

ELECTORAL LAW: INTERIM EQUALITY IMPACT ASSESSMENT

Background and introductions

The Law Commissions

The Law Commission for England and Wales and the Scottish Law Commission were established by the Law Commissions Act 1965. The Northern Ireland Law Commission was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). The three Law Commissions of the UK (“the Law Commissions”) are tasked with keeping the law of England and Wales, Scotland and Northern Ireland under review and to make recommendations for its systematic development and reform.

The electoral law project

The electoral law reform project originated in the Law Commission for England and Wales’ Eleventh Programme of Law Reform. Its scope, determined in 2012, extends to electoral administration law, offences and legal challenges. It excludes reform of the franchise, voting systems, electoral boundaries, national campaign, party, and broadcast regulation, and fundamental change to institutions.

After references were made by the UK and Scottish Government, the three Law Commissions in the UK engaged in substantive reform work, resulting in the publication of our consultation paper, *Electoral Law in the UK*¹. That paper made or asked 114 proposals or questions concerning the reform of electoral law. There followed a public consultation. 74 individuals or organisations responded to our consultation in writing, with others participating in our consultation events. Our interim report reviews the response to our consultation paper on UK electoral law and sets out our interim recommendations for reform.

The response has been overwhelmingly positive, with many proposals attracting unanimous or near-unanimous support. Key stakeholders in the electoral community stressed the need for sensible, rational reform of our complex electoral laws. There is now a review stage for Government to decide whether to go on to the next stage: the production of a draft Bill and final report, which will contain our final recommendations. If the project does proceed to the final stage it will be the responsibility of Government to implement the recommendations.

The electoral law project and the Law Commissions do not formulate electoral policy; they cannot properly set the balance between access to the poll and

¹ Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, available at http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp218_electoral_law.pdf.

security from fraud and as such chapter 1 of our interim report explains that it is not for the Commissions to consider matters such as weekend voting or identification at the poll. The purpose of the project is to simplify and modernise complex and outdated laws, and to set them out within a rational and holistic legislative structure.

Section 75 of the Northern Ireland Act 1998

Section 75 of the Northern Ireland Act 1998 requires public authorities (in this instance, the Northern Ireland Law Commission) to ensure that they carry out their functions having due regard to the need to promote equality of opportunity:

- (1) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- (2) between men and women generally;
- (3) between persons with a disability and persons without; and
- (4) between persons with dependants and persons without.

Without prejudice to the obligations set out above, the Northern Ireland Law Commission is also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. The Commission's Equality Scheme sets out how the Commission fulfils these obligations in carrying out its functions. Throughout the course of the project, the Commission has given due consideration to the impact of our proposals and recommendations on each of the section 75 categories and endeavoured to promote equality of opportunity where possible.

Available Evidence

There is limited statistical evidence available for consideration in this area. We are aware of more general research that is available such as that carried out by the Official of National Statistics which stated that:

Disabled people are a large constituent group in society. There are over ten million disabled people in the UK and on average each parliamentary constituency contains 15,000 disabled voters; a fifth of their total electorate. Moreover, demographic changes mean that we will see a growth in the number of disabled children coming up to voting age and an increase in older voters with age-acquired impairments².

² ONS (2007) National Projections: UK population: www.statistics.gov.uk/cci/nugget.asp?id=13523 Scope / ComRes (2010) National Disabled People's Poll on politics. According to the poll the disabled vote has a very low level of trust (three percent) in politicians, with few (12 percent) feeling that their views and opinions are generally heard by them.(Source: Polls Apart).

However, we have yet to uncover more targeted research on the issues raised in the interim report. In the absence of specific qualitative data much of the evidence has been supplied to us in anecdotal form through discussions with stakeholders and disability groups throughout the course of the project, and through formal consultation responses. This is discussed in further detail below.

The Commission will continue researching for any relevant data, both in statistical and anecdotal format, in the next phase of the project.

Equality Screening Analysis and responses from consultees and disability groups

The Law Commissions' consultation paper invited the public to comment on the impact of our provisional proposals and the equality consequences of any matter on which we asked a consultation question.³ Consultees' responses revealed that the vast majority of our proposals or questions had no impact on equality issues, but commented on some matters where there was a risk of adverse impact, or welcoming a positive impact. We outline the relevant matters further below. ("the recommendations")

The consultees whose responses were partly or chiefly concerned with equality issues and the interests of minority groups included:

- (1) The Royal National Institute for Blind People (RNIB);
- (2) Mencap UK;
- (3) Disability Action Northern Ireland;
- (4) Diverse Cymru;
- (5) The McDougall Trust;
- (6) The Electoral Reform Society;
- (7) The Local Government Ombudsman for England;
- (8) The Public Services Ombudsman for Wales;
- (9) The Scottish Public Services Ombudsman; and
- (10) The Northern Ireland Ombudsman

³ Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, at p 6 para 1.22. The paper is available at http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp218_electoral_law.pdf.

As well as obtaining written responses from the above organisations, the Law Commission engaged with and met some of them, as well as with Scope UK on issues arising out of its 2010 report, *Polls Apart*.⁴ Some limited data and anecdotal reports were provided by consultees, including in Scope's *Polls Apart*. The Law Commission's lawyer appeared on BBC radio 4's programme "In Touch", to comment on issues relating to polling for blind and partially sighted voters.

The written responses and oral feedback from these and other consultees identified some problems with the current law affecting the following section 75 groups:

- (1) Disability: persons with mental health problems and/or learning difficulties who
 - (a) might experience difficulty in accessing and understanding the law and/or
 - (b) experience difficulty in accessing polling stations, voting independently, or using the assisted voting procedure through a companion or the presiding officer.
- (2) Racial group: persons from ethnic minorities were said to be less likely to be informed about electoral law or the voting procedure.

On the basis of the responses and our recommendations, the Law Commissions do not presently consider that the recommendations in the interim report have an adverse impact on the protected groups identified above; having considered the response from consultees, our recommendations would enhance and improve the current law, provide a clear mechanism for informal complaints and a clearer process for legal challenge, and a platform for better and more effective implementation of the law by electoral administrators where the complaints are related to lack of knowledge by them of the legal procedures.

⁴ Scope, *Polls Apart: Opening elections for disabled people* (July 2010), <http://www.scope.org.uk/Scope/media/Documents/Publication%20Directory/Polls-apart-2010.pdf>

One question which was asked in the consultation paper concerned the regulation, through the criminal law, of campaign handling of completed absent voting applications, and postal voting documents. (Consultation question 6-7)⁵ A wide range of consultees answered this question, with some noting that such regulation risks hampering the promotion of access to the vote by disabled or elderly voters through the public purse. In the event, our interim report did not make such a recommendation, including for the reason that regulation would criminalise helpful and otherwise unavailable assistance for those voters who need it.

The recommendations

The recommendations are generally aimed at improving electoral law from the wider public's point of view. Based on the response of, and our interaction with, certain consultees and disability groups, some of our recommendations will particularly benefit protected section 75 groups. We turn to them under certain chapter headings.

A rationalised and holistic legislative structure for elections and referendums

Electoral law is complex, voluminous and fragmented. After 1997, many more types of election and local referendums were created, while recourse to national referendums grew. Each type of election or referendum is generally governed by its bespoke legislation. We describe this feature of the legislative framework as "election-specificity".

More than 17 statutes and some 30 pieces of secondary legislation govern the area of electoral law that is considered by this reform project. Some of their content is repeated, almost word for word, from the "classical" law which is contained in the Representation of the People Act 1983 ("the 1983 Act"), which governs UK Parliamentary elections and some aspects of local government elections in England, Wales and Scotland.

All of the newly created elections use a voting system other than first past the post, for which the classical law contained in the 1983 Act was designed. Accordingly, some of the classical law had to be adapted to account for the different voting system. We call efforts to adapt a classical rule to a new voting system "transpositions". These have not been consistent, even for elections which use the same voting system. This greatly contributes to the problems of volume and complexity.

⁵ Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20 paras 6.106 to 6.133.

This poses problems not only for those consulting the law, but also for implementing new or changed policies. Introducing a new election requires replicating every aspect of the existing electoral law, while introducing new policy requires many different pieces of legislation for each election type. This is undesirable when, in fact, a large number of rules are shared by all elections. It is not a good and efficient use of Government and Parliamentary resources to draft, and to scrutinise the same change of policy, or new policy, in potentially 15 pieces of primary or secondary legislation. Nor is it helpful to those who use electoral law to have such a plethora of sources, and the inevitable differences that creep into the detail of electoral administration of particular electoral events.

As a consequence of the current approach to legislation, there is a particular problem of access to the law in Northern Ireland. Its electoral laws are spread across several pieces of primary and secondary legislation, including an Act of the Stormont Parliament, the Electoral Law Act (Northern Ireland) 1962, which continues to be amended by secondary legislation. The lack of commercial legislation tools in Northern Ireland means that expert stakeholders keep track of amendments with hard copy documents amended by hand. The wider public, including minority groups, faces an uphill task in accessing up to date electoral laws.

Our view is that electoral law should be governed by a rational and holistic framework governing all existing elections. Any new elections – or referendum – would be able to make use of the existing electoral law infrastructure, once certain policy decisions are made, such as the franchise to be employed. Any changes in electoral policy would require just one instance of legislative amendment, not several. Chapter 2 of our interim report makes two recommendations to that effect which we set out below. It is important to note, however, that the approach behind these recommendations underpins recommendations made in other chapters where the election-specific arrangement of electoral law causes particular problems. Rationalising the legislative framework is the key reform aim, and will allow a reforming Act to achieve considerable savings in terms of detail and volume of laws on the conduct of elections in chapters 7, 8, 9 (on nominations, polling and the count) and chapter 10 (on the combination of polls, where the current approach introduces significant complexity). This will improve accessibility to electoral law to the public at large, including section 75 groups.

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

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

Polling district reviews and allocating voters to polling stations.

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

The periodic review and alteration of parliamentary polling districts and places is carried out, in Great Britain, by the local authority council, who are themselves elected and political actors. After consultation, we maintain in chapter 4 of our interim report our view that this administrative task, the aim of which is to make polling convenient for voters (including disabled voters specifically) should be the responsibility of returning officers, rather than local authority councils. We also conclude that appeals from polling district reviews should continue to be heard by the Electoral Commission.

This recommendation does not affect Northern Ireland, whose Chief Electoral Officer already allocates voters to polling station in line for our recommendation for Great Britain.

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

EU Citizens’ declaration of intent to vote at EU Parliamentary elections

While no one has suggested that this part of our proposals affected a protected group under section 5, we consider that there is a possible argument that difficulties in the current law affect ethnic minorities or particular racial groups. The issue, which was reported as a problem in 2013, is that EU citizens’ declaration of an intent to vote in the UK lasts only one year in the current law. Some voters presented at polling stations in 2013 without having made a declaration in the previous year, and were unable to vote. In our interim report, having considered consultees’ responses, we could see no reason in EU law why this should not be extended for the term of the EU Parliament.

Recommendation 4-14: EU citizens’ declaration of intent to vote in the UK should have effect for the duration of the elector’s entry on the register subject to a limit of five years.

Ballot paper design and content

At present, ballot papers are in a form prescribed in secondary legislation (or annexed to the 1983 Act, subject to amendment by the Secretary of State). The increase in the number of electoral events, and the variety of voting systems in use in the UK, led to some criticism regarding the consistency and clarity of prescribed ballot paper forms, included for disabled electors. In more recent times, there has been a shift towards professionally designed, user-tested forms of ballot papers, evidenced by recent changes in the prescribed forms as part of a review by the UK Government.

Reflecting these recent trends, our view is that the form of ballot papers should continue to be prescribed in secondary legislation. In order to improve the experience of voters and the effectiveness of ballot papers, general principles should be enacted so that the existing duty of the Secretary of State to consult the Electoral Commission on changes to electoral law should specifically refer, in the context of prescribed ballot papers, to adherence with those principles. They are:

- (1) internal consistency, which is concerned with preserving presentational equality between candidates;
- (2) clarity, which is concerned with the voter user-friendliness of the form; and
- (3) general consistency, which considers consistency of design across elections and fostering consistent voting habits.

This would be of benefit to all voters, but should be especially helpful for certain section 75 groups such as those with disabilities, ethnic minorities where English is not their first language or older people, who may find it difficult to deal with numerous ballot papers which lack consistency.

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

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

Waiver of signature requirement for absent voting

Under the current law the “personal identifiers” used to check the legitimacy of postal votes must be provided in a certain form. One of the personal identifiers, a signature, may be waived under the current law. However, no guidance is given as to how the registration officer should make the decision to grant a waiver, which risks inconsistent practice and experience by disabled electors who cannot consistently sign in the same way. After considering consultation response, our interim report recommends that applications for a waiver from the requirement for signature should be attested by stipulated persons, as applications to become a proxy currently must be. We consider it is important to retain a facility to deal with this type of situation, whilst also ensuring it cannot be abused or inconsistently applied in order to promote equality of opportunity.

Recommendation 6-6: Requests for a waiver of the requirement to provide a signature as a personal identifier should be attested, as proxy applications currently must be.

Manner of delivery of nomination papers

The classical rules governing the nomination of candidates at UK Parliamentary and local government elections differ slightly. Our recommendations are primarily intended to secure a simple, and general statement of the law governing nomination, but they would also result in a relaxation in the requirement at UK Parliamentary and some other elections for personal delivery of nomination papers by candidates or their agents to the returning officer. While no consultee suggested that this was a particular problem for disabled voters, we certainly consider that enabling postal or electronic delivery of nomination papers would assist disabled potential candidates in putting forward their candidacy for election.

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

The assisted voting procedure and the tactile voting device (Chapter 8)

Equal access for disabled voters to polling is an important policy in the polling context. This manifests itself in part in the “assisted” voting procedure, whereby a voter can cast their vote with the assistance of a companion or the presiding officer. In the former case there are written declarations which must be made by the companion, while a companion may only assist 2 electors at an election. This policy also manifests itself in enabling a disabled voter to vote without assistance where possible, which maintains secrecy of their vote. This is done by ensuring that large size ballot papers are available in polling stations, and by requiring use of a tactile voting device which can help blind and visually impaired electors to vote unassisted. However the description of the device is excessively detailed at some elections. In our view there should be a single formulation of the required characteristics of the equipment to be used to help disabled voters vote unassisted, which in the long term will enable product innovation to assist blind and other disabled voters. Our recommendation also proposes a simplified assisted voting procedure. These recommendations flow from our proposals in the consultation paper, which received widespread support for disability groups who responded to the consultation in improving accessibility to the poll.

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

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

Undue influence

Chapter 11 concerns criminal offences applying only to elections, with a view to restating them simply for all elections. Undue influence is one of the most complex such offences. Section 115 of the 1983 Act draws the offence widely, and our view is that it must capture the following conduct:

- (1) Pressure and duress: to include any means of intimidation, whether it involves physical violence or the threat of it, or some other compelling threat.
- (2) Deception: to cover devices and contrivances such as publishing a document masquerading as a rival campaign's.

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

However, it is very difficult to express the line between “proper” and “improper” pressure. Voters are faced with all sorts of pressure during electoral campaigns. The conduct which is criminal in undue influence, and the accompanying mental element, are not clearly set out. In our view the offence should be redrafted and modernised so it can be understood by candidates and campaigners, by police officers called upon to investigate complaints, by prosecutors who must decide whether to prosecute, and by the courts. The key to distinguishing between the application of proper and improper pressure is whether the pressure involves the commission of an illegal act (such as a crime or wrongful eviction), or applying pressure which a reasonable person would regard as an improper infringement on the free exercise of the franchise. This is the line which is crossed in cases of undue “religious” influence, and we will take particular care in drafting the offence to monitor the impact on religious groups of the offence. Our current view is that our aim is to clarify a difficult and opaque part of the legislation, and it is not intended either to increase or reduce the exposure of religious groups to committing the electoral offence of undue influence. Rather, it is intended to make clear to them how electoral law affects their conduct in respect of an election.

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

- (a) it involves the commission or threat of commission of an illegal act; or
- (b) a reasonable person would regard it as improperly infringing the free exercise of the franchise.

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

Expense limits expressed by formula

Certain expenditure limits, for example those for spending at local government elections or UK Parliamentary general elections, are expressed as formulas. The precise limit can only be established if the candidate or agent knows the number of registered electors on the day that notice of election is published. Our view in chapter 12 is that such expense limits should be declared by the returning officer – who will also know whether his is a borough or county constituency – along with the notice of election. While the problem with the current law is experienced by the wider public, we can see an argument that disabled voters, or other minority or disadvantaged groups, are less likely to be able to calculate expenditure limits either as candidates or as members of the public supporting a candidate. We therefore think that this recommendation will also have a positive impact on protected groups.

Recommendation 12-3: Expenditure limits which are calculated according to a formula should be declared by the returning officer for the constituency or electoral area in a notice accompanying, or immediately following, the notice of election.

Legal challenge grounds, process, and complaints

The law governing legal challenge is extremely complex, the product of historical developments in the 19th century. Chapter 13 divides the subject matter between the ground for reviewing elections, and the procedure governing legal challenge. As to the grounds of challenge, we recommend that they be simplified, clarified, and set out positively in legislation. As to the procedure for bringing an election petition, we consider that the ordinary court structure and procedural rules in the UK should be used, which would benefit the public generally and protected groups in particular. The cost of bringing election petitions is an issue, with the availability of protective costs or expenses orders to cap the costs of challenge in no way beyond doubt. Our recommendation puts that right, paving the way for cost-proportionate challenges brought in the public interest in appropriate cases.

Recommendation 13-8: Legal challenges should be heard in the ordinary court system in the UK, with a single right of appeal to the Court of Appeal (in England and Wales, and Northern Ireland) and the Inner House of the Court of Session in Scotland.

Recommendation 13-9: Election petitions in England, Wales and Northern Ireland should be heard by the High Court; judges, including deputy judges, should be authorised to hear election petitions by the senior judiciary. Election petitions in Scotland should be heard by the Outer House of the Court of Session (for national elections) and by the Sheriff Principal (for local elections).

Recommendation 13-10: Challenges should be governed in each UK jurisdiction by simple and modern rules of procedure. Judges should continue to have regard to the needs of justice, striking a balance between access to the court and certainty in electoral outcomes.

Recommendation 13-12: The power of courts hearing election challenges to make protective costs or expenses orders should if necessary be acknowledged in primary legislation.

Much of the complaints of disability and third sector groups who responded to our consultation, as well as those contained in the reports of Scope (“Polls Apart”) or BBC radio’s in-touch, concern poor and inconsistent understanding or implementation by electoral administration of the current law. Part of the answer lies in simplifying and clarifying electoral laws, so that they are more readily accessible to administrators and the public. Plainly another is the practical task of better electoral management. However a third answer, prompted by consultees and welcomed by disability groups, is for recognition of informal processes for complaints about electoral administration.

“Informal complaints” are those that do not seek to affect the outcome or validity of an election, because the breach of the law or bad practice did not materially affect the election or was not so gross as to invalidate it. Nevertheless, our interim report recommends that the scope for informal complaints should be put beyond doubt by election law. The important issue here is that voters’ complaints – including those of disabled voters and other protected groups - are heard, and lessons are learned by electoral administrators. After asking consultees who should consider such complaints, we conclude that it should be the UK’s local government ombudsmen, who welcomed the role in the consultation.

Recommendation 13-13: Electors’ complaints about the administration of elections (which do not aim to overturn the result) should be investigated by the Local Government Ombudsman in England, the Scottish Public Services Ombudsman, the Public Service Ombudsman for Wales and the Northern Ireland Ombudsman.

Screening Decision

To summarise, the Commission believe that the recommendations contained in the interim report do not have any impact on the following section 75 groups; political opinion (in the context of treating those with certain political opinions more or less favourably than others), marital status, sexual orientation, gender or dependants. Of the remaining categories (religious groups, racial group, age, disability) the recommendations, as set out above, will not have an adverse impact on those groups and will promote equality of opportunity, thereby benefitting these groups. There is potential for impacts on those with multiple equality identities, for example elderly people with disabilities. In such instances the impact would be the same as those people who may fall under one grouping, and the recommendations would apply equally in promoting equality of opportunity.

Where there was potential for an adverse impact in relation to age and those with a disability, in the context of regulation of campaigners handling of absent voting applications, the Commission took mitigating action and decided not to make any recommendations in this context. The remaining recommendations that have not been highlighted in the course of this assessment, are technical in nature which seek to simplify and modernise the current legislative framework and promote consistency across all jurisdictions, and therefore have no impact in relation to equality of opportunity.

Consequently, the Commission does not consider that it is necessary to carry out a full equality impact assessment at this stage. The next stage of the project will further develop the recommendations and due regard will continue to be given to

equality issues and the impact upon section 75 groups. This assessment will be monitored as the recommendations are further developed and a full detailed equality impact assessment will accompany the final report.

Monitoring

The Commission will continue to have due regard to its equality obligations and the impact upon section 75 as the project continues. A detailed equality impact assessment will be undertaken to accompany the final Report and draft legislation. The Commission will not have responsibility for implementation of the recommendations as its role is strictly advisory in nature. Should any of the recommendations be implemented, it will be the responsibility of Government to monitor the potential for adverse impacts on equality groups.

Approval and Authorisation

Screened by	Position/Job Title	Date
Rebecca Ellis	Project Lawyer	25 January 2016
Henni Ouahes	Project Lawyer	26 January 2016