Law Commission Review of Electoral Law – Consultation Paper

Electoral Commission Response

March 2015

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1 Introduction

1.1 The Electoral Commission is an independent body set up by the UK Parliament. We regulate party and election finance and set standards for well-run elections. We work to support a healthy democracy, where elections and referendums are based on our principles of trust, participation, and no undue influence.

1.2 In 2011 the Law Commission of England and Wales confirmed that, with the Law Commissions of Scotland and Northern Ireland, they would be carrying out a project of electoral law reform. This followed submissions to them by the Electoral Commission and the Association of Electoral Administrators.

1.3 We strongly support the Law Commissions' electoral law reform project. Reform will lead to a simpler and more modern law, enabling well-run elections and making it easier for candidates and voters to take part. We have been supporting the Law Commissions' work to help inform the process[1].

1.4 The Law Commissions' consultation on law reform is an important part of the project. The consultation paper and the associated research papers published alongside it provide an excellent review of electoral law as it stands today. In addition, the papers sets out how the Law Commissions propose to reform the law through a series of provisional proposals and questions. The consultation paper is an impressive achievement; this is the first time that the law governing elections has been reviewed on this scale.

1.5 We have set out our views in respect of each proposal and question and we hope that others with an interest in the electoral process will do likewise. Although we have commented on every proposal and question, in a small number of places we have not reached a firm view. In these cases we will consider the issue further, especially in light of evidence from the May 2015 elections.

1.6 As well as commenting on the provisional proposals and questions, we have also commented more generally on the issues raised in the paper and in a few places have identified issues not included in the consultation, which we would request the Law Commissions consider during their review.

[1] For further information on our work on the Law Commissions' electoral law reform project to date, please see http://www.electoralcommission.org.uk/our-work/our-views/law-commission-review-of-electoral-law

2 The Legislative Structure

2.1 As noted by the Law Commissions, the UK's electoral law is 'complex, voluminous, and fragmented'[2]. Many of the present problems with our electoral law result from a legislative structure that unnecessarily complicates the process of running and participating in elections. Electoral legislation in the UK is spread out across around two hundred Acts, Regulations and Orders. We have published detailed work on the legislative structure governing UK elections in:

- Electoral legislation, principles and practice: a comparative analysis
- Reflections on a new structure for the UK's electoral law (by Prof Watt)

Response to Law Commissions' provisional proposals

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

2.2 A key aim of the Law Commissions' reform project should be to reduce the number of Acts, regulations and orders governing electoral law and bring together the numerous statutes and secondary legislation into a more coherent statutory framework. This will have benefits for all involved in elections as it will make the law easier to understand and use.

2.3 We strongly support the Law Commissions' proposal to end the current approach of 'election-specific' electoral law, i.e. the approach of producing a discrete, complete set of laws for each electoral event. This will significantly reduce the volume of, and simplify, the law.

2.4 However, as the Law Commissions note, responsibility for legislating for some polls is devolved and there is the prospect of further devolution. Currently legislation-making powers for Scottish local government elections are devolved to the Scottish Parliament and Government, except for the franchise. However, under the Smith Commission's report and the UK Government's draft Scotland Bill 2015, the franchise at Scottish Parliament and local government elections will be devolved. Under the Smith Commission and the draft Scotland Bill 2015 the Scottish Parliament and Government will also get legislative competence for Scottish Parliamentary elections (including the franchise). The National Assembly for Wales and Welsh Government does not currently make legislation on the conduct of elections but the UK Government announced in March 2015 that it intends to devolve further powers to the Assembly, giving it legislative competence for National Assembly and local government elections in Wales, including the

[2] Law Commissions, *Consultation Paper*, p. 4.

franchise. The Northern Ireland Assembly and Executive do not currently have powers to make election law. We are not aware of any plans to devolve powers to Northern Ireland in this area.

2.5 Given this, it does not seem possible to create a single, UK-wide electoral Act with supporting secondary legislation. Legislation for Scottish local elections and (if the Smith Commission recommendations are implemented) Scottish Parliamentary elections will need to be set out in separate legislation passed by the Scottish Parliament or made by the Scottish Government. A similar approach will need to apply to Wales if there is further devolution of electoral law in Wales. Therefore, whilst, we support in principle the proposal to rationalise the law into a single, consistent legislative framework for all elections, this will need to be done within the context of devolution across the UK. This comment applies wherever there is a proposal in the Law Commissions' consultation paper to create a single set of provisions. In a number of places in the consultation paper there is a proposal to create a single set of provisions for a certain aspect of electoral law; although we support such proposals we only do so to the extent that it is consistent with the devolution framework.

2.6 We also note that the Law Commissions welcome views on the hierarchy of electoral laws, i.e. what should go into primary and secondary legislation (and what should be left to 'tertiary law' such as Electoral Commission guidance). We support the Law Commissions' provisional views in paragraphs 2.32 and 2.33. The current hierarchy has arisen in a piecemeal fashion and is not always consistent. It is important to get the balance right between the different levels of the electoral law hierarchy and for this to be based on sound principles that are clearly understood. The Law Commissions' reform project is the ideal opportunity to achieve this and we think the rationale for the legislative hierarchy proposed by the Law Commission is sound.

2.7 Electoral law is currently highly prescriptive; it sets out in great detail how elections are to be administered. This sometimes makes the law inflexible, hindering effective administration, and also means that there needs to be a large volume of amending legislation to implement policy change. Despite this there are many cases where the law is silent, resulting in uncertainty as to what administrators can or should do. It is inevitable that no matter how detailed the law is, the current structure means that there will be gaps in the legal provision that were not forseen and, in the tight timetable to which elections are run, this can cause problems for those running elections.

2.8 We hope that one of the results of the Law Commissions' reform project is that detailed rules are moved lower down the hierarchy, to secondary legislation or Electoral Commission guidance. This will allow for greater flexibility to run elections, whilst also ensuring that there is consistency in administration and that those running elections have the support they need. In our view legislation should focus less on the process of administering elections and instead should deal with outcomes, leaving much of the process for administering elections to statutory guidance. Guidance has the advantage of being easier to amend than legislation and so it can more easily keep up to

date with best practice and technological developments. It also has the advantage of allowing different approaches to be taken, if they are in the best interests of the voter. It is however important to ensure that such guidance is followed in order to ensure consistency.

2.9 One area where we consider that there is a strong case for removing some of the detail from legislation is election forms and notices. We can see no good reason for the exact content and format of forms and notices themselves (as opposed to their minimum required content) to be set out in legislation. This leads to significant difficulties for all those involved in elections, especially where errors in the prescribed form are discovered too late for the form to be amended by amending legislation. Our views are set in more detail elsewhere in this response and also in a separate paper for the Law Commission[3].

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

2.10 We agree with this proposal. Unless there is good reason for a difference between the law governing two elections, the law should be the same.

2.11 However, as the Law Commissions note, some inconsistencies are deliberate and can be justified by a principle or policy. Some of these reflect a different choice for a certain part of the UK, for example the law on registration, absent voting and in-person voting differs significantly in Northern Ireland compared with Great Britain. These inconsistencies should be retained. Also, it is highly likely that further justifiable differences in the law governing different elections will emerge over time, especially if there is more devolution of law-making powers. The law should be framed so as to allow these differences to be created, without upsetting the overall structure.

[3] Electoral Commission, *Where should electoral forms and notices be set out in the law?*, July 2014, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0020/184151/The-position-of-election-forms-and-notices-in-the-hierarchy-of-electoral-laws.pdf

3 Management and Oversight

Response to Law Commissions' provisional proposals and questions

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

3.1 We support this proposal, and agree that simplifying and clarifying the roles, responsibilities and powers of Returning Officers should be a goal for electoral law consolidation and simplification. We highlighted similar issues as part of our 2010 review of the problems faced by some electors who were still queuing outside polling stations at the close of poll for the May 2010 elections.[4] We concluded that there is a complex pattern of responsibilities for the management of elections in Great Britain, including the unnecessary involvement in electoral administration of some ceremonial positions, which is – at best – out-of-date and confusing in an era when expectations are that public services will be delivered efficiently and professionally.

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

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

3.2 We support these two proposals, which aim to clarify the roles, responsibilities and powers of Returning Officers and Regional Returning Officers (including PAROs for Police and Crime Commissioner elections). We note that this would mean a change to the law as it would create powers of direction at Scottish Parliamentary and National Assembly for Wales elections; we support this provided that Regional Returning Officers at Scottish Parliamentary elections are subject to direction by the Convener of the EMB[5].

3.3 The Law Commissions point out that the responsibilities of registration officers and returning officers have evolved. The management of elections

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[4] Electoral Commission (2010) *2010 UK Parliamentary general election Interim report: review of problems at polling stations at close of poll on 6 May 2010* http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/99091/Interim-Report-Polling-Station-Queues-complete.pdf

[5] Paragraphs 3.20 and 3.43 of the consultation paper.

has moved to a more hierarchical system with most elections being overseen by a directing returning officer and less autonomy for the local returning officer. However, as the Law Commissions note there is inconsistency between each election as to how this system works and there are some elections[6] that are still run without any oversight from a directing returning officer. We would draw attention to ongoing work to identify whether a more consistent management structure should apply to all elections in England and Wales, including UK parliamentary and local elections[7].

3.4 As one part of this it may be that in the future regional returning officers appoint returning officers for UK Parliamentary General Elections and European parliamentary elections. We recognise that some returning officers may not welcome the extension of regional management structures as they may perceive it as an erosion of their independence.

3.5 We suggest that the Law Commissions monitor such developments to see whether there is an opportunity to reflect any emerging new management structure in England and Wales in the reformed electoral law.

3.6 On a separate point and although not necessarily a matter for law reform, we would point out that currently returning officers are not under any obligation to be trained or qualified in election matters, although some of them voluntarily may attend training and awareness courses organised by the professional associations such as SOLACE and AEA; other returning officers may not undertake training and rely on their local authority staff who may or not be experienced and/or qualified in the management of elections. Performance standards for EROs and ROs are an ongoing means of ensuring consistency and key targets operate in Great Britain and it is proposed to extend to Northern Ireland..

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

3.7 The Law Commissions note that some coordinating officers (often called Regional Returning Officers) have responsibility for overseeing the conduct of certain elections over wide geographical areas which often cover multiple local authority areas. This means that the coordinating officers are dependent on the performance of individual local Returning Officers to ensure the effective conduct of the poll.

3.8 In circumstances such as these, where one individual Returning Officer has been given responsibility for returning the result of an election which involves multiple local Returning Officers, he or she should be given clear authority to ensure that polls are administered to a satisfactory standard

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[6] UK parliamentary elections and England and Wales local government elections.
[7] SOLACE, *Cooperation in electoral services*, paper submitted to the UK Electoral Advisory Board on 21 October 2014.

across the electoral area. This authority should be used to ensure consistency of outcome and experience for voters and campaigners across the electoral area, but may also be used to give confidence to the coordinating officer that key processes (at the count, for example) have been carried out to an appropriate standard.

3.9 Powers for coordinating officers to direct local returning officers should not be restricted in law – if they are to be personally responsible for returning the result of an election, they must be able to satisfy themselves that any aspect of the administration of the election has been carried out to the standard which they believe is appropriate and necessary. We recognise that, in some circumstances, local returning officers may disagree with aspects of the coordinating officer's approach – this risk should be managed and mitigated locally by individual coordinating officers through their relationships with local returning officers, rather than constraining their authority in law.

3.10 We have also recognised that, for elections where the Commission sets and monitors performance standards for local Returning Officers and directing/coordinating Returning Officers, the Commission and the directing/coordinating Returning Officer will need to work closely to ensure that timetables are aligned, that directions and performance standards do not contain inconsistencies, and that all requirements are well communicated and understood.

3.11 The Law Commissions should also consider the potential financial implications where polls are combined – funding might be available to ensure a consistent standard of delivery across a large electoral area, but local ROs might not be able or willing to provide funding to enable a similar standard to be met for the local elections for which they are responsible.

3.12 The Law Commissions should also consider whether it would be appropriate to recognise the role of Borough Returning Officer for Greater London Assembly and Mayoral elections in legislation for those elections. We are aware that the lack of formal statutory recognition has caused some confusion and conflicting interpretations of responsibilities has been a problem at some previous elections.

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

3.13 We strongly support this proposal because these are administrative tasks relating to an election that should be carried out by the independent Returning Officer, rather than a local authority, which is a political body. Electoral administration should be solely in the hands of the Returning Officer and the Returning Officer's staff (all of whom must be impartial, as discussed elsewhere in this response). This is necessary to ensure that elections are effectively administered and in voters' best interests, to secure the impartial administration of elections and avoid any perception of bias and to promote public confidence and trust in the process.

3.14 Like the Law Commissions, we also question the relevance of the 'polling place' concept. It would seem much simpler for the law to refer to polling districts and polling stations. However, if the concept of a 'polling place' is abolished the current law governing the factors to be taken into account when designating and reviewing polling places[8] will need to be applied to the designation and review of polling stations. There will also need to be consideration of the law in Northern Ireland where there is currently a duty on the Chief Electoral Officer for Northern Ireland to carry out both a review of polling places and a consultation on a polling stations scheme.

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

3.15 We currently have a statutory duty to consider appeals against a review of polling districts and places made by certain categories of persons[9]. The appeals can only made on the grounds that the review was not conducted by an authority so as to:

- meet the reasonable requirements of the electors in the constituency or any body of those electors, or
- take sufficient account of the accessibility to disabled persons of polling stations within a designated polling place.

3.16 If we think fit, we can direct the authority to make any alterations to the polling places designated by the review which we think necessary in the circumstances and, if the authority fails to make the alterations before the end of the period of two months starting on the day the direction is given, we can make the alterations ourselves. As noted above, the Law Commissions' consultation paper proposes that Returning Officers, rather than local authorities, should designate and review polling districts.

3.17 The Law Commissions ask for views on how well the current process for hearing appeals in relation to polling district reviews works, how it might be improved and whether another forum is more suitable. The paper adds that it has been suggested to the Law Commissions that the local government boundary commissions may be better placed than the Electoral Commission. This refers to a suggestion from both the Local Government Boundary Commission for England and ourselves to the Law Commissions that it would be useful to consider these issues in the Law Commissions' review of electoral law. The consultation paper highlights, however, that the Law Commissions "are not at present convinced that a change in the law is necessary".

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[8] Section 18B, RPA 1983.
[9] Section 18D, RPA 1983.

3.18 The role of considering appeals against reviews of polling districts and places was given to the Electoral Commission shortly after its creation in 2001[10]. Previously this power was vested in the Secretary of State[11]. On the setting up of the Electoral Commission it was clearly thought more appropriate for this function to sit with the Commission, rather than the Secretary of State. It seems likely that, given that the Commission's role at the time covered both elections and the setting of electoral boundaries, it was considered well-placed. However, there is a question as to whether we remain the best-placed body to consider these appeals given that in 2010 all of our functions in respect of electoral boundaries were removed[12].

3.19 Our records show that, since this role was given to us in 2001 until the beginning of 2015, we had only received and determined four appeals. Since the beginning of 2015, we have received a further 10 appeals. Such appeals have raised issues about whether the choice of polling districts and places meets electors' reasonable requirements having regard, for example, to local demography and geography. They also sometimes relate to whether disability access has been sufficiently taken into account. We have considered all the valid appeals that we have received, for example by scrutinising review documentation, visiting the local area and (in one case) instructing a disability access audit of premises and we have come to a considered decision. In some cases we have directed that changes needed to be made to polling places.

3.20 The question raised by the Law Commissions' consultation paper is whether there is any other body or bodies that would be in a better position to take on this function having regard to their, and our, other functions. One alternative is for the local government boundary commissions to consider these appeals. They may have more direct and relevant experience and expertise in assessing the suitability of administrative areas and boundaries, routinely considering issues such as demography and geography. However, this would mean that this function would be split between a number of bodies, as each part of the UK has its own separate local government boundary commission. There would be a particular problem in Northern Ireland because we understand that the Local Government Boundaries Commission for Northern Ireland does not exist continuously as a permanent entity as it is held in abeyance unless a review is in progress[13].

3.21 On the other hand, it is arguable that the Commission remains the best body to carry out this function. We are a single, UK-wide body that can consider appeals throughout the UK. We also produce the guidance that supports local authorities in their review.

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[10] Paragraph 6(2), Schedule 21, Political Parties, Elections and Referendums Act 2000 (PPERA).
[11] Section 18, RPA 1983 (as originally enacted).
[12] Sections 14 to 20 PPERA were repealed in April 2010 by the Local Democracy, Economic Development and Construction Act 2009.
[13] Section 50, Local Government Act (Northern Ireland) 1972.

3.22 This function has been vested in the Commission since 2001 and we are content for it to remain vested with us. We have the necessary expertise and skills to carry out this function effectively and we have demonstrated this in the appeals that we have determined. However, we are pleased that the Law Commissions have asked this question and we would be interested to hear others' views as to whether another body or bodies would be better placed than us to carry out this function.

3.23 Regardless of what decision is taken about who deals with appeals, we would request that sections 18A to 18E of, and Schedule A1 to, the RPA 1983 and the Review of Polling Districts and Polling Places (Parliamentary Elections) Regulations 2006 are reformed by the Law Commissions. We have come across a number of problems caused by the drafting of these provisions, which makes exercising our functions more difficult. For example, the period for completing a review expires at the end of the January before a parliamentary election[14]; this leaves little time before the election, especially if appeals are submitted to the Commission. We would be happy to provide further information to support this work at the appropriate stage.

[14] Section 18C(2), RPA 1983.

4 The Registration of Electors

4.1 In our view the two principles that should underpin the law and practice relating to electoral registration are the principles of accuracy and completeness. Our approach to assessing the quality of the electoral registers is based on two measures: accuracy and completeness. The Commission defines accuracy and completeness as follows:

> By **accuracy** we mean that 'there are no false entries on the electoral registers'. The accuracy of the electoral registers is therefore a measure of the percentage of entries on the registers which relate to verified and eligible voters who are resident at that address. Inaccurate register entries may relate to entries which have become redundant (for example, due to home movement), which are ineligible and have been included unintentionally, or which are fraudulent.
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> By **completeness** we mean that 'every person who is entitled to have an entry in an electoral register is registered'. The completeness of the electoral registers therefore refers to the percentage of eligible people who are registered at their current address. The proportion of eligible people who are not included on the register at their current address constitutes the rate of non-registration.

4.2 The accuracy and completeness of the electoral registers is particularly relevant at this time because in Great Britain the way that the electoral registers are created is changing to a system known as individual electoral registration (IER). Under this new system each individual is responsible for registering to vote, rather than one member of the household registering all those who live at a property.

4.3 The law should ensure that the registration process meets these two principles, so that, as far as possible, the process is efficient to administer, guards against electoral fraud and is accessible to those who want to register.

4.4 The law at present is particularly complex around registration and there is a need to set out rules clearly.

4.5 The transition to an individual electoral registration system in Great Britain will mark a significant step in the transformation of electoral registration for the UK. It will mean that all entries on electoral registers in the UK will have been individually verified against another trusted data source. It will also mean that people in Great Britain can apply to register to vote or update their registration details online, bringing a more customer-focused service and approach to the electoral registration process.

4.6 The transformation of electoral registration should not stop at that point, however, and we will continue to explore options for further improving the

electoral registration process across the UK. Others with an interest in ensuring accurate and complete electoral registers, including EROs, political parties and elected representatives, will also expect and seek further improvements to current processes. The UK Government will continue to be responsible for developing policy and legislation for electoral registration, and it will need to ensure that it retains the capacity to focus on and manage further change in the medium and long term.

Response to Law Commissions' provisional proposals and questions

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

4.7 We agree that the franchises for all elections should be set centrally in primary legislation. The legislation should be structured to enable changes to the franchise to be accommodated. However, any proposed reform should be consistent with the devolution of electoral law in the UK.

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

4.8 We agree that the law on residence, including factors to be considered, and special category electors, should be restated clearly and simply in primary legislation. However primary legislation should be sufficiently flexible to permit changes to the franchise to be made.

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

4.9 We agree that the possibility of satisfying the residence test in more than one place should be explicitly acknowledged in legislation so the law is clear and unambiguous about the criteria to be used for registering at a second residence.

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

4.10 We agree that the law should lay down the factors to be considered by registration officers when registering an elector at a second residence so the law is clear regarding the second residence test.

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

4.11 We agree that electors applying to be registered in respect of a second home should be required to make a declaration supporting their application.

4.12 We support the proposal that there should be a declaration of intent by the elector to occupy the second home for the foreseeable future and that a description of the person's connection, if any, to the local area, including past residences, local businesses or other interests should be part of the declaration relating to the second residence. However 'other interests' would

need to be specified to avoid ambiguity either in secondary legislation or in guidance. We do not support the proposal that a person should declare a typical duration of presence in a calendar year and total length of occupation at the second home, accompanied by evidence in support of this as this would be administratively burdensome and, in cases of a declaration for a new residence, unworkable in practice. We also do not support the proposal that, if a person is able to provide one, an attestation by a current elector in the area that they know the applicant and can attest to their being a member of the community as this would be discretionary and unworkable in practice.

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

4.13 The Electoral Commission has not yet reached a firm position on the merits of this proposal, and we will therefore focus on the likely practical impact of any change. If a person, in relation to a second residence, were to designate one home as the one from which they vote at national elections, the electoral registration officers in both electoral areas where each residence is situated would require to be informed (as the Law Commissions note). This would not just apply to UK parliamentary elections and European parliamentary elections but also, depending where the second residence is located, to elections to the devolved legislatures which, within each country, are national elections. This would entail the creation of new categories of electors depending where each main and second residence is located. It may also be necessary to devise a system whereby electors could change their declaration of residence at which they are registered for national elections. For practical purposes (e.g. for the issue of poll cards) before an election there would then need to be a deadline prior to polling day for such changes to be notified to the ERO.

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

4.14 We agree that the entitlement to be a special category elector should be governed by primary legislation which should require a declaration in a common form establishing a voter's entitlement to be registered at a notional place of residence. This would enable special category electors to be defined using a standard form of declaration for a notional place of residence (including merchant seamen who currently are dealt with in a different way for historical reasons), with the detailed procedure set out in secondary legislation.

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

4.15 We agree that the provisions on maintaining and accessing the register of electors should be simplified and restated.

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

4.16 We agree that primary legislation should contain core registration principles including the objective of a complete and accurate register and the attendant duties and powers of registration officers, the principle that the register determines entitlement to vote, requirements of transparency, and local scrutiny and appeals, but that the deadline for registration should be in secondary legislation as this may require to be altered due to changing circumstances.

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

4.17 We agree that the deadline for registration should be expressed as a number of days in advance of a poll as it would be straightforward to calculate in the same way as the other latest dates are calculated in the election timetable. As a general point on timing, it is important that calculations of time are expressed as consistently as possible across the legislative framework to enable clear calculation of deadlines.

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

4.18 We agree that primary legislation should prescribe one electoral register, containing records held in whatever form, which is capable of indicating the election(s) the entry entitles the elector to vote at.

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

4.19 We agree that secondary legislation should set out the detailed administrative rules concerning applications to register, their determination, publication of the register and access to the full and edited register.

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

4.20 We agree that registration officers' systems for managing registration data should be capable, in the long term, of being exported to and interacting with other officers' software, through minimum specifications or a certification requirement laid down in secondary legislation. We are of the view that this could be achieved through our input with our Electoral Advisory Board and with the input of the government. We are aware that there may be practical, though not insurmountable, implications for electoral registration officers and

local authorities in accomplishing this. We welcome and support the intention to 'future proof' the use of the registration data. However we are aware that the detail on how this could be achieved, such as the setting of minimum specifications, would require careful consideration and development.

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

4.21 We noted in our report on the European Parliamentary elections held on the 22 May 2014 that we received complaints from some EU citizens that they were unable to vote in the European Parliamentary election as while they were registered to vote, they had not successfully completed the declaration of intent.

4.22 We recommended in our report that the legislation could be changed so that in future citizens of other EU member states do not need to complete more than one electoral registration form to be able to vote at European Parliament elections in the UK. We want changes to legislation to be introduced ahead of the 2019 European elections, and make sure that whatever process is in place it is clearly communicated to EU citizens in the UK.

4.23 While we support the intent of this proposal to improve the registration arrangements for EU citizens, we would prefer that the law is further changed so that EU citizens are automatically entitled to vote in European Parliament elections once they have registered to vote, and do not have to complete any additional declaration at the time of registration. We have been working with representative groups such as the New Europeans to identify how to enable EU citizens to register to vote and take part in future European Parliament elections as easily as possible, and they also support this additional change to the requirements.

Request for the consideration of additional law reforms

4.24 The Electoral Commission will be reviewing the IER legislation in light of practical operation in due course after which further comments arising from the recommendations from that review may identify factors to be considered.

4.25 The experience of using data to verify the identity of potential electors without requiring them to provide additional information also highlights the potential for direct registration to significantly improve the accuracy and completeness of electoral registers. Electors would then not be required to complete a registration application form, but an information notice would be sent to their registered address setting out how they may correct any errors.

4.26 In future electors may also be provided with a mechanism to enable them to check online their registration status.

5 Manner of Voting

Response to Law Commissions' provisional proposals

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

5.1 We support the principle behind the proposal to extend the secrecy requirements under section 66 RPA 1983 to cover information obtained when a person completes their postal vote; there should be greater consistency and equivalency between offences which may be committed in a polling station or at a count, and elsewhere, including in a voter's home. We would welcome the opportunity to discuss further with the Law Commissions, police forces and prosecutors how such a change would be enforced, including how best to ensure that ballot secrecy requirements are clearly expressed and easily understood by those who are required to observe them.

5.2 We also support the principle behind the provisional proposal to make it an offence to take a photograph in a polling station, to provide greater assurance that individual voters are not subject to bribery or undue influence in the way they have cast their votes. We have identified some questions about the practicalities of enforcing this prohibition in a busy polling station and given the proliferation of smartphones with cameras over the last decade. Perhaps a more logical prohibition and more in line with the spirit of current legislation, although equally difficult to police, would be for the prohibition to be of photographs portraying a completed and visibly complete ballot paper. On the other hand, Presiding Officers may find it simpler to enforce an absolute prohibition on the use of cameras in polling stations than attempting to ascertain the circumstances of individual incidents.

5.3 Given the large numbers of people who could be affected by a new offence we would again welcome the opportunity to discuss further with the Law Commissions, police forces and prosecutors how such a change would be communicated and enforced.

5.4 We also recommend that the Law Commissions consider how the electoral law framework can better define the concept, purpose and practical implications of ballot secrecy: whether secrecy requirements are intended only to protect the secrecy of individual votes cast by individual electors, or whether they should also extend to aggregated information about the number of votes cast for particular candidates or parties across a number of individual ballot papers (see also our additional comments at the end of this section).

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

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

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

5.5 We support the principles behind these provisional proposals, which would provide further protections for the secrecy of individual votes. We are not aware, however, of any specific instances where the secrecy of the ballot has been compromised as a result of inadequacies in the storage of ballot papers and corresponding number lists.

5.6 We have identified some further questions about the practical implications of the proposal that corresponding number lists should be stored in a different location from ballot papers and in a different person's custody. First, would the requirement be able to be satisfied by storing documents in another room within the same building, or would it require storage in a different building entirely? Many local authority offices are extensive and so might plausibly offer two or more viable locations to store this material. On the other hand, some local authorities may not have secure storage facilities in multiple buildings to be able to meet such a requirement.

5.7 Second, the period for retaining ballot papers after elections currently differs from event to event, and so it would be necessary to have some clarity about the necessary provisions for storage at combined elections (although it may be that the Law Commissions will increase the consistency of these provisions).

5.8 Third, this reform may raise resource implications for Returning Officers, as the costs of storage are not provided for in various Election Charges Orders. We are aware that some ROs have to pay for it themselves, while others argue that it should be covered by the local authority.

5.9 Finally, we do not believe that the Electoral Commission would be well-placed to take on responsibility for storing corresponding number lists after elections. The Commission does not currently have the capacity to undertake such a responsibility, and we believe it would remain appropriate and more practical for corresponding number lists to be stored locally, rather than having to be collated and securely stored in one location. We do not have any reason to doubt that Returning Officers would be capable of securely storing both used ballot papers and corresponding number lists, including in separate locations if necessary.

5.10 We would welcome the opportunity to discuss these proposals and their practical implications further with the Law Commissions and Returning Officers.

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

5.11 The current law has three main approaches to the position of forms and notices in the legislative hierarchy:

- Prescribing the exact content and format of the form in legislation (usually in secondary legislation).
- Setting out the minimum information that a form or notice must contain but giving the Electoral Commission a duty to design the form.
- Setting out what a form or notice must contain but allowing discretion as to the exact wording and format of the form that is used[15].

5.12 We do not agree with the proposal that the form and content of all materials supplied to voters should continue to be prescribed in secondary legislation. Our priority is that ballot papers and other materials provided to electors to help and support them during the voting process should be consistently well-designed and user tested so that they are easy to understand and complete. We recognise and welcome the significant improvements that both the UK and Scottish governments have made to their approach to specifying the designs of ballot papers and other voter materials, including carrying out user testing on draft designs.

5.13 Nevertheless, we remain concerned that the approach of prescribing the exact content and format of forms or notices in legislation does not provide sufficient flexibility to ensure that any problems with forms can be rectified before they adversely affect voters or candidates. There are often problems with the prescribed form that are only noticed shortly before an election; sometimes there is insufficient time to bring forward amending legislation to correct this in time for the election. For example, an issue that we have previously identified at the November 2012 Police and Crime Commissioner elections a drafting error caused confusion for candidates about which version of the electoral register they should use when filling out the details of subscribers on their nomination forms, and which register would be used by the Returning Officer to check the nomination form.

5.14 This causes difficulties for those administering the election (for example it is not clear the extent to which they can amend the prescribed form themselves) and also for candidates and voters who may be presented with contradictory, confusing or inaccurate information. We also note that some consultees during the Law Commissions' scoping consultation, including

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[15] Electoral Commission, *Where should electoral forms and notices be set out in the law?*, July 2014, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0020/184151/The-position-of-election-forms-and-notices-in-the-hierarchy-of-electoral-laws.pdf Further details of our views on this topic can be found in the above paper.

some disability organisations, argued that forms and notices should be taken out of legislation.

5.15 This lack of flexibility to modify the prescribed form also results in forms that are not always easy to use for all those taking part in elections. If forms and notices were easier to amend (for example if they were in guidance not legislation), it seems to us that it would be easier to keep them under review and to ensure that any improvements can be made, including those necessary to promote access for disabled voters. Prescription also presents problems for administrators as it results in significant costs associated with reproducing prescribed forms for their local areas (as opposed to being provided with amendable template forms in Word documents).

5.16 The argument in favour of prescribing forms in legislation is often based on the need to ensure there is consistency in the forms and notices used. However, our experience is that it may actually achieve the opposite as there is currently great variation in the quality of forms across the UK as the legislative version cannot be easily adapted locally and so it is reproduced in many different ways.

5.17 We recognise that legislators may wish to retain oversight and formal approval for the detailed designs of some election forms and notices. In particular, it may be appropriate for the design of ballot papers to continue to be specified in legislation. We would, however, expect Governments to apply consistent user-focused design principles to the design of ballot papers which are specified in legislation, and we would seek assurances that designs have been appropriately user-tested before they are specified in legislation.

5.18 We do not agree, however, that detailed parliamentary scrutiny of the exact content and layout of a large number of administrative forms is necessary or helpful. We accept that the minimum contents of forms and notices should be set out in legislation and this should be subject to parliamentary scrutiny but we do not see what would be added by such scrutiny of the design of the form itself. We are not aware of any significant support among electoral administrators for such a large number of administrative forms and notices to be set out in legislation.

5.19 We would also add that the present approach of having multiple ways in which forms and notices in electoral law are set out (in legislation, in Commission guidance or entirely at candidates and officers' discretion) is inconsistent. For example, why should the Commission prescribe some forms and notices but legislation sets out others? In addition, sometimes the same form or notice is set out in a different way at different elections. Why could a more consistent approach not be taken? It is often not clear to us why these inconsistencies exist and we would hope that the Law Commissions' reformed law will take a more coherent approach.

5.20 For these reasons we would not support retaining this approach in the reformed electoral law produced by the Law Commissions. Instead we would prefer the legislation to set out what must be contained in a form or notice and then leave it to another body, such as the Electoral Commission (working in

consultation with others such as the AEA and Electoral Advisory Board), to set the content and format by producing templates for EROs and ROs to adapt and use locally. We consider that this would provide flexibility to correct and improve the forms and as a result would be in everyone's best interests. An alternative approach would involve the Secretary of State specifying forms and notices, following design and testing of these materials by the Electoral Commission. This approach has been adopted in relation to the development of forms and notices to support the implementation of IER in Great Britain.

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

5.21 As set out in our response to the previous proposal we do not agree that the detailed design of administrative forms and notices should be prescribed in law. However, if the reformed electoral law continues to prescribe some forms and notices, including ballot papers, we would support a duty to consult the Electoral Commission on the form and content. It will also be important to consult others such as the AEA, EMB, CEONI, EHRC and disability organisations.

5.22 Although this consultation would bring significant benefits as issues would be identified and corrected, it is sometimes not until during or shortly before an election that problems with forms become apparent. Therefore, we do not consider that this proposal will address our overarching concerns about the impact of inflexibility of designs which we have set out in our response to the previous proposal. Our strong view is that the detailed designs for administrative forms and notices for elections should be taken out of legislation to ensure that there is flexibility to deal more swiftly and responsively with unforeseen problems and to make it easier to improve designs for future elections.

Request for the consideration of additional law reforms

Tallying / sampling postal votes

5.23 Section 66(4)(d) RPA 1983 needs to be clarified so that is it clear whether keeping a tally of postal votes, or a sample of them, at postal vote opening sessions and communicating is an offence. This is commonly referred to as postal vote tallying or sampling. We are aware of one case where a police caution was given to a candidate in 2010 for tallying / sampling. Our view is that tallying / sampling at postal vote opening sessions is currently unlawful, but we are aware of others who take a different view. Therefore, we would ask the Law Commissions to ensure that the law is clearer on this point, if it is not clarified by amending legislation before the Law Commissions produce their draft Bill.

5.24 Postal vote opening sessions aside, informal tallying of votes at the count is a common practice and we do not believe it should be a cause for concern. Beyond that the legality of communicating externally either the results of tallying or, later in the process, the apparent progress of the election which can be judged in some cases from the piling up of counted ballot papers is something which should be clarified. Televised election coverage often features reporters that clearly know much more than they are willing to announce; presumably this reticence is because they are worried about the provisions of secrecy. We feel that this is something which should be safely clarified.

Tallying / sampling at the count

5.25 Similarly, we would request that the law is clearer as to whether it is possible to keep a tally / sample of ballot papers at the count and communicate it externally.

5.26 It is important that the secrecy requirements are unambiguous so that all those attending the various electoral proceedings are in no doubt as to what behaviour is prohibited.

6 Absent Voting

Response to Law Commissions' provisional proposals and questions

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

6.1 We agree that this proposal would help to simplify and rationalise electoral law as it relates to entitlement to an absent vote. The detailed administrative procedures and requirements for making an application for an absent vote should be set out in secondary legislation.

6.2 We would welcome confirmation that the Law Commissions' proposed approach would accommodate different policy choices made by governments and legislatures in different parts of the UK where required – in Northern Ireland, for example, the availability of postal voting is relatively constricted, compared with Great Britain.

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

6.3 We agree that the law governing postal voting should be set out in one place but only to the extent that this is possible within the UK's devolution framework.

6.4 We do not agree with the proposal that applications to become an absent voter should not be capable of being made selectively for particular elections. While we recognise the value in simplifying the process of applying for an absent vote we are concerned that this would reduce the level of choice for voters about how they cast a vote for different polls or types of poll.

6.5 Voters should continue to be able to exercise their own choice about whether they want to vote as an absent voter for any specific type or set of polls if they wish, or to vote as an absent voter for all polls. We would welcome the Law Commissions' consideration of how best to enable voters to make simple and accurate choices about their preferences.

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

6.6 We support this proposal, which aims to simplify the current arrangements for establishing and maintaining details of absent voters.

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

6.7 Our understanding is that this legislation has never been used in Northern Ireland. We would have no issue with repealing it.

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

6.8 The Law Commissions note that in some cases campaigners have designed and used their own form for voters to apply for an absent vote and the problems that this has caused at past elections. We reported in our May 2014 report on the European Parliamentary and local government elections[16] that absent vote application forms had been sent out by parties which only applied to the European Parliament elections – so that electors who completed them were not sent postal ballot packs for the local government elections on 22 May. To avoid this, the Law Commissions recommends that absent vote applications should be prescribed in legislation.

6.9 As we set out above in relation to provisional proposal 5-5, we do not support prescribing election forms in legislation. We set out the reasons for our position in our response to that proposal and in the separate paper that we have prepared on that subject; these reasons are equally valid here. In particular, as the Law Commissions note, prescribed forms introduce rigidity. Our strong view is that the detailed designs for such forms should not be set out in legislation in order to ensure that there is flexibility to deal quickly and effectively with unforeseen problems and to make it easier to improve designs for future elections.

6.10 However, we recognise the problems that can be caused by bespoke forms being used by campaigners that do not comply with the statutory requirements or which may confuse voters. Therefore, we would support a requirement to adhere to wording and options for the completion of applications forms as specified in the form set out by the Electoral Commission. This would help to ensure greater consistency in the forms being used (so that they do not contain inaccuracies or misleading information), whilst also allowing for greater flexibility in the design and modification of the form (compared to legislation).

6.11 We recognise and support the vital role that campaigners play in encouraging participation in elections and believe that the current flexibility for the design of absent vote forms makes it easy for campaigners and parties to

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[16] Electoral Commission, *The European Parliamentary elections and the local government elections in England and Northern Ireland May 2014 - Report on the administration of the 22 May 2014 elections*, 2014, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/169867/EP-and-local-elections-report-May-2014.pdf

produce their own form and to actively encourage voters to complete it. We are concerned, however, that prescribing the form in legislation could mean that electors who have made a choice about how they want to vote using a form which was not exactly as prescribed could have their application refused by the ERO, even if it contained all the correct information required to process the application. We do not think it would be in voters' interests if otherwise valid absent vote applications cannot be processed or approved by EROs because of minor variations from the specified form design or wording, as long as all the correct options and information have been provided.

6.12 However, the information included on absent vote applications must be accurate. The Commission already provides guidance for campaigners to help make sure that application forms are accurate and can be processed by Electoral Registration Officers. The Code of Conduct for Campaigners[17] developed by the Commission and agree with political parties represented on the Parliamentary Parties Panel includes provisions which specify that campaigners should:

- ensure that any bespoke postal or proxy voting application forms conform fully to the requirements of electoral law, including all the necessary questions and the options open to electors;

- ensure that the local Electoral Registration Officer's address is provided as the preferred address for the return of absent vote application forms; and

- send on unaltered any completed application forms given to them to the relevant Electoral Registration Officer's address within two working days of receipt.

6.13 In addition, our candidates and agents guidance reminds candidates that if they develop their own absent vote application form to make sure they include all the required information or the applications will be rejected. It also reminds them to make sure that the signature and date of birth fields on postal and proxy application forms are in the correct format so they are able to be scanned and are compatible with the software system.

6.14 On this basis, we would welcome further discussion with the Law Commission and campaigners about how this proposal could work in practice, and in particular how to ensure that voters are able to exercise an informed choice about which voting method they would prefer to use, as easily and accessibly as possible.

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[17] Electoral Commission, *Code of conduct for campaigners: electoral registration, postal voting, proxy voting and polling stations*, 2014, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0011/179741/Code-of-conduct-for-campaigners-2015.pdf

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

6.15 The Law Commissions propose that where someone requests a waiver from providing a signature on their application for a postal or proxy vote, that request should be attested. Proxy applications are already attested. We support this proposal as it will help to ensure the integrity of the absent vote application process.

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

(1) assisting in the completion of postal or proxy voting applications;

(2) handling completed postal or proxy voting applications;

(3) handling another person's ballot paper;

(4) observing a voter marking a postal ballot paper;

(5) asking or encouraging a voter to give them any completed ballot paper, postal voting statement or ballot paper envelope;

(6) if asked by a voter to take a completed postal voting pack on their behalf, failing to post it or take it directly to the office of the Returning Officer or to a polling station immediately;

(7) handling completed postal voting packs at all?

6.16 We most recently considered the case for further statutory restrictions on the handling of absent vote applications and postal ballot packs in our review of electoral fraud vulnerabilities, which reported in January 2014.[18] We concluded that it is not appropriate for campaigners to be directly involved in the administration of the voting process, including completing absent vote applications and postal ballot packs, because of the direct risk of electoral fraud and also because of the perceptions of voters themselves that such activity is inappropriate.

6.17 Our report made clear that we did not believe, however, that introducing further statutory regulation or new offences was necessarily the right first step to change campaigner behaviour. Instead, we proposed consulting political parties, other campaigners and EROs/ROs on changes to strengthen the provisions of the voluntary Code of Conduct for Campaigners relating to handling absent vote applications and postal ballot packs, and on how best to

[18] Electoral Commission, *Electoral fraud in the UK Final report and recommendations*, 2014, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/164609/Electoral-fraud-review-final-report.pdf

ensure campaigners understand the need to change how they deal with these documents. We also noted that:

> If we are unable to secure support and agreement by parties and other campaigners to a strengthened Code of Conduct for Campaigners, however, we will reconsider the case for more direct statutory regulation of campaigner behaviour in future, including whether we would recommend new legislation to make it an offence for campaigners to handle any postal voting materials.

6.18 We did discuss and consult on changes to the Code during summer and autumn 2014, but were not able to secure agreement from representatives of the UK Parliamentary Parties Panel (PPP) to accept voluntary restrictions on handling absent vote applications by campaigners. While we reached agreement that campaigners should not ordinarily handle completed postal ballot packs, the PPP were keen to ensure that the Code recognised that it may be appropriate for a campaigner to handle a completed and sealed postal ballot pack in limited circumstances – where it was clear that the voter had no alternative means of returning their postal ballot pack and where the Returning Officer had been contacted and agreed it would be appropriate for the campaigner to do so.

6.19 We can see two areas of potential difficulty with the proposals which are the subject of the Law Commissions' questions, both of which are acknowledged in the consultation paper. First, consideration would need to be given to how 'campaigners' would be defined for the purpose of formulating and applying new offences to ensure that the offences extend to those persons they are intended to cover (and not others accidentally). There may be some risk that workable definitions still leave a wider range of less formal participants comparatively unregulated.

6.20 Second, while new offences may succeed in deterring inappropriate activity by unscrupulous campaigners, they may also have the effect of deterring the provision of legitimate support and help to voters. For instance, by preventing people who have volunteered to do campaign activity from providing such assistance to friends or family members.

6.21 It will be useful to reflect on the behaviour of campaigners at the May 2015 elections, especially given that this will be the first set of UK-wide elections at which the revised provisions of the Code of Conduct will apply. We would be better placed then to assess whether campaigner behaviour remains a significant vulnerability which would more appropriately be addressed by new offences. We do not, therefore, make a firm response to the Law Commissions' question 6-7 in this response document.

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

Provisional proposal 6-9: These rules should set out the powers and responsibilities of returning officers regarding issuing, receiving,

reissuing and cancelling postal votes generally rather than seeking to prescribe the process in detail.

6.22 We agree with these proposals; however this will need to take account of the devolution of the law governing some elections. It would be much better for everyone involved in the postal vote process, particularly to reduce the scope for confusion and inconsistent administration, to only need to consult one set of rules, rather than a separate (almost identical) set of rules for each type of election.

6.23 Further consideration will need to be given to what is included in the statutory rules as opposed to guidance. There is scope for reducing some of the procedural detail in the law in this area.

Request for the consideration of additional law reforms

Extending the grounds for the criteria for emergency proxies

6.24 We recommended to the UK Government in our 2011 report on the referendum on the voting system for UK parliamentary elections and report on the May 2014 elections that the grounds for being able to apply for an emergency proxy voter should be extended so that those who have unforeseen caring responsibilities or who have experienced the death of a close relative would also be eligible to apply for an emergency proxy vote. The Government have not yet amended the law to implement this recommendation. We recommend that the Law Commissions should make this change as part of the electoral law reform project.

7 Notice of Election and Nominations

7.1 We have recently reviewed the law on standing for election. Our report made a number of recommendations to simplify and modernise the relevant law[19]. It is important that this area of law is clear and up to date in order to make it easy to participate in elections as candidates and to assist those who are administering the process.

Response to Law Commissions' provisional proposals

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

7.2 We agree that this would simplify the nomination process. It would be a significant improvement that would benefit candidates and administrators.

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

7.3 We agree and made a similar recommendation in our report *Standing for Election in the United Kingdom*. We note, however, the practical points raised by electoral administrators about the need for changes to legislation to be precise in terms of how papers are submitted and about liability if papers are not delivered on time. Therefore it is important that changes to the law are carefully considered to make sure that they work in practice.

7.4 In *Standing for Election in the United Kingdom* we also recommended that consideration be given to given to allowing nominations to be submitted via an online system.

7.5 We note that the Law Commissions also provisionally propose that completed nomination forms should be open for public inspection during the period between notice of election and notice of the poll[20]. We support this proposal but feel it should be extended beyond the date of publication of the notice of poll to the latest date permissible for a legal challenge to the result of the election to be made. This proposal would increase the transparency of the nomination process; there is no reason why such forms should not be

[19] Electoral Commission, *Standing for Election in the United Kingdom*, 2015, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/180458/Standing-for-Election-in-the-UK-report-Jan-2015.pdf

[20] Paragraph 7.58 of the consultation paper.

open to public scrutiny, however there may be practical issues for RO's in administering this, particularly at local elections where there can be a considerable number of nomination forms received. We agree that this right of access should not be limited to those with a connection to a candidate, as is currently the case for some elections; there is a public interest in scrutinising these papers and so we support this right being given to everyone. It is not clear whether anyone so attending would have a right to object to a nomination paper but we would support a right of objection being conferred on all attendees, rather than just those with a connection to a candidate[21].

7.6 We also support the proposal to set out in law the Returning Officer's power to offer a preliminary view on the validity of draft nomination papers, so long as this power only extends to giving a preliminary, informal view about the accurate completion of the paper, not the validity of the details contained within it [22].

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

7.7 We agree with this proposal.

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

7.8 We agree with this proposal.

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

7.9 As the law currently stands, we agree with this proposal as it would bring the treatment of disqualification under the RPA 1981 into line with other disqualifications and would be consistent with the general position in electoral law whereby Returning Officers must treat nominations at face value.

7.10 However, in *Standing for Election in the United Kingdom* we recommended that consideration be given to allowing objections to nominations on the grounds that a candidate is not qualified or is disqualified and, if satisfied that this is the case, requiring a Returning Officer to hold a nomination paper to be invalid (including disqualification under the RPA 1981). This would help ensure the integrity of the process, since it would help avoid a situation where an obviously disqualified (or not qualified) candidate is able to stand for election.

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[21] We discussed this in our *Standing for Election in the United Kingdom* report (page 93).
[22] Paragraph 7.60 of the consultation paper.

7.11 Holding a nomination paper to be invalid is a significant step. It should therefore only be possible to do so in exceptional circumstances where there is little or no doubt in the Returning Officer's mind that the person is ineligible. It would be important that any change to the law is carefully considered to ensure uncertainty and dispute is not caused unnecessarily during the election process. Consultation with Returning Officers will be particularly important before any change is made, especially on how it would fit within the election timetable.

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

7.12 We agree that giving Returning Officers greater flexibility and power to reject 'sham' nominations would help to protect the integrity of and confidence in the electoral process. At present the law is set out in case law. Unwritten law is difficult to find, especially at short notice during the nominations period[23], and the position is not clearly stated in the cases. We would prefer the grounds and legal basis for rejecting sham nominations to be set out in a clear statutory provision.

7.13 However, we note that there may be problems with this power (as noted by the Law Commissions on page 153). It is inconsistent with the general requirement for Returning Officers to take nominations at face value. Presumably the power will only apply where someone tells the Returning Officer or the Returning Officer has their own knowledge that a nomination may be a sham. There have been, and will continue to be, cases where the Returning Officer has information to suggest that a nomination may be a sham but is reluctant to reject the nomination without being sure. To what extent would a Returning Officer be able to investigate to ascertain whether the nomination is a sham and what burden of proof would need to be met? A Returning Officer would not want to prevent a legitimate candidate from standing for election, so would want to be satisfied that the nomination was definitely a sham, which may be difficult without conducting some enquiries. A power to conduct some enquiries seems to conflict with the Returning Officers' role and is especially difficult within the short period for nominations. These are currently problems with the law as it stands but by moving the law into the statutory framework there is an opportunity to address these sorts of issues. Therefore close consideration is needed of the practical outworking of this proposal, including consultation with Returning Officers and electoral administrators.

[23] However, we do refer to the power to reject sham nominations in our guidance, for example in Part C of our UK Parliamentary election guidance, p. 21, fn. 1, (http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/175379/Part-C-Administering-the-poll.pdf).

8 The Polling Process

8.1 Voting should be an accessible and simple process, conducted efficiently and in a way to guarantee the secrecy of the ballot.

8.2 The administration of the poll by the presiding officer and poll clerk(s) should be as straightforward as possible in order to reduce the possibility of mistakes and also encourage people to take on these roles.

Response to Law Commissions' provisional proposals and questions

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

8.3 We welcome the simplification of notices, but do not support that a single polling notice should be in a prescribed form as stated in our comments on ballot papers and other materials supplied to voters on provisional proposal 5-5 above. There also may be practicalities for returning officers in the production of such a notice as the "notice of situation of each polling place" at present may be large, as also can be the notice of poll, so to combine these may be unwieldy for the printed version. This would not apply to notices placed on websites.

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

8.4 We agree that a standard format for poll cards for all elections is desirable but these should not be prescribed for the reasons we give elsewhere in this response. In this case it is particularly important that there is flexibility to insert additional relevant information to the poll card that may aid the elector and reduce the possibility of voter confusion. We agree that there should be standard formats of poll cards for each category of elector (voting in person, postal, proxy, postal proxy and anonymous) for all elections but do not consider that the best approach is to set out the format in legislation.

8.5 We also notice that in a number of places in the consultation paper the Law Commissions refer to 'substantial adherence' to a prescribed form or notice, rather than 'to the same / like effect' (and the existing power to adapt the form 'so far as the circumstances require'), which is the wording that is currently used in the legislation. We are not sure whether this is intended to allow greater or lesser freedom to adapt the prescribed form or whether (as seems more likely) there is no intention to change the effect of the law. If some election forms and notices remain prescribed in legislation following the Law Commissions' review and there is wording (whatever exact wording is used) to limit departures from the prescribed version, we would expect that the current uncertainty as to what extent a prescribed form can be modified by administrators will continue. In our experience such uncertainty is undesirable

as it delays, and in some cases, prevents changes being made by administrators to forms and notices that are necessary to ensure that the documents are accurate, clear and accessible for voters and candidates. Therefore, we would reiterate our view that forms and notices should not be set out in legislation, as the uncertainty described here is an inevitable feature of such an approach and would seem unlikely to present the same problems if the form could be more flexibly amended outside legislation[24].

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

8.6 We welcome this provision in principle as it would make it clear that all officials involved in the conduct or administration of an election have a duty of neutrality and should not have any involvement in the campaign. There has previously been uncertainty as to whether the law applies only to staff at the polling station or all election staff. It should be noted that the duty of political neutrality of election administrators largely operates implicitly in practice at present; the proposal would therefore regularise current practice. However guidance would be required as to how far this would extend to those employed by, or contracted to, the RO. There would also need to be a further provision for dealing with circumstances where elections take place at the same time, whether or not they are combined, or where their timescales overlap.

8.7 As well as ensuring that all those appointed by returning officers to work at an election in any capacity have not campaigned in respect of the electoral event in question, it is also important that returning officers themselves (and electoral registration officers and their staff) are neutral and have no involvement in the campaign. The political impartiality of the ERO and RO, and their duty to always act in the best interest of the voter is implicit in electoral law but is not explicitly stated in the legislation. There is no penalty under electoral law attached to not being politically impartial or not acting in voters' interests, unless there is a breach of electoral law. It may be that the law is sufficient and unwritten norms are adequate but we think the law should make it clear that EROs and ROs must act impartially, have no connection or perceived connection with any of the campaigns and that they act in voters' best interests at all times.

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

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[24] Electoral Commission, *Where should electoral forms and notices be set out in the law?*, July 2014, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0020/184151/The-position-of-election-forms-and-notices-in-the-hierarchy-of-electoral-laws.pdf

8.8 The law regarding the power to use school rooms and public rooms, the expense of maintaining which is paid out of any rate, is not always clear to operate in practice. The use of rooms in schools for polling leads to confusion as the use of, and access to, the other parts of the premises, which may not be controlled by the returning officer. We agree that the RO (currently this power lies with the local authority) should be able to select whatever premises are needed for the efficient conduct of the poll (provided such premises fulfil the requirements for the selection of polling stations) rather than the right to the use of a room which appears to be more restrictive. There is a clear connection between the security of the ballot, access for voters and the use of the premises to be used for polling purposes and any other activities that may be taking place there on polling day. The current legislation may lead to a conflict of interest between the usual users of the premises and the RO.

8.9 Some local authorities when reviewing polling arrangements have ceased to designate, as far as possible, the use of rooms in schools for polling purposes as polling usually takes place on a school day which may result in the school closing for educational purposes that day. The effect of this policy is that premises which are not used for educational purposes, whether or not the expense of maintaining which is paid out of any rate, may be designated as polling places such as community centres, village halls and church halls. For premises the cost of maintaining which is payable out of any rate, the RO's are permitted to defray only the cost of heating, lighting, cleaning and caretaking whereas for premises which do not fall within this category they may need to pay rent. The law needs to be clear about the right of the RO to use premises that have been designated for polling purposes and the basis on which the calculation of the cost for reimbursement of expenses for using such premises. The RO should not be required to offset notional or actual losses of income incurred by owners or occupiers of premises used for polling purposes.

8.10 The right to exclusive use of premises by the RO which have been designated as polling places has implications for the security of the poll, the safety of voters and others using the premises. We suggest that a general duty of care (which would include safety and security) on ROs should be incorporated into legislation. The consequence may be that the RO would require the closure of the whole premises for its normal activities, even if only part of the premises would be used for polling purposes.

8.11 An additional problem in electoral law is the lack of clarity as to what premises may be used. The law currently varies for each election but in general allows the use of:

- a room in certain schools (for example schools maintained or assisted by a local authority or in respect of which grants are made out of moneys provided by Parliament to the person or body of persons responsible for the management of the school[25]), and

[25] Rule 22, UK Parliamentary Elections Rules, Schedule 1, RPA 1983.

- a room the expense of maintaining which is payable out of any rate.

8.12 Our experience is that both categories of room cause confusion. It is often not easy to establish whether a school falls within the test set out in electoral law as these require an understanding of the legal and financial status of the school and education law. Also, it is not clear what is meant by 'payable out of any rate'. The reference to a 'rate' may be outdated and the language may need to reflect current public funding arrangements. We understand that this does not mean any publicly funded room (which would be particularly broad and encompass many rooms) and that instead it may mean a room that is funded by the council. However, this is not clear and we would support updating and clarifying this drafting. This rule, like many others, requires updating in other aspects, for example the use of language such as 'defraying' expenses seems to be outdated.

8.13 A related issue that is not mentioned in the consultation is the right of a returning officer to use publicly funded premises for the purpose of postal vote proceedings and for verifying and counting the votes. The provision relating to the right to use rooms for the counting of votes does not apply at UK parliamentary or European parliamentary elections but applies to local government elections in England and Wales, Scottish Parliament elections, Scottish local government elections and Northern Ireland local government elections[26]. In our view the right of the returning officer should be extended for all elections so there would be the right to use publicly funded premises for the purpose of postal vote proceedings and verifying and counting the votes on the same basis as proposed for polling purposes.

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

8.14 We agree that the law should prescribe only essential equipment required for a poll. This would include ballot papers, ballot boxes which can be made secure from tampering and a list containing the polling station register, absent voter's list and the corresponding numbers list. A general duty would be placed on ROs to furnish and equip polling stations with the equipment and materials required for the lawful and effective conduct of the poll would permit some flexibility. The minimum requirements and additional items could be contained in guidance for each election.

Provisional proposal 8-6: Presiding officers should have the power to use, or authorise the use by polling station staff of, reasonable force to

[26] For example, compare rule 22 of the UK Parliamentary Elections Rules with rule 20 of the Local Elections (Principal Areas) (England and Wales) Rules (Schedule 2 to the Local Elections (Principal Areas) (England and Wales) Rules 2006).

remove from a polling station a person not entitled to be there. The procedure for returning officers to issue authorisations to use force should be abolished.

8.15 The Law Commissions propose that presiding officers, but not polling clerks, should have the power to remove by reasonable force a person not entitled to be in the polling station. There is no mention of the right of an individual who is about to be removed to vote, if otherwise entitled to do so, prior to being forcibly ejected. We agree that this rule needs updating however we do not agree that poll staff should have a power to remove by reasonable force or otherwise an unauthorised person who remains in a polling station. Poll staff may either not be physically capable or, conversely, be zealous in using force. There is a possibility that this could lead to subsequent complaints or action against the individual(s) who used such force, especially if the unauthorised person who was forcibly removed sustained an injury as a consequence of their treatment at the hands of a presiding officer. Poll staff at present are neither trained nor advised on the use of "reasonable force" to remove an unauthorised person from the polling station nor is this covered in our current guidance for poll staff. Our view is that there should be no power for presiding officers to use force and instead if an unauthorised person refuses to leave the polling station on being requested to do so, the presiding officer should contact the police and the RO.

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

8.16 We agree that the polling rules for all elections should be simplified and consistent for all types of elections so far as possible. We agree that a set of rules setting out the essential elements of conducting a lawful poll is desirable, with some of the procedural detail taken out of legislation.

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

8.17 We agree that the rules should set out general requirements for a legal poll which the returning officer should adhere to and that there should no longer be a requirement for voters to show the official mark on their ballot paper to polling station staff. However there should still be a discretionary power for polling staff to ask voters, and an obligation on voters to do so, to show the official mark on their ballot paper, if asked. This would enable polling station staff to have the right to check if they had concerns about a ballot paper not being genuine and to place an obligation on the voter to comply with the request. It is already the case that the requirement that voters must fold their ballot paper after they have voted does not necessarily apply depending on the type of count taking place. In circumstances where votes will be counted electronically voters have been instructed not to fold their ballot paper and to place it unfolded (face down) in a specially designed ballot box for this purpose. However it is our view that voters at all elections

should continue to be required to fold their ballot paper after voting, so as not to reveal how they have voted, before placing the ballot paper in the ballot box.

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

8.18 We support this proposal.

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

8.19 Our view is that wherever possible a voter should be able to vote in secret unaided, to minimise the risk of compromising the secrecy of individual votes or of undue influence being placed on voters who are assisted by a companion. Where assistance is required this should be provided by either the poll staff or a companion of the voter.

8.20 We agree with and support the proposal for a requirement that for those voting with the assistance of a companion it should not involve either the voter or the companion making formal declarations. The voter should be required to state orally that they cannot vote unaided and that they consent to the companion assisting them. We suggest that a separate record should be completed of those voting with the assistance of a companion and that there should be general restrictions on the qualifications to be a companion. For example, we suggest that the companion must have attained voting age to be eligible to vote at that particular election, be able to see and be capable of undertaking unaided the voter's instructions on how to cast their vote. The name and the electoral number of voter, the name and address of the companion and the relationship (if any) of the companion to the voter should be recorded on a form for this purpose by the presiding officer, prior to issuing a ballot paper, who should also note the time the voting took place. This form should be signed by the presiding officer at the close of the poll and delivered to the RO along with the other polling station documentation.

8.21 We agree that the existing limit on the number of disabled voters a person may assist should be abolished. The existing prescriptive list of family members who may assist more than two voters is restrictive. If it is to be retained we agree that the list should be extended to include grandparents and (adult) grandchildren.

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

8.22 We support this proposal. We also suggest that while there has been established provision for the procedure for dealing with voters with severe sight impairments for many years, those with physical mobility impairments and other disabilities are not specifically covered, for example those with hearing and learning impairments. We suggest that groups representing people with various disabilities be involved in devising appropriate procedures regarding this aspect of specialist support but that this could be contained in guidance rather than legislation. However it should be noted that at elections we issue guidance to polling staff on how they should deal with voters requiring assistance. This is explained in the *Handbook for poll staff*[27].

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

8.23 We support this proposal.

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

8.24 We support this proposal.

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

8.25 We suggest that, the death of an independent candidate at (England and Wales) local government elections should not trigger a new election unless they gain enough votes to be elected.

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

8.26 We support this proposal.

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

8.27 We agree that returning officers should have a power to alter the application of electoral law in order to prevent or mitigate the obstruction or frustration of the poll by a supervening event affecting a significant portion of

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[27] Electoral Commission, *UK Parliamentary General Election Guidance*, 2014, pp. 21-22, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/175621/Polling-station-handbook-UKPGE.pdf

electors in their area. However the final decision would be for returning officers, who have local knowledge of their own areas, to make. In the case of unforeseen national disruptions we could offer advice so that ROs could evaluate the situation in their own areas and then make an informed decision. Currently returning officers, as part of their election planning, compile risk registers detailing the arrangements that they have in place for alternative polling and count venues should a polling place or count venue become unexpectedly unavailable due to unforeseen circumstances. These should be sufficient to deal with a local emergency. A prescribed list of supervening events which would justify the use of emergency powers is not supported.

Request for the consideration of additional law reforms

8.28 We have previously recommended that voters should be required to show proof of their identity before they can be issued with a ballot paper at polling stations for elections and referendums in Great Britain, as is already the case in Northern Ireland. We will consult widely and work with others to identify and develop a proportionate and accessible scheme for verifying the identity of electors at polling stations. We will also work with the UK Government to develop legislative proposals for such a scheme which could be introduced for approval by the UK Parliament.

9 The Count and Declaration of the Result

Response to Law Commissions' provisional proposals and questions

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

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

9.1 We support these proposals, which would provide greater simplicity and clarity for Returning Officers and candidates and their agents. We acknowledge the need, identified in the consultation paper, for a standard set of rules to account for justifiable differences in the administration of the count system to reflect different electoral systems but this should be consistent with the UK's devolution framework.

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

9.2 We support this proposal, which would make clear that Returning Officers are both responsible and accountable for important decisions about the effective administration of the count process.

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

9.3 We support this proposal, which reflects rather than alters current practice.

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

9.4 We support this proposal, which would help to ensure consistency in the administration of count processes, while continuing to allow flexibility for

policymakers and legislators to specify appropriate transfer values for different types of elections.

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

9.5 We support these proposals, which would help to simplify and bring appropriate consistency between the different methods of counting. While we agree that a separate power to provide by statutory instrument which elections may be subject to electronic counting, we suggest that such secondary legislation should be subject to an affirmative Parliamentary procedure, so that legislators are given appropriate opportunities to debate and approve any change.

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

9.6 We support a certification requirement to provide independent quality assurance and ensure a minimum standard for electronic counting systems.

9.7 Previous evaluations of e-counting pilot schemes by the Commission have highlighted that effective implementation of e-counting requires fully tested solutions and sufficient time to implement them. We have previously recommended that an accreditation and certification scheme is required to provide independent quality assurance of e-counting solutions before they are made available for use at elections, including to support the use of e-counting outside a piloting framework.[28] It will be important to ensure that any accreditation and certification scheme has appropriate characteristics, including a set of requirements for e-counting covering usability, availability, security and transparency.

9.8 Buy-in from political parties and other stakeholders will be important, so any accreditation and certification scheme must be suitably transparent. This will include the publication of the e-counting requirements and of the certification process that will be undertaken as well as transparent reporting for each certified product outlining the results of the certification process.

9.9 Further consideration should be given to identifying a suitable body to take on responsibility for confirming the certification or signing off on the process. The Electoral Commission, together with the UK Electoral Advisory

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[28] The Electoral Commission, *Electronic counting: May 2007 electoral pilot schemes*, 2007, http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0016/13219/Electroniccountingsummarypaper_27193-20113__E__N__S__W__.pdf

Board, could play a key role in provide a suitable level of oversight of any certification process.

10 The Timetables and Combination of Polls

Response to Law Commissions' provisional proposals and questions

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

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

10.1 We support proposals 10-1 and 10-2, which would be consistent with the method of calculating timetables for other elections, and would allow better alignment of voter/candidate facing deadlines and electoral administration processes where polls are combined or held on the same day.

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

10.2 We support this proposal, which reflects the accepted way most business processes are now conducted by public bodies. However, we also recommend that the Law Commissions should consider whether the issue of a writ is necessary, particularly in light of changes introduced by the Fixed Term Parliaments Act which mean that polling day is now set in law.

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

10.3 We support these proposals, which would allow better alignment of voter/candidate facing deadlines and electoral administration processes where polls are combined or held on the same day. We agree that it is important that the timetable includes the key milestones in electoral administration, including registration, and that these should be the same for each election to assist those involved in the election. Deadlines requiring steps to be taken 'not later than' a specified date (for example, publishing the notice of election for some elections) should be retained, so that Returning Officers retain some discretion to begin activities earlier, particularly where it would allow candidates or electors more time to meet other deadlines.

10.4 The Law Commissions should also consider ensuring that deadlines for applications by electors (including for registration and absent voting

applications in particular) use consistent timings; we suggest that midnight on the specified day would best reflect and meet legitimate customer service expectations.

10.5 However, as noted earlier in this response, it will be important to ensure that any reform proposals are consistent with the UK's devolution framework.

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

10.6 The timetable for UK Parliamentary elections was changed from 17 working days to 25 working days by legislation passed in 2103, and the 2015 UK Parliamentary general election will be the first at which the new longer timetable will apply. While we can see that there may be advantages for electoral administration in a longer timetable, we suggest that the Law Commissions consider the experience of Returning Officers, campaigners and electors using the new timetable at the May 2015 elections before reaching firm conclusions on the merits of further extending the timetable to 28 days. We will consider the impact of the new timetable in our own reporting on the May 2015 elections, including any impact on the regulation of candidate spending under the new timetable and the preparation and delivery of candidate booklets for local mayoral elections.

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

10.7 We support this proposal, which aims to simplify the application of the rules enabling the combination of coinciding polls by Returning Officers. This would help to ensure more effective administration of polls which are, or may be, combined.

10.8 The Law Commissions should consider further how these rules can best reflect the devolution of policy responsibility within and between the UK's legislatures. For example, if it is possible for the poll for a UK Parliamentary election to be held on the same day and combined with the poll for a Scottish local government election, two separate sets of rules emanating from two different legislatures would need to be accommodated, without constraining the implementation of different policy choices by those legislatures.

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

10.9 We agree that, where policy makers and legislators have agreed that elections should (or may) be held on the same day, the polls for those elections should always be combined. We do not believe that it would be in the best interests of voters, or Returning Officers, to have separate polls for elections on the same day. We are concerned that administering them separately could create significant administrative problems, as we understand has happened in the past.

10.10 However, there is a question as to whether there is merit in having discretion as to whether or not certain parts of combined elections should be

combined. For example currently there is discretion as to whether the issue and receipt of postal votes should be combined.

10.11 If policy makers and legislators decide that two polls should not be combined, for example because of the risk of voter confusion, they should be held on different days rather than be held on the same day but run separately.

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

10.12 While we acknowledge that there is scope currently for relatively large numbers of polls to be held on the same day, and recognise the potential impact on voters, campaigners and Returning Officers, we do not agree that Returning Officers should be given a new power to defer coinciding polls. As the Law Commissions' consultation paper notes, such a change would be a significant extension of Returning Officers' powers, the use of which could leave them open to pressure or suggestions of impartiality.

10.13 The date of future UK Parliamentary general elections is now fixed in legislation as the first Thursday in May every five years from May 2015 (subject to provisions allowing an earlier general election in specific conditions). As such, it is now possible for policy makers and legislators to anticipate the scale of possible coinciding polls which are scheduled to be held in any given year, and to take into account the impact on voters, campaigners and Returning Officers of decisions about the timing of elections. It should be for policymakers and legislators – rather than Returning Officers – to decide whether or not there should be a maximum limit on the number of polls which should be held on the same day, taking into account evidence about the practical impact of proposals on voters, campaigners and Returning Officers.

10.14 It may also be difficult in some circumstances to identify appropriately and consistently how many polls are likely to be held in any given year, for example: elections for local ward councillors and directly-elected Mayors are both local government elections, but require two separate polls; similarly, elections for constituency members and regional members of the Scottish Parliament involve two separate polls; some local elections, in particular to parish or community councils, may be scheduled for the first Thursday in May in a particular year but are not in fact contested, meaning that no poll is required in that specific area. By-elections or referendums (including local referendums on council tax increases or neighbourhood planning proposals) are less predictably scheduled, and may not be known until relatively close to the date of the poll. There may also be different numbers of polls taking place within any single electoral area: across a Police Area, for example, the pattern of local and parish council elections may vary between different local authorities, and there may also by Mayoral elections taking place which change the number of polls from area to area.

10.15 It would be useful for the Law Commissions to reflect on the experience of the multiple combinations of polls which are expected to take place in May 2015, and we will report on any particular issues and conclusions in our statutory election report in July 2015.

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

10.16 We agree that it would be helpful for the legal framework to more clearly and consistently identify and set out the functions of Returning Officers for different elections where the poll is combined. This would enable better planning and coordination between Returning Officers, including for elections where there is a coordinating Returning Officer such as Regional Returning Officers for European Parliament elections.

10.17 Policymakers and legislators considering scheduling or allowing polls to be held on the same day and combined would, however, need to consider carefully how the functions of Returning Officers for the different polls should be determined in each instance.

10.18 We would also welcome consideration being given to whether the existing 'hierarchy' of Returning Officers is appropriate; for example, we wonder whether it is right that a Regional Returning Officer for European Parliamentary elections is at the bottom of the list, below parish council elections.

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

10.19 We support this proposal, and agree that it would be helpful for the reform of electoral law to aim to simplify the practical administrative implications of holding combined polls, although we recognise that it may be challenging to identify and deal with all possible permutations of combined polls.

11 Electoral Offences

11.1 Trust and confidence in the integrity of the electoral process and those who stand in elections requires modern and clear electoral law offences. It is also essential that those who must comply with electoral law (including candidates, voters and administrators) and those who must enforce the law (the police) can easily understand what behaviour is prohibited.

11.2 Many electoral offences overlap with the general criminal law. There are cases where it is possible to prosecute someone under either the general criminal law or electoral law. Nevertheless, electoral offences are important, not least because there are special consequences that flow from committing them, including the annulling of an election and the loss of elected office. Therefore, it is important that the drafting of the electoral offences is not so complex and out of date that it deters police and prosecutors from enforcing them.

11.3 At present many electoral offences are not well understood and therefore we strongly support the Law Commissions' aim to update and clarify the law.

Response to Law Commissions' provisional proposals and questions

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

11.4 We support this proposal.

11.5 The Law Commissions raise the issue of the classification of electoral offences into corrupt and illegal practices (paragraphs 11.20 to 11.23). The current classification seems to us to add unnecessary complexity to the law. The use of such terminology appears to be outdated; as is recognised elsewhere in this chapter of the consultation paper, 'corrupt' is a vague and archaic term and seems unsuitable in electoral law today (page 242). Once references to 'corruptly' are removed in the substance of electoral offences, it seems appropriate to also remove such language in the classification of the offences.

11.6 We also consider that there is a risk that the terminology of 'corrupt and illegal practices' suggests to a lay reader that these are not full criminal offences (an 'illegal practice' may not be seen to be as serious a matter as an 'offence'). It is also unlikely to be obvious to a non-expert reader that a 'corrupt' practice is viewed more seriously under electoral law than an 'illegal' practice (this distinction is further flawed by the fact that all such practices are illegal, insofar as they are breaches of the law).

11.7 Our view is that this distinction between 'corrupt and illegal practices' should be removed, so that electoral law describes them simply as 'offences'.

Consideration should then be given to how to provide for the special consequences that currently attach to these practices (for example, they lead to the vacation of a candidates' seat and constitute grounds for annulling the election).

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

11.8 We agree with this proposal. The drafting of section 113 RPA (bribery) seems to be unnecessarily complex and capable of being significantly simplified.

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

11.9 We have no objection to treating being incorporated into the offence of bribery. It would appear to make more sense to deal with this in bribery than in a separate section on 'treating', which now appears to be an old-fashioned concept.

11.10 It is important to ensure, if this approach is adopted, that this does not lead to a substantive change in the law, i.e. that behaviour that is now prohibited remains so. As the Law Commissions note, bribery tends to involve a one to one arrangement; a single person makes the bribe and a single person accepts it. On the other hand, treating is aimed at more indirectly influencing a group through largesse. Although the offence of treating was created when using largesse to influence voters may have been a more widespread problem than it is today, our experience is that there are still allegations of treating, as shown for example in the ongoing Tower Hamlets election petition. Also, we think that the existence of the offence of treating has some effect in deterring this behaviour. We think that using largesse to influence voters should still be prohibited in electoral law.

11.11 We note that the Law Commissions provisionally propose that 'the provision of gifts or hospitality with intent to influence voting should be subsumed into bribery' (paragraph 11.43). This appears to meet our concerns set out in the preceding paragraph. We therefore would support this proposal; any provision of gifts or hospitality that is intended to influence voting, should be part of the offence of bribery (meaning that the offence of treating can be abolished). We would add that as with all other electoral offences, it is important that the reformed law is clear as to what behaviour is an offence.

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

11.12 Section 115 (undue influence) perhaps contains the most complex drafting of all the electoral law offences and we support the Law Commissions' work in simplifying and modernising it. We agree that this offence should cover pressure / duress and trickery. More detailed consideration will be needed to further define these aspects, whilst avoiding the complicated drafting that is currently used in the law.

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

11.13 Our view is that the law should regulate the exercise of abuse of any position of influence to persuade a person to vote for a particular candidate or to not vote at all. However, we wonder whether the exercise of abuse of influence, religious or otherwise, by a person over a voter would fall within the pressure / duress element of the proposed undue influence offence, rather than it requiring separate provision. It seems to us that anyone abusing a position of influence to seek to persuade someone to vote or not vote would be placing pressure / duress on that person. Therefore, we are not currently persuaded of the need to create a specific new 'abuse of influence' offence but instead consider that this should form part of the pressure / duress component of the reformed undue influence offence.

11.14 In designing a reformed undue influence offence attention will need to be given to ensuring that it does not conflict with the right to freedom of expression. Many people will legitimately want to persuade others to vote for a certain candidate and any restrictions on this freedom will need careful consideration. We note here the Law Commission's view: "we do not think the law is, or ever was, that any kind of statement by religious authorities as to a campaign matter amounts to undue influence". We are conscious, however, that some electors who may be more vulnerable to pressure or undue influence because of their personal position within a family, social group or wider community, who might benefit from greater protection, and we would expect any modernised definition of undue influence or duress to be capable of identifying and being applied to this kind of influence.

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

11.15 In general, we think it is desirable for the law to be clear who is responsible for the production and distribution of campaign material at elections. This ensures there is transparency about who is campaigning and who is responsible for the costs of a campaign. In theory we can see why the imprint requirements should be the same for both printed and electronic campaign material as transparency is equally important for electronic campaign material as it is for printed campaign material. However, there are a number of workability issues and factors that need to be considered before any changes should be made in this area, namely:

- the current voluntary use of imprints on electronic campaign material;
- the scope and content of any new imprint requirements;
- the sanctions available for deterring non-compliance with the requirements;

- who should be responsible for monitoring and ensuring compliance with these rules; and

- the resource implications of such a change both for those monitoring the rules, those enforcing the rules and those who need to comply with the rules.

The current voluntary use of imprints on electronic material

11.16 Currently, we recommend that candidates and local non-party campaigners should include imprints on electronic campaign material as good practice. We are monitoring their use in the run-up to the 2015 UKPGE to understand how widely they're being used by these campaigners at major elections. Our experience from 2015 could help inform Governments' and the Law Commissions' understanding of the current use of electronic imprints when examining options for making them a mandatory requirement.

The scope of any new imprint requirements

We have already recommended that proportionate electronic imprint requirements should be introduced for campaign material distributed by national campaigners, such as political parties, non-party campaigners and referendum campaigners[29]. These were introduced for the first time at the Scottish Independence Referendum, where campaigners had to include imprints on electronic campaign material unless it was not reasonably practicable to do so. However, based on our experience of these polls[30], we think that these new provisions were unintentionally wider than had been intended. Before any further changes to the law are made in this area for other electoral events, we would welcome the opportunity to work with the Scottish and UK Governments, and the Law Commissions to ensure that the scope of any new imprint rules strike the right balance between ensuring there is transparency about who is campaigning and proportionate and modern regulatory requirements.

The sanctions available for deterring non-compliance with the requirements

11.17 Under the current framework for the local campaign, we do not have a role in monitoring and ensuring compliance with the rules on imprints or for candidates or local non-party campaigners. Although we produce guidance for them on the imprint requirements, monitoring compliance with these rules is a matter for the public, and breaches of the rules can only sanctioned by

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[29] The Electoral Commission, *A regulatory review of the UK's party and election finance laws: Recommendations for change*, June, 2013, Recommendation 34 p.75 http://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/157499/PEF-Regulatory-Review-2013.pdf

[30] The Electoral Commission, *Scottish Independence Referendum: Report on the referendum held on 18 September 2014*, December, 2014, pp.110-112 http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/179812/Scottish-independence-referendum-report.pdf

criminal prosecution. There is a question as to whether it would be more proportionate to give us civil sanctions and investigatory powers for the candidate spending and donation rules generally, and for these imprint requirements in particular. We have these investigatory powers and civil sanctions for breaches of the political party and general non-party campaigners under PPERA, including the PPERA imprint rules.

11.18 We have already recommended that we are given investigatory powers and civil sanctions for certain candidate spending and donation rules at major elections. However, we think these tools should initially only be available to elections where, from our experience, unsanctioned breaches of the rules are likely to have the most impact. These are elections to the following legislatures:

- UK Parliament
- Scottish Parliament
- National Assembly for Wales
- Northern Ireland Assembly

11.19 We would also not want to have these powers or sanctions for imprint or local non-party campaign offences unless we were given the responsibility for monitoring and ensuring compliance with these rules first.

The resource implications of such a change both for those monitoring the rules, those enforcing the rules and those who need to comply with the rules

11.20 If we were to be given responsibility for monitoring and ensuring compliance for the imprint and local non-party campaign rules, and given investigatory powers and civil sanctions to deter non-compliance with these rules, the cost of setting up this new regulatory regime against the supposed regulatory benefits should be considered. We would also want to be involved early in any changes to the rules like this that would affect our regulatory remit.

Broader reforms of the imprint requirements

11.21 As well as exploring the issues surrounding any new imprint requirements, we think there is merit in examining the content and scope of the existing ones, too. Currently, imprints on printed material require the name and address of:

- the printer
- the promoter
- any person on behalf of whom the material is being published (and who is not the promoter)

11.22 There is a question as to whether the content of these requirements, which have their origins in the nineteenth century, are still appropriate for modern day campaigning. For example, it is unclear what benefits there are for requiring the name of the printer to be included when this seems to be of secondary importance to who is responsible for the costs and content of the material.

11.23 There is also a question as to whether the prescriptive scope of the current requirements is too inflexible to be workable in practice. We often have enquiries from candidates and their agents asking whether small items of printed material, such as stickers or badges, require an imprint when it is obviously impracticable to do so. Considering this, it would be helpful to explore whether some material should be exempt from the requirement if, for example, it was unreasonably practicable to do so. We would be happy to work with Governments and the Law Commissions to examine how to make these existing requirements more proportionate and workable.

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

11.24 We are not aware of any recent cases where there has been an allegation that this offence has been committed. This may be because this offence is effective at deterring such behaviour but to our knowledge this offence is not well-known, even amongst electoral law experts.

11.25 We have considered whether there is a need for a separate electoral law offence, given the general offence in the Public Meetings Act 1908 and the general public order offences. However, an electoral law offence will ensure that electoral consequences flow from a conviction (such as disqualification for holding elected office) and will also make the law more visible for campaigners, the police and electoral administrators (it seems undesirable to leave it to a 1908 Act and non-electoral law). Therefore we would support the retention of this electoral offence.

11.26 We can see the argument for narrowing the offence so that it can only be committed by candidates and their supporters. On the other hand, there is an argument that this offence should still apply to all persons. We note that under section 97 of the RPA 1983 the fine is unlimited, whereas the fine under the 1908 Act is limited to £1,0000, albeit that under the 1908 Act there is a possibility of imprisonment. Also, under the RPA there are additional penalties outlined in section 173 (for example, being considered incapable of holding elected office). Whether someone is connected to a candidate or otherwise, disturbing an election meeting is a serious matter as it frustrates the democratic process and we would not expect there to be a different maximum penalty depending on whether someone was a candidate / supporter or someone else.

11.27 There is also a question as to whether the general criminal law on public order is appropriate for disturbances to electoral meetings, or whether electoral law should cater for this. It seems preferable for the law governing elections to be set out in one place, rather than have an offence applying to

some persons in electoral law and another offence to others in the general law (especially a law that is unlikely to be well-known).

11.28 Also, it is unlikely to be straightforward to identify whether those disturbing a meeting are 'supporters' of a particular candidate. This point is similar to the one raised earlier in our response in respect of the suggested offences relating to 'campaigners' handling postal vote documents.

11.29 Therefore, on balance we do not support narrowing the offence so that it is only capable of being committed by candidates and their supporters.

11.30 We do however agree that the lawfulness of the meeting does not seem to be relevant for the reasons given by the Law Commissions.

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

11.31 We do not consider that there is any need for this offence to be retained as a separate offence provided that the proposed new undue influence offence will be broad enough to cover any such false statement (by trickery).

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

11.32 It is important that there should be proportionate penalties attached to each electoral offence, ensuring that there is a sufficient deterrent from, and punishment for, breaching the law. Such deterrents and punishments are important to secure the integrity of the electoral process and promote public confidence in elections.

11.33 We understand that some cases where an allegation of an electoral offence has been made have not been prosecuted because the prosecuting body has considered that the penalties in the event of a conviction are not great enough to merit bringing a prosecution. Therefore, we would support such an increased sentence in principle but further consideration would need to be given to when it would apply; it is not clear what 'serious electoral fraud' means.

Request for the consideration of additional law reforms

11.34 We request that the Law Commissions consider addressing the following additional issues in the electoral law reform project.

When should electoral offences be capable of being committed?

11.35 The law currently takes a variety of different approaches to when electoral offences are capable of being committed. Some offences may be

committed ‘before, during or after an election’, e.g. the prohibition of paid canvassers[31]. Others can only be committed ‘before or during an election’, e.g. false statements as to candidates[32]. Others can only be committed ‘at an election’, e.g. imprints[33]. There are now also provisions that regulate campaign spending during the ‘long campaign’[34] as well as the ‘short campaign’[35].

11.36 There may be justifiable reasons for a different approach to be taken for each offence or it may be that a more consistent approach should be taken. Either way, we would request that greater clarity is provided in the law.

11.37 In addition, there is a conflict between offences that apply before or after an election (as well as during it) and the definition of ‘candidate’ in section 118A RPA 1983 which means that someone only becomes a candidate at the earliest on the last day for the publication of the notice of election or on the dissolution of Parliament. There is added uncertainty caused by section 118A providing that the definition does not apply if the context suggests otherwise. This introduces uncertainty as to when some offences can be committed. For example the offence of paying canvassers under section 111 RPA 1983 applies before, during or after the election but it only applies where canvassing promotes a candidate’s election; someone can only become a candidate under section 118A once Parliament is dissolved or on the last day for notice of a local election, which would appear to be during the election (not before the election). In this case, therefore it appears that the context requires otherwise, and the section 118A definition of candidate does not apply. However, any uncertainty as to what constitutes an offences is undesirable and we hope the Law Commissions’ review will ensure that there is the sufficient level of clarity.

False statements as to candidates’ personal character or conduct

11.38 The offence of making a false statement as to a candidates’ personal character of conduct is referred to in the Law Commissions’ consultation paper but without making any recommendations for change (page 250).

11.39 It may be that the existing content of this offence cannot be improved upon but we would ask that thought is given to what constitutes a ‘candidate's personal character or conduct’. It seems difficult to separate someone’s personal character or conduct, on one hand, from their political or professional character or conduct, on the other hand. As the Law Commissions’ consultation paper acknowledges, election courts have attempted to consider the scope and limitations of this offence in a recent UK Parliamentary election petition.

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[31] Section 111, RPA 1983. Does this mean at any time?
[32] Section 106, RPA 1983.
[33] Section 110, RPA 1983.
[34] Section 76ZA, RPA 1983.
[35] Section 76, RPA 1983.

11.40 It seems that a choice has been made in electoral law that the law should not criminalise making false statements about a candidate's political life. So someone is not prevented from making false statements about, for example, a rival candidate's record in office as an elected representative on policy matters. However, someone cannot make false statements about a rival's personal character or conduct. This might be a sound distinction but we would request that consideration is given to whether this is the best approach.

11.41 Our main concern is to make sure that the offence is easily understood both by those who may commit it (mainly candidates) and the police and courts that must enforce it. At present we have concerns that it may not be clear whether a statement relates to a person's personal or professional life, and so the criminal offence is not sufficiently clear.

12 Regulation of Campaign Expenditure

Response to Law Commissions' provisional proposals

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

12.1 We support this proposal, which reflects recommendation 35 in our 2013 regulatory review[36].

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

12.2 We support this proposal but, as mentioned elsewhere, any proposed reforms will need to be consistent with the devolution of electoral law in the UK.

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

12.3 We support this proposal, provided that it is consistent with the devolution of electoral law in the UK.

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

12.4 We have previously recommended that the current provisions regarding the spending limit for candidates at certain elections need simplifying to reduce the risk of unintentional non-compliance[37]. When doing so, we suggested a number of ways in which this could be achieved. We welcome the Law Commissions' consideration of this issue.

12.5 We support the proposal that at elections where the candidate spending limit is defined by a formula, the Returning Officer (RO) should be given a formal responsibility for making the spending limits available for candidates and their agents. At the moment there is no requirement for ROs or their

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[36] The Electoral Commission, *A regulatory review,* Recommendation 35 p.63 http://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/157499/PEF-Regulatory-Review-2013.pdf

[37] The Electoral Commission, *A regulatory review*, Recommendation 37 pp.67-70

officials to provide this figure to candidates and agents. Evidence from previous elections, including the 2010 UKPGE, suggests that even when they are provided with this figure some have not been able to calculate the limit properly. Giving this responsibility to the RO should ensure that there is clarity about what the spending limit is at most of these elections and, therefore, reduce the potential for accidental non-compliance.

12.6 As the consultation paper recognises, the provisional proposed approach would not solve the uncertainty around the exact level of the pre-candidacy 'long campaign' spending limits at certain UK Parliamentary general elections. Currently, candidates and agents don't know their exact long campaign spending limit until long after this regulated period has started. Although, as the consultation paper suggests, there is never complete certainty that the long campaign spending limits will apply – they only apply when Parliament has sat for over 55 months – there should be relative certainty in the month or so before the start of the long campaign that Parliament will actually sit for over 55 months. Therefore, it may be possible to have the long campaign spending limit linked to an electorate figure that has effect just before the start of the long campaign.

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

12.7 We support this proposal, which reflects recommendation 40 in our regulatory review[38].

Request for the consideration of additional law reforms

Powers and sanctions for candidate expenses offences

12.8 We also think that consideration should be given to extending the Commission's investigatory powers and civil sanctions so they cover candidate spending and donation offences at all elections. At the moment the Commission only has investigatory powers and civil sanctions for the rules on national campaigning under the Political Parties, Elections and Referendums Act 2000 (PPERA). As we have already highlighted in meetings with the Law Commission, we would have concerns with any approach that applied these new powers and sanctions to candidate spending and donations offences at all elections by default.

12.9 At local government elections in England and Wales there can be up to 30,000 candidates standing in any one year. If we were to obtain new powers and sanctions for candidate offences at these elections it is likely that this would have significant resource implications for the Electoral Commission.

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[38] The Electoral Commission, *A regulatory review*, pp.72-73

This could create a high risk that we will not be able to deal with allegations in a timely manner, which in turn could erode trust in the regulatory system. We therefore propose that there should be a staged approach to introducing these regulatory tools for different sets of elections.

12.10 As highlighted in our regulatory review report[39], we would only initially want to have powers and sanctions for offences relating to candidate spending and donations rules at major national elections. We would be concerned if there was expectation these new regulatory tools must be available to all elections regardless of an analysis of the relevant costs and benefits involved.

[39] The Electoral Commission, *A regulatory review of the UK's party and election finance laws: Recommendations for change,* June, 2013, pp.78-80 http://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/157499/PEF-Regulatory-Review-2013.pdf

13 Legal Challenge

13.1 Election challenges ('election petitions') are a fundamental part of free and fair elections. They play an important role in ensuring the legitimacy of elections and securing public confidence in the electoral process. However, the UK's current system for challenging elections is perhaps the most out of date part of electoral law and the area that requires the greatest amount of reform.

13.2 We set out a range of problems with the current law in our 2012 report *Challenging Elections in the UK*[40]. We strongly support the Law Commissions' review of this area, which we expect will produce a more modern and efficient system. Many of the issues raised below are discussed in more detail in our 2012 report.

Response to Law Commissions' provisional proposals and questions

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

13.3 We support the abolition of this doctrine for the reasons given by the Law Commissions. It is inappropriate for the law to assume that the second-placed person would have won if the disqualified candidate who won the election had not been standing; those who voted for the winning candidate may have voted for some other candidate, leading to someone else (not the second-placed candidate) winning. We would prefer a fresh election to be conducted where a winning candidate is found to be disqualified. This would ensure that the ultimate election result accurately reflects all voters' wishes and this argument in our view clearly outweighs any arguments about avoiding the expense of another election.

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

13.4 We support this proposal. The law governing election petitions is important and it seems appropriate to set it out in primary legislation. We would prefer this to be set out in one place, rather than have separate provisions for each type of election. However, it will be important to ensure that this reform is consistent with the devolution of electoral law in the UK.

Provisional proposal 13-3: Defects in nomination, other than purely formal defects, should invalidate the election if they amount to a breach

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[40] Electoral Commission, *Challenging Elections in the UK*, 2012, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf

of election law which was committed knowingly or can reasonably be supposed to have affected the result of the election.

13.5 We support this proposal for the reasons given by the Law Commissions.

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

13.6 We support this proposal. It would be a significant improvement for electoral law to set out the grounds for overturning an election result.

13.7 Although the grounds set out in paragraph 13.99 of the consultation paper are well-stated and appear comprehensive, further consideration should be given to the precise formulation of these grounds as the project progresses. For example, we would ask whether there is a need to have a separate ground for annulling an election because a breach was 'fundamental' when there is also a ground for annulling the election where a breach may reasonably be supposed to have materially affected the result. We understand that this would cover administrative errors by those running the election and we suggest that a single test of whether the error affected the result would be sufficient. Furthermore, it is unlikely to be easy to consistently apply a 'fundamental' breach test.

13.8 It would be useful for those who are considering bringing a petition to be able to consult a clear list of the grounds on which they can bring the petition. This list would appear to be similar to the Law Commissions' list setting out the court's jurisdiction. It seems to us that there may be merit in setting out the grounds for bringing a petition in electoral law, in addition to the jurisdiction of the election court. These are two different things, so for example a ground for challenging an election would be that the petitioner believed that the result was not correct (for example, because the votes had been incorrectly counted) and the jurisdiction of the court would be to carry out a scrutiny and (if appropriate) unseat the winning candidate and declare another candidate as elected.

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

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

13.9 We respond to both of the above two points together. Our view is that the best reform option is the third option stated in paragraph 13.106 of the Law Commissions' consultation paper. There should be a way to distinguish between disqualifications that bite at the time of election and those that bite at the time of nomination. We would prefer this distinction to be set out in legislation rather than be left to a court's discretion in order to achieve certainty as to when a disqualification applies for the purposes of overturning an election.

13.10 There will be some cases where the result of an election should not be annulled where the winning candidate was disqualified at the time of nomination but not at the time of election; these will be cases where the disqualification was only aimed at preventing someone from taking up office (not campaigning). However, there will also be cases where the purpose of the disqualification was to prevent someone from campaigning for election as a candidate and in such cases it would seem right for the court to annul the election result even if the disqualification was removed by the time of the election.

13.11 It is difficult to separate the issue of when an election should be overturned because of a candidate's disqualification from the issue of when each disqualification should apply and the associated offence of making a false statement on a nomination paper. We would request that all these issues are looked at together by the Law Commissions. We set out our thinking on when disqualifications should apply in our *Standing for Election in the United Kingdom* report earlier this year[41].

13.12 In our view the law should set out clearly which disqualifications apply on nomination and which only apply on election. This is not clearly stated in the current law. Although the law is not currently clear, its effect is that most disqualifications apply on nomination, which is not appropriate given that some disqualifications seem likely to have only been intended to prevent a candidate taking up office (rather than them being able to campaign as well). It is unfair for candidates to be expected to resign their employment or position in order to stand for election, with no guarantee of getting it back if they are unsuccessful, when the purpose of the disqualification is only to prevent someone from taking up office.

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

13.13 We support this proposal, which appears to represent an appropriately flexible approach to the scope of an election court's powers.

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

13.14 We support the proposal that legal challenges should be dealt with in the UK's ordinary court system. This would allow the general procedural rules to be applied to election petitions, with a small number of specific procedural provisions being set out in primary electoral legislation. This would bring a number of benefits, as outlined by the Law Commissions.

[41] Pages 28 to 36.

13.15 We note in particular that this would allow any party to apply for a petition to be struck-out because it discloses no reasonable grounds. This would allow unmeritorious petitions to be filtered out at an early stage (if a party decided to make such an application), which seems better to us than requiring a flawed petition to continue to a full consideration of its merits unless a party can argue that there has been a procedural flaw. We discuss filtering petitions in more detail below.

13.16 We support the law clearly setting out a single right of appeal. We understand that the reason the Law Commissions suggest that the appeal should only be available on points of law (rather than also on facts) is that the facts should have been established during the trial and to revisit them in an appeal would lead to delay in the determination of the appeal and a resulting lack of certainty in the election outcome. Whilst this is a strong argument, there is a counterargument that any error of law or fact should be capable of being rectified by appeal in order to protect the interests of the losing party (there are severe consequences of being found to have committed an electoral offence by an election court) and to ensure that the election result is correct and commands public trust. In our view both errors of law and fact should be capable of being corrected on appeal for these reasons.

13.17 Therefore, we request that the Law Commissions give consideration to whether it would be more appropriate for appeals to be possible on both facts and law. There would need to be thought given to how to prevent this causing unreasonable delays; for example, there would presumably need to be a stage where permission to appeal is sought to ensure that any appeal has merit before it progresses to a full consideration[42].

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

13.18 One of the key principles underpinning the Law Commissions' electoral law reform project is that electoral law should be consistent for all elections, unless there is a good reason for this difference[43]. We understand that the Law Commissions propose retaining the difference between the level of judge who may determine parliamentary election petitions and who may determine local election elections; it is not clear from the paper who will determine other election petitions.

13.19 We are not aware of the rationale for any difference between those who may determine parliamentary election petitions and those who may determine local election petitions. Therefore we consider that the law should be the same here for all elections.

13.20 We would support petitions being capable of being heard by senior expert lawyers sitting as deputy judges at all elections.

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[42] We discussed this issue in *Challenging Elections in the UK*, pp. 50-51.

[43] Provisional proposal 2-2, page 19 of the Law Commissions' consultation paper.

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

13.21 We support this proposal. The current rules governing petitions, both those in Part 3 of the RPA 1983 and in the Election Petition Rules 1960, are in many places out of date. As the Law Commissions note the existing rules contain inconsistencies and errors. They also impose onerous and strict formal requirements that in some places conflict with human rights legislation (see the *Miller v Bull* case) and are drafted in complex, old-fashioned language.

13.22 We support using the standard procedural rules (which are much more modern and accessible) rather than specific election petition rules, with a small number of specific electoral procedural provisions in primary electoral legislation.

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

13.23 We support this proposal. It would allow administrative errors that affected the result of the election to be rectified where the Returning Officer knows that a mistake has been made which affected the result of the election, without the need to persuade a voter or candidate to bring a petition. This means that mistakes can be rectified through a Returning Officer's petition in cases where no one else may be willing to bring a petition

13.24 The Law Commissions should, however, further consider whether it would be possible to include protections within a reformed electoral law framework to ensure that Returning Officers are not themselves placed under inappropriate pressure not to initiate a petition where one might be merited. Public scrutiny and accountability of Returning Officers for their decisions may be sufficient, but it would be helpful to consider whether there are any equivalent or comparable protections for other holders of public office.

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

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

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

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

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

13.25 As the above questions are closely related we will respond to them together.

13.26 Among a range of proposals for reforming the system for challenging the results of elections (where electoral fraud, candidate disqualification or administrative failings are alleged to have affected the result of an election), the Law Commissions ask for views about proposals for a 'public interest petitioner' which could step in to plug the gap in the system for policing elections where individuals do not or cannot bring a petition themselves.

13.27 Currently only an elector in the area or a candidate in the election can challenge the result of an election (an 'election petition'). In 2012 we looked in detail at the law governing election petitions and produced a report to inform the Law Commissions' work.[44] We concluded that significant reform was needed in this area. In particular, we identified that the result of an election is a matter of great public interest and that, given this, it seemed inappropriate that the only way to overturn a potentially flawed election was by way of a private individual taking on the considerable expense and time of launching a legal action[45]. It seemed to us to be wrong that an unsafe election would be allowed to stand just because there was no individual willing or able to bring a petition.

13.28 The Law Commissions note that the Australian Electoral Commission (AEC) does have a power to bring a petition. We understand that the basis for the AEC being given the power to challenge an election result was a recommendation from the Australian Joint Select Committee on Electoral Reform in 1983 that the onus rests with the AEC to ensure that elections are conducted in accordance with the law. Accordingly, it was given the power to petition the Court of Disputed Returns "on any occasion when in its opinion sufficient reason is demonstrated"[46]. We understand that the AEC would only bring a petition if it had the information and evidence to show that a breach of electoral law has taken place. So far, it has only brought one petition[47]. The AEC may be a limited comparator for the proposal to give the Commission such a role as we do not have the function of ensuring elections are conducted in accordance with the law and, as we do not administer elections, may not have the information or evidence that a breach has taken place.

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[44] *Challenging elections in the UK* http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf

[45] Bringing a parliamentary election petition is likely to cost around £5,000; a figure that will rise as the proceedings progress.

[46] Section 357, Commonwealth Electoral Act 1918.

[47] *Australian Electoral Commission v Johnston* [2014] HCA 5 (18 February 2014).

13.29 The Law Commissions also refer to UK examples of public bodies being able to bring proceedings. For example, the Equality and Human Rights Commission has a power to "institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function".[48]

13.30 We agree that there should be a robust process for filtering out vexatious or groundless petitions before the full cost of an electoral petition falls upon the local authority and any parties named. We have some concerns that the public interest petition route is likely to become the first option for those considering challenging the result of an election, rather than the last resort. The process should be as transparent as possible, to ensure that the results are granted legitimacy and avoid undermining confidence in the democratic process.

13.31 The threshold for bringing a petition in the public interest should be relatively high – a public interest petition would involve action by a public authority to overturn the election of an individual representative, and should therefore be used carefully. It should not be capable of being abused, by being used as a means to undermine the legitimate and properly expressed will of electors. A public interest petition is only likely to be appropriate where there is significant risk that confidence in the integrity of an election would be damaged without the opportunity to openly consider the strength of evidence supporting allegations of fraud or errors in administration.

13.32 While the Law Commissions do not explicitly seek views on whether the Electoral Commission could or should take on the role of initiating or overseeing a public interest petition, it does identify us as the only candidate in the UK electoral system (page 313).

13.33 **However, we have identified a number of concerns about the specific suggestion that the Electoral Commission undertake this role (set out below), and we will continue to consider in more detail the implications for the Commission of this suggestion. We would welcome the opportunity to discuss this suggestion in more detail during the next stage of the review process.**

13.34 First, the role of initiating public interest petitions could have an impact on perceptions of our political neutrality. As the Law Commission paper acknowledges (pages 314-15):

> "Exercising a public interest petition function might lead to accusations, or the perception, that the Commission's actions are affected by political considerations, or in fact affect the balance of political power. Winning candidates and their parties may also be concerned about facing a publicly funded challenge to their election. A converse risk is risk

[48] Section 30(1) of the Equality Act 2006.

aversion in using the power to bring petitions, in order to avoid such concerns."

13.35 The Law Commissions have considered this risk and put forward two options:

- The Electoral Commission decides whether to bring a petition, applying a threshold test, and, if it decides the threshold is met, will bring a petition; or

- The Electoral Commission appoints an independent electoral expert, from a panel of such persons, to investigate whether the threshold for a petition to be brought has been met and, if that person decides that the threshold is met the Electoral Commission would be required to bring a petition.

13.36 The second option is designed to shield us from allegations that we are not acting impartially; this is because the decision as to whether to challenge an election result would rest with an external person, appointed by us.. However, there could still be questions about our decision to appoint that person to investigate the matter in the first instance and also about whether that person was truly independent of us. Other issues to consider include who would sit on this panel of independent experts. Also, there would be a need to consider the fact that some of our Commissioners are drawn from political parties.

13.37 Second, any process for a preliminary investigation by a public interest petitioner or independent expert to decide whether the threshold for bringing a petition has been met will take time. The Law Commissions propose giving the court a power to extend the time for bringing a petition in the public interest to allow such an investigation to take place, subject to a long-stop of three months[49]. One of our main concerns with the current petitions process is that it takes a long time for petitions to be determined; we discuss this in more detail below. Therefore, we are concerned that any change allowing for public interest petitions could further delay the determination of petitions and leave elections open to uncertainty for a greater time than at present.

13.38 Third, it is important to be realistic about the likely resource implications of any iteration of this proposal. It is reasonable to assume that candidates and/or political parties might increase the number of elections they seek to challenge if the direct financial burden of doing so was removed from them. It is unlikely that the Commission could undertake this role within current resources without some impact on the delivery of other responsibilities.

13.39 There may also be alternative ways to secure a greater representation of the public interest in the petition process that do not involve giving the Electoral Commission (or another body) a power to bring petitions. For

[49] Paragraphs 13.165 and 13.190 of the consultation paper.

example, the Law Commissions are also proposing that Returning Officers should be able to challenge an election result; Returning Officers would be in a good position to know whether there had been any fault in the electoral process and may have greater resources to bring a petition than a private individual. This reform may in particular deal with cases where the election should be annulled even though none of the parties believe this to be the case (although the funding of such actions would need to be considered).

13.40 If the main problem is that petitions are not brought because potential petitioners cannot afford them, it may be that the best solution is not to transfer the role of claimant to a public authority (which is likely to become the first port of call, not the last resort as the Law Commissions hope) but to offer some mechanism for directly funding deserving cases. For example, the independent experts that the Law Commissions envisage making recommendations to the Electoral Commission might instead make decisions on whether a petitioner should receive public funding or be able to bring a petition with lower costs.

13.41 Whether or not there is a public interest petitioner, there is a strong case for making the bringing of petitions more affordable; starting a petition currently costs around £5,500 for a parliamentary election[50]. Instead there could be a mechanism to filter out unmeritorious and vexatious petitions at an early stage; this seems better than imposing a financial barrier on challenging an election to deter ill-founded petitions. We discuss this in more detail in our *Challenging Elections in the UK* report; in particular we refer to comparable countries where the cost of petitioning is much lower and also international guidelines, which stress that challenging an election should either be free or should at least keep costs to a minimum[51]. We also note the blog by Juliet Wells, an academic at UCL, who makes similar points[52]. Reducing the costs of bringing a petition may go some way to solving the problem of ensuring that the public interest in bringing petitions was represented without the need for the creation of a 'public interest petitioner'.

13.42 However, even if there was to be a public interest petitioner, we recommend that consideration is given to reducing the costs of bringing a petition as it does not seem right to us that in the twenty first century the ability to challenge the result of an election depends not on the strength of your grounds but on your ability to pay a large sum of money. Reducing the costs would also help to address the concern that a public interest petitioner would be frequently used as a 'free ride' as it would be more affordable for individuals to bring their own petitions rather than rely on the public interest

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[50] This comprises the fee for various applications and the maximum amount of the security for costs.
[51] Pages 28 to 34 of our report.
[52] Juliet Wells, Reforming Electoral Law: a Comment on the Law Commission's Joint Consultation Paper, *U.K. Const. L. Blog* (25th Feb 2015) (available at: http://ukconstitutionallaw.org/)).

petitioner because of the prohibitive expense of bringing a petition. We do not support the Law Commissions' proposal to keep the costs as they are.[53]

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

13.43 We support this proposal, and agree that there should be an informal means of reviewing complaints about the administration of elections which do not aim to overturn the result. It is important both that individual electors or candidates have the opportunity to air their concerns and have them heard, and also that there are opportunities for identifying improvements for the administration of elections and electoral registration and ensuring that they are implemented in the future.

13.44 If the Law Commissions confirm that this proposal should be further developed, we would be happy to consider how such a role could be developed alongside, or incorporated within, the Commission's existing performance standards framework for Electoral Registration Officers and Returning Officers.

Additional questions

13.45 The Law Commissions ask about the special evidential provisions[54]. The law does not allow a witness to avoid answering any questions because it might incriminate the witness to do so and in return prevents any answer the witness gives from being admissible in evidence in any criminal trial (except if it is a lie and the witness is prosecuted for perjury). The Law Commissions ask:

- To what extent are the evidential provisions offering some protection to self-incriminating witnesses relevant in modern petition practice?
- Would removing these provisions deter witnesses from telling the truth in petition trials?
- Might prosecutorial discretion not to prosecute election crimes by those who have effectively blown the whistle at election petition proceedings be a sufficient tool to promote truthfulness?

We do not have direct experience of any issues with how these special evidential provisions work in practice. It may be that police and prosecutors have comments.

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[53] Paragraph 13.165 (sub-paragraph (3)).
[54] Section 141, RPA 1983. Paragraph 13.157 of the Law Commissions' consultation paper and paragraph 1.22 of their research paper on legal challenge.

Request for the consideration of additional law reforms

13.46 There are a number of other issues that we would request are considered by the Law Commissions.

Time taken to determine a petition

13.47 We are concerned at the length of time it takes for some petitions to be determined. There is a need to allow sufficient time for parties to compile their evidence and prepare their case and for the court to deal with procedural matters, conduct a scrutiny and a trial and reach a conclusion. However, there is also a need for certainty – for electors, the candidates and the elected body and staff. Therefore, petitions should be determined as quickly as possible, without any unnecessary delay.

13.48 We are concerned that the current system does not currently determine petitions as quickly as is possible. We are aware of one petition in Stoke on Trent in 2008 which took 21 months to be determined even though it related to a question which could be expected to have been resolved much more quickly, namely which of two candidates received the most votes. Even where there has been an administrative error, which is recognised by the Returning Officer, the petition is unlikely to be resolved in under three months and may take over half a year (as in Prestatyn). We understand that one of the most common causes for delay is the unavailability of judges over the summer.

13.49 We are unsure what impact bringing election petitions into the ordinary court structure would have on this but we would request that consideration is given to the importance of petitions being dealt with without delay.

Slip rule

13.50 Once a Returning Officer has declared the result of the election they are unable, by law, to change that declaration. If they realise subsequently that the declaration was wrong the only current recourse is to ask a voter or candidate to bring a petition; under the Law Commissions' proposals the Returning Officer will also be able to bring a petition.

13.51 Would there be merit in the Returning Officer being given a power to correct the declaration themselves? Designing such a power would not be straightforward. A number of issues would need to be considered such as whether it would be necessary for the candidates (or their agents) to be present and to agree to the correction (and what if any were to unreasonably disagree)? How long after the declaration and in what venue could the correction be made? Would there be scope for political pressure being exerted on the Returning Officer after the declaration was made to change the result?

13.52 Notwithstanding these difficulties, it does not seem appropriate that a straightforward error by the Returning Officer or a staff member in the count or declaration that is not in dispute cannot be corrected without recourse to a legal challenge that will take several months, and great cost, to be resolved.

Therefore, we request that consideration is given to a mechanism to address this scenario – whether this is a ‘slip rule’, an expedited application for a correction to the result or some other means.

14 Referendums

14.1 This section covers our response to issues in the Law Commission's consultation concerning national referendums, local government referendums and parish polls.

14.2 In 2011, we set out our views on the law governing referendums in our reports on the administration of:

- *the referendum on the law-making powers of the National Assembly for Wales*,
- *the referendum on the parliamentary voting system*.

14.3 We also published a report on *the cost of the parliamentary voting system referendum* and a report on *the referendum held in the North-East of England in 2004*.

14.4 In December 2014, we published our report on the Scottish independence referendum, again setting out our views on the law governing referendums and taking account of experience from this much higher public profile referendum.

http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/179812/Scottish-independence-referendum-report.pdf

Response to Law Commissions' provisional proposals and questions

14.5 Drawing on our published views and existing recommendations where relevant, below is our response to the provisional proposals and questions raised by the Law Commission.

Provisional proposal 14.1: Primary legislation governing electoral registers, entitlement to absent voting, core polling rules and electoral offences should be expressed to extend to national referendums where appropriate.

Provisional proposal 14.2: Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring that governing elections, save for necessary modifications.

14.6 We support these two proposals. As the Law Commission identifies (paragraphs 14.52 to 14.56) inefficiencies in the current approach to making referendum legislation would be mitigated by including referendums within the primary legislation for electoral registration, core polling laws and offences.

We have already called for generic conduct rules for referendums to be made by the Secretary of State in secondary legislation.

14.7 There would be a number of benefits from implementing these two proposals, including:

- The legislation specific to each particular referendum need concentrate only on the substance of that referendum, the franchise, when it will be held and the referendum question(s) to be asked of voters

- The legislative process instigating a referendum would be speedier, enabling a referendum to be held more quickly

- Clarity for those planning to campaign in the referendum and for those running the referendum would have clarity, and planning and preparation could commence sooner

- Any scope for amending rules for political reasons during the process of calling for a referendum would be removed

- Greater efficiency – the process of producing and consulting on specific rules for each referendum has a cost impact on Governments, Parliaments and consultees.

14.8 Our published report on the Scottish independence referendum identified the clear benefits of achieving legislative certainty well in advance of a referendum being held.

Provisional proposal 14.3: A single legislative framework should govern the detailed conduct of local referendums, subject to the primary legislation governing their instigation.

Provisional proposal 14.4: The grounds of challenge governing elections should apply to local referendums, save that only extensive corrupt or illegal practice shall be a ground for annulling the referendum.

14.9 We support these proposals for the simplification, consolidation and modernisation of the law on local referendums, which in our experience is not well known (partly as a result of the infrequency of such referendums) and has received little scrutiny. The Commission is rarely asked to advise on local referendums, but what information we do provide normally relates to issues concerned with how local referendums are combined with elections happening on the same day.

Provisional proposal 14.6: A parish poll pertaining to an appointment should be governed by the conduct rules governing elections, omitting the nomination stage.

14.10 See our answer to proposal 14.7.

Provisional proposal 14.7: A parish poll pertaining to an issue should be governed by the conduct rules for local referendums.

14.11 The Commission does not advise on parish or community polls, since our remit for referendums does not extend to them. However, these two provisional proposals are a sensible way forward and consistent with the need to simplify, consolidate and modernise the rules for all polls.