Law Commissions' Review of Electoral Law

Electoral Commission paper on legislative issues that arose in our work relating to the May 2015 elections

September 2015

This note sets out some of the issues that we came across with electoral law during our work relating to the elections held on 7 May 2015. The issues consist, for example, of areas where there seems to be uncertainty in the effect of a provision, a potential gap or inconsistency or where we would wish to make a suggestion for a change to the drafting or policy.

We thought that it would be useful to forward these issues to the relevant Governments and Law Commissions so that any necessary amendments could be made for future elections or addressed as part of the Law Commissions' electoral law reform project.

We would be happy to explain any of these issues in more detail or discuss them further.

1. Tallying at postal vote opening sessions and at the count

1.1. We stated the following in our response to the Law Commissions' consultation:

> Section 66(4)(d) RPA 1983 needs to be clarified so that is it clear whether keeping a tally of postal votes, or a sample of them, at postal vote opening sessions and communicating is an offence. This is commonly referred to as postal vote tallying or sampling. We are aware of one case where a police caution was given to a candidate and her agent in 2010 for tallying / sampling. Our view is that tallying / sampling at postal vote opening sessions is currently unlawful, but we are aware of others who take a different view. Therefore, we would ask the Law Commissions to ensure that the law is clearer on this point, if it is not clarified by amending legislation before the Law Commissions produce their draft Bill.
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> Postal vote opening sessions aside, informal tallying of votes at the count is a common practice and we do not believe it should be a cause for concern. Beyond that the legality of communicating externally either the results of tallying or, later in the process, the apparent progress of the election which can be judged in some cases from the piling up of counted ballot papers is something which should be clarified. Televised election coverage often features reporters that

clearly know much more than they are willing to announce; presumably this reticence is because they are worried about the provisions of secrecy. We feel that this is something which should be safely clarified.

1.2. It seems to us that there is good reason for the law to not allow tallying at postal vote opening sessions, partly for the same reason that the publication of exit polls is not allowed – i.e. it gives an indication of how voters have voted before close of polls. Also, postal vote tallying increases the risk of the secrecy of the ballot being undermined, which is a greater risk at postal vote opening sessions rather than at count because of the smaller number of ballot papers that are being processed. For these reasons we consider that the law should be clarified so that it explicitly prevents postal vote tallying. However, we are not opposed to the law being clarified in relation to permitting tallying at the count (i.e. after polls have closed), so long as it includes safeguards to protect the secrecy of how individual electors cast their vote.

2. Commonly used names

2.1. Rule 6(2A) of the UK parliamentary elections rules (Schedule 1, RPA 1983) provides that if a candidate commonly uses a surname which is different from any other surname he has or a forename which is different from any other forename he has, the nomination paper may also state the commonly used surname or forename.

2.2. Where a commonly used forename and / or surname is provided, this name will appear instead of the actual name on the statement of persons standing nominated and the ballot paper unless the returning officer thinks that the use of the name may be likely to mislead or confuse electors or is obscene or offensive (rule 14(2A) and (2B)). If the returning officer thinks that the commonly used name would be likely to cause confusion or that it is obscene or offensive, the actual name will appear instead.

2.3. It is the candidate's responsibility to ensure that where a commonly used name is given, this is both a name and is something by which they are commonly known. The candidate could face legal action after the election if they entered something that was not their commonly used name, either by way of a prosecution for providing false information under section 65A(1)(a) RPA 1983 or an election petition.

2.4. These provisions have caused some uncertainty in the past and it would be useful to consider whether these provisions could be clarified. For example:

- Is the returning officer able to reject a commonly used name on grounds other than those stated in rule 14(2B), i.e. those other than grounds of confusion, obscenity or offensiveness? What if the returning officer considered that what has been entered on the candidate's nomination paper is not in fact a name that the candidate

commonly uses. Our view is that the returning officer must take whatever has been entered at face value (with the exception in rule 14(2B)) even if the returning officer does not believe that what has been entered is a name and / or something that the candidate commonly uses. However, there is an alternative view – under rule 12(1)(a) and (2)(a) the returning officer is entitled to hold a nomination to be invalid where the particulars of the candidate or the persons subscribing the paper are not as required by law. The commonly used name could be argued to comprise part of these particulars and if the returning officer considered that the commonly used name provided was not in fact the candidate's commonly used name, he/she could arguably hold the nomination paper to be invalid. We do not agree with this interpretation; the commonly used name is not a requirement on the nomination paper, it is an optional addition, so any error in the commonly used name details would not seem to result in the particulars being 'not as required by law'.

At candidate briefings, our view is that returning officers should remind candidates that, by law, a commonly used name is one that is different from any other forename or surname they may have. If, at an informal check stage, returning officers are presented with a nomination form that has been completed in such a way that it appears to the returning officer that the commonly used name given is not different from any other forename or surname they may have, we consider that the returning officer should draw the candidate's attention to the legal definition of a commonly used name and highlight that it is an offence to knowingly make a false statement on the nomination form. The returning officer should also point out that if a nomination form is not completed in accordance with the law, the candidate will run the risk of challenge if they are elected. It is the candidate's responsibility to ensure that they have completed their nomination in accordance with the law.

- Would it be permissible for a candidate to use a prefix / title as their commonly used forename, for example 'Councillor' or 'Professor' – so that the person would appear on the ballot paper as Councillor Smith or Professor Smith? This depends on the definition of a 'forename' – is a prefix / title a 'forename'? Other examples include 'Rt. Hon.', 'Sir', and 'Dr'. Similarly, would it be permissible for a candidate to use a suffix as part of a commonly used surname, for example 'Smith QC' – so the person would appear on the ballot paper as James Smith QC?

- The nomination paper must contain a candidate's full names (rule 6(2)(a) of the UK parliamentary elections rules), so it would appear that they must provide their first name, middle name(s) (if any) and

surname. For example, if someone was called James Edward Smith, they would need to include this name in full on the nomination paper and this would appear in full on the ballot paper.

If they did not want 'Edward' to appear on the ballot paper, could the candidate do so by requesting that their commonly used name is 'James'? The provisions require any commonly used name to be carried forward to the ballot paper instead of any other name, so in this case would the ballot paper only show 'James Smith'? Alternatively, it may be that the candidate would want to drop the 'James' and to do so provides 'Edward' as their commonly used forename.

Our view is that the commonly used names provisions do not entitle a candidate to give their first name as a commonly used name and drop their middle name because their first name is not a name that is different to their 'forename'. This is because rule 6(2A)(b) requires the commonly used forename to be 'different from any other forename he has'.

In relation to whether the provisions enable a candidate to drop their first name by giving only their middle name as a commonly used forename, we have taken the view that this is also not permissible. This is because our view is that the middle name would not be a name that is 'is different from any other forename'. However, the position is arguably less clear in respect of candidates wishing to drop their first name, as this depends on whether a view is taken that a 'forename' includes a middle name. If it does, then the first name cannot be dropped but, if it does not, then the first name can be dropped as the middle name would be different to the 'forename' (i.e. the first name). The term 'forename' is not defined in the legislation and so should be given its natural (contextual) meaning. There are arguments either way on this point. We note for example the dictionary definition of a forename is a 'first' name but on the other hand rule 6(2A) refers to 'a forename which is different from any other forename he has' – the use of 'any other' suggests that 'forename' in this context suggests there could be multiple forenames, presumably first and middle names.

We have recommended in our election report (pages 56 and 57) that the law should be amended to remove the requirement for the commonly used name to be different to any other forename or surname that the candidate has. It is our view that candidates should be able to stand for election using any name that they commonly use (provided it is not confusing or offensive), as this will help voters recognise them on the ballot paper. A candidate who is known by their first name only should be able to appear on the ballot paper without their middle name. Equally, a candidate who is known by their middle name only, should be able to appear on the ballot paper without their first name.

It is interesting to note that the legislation is different in Scottish local government elections. Rule 4(3) states that if a candidate commonly

uses a surname or forename in addition to or instead of any other surname or forename the candidate has, the nomination paper may state the commonly used surname or forename in addition to or instead of the other name, as the case may be.

- Could a candidate add an extension to their surname using the commonly used name provisions? For example, a candidate may have provided the full name 'Jane Smith' but entered 'Smith-Parker' as their commonly used surname (or vice versa). Is this 'different from any other surname' she has, as required by rule 6(2A)(a)? It contains part of the candidate's actual surname but does the extension create an entirely different surname?

- Could a candidate add initials as their commonly used forename so that they could appear on the ballot paper for example as J.K. Rowling? If the candidate used those initials commonly as their forename, we would consider this to be permissible.

3. Can a candidate subscribe their own nomination paper?

3.1. At UK parliamentary elections rule 7(1) (Schedule 1 to the RPA 1983) provides that the nomination paper must be subscribed by two electors as proposer and seconder, and by eight other electors as assenting to the nomination. There is the same or similar provision at other elections, for example at local elections to principal areas the rule is the same (rule 6(1), Schedule 2 to the Local Elections (Principal Areas) (England and Wales) Rules 2006). At parish elections, the rule only requires subscribed by two electors as proposer and seconder (rule 6(1), Schedule 2 to the Local Elections (Parishes and Communities) (England and Wales) Rules 2006.

3.2. The legislation does not expressly deal with whether a candidate could act as one of his/her subscribers, either as proposer, seconder or assenter. As the rules do not contain any express prohibition on candidates subscribing their own nomination, we have consistently taken the view that this is permissible, so long as the candidate is an elector within the meaning of the relevant rule.

3.3. On the other hand, it could be argued that in principle subscribers should be persons other than the candidate and that it should therefore be implied into the rules that a candidate cannot propose, second or assent to their own nomination. For example, at a parish election, if a candidate was an 'elector' as defined in the rules and is able to propose themselves for nomination, they would only need to find someone else to second this; in that case, it would only seem necessary for the law to require one person to subscribe the nomination as presumably the candidate would always be happy to subscribe their own nomination. It is therefore possible that the intention was for subscribers to be persons other than the candidate, to show that the candidate has some local support, but the position is not clear and the alternative argument could be put forward.

3.4. This issue has caused uncertainty in practice, so we would request that the position is clarified in the legislation.

4. The use of languages other than English and Welsh on candidate forms

4.1. Can languages other than English and Welsh be used on candidate forms, such as nomination papers, consents to nomination and home address forms? For example, are candidates in Northern Ireland allowed to write their address in Irish on their home address form at a UK parliamentary election? This address will appear on the statement of persons nominated and the ballot paper.

4.2. *Parker's* discusses language on nomination papers in paragraphs 12.13 and 12.14. Reference is made to the *Evans v Thomas* [1962] 2 QB 350 case, which predated the Welsh Language Act 1967 and found that there was nothing that required nomination forms (or other public documents) to be completed in English. In this case they could be completed in Welsh, partly because the law allowed for a nomination form to the like effect to be used.

4.3. Parker's discusses whether people will be able to read the language locally. The case also discusses this:

> Any difference tending materially to obscure identification or otherwise to produce prejudice to other candidates or the public, or to delay, impede or embarrass the due functioning of the electoral machinery or staff would be so material: in this resides the basic distinction between the very special circumstances found in this case and any hypothetical case of a nomination tendered in a language familiar only to rare persons unlikely to be immediately available in the locality to interpret it. Here the county returning officer could readily read Welsh and, having regard to the facts found, his deputy or any assistant to whom the nomination paper might be handed would have had no difficulty in promptly appreciating or ascertaining its full meaning and effect. Of the population of the urban district of Ammanford, 79 per cent. speak Welsh. All the information required by the statutory rules to be provided was in my judgment set out, and in the circumstances plainly and effectively set out, in the paper tendered, which accordingly was a valid nomination paper (page 357).

4.4. So, under the *Evans* case, if 'a language familiar only to rare persons unlikely to be immediately available in the locality to interpret it' is used, the nomination may be invalid. This goes to the purpose behind the legislation. A candidate must provide their address details on their nomination form, which then appears on the ballot paper, presumably because this is information that voters should know before they cast their vote. Therefore they clearly need to be able to read the address. Also, it is arguable that those attending at the delivery of nominations should be able to read the address so as to be able to object.

4.5. In respect of home addresses, we have advised that the returning officer must be satisfied that what has been provided is the candidate's home address in full. In doing so, the returning officer should have regard to the purpose of the legislation which is to inform electors as to where a candidate lives. We would request that consideration is given to whether there is a need to clarify what languages can be used on candidate forms.

5. Legislative references in the consent to nomination form at principal area elections

5.1. Under section 34(4) of the Localism Act 2011, a court may disqualify a person who has committed a specified offence under the 2011 Act for up to 5 years for being or becoming a member or co-opted member of a relevant authority. The 2011 Act extends to England and Wales by virtue of section 239(1), subject to the other provisions in section 239 (none of which limit the extent in respect of section 34).

5.2. However the candidate's consent to nomination (Appendix of Forms, Part 7, Schedule 2, Local Elections (Principal Areas) (England and Wales) Rules 2006) refers to disqualification under the 2011 Act for England, but does not do so for Wales. It is possible for someone seeking nomination in Wales to have been disqualified under section 34 of the 2011 Act, so the declaration in the consent to nomination should be amended.

5.3. We also notice that for both England and Wales, section 78A of the Local Government Act 2000 is referred to, despite this having been repealed.

5.4. Please could the wording of the consent to nomination form be reviewed to ensure that it does not contain any inaccuracies.

6. Impact of changes to a party's registered details on what appears in the statement of persons nominated and ballot paper

6.1. We would support there being a clear deadline, which should be before the period for nominations opens and should, if practicable, be expressed as a fixed number of days before polling day, after which any changes made to a party's name, emblem, description and officers that are granted by the Commission do not take effect until the day following the poll. Any fixed deadline would therefore need to be before the earliest point at which nominations can be opened at different electoral events.

6.2. At present the law only achieves this in respect of the substitution or removal of descriptions (section 30(6A) of the Political Parties, Elections and Referendums Act 2000). We believe that there is no good reason why the same provision should not be made for changes to party names, emblems and officers.

6.3. Section 30(6A) only refers to changes made after the publication of notice of election. This can cause administrative difficulties where returning officers publish notices at different times. We believe a fixed date would be preferable

for all changes (party names, descriptions, emblems, and officers) if a practicable date could be identified for all elections. This is something that would need further consideration.

6.4. Once the election is underway any changes to a party's registered details can cause administrative problems and may lead to voter confusion, unless there is a clear provision that provides that any such changes do not apply until after the election. For example, if a party changes their registered emblems during the nominations period, after candidates standing on behalf of the party had requested the use of an emblem, this causes uncertainty after the close of the nominations period as to which emblems the candidates are entitled to use (if any) where the requested emblem had subsequently been substituted or removed by the party.

6.5. There would be clear practical benefits of having an earlier, fixed date for changes, as opposed to only simplifying the law to be clearer on the effect of later changes. Having an earlier, fixed date would create certainty for administrators, which would help to make administering elections more straightforward. There would be an impact on parties as it would reduce their ability to make changes to their registered details during an election, so it will be important to ensure they are consulted on the impact of any changes.

7. Power to correct procedural errors

7.1. Section 46 of the Electoral Administration Act 2006 is headed '**Returning officers: correction of procedural errors**'. Section 46(1) states that a returning officer for an election to which this section applies may take such steps as he thinks appropriate to remedy any act or omission on his part, or on the part of a relevant person (i.e. the registration officer, presiding officer, a person providing goods or services to the returning officer or a deputy / assistant of such persons), which:

(a) arises in connection with any function the returning officer or relevant person has in relation to the election, and

(b) is not in accordance with the rules or any other requirements applicable to the election.

7.2. Subsection (2) adds that a returning officer may not under subsection (1) re-count the votes given at an election after the result has been declared.

7.3. In addition subsection (6) provides where a returning officer remedies an error under this section he is not guilty of the offence of breach of official duty set out in section 63 RPA 1983.

7.4. The scope of the power conferred on returning officers by section 46 is not clear. The fact that the heading refers to 'procedural' errors seems to suggest a narrow scope. It suggests that not all errors can be remedied; only those that are 'procedural'. So arguably an error that was substantive, rather than procedural, could not be corrected. However, the distinction between a

procedural and substantive error would seem difficult to determine in practice.

7.5. Also, the reference to 'procedural' in the heading seems to be at odds with the body of the provision. The provision itself appears to confer a broad power to remedy any error. The only express restrictions on the use of this power in the provision are that:

- the act or omission must arise in connection with any function the returning officer or relevant person has in relation to the election,
- the act or omission must be not in accordance with the rules or any other requirements applicable to the election, and
- in correcting the error the votes cannot be re-counted after the election result has been declared.

7.6. There's also a question as to whether there are in fact implied restrictions on the use of this power in addition to the three express restrictions listed above. For example, there is the potential for different interpretations as to whether the returning officer would be able to exercise his/her decision-making functions again (once a decision has been taken) or do something that would be inconsistent with or not expressly provided in the election rules.

7.7. If there are any additional, implied restrictions it might be useful to set these out clearly in the legislation.

7.8. There is case law on this provision but it seems to add little to the legislative wording. In *Fitch v Stephenson* [2008] EWHC 501 (QB) (DC) Mrs Justice Cox stated 'In our judgment, the purpose of section 46(1) is to enable Officers to take appropriate steps to correct any procedural errors and, as sub-section (6) makes clear, if he does so, to prevent him being prosecuted under the RPA for an act or omission in relation to the conduct of the election' (paragraph 59).

7.9. The explanatory notes provide a little assistance:

> This section allows returning officers to correct errors or omissions that arise during the preparation for and conduct of elections. This will apply to acts and omissions that are made by those administering elections (returning officers, EROs and their staff) and those supplying goods and services to the administrators. By way of example, electoral documents printed with incorrect details would be capable of correction under this provision.

7.10. However, this could support either a wide or narrow interpretation of section 46. On the one hand, the notes state that this power allows returning officers to correct errors or omissions (not just 'procedural' errors) arising during the preparation for and conduct of elections – this suggests a wide interpretation, i.e. any error made in preparing for or delivering an election

could be corrected. However, the example given appears more procedural than substantive, i.e. correcting printing errors.

7.11. When providing advice to electoral administrators on this provision, we have taken the view that the power was only intended to apply to procedural errors. So, for example, we have advised that the power can be used to reissue postal ballot papers that contained an error such as if the papers said that electors could vote for up to three candidates, when in fact it was up to two candidates.

7.12. The interpretation of this provision frequently causes uncertainty and we would welcome consideration of what the scope of the power should be and whether the provision should be clarified.

8. Duty to send statement of persons nominated and certificates of authorisation to the Electoral Commission

8.1. RPA 1983, Schedule 1, paragraph 14(5) states that

> The returning officer shall send to the Electoral Commission a copy of the statement and in the case of each candidate standing nominated in respect of whom a certificate has been received by the returning officer in accordance with rule 6A(1) or (1B) above, a copy of that certificate as well.

8.2. We have considered this provision and concluded that we do not require these documents to be sent to us on the basis that much of this information is made publicly available by Returning Officers and we generally access it via council election webpages. We request that this be amended to say that we may require copies to be provided.

9. Use of 'fraudulently' in electoral law

9.1. The word 'fraudulently' is used in some provisions. For example, section 65(1) provides that a person is guilty of an offence if he:

a) fraudulently defaces or fraudulently destroys any nomination paper; or

b) fraudulently defaces or fraudulently destroys any ballot paper, or the official mark on any postal voting statement or ballot paper, or any declaration of identity or official envelope used in connection with voting by post; or

c) without due authority supplies any ballot paper to any person; or

d) fraudulently puts into any ballot box any paper other than the ballot paper which he is authorised by law to put in; or

e) fraudulently takes out of the polling station any ballot paper; or

f) without due authority destroys, takes, opens or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election; or

g) fraudulently or without due authority, as the case may be, attempts to do any of the foregoing acts.

9.2. 'Fraudulently' is not defined and so there has been uncertainty as to what constitutes an offence under this provision. It may be that there are clearer ways to express the intention behind these provisions (and similar language in other provisions).

10. Applications for relief

10.1. Section 167 RPA 1983 allows a person to apply for relief in respect of any act or omission that would constitute an illegal practice. Relief will be granted if the court is satisfied that the act or omission arose from inadvertence or from accidental miscalculation or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith (section 167(2)(b)).

10.2. Relief can also be granted under section 86 for failure to deliver returns or declarations as to election expenses, or any error or false statement contained in them. One of the grounds for granting relief is that the failure, error or false statement arose by reason of inadvertence or any reasonable cause of a like nature and not by reason of any want of good faith on the applicant's part (section 86(3)(d)).

10.3. On the meaning of 'inadvertence', the Law Commissions refer to *McCrory v Hendron* [1993] NI 177 (High Court of Northern Ireland) at p 224 (Kelly LJ). In this case the court held that when establishing whether relief should be granted on the ground that an illegal practice had occurred as a result of inadvertence, a broad definition should be used to include both inattention to, and ignorance of, the law. The judgment adds that negligence would constitute inadvertence, for example negligently failing to check the relevant legislation or documentation

10.4. This principle was also applied more recently in *Finch v Richardson* [2008] EWHC 3067 (QB). The court found that ignorance of the law could constitute 'inadvertence' within the meaning of sections 86 and 167 of the 1983 Act. On the facts the commission of the illegal practices had been inadvertent, despite the fact that the first claimant was a lawyer and that both claimants had previous experience of elections. Accordingly, in all the circumstances, including the fact that there was no suggestion of bad faith on the part of the claimants, relief would be granted.

10.5. We would question whether it is appropriate for someone to be able to be granted relief in respect of an electoral offence on the grounds that it was

committed inadvertently. As the case law shows this allows candidates and their agents to avoid committing offences due to ignorance of the law and negligence. Although this may have been the policy intention when these provisions were first enacted (which appears to have been in 1949 but they may date back further), we think that this is unlikely to be consistent with modern expectations. In the twenty first century we do not think that ignorance of the law or some other sort of negligence should be grounds for relief from prosecution. Such grounds seem to us to weaken the regulatory framework and endanger public confidence and trust in electoral integrity.

10.6. We would request that these provisions are amended so that inadvertence is not a ground for being granted relief in sections 86(3)(d) and 167. However, this should be part of a broader consideration of what the grounds should be for seeking relief or indeed whether there should be a right to seek relief at all.

11. Schools and rooms for candidate meetings

11.1. Sections 95 and 96 RPA 1983 gives a candidate a right to hold public meetings in furtherance of his/her candidature free of charge in certain schools and public meeting rooms. However, expenses incurred, for example, in heating and lighting the room, must be defrayed by the person by whom or on whose behalf the meeting is convened (presumably the candidate).

11.2. It is not clear whether a hustings for multiple candidates could be held under these provisions. The provisions refer to ‘candidate’ in the singular and there is no provision for dividing the expenses payable between the candidates if they all convened the meeting.

11.3. We can see no good reason why electoral law should not allow multiple candidate hustings to be held free of charge, presumably with any expenses being split equally between all the candidates attending. The holding of such events would be in voters’ interests. We would request that the law is amended to this effect.

12. Use of candidate or party descriptions on ballot papers

12.1. Our report on the May 2015 polls highlights one of our longstanding recommendations about clarity of candidate descriptions on ballot papers (pages 63-65). UK Parliamentary ballot papers can include a registered party description without any reference to the registered party name. We are concerned this presents arisk that voters may not know if a candidate is standing for election on behalf of a particular party. We continue to recommend that where a candidate represents a political party , it should be clear to voters on the ballot paper which party the candidate represents.

12.2. Our report also highlights the challenges presented by the UK’s registration system, which allows each political party to register a name, up to 12 descriptions and three emblems, and which requires us to ensure that

these identity marks are sufficiently dissimilar from another party. We are concerned about the increasing size of the party registers and the growing complexity of applying the registration tests. Because of this, it is becoming more difficult for the Commission to manage the risks of confusion for voters. Additionally, the participation of new parties is becoming ever more restricted by the choices of words and phrases used by other parties in their 12 descriptions.

12.3. We have recommended that the UK Government should reform or remove the provisions on party descriptions. Following the 2014 polls, we discussed the party registration legal provisions and the risks of voter confusion with the UK Government and jointly considered possibilities for changing the ballot paper rules regarding party descriptions. The UK Government opted not to make changes ahead of the polls in May 2015, but did indicate that it was willing to consider changes in the medium term.

12.4. If the Law Commissions want to explore the scope to resolve these issues within the review of electoral law, we would be pleased to discuss several potential legal solutions. These could include changes to the provisions in Part 2 of PPERA and changes to the election orders which prescribe the contents of candidate nomination forms and ballot papers. The Association of Electoral Administrators' report on the 2015 elections describes some of the practical problems that arose because the 'description' field on the prescribed nomination forms is unclear and frequently misunderstood by candidates[1].

13. Transparency and regulation of open primary party selection contests held close to an election or during a candidate regulated period

13.1. Our report on the May 2015 polls highlights an issue around transparency and regulation of open primary party selection contests held close to an election or during a candidate regulated period (pages 73-74). Open primaries are where members of the public, not just party members, are invited to decide who should stand for a political party at an election.

13.2. Depending on how an open primary process is run, there are two kinds of spending to consider:

- Spending by the political party to promote the open selection process to the public and pay for the costs of running it
- Spending by contestants in the public contest, including by the winner who subsequently is nominated as the party candidate at the election.

13.3. Usually, if a party conducts an open primary selection process outside of a party regulated period, there would be no requirements for transparency

[1] http://www.aea-elections.co.uk/wp-content/uploads/2015/07/aea-report-elections-and-ier-challenge-of-2015.pdf (page 110).

of the party's promotional or administrative spending. But, if a PPERA regulated period is in place at the time, any spending by a party for an open primary or similar publicity exercise during that period will be subject to PPERA party spending limits.

13.4. If an open primary contest is held far in advance of an election, there is no candidate regulated period in place. But if an open primary is held after an election or by-election has been called, it may take place during the candidate regulated period. However, in these circumstances, the candidate spending limits only apply from the day after the person's selection until polling day and not to any spending on publicity while they are competing in an open primary to become selected. In contrast, if other candidates standing in the election have already been selected by their party or nominated as an independent, any spending they incur during that time will be regulated.

13.5. During November 2014, the Conservative Party used an 'open primary' to select its election candidate at the Rochester and Strood by-election. The timing of that by-election highlighted that the law needs clarifying in relation to open primaries held just prior to a by-election and during the candidate regulated period. When an open party contest is held close to an election, it means that the candidate and party can benefit from additional publicity and voter engagement that is not clearly regulated by the candidate spending rules but which may well have an impact on voters casting their vote at the forthcoming election. At present, the law does not require all such spending to be declared and made transparent. It also means that spending by a winning primary contestant will only count against spending limits after the point when they have won the primary contest. Depending on the date of the outcome of the primary, this may give them a spending advantage against other election candidates who will have to count their spending for the whole of the regulated period against their spending limit.

13.6. We recommended that governments with legislative competence over elections within the UK should consider transparency and regulation of open primary party selection contests held during a candidate regulated period. If an open primary contest takes place **during** a candidate regulated period, the campaign spending that promoted the successful open primary contestant should be transparent and subject to appropriate limits, and relevant donations towards this spending should be subject to appropriate controls. Consideration should also be given to transparency of the costs of unsuccessful primary contestants and the central party in relation to such open primaries.

14. Appeals against reviews of polling districts and places

14.1. We are currently reviewing this area of law in detail and will provide our comments in a separate paper.

15. Section 75 RPA 1983

15.1. We have come across an issue relating to how section 75 RPA 1983 is meant to operate. We are currently considering this and will be providing further details.