⁵

Power of the Secretary of State to vary ballot papers

- 3.103 The Secretary of State may prescribe in regulations a different ballot paper or amend the directions and instructions to voters for UK Parliamentary elections.⁸⁶ For other elections, the Secretary of State (and in respect of Scottish local government elections, the Scottish Ministers) can also amend the rules as they are contained in secondary legislation.⁸⁷ As we previously mentioned, the question of consistency of the place of rules within the legislative hierarchy is one that we anticipate will be a key part of the substantive reform project.

Security measures for ballot papers

- 3.104 Ballot papers are required to have a number, a unique identifying mark, and an “official mark”. The corresponding number list system requires a returning officer to keep a list that contains the numbers and unique identifying marks of all the ballot papers.⁸⁸ When a ballot paper is issued, the voter’s electoral number is written beside the ballot paper number on the corresponding list. While it was intended that voters would sign the list beside the corresponding numbers, this additional requirement has not been brought into effect.
- 3.105 Once a poll has closed, the ballot papers and the corresponding number lists are sealed in packets. While it is possible to identify who cast particular votes, this can only occur following a court order. However, voters naturally query why their

⁸² Representation of the People Act 1983, sch 1 Appendix of forms.

⁸³ Electoral Commission, *Preliminary Views on the Scope of the Law Commission Review of Electoral Administration Law* (November 2011) at pp 17 and 18, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/148425/Preliminary-views-on-project-scope.pdf (last visited 31 May 2012).

⁸⁴ Cabinet Office, *Response to Reports on the Administration of the 2010 UK Parliamentary General Election* (September 2011) at p 18.

⁸⁵ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, reg 12.

⁸⁶ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 19(4).

⁸⁷ For example, Scottish Local Government Elections Rules 2011 SI 2011 No 339, sch 1 r 14.

⁸⁸ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 rr 19A and 20.

electoral and ballot paper numbers are being recorded and may be concerned that the secrecy of their vote is being compromised. Some have argued that a vote tracing procedure might be seen as undermining the secrecy of the ballot without sufficiently deterring impersonation.⁸⁹

- 3.106 The Association of Electoral Administrators has also raised the practical concern that the corresponding number list is imperfectly described in legislation and does not properly take account of combined polls, where there are multiple ballot papers and entitlements to the franchise.⁹⁰ No doubt there is a significant administrative burden imposed by the system and this along with concerns about jeopardising the secrecy of the ballot should be considered in light of its purpose of dissuading impersonation.

Absent voting

- 3.107 Absent voting procedures are desirable in a modern democracy to cater for a more transient population and voters with disabilities and special needs. However, such procedures have a role not only for the purposes of voter accessibility but also because they can reduce administrative burdens on polling day. For example, the Electoral Commission has recommended that the UK considers whether there is a role for advance polling “in helping to provide more flexible options for people wanting to vote and reducing the potential for queues to build up on polling day”.⁹¹ Our preliminary view is that a move to any new form of special voting procedure is a political decision outside the scope of this project. However, an important question that we think is within scope is whether provisions on absent voting can be brought together into one statutory framework as part of an electoral modernisation strategy.

Framework for absent voting

- 3.108 Electors can choose to cast an absent vote by returning a postal ballot paper by mail, or appointing someone to vote as a proxy on their behalf. There is also special provision for polling staff working on the day of the poll, which enables them to vote in person somewhere other than at their designated polling station.⁹²
- 3.109 The main advances in absent voting in Great Britain were a result of the Representation of People Act 2000, which provided for postal voting on demand, availability of overseas postal ballot papers and flexibility in the effect and duration of being listed as an absent voter. Absent voting at parliamentary and local government elections is made available by schedule 4 of the 2000 Act. The Representation of the People Act 1985 governs Northern Ireland. Detailed provision on absent voting is made in three sets of regulations, one for each

⁸⁹ Home Affairs Committee, Report of on Electoral Law and Administration (1998) HC 768-I at para 107.

⁹⁰ Association of Electoral Administrators, *Beyond 2010 Report on the Future of Electoral Administration in the UK* (July 2010) at p 55.

⁹¹ Electoral Commission, *Interim Report on the 2010 UK Parliamentary General Election: Review of Problems at Polling Stations at Close of Poll on 6 May 2010* (May 2010) at p 30.

⁹² See, for example, Representation of the People Act 2000, sch 4 para 2(3) to (5).

jurisdiction in the UK.⁹³ Absent voting for other elections is provided for in similarly worded statutory instruments for those particular types of elections.⁹⁴

Postal voting

- 3.110 Postal voting enables an elector to vote in an election by posting a ballot paper instead of attending the polling station. An elector voting by post will receive a postal voting package. This contains a ballot paper for casting a vote, a postal voting statement to verify personal identifiers, and two envelopes in which to return both papers. The elector must first mark the ballot paper and complete the postal voting statement before placing the postal ballot paper inside the smaller envelope. This smaller envelope and the postal voting statement must then be sealed in the larger envelope and posted to the local registration office.
- 3.111 Applications must arrive no later than 5pm on the 11th day before polling day, and must meet the formalities under the Representation of the People (England and Wales) Regulations 2001.⁹⁵ In Great Britain, electors are entitled to a postal vote on demand if they are on the relevant register and their application provides their name, address, date of birth and signature.⁹⁶ While nothing prevents an elector from remaining registered for postal voting indefinitely, registration officers are required to obtain fresh signatures every five years.⁹⁷ In Northern Ireland, applicants for a postal vote must satisfy the registration officer that they cannot reasonably be expected to vote in person.⁹⁸
- 3.112 Returning officers are required to issue postal ballot papers as soon as practicable after the electoral registration officer has granted an application for a postal vote at a specific election, but they cannot issue papers to electors with standing absent voting arrangements any earlier than 5pm on the 11th working day before the poll. Where there is a combined poll, the postal ballot papers for each election may be issued together if the relevant returning officers agree. In the event that a person does not receive a ballot paper by the fourth working day before the poll or spoils or loses it then they can apply for a replacement before 5pm on the day of the poll. Postal ballot papers may be returned by hand or post to the returning officer or by hand at any polling station in the constituency before the close of the poll.⁹⁹

⁹³ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341; Representation of the People (Scotland) Regulations 2001 SI 2001 No 0497 (substantially identical to those in SI 2001 No 0341); Representation of the People (Northern Ireland) Regulations 2008 SI 2008 No 1741.

⁹⁴ For example, European Parliamentary Elections Regulations 2004, sch 2; the Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 3 arts 7 to 11.

⁹⁵ SI 2001 No 0341, regs 56 and 51.

⁹⁶ Representation of the People Act 2000, sch 4 paras 2 to 4 (applies to Great Britain only).

⁹⁷ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, reg 60A.

⁹⁸ Representation of the People Act 1985, ss 5 to 7 as amended by Electoral Fraud (Northern Ireland) Act 2002 (applies to Northern Ireland only); Representation of the People (Northern Ireland) Regulations 2008 SI 2008 No 1741, reg 55.

⁹⁹ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, regs 65, 71, and 77 to 79.

- 3.113 Detailed prescription is made in regulations as to the handling of envelopes containing postal votes, the ongoing provision of at least one secured postal voters' ballot box and the opening of ballot boxes in the presence of counting agents, and receptacles to be used when verifying postal voting statements. After verification, postal ballot boxes are retained securely until the count.¹⁰⁰
- 3.114 The verification procedure requires the returning officer to be satisfied that the date of birth and signature on 20% or more postal voting statements are the same as those on the personal identifier records for each of the electors.¹⁰¹ A number of local authorities use computerised systems, following up with visual checks if required. Some concerns have been expressed at the adequacy of this procedure, particularly for detecting fraud.¹⁰² If personal identifiers are defective, administrators cannot contact electors whose postal votes have been rejected. The Association of Electoral Administrators has called for a change in the law to enable electoral officers after the close of polls to use the postal vote rejection data to contact voters to explain the correct process and the penalties for malpractice, to invite the re-submission of their identifiers, and to correct and update the record at any time.¹⁰³ The Electoral Registration and Administration Bill 2012 proposes that regulations may stipulate when registration officers must notify persons whose postal ballot papers were rejected at UK Parliamentary and local government elections.¹⁰⁴

Proxy voting

- 3.115 Proxy voting allows those unable to vote in person to appoint another elector to cast a ballot on their behalf. To appoint a proxy, an elector must ensure their application arrives no later than 5pm on the sixth day before polling day. Unlike postal voting, an elector has to justify their application for the appointment of a proxy to be accepted. In particular, they must satisfy the registration officer that they cannot reasonably be expected to vote in person on polling day on the basis of being absent because of work, study, holiday, distance or illness.¹⁰⁵
- 3.116 The 2001 Regulations stipulate a number of general and specific requirements for proxy applications, and any person is capable of being appointed as a proxy with only a few exceptions. A duly appointed proxy can exercise the vote on behalf of the elector by attending the designated polling station or by post if they were granted authority to vote by post as a proxy. The duration of the appointment of the proxy can either be for the particular election, a set period of

¹⁰⁰ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, regs 82 to 83 and 84 to 85.

¹⁰¹ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, reg 85A.

¹⁰² Office for Democratic Institutions and Human Rights, *Report on the May 2010 UK General Election* (July 2010) at p 13.

¹⁰³ Association of Electoral Administrators, *Beyond 2010 Report on the Future of Electoral Administration in the UK* (July 2010) at pp 42 to 43.

¹⁰⁴ Electoral Registration and Administration Bill 2012, cl 20.

¹⁰⁵ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, reg 56; Representation of the People Act 2000, sch 4 para 3(2) 3(3) and 4(2).

time or it may continue until it is revoked under regulation 59.¹⁰⁶

- 3.117 While proxy voting offers an alternative means of absent voting, it is often criticised on the basis that there is no guarantee that proxies will receive and act upon the instructions of electors. This has led some to state that proxy voting is a “poor substitute for a properly administered system of absentee voting”.¹⁰⁷ The system relies on people acting in good faith and there is no way to test this assumption without jeopardising the secrecy of the ballot. It has also been argued that “the development of postal voting appears to have rendered the proxy voting option somewhat redundant”.¹⁰⁸

Conclusion as to inclusion within the scope of reform project

- 3.118 What emerges from the above is that the current law remains election-specific, highly detailed and inflexible. The developments in absent voting since 1983 have led to a complex mixture of primary and secondary legislation that may be inaccessible for electors, difficult for administrators to use and has led to practical problems such as those relating to the use of party emblems in joint descriptions. While particular issues can be patched as they arise, our preliminary view is that the substantive reform project should address the underlying causes of these problems, which involves questions of approach to legislation, particularly the desirability of assimilating, so far as possible, the rules into a single set of measures. That in turn invites consideration of the proper place of rules and forms within the hierarchy of legislative measures.

Question 8:

Should the scope of the reform project include consideration of the rules on manner of voting?

POLLING DAY

- 3.119 There are three fundamental aspects of polling day, namely: determining the entitlement of electors to vote, completing ballot papers, and preventing fraud.¹⁰⁹ When polling day goes wrong, or is seen to have gone wrong, public confidence in the electoral system suffers. It is, therefore, our preliminary view that the substantive project should consider all issues arising out of the day of the poll.

Administration and management

- 3.120 For each type of election, every ward, division or constituency is divided into smaller geographical administrative areas, known as polling districts. In each polling district, there must be a designated polling place, within which a sufficient

¹⁰⁶ Representation of the People Act 2000, sch 4 para 7; Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, reg 52 (general requirements) and regs 53 to 55 (specific requirements).

¹⁰⁷ M Maley of the Australian Electoral Commission in R Rose (ed), *International Encyclopedia of Elections* (2000) at p 241.

¹⁰⁸ Office for Democratic Institutions and Human Rights, *Report on the May 2010 UK General Election* (July 2010) at p 12.

¹⁰⁹ R Rose (ed), *International Encyclopedia of Elections* (2000) at p 11.

number of polling stations must be provided by the returning officer. Local authorities review polling places every four years. The Electoral Commission publishes guidance on both polling place reviews and polling station provision.¹¹⁰

- 3.121 The returning officer allocates registered electors to a polling station where they must cast their vote, having received notice by polling card. Ballot boxes and papers, polling booths and an extract of the register of electors are assigned to the station which is staffed by a presiding officer and clerks. Presiding officers have a number of statutory duties that are designed to ensure the integrity of the poll. These include showing and sealing the ballot boxes, regulating the number of electors admitted at any one time for the purpose of keeping order, and guarding against violence. The presiding officer is also responsible for issuing ballot papers, responding to specific voter issues, and closing the poll.¹¹¹

Issuing ballot papers

- 3.122 When issuing ballot papers, the duties of polling staff involve identifying the relevant elector, marking the register and lists, explaining the process and secrecy requirements and, if appropriate, asking the prescribed questions. Once electors have received their ballot paper, the law requires that they secretly mark their ballot paper, fold it and show the presiding officer the back of their ballot paper to disclose the number and unique identifying mark before casting their vote. At elections to the Greater London Authority, there is no requirement to fold the paper before showing it and voters who might do so out of habit are asked not to do so as the papers are counted electronically.¹¹²

Identification requirements

- 3.123 Before an elector can vote, polling staff must determine if that person is on the register. In Great Britain, the elector only has to state their name and does not have to produce a form of identification before being issued with a ballot paper. The presiding officer can ask only the prescribed questions set out in election rules and must do so if a candidate or agent requests them to. These ask whether the voter is the person named in the register of electors for the particular election and whether they have already voted apart from as a proxy. Any satisfactory answer to these questions entitles the voter to a ballot paper, and even someone arrested at the direction of the presiding officer on suspicion of personation is not prevented from voting.¹¹³

¹¹⁰ Representation of the People Act 1983, ss 18A to 18C, sch A1, and sch 1 r 25; Electoral Commission, *Guidance on the Essentials of Effective Election Management: Planning for a UK Parliamentary General Election* (September 2009) at paras 15.12 to 15.17, and 15.36. The guidance repeats previous government guidance for UK Parliamentary elections that a polling station should wherever possible have no more than 2,500 electors allocated to it and that a presiding officer should have at least one poll clerk for 1,000 voters or less, two clerks for up to 1,750 electors and three clerks for any more electors.

¹¹¹ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 rr 26 and 32 to 34.

¹¹² Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 37; Local Elections (Principal Areas) (England and Wales) Election Rules 2006 SI 2006 No 3304, r 35; cf Greater London Authority Elections Rules SI 2007 No 3541, r 38.

¹¹³ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 rr 35 and 36.

- 3.124 The advantage of this procedure is that it is simple and allows polling staff to distribute ballot papers quickly. But it means there is limited protection against impersonation and electoral fraud, and has led some to call for serious consideration to be given to the introduction of “a more robust mechanism for identification of voters”.¹¹⁴ However, research suggests that established democracies, like Australia and Canada, tend to require voters merely to identify themselves by name alone.¹¹⁵
- 3.125 The situation is different in Northern Ireland, where electors are required to produce some form of photographic identification, like a driver’s licence or passport. The Electoral Office for Northern Ireland also issues specially designed electoral identity cards for the purpose of protecting against fraud.

Responding to specific voter issues

Electors with disabilities

- 3.126 Electors who are blind, disabled or illiterate, can apply to the presiding officer who in the presence of polling agents can assist them to cast their vote. Alternatively, an elector can apply to be allowed to vote with the assistance of an accompanying person. If the application is granted, the presiding officer must record the name and electoral number of the voter and the name and address of the companion on a list of voters with disabilities assisted by companions.¹¹⁶

Tendered votes

- 3.127 Voters who upon arrival at a polling station discover that their name is marked off as having already voted – or claim they are wrongly listed as voting by post or proxy, or not to have received a replacement ballot paper – are allowed to cast a tendered ballot.¹¹⁷ When tendered ballot papers are issued, the name of the elector and their electoral number is marked on the list of tendered voters. Tendered votes are not placed in the ballot box but are kept separately by the presiding officer. This is because tendered votes will not be counted unless there is a scrutiny of the votes at election petition proceedings, in which case the votes cast by impersonators will be struck off and rightful votes will be counted.¹¹⁸

Spoilt ballot papers

- 3.128 Spoilt ballot papers are those that have been torn, where the voter has selected the wrong candidate in error, voted for more candidates than entitled or where marks may otherwise render the ballot paper bad. In such circumstances, a voter may deliver a spoilt ballot paper to the presiding officer, who can issue a new one in its place if satisfied the voter has inadvertently spoilt the paper. The presiding

¹¹⁴ Office for Democratic Institutions and Human Rights, *Report on the May 2010 UK General Election* (July 2010) at p 20.

¹¹⁵ L Massicotte, A Blais and A Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (2004) at pp 121 to 122.

¹¹⁶ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 rr 38 and 39.

¹¹⁷ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 rr 40(1) and 40(1ZA) to 40(1ZD).

¹¹⁸ *Oldham Case* (1869) 1 O’M&H 151 at pp 152 to 153. See Chapter 4 below.

officer must immediately cancel the spoilt ballot paper and record its identifying number so that it can be included in the ballot account.¹¹⁹

Closing the poll

Polling hours and queues at close of poll

- 3.129 Polling hours are between 7am and 10pm on the day of the poll, which is traditionally a Thursday. The UK is one of a minority of democracies that conducts elections on a weekday and has a comparatively long period of voting.¹²⁰ The election rules state that the polls close at 10pm while case law adds that anyone who has been issued with a ballot paper by 10pm must be allowed to vote. A necessary corollary, emphasised in guidance, is that ballot papers cannot be issued after 10pm even if an elector was in the queue before this time.¹²¹
- 3.130 At the 2010 UK Parliamentary general election widespread media reports emerged of voters being turned away at the close of poll. By way of example, one presiding officer closed the poll strictly at 10pm while some electors remained in the queue. Another brought those still in the queue inside the polling station and issued ballot papers before 10pm. The Electoral Commission later reported that 27 polling places in 16 constituencies experienced problems with queues, which affected over 1,200 people.¹²² The Commission concluded that poor planning and weaknesses in the administrative structure were contributing factors, but also called for the law to be changed to allow for participation of those still queuing before close of poll.¹²³
- 3.131 The Cabinet Office has indicated its preference to address the administrative failings that led to last minute queuing before seeking a legislative solution.¹²⁴ This was also the view of the House of Commons Political and Constitutional Reform Committee, which observed that “careful planning and allocation of resources are likely to be more effective a solution than legislation”.¹²⁵
- 3.132 The law in the UK arguably does not offer a clear answer to the issue of how to approach queues at the polling station. In the example given above of the two presiding officers, one strict and the other inviting queuing electors into the

¹¹⁹ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 41.

¹²⁰ R Rose (ed), *International Encyclopedia of Elections* (2000) at p 55.

¹²¹ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 1; *The West Division of the Borough of Islington* [1901] 5 O'M & H 120 at p 129; followed in *Fermanagh and South Tyrone* [2001] NIQB 36; Electoral Commission, *Handbook for Polling Station Staff* (2010) at p 17.

¹²² Electoral Commission, *Report on the Administration of the 2010 UK General Election* (July 2010) at pp 3 and 47 to 48.

¹²³ Electoral Commission, *Interim Report on the 2010 UK Parliamentary General Election: Review of Problems at Polling Stations at Close of Poll on 6 May 2010* (May 2010) at pp 29, 30 and 32.

¹²⁴ Cabinet Office, *Response to Reports on the Administration of the 2010 UK Parliamentary General Election* (September 2011) at p 17.

¹²⁵ Political and Constitutional Reform Committee, *Report on Individual Electoral Registration and Electoral Administration (2010-12)* HC 1463 at para 98.

station and issuing ballot papers before 10pm, neither officer can be said to have erred in law. Our preliminary view is that the substantive project will offer an opportunity to consider the clarification of the law on the sort of issues that emerged from the events at some polling stations in May 2010.

Ballot paper account, delivery and verification

- 3.133 At the close of poll, presiding officers are responsible for conducting a ballot paper account, making up packets of electoral materials and delivering them to the returning officer. Ballot papers from the constituency are counted together at the counting centre. The number of ballot papers in each ballot box is compared with the numbers supplied by the presiding officers following their account.

Conclusion as to inclusion within the scope of reform project

- 3.134 The law governing polling day can make significant demands of administrators. In some fields, like those for disabled voters and their companions, there are highly detailed provisions that seek to strike a balance between facilitating the exercise of the franchise and safeguarding vulnerable voters from unscrupulous companions. In other fields, such as the criteria for selection of polling stations, and the handling of queues outside polling station before the close of poll, it may be that the law gives too little, or uncertain guidance, effectively leaving the matter to individual local authority officers who may come to different or inconsistent conclusions. Our preliminary view is that the substantive project should review this area of the law with a view to simplifying and rationalising the law.

Question 9:

Should the scope of the reform project include consideration of the rules on polling day?

DETERMINING AND DECLARING THE RESULT

- 3.135 Once polls close, the final task for administrators is to verify ballot papers, count votes, and declare the result. The first two tasks are among the most intense and pressured parts of electoral administrators' work.

Election-specific rules

- 3.136 A consequence of each election having its own set of rules is that administrators must routinely consult election-specific rules in case they make different provisions on otherwise familiar administrative functions. In some respects, the rules are detailed and prescriptive; in others, they leave the returning officer with a large degree of judgement about how to perform duties that are relatively shortly stated in the rules. There is a sense that there are gaps that are filled by best practice and common sense. The Electoral Commission's guidance is an effort to compile best practice, but has no formal legal status.
- 3.137 It is implicit in the election rules that some planning must be carried out. In relation to the duty to make "arrangements" for the count, for example, the returning officer must give notice in writing to counting agents of the time and

place at which he will begin to count the votes.¹²⁶ The rules do not state when or how much notice should be given. However, in the context of venues for opening postal ballot papers, 48 hours' notice must be given to candidates' counting agents.¹²⁷ As a result, the law is supplemented by accumulated local practice and experience and by extensive guidance on advance project planning.

Timing of the count

- 3.138 The returning officer has a duty “as soon as practicable after the close of the poll” to make arrangements for counting the votes in the presence of the counting agents. Although it is customary to count immediately after polls closed, especially at a general election, returning officers are not obliged to proceed with the counting of the votes on polling day. After a high-profile debate about the possibility of Friday counts at the last general election, the legislation was amended to include a supplementary duty. At a UK Parliamentary election reasonable steps must be taken to begin the count as soon as practicable within four hours of close of poll. If counting did not begin within that time, the returning officer must send to the Electoral Commission a statement explaining the delay within 30 days of the poll, and the Commission in turn is required to publish the constituencies which did not begin the count within four hours.¹²⁸
- 3.139 After the last general election, many administrators commented adversely on the effect of continuous counting immediately following close of the poll. In particular when polls are combined verification must take place for all combined polls before proceeding to the UK Parliamentary election count. This can be a challenging task to accomplish in four hours.¹²⁹

Guiding principles

- 3.140 While the aim is to determine the result accurately and in a timely manner, electoral administration is also guided by the underlying principles of administrative transparency and secrecy of the vote. Concerning transparency, counting agents will typically flag up mistakes to a count supervisor, make representations and objections about ballot papers and, where the returning officer's judgement is against them, expect reasons to be given. Little, if any, detail of what this involves is prescribed by rules.¹³⁰ The returning officer must decide what this specifically requires. The rules have formal requirements, such as to mark rejected ballot papers and to note if the rejection is objected to, but they do not require reasons to be given. In practice, we understand returning officers will try to explain their decisions and methods but much of what happens is effectively a matter of local practice and experience. The Electoral

¹²⁶ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 44(1).

¹²⁷ Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, reg 80. Materially identical notice periods appear in the Northern Irish and Scottish equivalent regulations.

¹²⁸ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 rr 2(1), 44(1), 45(3A) and 53ZA. These rules are not replicated in the rules for other elections.

¹²⁹ Association of Electoral Administrators, *Beyond 2010 Report on the Future of Electoral Administration in the UK* (July 2010) at pp 56 to 58.

¹³⁰ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 44(4).

Commission's guidance draws on the law and supplements it with best practice by encouraging returning officers to explain decisions to candidates and agents, stressing the importance of building confidence in the process.¹³¹

- 3.141 The second principle underlying this stage of electoral administration is the need to preserve voter secrecy. The need for transparency of the counting process should not come at the cost of identifying voters. Thus, throughout verification and the count, ballot papers must be face up, concealing the numbers and unique mark on its back. Ballot papers cannot be counted until they have been mixed with papers from at least one other ballot box.¹³² Breaching voter secrecy is an electoral offence and the returning officer must give every person attending the count a copy of the secrecy provisions under the relevant legislation, the purpose of which is to deter breaches.¹³³

Verification

- 3.142 We noted earlier that presiding officers must make a statement called a ballot paper account, which matches the total ballot papers issued, spoilt, unused and tendered against the initial number allocated to the station. Verification is effectively that exercise writ large across the entire constituency or electoral area. It is an exercise in counting ballot papers and making sure that count is right, as distinguishable from an exercise in counting the actual votes.
- 3.143 The returning officer receives ballot paper accounts from each polling station as well as the postal votes, ballot boxes and various packets of unused and spoilt ballot papers for the purpose of checking the number of ballot papers against the accounts.¹³⁴ Packets of electoral materials must also be sealed and delivered personally to the returning officer at the count (unless otherwise approved) by the presiding officer.¹³⁵ The object of the verification stage is to produce a statement of the result of verification, which must be copied to candidates.

Discrepancies at the verification stage

- 3.144 Ideally, verification should match exactly the ballot papers and list of tendered votes after close of the poll with the initial number of ballot papers allocated to all the polling stations. In practice there are often discrepancies which, as long as they are small and, ideally, explicable, will not prevent the administrators from proceeding to count the votes. A serious discrepancy may indicate something more serious has gone wrong at a polling station. Detailed steps are given by the

¹³¹ Electoral Commission, *Managing a UK Parliamentary General Election: Guidance for (Acting) Returning Officers* (2009), pt E.

¹³² Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 45(1A), (1B) and (4). In European Parliamentary elections at the verification stage the ballot papers must be face down.

¹³³ Representation of the People Act 1983, s 66(2) and (4); European Parliamentary Elections Regulations 2004 SI 2004 No 0293, reg 29(2).

¹³⁴ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 45(5).

¹³⁵ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 43(1).

Electoral Commission on how to resolve discrepancies.¹³⁶ Notably, the election rules are silent on this issue.

Postal ballot papers

- 3.145 Significant planning must be undertaken to ensure systems are compatible and that multiple local authorities can work together to check personal identifiers at the count. For example, registration officers deal with applications for postal votes and keep records of personal identifiers (dates of birth and signatures). If parliamentary boundaries are not coterminous with a local authority's boundaries there will be two or more registration officers but a single returning officer is in charge of determining the result. At the verification stage that officer must verify signatures and dates of birth on postal voting statements returned by electors. That includes electors from a local authority other than the returning officer's, and whose details are kept by registration officers employed by a different authority.

The Count

- 3.146 The count begins after the verification stage is complete and ballot papers have been mixed. Apart from the returning officer and their staff, the persons entitled to attend the count include candidates and their guests, election agents, and counting agents as well as Commission and accredited representatives.¹³⁷
- 3.147 There is more than one way to organise a count, and no one approach is stipulated by the rules. The rules only require that, where the votes are counted by sorting the ballot papers according to the candidate for whom the vote is given, the counting agents are entitled to satisfy themselves that the ballot papers are correctly sorted.¹³⁸ The count is typically organised so that ballot papers, uniformly facing up so onlookers can follow the count, are sorted into votes for each candidate, which are then counted into bundles of votes. The bundles are in turn counted to arrive at a particular figure for each candidate. Doubtful ballot papers are handed to a count supervisor for a decision on whether they count by the returning officer.

Rejected votes

- 3.148 The Parliamentary Election Rules state that any ballot paper which does not bear the official mark, votes for more than one candidate, identifies the voter or is unmarked or uncertain, is void and cannot be counted. The returning officer must reject the paper and mark it as such, subject to a candidate's objection being also marked. The officer must make a statement recording the number of papers rejected under each head.¹³⁹
- 3.149 A ground for rejecting papers which caused particular problems was the lack of

¹³⁶ Electoral Commission, *Managing a UK Parliamentary General Election: Guidance for (Acting) Returning Officers* (2009), pt E at pp 7 to 8.

¹³⁷ Parliamentary Elections Rules, Representation of the People Act 1983, sch 1 r 44(2)(a) to (e); Political Parties, Elections and Referendums Act 2000 (c 41), ss 6A to 6D.

¹³⁸ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 44(5).

¹³⁹ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 47.

official mark.¹⁴⁰ The official mark is now imprinted on each ballot paper, as opposed to being perforated or stamped by administrators, so the issue has greatly diminished in importance.

Doubtful votes

- 3.150 Where the mark on any ballot paper leaves their staff in doubt as to the vote cast, returning officers are expected to give a definitive ruling. The rules state that the officer's decision in respect of any ballot paper is final. The Electoral Commission guidance encourages this process – which it describes as adjudication – to be continuous and for the returning officers to give reasons for their decisions.¹⁴¹

Recounts

- 3.151 The returning officer must be satisfied as to the initial results. If in doubt, he may decide to conduct the count once again. Candidates and election agents have the right to request a recount but the returning officer may refuse the request if of the opinion that the request is unreasonable. Typically, recounts will occur if the outcome is close. If the result is confirmed, the officer will proceed. If the result is tied, the returning officer allocates a vote to one of the tied candidates by lot.¹⁴²

Declaring the result and returning the writ

- 3.152 Having performed the count, the returning officer will informally report the result to candidates. Officially the result is declared publicly in accordance with the rules. At UK Parliamentary elections the returning officer returns the name of the elected member by endorsing the writ, the form of which is certified, and sending it – by personal delivery to “the postmaster of the principal post office of the place of the election” – to the clerk of the Crown.¹⁴³
- 3.153 Once the result is declared, it cannot be revisited, even if an obvious mistake is discovered. The returning officer's post-declaration duties include matters such as the return of candidates' deposits, receipt and notice of returns and declarations as to candidate's expenses, and the secure disposal of election documents, including delivering various sealed packets to the registration officer who is the permanent electoral administrator. These duties complete the returning officer's role in relation to the election.

Differences across elections

- 3.154 As we stated above, the rules governing the count are election-specific. Space precludes detailed analysis of the differences across all elections but we include the following examples.

¹⁴⁰ This led to the litigation culminating in *Morgan v Simpson* [1975] QB 151; *Ruffle v Rogers* [1982] QB 1220.

¹⁴¹ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 48; Electoral Commission, *Managing a UK Parliamentary General Election: Guidance for (Acting) Returning Officers* (2009), pt E at pp 15 to 16.

¹⁴² Parliamentary Election Rules, Representation of the People Act 1983, sch 1 rr 46 and 49.

¹⁴³ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 51.

Technology

- 3.155 In this section we focused on the conventional process for verifying and counting votes, which requires manual labour. At a Greater London Authority election the Greater London returning officer is empowered to procure an electronic counting system for the verification and counting of votes, which must be used unless written consent is given by the officer to use manual systems.

European Parliamentary elections

- 3.156 One of the chief causes of differences across election-specific provisions is the particular nature of the body the election relates to. Because elections to the European Parliament occur on different days across the EU within a set window, the UK elections may take place ahead of another member state's poll. Determining the result of European Parliamentary elections therefore involves breaking up verification from the count. Verification takes place immediately. At the verification stage the ballot papers are kept facing down (concealing the vote), rather than upwards (concealing the number and unique mark). The count proceeds on a later date, along with the allocation of seats. At the count, the paper must face upward, concealing the number and unique identification mark.¹⁴⁴ It would seem voter secrecy is not affected because that would require access to both sides of the ballot paper at the same time.

Allocation of seats

- 3.157 The rules for the count at UK Parliamentary elections or local elections in England and Wales are by and large well understood. This is because administrators have organised counts featuring the first-past-the-post system since time immemorial. Newer elections, however, may use more party-centric or proportional voting systems. This has an impact on how the count is organised, for example if the system used is the supplementary vote (such as for elected mayors) or the single transferable vote (such as elections to the Northern Ireland Assembly).
- 3.158 If the system is a composite of first-past-the-post for constituency members and a party list system, the relevant returning officer's final task before declaring the result involves collecting final voting figures and allocating seats to members on party lists according to the specified formula.

Conclusion as to inclusion within the scope of reform project

- 3.159 Determining the result is a crucial part of electoral law, one which involves key principles including timeliness, transparency, security, professionalism, accuracy, secrecy, accountability and equity.¹⁴⁵ Our preliminary view is that the scope of the substantive project should keep these aims in mind while aiming to modernise and rationalise the rules. In some respects little guidance is given to administrators and matters are left to returning officers' judgement and electoral administrators' experience and best practice. In others, legislative guidance is

¹⁴⁴ European Parliamentary Elections Regulations 2004 SI 2004 No 0293, regs 51(4) and 53(3).

¹⁴⁵ Association of Electoral Administrators, *Beyond 2010 Report on the Future of Electoral Administration in the UK* (July 2010) at p 56.

extensive. Furthermore, no matter how experienced administrators may be, they are still required to find, learn and understand discrete pieces of legislation which relate to particular elections.

Question 10:

Should the scope of the reform project include consideration of the rules for determining and declaring the result?

ELECTION TIMETABLES

3.160 All elections are administered according to a timetable which runs to polling day. We consider the timetable for elections as set out in legislation, and modified to take account of crucial steps that electoral administrators must take that are not reflected in the statutory timetable. Electoral timetables determine the length of electoral campaigns and set out the key deadlines on the road to polling day. At present, there are wide variations in the length of timetables for UK elections, with the timetable for UK Parliamentary elections notably different.

Two example timetables

3.161 Most timetables are 25 working days in length. But there are variations in both the overall length of the timetable (from 17 days for UK Parliamentary general elections to 35 days for Scottish local government elections) and the steps to be taken within it. We provide two example timetables.

Table 2: Timetable for UK Parliamentary general elections

Deadline	Day	Observations
Proclamation summoning new Parliament, dissolution of old Parliament and issue of writ	0	The timetable is calculated by reference to the proclamation date.
Receipt of writ	1	
Publication of the notice of the election	3	This deadline is calculated by reference to the date of receipt of the writ.
Delivery of nomination papers	6	*The italicised and starred rows indicate a deadline that is not in the statutory timetable.
Withdrawals of nomination		
<i>Appointment of election agents*</i>		
Objections to nominations		
Publication of statement of persons nominated		
<i>New postal vote applications and changes to existing postal or proxy votes*</i>		
<i>Registration to vote*</i>	11	
<i>New applications to vote by proxy (except for medical emergencies)*</i>		
<i>Appointment of polling and counting agents*</i>		
Polling day (7am to 10pm)	17	

Table 3: Timetable for local government election in England and Wales

Deadline	Days from poll	Observations
Publication of the notice of the election	25	The timetable is calculated by reference to polling day. *The italicised and starred rows indicate a deadline that is not in the statutory timetable.
Delivery of nomination papers	19	
Publication of statement of persons nominated		
Withdrawals of nomination	16	
<i>Appointment of election agents*</i>		
<i>New postal vote applications and changes to existing postal or proxy votes*</i>	11	
<i>Registration to vote*</i>		
<i>New applications to vote by proxy (except for medical emergencies)*</i>	6	
<i>Appointment of polling and counting agents*</i>	5	
Polling day (7am to 10pm)	0	

3.162 Apart from its short length, it is important to note that the timetable for UK Parliamentary elections runs by reference to the event that triggers the occasion of the election – the proclamation summoning a new Parliament. All other deadlines are included here by reference to that date, whether or not that is how the underlying legislation lays them down. By contrast, the timetable for local government elections is calculated by reference to polling day. All other electoral timetables are similarly constructed, though their overall length will vary. For example, Greater London Authority and Scottish local government elections have a 30 day and up to a 35 day timetable respectively.

Construction of electoral timetables

Occasion of elections

3.163 Elections are caused by different events. The background to an election can vary according to the specific rules that constitute the relevant elected office or legislature. The election may arise as scheduled at the expiry of an elected term or on a date stipulated by law. UK Parliamentary elections, for example, must now take place on the first Thursday in May every five years after 7 May 2015.¹⁴⁶ Alternatively, an election may arise because of a vacancy caused by a supervening event such as the resignation of an elected official, causing a by-election or a casual vacancy. The constitution of elected offices and bodies, not electoral law, governs how they trigger elections. It may also stipulate the modalities for calling elections, such as the need for the dissolution of Parliament and a writ of election in order to call a general election.

Structuring the timetable

3.164 Electoral law governs the structure of election timetables. Whatever causes the election, its timetable must be calculated by reference to a particular event. In Table 3 the local government election timetable is calculated by reference to polling day, starting with the notice of elections a set number of days before polling day.

¹⁴⁶ Fixed Term Parliaments Act 2011, s 1.

3.165 As reflected in Table 2, a different approach is taken in the Parliamentary Election Rules to the timetable for UK Parliamentary elections. A general election is triggered by the proclamation summoning the new Parliament and the issue of the writ. Notice of the election must be published no later than 4pm two days after the receipt of the writ, but other deadlines are calculated by reference to the proclamation. The date of proclamation is both the trigger for a UK Parliamentary election and the date by reference to which the timetable is determined. It follows that by comparing this 17 day timetable with, for example, a 25 day timetable for local government elections, we are not comparing like with like. In practice, from the point of view of electoral administrators and candidates, the timetable is even shorter than the figure implies.¹⁴⁷

Plans to change length of the Parliamentary timetable

3.166 The Electoral Registration and Administration Bill 2012 would extend the UK Parliamentary election timetable by providing that Parliament shall be dissolved 25, rather than 17, working days before the next UK Parliamentary election or by-election. The statutory timetable is also to be amended so that polling day will take place between 17 and 19, rather than between 9 and 11, days after the last day for delivery of nomination papers, which will mean the last day for nominations will no longer coincide with the deadlines for new postal voting applications and registration.¹⁴⁸ The timetable will remain structured by reference to the proclamation of a new Parliament.

Calculating time generally

3.167 As we have noted, except for UK Parliamentary elections, time is calculated by reference to polling day. Deadlines are generally expressed in electoral law as a period of days, which means working days. That excludes weekends, Christmas Eve, Christmas Day, Good Friday and bank holidays. For UK Parliamentary elections only bank holidays applying throughout the UK are excluded. At a by-election or local government elections, the Scottish, Northern Irish, or English and Welsh bank holidays apply depending on which country the election takes place in. Unless stipulated otherwise, the deadline on any particular day is midnight.

Deadlines within election timetables

Timetables in election rules

3.168 In the tables above we have sought to distinguish those deadlines within the timetable that do not appear in the statutory timetable, which are routinely set out at the outset of the relevant election rules. The deadlines include those for:

- (1) The proclamation and writ of election, for UK Parliamentary elections;
- (2) Publication of the notice of the election;
- (3) Delivery of nomination papers;

¹⁴⁷ Parliamentary Election Rules, Representation of the People Act 1983, sch 1 r 1.

¹⁴⁸ Electoral Registration and Administration Bill 2012, cl 13.

- (4) Withdrawal of candidature;
- (5) Objections to nomination papers, in the case of UK Parliamentary elections and elections to other UK legislatures such as the European and Scottish Parliaments;
- (6) Publication of statement of persons nominated; and
- (7) Polling day.

Key deadlines omitted from the election rule timetables

- 3.169 The headings contained in the timetables set out in election rules do not cover the entire ground that administrators cover. Key deadlines relating to the interaction of administrators with electors and candidates must be included in a complete timetable. Table 2 and 3 above include some, though not all, interactions which are missing from the statutory timetables. While some of these are purely administrative matters that may not be important enough to be placed on the statute book, it is unarguable that the deadlines for registration and postal vote applications are of equal importance to deadlines relating to nominations.
- 3.170 The explanation for their absence appears to be historical. When the Parliamentary Election Rules were drafted, registration involved a snapshot view of residence qualifications on the date of the canvass. There was no question of late registration, nor was there any way to vote other than at the poll. These rules were taken as a template for other election rules, at least in terms of the subject matter covered, including the headings within the timetable. Registration and absent voting came to be governed by a separate regime of regulations.¹⁴⁹

Differences in length of and deadlines within timetable

- 3.171 As will be evident from Table 2 and 3, election timetables vary in length, in some cases as to key deadlines within them, and in relation to the intervals between key deadlines. While some of the differences across elections are due to some administrative deadlines not being replicated across all elections – for example the time for objection to nominations – others, notably the length of the timetable, appear to have no reason other than the policy concerns or other circumstances at the time each form of election was introduced.¹⁵⁰

Criticism of timetables

- 3.172 As we will see in the next section, there has been a growing tendency to combine polls in recent years. The complexity of the combination exercise is exacerbated by the fact that elections that may combine have timetables that vary in length and intervals as to their key content. This is particularly so in relation to UK Parliamentary elections, whose timetable is shortest. While government plans to lengthen the timetable to 25 days will alleviate some problems, others are likely to persist.

¹⁴⁹ For a very thorough timetable that takes into account registration and absent voting see Electoral Registration and Administration Bill 2012, Annex D1 and D2.

3.173 In 2003, an Electoral Commission report recommended a standardised timetable for all elections, citing the need for timetable consistency. In its view inconsistency risked confusion and error in voters and inexperienced candidates and agents, as well as administrators dealing with combined polls.¹⁵¹ The report's recommendation of a standard prototype 25 day election timetable was not adopted by the Government. The inconsistency in the timetables has continued to be criticised since.¹⁵²

Conclusion as to inclusion within the scope of reform project

3.174 It is our preliminary view that it is within the scope of the electoral law project to examine the reason for inconsistencies in timetables across UK elections, and to aim to reduce or eliminate them. This is with a view to making the law simpler, elections more readily combined, and to reduce the risk of voter confusion or administrative error.

Question 11:

Should the scope of the reform project include consideration of the timetables for elections?

COMBINATION OF POLLS

3.175 If polls fall due on the same day, there is a question whether they should proceed separately or be combined into one poll. Electoral law makes extensive provision as to when combination occurs, who is in overall charge of combined elections, and how the rules change for combined elections.

Planning ahead and electoral timetables

3.176 Given the complexity of the combination exercise, advance planning is desirable to determine which rules will govern the administration of combined polls, although little advance planning can be done for an election triggered by some unforeseen event. Even planned elections can present difficulty for administrators, given the differences in timetables. An example is that of returning officers who wished to issue combined poll cards for a planned UK Parliamentary election and local government election on 6 May 2010. The writ was issued on 13 April 2010, which meant these poll cards could not be sent out until after that date, leaving voters with less than a week to act until the registration and postal voting deadlines closed.¹⁵³

¹⁵⁰ Electoral Commission, *Election timetables in the United Kingdom: Report and recommendations* (2003) at p 11.

¹⁵¹ Electoral Commission, *Election timetables in the United Kingdom: Report and recommendations* (2003) at pp 12 to 13.

¹⁵² See, for example, Association of Electoral Administrators, *Response to the Cabinet Office Request for Views on Specific Provisions of UK Electoral Legislation Requiring Amendment* (March 2011) at paras 3.1 to 3.6.

¹⁵³ Association of Electoral Administrators, *Beyond 2010 Report on the Future of Electoral Administration in the UK* (July 2010) at p 26.

When polls are combined

- 3.177 The question whether polls should be combined arises if elections are due to be held on the same day, or if an election and local referendum are due within a certain period of time of each other. Although we continue to refer to “elections” when speaking generally about combination of polls, it should be borne in mind that elections and referendums may be combined under the relevant legislation.

Compulsory combination of polls

- 3.178 Polls for certain elections must be combined. In others they must not be combined. Where combination is neither mandatory nor prohibited elections may be combined at the discretion of the returning officers concerned. Polls for the following type of elections must be taken together if they are to be taken on the same date:
- (1) UK Parliamentary and European parliamentary general elections;
 - (2) Local government and UK Parliamentary general elections; or
 - (3) Local government and European Parliamentary general elections.¹⁵⁴

- 3.179 At a local government level, there is provision for parish and community council elections to combine with district council and county or county borough council elections if the relevant areas are coterminous or related. In Scotland, polls for Scottish Parliamentary general elections which coincide with ordinary Scottish local government elections must be combined. Similarly, polls for a general election to the National Assembly of Wales must be combined with ordinary local government elections in Wales due on the same day.

- 3.180 Polls must also be combined if the poll for a local referendum under the Local Government Act 2000 (for example on establishing an elected mayor) would otherwise occur during the period 28 days either side of the day for the poll for a specified election. The list of specified elections is extensive, and includes a UK Parliamentary general election and a by-election in respect of a constituency wholly or partly within the relevant local authority’s area.¹⁵⁵

Prohibited combinations

- 3.181 In certain circumstances, the combination of polls is prohibited. Elections to the UK Parliament and the European Parliament cannot be combined with elections to the Scottish Parliament or the National Assembly for Wales. If the election of councillors for local government in England and Wales coincides with the day of a general election to the UK Parliament or the European Parliament, by operation of statute the parish and community council elections are postponed for three weeks. The Electoral Registration and Administration Bill 2012 proposes to revoke this rule so as to allow polls at parish and community council elections

¹⁵⁴ Representation of the People Act 1985, s 15(1).

¹⁵⁵ See, Local Authorities (Conduct of Referendums) (England)(Regulations) SI 2012 No 323.

more often to be run in combined form with polls at other elections.¹⁵⁶

Discretionary combination

- 3.182 If combination is neither required nor prohibited, it is still possible if provision is made for it in legislation. Under the Representation of the People Act 1985 polls at UK Parliamentary, European Parliamentary or local government elections for “related areas” may be due to be taken on the same date, but not required to be combined. Two areas are related if one is coterminous with or situated wholly or partly within the other. This might be the case for a UK Parliamentary by-election and an ordinary local government election. The decision to combine polls is for the returning officer for each election. Both must agree that the polls combine.¹⁵⁷

The effect of combination

- 3.183 Combination results in polls at elections being “taken together”, as opposed to taken separately on the same day by different electoral administrators. If combined, responsibility for the discharge of various functions at these elections will fall primarily on one returning officer, although it is important to note that it is the polls that are combined, not every aspect of administering the elections. The first task is to determine the primary returning officer.

Determining the returning officer responsible for combined elections

- 3.184 Where different returning officers are responsible for the polls that are combined the process of identifying the primary officer is one of elimination, working through the detail of regulation 4 of the Representation of the People (Combination of Polls) (England and Wales) Regulations 2004.¹⁵⁸ It essentially lists a hierarchy of primary returning officers. By way of illustration, the first of a set of provisions under the regulation above provides that:

- (1) Where the poll at a UK Parliamentary election is taken together with the poll at another election or referendum under a relevant enactment;¹⁵⁹
- (2) Some functions of the returning officer other election or referendum are to be discharged by the parliamentary returning officer for such part of the electoral region, local government area or voting area as is situated in the parliamentary constituency; and
- (3) Only polling stations used for the UK Parliamentary election are to be used for the other election or referendum.¹⁶⁰

- 3.185 If the first provision is not relevant to the combined elections, the next provision

¹⁵⁶ Electoral Registration and Administration Bill 2012, cl 14.

¹⁵⁷ Representation of the People Act 1985, s 15(2) to (3).

¹⁵⁸ SI 2004 No 294.

¹⁵⁹ Defined to include combination under the Representation of the People Act 1983, the Representation of the People Act 1985, and under regulations made under the Local Government Act 2000 referring to those Acts.

¹⁶⁰ Representation of the People (Combination of Polls) (England and Wales) Regulations 2004 SI 2004 No 294, reg 4(1)(a).

applies. For example, this would make the Greater London Returning Officer the primary officer at combined polls for an election to the Greater London Authority and another election and referendum.

The functions transferred to the primary returning officer

- 3.186 As the above shows, only some functions are transferred to the primary returning officers. In summary the transferred functions include those relating to the notice of situation of polling stations, the provision and equipping of polling stations, the appointment of staff, and the separation and counting of ballot papers.
- 3.187 The primary returning officer must take great care to consult the relevant provisions to establish how the primary election rules are modified to cater for combination. The officer must, for example, issue a notice of the poll for each election that states that the poll is being combined, and specify details of the other election. In Scotland, where a UK Parliamentary election is combined with another election, the same ballot box must be used for every election; in England and Wales that is a decision for the returning officer.
- 3.188 To illustrate the tasks faced by administrators, we consider the case of separate ballot boxes used at a combined UK Parliamentary and county council election. The returning officer must still verify the ballot papers for both elections before proceeding to the count. The combined poll is governed by rule 45 of the Parliamentary Election Rules as amended by paragraph 22 of schedule 2 of the Combination of Polls Regulations 2004.¹⁶¹ The amended rule sets out the steps which the returning officer must take as follows:
- (1) Open each ballot box and record separately the number of ballot papers for each election;
 - (2) Verify each ballot paper account;
 - (3) Count and record the numbers of postal votes returned for each election;
 - (4) Separate the ballot papers for the UK Parliamentary election from those for the county council election;
 - (5) Seal up the county council papers; and
 - (6) After verification is thus complete, the parliamentary papers shall then be mixed together and counted. Since the returning officer has a duty to begin the count within four hours of the close of poll, the verification stage for both elections must be completed in that time.

Discretion to add combined functions

- 3.189 As we noted above, some functions remain with the second returning officer. However the returning officers may agree to combine certain other functions, making them the responsibility of the primary returning officer. For example:
- (1) The issue and receipt of postal ballot papers in respect of each election

may by agreement be combined, bringing into play some modifications of the rules relating to the postal voting statement, covering envelopes, and the differentiation of postal ballot papers by colour.¹⁶²

- (2) Official poll cards or notifications may also be combined if polls are to be taken together. In England and Wales this is explicitly subject to returning officers agreeing, but in Scotland there is no equivalent provision.¹⁶³

Criticism of combination

- 3.190 The combination of polls has been identified by some as in need of major reform. The issues can be divided into the intrinsic complexity of the rules, and the practical effect of the increasing tendency for combination has on the electorate.

Complexity

- 3.191 The first issue is to deal with the complexity of the law on combination, which should be evident even from the summary exposition above. We have not attempted to lay out in extensive detail the sort of exercises that returning officers undertake in order to establish the law governing the combination of polls, and the rules that apply to the combined polls. In relation to the latter they are essentially faced with a draftsman's task of compiling amendments to the relevant election rules. After the May 2010 general election the Association of Electoral Administrators stated that the combination rules in their current form are largely unworkable and recommended that they should be reviewed and rewritten.¹⁶⁴ The Electoral Commission believes that there may be a simpler way of setting down the basic rules on combination and writing out the detailed rules in full for administrators to read and digest.¹⁶⁵ Though that would make matters simpler for administrators, if electoral law retains the current level of election-specificity this solution may result in the addition of volumes of material to what is already a large body of accumulated rules and measures.

Increased potential for and incidence of combination

- 3.192 The tendency to combine elections, and elections and referendums has resulted in some considerable pressure on electoral administrators and may result in voter

¹⁶¹ SI 2004 No 0294.

¹⁶² Representation of the People (England and Wales) Regulations 2001 SI 2001 No 0341, reg 65; European Parliamentary Elections Regulations 2004 SI 2004 No 0293, reg 10 and sch 2 para 41; Representation of the People (Postal Voting for Local Government Elections) (Scotland) Regulations 2007 SSI 2007 No 263, reg 4.

¹⁶³ Representation of the People (Combination of Polls) (England and Wales) Regulations 2004 SI 2004 No 294, sch 2 para 6; Representation of the People (Scotland) Regulations 1986 SI 1986 No 1111, reg 98(4).

¹⁶⁴ Association of Electoral Administrators, *Beyond 2010 Report on the Future of Electoral Administration in the UK* (July 2010) at p 27.

¹⁶⁵ Electoral Commission, *Preliminary Views on the Scope of the Law Commission Review of Electoral Administration Law* (November 2011) at para 7.4, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/148425/Preliminary-views-on-project-scope.pdf (last visited 31 May 2012).

confusion. There has been, since the second consolidation of electoral law in 1983, a proliferation of electoral events which can or must be combined. The latter category – compulsory combination – is particularly problematic. We have seen in the case of local referendums under the Local Government Act 2000 that polls must be combined at certain elections even if the date of the poll for the local referendum does not exactly coincide with the date of the other election. In response to a consultation proposal that provisions will require a neighbourhood planning referendum to be combined with another election if the latter is held either three months before or after the date of the referendum, the Association of Electoral Administrators stated its concern with what it has called “the presumption that any number of polls can be combined and held on the same day” and called for a review of the issue of combining polls.¹⁶⁶

Conclusion as to inclusion within the scope of reform project

- 3.193 There are more species of elections and referendums in the UK than there has ever been before. Organising an election is a major logistical and financial undertaking, and unsurprisingly the tendency to combine polls for different elections and referendums is on the rise. Resources can be pooled, costs kept down, and voter interest maximised. Combining polls, however, puts election administrators in real difficulty. Apart from pragmatic concerns, the complexity of the rules that govern the combination of polls has been frequently raised as an issue by key stakeholders in the electoral administration landscape.
- 3.194 Our preliminary view is that combination requires major reform as part of a systemic review of electoral administration law, particularly one which addresses the election-specific approaches to election rules and seeks to simplify, rationalise, and so far as possible harmonise these rules and election timetables. The more consistent the timetables and fundamental rules across elections are, the less complicated combination will be.

Question 12:

Should the scope of the reform project include the combination of elections?

¹⁶⁶ Association of Electoral Administrators, *Formal comments on the draft Neighbourhood Planning (Referendums) Regulations 2012* (February 2012) at pp 3 to 4.

CHAPTER 4

LEGAL CHALLENGE AND ELECTORAL OFFENCES

- 4.1 In this Chapter we consider judicial processes in the field of electoral law, chief of which is the election petition, the sole judicial process for mounting a private challenge to the validity and outcome of an election. We also consider the criminal offences that relate to electoral conduct.

THE ELECTION PETITION AND ELECTION COURTS

- 4.2 The law on challenging the outcome of elections generally is derived from the blueprint for UK Parliamentary elections. We consequently outline the petitions process for UK Parliamentary elections (the “parliamentary election petition”) before looking at differences in the petition process across different elections and UK jurisdictions.

Origin of the parliamentary election petition

- 4.3 The election petition was born of historical settlements which we briefly outline because they have lasting effects on its modern character. Before 1868, the House of Commons was “the sole proper judge” of its members’ returns, and had been for some time. Election petitions were heard, initially, by the whole House, and later in Committees. In Scotland the jurisdiction of the Court of Session in electoral disputes ceased with the Act of Union in 1707, to be resumed in restricted form as to franchise disputes between 1742 and 1832.¹
- 4.4 The House of Commons generally retained exclusive competence to consider the propriety of its members’ elections, and that function was exercised by the whole House. In due course it was recognised that partisanship was affecting the impartial and just disposal of disputed election results at Westminster. Various attempts were made at remedying the problem culminating with the establishment in 1848 of a Committee of Elections, whose functions had a more legal character.
- 4.5 However, corruption and the increased cost of elections continued to be a concern. In response, the House of Commons proposed to delegate the hearing of election petitions to the judiciary in what became the Election Petitions and Corrupt Practices Act 1868.
- 4.6 The election courts heard 93 election petitions between 1870 and 1911. The judges were aided by a contemporary legislative drive, in particular the introduction of secret voting by the Ballot Act 1872, which hampered the effectiveness of corruption, and the regulation under the Corrupt and Illegal Practices Act 1883 of election expenses by channelling them through the election

¹ C O’Leary, *The Elimination of Corrupt Practices in British Elections 1868-1911* (1961) p 8; The Stair Memorial Encyclopaedia (Reissue) “Elections and Referendums” at paras 9 to 15. For a concise historical account of election courts see *R (Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin), [2011] 2 WLR 1362 at [22] to [30].

agent. Judicial handling of election petitions was considered to have been a thorough success, and continues to date, though more sparingly exercised.²

The modern UK Parliamentary election petition

- 4.7 The election petition remains the only way for an individual to challenge the validity and outcome of an election. It is thus essentially a civil process, brought by persons directly concerned by the election in question. The petitioner must be a person who voted or had a right to vote at the election or a person who was, or claimed to have had a right to be, a candidate at the election. The MP whose election or return is challenged is always a respondent, and if the petition questions the administration of the election, the returning officer is deemed to be a respondent.
- 4.8 The petition must be brought within 21 days of the return of the writ. It is tried without a jury, before two judges of the Queen's Bench Division who are on a rota for the trial of parliamentary election petitions. The election court has the same powers, jurisdiction and authority as the High Court. The court conducts a full trial at the end of which it makes a certified determination to the Speaker of the House of Commons as to correctness of the outcome and the validity of the election. The House of Commons is bound to give effect to the decision. The court must additionally make a report to the Speaker as to whether corrupt or illegal practices were committed or widely prevailed at the election.
- 4.9 The election court is not a "standing" court or division of the High Court which is permanently in existence. In *R v Cripps ex parte Muldoon*, the High Court held that once it had made its determination in relation to the petition, the election court had performed its function and had no further legal authority to revisit or add to its decision at a later date.³
- 4.10 The court is required to sit in the constituency for which the election was held, unless the High Court finds special circumstances render it desirable that it should take place elsewhere.⁴ Preliminary matters are dealt with in the Royal Courts of Justice. A House of Commons shorthand writer attends the trial and a copy of the transcript of the evidence accompanies the court's certified determination to the Speaker.⁵
- 4.11 The election petition process was designed with finality and exclusivity in mind. There is no appeal on issues of fact though a special case may be stated on any

² D Butler, "Elections, Litigation and Legislation" in D Butler, V Bogdanor and R Summers (Eds), *The Law, Politics and the Constitution: Essays in Honour of Geoffrey Marshall*, (1999) at p 173. Individual setbacks did occur, for example concerning Grantham J's decision in the Borough of Great Yarmouth case, *White v Fell* (1906) 5 O'M & H 176, and subsequent extrajudicial comments, which were widely seen as evidence of political partiality.

³ [1984] QB 686. The court found that an election commissioner (the court adjudicating on local government elections) was, in legal jargon, "*functus officio*". The same reasoning applies to the UK Parliamentary election court.

⁴ Representation of the People Act 1983, s123(3).

⁵ Representation of the People Act 1983, s 126.

question of law to the High Court.⁶ The Divisional Court recently held in *R (Woolas) v The Parliamentary Election Court* that an election court was subject to judicial review for error of law.⁷

Inquisitorial and quasi-criminal characteristics

4.12 Part of the historical legacy of the election court survives in its interactions with the House of Commons, and its nature as a temporary court with no permanent standing, both of which we described above. But the modern court has also retained some unique characteristics. For a civil process some of the court's functions have a definite inquisitorial character. In particular:

- (1) An election petition must proceed notwithstanding the resignation of the respondent MP or the prorogation of Parliament, even though both events trigger a new election, rendering the result academic.⁸
- (2) The election court has the power unilaterally to decide to examine any person it has called to give evidence or any other person in court, even where none of the parties proposes to do so. Witnesses cannot invoke the privilege against self-incrimination in election petition proceedings, though their answer is not admissible evidence against them in any subsequent proceedings, except for perjury in respect of the evidence given at the petition.⁹

4.13 Other characteristics may be seen as quasi-criminal, a vestige of a historical dual civil and criminal jurisdiction.¹⁰ In particular:

- (1) The Director of Public Prosecutions retains a role under the 1983 Act in election petitions. The Director must be given notice of presentation of an election petition along with respondents; may, and if requested by the court must, attend every election petition; must "without any direction from the court cause any person appearing to him to be able to give material evidence" to attend trial; and may with the court's permission examine that person as a witness.¹¹
- (2) The election court has a duty to report corrupt or illegal practices if it concludes they have been committed. The court decides the question whether a person is guilty of a corrupt or illegal practice to the criminal

⁶ Representation of the People Act 1983, ss 144 and 146(4). Cases are stated to the Court of Session in Scotland and to the Court of Appeal in Northern Ireland. That the procedure amounts to an appeal on a point of law was confirmed in *R (Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin), [2011] 2 WLR 1362 at [25], [29] and [41].

⁷ [2010] EWHC 3169 (Admin), [2011] 2 WLR 1362.

⁸ Representation of the People Act 1983, s 139(3). An MP can only resign via the legal fiction of accepting an office of profit under the Crown, hence the reference to the latter.

⁹ Representation of the People Act 1983, s 140(6).

¹⁰ The court retained a criminal jurisdiction under s 171 of the Representation of the People Act 1983 until it was repealed in 1985.

¹¹ Representation of the People Act 1983, ss 181 and 140(6). The Lord Advocate does not have equivalent duties and powers in relation to petitions in Scotland under s 140(7).

standard of proof (beyond any reasonable doubt),¹² even if it is determining the validity and outcome of the election and not conducting a criminal trial. The consequence of guilt, as we will note below, is disqualification from certain offices for a set period, which is a major part of the punitive and deterrent elements of these electoral offences.

The election petition jurisdiction

- 4.14 A petition may be brought for an “undue election” (which is concerned with the validity of the election process) or an “undue return” (which is concerned with outcome, namely whether the correct person was returned as elected).¹³ The object of a petition is a certified determination to the Speaker of the House of Commons of the validity and outcome of an election. An election court can thus declare an election void, resulting in a new election taking place. Alternatively, it may uphold the outcome of the election or find that another candidate was duly elected. Where allegations are made of corrupt or illegal practices, the court must additionally make a report to the Speaker of the Commons setting out the court’s findings as to such practices.
- 4.15 The precise grounds upon which the election court examines the validity and outcome of an election are not positively set out in the 1983 Act. Instead users of electoral law must collect those grounds from a number of sources, including the specific powers granted to the election court in the Act, case law and the relevant sections in the loose-leaf practitioners’ works, Parker’s Law and Conduct of Elections and Schofield’s Election Law, which digest the case law of the election courts and the petitions decided in the House of Commons’ committees before 1868.¹⁴
- 4.16 Taking the above into account, the court’s jurisdiction can be summarised as:
- (1) Reviewing the votes in a scrutiny, potentially declaring another candidate elected as the person having the most lawful votes; or
 - (2) Examining the validity of the election, potentially resulting in an MP being unseated and a new election being called. Here it is useful to distinguish between:
 - (a) Invalidity for breaches of the rules by electoral administrators,
 - (b) A successful candidate’s corrupt or illegal practice, and
 - (c) A successful candidate’s disqualification from office.
- 4.17 The jurisdiction to determine the validity of an election in category 2(a) above is essentially based on the error causally affecting the outcome of the election,

¹² *R v Cripps ex parte Muldoon* [1984] 1 QB 68.

¹³ In UK Parliamentary elections, one additional ground for petitioning is there being “no return”. For an explanation of the difference between election and return see *Irwin v Mure* (1874) 1 R 834 at p 836 by Lord Neaves.

¹⁴ R Price (ed), *Parker’s Law and Conduct of Elections*, loose-leaf, issue 37; P Gribble (ed), *Schofield’s Election Law*, loose-leaf 6th reissue.

whereas a candidate's corrupt or illegal practice or disqualification vitiates the validity of the election absolutely. We turn to each of these grounds.

Scrutiny of votes

- 4.18 The court can correct the outcome of the election by deciding for itself, after a detailed and adversarial court process, which votes should lawfully be counted, and consequently who ought to have been returned as the winning candidate. This process is called a "scrutiny", and the election court is bound to observe the "principles, practice and rules" of the House of Commons committees before 1868. This is the reason for securely storing ballot papers for one year before destruction. They can be produced by court order only.¹⁵
- 4.19 In a scrutiny, the court may disregard counted votes, or take into account rejected votes; it can exercise its own judgement as to whether a ballot paper casts a valid vote, and for whom. This is so even in cases where the returning officer's decision as to the validity of a vote cast was correct, for example by counting the vote of a voter disqualified on the grounds of age, who appeared on the register to be entitled to vote. Such a voter could not to be excluded from voting but their vote may be rejected on scrutiny. Similarly, the court will take into account its own findings as to whether corrupt or illegal practices have been committed. If a candidate is proved to have been personally or through agents guilty of bribery, treating or undue influence, the votes of the persons who were the object of these offences will not be taken into account. A vote by any person who is guilty of a corrupt or illegal practice is also void.
- 4.20 A subsidiary part of the scrutiny jurisdiction is the doctrine of "votes thrown away". Where a candidate gives public notice to the electorate that a rival is disqualified from election, and the court subsequently agrees, votes given for the disqualified candidate after due notice has been given are discounted or "thrown away" for the purposes of determining the outcome. It appears the doctrine applies only to disqualification and not to other legal defects in the candidate's conduct, like the commission of a corrupt practice. The doctrine is an example of a pre-1868 practice of the Commons election petition committees surviving today by reason of section 157(2) of the 1983 Act and its subsequent appearance in case law.¹⁶

Administrative breaches

- 4.21 In Chapter 3 we described some of the rules that regulate the conduct and administration of elections. The question arises what the effect is of an established breach of these rules. If every breach were to affect the outcome of an election, post-electoral political landscapes might be rendered uncertain. The law has therefore placed some restraints on the consequences of breach which, as mentioned above, essentially turn on the materiality of a mistake to the outcome of the election. Section 23(3) of the 1983 Act states that no UK Parliamentary election shall be declared invalid if it appears that (a) the election was so conducted as to be substantially in accordance with the law as to

¹⁵ Representation of the People Act 1983, s 157(2); Parliamentary Election Rules, Representation of the People Act 1983, sch 1 rr 54(1) and 57(1); Election Petition Rules 1960, r 10(1) and (4).

¹⁶ See, for example, *Re Bristol South-East Parliamentary Election* [1961] 3 All ER 354.

elections; and (b) the act or omission did not affect the result.

- 4.22 The negative wording of the section led to some difficulty which was resolved by the Court of Appeal in *Morgan v Simpson* when Lord Denning MR re-stated it in positive form.¹⁷ Any breach of the rules, which affected the outcome of the election, must result in its nullity no matter how trivial. For an election to be held not to have been conducted substantially in accordance with the law as to elections there must be a “substantial departure” such as to make “the ordinary man condemn the election as a sham or a travesty of an election by ballot”.¹⁸
- 4.23 What emerges is that the election court’s jurisdiction to assess the validity of an election for administrative error is essentially based on the error causally affecting the result. Any breach of the rules which cannot be remedied by a re-count of the lawful votes invalidates the election if it affected the result. While there is a ground for intervention which does not require such material causation, the threshold – that the conduct of the election was not substantially in accordance with electoral law – is very high.
- 4.24 The stark consequences of a failure by electoral administrators to adhere to election rules are plain to see. The difficulty in accessing, interpreting, and putting into practice the rules governing a variety of elections, and the rules governing the combination of particular elections, exacerbates the challenge they face. In close elections, candidates with strong party backing may be tempted to examine the administration of an election very closely to look for any breach of the rules. The court has no discretion and an election petition is the only process by which a mistake can be put right once the result has been declared.

Corrupt and illegal practices

- 4.25 The court’s reporting function with respect to the commission of any corrupt or illegal practices at the election is a crucial part of the scope of its jurisdiction to interfere with the validity and outcome of elections in three respects. First, the commission of such practices is relevant to the court’s jurisdiction to correct the outcome of an election at a scrutiny because it may render votes void, thus affecting the count.
- 4.26 A more absolute effect of corrupt and illegal practices is that they serve to invalidate an election. The main instance in which the practices serve as invalidating factors is where the elected candidate or his election agent is reported personally guilty by the election court of a corrupt or illegal practice. The candidate’s wrongful conduct must be established beyond reasonable doubt, whereupon the election is declared void irrespective of whether the conduct affected the result. The candidate is disqualified from contesting an election for five years if guilty of a corrupt practice and three years for an illegal practice.
- 4.27 Candidates are responsible in law for all the acts and omissions of their agents and the ordinary common law of agency has no application. To avoid nullity candidates must show that the offences were committed against orders and

¹⁷ [1975] QB 151.

¹⁸ [1975] QB 151 at p 168 by Lord Justice Stephenson.

without sanction, that they took all reasonable steps to prevent them, that the offences were of trivial character and the election was otherwise free from corrupt or illegal practices.¹⁹ Candidates who inadvertently committed illegal practices may also proactively apply for judicial relief under the 1983 Act.²⁰

- 4.28 There is a second, more generic way in which corrupt and illegal practices affect the validity of an election. This is where it is shown that corrupt or illegal practices have so extensively prevailed that they may reasonably be supposed to have affected the result of the election.²¹ The most recent instance of elections being invalidated on this ground was 2004 at the local government elections for the Aston and Bordesley Green Wards in Birmingham.²²

Disqualification of candidates

- 4.29 The court has a general jurisdiction to invalidate an election which has returned a candidate who is not qualified to take up the seat. As we noted in Chapter 3, certain persons are disqualified from elected office. A returning officer generally has no power to refuse the nomination of a disqualified person and the election of such a person can only be annulled by an election court. The House of Commons itself can grant relief and an application can be made to the Privy Council for a declaration as to disqualification.²³

Clarity of grounds of challenge a key issue for reform

- 4.30 In light of the above, our provisional view is that the grounds of challenge by petition are complex and would benefit from clarification. The 1983 Act does not positively and conclusively set out the election court's jurisdiction. A great deal of work is required to clarify the grounds for legal challenge of elections. In particular, the scrutiny jurisdiction is only obliquely mentioned by the statute and the grounds for invalidating an election for administrative error have had to be re-stated by judges. A statute of such fundamental importance to electoral law ought to set out the scope of intervention in elections more clearly and simply.

Formal procedure and costs

- 4.31 A major characteristic of the election petition is its strict formality. The procedure for parliamentary and local government election petitions is governed by the 1983 Act and election petition rules.²⁴ In England and Wales, on which we presently focus, the gaps in procedural rules are also governed by a third source, the general Civil Procedure Rules.

¹⁹ Representation of the People Act 1983, ss 157(2) and 158(3). Not for bribery or personation.

²⁰ Representation of the People Act 1983, s 167.

²¹ Representation of the People Act 1983, s 164(1).

²² *Akhtar v Jahan; Iqbal v Islam* [2005] All ER (D) 15 and *R (Afzal) v Election Court* [2005] EWCA Civ 647.

²³ House of Commons Disqualifications Act 1975, s 7.

²⁴ In England and Wales, the Election Petition Rules 1960; in Scotland, the Act of Sederunt (Rules of the Court of Session) 1994, Ch 69; in Northern Ireland, the Election Petitions Rules 1964 SR 1964 No 347.

4.32 The early procedural stages of election petitions are overseen in by the Senior Master of the Queen’s Bench Division. The Master fixes security for costs and sets a date for the hearing, after which an election court will be seized of the petition. Election petitions are filed in the election petitions office, must be in the form set out in the Election Petition Rules and must state the prescribed matters. These include the capacity in which the petition is presented, the relevant dates for the purposes of time limits, the particular grounds on which relief is sought and a “prayer” for, or formula setting out, relief.²⁵

Petition “at issue”

4.33 A petition must be filed 21 days from the date of the return, with a limited power to extend time.²⁶ The proper presentation of a petition additionally requires:

- (1) An application to be made, within 3 days of initial presentation, to provide security for costs in the amount of £5,000 for parliamentary election petitions and £2,500 in local government election petitions; and the provision of that security within that time.²⁷
- (2) Service on the respondents, within a further five days, of both the petition and the nature and amount of the security.²⁸
- (3) The passing of the period for objecting to the adequacy of the security (14 days) or the resolution of any such objection by the Master.²⁹

4.34 Once the above formal steps have been completed within the time limits, an election petition can be said to have been properly issued or, as the 1983 Act puts it, to be “at issue”. The time limits in steps (1) and (2) above cannot be varied. Once at issue, a rota judge can fix a date for the hearing of the petition.³⁰

Mandatory formal requirements

4.35 The courts have since 1879 regarded compliance with formal requirements, security for costs, and certain time limits as “mandatory”. This means that failing to comply with them is absolutely fatal to the petition, and the court has no power or discretion to extend time or to dispense with formalities even in exceptional circumstances. There is a general power to extend time under the Civil Procedure Rules, but these are subordinate to the provisions in the 1983 Act and the Election Petition Rules 1960.³¹

²⁵ Election Petition Rules 1960, r 4.

²⁶ Representation of the People Act 1983, s 122(3).

²⁷ Election Petition Rules 1960, r 5; Representation of the People Act 1983, s136. The amounts of security, though expressed as maximums, are in practice always required.

²⁸ Election Petition Rules 1960, r 6.

²⁹ Representation of the People Act 1983, s 137; Election Petition Rules 1960, r 7.

³⁰ Election Petition Rules 1960, rr 9 and 19.

³¹ *Williams v The Mayor of Tenby and Others* (1879-80) LR 5 CPD 135; *Absalom v Gillett* [1995] 1 WLR 128 at p 128; *Ahmed v Kennedy* [2002] EWCA Civ 1793, [2003] 1 WLR 1820 at [23].

- 4.36 The absolute consequence of failing to comply with procedural requirements has led to some strained interpretations, for example of section 184(1) of the 1983 Act requiring service of the petition by post to be at the last known place of abode in the constituency. Despite previous cases holding that returning officers must be served by hand or at their residential address, the High Court in *Scarth v Amin* held that the petitioner could validly serve by post at the officer's local government work address. The returning officer was akin to the proprietor of a business so that he could be served at his place of business under rule 6.5 of the Civil Procedure Rules.³² Commenting on the underlying principles behind the legislation, the court noted that competing public interests were at stake. One was that there should be early clarity as to who has been elected. Another was the provision of an effective means of questioning elections. It was wrong in principle to adopt an interpretation which placed conditions upon the presentation of valid petitions which were more restrictive than necessary to achieve certainty, and which obstructed the determination of the outcome of the poll.³³

Compatibility with human rights

- 4.37 The High Court went further in *Miller v Bull*. A returning officer brought an application to strike out a petition for late service. The petitioner had presented and served the petition in time. He paid the security for costs in time but served notice of its amount and nature on the respondents out of time. The court confirmed that the time limits in rules 5, 6 and 7 of the Election Petition Rules (as to when petitions are at issue) remained mandatory under rule 19 of the Election Petition Rules. However, the court considered this was contrary to Article 6 of the European Convention on Human Rights and Article 3 of the First Protocol to that Convention. The court took into account the public interest in the certain and swift resolution of disputes as to the validity and outcome of the elections, as formulated in previous cases. However, it held that the mandatory time limits were disproportionate to that legitimate aim, that it could disregard the relevant part of rule 19, and granted an extension of time to the petitioner.³⁴ The returning officer did not appeal the decision. At least in relation to formal requirements that derive from the Election Petition Rules as opposed to the 1983 Act, therefore, there is now scope for extending time under the Civil Procedure Rules.

Rigid formality and proportionate redress key issues for reform

- 4.38 The rigidity of the procedural rules and the draconian consequences for breaching them have led courts to question whether they might lead to injustice, culminating in the decision in *Miller v Bull* that one such rule breached human rights legislation. The strict formality and general complexity of election petitions constitute a high bar to access to the courts. The Electoral Commission has described the procedure as cumbersome, detailed and complex, and calls for a

³² *Scarth v Amin* [2008] EWHC 2886 (QB), [2009] PTSR 827; contrast *Fitch v Stephenson* [2008] EWHC 501 (QB); *Ali v Hacques* (Unreported) 10 October 2006.

³³ [2008] EWHC 2886 (QB), at [15] to [17], citing art 3 of the First Protocol of the European Convention of Human Rights 1950 and art 8 of the Bill of Rights Act 1688.

³⁴ [2009] EWHC 2640 (QB), [2010] 1 WLR 1861 at [43], [68] to [82], and [92] to [94].

clearer, simpler and more accessible process of challenge.³⁵

- 4.39 As we have previously noted, the key to a successful petition for administrative error is that it affected the result of the election. Consequently, a less costly means of testing whether errors were material to outcome has emerged. In *Gough v Sunday Local Newspapers (North) Limited*, the Court of Appeal held that a returning officer could apply to the county court under rule 53(1)(b) of the Local Elections (Principal Areas) Rules 2006 for inspection and counting of all the ballot papers. The purpose would be to resolve a real doubt as to the correctness of the declared result where there was a real likelihood of a petition being presented if the inspection showed an incorrect result. The Court stressed the desirability, following an admitted error in the counting process, of recourse to a relatively quick and cost-effective way of establishing whether it was worthwhile to present a petition questioning the legitimacy of the election.³⁶
- 4.40 A different issue arises where electors complain about the electoral administration process but do not claim the outcome of the election was affected. Such electors would be ill-advised to use the petitions process to complain about an immaterial breach of the rules. The Association of Electoral Administrators stated in 2010 that both the challenge process and the remedy are disproportionate for dealing with the range of complaints that administrators encounter.³⁷ Our preliminary view is that issues relating to rigid formality of the petitions process and proportionality of redress to complaint should form part of the scope of the project.

Differences across elections

- 4.41 We have so far focused on the petition process for UK Parliamentary elections. We now turn to some election-specific petition processes. As we will discuss, the classical election petition jurisdiction has been applied to new elections in the UK in inconsistent ways.

The local government election petition

- 4.42 There has since 1872 been an alternative election court, which we will call the local election court. The relevant provisions are now set out in sections 127 to 135A of the 1983 Act. The local election court determines petitions arising out of elections “under the local government Act”, which for England and Wales includes elections held under the Local Government Act 1972 and elections to the Greater London Authority. It is staffed by an election commissioner, who is a senior legal practitioner selected by rota judges to hear petitions.
- 4.43 The local election court’s jurisdiction is in general similar to its parliamentary

³⁵ Electoral Commission, *Preliminary Views on the Scope of the Law Commission Review of Electoral Administration Law* (November 2011), http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/148425/Preliminary-views-on-project-scope.pdf (last visited 31 May 2012).

³⁶ [2003] EWCA Civ 297, [2003] 1 WLR 1836 at [41] to [50], by Lord Brown when he was a Court of Appeal judge; SI 2006 No 3304. Equivalent provision is made in Parliamentary Election Rules, Representation of the People Act 1983. sch 1 r 56.

equivalent. There are, however, some key differences that emerge from the different nature of local government elections. The law does not conceive of a general election as one election consisting of a series of constituency polls, but as a series of simultaneous constituency elections. An ordinary local government election returns a number of candidates in a single election. The local election court is therefore empowered to invalidate the election of any one person, as well as the election as a whole. Where the election of a particular person is declared void, and none other is declared elected, the nullity gives rise to a new election as if it were for a casual vacancy.

The London Assembly election petition

- 4.44 Another difference emerges from an election's use of a different voting system. The election of London members of the London Assembly is based essentially on a party list system.³⁸ The court may declare a particular candidate's election void leading to a casual vacancy or declare another elected. But if it concludes that the London members' election is void, a new ordinary election arises but the results of the constituency members of the London assembly election are carried forward into the new election by section 135A of the 1983 Act.

National Assembly for Wales election petition

- 4.45 Broadly the same provisions as govern UK Parliamentary election petitions are replicated to apply to elections to the National Assembly for Wales with modifications relating to the make-up of the Welsh Assembly and the voting system used. These are similar to those made in the 1983 Act in relation to London Assembly election petitions which we have previously mentioned.³⁹

The Scottish Parliament election petition

- 4.46 As we have encountered elsewhere, the rules governing election petitions set out in Part III of the 1983 Act apply, with modifications, to challenging the validity and outcome of Scottish Parliamentary elections. Limited modifications are made in relation to questioning the return of a constituency member to the Scottish Parliament.⁴⁰ As to the election of a regional member of the Scottish Parliament, significant modifications are made to the orthodox rules. Notably, no election petition may be brought on the basis of the commission of a corrupt or illegal practice. The election court is limited, therefore to making a declaration to the Clerk of the Scottish Parliament. Furthermore, the rules of the House of Commons committee which must be observed by the election court under section 157 of the 1983 Act are to be observed, "so far as appropriate having regard to

³⁷ Association of Electoral Administrators, *Beyond 2010: the future of electoral administration in the UK* (July 2010) at pp 19 to 22.

³⁸ London Assembly elections use the Additional Member System, but looking at the London Members in isolation from the Constituency Members – as the legislation does – their election is based on voting for a party whose seat allocation is governed by the overall proportion of the vote, with seats allocated in list order.

³⁹ National Assembly for Wales (Representation of the People) Order SI 2007 No 236, pt 4.

⁴⁰ Scottish Parliament (Elections etc) Order 2010 SI 2010 No 2999, sch 6 para 84.

the different system of election”.⁴¹

The European Parliamentary election petition

- 4.47 The European Parliamentary Elections Regulations 2004 and European Parliamentary Election Petition Rules 1979 replicate the rules governing UK Parliamentary elections, with modifications flowing from the different nature of the legislative body and voting system.⁴² The election court’s jurisdiction is to determine whether an MEP was duly elected, whether some other person should have been declared elected, or whether the election of all members for the relevant constituency was void, triggering a new election for that region.⁴³
- 4.48 One point of substantial departure from the law on UK Parliamentary elections is that there is no equivalent invocation of the rules of the Commons committees under section 157(2) of the 1983 Act. This leads the editors of Parker’s Law and Conduct of Elections to conclude that the scrutiny jurisdiction is not open to the European Parliamentary election court, which they explain flows from the difference between the regional party list systems and first-past-the-post.⁴⁴
- 4.49 Another apparent consequence of the difference in voting systems is that the jurisdiction of the election court to invalidate an election for corrupt or illegal practices is severely restricted. Only personation under regulation 23 and other voting offences under regulation 24 of the 2004 Regulations operate as factors for invalidating an election by way of election petition. Other corrupt and illegal practices remain as offences of which an MEP may be convicted through the ordinary criminal courts, resulting in disqualification and vacation of the seat.⁴⁵

Inconsistent application of grounds of challenge a key issue for reform

- 4.50 As we have seen, the classical election petition jurisdiction has been applied to modern elections in inconsistent ways. In particular, new elections tend to use a proportional, party-list based election system to elect at least part of the membership of the relevant elected body. It may be that some of the classic features of election petitions – the scrutiny of votes and the operation of corrupt and illegal practices to invalidate elections – are not ideally suited to such a voting system. Even so, no consistent solution has been used by legislators on how these features of the election should be adapted for new voting systems, leading to the grounds of challenge being different in Scottish Parliamentary, European Parliamentary, and London Assembly election petitions.

Differences across UK jurisdictions

- 4.51 We have so far, for ease of presentation, focused on the jurisdiction and

⁴¹ Scottish Parliament (Elections etc) Order 2010 SI 2010 No 2999, sch 6 pt 2.

⁴² SI 2004 No 293; SI 1979 No 521.

⁴³ European Parliamentary Elections Regulations 2004 SI 2004 No 293, reg 100(1).

⁴⁴ R Price (ed), *Parker’s Law and Conduct of Elections*, looseleaf, issue 23, at para 19.30. The electoral system for European Parliamentary elections, however, is similar to that for the election of the London members of London Assembly, in respect of which the local election court retains the scrutiny jurisdiction, however inapt.

⁴⁵ European Parliamentary Elections Regulations 2004 SI 2004 No 0293, regs 88(3) and 107.

institutions of England and Wales, only occasionally mentioning the equivalent systems in Scotland and Northern Ireland. We now outline the institutional and substantive differences in these jurisdictions.

Scotland

- 4.52 As elections to UK or EU institutions, the same rules govern Parliamentary and European Parliamentary election petitions in Scotland. Part III of the 1983 Act and Part 4 of the European Parliamentary Elections Regulations 2004 apply with the necessary changes due to institutional and jurisdictional differences.
- 4.53 Parliamentary election courts consist of two judges of the Court of Session selected by the Lord President to be on the rota for the trial of election petitions. The same court hears European Parliamentary and Scottish Parliamentary election petitions. The procedural rules in Chapter 69 of the Rules of the Court of Session are broadly similar to the Election Petition Rules 1960, but contain notable differences. The time limit for intimation and service of the petition and for objection to the form of security for costs is not fixed, but set at the judge's discretion.⁴⁶ There is no mention of recognizance as in English law, only to the giving of security for expenses, part of which may be by bond of caution.
- 4.54 Local government elections are governed by the Local Governance (Scotland) Act 2004 and statutory instruments made under the Act by the Scottish Ministers. The rules on election petitions in the 1983 Act apply to election petitions questioning Scottish local election petitions. The local election courts are staffed by the sheriffs principal where the local election took place. The procedural rules governing local election petitions are set out separately.⁴⁷ Though similar to the Rules of the Court of Session, they are more succinct and less demanding. There are no prescribed contents of the application or prescribed form. The Lord Advocate performs the functions in relation to election petition proceedings equivalent to those of the Director of Public Prosecutions.⁴⁸

Northern Ireland

- 4.55 The Electoral Law (Northern Ireland) Act 1962 generally reproduces, with appropriate modification, the rules on the scope of challenge set out in the 1983 Act. The procedural rules are set out in the Election Petitions Rules 1964. The parliamentary election court is made up of two judges of the High Court or Court of Appeal for the time being selected to hear them. The local election court is constituted by a barrister of not less than ten years' standing in practice.⁴⁹ Elections to the Northern Ireland Assembly are governed by Northern Ireland Assembly (Elections) Order 2001,⁵⁰ as amended. Schedule 1 of that Order applies, with modifications, the relevant rules of the 1983 Act, making institutional

⁴⁶ Act of Sederunt (Rules of the Court of Session) 1994 SI 1994 No 1443, r 69.4(1).

⁴⁷ Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999 SI 1999 No 929, pt XI.

⁴⁸ Representation of the People Act 1983, s 204(5).

⁴⁹ SR 1964 No 347; Judicature (Northern Ireland) Act 1978, s 108; Representation of the People Act 1983, s 123(1)(b); Electoral Law (Northern Ireland) Act 1962, s 72(2).

⁵⁰ SI 2001 No 2599.

changes such as requiring certification to be to the Chief Electoral Officer for Northern Ireland, rather than the Speaker. Schedule 2 applies, with modifications, the Election Petitions Rules 1964.

Conclusion as to inclusion within the scope of reform project

- 4.56 Our preliminary view is that the current means of challenging the result of elections is within the scope of the project. It would be surprising if a system designed in 1868 to deal with a different electoral landscape were not in need of reform. We see the key issues for the substantive reform as striking a better and more nuanced balance between access to the process of challenging elections and safeguarding the certainty of elected office, modernising and clarifying the law of election petitions generally and the current grounds of challenge in particular. Further issues include updating the law so that it deals with different voting systems in a principled and consistent way, addressing problems arising out of the rigid formality of the petitions process, and considering more proportionate means of redress where complaints do not challenge the validity or outcome of elections. Finally, there is the question whether it is possible, and if so desirable, to assimilate election courts into the modern civil court structure.

Question 12:

Should the scope of the reform project include the process of challenging elections?

ELECTORAL OFFENCES

- 4.57 We have considered corrupt and illegal practices as grounds for invalidating the result of an election in election petition proceedings. We now turn to these and other offences that relate to electoral conduct.

Relief and prosecution

- 4.58 A person may proactively apply for relief under the 1983 Act from any of the consequences of their offending conduct, effectively making them immune from criminal prosecution. An elected candidate can also avoid the invalidation of their election. The application is to the High Court or Court of Session, an election court, or if in respect of the time for the sending in and payment of election expenses, a county court or sheriff. The court has discretion to exempt an innocent act from being an illegal practice, payment or employment if it is shown that it arose from inadvertence, accidental miscalculation or some similar reasonable cause. Candidates and agents can also specifically apply to be excused from breach of duty in respect of the return, declaration and statements as to election expenses, where some additional excuses can be invoked. A major advantage of such an application is that if made out relief must be granted.⁵¹
- 4.59 The Director of Public Prosecution has a duty to consider making inquiries and instituting prosecutions when informed that an electoral offence has been

⁵¹ Representation of the People Act 1983, ss 86 (authorised excuse), and 167 (general relief). See also *McCorry v Hendron* [1993] NI 177 (QBD of Northern Ireland) and *Finch v Richardson* [2008] EWHC 3067 (QB), [2009] 1 WLR 1338.

committed. The prosecutor must consider whether the evidence provides a realistic prospect of conviction and a prosecution is in the public interest. Criminal proceedings must be commenced within one year of the commission of the offence, which in exceptional circumstances can be extended to 24 months.⁵²

The classification of electoral offences

- 4.60 Electoral offences are usually classified into three categories: corrupt practices, illegal practices, and other miscellaneous offences. The table at Appendix B to this paper sets out the offences under each of these categories.

Difference between corrupt and illegal practices

- 4.61 After 1883 electoral offences divided into two key categories. Corrupt practices such as bribery, treating, and personation involved an element of intentional wrongdoing. Illegal practices involved the commission of acts, some even honestly, which the legislation sought to prohibit. This rationale has not survived the passage of time. Liability under section 75(5) of the 1983 Act for incurring expenses without the election agent's authority, a corrupt offence, is strict. By contrast corruptly inducing or procuring a withdrawal from candidacy is an illegal practice. The difference between the labels "corrupt" and "illegal" now lies in the severity of the criminal sentence, the duration of disqualifications from the electoral process, and whether it is possible to apply to a court for relief.

Difference with miscellaneous electoral offences

- 4.62 A second useful distinction is between both corrupt and illegal practices on the one hand and the miscellany of other electoral offences on the other. Labelling an offence a corrupt or illegal practice means it also operates as a vitiating factor, a ground for annulling an election at petition proceedings, and disqualifies the offender from the electoral process. To illustrate the point, the offence of illegal employment of canvassers is covered by two provisions in the 1983 Act. It is an illegal practice under section 175(2) if committed by an election agent or a candidate. The same conduct amounts to an offence under section 111 if committed by any other person. The sentence is the same under either section, but labelling the offence as an illegal practice makes it both a ground for annulling the election at petition proceedings, and brings into play the disqualification from the electoral process for 3 years for its commission. The same analysis applies to the offence contrary to section 110 of the 1983 Act of publishing election literature without complying with legal requirements to bear the printer and other persons' name and address. If the offence is committed by a candidate or agent it is labelled an illegal practice under section 110(12).

Classification of offences a key issue for reform

- 4.63 The current classification of electoral offences focuses less on severity of conduct and impact on elections than the labelling of criminal offences as vitiating and disqualifying factors. The confluence of the public law issue of what conduct vitiates the validity of an election and what conduct is criminal affects the drafting

⁵² Representation of the People Act 1983, ss 181, and 176(1), (2A) and (2B). See also Crown Prosecution Service Legal Guidance "Code for Crown Prosecutors – Considerations" http://www.cps.gov.uk/legal/d_to_g/election_offences (last visited 31 May 2012).

and presentation of offences, generally contributing to the complexity of electoral law. It is our preliminary view that the electoral law project should consider rationalising the classification of criminal offences.

Some issues with the substance of offences

- 4.64 Electoral offences under the 1983 Act range from bribery, an ancient common law crime, to postal and proxy ballot offences in section 62A of the 1983 Act, which was inserted by the Electoral Administration Act 2006 in the wake of a number of cases of postal ballot fraud. Consequently different drafting styles are used to describe offences in different parts of the statute. There is no consistent way to describe the mental state required in order to find the accused guilty of the offence. Older provisions tend to describe the mental element of the offence using words such as “corruptly”, for example in section 107 (corrupt withdrawal of candidature), section 114 (treating) or section 113 (bribery) of the 1983 Act. Judicial decisions took this to mean a specific intent to break the law. Modern offences designed to combat malpractice use specific intent to commit the offence to describe the mental element.⁵³

Modernising the language: the example of undue influence

- 4.65 More generally, older offences tend to use out of date language and concepts. An example is the corrupt practice of undue influence contrary to section 115 of the 1983 Act. A person is guilty of undue influence:

- (1) if he, directly or indirectly, by himself or by any other person on his behalf, makes use of, or threatens to make use of, any force, violence or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person to induce or compel that person to vote or refrain from voting or on account of that person having voted or refrained from voting; or
- (2) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents or intends to impede or prevent the free exercise of the franchise of an elector or proxy for an elector, or so compels, induces or prevails upon, or intends so to compel, induce or prevail upon an elector or proxy for an elector either to vote or refrain from voting.

- 4.66 It should be reasonably plain that the offence is widely drafted and that some of the conduct caught by the offence is criminal in any event. The illegitimate use of force or violence is, of course, the subject matter of many criminal offences. The catch-all nature of the offence reflects its origin in an era when armed mobs and the like were not unknown at elections.⁵⁴ While the general criminal law might serve to deal with members of a mob, the electoral law approach was to criminalise the organisers who “directly or indirectly” and by themselves or others committed such acts. As a crime it was aimed at candidates and their agents, its status as a corrupt practice invoking the vitiating and disqualifying functions we

⁵³ Representation of the People Act 1983, s 62A(1)(b).

⁵⁴ See, for example, *Drogheda Borough case*, *McClintock v Whitworth* (1869) 1 O'M & H 252, *Stafford Borough case*, and *Chawner v Meller* (1869) 1 O'M & H 228.

mentioned above.

- 4.67 Section 115 of the 1983 Act was amended to include within the second limb of the offence conduct intended to “compel, induce or prevail” upon an elector or proxy, irrespective of success. But the drafting of the section overall remains dated as is shown by the archaic reference to inflicting or threatening to inflict “temporal or spiritual injury”.⁵⁵ A similar view might be taken of the continuing relevance of prohibiting the giving of “meat, drink, entertainment or provision” for the purpose of corruptly influencing a person’s vote (treating). This is especially so in local communities where hospitality may be expected, in the form of a meal at a community centre or tea and biscuits at a meeting. There is a question whether the law should now be more nuanced in its attempt at criminalising electoral largesse in the form of food and drink.

Outdated legal concepts: the example of bribery

- 4.68 Archaic language poses the problem of inaccessibility to those who do not have expertise in the field, like the general public or the police who must make the initial response. Experienced officers and prosecutors, as well as seasoned political actors and specialist lawyers, can surmount the initial problems posed by archaic language. What may pose problems even to experts is the continuing use of out of date legal concepts. A closer look at bribery is instructive.⁵⁶
- 4.69 Bribery is set out in section 113 of the 1983 Act. We can summarise the offence as follows. A person is guilty of bribery if “he, directly or indirectly, by himself or by any other person on his behalf”:
- (1) Gives any money to a voter in order to induce him to vote or not to vote (section 113(2)(a)), or
 - (2) “Corruptly does any such act as mentioned above on account of any voter having voted or having refrained from voting” (section 113(2)(b)).
- 4.70 The full provision on bribery is extensive and rather detailed, so we focus on the use of the word “corruptly” to describe the mental element. If an inducement is offered ahead of the election, the inducement constitutes the offence. There is still the mental element of intending to induce the vote. If an inducement occurs after the election, the offence is described as “corruptly” giving the inducement. No material change has occurred in this respect since election courts first started hearing petitions raising what they described as “the usual” allegations of bribery.
- 4.71 The old cases seemed to regard the use and place of the word “corruptly” in the second part of the offence as significant to the issue of proof of the offence. This understanding persists in modern practitioners’ works which rely on these cases for authoritative guidance on the law. Thus, for example:

⁵⁵ A Bishop’s pastoral letter amounted to undue influence in the Meath Southern Division Case, *Dalton v Fulham* (1892) 4 O’M & H 130. A recent example of undue influence was the contrivance of distributing leaflets attributed to a rival party in *R v Rowe, ex parte Mainwaring* [1992] 1 WLR 1059.

⁵⁶ A more modern notion of bribery in s 1 of the Bribery Act 2010 is inapplicable to bribing voters, since the conditions in section 3 of that Act are not met.

- (1) The placement of the word “corruptly” in section 113(2) meant that if the act of bribery occurred shortly before the voter voted then bribery would be assumed until the contrary was shown, whereas if the act was done after the election, it had to be shown to have been done corruptly in pursuance of a previous understanding.⁵⁷
- (2) Proving a payment before an election was a bribe is harder the more distant from the election date the act is. Where a considerable period elapses between the bribe and the election, the matter of proof becomes more difficult. The burden of proof is somewhat shifted where the bribery takes place at the election. It then becomes more the onus of the person charged to prove that it was an innocent act.⁵⁸
- 4.72 It is unlikely the legal burden of proof shifts to an accused to prove they did not have the requisite intent, and the books do not go so far as to say that. Recent case law has treated attempts to reverse the burden of proof in more explicit legislative terms as imposing an evidential burden only.⁵⁹ Article 6(2) of the European Convention on Human Rights guarantees the presumption of innocence until proven guilty in criminal proceedings.
- 4.73 The greater part of the case law that governs the interpretation of classic offences of bribery, treating, and undue influence dates back to the “golden age” of election petition litigation, between 1868 and 1911. A subsequent decline in the frequency of election petitions and of criminal prosecutions for electoral offences means that old statutory language has not benefited from frequent interpretive guidance by the judiciary. It is also important to note that election courts were primarily concerned with whether elections were void, and their analysis of corrupt and illegal practices should be viewed through the prism of those offences’ secondary function as vitiating factors.

Modernising language and concepts a key issue for reform

- 4.74 Archaic language and legal concepts are important issues in the field of electoral offences. As we have noted above, some of the drafting of the offences and the legal concepts within them dates back to the 19th Century. It is our provisional view that modernising and rationalising the language and legal concepts used by electoral offences should form part of the substantive electoral law project.

Combating electoral malpractice

- 4.75 Most modern legislative efforts to amend existing electoral offences or to create new ones have been concerned with combating electoral malpractice. The emergence of postal voting on demand in 2000 led to a perceived risk of resurgence in electoral malpractice in the UK. The risk of fraud was considered particularly high as regarded postal and proxy voting and fraudulent registration

⁵⁷ R Price (ed), *Parker’s Law and Conduct of Elections*, looseleaf, issue 37, vol. I at para 20.12, citing *Borough of Bradford case*, *Storey v Forster* (1869) 1 O’M&H 34 at p 36.

⁵⁸ P Gribble (ed), *Schofield’s Election Law*, looseleaf 6th reissue volume 1 at para 13-005.

⁵⁹ *R v Webster* [2010] EWCA Crim 2819, [2011] 1 Cr App R 207.

and the resulting risk of personation.⁶⁰ The response by legislators, administrators, police and prosecutors led to increased activity in the field of election petitions and the prosecution of electoral offences. Analyses of allegations of electoral malpractice at polls in June 2009, May 2010 and May 2011 were carried out jointly by the Electoral Commission and the Association of Chief Police Officers. The 2011 analysis concluded that there was no evidence of widespread or systematic malpractice, noting that there had been a legislative and institutional response to prevent and deter electoral malpractice.⁶¹

- 4.76 The Electoral Administration Act 2006, for example, created the new postal and proxy voting offences contained in section 62A of the 1983 Act. These offences, as well as personation, have a maximum sentence of two years' custody, whereas other corrupt practices attract a 1 year maximum sentence. They also attract an additional disqualification for five years from being registered as an elector or voting at any UK Parliamentary election or local government election. Nevertheless, there have been instances where sentences for electoral offences have been thought insufficient to address the degree of criminality involved.
- 4.77 For the most serious cases, prosecutors have turned to the common law offence of conspiracy to defraud, which attracts a maximum sentence of ten years. In *R v Hussein*, the Court of Appeal upheld a deterrent sentence of three years and seven months' custody for postal vote fraud, sending the message that "that sort of conduct which undermines our system of democracy will not be tolerated".⁶² The need for recourse to the common law offence of conspiracy to defraud in order to deal adequately with serious attacks on the electoral process might indicate that consideration of the current range of sentences for electoral offences should form part of the reform project.

Conclusion as to inclusion within the scope of reform project

- 4.78 Our preliminary view is that the reform project should include modernising and rationalising electoral offences including their classification, the language and legal concepts they use, and the range of sentences that can be imposed.

Question 14:

Should the scope of the reform project include consideration of electoral offences?

⁶⁰ S Wilks-Heeg for the Joseph Rowntree Reform Trust, *Purity of elections in the UK: causes for concern*, April 2008; *Re Bordesley Green and Aston Ward of Birmingham City Council petition*, 4 April 2005 (unreported); Library of the House of Commons Briefing Paper, *Postal Voting & Electoral Fraud* (last updated June 2011).

⁶¹ Electoral Commission and ACPO, *Analysis of allegations of electoral malpractice at the June 2009 elections* (January 2010); Electoral Commission and ACPO, *Analysis of allegations of electoral malpractice in 2010* (February 2011); Electoral Commission and ACPO, *Analysis of allegations of electoral malpractice in 2011* (March 2011).

⁶² [2005] EWCA Crim 1866, [2006] 1 Cr App R at [20].

CHAPTER 5

REFERENDUMS

- 5.1 Instruments of direct democracy were extensively debated at the turn of the 20th Century.¹ The referendum is a poll where a mass electorate votes on a particular issue. It is, therefore, an example of direct but not pure democracy because the question is predetermined without debate by the electors. Referendums are the focus of this Chapter because they have a clear presence in the UK system of government. Our approach distinguishes between national referendums on one hand, and local referendums on the other.
- 5.2 The key issue is whether the substantive project should consider the current law on both national and local referendums. Our view is that the substantive project should cover referendums because they are well-established instruments of direct democracy that share the same administrative framework as elections. Further, referendums are an important and growing feature of the UK system of government and clarity in their administration is as desirable as that for elections.
- 5.3 It is useful to describe briefly two other forms of direct democracy, the recall and the initiative, as there is a trend towards their use in the UK. The recall is a process in which electors vote to terminate the mandate of an elected representative. The initiative is similar to a referendum except that a proportion of electors put the question directly to the people. The Government has recently put a type of recall process on the legislative agenda by releasing a draft Bill on the recall of MPs in certain circumstances.² Likewise, the Government has signalled its intention to introduce citizen-initiated local referendums, which are likely to be similar to the initiative process. While we await details, these proposals are a clear sign of a trend towards direct democracy. In the life of the project, both instruments may also need to be considered as part of the electoral law reform project.

NATIONAL REFERENDUMS

- 5.4 Referendums on a national scale were discussed as early as the 19th Century as a way of resolving contentious and divisive political issues. These included Irish Home Rule or tariff reform, and revitalising British democracy in light of the rise of the party system.³ The first UK-wide referendum on the issue of remaining in the European Economic Community was not held according to any planned constitutional agenda but rather as a result of “fortuitous circumstances”, involving the internal and fractious situation within the Labour Party.⁴ The

¹ D Butler and A Ranney (ed), *Referendums: A Comparative Study of Practice and Theory* (1978) at p 5.

² HM Government, Recall of MPs Draft Bill (December 2011) Cm 8241.

³ V Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics* (2009) at pp 11 to 17; M Qvortrup, *A Comparative Study of Referendums: Government by the People* (2002) at pp 54 to 58.

⁴ V Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics* (2009) at pp 39 to 40; David Butler and Austin Ranney (ed), *Referendums: A Comparative Study of Practice and Theory* (1978) at p 214.

referendum was then quickly adopted as the mechanism of choice for settling devolution issues.⁵

- 5.5 Recent years have seen an increase in the number of national referendums and the adoption of a standardised set of rules contained in the Political Parties, Elections and Referendums Act 2000 (“the 2000 Act”). All of the referendums held under the 2000 Act, except for that on the alternative voting system in 2011, concerned devolution and the creation of new representative bodies. There is no sign of this trend abating with the upcoming Scottish independence referendum.

Statutory framework

- 5.6 Prior to 2000, national referendums were carried out on an *ad hoc* basis using specifically drafted procedures. The 2000 Act now sets out standardised provisions for the administration and regulation of national referendums. While a framework exists, specific primary legislation is still required to: trigger a referendum; provide for the core referendum parameters; deal with some administrative and regulatory issues; and provide for a challenge process.

UK-wide, country-specific and regional referendums

- 5.7 The 2000 Act applies to (a) UK-wide referendums, (b) referendums held throughout England, Wales, Scotland or Northern Ireland, and (c) referendums in any region of England.⁶ There have been 11 national referendums held in the UK, of which two were at a UK-wide level, seven at a country-specific level and two on a regional level.⁷ Of these, three referendums of each geographical reach have now been conducted under the new statutory framework.
- 5.8 The first UK-wide referendum was on the issue of the European Economic Community in June 1975, while the second was on the proposal to introduce the alternative vote for UK Parliamentary elections in May 2011. The former was conducted prior to the establishment of an independent body and the regular use of referendums as a constitutional device, while the latter was conducted by the Electoral Commission according to the rules in the 2000 Act.
- 5.9 The majority of referendums in the UK have been held on the question of devolution in Northern Ireland, Scotland and Wales. Statutes providing for these country-specific referendums set out the date, electorate and the question to be asked. In the case of two of these referendums in Scotland and Wales in 1979 a threshold requirement was also in place. All of these country-specific referendums, bar the 2011 referendum on the law making powers of the National Assembly for Wales, were conducted prior to the adoption of the 2000 Act.
- 5.10 The first referendum held at the regional level was on the establishment of the General London Authority, while the second concerned the creation of the North East Regional Assembly. The latter was meant to be the first in a series of referendums under the Regional Assemblies (Preparations) Act 2003 concerning

⁵ V Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics* (2009) at pp 51 to 62.

⁶ Political Parties, Elections and Referendums Act 2000, s 101.

⁷ See Appendix C to this paper.

elected assemblies for certain regions of England. Under this Act, the Secretary of State could order a referendum to be held in a specified region but, following the failure of the North East referendum, plans to conduct other referendums were put on hold and the legislation has since been repealed.

Generic administrative and regulatory rules

- 5.11 While the statutory framework establishes the administrative and regulatory pillars for conducting polls, a lot of detail is left for referendum-specific legislation. For the purpose of providing certainty in the conduct of future referendums, the Electoral Commission has recommended that the Secretary of State exercise the power under section 129 of the 2000 Act to make an order providing for generic rules for all future referendums, including processes for publishing notices, issuing poll cards, setting up polling stations and conducting the count.⁸ In their report on the alternative vote referendum, the Electoral Commission recommended that the rules for the May 2011 referendum should be used as a template for a generic conduct order.⁹
- 5.12 One of the key issues is whether a complete code of administrative and regulatory rules, which are the same across all national referendums, should be considered as part of the substantive reform project. Our view is that such consideration should be included within the scope of the project because a set of generic rules would simplify the task of electoral administrators and provide greater clarity in the law.
- 5.13 Other issues relate to the nature of these conduct rules. For example, whether generic rules should deal with core referendum parameters, like the franchise and the referendum question, or whether the generic rules should purely deal with administrative issues, like the powers of the chief counting officer and the requirements during the referendum period. Another issue is whether the regulatory powers of the Electoral Commission should be consolidated in the generic rules or whether they require reform.

Core referendum parameters

- 5.14 Some aspects of running national referendums are fundamental. These include the type of franchise, the wording of the referendum question, and whether a threshold or supermajority is required. Our preliminary view is that these are matters of political choice, best left to government and the specific legislation proposing a referendum. However, the eventual statutory solution will need to take account of these core parameters, the specific detail of which would be left to legislation proposing a national referendum.

⁸ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 38; Electoral Commission, *Report on the 2004 North East Regional Assembly and Local Government Referendums* at p 53.

⁹ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 137.

Franchise

- 5.15 The 2000 Act does not stipulate the franchise to be used for national referendums; instead this is done by the Act proposing a referendum. Precedent shows that both the parliamentary and local government franchises have been used for national referendums at different times without any obvious rationale. While we acknowledge that the franchise actually chosen for particular types of referendums may be a political judgment, our preliminary view is that consideration should be given to whether the eventual statutory solution should outline these options.

Referendum question

- 5.16 The Electoral Commission must consider and publish a statement of its views on the wording of the referendum question upon a draft being contained in a referendum Bill before Parliament or in subordinate legislation.¹⁰ The Electoral Commission has stated that it is vital that the referendum question is intelligible and has recommended that if the question is significantly revised by Parliament then it should be reconsidered by the Commission.¹¹

Thresholds and supermajorities

- 5.17 There is no threshold or supermajority requirement listed in the 2000 Act and the issue is left to the proposing legislation. However, some referendums have in the past contained a turnout and supermajority requirement.¹² A threshold requirement mandates that a fixed proportion of registered voters actually participate in the referendum in order for it to be valid. A supermajority requirement prescribes a fixed percentage of those who actually voted to be in favour of the change. The justification for both is usually based on a desire to ensure the legitimacy of the result because turnout is thought to be a measure of how seriously the issue was considered by the voters.¹³ Our preliminary view is that the use of thresholds and supermajorities is a political choice outside the scope of the reform project.

Administration

- 5.18 The rules governing the administration of a national referendum are contained in the proposing legislation and tend to be provisions that are common to other electoral events. These basic rules include matters like the duties of electoral officers, role of referendum agents, method of voting, pre-polling and polling day requirements, and procedures for the count and the declaration of the result. In short, there are no generic conduct rules for referendums; rather they are re-legislated based on the conduct rules of other polls. For example, the proposing legislation for the alternative vote referendum in 2011 repeated the formulaic

¹⁰ Political Parties, Elections and Referendums Act 2000, s 104.

¹¹ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 56.

¹² See Appendix C to this paper.

¹³ See House of Lords Select Committee on the Constitution, *Report on Referendums in the United Kingdom (2009-10)* HL 99 at pp 36 to 38.

conduct rules of other polls.¹⁴

- 5.19 Further, there was a degree of uncertainty for electoral administrators which rules would apply to the 2011 referendum until the Act received Royal Assent. This uncertainty in turn impacted the timetable and those planning to campaign in the referendum. The Electoral Commission has stated this makes the conduct of referendums challenging and unnecessarily risks their successful delivery.¹⁵ Instead, they recommend the legal framework for future referendums be incorporated into the 2000 Act directly rather than re-legislating all of the conduct rules for each new referendum. The Electoral Commission argues this would give campaigners, counting officers and the Commission itself the ability to plan around a known framework for referendums.¹⁶

The chief counting officer

- 5.20 The Electoral Commission has a major role in the administration and conduct of national referendums. The 2000 Act states that the chief counting officer is the Chair of the Electoral Commission or a person appointed by them to be the chief counting officer for that referendum.¹⁷ The chief counting officer must also appoint counting officers for each relevant area in Great Britain, while the Chief Electoral Officer for Northern Ireland assumes the role of counting officer in that country.¹⁸ Counting officers can rely on local authorities to assist them in discharging their duties because local authorities are required to place their services and offices at the disposal of counting officers.¹⁹ Counting officers must certify the number of ballot papers counted and the number of votes cast in favour of each answer for their area, while the chief counting officer is responsible for certification in the whole referendum area.²⁰
- 5.21 Outside of the provisions described above, the 2000 Act does not bestow any further power upon the chief counting officer. Rather, any further power, like a power of direction over counting officers, is provided for in the legislation proposing a referendum. For example, the chief counting officer was given a power of direction in the alternative vote referendum,²¹ and compliance with directions was compulsory.²²
- 5.22 In their report on the alternative vote referendum in 2011, the Electoral

¹⁴ Parliamentary Voting System and Constituencies Act 2011, sch 1 (general provisions about the referendum), sch 2 (conduct rules), sch 3 (absent voting), and sch 4 (application of electoral law provisions to the referendum).

¹⁵ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 27.

¹⁶ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at pp 36 to 37.

¹⁷ Political Parties, Elections and Referendums Act 2000, s 128(2).

¹⁸ Political Parties, Elections and Referendums Act 2000, s 128(3) and (8).

¹⁹ Political Parties, Elections and Referendums Act 2000, s 128(4).

²⁰ Political Parties, Elections and Referendums Act 2000, s 128(5) and (6).

²¹ Parliamentary Voting System and Constituencies Act 2011, sch 1 para 5(5).

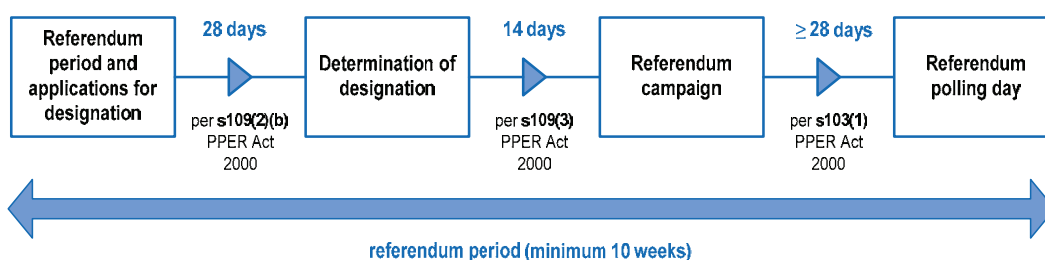
²² Parliamentary Voting System and Constituencies Act 2011, sch 1 para 5(8).

Commission recommended that the standardised management structure should reflect what was in place for that referendum. In particular, the Commission recommended giving the chief counting officer the power to appoint regional counting officers, issue directions about preparations and the discharge of duties, give advice and guidance to counting officers, specify modifications to prescribed forms and notices, and to appoint counting officers consistent with the voting areas for the referendum.²³

Referendum period and preparation

5.23 Before polling day, there is a “referendum period” during which a number of restrictions apply. The referendum period starts on the date a draft order is laid before Parliament and ends with either: (a) the date of the poll for referendums held under the Northern Ireland Act 1998; (b) the date provided in an order of the Secretary of State for referendums to which section 101(4) of the 2000 Act applies; or (c) the date provided for in proposing legislation for a referendum held under another Act.²⁴ For example, the proposing Act for the alternative vote referendum stated that the referendum period began on the day the Act was passed and ended with the date of the poll.²⁵ The date of the poll was prescribed in the Act as the 5 May 2011 and the Act itself received Royal Assent on 16 February 2011. This meant the referendum period was slightly longer than the minimum 10 weeks.

5.24 As observed below, 28 days are allowed for designation applications from the start of the referendum period. A further 14 days are provided for determining campaign designation. The polling day then has to be at least 28 days after the end of the 14 day period allotted to determine campaign designation and this will constitute the main campaigning period.²⁶ Accordingly, the referendum period will last for at least 10 weeks. However, the Secretary of State can by order vary this timeline by changing the designation periods of 28 and 14 days,²⁷ but the campaign period of at least 28 days cannot be varied in this way.²⁸



5.25 The Electoral Commission has argued that the statutory minimum referendum period should be at least 16 weeks. This would consist of a 28 day designation application period, 14 day designation decision period and a minimum 70 days

²³ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 136.

²⁴ Political Parties, Elections and Referendums Act 2000, s 102.

²⁵ Parliamentary Voting System and Constituencies Act 2011, sch 1 para 1.

²⁶ Political Parties, Elections and Referendums Act 2000, s 103(1).

²⁷ Political Parties, Elections and Referendums Act 2000, s 109(6).

²⁸ Political Parties, Elections and Referendums Act 2000, s 103(2).

between the final designation decision and polling day.²⁹ The Electoral Commission has also recommended that there should be at least 12 weeks between the campaign rules being finalised and the start of the regulated referendum period, which would allow guidance to be distributed and understood by electoral administrators.³⁰

Combination of polls

- 5.26 There are no generic provisions that apply for the combination of all national referendums. Instead, the combination of a referendum with other polls is dealt with in the proposing Act.³¹ In their report on the alternative vote referendum, the Electoral Commission recommended that the combination of referendums and elections should continue to be assessed on a case-by-case basis.³² Meanwhile, the Select Committee on the Constitution has indicated referendums should not be held on the same day as UK Parliamentary general elections, though for other elections it accepted that the decision should be decided on a case-by-case basis by the Electoral Commission.³³

Challenging the result

- 5.27 There is no generic process on which persons can challenge any given national referendum result. Instead, the provision for a challenge process is left entirely to the proposing legislation. Until the holding of the North East referendum in 2004, all previous referendums had expressly excluded the bringing of proceedings or the questioning of results that had been certified by the chief counting officer. From 2004 onwards, proposing legislation has included a provision that excludes challenging a result unless a claim for judicial review is made within 6 weeks from the date of the certified result.

Regulation

- 5.28 Under the 2000 Act, the Electoral Commission is given a regulatory role not only over political parties as observed in Chapter 3 but also with respect to the permitted participants in referendum campaigns.

Permitted participants and expenditure limits

- 5.29 At the beginning of the referendum period, the Electoral Commission opens and maintains the register of “permitted participants” for the campaign.³⁴ Under the 2000 Act, permitted participants include: registered parties that make a declaration to be such; individuals resident in the UK or registered on the

²⁹ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 107.

³⁰ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 106.

³¹ See, for example, Parliamentary Voting System and Constituencies Act 2011, s 4.

³² Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 38.

³³ House of Lords Select Committee on the Constitution, *Report on Referendums in the United Kingdom* (2009-10) HL 99 at p 36.

³⁴ Political Parties, Elections and Referendums Act 2000, s 107.

electoral register who have given notification; or any body under section 54(2)(b) and (d) to (h) that have given notification.³⁵

- 5.30 No individual, party or organisation may spend over £10,000 without registering as a permitted participant. For permitted participants there are also special restrictions on the amount that can be spent in a referendum, the limits of which are prescribed in schedule 14 of the 2000 Act.³⁶ In particular, the making, or claiming, of payments in respect to referendum expenses must be handled through the responsible person or a person authorised in writing.³⁷ Returns as to referendum expenses must also be made to the Electoral Commission and if expenses exceed £250,000 then the permitted participant must ensure a report is prepared by a qualified auditor.³⁸

Controls on donations and loans

- 5.31 The 2000 Act provides for controls in schedule 15 over donations that are made to permitted participants, which are not registered or minor parties.³⁹ These controls include certain prohibitions, requirements to make certain reports, statements and declarations as to amounts and sources. In their report on the alternative vote referendum, the Electoral Commission recommended the introduction of the pre-poll reporting of donations and that secondary legislation should be brought forward providing for loan controls for referendum campaigners.⁴⁰

Campaign designation and finance

- 5.32 The Electoral Commission may designate permitted participants as organisations to whom assistance is available as designated campaign groups, representing possible outcomes in the referendum.⁴¹ Where there are only two alternatives, the Electoral Commission can designate one participant for each outcome. If there are more than two possible outcomes then the Secretary of State can specify the possible outcomes for which permitted participants may be designated as campaign groups by the Electoral Commission.
- 5.33 Within the first 28 days of the referendum period, a permitted participant can apply to be a “designated organisation”, which is the lead campaign group for one of the possible outcomes of the referendum.⁴² The Electoral Commission then has the responsibility for selecting the designated organisations within 14 days thereafter but it does not have to do so if none of the organisations adequately represent a particular view.

³⁵ Political Parties, Elections and Referendums Act 2000, s 105.

³⁶ Political Parties, Elections and Referendums Act 2000, ss 117 and 118.

³⁷ Political Parties, Elections and Referendums Act 2000, ss 114 and 115.

³⁸ Political Parties, Elections and Referendums Act 2000, ss 120 to 122.

³⁹ Political Parties, Elections and Referendums Act 2000, s 119.

⁴⁰ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 108.

⁴¹ Political Parties, Elections and Referendums Act 2000, s 108.

⁴² Political Parties, Elections and Referendums Act 2000, s 109.

- 5.34 Designated organisations have the right to receive financial assistance determined by the Electoral Commission up to £600,000 to ensure a minimum level of campaigning. They are also entitled to postal distribution of referendum addresses, the use of public rooms for meetings, and referendum campaign broadcasts.⁴³ As designated campaign organisations, they have a total spending limit of £5 million for UK-wide national referendums, or an amount set by the Secretary of State for national referendums taking place in particular parts of the UK.⁴⁴
- 5.35 The Electoral Commission recommended in its report on the alternative vote that its capacity to pay grants to designated lead campaign groups in instalments should be confirmed. Further, that consideration should be given to whether legislation needs to clarify the position of lead campaign groups, and that provisions dealing with expenses incurred by persons “acting in concert” should be amended so as to remove or relax them in cases where there are no designated lead campaign groups. The Electoral Commission also recommended that steps be taken to reduce the potential advantages to prospective lead campaigners of not applying for designation.⁴⁵

Publications and broadcasts

- 5.36 The 2000 Act imposes certain limitations on publications and broadcasts with respect to national referendums. Government bodies are restricted from publishing materials on a referendum within 28 days from the poll but this does not apply to requests for specific information, the work of the Electoral Commission or designated campaign groups. The law requires the name and address of the printer, promoter and the person on whose behalf publications relating to national referendums are made. Broadcasters are also prohibited from including any referendum campaign broadcast other than those of designated campaign groups for that referendum.⁴⁶ Some changes have been recommended by the Commission, including commencing the prohibition on promotions by publicly-funded bodies at the same time as the referendum period.⁴⁷
- 5.37 As with elections, our preliminary view is that the scope of the project should not include substantive issues of political party regulation or publicity. However, we think the substantive project should clarify and consolidate the existing rules regulating referendum campaigns. The administrative dimension of campaign regulation, for example the impact on the referendum period of rules on designated campaign groups, should also be within the project’s scope.

Conclusion as to inclusion within the scope of reform project

- 5.38 National referendums should be within the scope of the project because they

⁴³ Political Parties, Elections and Referendums Act 2000, s 110.

⁴⁴ Political Parties, Elections and Referendums Act 2000, sch 14 paras 1(2)(a) and 2.

⁴⁵ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at p 107.

⁴⁶ Political Parties, Elections and Referendums Act 2000, ss 125 to 127.

⁴⁷ Electoral Commission, *Report on the May 2011 Referendum on the Voting System for UK Parliamentary Elections* (October 2011) at pp 57 and 108.

engage the same electoral administrative framework. Moreover, when polls are combined, referendums are conducted by the same people and on the same day as elections. Our preliminary view is that the project should include consideration of rationalising the administrative and regulatory rules for national referendums, particularly with a view to providing a lasting and stable framework for electoral administrators. The scope of the project with respect to national referendums would also be subject to the limitations mentioned in the context of elections in Chapter 3 so that we would exclude issues of constitutional importance and political judgement.

Question 15:

Should the scope of the reform project include consideration of the electoral administration of national referendums?

LOCAL REFERENDUMS

- 5.39 Local referendums have been held on a variety of matters, but can be broadly thought of as either statutorily prescribed referendums on specific topics, or as *ad hoc* referendums on local issues. Currently, there are three discrete types of local referendums that are statutorily prescribed. These referendums concern either changes to local governance under the Local Government Act 2000, the approval of excessive council tax under the Local Government Finance Act 1992, or the approval of neighbourhood planning orders under the Town and Country Planning Act 1990. Meanwhile, *ad hoc* referendums on local issues can be called by local authorities on issues they have determined.
- 5.40 There is currently no standardised framework for the conduct of local referendums. One of the key issues as to scope is whether the substantive project should consider rationalising the existing practice into one set of rules to be applied to the conduct of current and future local referendums. The Select Committee on the Constitution in its 2009-2010 report on referendums noted significant concern that there is a lack of any standard framework of rules in relation to local polls. Further, that some stakeholders wanted the Electoral Commission to be given responsibility for overseeing local as well as national referendums.⁴⁸ Our preliminary view is that there needs to be further consideration about how the law should provide for local referendums and the way in which local referendums, particularly when combined with other electoral events, are to be conducted.

History of local referendums

- 5.41 Local referendums enjoyed a period of popularity in the late 19th to early 20th centuries. The first use of local referendums occurred in the context of adopting provisions relating to public libraries.⁴⁹ The Public Libraries and Museums Act 1850 made it lawful for the mayor upon the request of the town council of any municipal borough, whose population exceeded 10,000, to ascertain whether the

⁴⁸ House of Lords Select Committee on the Constitution, Report on Referendums in the United Kingdom (2009-10) HL 99 at p 34.

⁴⁹ S Alderson, *Yea or Nay? Referenda in the United Kingdom* (1975) at p 23.

provisions of the Act should be adopted for the borough by holding a local referendum. The franchise was limited at that time to persons who were enrolled on the Burgess Roll and a two-thirds majority of the votes cast was required in order for the Act to come into effect for that borough.⁵⁰

- 5.42 The next use of local referendums occurred as part of the temperance movement, when political pressure led to the adoption of the local option in Scotland and Wales. In Scotland, the question put to the local people was whether they supported a no-change, limiting or no-licence resolution, which would see either the trade continue as normal, a 25% reduction in pubs or the abolition of all licences.⁵¹ In Wales, the Licensing Act 1961 provided that a pre-existing Sunday closing requirement in place since the late 19th Century would not apply if the electors in a local area made such a decision by majority at a local referendum.⁵²
- 5.43 The final classic use of local referendums was in relation to Sunday cinemas. The Sunday Entertainments Act 1932 provided for a procedure in which cinemas could be permitted to open on a Sunday if the local population supported it. A public meeting of local government electors would have to be held to consider the proposal and the majority decision of the meeting was final unless 100 electors or one-twentieth of the electorate called for a poll.⁵³
- 5.44 Local referendums have now come back into favour. This started with referendums on changes to local governance in 2000 but has now extended to referendums on council tax and neighbourhood development orders as a part of the Coalition Government's localism agenda.⁵⁴ In addition to specific referendums under legislation, it is also possible for local referendums to be held on an *ad hoc* advisory basis by local authorities under a general power granted to them for miscellaneous expenditure.⁵⁵

Local governance referendums

- 5.45 From 2000 to 2007, the Local Government Act 2000 provided for a process by which the committee system of governance for local authorities was to be replaced by new "executive arrangements". Few local authorities took up the then Government's preferred option of a directly-elected mayor and cabinet; instead four out of five councils adopted the leader and cabinet model.⁵⁶ In response to this disappointing uptake, the Government revised the process through the Local Government and Public Involvement in Health Act 2007 but with little effect on

⁵⁰ Public Libraries and Museums Act 1850, s 3.

⁵¹ Temperance (Scotland) Act 1913, s 2.

⁵² Licensing Act 1961, s 6.

⁵³ D Butler and A Ranney (ed), *Referendums: A Comparative Study of Practice and Theory* (1978) at p 212.

⁵⁴ The Coalition's Programme for Government (2010) at p 28; Conservative Party, *Control Shift Green Paper on Returning Power to Local Communities* (2009) at pp 15 to 16.

⁵⁵ Section 137 of the Local Government Act 1972 has been relied upon when incurring the expenses of holding local referendums on policy issues.

⁵⁶ Department for Communities and Local Government, *Local Government White Paper on Strong and Prosperous Communities* (October 2006) Cm 6939 at p 55.

the uptake of elected mayors.

- 5.46 Following the 2010 general election, the current Government indicated it would hold referendums on elected mayors in England's 12 largest cities.⁵⁷ Accordingly, the law is very complex as a result of multiple amendments by different governments. Most recently, the Localism Act 2011 inserted a new Part 1A into the Local Government Act 2000 (dealing with England), and amended the old Part II (now dealing solely with Wales).⁵⁸

England

- 5.47 Permitted forms of local governance in England are set out in legislation and there is a prescribed process for changing governance arrangements. Where a local authority proposes to change governance arrangements by resolution, a referendum will be required to approve the change. This requires the local authority to draw up a proposal for the change in governance arrangements and to hold a referendum on the proposal.⁵⁹
- 5.48 Referendums on local governance may also be initiated by petition according to regulations made by the Secretary of State.⁶⁰ A valid petition, which is signed by 5% of the number of local government electors in the area, will trigger a local governance referendum and, should a majority approve the proposal, the local authority must implement the new executive arrangements.⁶¹ A local referendum triggered in this way must generally be held no later than at the next ordinary day of election after the petition date.⁶²
- 5.49 Local referendums may also be triggered by: (a) directions issued by the Secretary of State pursuant to regulations, or (b) statutory orders made by the Secretary of State and that are directed at all local authorities or only those meeting a certain description.⁶³
- 5.50 The final trigger for referendums on local governance pertains to the adoption of mayoral systems in specified English cities. Section 9N of the Local Government Act 2000 enables the Secretary of State to make an order that requires a specified local authority to hold a referendum on whether the authority should specifically operate a mayor and cabinet executive. Such orders were made pursuant to the Coalition Government's plan to hold referendums in England's 12

⁵⁷ The Coalition's Programme for Government (2010) at p 12; Conservative Party, *Control Shift Green Paper on Returning Power to Local Communities* (2009) at pp 20 to 21.

⁵⁸ See, for example, s 10 of the Local Government Act 2000 as amended by sch 3 para 10 of the Localism Act 2011 inserts the words "in Wales". Similar changes are made in other sections that now give power to the Welsh Ministers to make regulations for local governance referendums.

⁵⁹ Local Government Act 2000, ss 9M to 9MB.

⁶⁰ Local Government Act 2000, s 9MC. The relevant set of regulations is the Local Authorities (Referendums)(Petitions)(England) Regulations 2011 SI 2011 No 2914.

⁶¹ Local Authorities (Referendums)(Petitions)(England) Regulations 2011 SI 2011 No 2914, regs 4 and 9, and regs 6 and 18.

⁶² Local Authorities (Referendums)(Petitions)(England) Regulations 2011 SI 2011 No 2914, reg 16.

largest cities outside London without a mayor. Both Leicester and Liverpool voluntarily adopted a mayoral system prior to the issuing of statutory orders, while the Secretary of State made orders for the remaining 10 cities.⁶⁴

- 5.51 The franchise for local governance referendums is contained in the Local Government Act 2000 and is based on the local government register for residential addresses within the authority's area. Rules for the conduct of local referendums and for combining these referendums with other polls are left to regulations to be made by the Secretary of State.⁶⁵
- 5.52 Functions are conferred on counting officers, which are defined as the relevant returning officers at elections for councillors of that area pursuant to section 35 of the 1983 Act.⁶⁶ The regulations require local referendums to be conducted according to the Local Government Act Referendum Rules contained in schedule 3 unless it is combined with another poll for which the Local Government Act Referendums (Combination of Polls) Rules in schedule 5 apply. These rules largely replicate the conduct rules of other electoral events.
- 5.53 Another important aspect of the conduct rules relates to challenging the result. In particular, schedule 7 applies the Election Petition Rules 1960 with some modifications. Therefore, challenging the result of a local referendum invokes the election petition court process described, in Chapter 4.

Wales

- 5.54 Welsh Ministers now have the power to make regulations for the provision of local referendums on whether a local authority in Wales should operate a form of executive arrangements. Local authorities in Wales must consult their communities, draw up executive arrangement proposals and send them to the Welsh Ministers.⁶⁷ Proposals that involve a mayor and cabinet executive, a mayor and council manager executive, or another prescribed form require a local referendum before they can be adopted. However, in the event that a local authority does not propose a mayoral system then a referendum on the issue may still be triggered by a petition process or a direction issued under regulations made by the Welsh Ministers, or a specific order made by Welsh Ministers.⁶⁸

⁶³ Local Government Act 2000, ss 9MD and 9ME.

⁶⁴ The referendums were held on 3 May 2012. While Bristol voted in favour, nine other cities voted against the introduction of elected mayors.

⁶⁵ Local Government Act 2000, s 9MG. The relevant set of regulations is the Local Authorities (Conduct of Referendums) (England) Regulations 2012 SI 2012 No 323.

⁶⁶ Local Authorities (Conduct of Referendums) (England) Regulations 2012 SI 2012 No 323, reg 9.

⁶⁷ Local Government Act 2000, s 25.

⁶⁸ Local Government Act 2000, ss 26 to 27, 34 to 35 and 36. The relevant set of regulations concerning the petition process and directions as to when a referendum may be required is the Local Authorities (Referendums) (Petitions and Directions) (Wales) Regulations 2001 SI 2001 No 2292.

- 5.55 The petition regulations mirror those that apply in England and which were discussed above, though some differences do exist. For example, a petition will only be valid in Wales if it is signed by 10% of the number of local government electors in that area, as opposed to 5% in England.⁶⁹ A valid petition will trigger a local governance referendum, and should a majority approve the proposal then the local authority must implement it.⁷⁰ The capacity for the National Assembly for Wales to issue a direction requiring a local referendum on the issue of local governance is also contained in part III of these regulations.
- 5.56 The franchise for local governance referendums in Wales is contained in the Local Government Act 2000 and is based on those who are on the local government register and who would be entitled to vote at an election of local councillors. Rules for the conduct of local referendums and for combining these referendums with other polls in Wales are left to regulations to be made by the Welsh Ministers. These regulations can apply or incorporate with or without any changes any enactment relating to elections or referendums.⁷¹
- 5.57 The conduct rules largely replicate those rules that apply to local referendums in England, which we discussed above. Similarly, the Election Petition Rules 1960 are applied with some modifications under the Welsh conduct rules.⁷² Therefore, challenging the result of a local referendum in Wales also invokes the election petition court process described in Chapter 4.

Council tax referendums

- 5.58 As part of the Coalition Government's move to empower local communities, local referendums have been adopted as the means by which such communities can approve or veto increases in council tax. The Localism Act 2011 makes amendments to the Local Government Finance Act 1992, which governs the calculation of council tax in England. In particular, section 72 of the Localism Act 2011 inserts a new chapter 4ZA, which provides for council tax referendums in the event that local authorities increase their relevant basic amount of council tax in an excessive way.

Occasion of referendums

- 5.59 Council tax referendums will be required to be held if the council tax set by authorities exceeds nominated levels, which are set annually. The requirement to hold a referendum on council tax applies to (a) billing authorities (like unitary, district or London borough councils), (b) major precepting authorities (like county councils, the Greater London Authority and police or fire authorities), and (c) local

⁶⁹ Local Authorities (Referendums)(Petitions and Directions)(Wales) Regulations 2001 SI 2001 No 2292, regs 4 and 9.

⁷⁰ Local Authorities (Referendums)(Petitions and Directions)(Wales) Regulations 2001 SI 2001 No 2292, regs 6 and 23.

⁷¹ Local Government Act 2000, s 45. The relevant set of regulations made by the Welsh Ministers for the conduct of local governance referendums is the Local Authorities (Conduct of Referendums) (Wales) Regulations 2008 SI 2008 No 1848.

⁷² Local Authorities (Conduct of Referendums) (Wales) Regulations 2008 SI 2008 No 1848, sch 6.

precepting authorities (like town and parish councils).⁷³

5.60 All three types of authorities have a duty to determine whether their relevant basic amount of council tax for a financial year is excessive.⁷⁴ Where it is deemed to be excessive, the authorities have a duty to make a substitute calculation and hold a referendum on the issue.⁷⁵ Whether the relevant basic amount of council tax is excessive is decided in accordance with a set of principles determined by the Secretary of State for the year, but the principles must be set out in a report and approved by the House of Commons.⁷⁶ Such a report has been presented to the House of Commons for 2012-2013.⁷⁷ In particular, a mandate must be sought at a council tax referendum if the increase exceeds (a) 4% for the Greater London Authority, police, fire and rescue authorities, (b) 3.75% for the City of London, and (c) 3.5% for all other principal authorities.

5.61 If the billing authority itself exceeds these principles, then they must make arrangements to conduct a referendum under section 52ZG. In the event that precepting authorities exceed these principles, separate regulations mandate that they must inform billing authorities by certain dates,⁷⁸ and the billing authorities must make arrangements to hold a referendum in relation to the precepting authority's tax increase under section 52ZN. Accordingly, more than one referendum may be triggered in a local area if multiple authorities elected to exceed the principles set by the Secretary of State. If the result of a referendum is that the increase is not approved then the substitute calculations made in relation to the year by the authority has effect.⁷⁹ Further, if a billing authority fails to hold a referendum when it is required then the substitute calculations made in relation to that year will have effect.⁸⁰

Conduct rules

5.62 Rules on the conduct and combination of council tax referendums with other polls are to be made under regulations by the Secretary of State.⁸¹ These conduct rules broadly reflect those dealing with local governance referendums, discussed above, and are thus similar to the rules for other electoral events.

⁷³ See s 39 of the Local Government Finance Act 1992 for the definition of major and local precepting authorities.

⁷⁴ Local Government Finance Act 1992, s 52ZB.

⁷⁵ For billing authorities see ss 52ZF to 52ZI, for major precepting authorities see ss 52ZJ and 52ZK and 52ZN to 52ZP, and for local precepting authorities see ss 52ZL to 52ZP of the Local Government Finance Act 1992.

⁷⁶ Local Government Finance Act 1992, ss 52ZC and 52ZD.

⁷⁷ Department for Communities and Local Government, *Report on the Referendums Relating to Council Tax Increases (Principles)(England) 2012-13* (31 January 2012) at pp 5 to 7.

⁷⁸ Local Authority (Referendums relating to Council Tax Increases) Regulations 2012 SI 2012 No 460.

⁷⁹ Local Government Finance Act 1992, ss 52ZH and 52ZO.

⁸⁰ Local Government Finance Act 1992, ss 52ZI and 52ZP.

⁸¹ Local Government Finance Act 1992, s 52ZQ. The conduct rules for council tax referendums are contained in the Local Authorities (Conduct of Referendums)(Council Tax Increases) (England) Regulations 2012 SI 2012 No 444.

- 5.63 Functions under the regulations are conferred on counting officers, which are defined as the relevant returning officers at elections for councillors of that area pursuant to section 35 of the 1983 Act. Further, where there are two or more referendums held in respect of a precepting authority's council tax, the precepting authority must appoint a person to be the chief counting officer in relation to those referendums who may exercise a power of direction over counting officers at the referendum.⁸²
- 5.64 The regulations require council tax referendums to be conducted according to the Local Government Finance Act Referendum Rules contained in schedule 3 unless it is combined with another poll for which the Local Government Finance Act Referendums (Combination of Polls) Rules in schedule 5 apply. These rules largely replicate the conduct rules for local governance referendums and thus of other electoral events. As with local governance referendums, schedule 7 applies the Election Petition Rules 1960 with some modifications. Therefore, challenging the result of a council tax referendum invokes the election petition court process described in Chapter 4 of this paper.

Neighbourhood planning referendums

- 5.65 Local referendums have also been adopted as the means by which communities approve neighbourhood planning orders. The Localism Act 2011 amends the Town and Country Planning Act 1990,⁸³ which governs the making of neighbourhood planning orders in England. Section 116 of the Localism Act 2011 inserts a new schedule 4B, which provides for neighbourhood planning orders to be put to referendum by parish councils or neighbourhood forums.

Occasion of referendums

- 5.66 Qualifying bodies, defined as parish councils and bodies designated as neighbourhood forums, are entitled to initiate a process by which a local planning authority in England is required to make a neighbourhood development order. In particular, local planning authorities are required to make the requisite neighbourhood development orders if they are supported at referendum by more than half of those voting.⁸⁴
- 5.67 An area within a local planning authority's jurisdiction in England can be designated as a "neighbourhood area" upon the application for such designation by a parish council or neighbourhood forum.⁸⁵ In the event that a neighbourhood planning order is proposed then a referendum will be required before it is made by the local planning authority. If the area is designated as a "business area" then two referendums will be required in which the nature of the electors will vary.⁸⁶ The first referendum is held for residents in that area, and the second for non-domestic ratepayers. Additional referendums for "business areas" may also have

⁸² Local Authority (Referendums relating to Council Tax Increases) Regulations 2012 SI 2012 No 460, regs 15 and 16.

⁸³ Localism Act 2011, ss 116 to 121 and schs 9 to 12.

⁸⁴ Town and Country Planning Act 1990, s 61E.

⁸⁵ Town and Country Planning Act 1990, s 61G.

⁸⁶ Town and Country Planning Act 1990, s 61H.

further conditions and exclusions on the entitlement to vote pursuant to regulations made by the Secretary of State.⁸⁷

Conduct rules

- 5.68 Rules on the conduct and combination of neighbourhood planning referendums with other polls are to be made under regulations by the Secretary of State.⁸⁸ At the time of printing, regulations are yet to have been made under this section. However, the regulations are likely to be based on the rules for other local government referendums discussed above.

Local authorities' power to conduct *ad hoc* referendums

- 5.69 In addition to prescribed local referendums, there is the wider issue of the power of local authorities to call *ad hoc* local referendums on issues of local policy pursuant to a general power to incur expenditure for other purposes.⁸⁹ Referendums carried out according to this power have included several that were held on whether comprehensive schooling should be introduced pursuant to the Education Act 1944. It has been argued that the use of the general expenditure power is valid in circumstances where it pertains to statutory responsibilities. However, if local authorities use this power for the expenses of local referendums held on other issues unrelated to a Bill or statute, some commentators have suggested this may be an unlawful use of the power.⁹⁰
- 5.70 Referendums of this type are akin to advisory polls and may be performed by commercial polling agencies on behalf of local authorities. For this reasons, our preliminary view is that they should fall outside the scope of the project.

Conclusion as to inclusion within the scope of reform project

- 5.71 Local referendums should be within the scope of the project because they will increasingly be combined with other polls, use the same administrative officers as elections, and employ existing concepts in electoral law. Our preliminary view is that the substantive project should include rationalising the conduct rules for local referendums prescribed under statute, subject to relevant limitations as to scope for elections discussed in Chapter 3.

Question 16:

Should the scope of the substantive project include consideration of the electoral administration of local referendums?

⁸⁷ Town and Country Planning Act 1990, sch 4B paras 14 and 15.

⁸⁸ Town and Country Planning Act 1990, sch 4B para 16.

⁸⁹ Local Government Act 1972, s 137 (for England and Wales); Local Government Act (Northern Ireland) 1972, s 115 (for Northern Ireland); Local Government (Scotland) Act 1973, s 83 (for Scotland).

⁹⁰ S Alderson, *Yea or Nay? Referenda in the United Kingdom* (1975) at p 32.

APPENDIX A

LIST OF QUESTIONS AS TO SCOPE

QUESTION 1: INTRODUCTION

- A.1 Should the scope of the reform project include the elections and referendums listed in paragraphs 1.10 and 1.11?

QUESTION 2: THE NEED FOR REFORM

- A.2 Should the scope of the reform project include, with a view to reducing the volume, complexity and fragmentation of the law, consideration of the current legislative framework for electoral administration including the place of rules within the legislative hierarchy?

QUESTION 3: CORE ELECTORAL PARAMETERS

- A.3 Do you agree the scope of the project should exclude the franchise, electoral boundaries and voting systems?

QUESTION 4: MANAGEMENT AND OVERSIGHT

- A.4 Should the scope of the reform project include consideration of management and oversight of elections, but exclude fundamental change to the current institutional framework for electoral administration?

QUESTION 5: THE REGISTER OF ELECTORS

- A.5 Should the scope of the reform project include electoral registration, and if so, the meaning of residence?

QUESTION 6: CANDIDATES AND THE CAMPAIGN

- A.6 Should the scope of the reform project include consideration of the rules on candidates and the campaign?

QUESTION 7: POLITICAL PARTIES AND BROADCASTS

- A.7 Do you agree the scope of the project should exclude political party regulation and national campaign publicity?

QUESTION 8: MANNER OF VOTING

- A.8 Should the scope of the reform project include consideration of the rules on manner of voting?

QUESTION 9: POLLING DAY

- A.9 Should the scope of the reform project include consideration of the rules on polling day?

QUESTION 10: DETERMINING AND DECLARING THE RESULT

- A.10 Should the scope of the reform project include consideration of the rules for determining and declaring the result?

QUESTION 11: ELECTION TIMETABLES

- A.11 Should the scope of the reform project include consideration of the timetables for elections?

QUESTION 12: COMBINATION OF POLLS

- A.12 Should the scope of the reform project include the combination of elections?

QUESTION 13: THE ELECTION PETITION AND ELECTION COURTS

- A.13 Should the scope of the reform project include the process of challenging elections?

QUESTION 14: ELECTORAL OFFENCES

- A.14 Should the scope of the reform project include consideration of electoral offences?

QUESTION 15: NATIONAL REFERENDUMS

- A.15 Should the scope of the reform project include consideration of the electoral administration of national referendums?

QUESTION 16: LOCAL REFERENDUMS

- A.16 Should the scope of the reform project include consideration of the electoral administration of local referendums?

APPENDIX B TABLE OF ELECTORAL OFFENCES

Category	Offence	Statute	Sentence	Notes
Corrupt practices Disqualification period 5 years	Bribery	s 113	1 year maximum custodial sentence, an unlimited fine, or both if convicted on indictment (s 168(1)(a)(ii)) 6 months maximum custodial sentence, a statutory maximum fine, or both on summary conviction (s 168(1)(b))	All corrupt practices are either way offences A candidate or person reported personally guilty of a corrupt practice is disqualified from being elected to parliament or holding any elective office for five years from the date of conviction or report by an election court (s 173)
	Treating	s114		
	Undue influence	s115		
	"Fraudulently" purporting to be entitled to issue certificate for registered political party	sch 1 r 6A(2)		
	False declaration as to election expenses incurred	s 82(6)		
	Unauthorised expenses	s 75		
	<i>Including aiding and abetting, counselling or procuring</i>			
	Wilfully making false statements or signatures in nomination papers	s 65A		
	Postal and Proxy voting offences	s 62A		
	Personation <i>Including aiding and abetting, counselling or procuring</i>	s 60		

Category	Offence	Statute	Sentence	Notes
Illegal Practices Disqualification period 3 years	Providing money for illegal purposes (illegal payments)	s 175(2) and s 112	Fine not exceeding level 5 on the standard scale	All illegal practices are summary offences On a prosecution, it is sufficient to allege that the person charged was guilty of an illegal practice s 169 (i.e. the precise illegal practice alleged need not be named in the Information or Summons) A person charged with a corrupt practice may be convicted of an illegal practice instead and in such circumstances the trial will proceed as if the illegal practice were an indictable offence (s 170) Illegal practices result in disqualifications from elective office for three years from the date of conviction or report by the election court (s 173)
	False statement as to candidate	s 106		
	Illegal employment of canvassers by agent or candidate	s 175(2) and s 111		
	Paying an elector for exhibition of election bills and notices	s 109		
	Election literature not bearing printer's name and address (candidate or his agent only)	s 110(12)		
	Unauthorised broadcasts	s 92		
	Disturbing election meetings	s 97		
	Standing as a candidate in more than one Member State at European elections	European Parliamentary Elections (Changes to the Franchise and Qualification of Representatives) Regulations SI 1994 No 342, reg 4		
	Inducing withdrawal of candidate (by candidate or agent) "corruptly"	s 175(2) and s 107		
	False statement about withdrawal of candidate	s 106(5)		

Category	Offence	Statute	Sentence	Notes
Illegal Practices (continued) Disqualification period 3 years	Imitation poll cards	s 94	As above	As above
	Breach of rules on candidate's expenses including: <ul style="list-style-type: none"> - Return / declaration of election expenses - Expenses maximum - Expenses through election agent only - Election expenses must be paid within the permitted time for such payments 	ss 81 to 82 and 75(5) s 76 s 73 ss 78 and 90	As above	As above
	Donation other than to candidate or agent	s 71A	As above	As above
	Voting or inducing/procuring vote at certain elections under the Local Government Act knowing of statutory disqualification from vote	s 189	As above	As above
	Voting offences including multiple voting and violations of proxy or postal ballot other than those in s 62A	s 61	As above	A person guilty of this offence is, additionally to the above, disqualified from being registered as an elector or voting at any parliamentary or local government election (s 173(1)(a)(i) and (2))

Category	Offence	Statute	Sentence	Notes
Other Electoral Offences	Illegal payment	s 175(1) and s 112	Fine not exceeding level 5 on the standard scale	Summary offence
	Illegal employment of canvassers (other than by election agent or candidate)	s 175(1) and s 111		
	Inducing withdrawal of candidate (other than by election agent or candidate) "corruptly"	s 175(1) and s 107	Summary offence	
	Election literature not bearing printer's name and address	s 110, and Political Parties, Elections and Referendums Act 2000, s 143		
	Fraudulent tampering with or unauthorised dissemination of election materials e.g. nomination papers, ballot boxes,	s 65	2 years and/or fine on indictment, 6 months and statutory maximum fine in summary trial	Either way offence if committed by returning or presiding officer or their poll clerks
	Breach of secrecy	s 66	Fine not exceeding level 5 on the standard scale	Summary offence if committed by any other person
			Fine not exceeding level 5 on the standard scale or 6 months custodial term	Summary offence

Category	Offence	Statute	Sentence	Notes
Other Electoral Offences (continued)	Declaration offences (service or local connection)	s 62	Fine not exceeding level 5 on the standard scale	Summary offence
	False overseas elector's declaration	Representation of the People Act 1985, s 12	Fine not exceeding level 5 on the standard scale	Summary offence
	False information (register) (applies to all applications to register, requires knowledge or reasonable suspicion of falsehood)	s 13D	6 months max custodial term, fine not exceeding level 5 on the standard scale, or both	Summary offence
	False information / failing to respond to registration request (strict liability)	Representation of the People (England and Wales) Regulations 2001 SI 2001 No 341, reg 23	Fine of £1,000	Summary offence
	Defacing notices (register)	As above, reg 11	Fine of £1,000	Summary offence
	Breach of official duty	s 63	Fine not exceeding level 5 on the standard scale	Summary offence
	Prohibition of administration officers acting as candidate's agent	s 99	Fine not exceeding level 4 on the standard scale	Summary offence
	Illegal canvassing by police	s 100	Fine not exceeding level 3 on the standard scale	Summary offence

Category	Offence	Statute	Sentence	Notes
Other Electoral Offences (continued)	Sitting or voting after failing to transmit expense returns/declarations	s 85	£100 fine per day £50 fine per day (local government candidates)	Civil proceedings for a penalty Summary proceedings in magistrates' court
	Failure of agents to comply with court order to supply information	s 87(3)	Fine of up to level 5 on the standard scale	Summary offence
	Publishing exit poll	s 66A	Fine not exceeding level 5 on the standard scale or 6 months custodial term	Summary offence
	Miscellaneous offences in relation to dealing with the register of electors	Representation of the People (England and Wales) Regulations 2001 SI 2001 No 341, reg 115	Fine not exceeding level 5 on the standard scale	Summary offence
	Breach of control of documents post election	s 66B	Fine not exceeding level 5 on the standard scale	Summary offences
	Failure to give details of donation "without reasonable excuse"	sch 2A para 6	On indictment, fine and/or 1 year's imprisonment; Summary: fine up to statutory maximum or 6 months	Either way offence

Category	Offence	Statute	Sentence	Notes
Relevant General Offences Not restricted to elections	Forgery and using false instruments	Forgery and Counterfeiting Act 1981, ss 1 and 2	10 years maximum custodial term or unlimited fine or both (indictment) 6 months custodial term or fine up to the statutory maximum or both	Either way offence
	Perjury	Perjury Act 1911, s 5	2 years maximum custodial term, a fine, or both	Indictable only
	Conspiracy to defraud	Common law offence	10 years maximum sentence, a fine or both	Indictable only
	Bribery (general)	Bribery Act 2010, ss 1, 2 and 6	On indictment: 10 years maximum sentence, a fine or both Summary: 12 months or fine up to statutory maximum or both	Either way offence

APPENDIX C TABLE OF NATIONAL REFERENDUMS

Referendum Date Type	Instrument(s)	Question(s)	Turnout Yes No	Result	Franchise	Threshold? Super-majority?	Binding or advisory?	PPER Act ¹ applied? Combined?	Challenge process?
UK Voting system 5 May 2011 UK-wide	Parliamentary Voting System and Constituencies Act 2011	At present, the UK uses the 'first past the post' system to elect MPs to the House of Commons. Should the 'alternative vote' system be used instead?	42.20% 32.10% 67.90%	The voting system for parliamentary elections remained the first past the post system.	Parliamentary franchise	No	Binding	Yes Yes (elections to Scottish Parliament, National Assembly for Wales, Northern Ireland Assembly and local authorities in Northern Ireland and England)	Yes (exclusion unless a claim for judicial review is made within 6 weeks from the date of the certified result)
National Assembly for Wales law making power 3 March 2011 Country-specific	Government of Wales Act 2006 National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc) Order 2010 National Assembly for Wales Referendum (Assembly Act Provisions) (Limits on Referendum Expenses Etc) Order 2010	Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?	35.60% 63.50% 36.50%	The Assembly was granted power to make laws on all subject matters.	Local government franchise	No	Binding	Yes No	Yes (exclusion unless a claim for judicial review is made within 6 weeks from the date of the certified result)

¹ Political Parties, Elections and Referendums Act 2000.

Referendum Date Type	Instrument(s)	Question(s)	Turnout		Result	Franchise	Threshold? Super-majority?	Binding or advisory?	PPER Act applied? Combined?	Challenge process?	
			Yes	No							
North East England Regional Assembly 4 Nov 2004 Regional	Regional Assemblies (Preparations) Act 2003 Regional Assembly and Local Government Referendums (Date of Referendums, Referendum Question and Explanatory Material) (North East Region) Order 2004	Should there be an elected assembly for the North East region?	47.10%	22.10%	77.90%	The Elected Regional Assembly for the North East was not established	Local government franchise	No	Binding	Yes Yes (local referendums on restructuring local government)	Yes (exclusion unless a claim for judicial review is made within 6 weeks from the date of the certified result)
Northern Ireland Good Friday Agreement 22 May 1998 Country-specific	Northern Ireland (Entry to Negotiations, etc) Act 1996 Northern Ireland Negotiations (Referendum) Order 1998 Northern Ireland Referendum (Counting Officer's Charges) Order 1998	Do you support the Agreement reached at the Multi-Party Talks in Northern Ireland and set out in Command Paper 3883?	81.00%	71.10%	28.90%	Consent was given for continuation of the peace process per the Belfast Agreement.	Parliamentary franchise with the addition of eligible peers but excluding overseas voters	No	Advisory	No (CCO appointed by Secretary of State) No	No (exclusion of proceedings or questioning results certified by CCO)
Greater London Assembly 7 May 1998 Regional	Greater London Authority (Referendum) Act 1998 Greater London Authority (Referendum Arrangements) Order 1998	Are you in favour of the Government's proposals for a Greater London Authority, made up of an elected mayor and a separately elected assembly?	34.00%	72.00%	28.00%	The Greater London Authority was established.	Local government franchise	No	Advisory	No (CCO appointed by Secretary of State) Yes (London borough councils)	No (exclusion of proceedings or questioning results certified by CCO)
Devolution in Wales 18 Sep 1997 Country-specific	Referendums (Scotland and Wales) Act 1997	I agree that there should be a Welsh Assembly or I do not agree that there should be a Welsh Assembly.	50.10%	50.30%	49.70%	The Welsh Assembly was established.	Local government franchise	No	Advisory	No (CCO appointed by Secretary of State) No	No (exclusion of proceedings or questioning results certified by CCO)

Referendum Date	Instrument(s)	Question(s)	Turnout Yes No	Result	Franchise	Threshold? Super-majority?	Binding or advisory?	PPER Act applied? Combined?	Challenge process?
Devolution in Scotland 11 Sep 1979 Country-specific	Referendums (Scotland and Wales) Act 1997	I agree that there should be a Scottish Parliament or I do not agree that there should be a Scottish Parliament.	60.20% 74.30% 25.70%	Scottish Parliament was established.	Local government franchise	No	Advisory	No (CCO appointed by Secretary of State) No	No (exclusion of proceedings or questioning results certified by CCO)
		I agree that a Scottish Parliament should have tax-varying powers or I do not agree that a Scottish Parliament should have tax-varying powers.	60.20% 63.50% 36.55%	Scottish Parliament was given tax raising powers.					
Creation of a Welsh Assembly 1 March 1979 Country-specific	Wales Act 1978 (s 80; sch 12)	Do you want the provisions of the Wales Act 1978 to be put into effect?	58.80% 20.30% 79.70%	Devolution did not pass.	Parliamentary franchise with the addition of eligible peers	Yes ≥ 40% entitled to vote must vote "yes"	Binding	No (CCO appointed by Secretary of State) No	No (exclusion of proceedings or questioning results certified by CCO)
Creation of a Scottish Assembly 1 March 1979 Country-specific	Scotland Act 1978 (s 85; sch 17)	Do you want the provisions of the Scotland Act 1978 to be put into effect?	63.60% 51.60% 48.40%	Devolution did not proceed as the threshold requirement had not been met (only 32.8% had done so)	Parliamentary franchise with the addition of eligible peers	Yes ≥ 40% entitled to vote must vote "yes"	Binding	No (CCO appointed by Secretary of State) No	No (exclusion of proceedings or questioning results certified by CCO)

Referendum Date	Instrument(s)	Question(s)	Turnout Yes No	Result	Franchise	Threshold? Super-majority?	Binding or advisory?	PPER Act applied? Combined?	Challenge process?
UK European Communities 5 June 1975 UK-wide	Referendum Act 1975	Do you think that the UK should stay in the European Community (the Common Market)?	64.00% 67.20% 32.80%	The UK remained in the European Community	Parliamentary franchise with the addition of eligible peers and members of armed forces	No	Advisory	No (CCO appointed by Secretary of State) No	No (exclusion of proceedings or questioning results certified by CCO)
Border Poll Northern Ireland 8 March 1973 Country-specific	Northern Ireland (Border Poll) Act 1972	Do you want Northern Ireland to remain part of the UK? or Do you want Northern Ireland to be joined with the Republic of Ireland outside UK?	58.70% 98.90% 1.10%	Northern Ireland remained part of the UK	Franchise used for the Parliament of Northern Ireland	-	Advisory	No No	-