

From: Electoral Commission

To: Henni Ouahes (England and Wales Law Commission), Esther Drabkin-Reiter (England and Wales Law Commission)

Cc: Rebecca Ellis (Northern Ireland Law Commission), Gillian Swanson (Scottish Law Commission).

Subject: Issues relating to the legislation governing the elections taking place on 22 May 2014

Date: 21 February 2014

Background

The Electoral Commission has recently published guidance for returning officers, candidates and agents relating to the European Parliamentary elections being held on 22 May 2014.

During the preparation of that guidance we came across a number of issues which we thought it may be useful to bring to the attention of the Law Commissions. 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. Some issues are specific to European Parliamentary elections, whilst others will apply to other elections as well. A small number of issues at the end of the note do not relate to European Parliamentary elections but to other elections that will also be held in May 2014.

The issues are set out below. We would be happy to explain any of them in more detail or discuss them further.

Issues relating to the legislation governing the elections taking place on 22 May 2014

1. Section 2(5) to (9) of the European Parliamentary Elections Act 2002: method for allocating seats

- 1.1. Section 2(5) to (9) sets out the method for allocating seats at a European Parliamentary election, often referred to as the d'Hondt Formula. It may be possible to further clarify in the legislation how seats are to be allocated. For example, it is not clear in section 2 that throughout the process the divisions required to be made in section 2(6) must always be to the number of number of votes actually received by that party and not the number of votes that results from a previous division in a previous step in the allocation process. We set out how we consider section 2 works in practice on pages 67 and 68 of our guidance for the European Parliamentary elections on 22 May 2014 (see below).

http://www.electoralcommission.org.uk/_data/assets/pdf_file/0020/164324/PE-Guidance-for-Regional-Returning-Officers.pdf

2. Section 2(5) to (9) of the European Parliamentary Elections Act 2002: allocation of seats where a candidate has died

- 2.1. Where an individual or party candidate dies following the publication of the statement of parties and persons standing nominated, the election continues and is not countermanded or abandoned. The only difference is that rule 32(9) provides that where proof has been given to the returning officer's satisfaction of the death of a candidate on a registered party's list or an individual candidate, he must request each local returning officer to provide each presiding officer with a sufficient number of notices to this effect for display in every compartment of every polling station.
- 2.2. Therefore the deceased candidate will appear on the ballot paper. Despite the notices displayed in the polling station compartments it is possible that votes will vote for that individual or their party. There is no requirement to disregard votes given to such an individual candidate or to treat a party list candidate as omitted from a party list during the allocation, as there are where a candidate is found to have been disqualified under the new rule 60A(2) and (3). Therefore it is possible for a deceased party list or individual candidate to be allocated a seat.
- 2.3. This appears to be an unintentional omission in either section 2 or the election rules. It seems that there should be an equivalent of rule 60A(2) and (3) for where a candidate has died.
- 2.4. However, even if the legislation contained such a provision we would remain concerned that the approach taken for European Parliamentary elections effectively deprives voters who unknowingly vote for a deceased candidate of their vote. In addition there is also the possibility that had the candidate been removed from the ballot paper, the voters who voted for him/her would have voted differently and in such a way that the result would have been different. In a close election, this could lead to a narrowly defeated candidate feeling a sense of grievance and also lead to a loss of trust in the system amongst voters. It seems undesirable that an election is allowed to go ahead with a ballot paper that includes a deceased candidate. We would request that consideration is given as to whether the election should be cancelled or whether the candidate could be omitted from the ballot paper.
- 2.5. We can see the rationale for not cancelling the poll where a party list candidate has died because their place could be filled by someone else on the list (provided the legislation required this) but it is different where an individual candidate has died. In any event, it seems preferable to cancel the election or omit the candidate's name from the ballot paper as the presence of the deceased candidate's name on the ballot paper may lead a voter to vote for a particular party in the false belief that they are helping that candidate to become their MEP. However, we note that it may be difficult to remove a candidate's name once postal ballot papers have been issued.
- 2.6. We also have a comment about rule 32(9), which is set out below.

3. Section 10: relevant date for disqualification

- 3.1. Section 80 of the Local Government Act 1972 states that disqualifications for local government elections apply to 'being elected or being a member' (and similar wording is used e.g. for Police and Crime Commissioner elections). This formulation was held in *Harford v Linskey* (1899) and subsequent case law to mean that disqualifications applied at the point of nomination (on the basis of a purposive rather than literal interpretation).
- 3.2. However, entirely different wording is used in section 10 of the European Parliamentary Elections Act 2002, which refers to being disqualified 'for the office of MEP'. References in section 10(6) to a return being void if the person who is returned as the MEP is disqualified suggest that the point at which the result is declared is the latest time at which the disqualifications could be interpreted as applying (as opposed to a potential later point of 'taking up office') but it is not clear if they would also apply from nomination. There are arguments both ways but, as a starting point at least, a court might ask why such different wording was used in the EPE Act than in the LGA if the same result was intended.
- 3.3. Very similar wording to the EPE Act is used for Westminster elections; section 1 of the House of Commons Disqualification Act 1975 simply refers to a person being disqualified 'for membership of the House of Commons'. Similar wording is also used for elections to the National Assembly for Wales (section 16 of the Government of Wales Act 2006). However, there are additional anomalies in some of the specific disqualification provisions. For example, under the Insolvency Act 1986, section 426A(1)(a) (English, Welsh and NI bankruptcy proceedings) disqualifies someone from 'membership' of the House of Commons, whereas under section 427(1)(b) (Scottish court proceedings) disqualifies the person 'for being elected to, or sitting or voting in, the House of Commons'. There is also the Representation of the People Act 1981 in relation to prisoners, which uses the 'disqualified for membership' wording in section 1, but goes on to spell out in section 2 that, if someone who is disqualified for membership is elected, that election shall be void, and also that if they are nominated their nomination is void.
- 3.4. There seems to be a clear case for clarifying the law on the time when disqualifications apply, not just for European Parliamentary elections but for all elections. This is an important point which affects an individual's ability to stand for election and could lead to challenges to the election result; we would request that there is a clear statement in the law as to when disqualifications apply (e.g. when delivering the nomination, on close of nomination or on polling day) and that this is applied consistently to all elections to avoid the anomalies stated above.
- 3.5. Even if the safe position at present is for candidates to ensure that they are not disqualified before they deliver their nomination, there is scope for much uncertainty if, for example, a candidate realises post-nomination but pre-poll

that they are disqualified (e.g. because they hold a relevant office), but then ensures they have removed the disqualification (e.g. by resigning from the relevant office) before polling day.

3.6. For European Parliamentary elections there is the added complication that 'incompatible' EU offices aren't treated as disqualifications for domestic purposes but instead are covered by the European Act of 1976. Article 1 just specifies that 'the office' of MEP 'shall be incompatible with' the listed EU offices. Since article 11(4) provides that the powers of the outgoing European Parliament cease upon the opening of the first sitting of the new Parliament, there must be an argument that new MEPs don't take up office until that point – giving candidates the chance to see if they've been successful before resigning their post.

4. Regulation 25(4) and 9(4A) of the European Parliamentary Elections Regulations 2004: correction of administrative errors and criminal liability

4.1. Regulation 25(4) provides that a local returning officer is not guilty of the offence of breach of duty if the local returning officer remedies that act or omission in full by taking steps under regulation 9(4A). We are not sure why there is no equivalent provision for a regional returning officer or the other persons who are also liable to commit this offence.

5. Regulation 28: discrepancies relating to offences in connection with candidature

5.1. It seems that a UK national who stands as a candidate in one UK electoral region and also in another member state isn't committing an offence under regulation 28 (or any other provision as far as we're aware). However, an EU citizen who does the same is likely to be in breach of regulation 28(1) because of the declaration that they are required to make under rule 9(4) of the EPE election rules and anyone who stands in more than one electoral region within the UK is likely to be committing an offence under regulation 28(2). The 'electoral regions' are set out in section 1 of the EPE Act 2002 and it does not seem possible to argue that the term extended to Member State electoral regions.

5.2. It is also not immediately clear why it is a less serious offence to make a false declaration on the EU national form (regulation 28(1) - £1000 maximum fine), which could include standing in both the UK and another Member State, than it is to stand in more than one UK electoral region (regulation 28(2) - £5000 maximum fine).

6. Regulation 32: computation of time for the purposes of Part 2 to the Regulations

6.1. This issue arose whilst we were producing guidance in Northern Ireland, so is set out below in respect of regulation 33 of the European Parliamentary Elections (Northern Ireland) Regulations 2004 but the issue is exactly the same in regulation 32 of the European Parliamentary Elections Regulations

2004. In summary there is uncertainty as to whether regulation 32(1)(b), which provides that in computing any period of not more than 7 days non-working days must be disregarded, applies to all such periods or only when the last day for doing something is a non-working day.

7. Regulation 51(2)(c) and reference to regulation 46(2): return of election expenses (individual candidates)

7.1. This appears to be a case of needing to amend the drafting to correct an inadvertent error in that the European Parliamentary Elections Regulations 2004 did not correctly reproduce the parallel provision in the RPA 1983 and failed accurately to cross-reference the relevant provision.

7.2. Regulation 51(2) reads:

(2) A return under this regulation must—

(a) specify the poll by virtue of which the return is required;

(b) specify the name of the candidate to whom the return relates and of the candidate's election agent; and

(c) under a separate heading with any expenses in respect of which a return is required by virtue of regulation 46(2).

7.3. There appears to be an error in the drafting of sub-paragraph (c) as it does not seem to us to make grammatical sense. The corresponding provision in the RPA 1983 is section 81 (Return as to election expenses) which reads:

(2) A return under this section must—

(a) specify the poll by virtue of which the return is required;

(b) specify the name of the candidate to whom the return relates and of the candidate's election agent; and

(c) deal under a separate heading with any expenses in respect of which a return is required by virtue of section 75(2) or 75A(6)] above.

7.4. It is apparent that the first word of sub-paragraph (c) in the EPE Regulations provision has been inadvertently omitted (though it is somewhat unclear as to how a return should 'deal with' the specified expenses). Section 81 also sheds light on the reference in regulation 51(2)(c) to regulation 46(2) (which does not require a return). The corresponding provision to section 75(2) referred to in section 81(2)(c) is regulation 46(3). So in regulation 51(2)(c), the reference to 'regulation 46(2)' should read 'regulation 46(3)'.

7.5. However, as a matter of policy the Commission regard regulation 46 as unnecessary. As mentioned in our Regulatory Review Report, the

requirement to provide a return to the returning officer under section 75(2) of the GB Regulations – which is the equivalent provision of regulation 46(3) of the NI Regulations – is effectively double reporting. Every election expense authorised by a candidate (either payments made by persons authorised or notional spending) has to be included in the candidate's spending return. Requiring these persons authorised to provide a separate return to the returning officer does not in our view add any transparency benefit and in practice causes confusion. Our recommendation (R40) can be found on pages 72-73 of our Report:

http://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/157499/P_EF-Regulatory-Review-2013.pdf

8. Regulation 52 and Schedule 7: declarations as to election expenses (individual candidates)

8.1. Regulation 52 prescribes a composite declaration form in Schedule 7 to cover various scenarios:

- Declaration by election agent (where one has been appointed) – paragraph (1);
- Declaration by candidate – paragraph (2);
- Declaration by candidate acting as own agent – paragraph (5).

8.2. In addition, the form itself says '(NOTE — Where there has been a change of election agent, suitable variations may be introduced into the declaration as to expenses.)'

8.3. This is confusing, especially as the modifications which need to be made to be appropriate for each scenario are not fully or clearly specified – even though in the case where the candidate is own election agent paragraph (5) says 'the declaration by the candidate as to election expenses shall be modified as specified in the form in Schedule 7'.

8.4. The confusing nature of the form probably stems from the way regulation 52 is constructed and the drafting of paragraphs (1), (2) and (5) could be helpfully revisited to separate out each of the possible scenarios to make the requirements in each case more clear.

8.5. In addition, we came across another minor point on Schedule 7 – the reference to the relevant regulation should be regulation 52 (not 51).

9. Regulation 58: publication of time and place for inspection of returns and declarations

9.1. Regulation 58(1)(a) provides that the returning officer shall, within 10 days after the end of the time allowed for delivering to him returns as to election expenses, publish in at least one newspaper circulating in the electoral region for which the election was held a notice of the time and place at which the returns and declarations (including the accompanying documents) can be inspected.

9.2. In our Regulatory Review Report we commented that the current requirement to circulate a notice in newspapers is also restrictive and expensive compared to other alternatives, such as publishing the notice on the council's website. Given developments in technology, the current legislation is in our view outdated. This is not an issue that is specific to European Parliamentary elections. Please see page 63 of our Report:
http://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/157499/P/EF-Regulatory-Review-2013.pdf

10. Regulation 59: making returns and declarations available online

10.1. In our Regulatory Review Report we stated that there is uncertainty as to whether the current legislation allows returning officers to publish candidate spending returns online as well as making them available for inspection in a physical place, such as a local authority office. Making returns available online, at least for major elections such as European Parliamentary elections, would improve transparency. This is not an issue specific to European Parliamentary elections; it applies to all elections although we note in the report that there may be a case for different provision being made for local government elections where they may be less of a case for online publication.

10.2. Regulations 59(1)(a) provides that copies of the documents must be made available for public inspection at the returning officer's office, or some other convenient place chosen by him. It is unclear whether 'some other convenient place' could be a website and also whether this allows for inspection at the office and some other place or the office or some other place.

10.3. We recommended in our Report that the law should be both clarified and modernised in this area. Making these documents available online is in our view an important part of the modernisation required of the UK's electoral law. Please see pages 62 to 64 of our Report for more details:
http://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/157499/P/EF-Regulatory-Review-2013.pdf

11. Regulation 59(1)(b): fee for supply of election expense returns and declarations

11.1. Regulation 59(1)(b) provides that where the appropriate officer receives any return or declaration under regulations 51(1) or 52 he/she must if requested to do so by any person, and on payment of the prescribed fee, supply that person with a copy of the return or declaration and any accompanying documents. There does not appear to be any prescribed fee. Instead there seems to be a need to state what the fee is in the regulation itself (for example see regulation 49(3) of the Police and Crime Commissioner Elections Order 2012). There is a prescribed fee under the Representation of the People Act 1983 but this only applies to UK parliamentary and local government elections.(section 89(1)(b) RPA 1983

and regulation 10(3) of the Representation of the People (England and Wales) Regulations 2001).

12. Rule 1 of the European Parliamentary election rules (Schedule 1): delivery of nomination papers and lists of candidates

12.1. The Timetable in rule 1 provides that the nomination paper and list of candidates can only be delivered between 10am and 4pm on any day after the date of the publication of the notice of election but not later than the nineteenth day. At local government elections there is no start date specified for the delivery of the nomination papers in the Timetable. The Timetable in the principal area rules only states that the nomination paper is to be delivered not later than noon on the nineteenth day before the day of election. However, rule 3(1)(a) of the principal area rules requires the notice of election to state the place and times at which nomination papers are to be delivered, so it seems that nomination papers cannot be delivered before the publication of the notice of election as a result of this provision. We were unsure whether this is a deliberate difference in drafting designed to create a different outcome or whether this inconsistency has arisen by accident. It seems likely that the effect is the same in both rules but it appears to be an example of an unnecessary inconsistency in the drafting.

13. Rule 1 of the European Parliamentary election rules (Schedule 1): period for the making of objections

13.1. We have found the drafting of the time for making objections to be complex and the wording seems capable of simplification. The present wording is as follows:

During the hours allowed for delivery of nomination papers and lists of candidates on the last day for their delivery and the hour following; but (a) no objection may be made in the afternoon of that last day except to a nomination paper delivered within 24 hours of the last time for its delivery and, in the case of a nomination paper so delivered, no objection may be so made to the sufficiency or nature of the particulars of a registered party or candidate on the party's list or individual candidate unless made at or immediately after the time of the delivery of the nomination paper; and (b) the foregoing provisions do not apply to objections made in pursuance of rule 18(2).

13.2. In addition, the meaning of the phrase 'sufficiency or nature of the particulars of a registered party or candidate' is not clear and not defined or used elsewhere in the rules. It is not clear what objections this would not include (and which would therefore not need to be made at or immediately after delivery), for example, would it not include objections relating to disqualification.

14. Rule 2(1): calculation of time

- 14.1. Rule 2(1) contains two points (which may benefit from being separated into two provisions). The meaning of the first appears to be clear, i.e. when calculating the time for doing something set out in the Timetable in rule 1, e.g. delivery of nomination papers, non-working days must be excluded. The meaning of the second point seems more uncertain. It provides that ‘any such day must not be treated as a day for the purpose of any proceedings up to the completion of the poll nor must the returning officer or local returning officer be obliged to proceed with the counting of the votes on such a day’.
- 14.2. It seems to us that the reference to ‘proceedings’ relates back to the ‘proceedings’ listed in the Timetable in rule 1. The effect of the provision therefore is that none of those proceedings may be done on a non-working day, e.g. the returning officer cannot publish the notice of election and a candidate cannot deliver a nomination paper to the returning officer on a weekend. In addition, the rule clarifies that the returning officer or local returning officer must not be obliged to proceed with the counting of the votes on such a day (although presumably they could do if they wanted to).
- 14.3. However, in recent correspondence with Peter Richardson (Cabinet Office) it appears that a different interpretation has been taken. Peter informed us that the Cabinet Office’s view is that in rule 2, the wording ‘any such day must not be treated as a day for the purpose of any proceedings up to the completion of the poll’ is not confined to the proceedings listed in rule 1 but to ‘all relevant proceedings’.
- 14.4. This issue arose because a new requirement, with its own deadline, has recently been inserted for EU candidates (other than British, Irish, Maltese or Cypriot citizens) (rule 9(2)). Rule 9(2) provides that a condition for such an EU candidate standing for election is that a declaration under paragraph (4) must be delivered to the returning officer, whether before or after the notice of election is published, but not later than 4 p.m. on the twenty-fourth day before the date of the poll. There is no provision expressly applying rule 2(1) to the calculation of this 24 day period (as there is elsewhere in the rules, e.g. rule 5(8)). Given that this condition is not one of the proceedings listed in the Timetable in rule 1 and rule 2(1) is not expressly applied in rule 9, it seems arguable that the 24 days should be counted as calendar days. However, given that this reading would clearly defeat the purpose of rule 9 (the deadline would be after the close of nominations), we have issued guidance stating that the 24 days should be read as working days.

15. Rule 2(2)(a): impact of Gibraltar bank holidays

Bank holidays celebrating the same occasion but on different dates in the UK and Gibraltar

- 15.1. This defines ‘bank holiday’ (which is one of the types of day to be excluded from calculating the Timetable in rule 1 by virtue of rule 2(1)) as:

in relation to a general election in the combined region, a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom or a bank or public holiday in Gibraltar not otherwise falling within sub-paragraph (b) of paragraph (1).

15.2. Sub-paragraph (b) of paragraph (1) refers to Christmas Eve, Christmas Day, Good Friday or a bank holiday.

15.3. The effect of this provision is that there will be a separate timetable for the South West electoral region at the European Parliamentary elections that is different for the timetable in all other regions. This is because there are bank holidays in Gibraltar on 28 April 2014 and 1 May 2014 (Workers Memorial Day and May Day), which are not also bank holidays in the UK and will need to be excluded when calculating the timetable in the South West region in addition to those days that are bank holidays in the UK (18 April, 21 April (both also bank holidays in Gibraltar) and 5 May). This appears to be the purpose of the provision and it seems right that as the electoral region includes the whole of the South West and Gibraltar any day which is a bank holiday in any part of the region must be excluded as no official business can be carried out on that day. The official confirmation of public and bank holidays in Gibraltar in 2014 is attached below:



Gibraltar - Public
Holidays 2014.pdf

15.4. However, in our published timetable we did not exclude 1 May in the South West on the understanding that 1 May was effectively the same holiday as 5 May (i.e. it was a bank holiday falling within sub-paragraph (b) of paragraph (1)) so it did not need to be excluded in addition to 5 May (http://www.electoralcommission.org.uk/_data/assets/word_doc/0019/163018/EPE-election-timetable-standalone.doc). On balance we now take the view that the 1 May should have been excluded in addition to 5 May because 1 May is a day which is a bank or public holiday in Gibraltar. It does not seem to fall within paragraph (1)(b) because 1 May is not Christmas Eve, Christmas Day or Good Friday. Nor is 1 May a 'bank holiday' in any part of the UK. Although it may be that the 1 May bank holiday in Gibraltar is celebrating the same thing as is being celebrated in the UK on 5 May, these are two separate days and the effect of rule 2(2)(a) is that any day which is a bank holiday in either the UK or Gibraltar is a 'bank holiday' and therefore we now think that it should have been excluded. We are now considering amending our published timetable.

15.5. The drafting of the rule could be clearer to avoid uncertainty as to whether two days (possibly) celebrating the same thing, one in the UK and one in Gibraltar, should both be excluded.

Interim notices of election alteration

15.6. The above also has an effect on the publication of interim notices of elections under section 13AB of the Representation of the People Act 1983 (yet to be commenced). The first notice must be published on the last day on which nomination papers may be delivered to the returning officer for the purposes of the election. As this will be a different day in the South West region for the European Parliamentary election as it will be for a local government election taking place in that same region in combination with the European election, it seems that two interim notices will need to be given on two different days. One for the European Parliamentary election on the close of nominations for European Parliamentary elections and another for local government elections in that region on the close of nominations for local government elections (these elections will be combined). The publication of the first interim notice affects when postal votes can be sent out (they can only be sent to voters on the register).

15.7. This would seem to cause some inconvenience to administrators. It may be that there ought to have been an amendment to the local government combination rules (Schedule 3 to the Local Elections (Principal Areas) (England and Wales) Rules 2006) to provide that in a local government election in the South West that is combined with a European Parliamentary election 'bank holiday' is defined as in rule 2(2)(a) of the European Parliamentary election rules. There appears to be an intention to ensure the close of nominations is that same time for both elections, as the local government combined election rules' timetable says that the deadline for nominations is 'Not later than noon on the nineteenth day before the day of election, except that where the poll at the principal area election is combined with the poll at a European Parliamentary election, nomination papers may be delivered until 4 in the afternoon'.

16. Rule 3(2): details of electronic transfer of funds for payment of deposit in notice of election

16.1. Rule 3(2) provides that:

The notice of election must also state the arrangements which apply for the payment of the deposit required by rule 10 to be made by means of the electronic transfer of funds.

16.2. However, the electronic transfer of funds is only permissible under rule 10(3)(c) if the returning officer consents to it, so it seems that rule 3(2) should state that it only applies where a returning officer has so consented.

17. Rule 4(1), 6(1), 22(3) and regulation 35(1) of the European Parliamentary Elections Regulations 2004: authorisation or acting on behalf of another

17.1. These provisions are examples of the different wording that is used in the legislation to allow someone to do something on behalf of or under the authority of someone else and the difficulties this creates.

17.2. Rules 4(1) and 6(1) state that nomination papers must be delivered by the individual candidate himself (or nominating officer of a party) or a person authorised in writing by him. It is not clear whether this written authorisation must be produced to the returning officer in order for the nomination paper to be delivered in accordance with the rules (Parker's at paragraph 12.34A states that a person could be expected to produce the written authorisation when the nomination paper is delivered). Neither is it clear whether the returning officer should ask to see such written authorisation nor the consequences of such a request being turned down. In practice the returning officer may not know whether the person is the candidate / nominating officer or someone else so wouldn't know when to ask such a question, unless it was preceded with a question asking whether the person was the candidate / nominating officer.

17.3. Rule 22(3) provides that a ballot paper must contain a party's emblem if a request is made for its use by or on behalf of a nominating officer of a registered party. In this case there is no express requirement for a person making the request on behalf of the nominating officer to have been authorised in writing (or authorised at all). If the returning officer was in any doubt under rules 4 and 6, they may be able to ask to see the written authorisation. However, it is not clear how the returning officer would know that a person was acting on the nominating officer's behalf. Our advice has been that if there is any doubt the nominating officer should be contacted and that if the nominating officer said that the person was not acting on their behalf, the request should be refused.

17.4. Regulation 35(1) provides that a national election agent or a person authorised by him may appoint sub-agents. This wording differs from both the examples above. The person must be authorised by the national election agent but the authorisation need not be in writing.

17.5. There appear to be two issues here:

- We would recommend that a consistent approach to drafting should be followed in all cases where electoral legislation allows or requires something to be done by a person or someone acting on their behalf or under their authority.
- It might also be worthwhile to clarify whether the person doing something on another's behalf or under someone else's authority must provide proof of this to the returning officer's satisfaction and also to clarify the consequences of failing to provide such proof. However, the returning officer would first need to be able to establish whether the person was the person who was entitled to do something (and not someone acting on their behalf).

18. Rules 4 to 22 and regulation 69: delivery of documents by candidates

18.1. We have recently received advice from counsel on how documents required to be delivered by or on behalf of candidates can be delivered, in particular whether they must be delivered in person / by hand or whether they can also be posted, emailed or faxed. This advice addresses the European Parliamentary election rules, along with the other election rules. We wanted to ensure that our guidance to candidates and returning officers accurately reflects the law and is consistent in light of modern methods of communication. A copy of the advice is attached below:



Electoral Commission
- Advice on delivery c

18.2. We have now published guidance that reflects the above advice. In summary, counsel advised that nomination papers, consents to nomination, notices of withdrawal and EU candidates' declarations must be delivered in person / by hand at all elections (not by post, email or fax). Certificates of authorisation and emblem requests may be delivered by post as well but not by fax or email. In addition, counsel advised that delivering a document without an original signature (where a signature is required) is not permissible.

18.3. We would welcome consideration being given during the electoral law review as to what methods of delivery should be permissible for such documents. This will involve a balance between ensuring nomination proceedings are both accessible to those who wish to stand for election and capable of being managed efficiently by administrators. It is also important that such proceedings are conducted in a way that guards against electoral fraud (e.g. the provision of false information on nomination papers) and allows for any offences to be detected.

18.4. Previously our guidance at local government elections advised that nomination papers could be posted. Changing our local government election guidance to state that nomination papers must be hand delivered in order for them to be delivered in accordance with the rules has concerned some administrators who have informed us that at parish and community council elections, particularly where the parishes and communities are very rural or some distance away from the district council's elections office, it may be highly inconvenient for someone to hand deliver their nomination papers to the fixed place and such candidates may be in the habit of posting their papers. ROs do not often consider it practical to fix the place for delivery of nomination papers as the parish hall or parish clerk's office, as it is often difficult for the RO to ensure the continued presence of a member of his or her staff during the time for delivery of nomination papers.

18.5. There may be cases where a candidate delivers a nomination paper and consent to nomination by post; in which case our advice is that the candidate's nomination and consent have not been delivered in accordance with the rules and therefore the candidate does not stand nominated and

there is no decision to take as to whether the paper is valid. It may be that on being informed of this fact a candidate asks the returning officer to pass the documents to someone else in the local authority to hand deliver them to the returning officer on the candidate's behalf. Although at a European Parliamentary election the requirement for this person to be authorised in writing by the candidate may mean this is not permissible, there is no such requirement at a local election.

18.6. There is a prohibition on a returning officer or any partner or clerk of a returning officer acting as an agent of a candidate in the conduct or management of the election (regulation 69 of the 2004 Regulations and section 99 RPA 1983) but it is not clear what local authority employees would be included in 'partner or clerk' nor what 'agent' means in this context. 'Agent' could be defined narrowly as an agent appointed under the legislation i.e. an election agent, sub-agent, polling agent, counting agent or postal vote opening agent. Alternatively it could be defined broadly as anyone acting on the candidate's behalf during the election e.g. someone delivering a document on the candidate's behalf, a canvasser or a teller. We take the view that the broader reading is the better one as 'agent' is not expressly restricted to agents appointed under the legislation and this reading appears to achieve the purpose behind the provision of preventing election staff assisting candidates when they should remain impartial. However, it is not clear whether this would extend to all local authority employees or whether they would be prevented from acting for candidates under their contractual obligations and codes of conduct. There is a need to redraft regulation 69 (and section 99 RPA) so that the language used is up to date and also to ensure that any ambiguity as to its effect is removed.

18.7. It may be that in a future reformed electoral law these documents could be delivered by post, email or fax, which would be more convenient to candidates. There may also be the option of online nomination. On the other hand, the benefit of personal delivery is that nomination papers can undergo an informal check prior to formal submission, thus enabling any errors to be quickly rectified, and it also allows the returning officer and the candidate to discuss the election, for example the returning officer may want to advertise upcoming candidate briefings. In addition, personal delivery allows for proceedings to be held where objections are made by persons attending the delivery (not applicable at local elections). There may be ways to achieve these advantages of personal delivery in a system that allows delivery by other methods. Whatever the methods of nomination are, we would request that the law is unambiguous about which methods are permissible and impermissible and that this is consistent between different elections; inconsistency, especially where elections are combined, can be confusing to those wishing to stand for election.

18.8. We plan to make further comments on this issue in our Standing for Election report this spring. It will also be interesting to reflect on the experience at this year's local government elections given that our local government election guidance now states that only personal delivery is allowed.

19. Rules 4, 6 and 8: no prescribed forms for nomination and consent to nomination

- 19.1. Unlike at some elections (e.g. local government elections) nomination papers and consents to nomination are not prescribed in European Parliamentary elections. We are not sure whether this is a deliberate choice. Unless there is a good reason for the inconsistency, we would welcome a consistent approach.
- 19.2. Another difference is that there is no requirement for the nomination paper to be subscribed at European Parliamentary elections. Instead a £5,000 deposit must be paid, see rule 10 below.

20. Rule 8(1)(b): attestation of consent to nomination

- 20.1. Uncertainty arises as to the meaning of the requirement for a consent to nomination to be ‘attested’. It is unclear how a witness would attest the consent, i.e. whether they would need to sign it, state their name and address and whether they must also state something else in writing to the effect that the candidate signed the form in their presence. The prescribed form for the consent to nomination in a local government election (which must also be ‘attested by one witness’ by virtue of rule 7(c)) states as follows:

Signed in my presence
Signature of witness
Name and address of witness

- 20.2. It may be helpful to clarify whether the above information must also be provided in a consent to nomination at a European Parliamentary election. It may be possible to avoid using the word ‘attest’ given that it may not be widely used or understood today and instead set out what must be done in rule 8. Other documents must also be attested including notices of withdrawal (rule 14), as must the declaration of a disabled voter’s companion (rule 43(7)). Whatever approach to the drafting is taken we would recommend that it is consistent between all the election rules.

21. Rule 8(2): delivery of consent to nomination in Gibraltar

- 21.1. One of the issues addressed by counsel in his advice on the delivery of candidate documents (attached above) is how a consent to nomination form may be delivered in Gibraltar (paragraphs 26 to 28 of his advice). Rule 8(2) provides:

If the returning officer is satisfied that, owing to the absence of a person from the United Kingdom or Gibraltar (as the case may be) it has not been reasonably practicable for his consent in writing to be given, a telegram (or any similar means of communication) consenting to his nomination and purporting to have been sent by him shall be

deemed for the purposes of this rule to be consent in writing given by him on the day on which it purports to have been sent, and attestation of his consent is not required.

21.2. There is a need to update the language as the reference to 'a telegram' is now out of place.

21.3. In addition, the words 'absence of a person from the United Kingdom or Gibraltar (as the case may be)' seems a little unclear, especially what 'as the case may be' means. It could mean that for elections other than for the South West region, the absence must be from the UK, whereas for an election in the South West it means absent from both the UK and Gibraltar. However, we have taken the view that 'as the case may be' refers to the question of where the returning officer fixes the place for delivery of nominations. If it is in Gibraltar, then a candidate in the UK can take advantage of rule 8(2); but if, as would be expected, the place is in the UK, a candidate living in Gibraltar is absent from the UK and can use electronic communication even though he is not also absent from Gibraltar.

21.4. We also wondered whether this exception from having to deliver the consent to nomination by hand would be of much use to a candidate who was outside the UK (or Gibraltar if that is where the place for nominations has been fixed). This is because they would still have to deliver their nomination paper in person (although this could be delivered by someone on their behalf). For example, if in an election in the South West region the returning officer fixed a place in Poole as the place for delivery of nominations, a candidate living in Gibraltar who wanted to stand for election would be able to deliver their consent by email but would either have to travel to Poole to deliver their nomination paper in person or post it to someone in the UK to deliver it (which may not be possible if they do not know anyone in the UK or at least in the South West). One way around this might be for the candidate to post it to the returning officer who could then pass it to a colleague, who could then 'deliver' it by hand to the returning officer; this would appear to defeat the purpose of the rule but it shows the difficulties caused by the present law on how nomination papers and other documents may be submitted.

22. Rules 9 and 9A: candidature by relevant citizen of the Union

22.1. This has recently been amended, so that if a candidate who is an EU citizen (other than British, Irish, Cypriot and Maltese citizens) delivers their declaration by 4pm on the 24th day before the poll they do not themselves need to obtain information confirming they are not disqualified from the EU Member State of which they are a national (as to whether it is the 24th working or calendar day, see above comment on rule 2). If they deliver their declaration after this date the candidate will also need to provide information from the Member State. On receipt of any declaration the returning officer must forward it to the Secretary of State who must then ask the designated contact point in the relevant Member State to confirm whether the candidate is disqualified. The Secretary of State must send the information received

from the designated contact point to the returning officer. If information is received before the statement of persons nominated is published that the candidate is disqualified, the candidate will not stand validly nominated (rule 13); if information is received afterwards, votes given to an individual candidate are disregarded and a party candidate is treated as being omitted from the list for the purposes of allocating seats.

22.2. In our response to the Cabinet Office's consultation we noted that these new requirements would represent a significant change to the nomination process for European Parliament elections and there may be additional implications from this change which have not yet been identified. We recommended that the Government should ensure that the operation of these new requirements is evaluated after the 2014 European Parliament elections, in time for any further changes to the Regulations to be made for the 2019 elections.

22.3. At present our concerns are:

- Voters may be unaware that a candidate included on a ballot paper is disqualified. Current provisions relating to the powers and duties of local or regional returning officers may not be broad enough to allow them to take all appropriate steps to mitigate voter confusion, including – for example – taking steps to inform electors across the electoral area before polling day that an individual candidate is disqualified. We recommended that the Government should consider whether both local and regional returning officers should be subject to a further duty to take necessary steps to mitigate voter confusion in these circumstances. One way may be to require the display of notices in polling booths such as are required to be displayed on the death of a candidate. In any event, it seems undesirable for a candidate who the returning officer knows is disqualified to be included on a ballot paper; voters who vote for such a candidate without knowing that they were disqualified will effectively lose their vote. Furthermore, this may affect the election result as had voters known of the disqualification they might have voted differently leading to another candidate being elected.
- It is possible that information as to whether a candidate is disqualified is only received after the election result has been declared or after public notice of the statement of result is given. If information is received shortly afterwards that an elected candidate was disqualified, it would appear that the only remedy would be to apply the High Court or Court of Session in Scotland under section 11 of the European Parliamentary Elections Act 2002 for a judicial determination of disqualification. We wonder whether it should be necessary to apply to the court in such circumstances.

23. Rule 10(1) and (2): amount of deposit

23.1. The deposit which must be paid for an individual candidate or a party to stand at a European Parliamentary election is £5,000. This appears to us to be a large sum of money and is likely to deter many smaller parties and individuals from standing because they may not be able to raise such money and also because there is no guarantee that it will be returned (it will only be returned if the party or candidate poll more than 2.5% of votes). In particular it may be seen as unfair to require an independent candidate to pay the same £5,000 deposit as a party, given that only very wealthy individuals will have financial resources similar to those of the major parties.

23.2. The deposit at a European Parliamentary election is significantly more than at a UK Parliamentary election (£500, rule 9(1) of the parliamentary election rules) and at a Scottish Parliamentary election (£500, rule 10(1) of the Scottish Parliamentary election rules) but is the same as at a Police and Crime Commissioner election (rule 9(1) of the Police and Crime Commissioner election rules). No deposit needs to be paid at local government elections. There are different requirements as to how many subscribers and what level of deposit must be paid for almost every election. In some other election rules, a requirement to have the nomination paper subscribed appears to either replace the requirement to pay a deposit or reduce the amount of deposit payable.

23.3. We think that there would be merit in looking at why these inconsistencies exist and whether they can be justified in each case or whether a more consistent approach could be taken. We would also recommend that consideration is given to what is the purpose of requiring a deposit to be paid and / or subscribers to be obtained and whether such requirements are an effective and proportionate means of achieving that purpose. It appears to us that the sole purpose is to act as a deterrent to those who may want to stand for election but are unlikely to be able to secure much support from the electorate. However, a requirement to pay a large deposit also acts as a deterrent to those without large financial resources who may want to stand for election; even if they were confident of getting over 2.5% of the vote they may not be able to find £5,000 to pay the deposit. A requirement to obtain the signatures of subscribers seems less of an obstacle and would not penalise less wealthy parties or candidates. However, we are unsure how effective a requirement for subscription may be at achieving the purpose stated above given that we know of instances where candidates have stood on the street asking passers-by to sign their form.

23.4. In 2003 report *Voting for Change* we called for the subscriber and deposit system to be abolished (page 22). We stated:

After detailed analysis of the options, the Commission has concluded that it would be inappropriate to continue with the present deposit and subscriber system. We set out in our report two alternative approaches for the future. Our strong preference is for the first, total abolition. We have identified no compelling evidence in support of the contention that the present 'belt and braces' system is necessary to deter 'frivolous' candidates. Moreover, we are concerned that too onerous a set of

hurdles can deter independent candidates, or small parties, with a legitimate claim to public attention and whose candidacy could promote public engagement. However, we offer the second option as an alternative in recognition of the strong concerns expressed by a number of stakeholders about the risks they perceive in ending the use of deposits, and taking account of the potential burdens on electoral administrators in checking the validity of large numbers of subscribers.

23.5. Our second (less favoured) option was that:

Deposits should be retained for candidates standing for higher tier elections in the UK. However, local government and parish and community council elections should continue to be exempt from deposits. A new standard deposit rate for all elections should be introduced. This should not exceed £500. The threshold for forfeiture should be reduced from 5% to 2% with a corresponding decrease for elections held under the STV system. The options open to candidates for paying deposits should be formalised and extended to include the use of credit and debit cards, etc. The subscriber system should be abolished and replaced with a simplified system along the lines of that developed in Scotland where a candidate self-nominates and has his/her nomination witnessed.

23.6. Our view is that the deposit of £5,000 at European Parliamentary elections is too large and is likely to make it difficult for independent candidates and smaller parties to stand for election. We will set out further views on the issue of deposits and subscribers in our Standing for Election report.

24. Rule 10(3): method of paying deposit

24.1. A candidate can only pay the deposit by debit/credit card or electronic transfer if the returning officer consents to this means of payment. In our report on the 2009 European Parliamentary elections we found that there was an increasing demand from parties and candidates to pay their deposit using these means (page 44, http://www.electoralcommission.org.uk/data/assets/pdf_file/0006/81483/047-elections-report-final-web.pdf).

24.2. In London, for example, around 60% of parties and candidates favoured electronic transfer to pay deposits. Others paid by cash, debit card or banker's draft. Not all returning officers had the facility to make electronic payments in place for these elections. We would welcome consideration being given to whether the requirement for the returning officer to consent to such means of payment should be removed.

24.3. In 2009 we also found that there seemed to be some confusion about when a deposit payment made electronically is deemed to have been made. This is important in relation to the deadline for nominations, as the deposit

must be paid before the deadline. In our report we stated that we considered it important that returning officers communicate their terms of payment to candidates and parties and agree a date by which electronic transfers must be made, so monies are received in time for the nomination deadline.

25. Rule 12(1): nominating officers' right to attend nomination

25.1. The effect of rule 12(1) appears to be that a nominating officer of a party cannot attend the delivery of nominations except to deliver the party's nomination paper, whereas if the nominating officer has authorised someone else in writing to deliver the paper that person can attend the proceedings in full.

26. Rule 12(2): grounds for objecting to a nomination paper or list of candidates

26.1. As mentioned above, it may be that the rules could be clearer as to the grounds on which someone may object to a nomination paper. Rule 12(2) only says that a person attending may object to the validity of, any nomination paper or list of candidates. The reader would then need to refer to rule 13(3) (individual candidate) and 13(4) (party) (but not 13(5), which does not relate to the validity of the nomination). It may be useful to expressly refer to those two provisions in rule 12(2).

27. Rule 12(4): choosing an additional person to attend the proceedings

27.1. It is not clear whether the ability to choose another person to be present at the delivery of nominations and attend the proceedings is conferred only on individual candidates or on party candidates as well. Given that both individual and party candidates are 'candidates' and 'stand nominated' as such, it seems all individual and party candidates can appoint someone each. We assume that this is the policy intention, even though it could lead to a large number of people attending the proceedings. Either way it would be useful to make it clear in rule 12(4) as the rules frequently make it clear where something applies to individual candidates or party candidates or both, e.g. rule 8(1) (consent to nomination) applies expressly to both.

28. Rule 13(3) and (5): grounds for determining an individual candidate to not be validly nominated and for removing a party list candidate

28.1. Under rule 13(3) a returning officer must hold an individual candidate's nomination paper to be invalid on the following grounds:

- (a) that the particulars of the candidate are not as required by law;
- (b) that the candidate is disqualified by the Representation of the People Act 1981 (which applies in respect of the office of MEP by virtue of section 10(1)(a) of the 2002 Act) or any corresponding provision in respect of detained offenders in Gibraltar made under section 10(4A) of the 2002 Act;

- (c) the candidate is a relevant citizen of the Union and the returning officer has received, under rule 9A(4), information that the candidate has been deprived of the right to stand as a candidate through a relevant disqualifying decision in the Member State of which the candidate is a national.

28.2. Under rule 13(5) a returning officer must delete the name and address of a party list candidate on the following grounds:

- (a) the particulars of any candidate in the list of candidates accompanying the nomination paper of a registered party are not as required by law;
- (b) the consent to nomination of any such candidate is not delivered in accordance with these rules;
- (c) any such candidate is a relevant citizen of the Union and neither Condition A nor Condition B in rule 9 has been met in relation to that candidate; or
- (d) any such candidate is a relevant citizen of the Union and the returning officer has received, under rule 9A(4), information that the candidate has been deprived of the right to stand as a candidate through a relevant disqualifying decision in the Member State of which the candidate is a national.

28.3. The grounds relating to individual candidates in rule 13(3)(a) (not as required by law) and (c) (information from another Member State as to disqualification) is replicated for party candidates in rule 13(5)(a) and (d). Rule 13(3)(b) (disqualification) is not replicated in rule 13(5). Rule 13(5)(b) (delivery of consent to nomination) is not replicated in rule 13(3) presumably because an individual candidate would not be deemed to stand nominated if no consent to nomination was delivered under rule 13(1). Similarly, rule 13(5)(c) (complying with Condition A or B in rule 9) is not replicated in rule 13(3) presumably because an individual candidate would not be deemed to stand nominated if they do not comply with one of those conditions under rule 13(1).

28.4. For simplicity it may be beneficial to have a single list that applies to both candidates.

29. Rule 15: statement of parties and individual candidates standing nominated

29.1. It is not clear in this rule whether the surname of all candidates (individual and party) must appear first before the other names. Individual candidates must be arranged alphabetically by order of surname (rule 15((7))), so it may be inferred that they are to be listed surname first. However, party candidates must be arranged in the order in which their names appear on that list. It is not clear whether party candidates should be

listed surname first or forename first; we understand that the practice is the latter.

30. Rule 18(2): disqualification by RPA 1981

30.1. Rule 18(2) provides that objections may be made on the grounds of disqualification under the RPA 1981 between the hours of 10 am and 4 pm on the day after the last day for the delivery of nomination papers. This rule does not state when an objection is to be determined by the returning officer. Rule 13(6) states that the returning officer must give his decision on any objection to a nomination paper:

- as soon as practicable after it is made; and
- in any event, before the end of the period of 24 hours starting with the close of the period for delivery of nomination papers set out in the Timetable in rule 1.

30.2. If rule 13(6) applies to objections made under rule 18(2) (it does not seem clear if it does so apply) it would not appear to leave the returning officer with sufficient time to make a decision on the objection, especially if the objection was made just before 4pm.

31. Rule 32(5)(a) regulation 122A(1) to (6): translation of enlarged sample copy of the ballot paper

31.1. The words that must appear at the top of the enlarged sample copy of the ballot paper must be 'Vote once (X) in one blank box' (regulation 122A(6)(a)). The enlarged sample copy may include a translation of 'those words' (i.e. 'Vote once (X) in one blank box') into such other languages as the local returning officer thinks appropriate (regulation 122A(6)(b)).

31.2. The ballot paper itself cannot be translated (regulation 122A(4)(b)). We have interpreted this as meaning that nothing on the ballot papers handed to voters or on the enlarged copy of it required to be provided by rule 32(5)(a) may be translated (except for the words 'Vote once (X) in one blank box' on the enlarged copy). So in our view the enlarged copy of the ballot paper must be in English, except for the words 'Vote once (X) in one blank box' at the top which may be translated. It would be useful for this to be clearer in the legislation.

31.3. An additional issue is that there appears to have been an oversight when the ballot paper was amended by the European Parliamentary Elections (Amendment) Regulations 2013. We understand that the wording in regulation 122A(6)(a), which must be stated at the top of the enlarged sample copy, should be the new wording that will appear on the ballot paper in the new Form A in the 2013 Regulations, i.e. "Vote only once by putting a cross (X) in the box next to your choice".

- 31.4. Our guidance states that 'Vote once (X) in one blank box' must be stated at the top of the enlarged copy of the ballot paper (even though it differs from the wording at the top of the ballot paper prescribed in Form A) and only these words may be translated into other languages. We understand that new draft Regulations are being considered to make this and some other changes to the 2004 Regulations in time for the elections in May.
- 31.5. In addition to the above, it is not clear whether the words 'Vote once (X) in one blank box', which must appear at the top of the enlarged copy because of regulation 122A(6)(a), must appear in addition to the full copy of the ballot paper, which before the recent amendment would have contained the same words at the top. We have assume these words must be added at the top followed by the full copy of the ballot paper (despite the repetition) as otherwise there would not seem to be any purpose of regulation 122A(6)(a). However, it is unclear why these words need to be stated twice on the ballot paper. We would prefer there to be a single instruction on the enlarged ballot paper, i.e. the one on the ballot paper itself. However, this also means that there may need to be a change in the law to allow the RO to translate the wording of the instructions on the enlarged copy.
- 31.6. The drafting also seems unusual in that regulation 122A(5) seems to do little more than to restate rule 32(5)(a); the only difference being that rule 32(5)(a) requires the local returning officer to provide the polling station with the enlarged ballot paper and regulation 122A(5) requires it to be displayed. It seems strange for the provision and display of the enlarged copy of the ballot paper to be dealt with in two separate provisions rather than being dealt with solely in rule 32.

32. Rule 32(9): notifying voters that a candidate has died

- 32.1. Rule 32(9) provides that where proof has been given to the returning officer's satisfaction of the death of a candidate on a registered party's list or an individual candidate, he must request each local returning officer to provide each presiding officer with a sufficient number of notices to this effect for display in every compartment of every polling station.
- 32.2. We assume that the purpose of this provision is to inform voters of this fact, which may affect how they vote. So that where the voter was planning to vote for an individual candidate who has died, they know of that fact and can give their vote to someone else. Also, where a voter was planning to vote for a party, one of whose candidates has died, they can decide whether the fact of the candidate's death changes their vote. If this is the intention, it is unclear how effective a notice in a compartment would be, as it seems easy to fail to observe the notice. Also, this would not be effective in informing postal voters of this fact; however, we note that there may be little that can be done once postal votes have been sent out.
- 32.3. It may be useful to consider what rule 32(9) is trying to achieve and whether it is effective. Also, it may be that the European Parliamentary rules' approach to the death of a candidate should be reconsidered, given the

concerns set out above and also in respect of section 2(5) to (9) above. It may be preferable for such a candidate to be omitted from the ballot paper.

32.4. An additional comment on rule 32(9) is that it requires the RRO to request the LRO to provide the PO with notices. This appears a little convoluted and there is no requirement for the notices to actually be displayed.

33. Rules 33, 36, 50, 52 and 58; paragraph 44 of Schedule 2 and regulations 35 and 39: attendance of polling, postal voting and counting agents, election agents and sub-agents at the poll, postal vote opening, verification, count, calculation of results and allocation of seats

33.1. These provisions are complex and it is not easy to establish who may attend the poll, postal vote opening, verification, count, result calculation and allocation of seats. There is a separate list of those entitled to attend each of these processes (rules 36, 50, 52 and 58 and paragraph 44 of Schedule 2). There may be scope for a single list of those able to attend all of these processes.

33.2. It is not always clear the extent to which agents and sub-agents can attend these proceedings. This is because of the interaction between the lists of people who can attend and the provisions dealing with the appointment of agents.

33.3. Candidates and election agents can attend all of these proceedings (rules 36(1), 50(2), 52(3) and 58(2) and paragraph 44 of Schedule 2). Sub-agents are included in the list of those who can attend proceedings on the receipt of postal ballot papers in paragraph 44 of Schedule 2 but are not included in the lists of those who can attend the proceedings set out in the election rules. We are not aware of the reason for this difference.

33.4. However, it appears that sub-agents can attend instead of polling or counting agents (rule 33(10)) or instead of the election agent (regulation 39(2)) at polling stations and the count (but the 2004 Regulations are not clear on this).

33.5. At the count the candidate may choose one other person to attend (which could be a sub-agent) (rule 52(3)(b)). Also, an election agent can appoint someone to attend postal vote opening in his place (paragraph 44(c) of Schedule 2).

33.6. We have found it challenging to produce guidance that clearly sets out a definitive list of all those who can attend these proceedings as a result of the above. There appears to be scope for the law to deal with this more clearly.

34. Rule 58(2)(g): attendance of Electoral Commission representatives and observers at the result calculation and allocation

- 34.1. Rule 58(2) provides that only certain persons can attend the result calculation and allocation of seats, unless permitted to attend by the returning officer. One of the categories of persons who can attend under rule 58(2)(g) is persons who are entitled to attend by virtue of any of sections 6A to 6D of the Political Parties, Elections and Referendums 2000.
- 34.2. It is clear that Electoral Commission representatives can attend the calculation and allocation. Section 6A(1)(a) PPERA provides that a representative of the Commission may attend proceedings relating to an election specified in subsection (5) which are the responsibility of the returning officer for the election. European Parliamentary elections are specified by virtue of section 6A(5)(a) and section 5(2)(b). The result calculation and allocation is the responsibility of the regional returning officer, who is described in the European Parliamentary Elections Regulations 2004 as the 'returning officer'. Furthermore, a representative of the Commission is entitled to observe the working practices of any returning officer under section 6B(1)(b).
- 34.3. However, the position is less clear in respect of accredited observers under sections 6C and 6D. Section 6C(1) provides that a person who is aged 16 or over may apply to the Commission to be an accredited observer at any of the following proceedings relating to an election specified in subsection (5) of section 6A:
- (a) proceedings at the issue or receipt of postal ballot papers;
 - (b) proceedings at the poll;
 - (c) proceedings at the counting of votes.
- 34.4. Subsection (2) adds that if the Commission grant the application, the accredited observer may attend the proceedings in question.
- 34.5. Section 6D(1) and (2) make the equivalent provision for organisations wishing to become accredited.
- 34.6. There is room for uncertainty as to whether the result calculation and allocation at a European Parliamentary election falls within 'proceedings at the counting of votes'. Arguments can be made either way. On one hand under the election rules the count and the result calculation and allocation are two separate processes in the election rules. They are dealt with by separate rules, one process is administered by the local returning officer and the other by the regional returning officer, they may be held in different venues and attended by different persons.
- 34.7. On the other hand, the reference to 'proceedings at the counting of votes' could be argued to be broader than the count itself (given that it refers to 'proceedings' in the plural) and that the result calculation and allocation is part of these proceedings. Also, as rule 58(2)(g) refers to persons who are entitled to attend by virtue of any of sections 6A to 6D of the 2000 Act, it

seems to have been intended that accredited observers would be able to attend, otherwise the rule would only have referred to sections 6A and 6B (Commission representatives) as it does elsewhere in the rules. In addition, we are unaware of any policy reason why accredited observers should not be able to attend the result calculation and allocation given that they can attend other proceedings including the count.

34.8. In our guidance we have stated that accredited observers are able to attend because we consider that on balance this is the better interpretation of the rule. However, as this is arguable either way we would be grateful if this could be clarified. There may also be uncertainty about whether the phrase 'proceedings at the counting of votes' includes the verification proceedings. Therefore, it may be better for sections 6C(1) and 6D(1) to state all the proceedings separately to remove uncertainty, i.e. verification, the counting of votes and (at European Parliamentary elections) the result calculation and allocation of seats.

35. Rule 62(1) and (4)(b) and rule 10(1): return of deposit where candidate dies

35.1. Rule 62(1) provides that the deposit made under rule 10 must either be returned to the person making it or his personal representatives or be forfeited to Her Majesty. Regulation 62(4)(b) provides that where an individual candidate has died, the deposit must be returned as soon as practicable after the returning officer is satisfied of the candidate's death.

35.2. We assume that this means that where a candidate has died, the deposit must always be returned to the deceased candidate's personal representatives. Rule 10(1) allows the deposit to be deposited by someone other than the candidate on the candidate's behalf. It might be possible to argue that where someone deposited the money on behalf of the candidate, it should be returned to that person under regulation 62. However, under regulation 62(1) we would interpret 'the person making it' to always refer to the candidate, even where the £5,000 was deposited by someone else because this person would only be depositing that sum on behalf of the candidate. We also assume that 'personal representatives' in rule 62(1) refers to those involved in administering a deceased person's estate rather than the representatives of living persons.

35.3. It may be clearer for the legislation to say that the deposit must be returned to the candidate or if the candidate has died, their personal representatives.

36. Paragraph 54A of Schedule 2: no power to cancel postal ballot papers if a voter is removed from the register in the final election notice of alteration

36.1. Where a postal voter is removed from the electoral register on publication of the final election notice of alteration ahead of the European Parliamentary elections it seems that there is no way to cancel that voter's postal ballot paper under paragraph 54A of Schedule 2 if they have already been issued with a postal ballot paper. This issue may arise given that postal

ballot papers can now be issued as soon as practicable. It would mean that someone was able to vote in the election despite not being on the register for the election, following their removal in the election notice of alteration on E-5 or E-6.

- 36.2. Paragraph 54A(1)(a) provides for the cancellation of a person's postal ballot paper if they have made an application to the ERO to be removed under paragraph 3(5)(a). So, if the postal voter had applied to come off the record of absent voters and this were to take effect after postal votes had been issued, paragraph 54A would apply.
- 36.3. However, paragraph 54A does not cover all of the circumstances where a person is removed from the postal voters record – such as if the person ceases to be registered at the qualifying address (paragraph 3(5)(c)) in circumstances where the ERO reached this conclusion without an application under paragraph 3(5)(a) being made, or on the expiry of a particular period during which a postal vote was granted (paragraph 3(5)(e)).
- 36.4. We are not sure whether these scenarios were omitted from paragraph 54A intentionally or by oversight. However, it seems to us that the correct position as the law is currently drafted, given that there is no provision to cancel the postal vote (in contrast to the scenarios specifically outlined in paragraph 54A), is that the person's postal vote cannot be cancelled and must be counted even though the voter will not be on the register on the day of the poll.
- 36.5. This issue is not specific to European Parliamentary elections; it also applies to other elections. For example, parliamentary and local government elections (regulation 78A of the Representation of the People (England and Wales) Regulations 2001).
- 36.6. A similar situation arises where someone has been deleted from the postal vote record by virtue of failing to provide a fresh signature within the specified time after a postal vote has been issued. We have also taken the view that there is no way to cancel the postal vote of someone who has failed to provide a fresh signature and that their vote must be counted despite no longer being on the absent vote record.

37. Paragraph 56(1) of Schedule 2: notice of postal vote opening

- 37.1. Paragraph 56(1) of Schedule 2 provides that the local returning officer must give to each election agent or sub-agent, where appointments of sub-agents have been made, not less than 48 hours' notice in writing of each occasion on which a postal voters' ballot box and the envelopes contained in it is to be opened.
- 37.2. There may be uncertainty as to whether this means that notice must be given to both election agents and sub-agents or just one or the other. We understand that it means 'and' because both have a separate right to attend

the opening under paragraph 44 but the legislation could state this position more clearly.

- 37.3. Also, there may be merit in others who are able to attend these proceedings being given the notice such as candidates and postal vote agents.

38. Paragraph 70(5) of Schedule 2: forwarding statements as to postal ballot papers to the Secretary of State

- 38.1. Paragraph 70(5) of Schedule 2 provides that the statement as to postal ballot papers must be provided by the local returning officer to the Secretary of State and the Electoral Commission 'in the period which starts 10 days after the day of the poll and ends 15 days after that day'. The wording '15 days after that day' is ambiguous. 'That day' could refer either to the day that is 10 days after the day of the poll or the day of the poll. Therefore, the period for submitting the statements could either be between 10 and 25 days after the day of the poll or between 10 and 15 days after the poll.
- 38.2. This wording mirrors the wording of regulation 91 of Representation of the People Regulations 2001. The relevant wording in that regulation was inserted by the Representation of the People (Amendment) Regulations 2006. The Explanatory Notes to the 2006 Amendment Regulations explain that: 'As amended the regulation requires the returning officer at both parliamentary and local government elections to send a copy of the completed statement to the Secretary of State and the Electoral Commission ten to fifteen working days following the date of the poll'.
- 38.3. It seems, therefore, that the intended meaning is that the statement must be provided within 15 days from the day of the poll (rather than 15 days from the start of the period) – i.e. giving a window of 5 days to return it. This is the position that is stated in our guidance for this year's European Parliamentary elections. This is a change to our guidance, informed by our reading of the explanatory notes cited above, as previous Commission guidance stated that the statement must be forwarded between 10 and 25 after the day of the poll.
- 38.4. Given the ambiguity in the drafting, we think that this is something that should be more clearly dealt with in the legislation.
- 38.5. It seems to us that there is a lack of clarity in many of the provisions that set out when something must or may be done both in the European Parliamentary elections legislation and elsewhere in electoral law. There are many different wording formulations setting out deadlines and periods; many are ambiguous and difficult to advise on with certainty (the above issue is an example). We would welcome consideration being given as to whether it is possible to adopt a more consistent practice to setting deadlines and periods on or in which things must or may be done, using consistent wording which is clear and unambiguous.

38.6. Also, it is not always easy to work out whether the 'days' being referred to are working or calendar days. Some deadlines or periods use working days and others use calendar days and whichever is being used is not clearly stated in the rule itself. Sometimes there is a reference to a general computation of time provision to assist the reader (but not always). For example, paragraph 70(5) must be read with reference to paragraph 15, the effect of which is that the days referred to in paragraph 70(5) are working days and if either the 10th or 15th day after the poll is a weekend, the time is extended until the next working day. It is very easy for those referring to the legislation to overlook how time is to be calculated.

38.7. We will be preparing a separate submission setting out examples of some of the difficulties we have faced advising on these matters.

39. Regulation 33 of the European Parliamentary Elections (Northern Ireland) Regulations 2004: computation of time

39.1. Regulation 33 provides as follows:

(1) Where the day or last day on which anything is required or permitted to be done by or in pursuance of this Part of these Regulations is any of the days mentioned in paragraph (2)–

(a) the requirement or permission shall be deemed to relate to the first day thereafter which is not one of those days; and

(b) in computing any period of not more than 7 days for the purposes of this Part any of the days so mentioned shall be disregarded.

(2) The days referred to in paragraph (1) are Saturday, Sunday, Christmas Eve, Christmas Day, Good Friday, a bank holiday or a day appointed for public thanksgiving or mourning.

(3) In this regulation "bank holiday", in relation to any European Parliamentary election, means a day which is a bank holiday in Northern Ireland.

39.2. On a literal interpretation, regulation 33(1) means that regulation 33(1)(b) only comes into play in the circumstances set out at the start of regulation 33(1), i.e. where the last day of a deadline falls on a non-working day.

39.3. So, if you had a 7 day period such as in regulation 48 (regulation 52(2) is the equivalent Great Britain provision) ending on a Wednesday, it would be counted as 7 calendar days, but if day 1 was a Monday, making the period due to end on a Sunday, regulation 33(1)(b) would apply and it would be counted as 7 working days, and so end the following Tuesday (giving 9 calendar days). This does not seem to be very logical, and we assume that

the intent behind regulation 33(1)(b) was that *any* period of 7 days or less should mean ‘working days’.

39.4. This issue is not unique to Northern Ireland; the same wording appears in regulation 32 of the European Parliamentary Elections Regulations 2004 and in section 119 of the almost identical wording and grammatical structure in section 119 of the Representation of the People Act 1983.

39.5. Very similar wording but a different structure is used in s.129 of the Electoral Law Act (Northern Ireland) 1962, in a way that does give effect to what we think is the real intention behind regulation 33:

Without prejudice to sub-section (4) of section thirty-nine of the Interpretation Act (Northern Ireland), 1954, in computing any period of not more than seven days for the purposes of Parts VI and IX, a Sunday or a public holiday shall be disregarded.

In respect of a local election and an election petition relating to a local election the foregoing provisions shall not have effect and any period of time shall be computed as follows:

(a) where the day or the last day on which anything is required or permitted to be done by or in pursuance of Parts VI and IX is any of the days mentioned in paragraph (b), the requirement or permission shall be deemed to relate to the first day thereafter which is not one of those days; and in computing any period of not more than 7 days for the purposes of those Parts any of the days so mentioned shall be disregarded;

(b) the days referred to in paragraph (a) are Saturday, Sunday, Christmas Eve, or a public holiday.

39.6. By way of an additional comment, as we see the provision, where the paragraph (1) pre-condition in regulation 33 (32 in GB) is satisfied, both sub paragraphs (a) and (b) may be triggered. So, in the regulation 48 example cited above, if the last day for delivery of the election agent’s election expenses return required by regulation 47 (51 in GB) falls on a paragraph (2) day, then regulation 33 sub-paragraph (1)(a) is triggered, so that the last day for delivery will be the day after that paragraph (2) day. Then sub-paragraph (1)(b) means that paragraph (2) days are disregarded in computing the 7 days permitted for delivery of the candidate’s declaration required by reg. 48/52 (2). That may result in 10 calendar days for the delivery of the candidate’s declaration in that scenario.

39.7. There may also be an issue about whether it would be possible to ‘deliver’ returns on a non-working day given offices will not be open on non-working days and that ‘delivery’ could be deemed to require in person / by hand delivery.

39.8. We would welcome consideration being given to the policy behind these provisions in the EPE Regulations and the equivalent provisions elsewhere in electoral law and in particular whether the policy intention would be better reflected by making sub-paragraph (1)(b) in regulation 32 (GB EPE Regulations) and 33 (Northern Ireland EPE Regulations) and section 119 RPR a separate paragraph or free standing provision.

39.9. Provisions in electoral legislation involving the computation of time limits have proved to be confusing in practice and anything that could be done to make them more straightforward would be welcomed. We will set out other examples of difficulties experienced with computation of time provisions in a separate note.

40. Regulation 48 and Schedule 5 of the European Parliamentary Elections (Northern Ireland) Regulations 2004

40.1. Regulation 48(1) provides that the return delivered under regulation 47(1) shall be accompanied by a declaration made by the election agent in the appropriate form. Regulation 48(3) provides that for the purposes of paragraphs (1) and (2), 'the appropriate form' is the form in Schedule 5. Paragraph 3 of the form in Schedule 5 states 'To the best of my knowledge and belief, all expenses shown in the return as paid were paid by my election agent (by me), except as otherwise stated in relation to my (the candidate's) personal expenses'.

40.2. The equivalent wording in the GB form states 'To the best of my knowledge and belief, all expenses shown in the return as paid were paid by my election agent (by me), except as otherwise stated' (Schedule 7 of the European Parliamentary Elections Regulations 2004).

40.3. It appears to us that the wording in the GB form is better as the exception from stating that expenses were paid by the agent is expressed more broadly (i.e. 'except as otherwise stated'). The Northern Ireland form's wording (i.e. 'except as otherwise stated in relation to my (the candidate's) personal expenses') does not seem sufficiently broad. This is because expenses other than 'personal expenses' may be paid by someone other than the agent. Regulation 39(5) sets out the circumstances where someone other than the agent may pay, which includes (for example) any expenses which are paid in accordance with regulation 40(4) by a person authorised as mentioned in that provision.

40.4. In addition, the Northern Ireland declaration still requires the signature of a Justice of the Peace. This is not required in the GB form. JPs are getting very rare in Northern Ireland so it is difficult for candidates/agents to comply with this requirement.

41. Rules 53 to 63 of the European Parliamentary Elections Rules in Northern Ireland: disclosing the number of votes before all polls close across the EU

41.1. There does not seem to be anything in the European Parliamentary Elections (Northern Ireland) Regulations 2004 about delaying notifying anyone of the outcome of the count until close of polls across the EU (the equivalent of rule 53(7) of Schedule 1 to the European Parliamentary Elections Regulations 2004).

42. Paragraph 8(2) of Schedule 2 to the European Parliamentary Elections (Northern Ireland) Regulations 2004

42.1. There is a reference to an application made under, inter alia, regulation 10(4) which we think should probably refer to regulation 10(7).

43. Regulation 2 of the European Parliamentary Elections (Northern Ireland) (Amendment) (No. 2) Regulations 2013

43.1. Regulation 2 amends rule 31 of the European Parliamentary Elections Rules to allow candidates to notify the appointment of polling and counting agents to the returning officer on the fifth day, rather than the second day, before the poll. This is consistent with the position at local, Assembly and parliamentary elections in Northern Ireland. It is also consistent with the European Parliamentary Elections Regulations 2004, which apply in GB. However, the deadline for declaring the details of sub-agents remains the second day before the poll (regulation 35(3) of the European Parliamentary Elections (Northern Ireland) Regulations 2004). This deadline is the fifth day before the poll for European Parliamentary elections held elsewhere in the UK (regulation 35(4) of the European Parliamentary Elections Regulations 2004) but the second day under section 68(3) of the Representation of the People Act 1983.

43.2. We are unsure whether there is an intention for the deadline for appointment sub-agents to be different at European Parliamentary elections in Northern Ireland compared with GB (or whether there is a good reason for the difference between the RPA 1983 and the European Parliamentary Elections Regulations 2004) or whether this has arisen accidentally. We would prefer the law to be consistent both between different elections and between the parts of the UK at the same election, unless there is a good reason for the inconsistency.

44. European Assembly Election Petition Rules 1979

44.1. The title of these Rules should refer to 'Parliament' rather than 'Assembly'.

44.2. Also, we would suggest that consideration is given to whether a single generic set of Petition Rules could be produced for all elections. We would also recommend that the Rules should be reviewed to modernise the language and eliminate any unnecessary complexity and legal formality to ensure that they can be easily understood and complied with by those who may wish to challenge an election. This relates to the broader issue about the reform of the system for challenging elections, given the concerns with the

present system (some of which are stated in our 2012 report *Challenging Elections in the UK* below).

http://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/150499/C_hallenging-elections-in-the-UK.pdf

45. Section 9A of the Political Parties, Elections and Referendums Act 2000: Commission's power to set performance standards at European Parliamentary elections

- 45.1. It is not clear in section 9A PPERA whether the Electoral Commission's power to set performance standards for returning officers extends to local returning officers at European Parliamentary elections.
- 45.2. Section 9A(1)(a) gives the Commission a power to determine standards of performance for relevant officers. 'Relevant officers' is defined in section 9A(8)(b) as including 'returning officers'. At European Parliamentary elections there are two returning officers; a regional returning officer and a local returning officer. The European Parliamentary Elections Regulations 2004 consistently use the term 'returning officer' to mean 'regional returning officer', so there is potential to argue that for European Parliamentary elections, a 'returning officer' for the purposes of section 9A PPERA includes a regional returning officer but not a local returning officer. On the other hand, it could be argued that 'returning officer' in section 9A PPERA should be interpreted more broadly and that both the RRO and LRO are returning officers within that section. Both have a title that includes 'returning officer', both are responsible for the administration of certain parts of the election and both will a returning officer at another election (section 6 of the European Parliamentary Elections Act 2002).
- 45.3. We discussed a similar issue with Matthew Rigg (Cabinet Office Lawyer) in respect of whether our power to set performance standards would apply to both police area returning officers and local returning officers in Police and Crime Commissioner elections. Matthew confirmed that the intention was that the Commission would be able to set performance standards for both returning officers and agreed with us that, although there are arguments either way, the better interpretation seems to be that our power to set standards applies to both. However, the position is less clear at European Parliamentary elections because, as mentioned above, the European Parliamentary election legislation uses the term 'returning officer' to refer only to the regional returning officer.
- 45.4. We would be grateful if this could be clarified in the law for all elections where there is more than one returning officer.

46. Application of Representation of the People Act 1983 to Northern Ireland

- 46.1. This is a broader comment that applies to electoral law in Northern Ireland in general. We have found that the way in which the RPA 1983 is applied to Northern Ireland seems to be unduly complicated in certain places.

46.2. For example, section 13BA is inserted into RPA 1983 by the Northern Ireland (Miscellaneous Provisions) Act 2006, applying solely to Northern Ireland, but not to local elections, but then section 2 and Schedule 1 of the Elected Authorities (Northern Ireland) Act 1989 are amended, also by the Northern Ireland (Miscellaneous Provisions) Act 2006, to (re-)apply s.13BA to local elections, with a small addition that would not obviously have caused any difficulties in the original.

47. Rule 11 of the Parish Council Election Rules (Schedule 2 to the Local Elections (Parishes and Communities) (England and Wales) Rules 2006): inspection of nomination papers in an uncontested election

47.1. Similar to the previous issue, this issue is not related to the European Parliamentary elections but we have included the details of it in this note as it appeared to be a convenient opportunity to mention it.

47.2. Rule 11 provides that during ordinary office hours on any day, other than a day specified in rule 2(1), after the latest time for delivery of nomination papers and before the date of the poll, any person may inspect and take copies of, or extracts from, nomination papers and consents to nomination.

47.3. The question arises as to what happens where a candidate is declared elected on the close of nominations in an uncontested election under rule 14(2). In such a case it is unclear whether the nomination papers of an elected candidate must be made available for inspection and, if inspection must be allowed, within what period of time the inspection is to take place. Where a candidate is declared elected in an uncontested election there will be no polling day, so the end point of the period for inspections in rule 11 does not apply. The question is whether that means rule 11 as a whole does not apply to uncontested elections or whether there must still be a period for inspection, ending for example before the day that would have been the day of the poll if the election had been contested. This appears to be an oversight in the legislation, which should be rectified. This query has been raised with us in practice.

47.4. Our view is that the legislation should clearly provide for inspection even where a candidate is elected in an uncontested election because this is an important part of transparency in the electoral process. Part of the rationale for inspection at local elections is for electors and others to be able to satisfy themselves that the candidate meets the qualifications they claim they do. If a candidate submitted their nomination papers at the last minute, then they could be declared elected without anyone having much opportunity to scrutinise their qualifications. While we don't think it is necessary to extend the inspection time to the day prior to the day the poll would have been held, there should be sufficient time after someone has delivered their nomination papers to allow for inspection. This becomes particularly important now with the proposed changes to the withdrawal deadline to align it with the deadline

for delivery of nomination papers. This will squeeze the time for any potential inspections further.

48. Rule 12 of the Parish Council Election Rules: nomination in more than one ward

- 48.1. Rule 12 provides that a candidate who is validly nominated for more than one ward of the same parish or community must withdraw from his candidature in all those wards except one, and if he does not so withdraw, he shall be deemed to have withdrawn from his candidature in all those wards.
- 48.2. There has been uncertainty as to whether this applies where there are two by-elections taking place in different wards in the same parish and where the two by-election are being held on different dates. Our view is that rule 12 would apply even though two separate elections are taking place and therefore someone could not be nominated for election at the same time in both by-elections. However, it may be possible to argue to the contrary, i.e. that rule 12 only applies to elections being held on the same timetable not to two by-elections running on different timetables.
- 48.3. Presumably the intention behind the provision is to prevent someone from being elected to two positions in the same parish council, which would apply whether elections were taking place on the same day or on different days. However, there is no restriction on a sitting councillor standing for election in a by-election in the same or a different ward in the parish under section 80 of the Local Government Act 1972.

Electoral Commission – February 2014