

Challenging elections in the UK

September 2012

Election disputes are inherent to elections. Challenging an election, its conduct or its results, should however not be perceived as a reflection of weakness ... but proof of the strength, vitality and openness of the political system...the right to vote would be merely abstract if the right to sue to enforce it was not guaranteed in law

Denis Petit (OSCE / ODIHR), *Resolving Election Disputes*, 2000

...the law is framed at both a procedural and substantive level precisely so as to discourage the bringing of election petitions...

The rules are complex and would certainly benefit from a thorough examination and redrafting in order both to modernise the rules and to clarify some of the issues. The law dates from 1868, for its wording is almost an exact copy of the relevant provisions of the Parliamentary Elections Act 1868

Prof Bob Watt, *UK Election Law: A Critical Examination*, 2006

Electoral systems and technology have changed, voter and candidate qualifications have altered, human rights law has entered the regulation of the political process, but the law on petitions remains staunchly rooted in Victorian quasi-democratic precepts...Our democracy requires fundamental redesign of the processes for securing judicial scrutiny of the electoral process...

Dr Heather Lardy, 'Challenging Elections', *Scottish Legal Action Group Journal*, 2007

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Executive summary

Election challenges are a fundamental part of the electoral process. It has rightly been stated that, ‘the right to vote would be merely abstract if the right to sue to enforce it was not guaranteed in law’¹.

In the UK, election results may be challenged by a candidate in the election or an elector in that area by issuing legal proceedings known as ‘election petitions’. Election petitions fall within two, sometimes overlapping², categories:

- Petitions alleging an error on the part of an election official (this includes a petition based, for example, on a complaint that the votes were not correctly adjudicated as valid or invalid or not counted accurately), and
- Petitions alleging that a candidate or agent of a candidate committed an electoral offence³.

This report, prepared in order to encourage debate in the context of the Law Commission’s review of electoral law and more generally, highlights perceived problems with the UK’s election petition system by reference to internationally recognised standards for challenging elections.

These problems largely fall within two main categories:

- The election petition system is not accessible or transparent, and
- The election petition system does not allow for challenges to elections to be dealt with promptly and does not provide a right of appeal.

Firstly, the election petition system is not designed to ensure that departures from electoral law (either because of an error by an election official or an offence committed by a candidate or agent) are properly considered and any appropriate action taken or sanctions applied. Candidates or electors with genuine complaints about an election, who wish to challenge the result, face barriers which for many are likely to be insurmountable.

These barriers include (though are not limited to):

- The cost of bringing a petition. The initial expense of bringing a parliamentary election petition is over £5,500, which will increase significantly if the matter proceeds to a hearing;
- The onerous and complex requirements to present and serve a petition; and

- The opaque legislative provisions that make it difficult to even establish whether there are grounds for bringing a petition.

The procedure for bringing and managing a petition is similar in nature to a private legal action; it is questionable whether this is appropriate considering the public interest in identifying and remedying electoral malpractice. Election results are more than just private disputes, they are of significant public importance.

It is likely that electors, independent candidates and candidates from small political parties would be less able to bring a petition than candidates who represent a large party.

Returning Officers are not allowed to bring a petition, despite on many occasions being best-placed to do so, having knowledge of their own error and the necessary resources to bring legal proceedings⁴.

Secondly, the petition process rarely delivers a swift determination of the validity of an election and therefore, does not provide certainty of outcome for candidates, parties, election officials and, most importantly, the electorate. Even a simple administrative error by an election official in the declaration may take three months to resolve. More complex cases can take nearly two years before a decision is made on who was, in fact, duly elected⁵.

Consideration is also required as to whether the sanctions currently available to the court hearing a petition are sufficient or need revising.

The lack of a right of appeal against the court's decision is particularly concerning and clearly departs from internationally recognised principles.

In summary, the evidence demonstrates that the UK's petition process is outdated, complex, inaccessible and inefficient. On this basis, fundamental reform is required to ensure that the UK has a system to challenge elections that complies with principles set out by international bodies and promotes public trust and confidence in election results.

Introduction

The Law Commission's review of electoral law and challenging elections

1. Following submissions by the Electoral Commission (the Commission) and the Association of Electoral Administrators (the AEA), the Law Commission announced in 2011 that it would include a project on electoral law in its 11th programme of law reform.
2. This project is currently in its first phase, a scoping study for which the Law Commission published a consultation paper in June⁶. The Law Commission will consider responses to the consultation and produce a report setting out the scope of the project by the end of 2012.
3. If the Law Commission decides to take the project forward, the second phase will consist of substantive law reform for which a further consultation paper on the substance of the project would be issued in 2014. The third phase would involve drafting legislation, to be published by February 2017.
4. As we stated in our November 2011 paper, *The Law Commission Review of Electoral Administration Law - Our preliminary views on the scope of the review*, we consider that the rules for challenging the outcome of elections require major reassessment⁷. The law governing election petitions dates back to the mid-nineteenth century and is largely unchanged⁸.
5. In the last hundred years, only one parliamentary committee or Speaker's Conference has considered the issues surrounding election petitions⁹. This is an area where a comprehensive review followed by fundamental reform is long overdue. A process that was created in the mid-nineteenth century is unlikely to be well-suited to elections held in the twenty-first. The developments in electoral law and practice as well as in society over the past 150 years, including the expansion of the franchise, the increasing number of elections and the differences in the nature of elections¹⁰, and, more recently, the introduction of postal voting and the widespread use of electronic communications, suggest that reform is urgently required.
6. Moreover, since the introduction of the modern petition system in 1868, new principles have been outlined by independent and expert international organisations, which are based on international law¹¹. These principles recommend best practice in how elections should be challenged. In addition, there are examples of good practice from other countries in how they have designed their systems for challenging elections. Reform of the UK's (largely) Victorian system can draw upon such sources to achieve a system that better serves the interests of voters.
7. This paper outlines the principles set by independent, respected and expert international bodies with which a system for challenging elections should comply.

These principles reflect the view of the international community as to the basic features of a system for challenging elections. The paper considers the extent to which the UK's system is consistent with those principles and also draws attention to some other issues relating to the UK's system.

8. In drafting this paper, the Commission liaised with electoral administrators, electoral lawyers and political parties, and also conducted independent research. The Commission considered the extent to which the current system allows challenges to be dealt with swiftly but thoroughly and ensures that appropriate sanctions are applied to those who breach electoral law.

9. This paper does not seek to propose alternative systems or recommend reforms and nor do any of the options identified constitute policy positions adopted by the Commission; rather, the paper focuses on how the current system operates, identifies apparent flaws and asks questions to promote further debate.

Whilst this report is UK-wide in its consideration, it does not seek to consistently reference the equivalent legislative provisions or systems in Scotland and Northern Ireland. However the principles and issues raised are equally applicable across the whole of the UK.

The UK's system for challenging elections

10. In the UK the only way to challenge the outcome of an election once a candidate has been declared elected¹² is by legal proceedings. These proceedings are referred to as 'election petitions'¹³ and can be brought by a candidate or elector in the area in which the election was held within a specified period of time after the election.

11. Part 3 of the Representation of the People Act 1983 (RPA 1983) sets out the process for challenging UK Parliamentary and local government elections by election petition¹⁴. Some relevant provisions are also set out in the Election Petition Rules 1960 (the 1960 Rules). The petition process, as set out in these two statutory vehicles, is detailed and complex.

Separate provisions provide for petitions in relation to elections to the European Parliament, devolved parliaments or assemblies in Scotland, Wales, Northern Ireland and London, and in relation to other electoral events. Paragraph 136 below lists the relevant legislation. The provisions, especially those concerning the issuing and hearing of the petition, will differ in Scotland and Northern Ireland, due to their separate legal systems.

12. The legislation provides that the outcome of an election may be challenged on the grounds of an undue election, an undue return¹⁵, that the candidate was at the time of election disqualified or that the election was voided by corrupt or illegal practices.

13. In summary, taking into account Part 3 of the RPA 1983 and relevant case law, the grounds for challenging an election are that:

- an error was made by an electoral official that affected the result or at least meant that 'the election was not conducted so as to be substantially in accordance' with the rules (under this ground, the election court is able to conduct a scrutiny of ballot papers to ascertain which candidate has the majority of lawful votes);
- corrupt or illegal practices were committed by a candidate or his or her agent or 'such practices so extensively prevailed in an election that they may reasonably be supposed to have affected the result';
- the successful candidate was disqualified¹⁶.

14. Election petitions are rare¹⁷; statistics for UK Parliamentary general elections show that only six petitions were determined between 1945 and 2006¹⁸

15. Petitions must be presented within a specified timeframe, in a particular manner and provide specific information. The legislation governing each type of election sets out the requirements for its challenge. Fees are payable both for the issue of a petition and for the assessment of surety to cover the costs of a hearing; in a UK Parliamentary election petition, the initial cost to the petitioner is likely to be over £5,500¹⁹.

16. An election petition must be heard in open court without a jury²⁰ and at the conclusion of the trial, must determine whether the person (or persons) elected were in fact duly elected — in which case the petition fails — or whether the election is void²¹.

17. The court has the power to declare some other person elected as well as declaring the election void²². The finding of an election as void does not affect any prosecution for an offence alleged to have been committed at that election.

International principles

18. The International Institute for Democracy and Electoral Assistance (the IDEA)²³, the Council of Europe's Venice Commission²⁴ and the Organisation for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights (the OSCE / ODIHR²⁵) have worked to develop basic principles and commitments for the conduct of elections. These principles emphasise the importance of allowing electoral challenges and the rights of respondents as a means of ensuring free expression and the will of the people.

19. Guidelines produced by the IDEA state:

- The legal framework should provide that every voter, candidate and political party has the right to lodge a complaint with the competent electoral body or court when an infringement of electoral rights is alleged to have occurred.
- The law must require that the appropriate electoral body or court render a prompt decision to avoid the aggrieved party losing his or her electoral right.
- The law must provide a right of appeal to an appropriate higher level of electoral body or court with authority to review and exercise final jurisdiction in the matter. The decision of the court of last resort must be issued promptly.
- The legal framework should provide for timely deadlines for the consideration and determination of a complaint and the communication of the decision to the complainant²⁶.

20. Item II.3.3 of the Venice Commission's *Code of Good Practice in Electoral Matters* sets out the main principles that should govern any process for challenging the outcome of an election. As a starting point, the Code states that, 'failure to comply with the electoral law must be open to challenge before an appeal body'²⁷.

21. The Code goes on to state that, 'There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;
- appeals may be heard by an electoral commission... the commissions are highly specialised whereas the courts tend to be less experienced with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second'²⁸.

22. The Venice Commission's Code advises that, 'decisions on the results of elections must also not take too long... This means both that the time limits for appeals must be very short... Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision'²⁹. The Venice Commission's *Report on the Cancellation of Election Results* states that, 'It could be argued that a shorter time-limit hampers the possibility to present solid reasoning and proofs in order for the case to be dealt with efficiently. A longer time-limit is a basis for uncertainty on the correctness and legality of electoral results and hampers the functioning of democracy'³⁰.

23. The Code notes that, 'The procedure must also be simple, and providing voters with special appeal forms helps to make it so. It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases'³¹.

24. In addition, the Code makes it clear that the appeal procedure, and especially the powers and responsibilities of the various bodies involved, should be clearly regulated by law, so as to avoid any conflicts of jurisdiction³². Standing in such

appeals must be granted as widely as possible; it must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal³³. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections³⁴.

25. The Code also states that appeal bodies:

should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated³⁵.

26. The ODIHR publication, *Resolving Election Disputes* includes the following principles:

- Every individual and every political party has the right to the protection of the law and to a remedy for violations of their political and electoral rights.
- Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to address their grievance within a competent jurisdiction.
- Where a violation has been found, the competent authority within the appropriate jurisdiction should provide for redress in a prompt manner within the timeframe of the electoral process.
- The effectiveness, impartiality and independence of the judiciary, including the office of the prosecutor, and that of electoral bodies, is a precondition for the fair, effective and impartial handling of election related disputes in conformity with the commonly accepted international standards on elections and the rule of law.
- The decisions made by independent and impartial authorities which are responsible for supervising the conduct of elections and other public consultations, including the preparation and periodic revision of the electoral roll, shall be subject to appeal to an independent and impartial judicial authority.

- The electoral law shall secure a clear demarcation of the respective jurisdictions of the courts and the electoral bodies so as to exclude the possibility of courts or electoral bodies being served with repeated or concurrent complaints on the same matters³⁶.

27. 'The complaints process should be transparent and easily understandable... civic education campaigns should include basic information on the complaints procedure'³⁷. In addition,

An effective, fair and transparent complaints procedure requires that potential complainants be informed of the means by which the complaint should be made, which body it will be considered by and the time frame for its resolution. In addition, complainants should be aware of the type and amount of evidence needed to sustain their allegations with sufficient factual and legal materials³⁸.

28. The OSCE / ODIHR also state that:

The complaints procedure should be free of unnecessary obstacles, especially as regards the cost of bringing an action to court. Wherever possible the complaints procedure should be accessible without charge to the complainant. Where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint³⁹.

29. The same guidance also recommends that the grounds upon which election results may be invalidated, either fully or in part, should be clearly stated in law along with 'the amount and type of evidence required for a review of the results'. The report warns that, 'In the absence of clear and unambiguous standards of evidence, the determination of what evidence would satisfy these standards could vary on a scale that may undermine the whole process'⁴⁰.

30. The OSCE / ODIHR add that:

Mechanisms for resolving election disputes should be governed by a coherent body of legal norms, preferably in a distinct chapter or section of the law. The terms, wording and legal scope of the election dispute provisions on the different subject matters should be mutually uniform so as to secure their consistency and completeness. The language used throughout the law should be clear and consistent so as to eliminate arbitrary interpretation⁴¹.

31. Regarding the promptness of making decisions on challenges, the OSCE / ODIHR is of the view that:

Considering that the conduct of an election requires prompt decisions and actions within a pre-determined timeframe, the procedures governing election disputes should differ from those provided for general civil disputes. This could be reflected in shorter deadlines and a single appeal process, which can be justified so long as sufficient time is provided to file complaints and appeals...

For each phase or facet of the electoral process (such as voter registration or the validity of the candidatures), the electoral law should expressly and systematically set deadlines for filing complaints and appeals by which either the courts or the electoral bodies must reach a decision⁴².

32. The same guidance adds that, 'election law must guarantee the resolution of disputes within a period of time suited to the electoral process. It is crucial here to ensure that the outcome of elections is not delayed. This implies that the period between the filing of a complaint and when it is dealt with is very short'⁴³. The guidance goes on to say that, 'all complaint and appeals should be determined once and for all within a maximum of two months'⁴⁴.

33. In addition to these principles, the ability to challenge the result of an election is arguably an integral part of the right to free elections under Article 3 of the First Protocol to the European Convention on Human Rights (ECHR)⁴⁵. A system of election challenges should allow for illegality and malpractice to be identified and investigated and for flawed election results to be overturned.

34. Drawing on all the above, it is possible to set out a list of basic international principles, falling under two broad headings, by which the UK's system for challenging the outcome of elections can be assessed:

A. Accessibility and transparency

- Standing in challenges to the outcome of elections should be granted as widely as possible.
- The electoral law should clearly state the grounds upon which an election result can be challenged.
- There should be sufficient time for the challenger to bring a challenge, considering the need to gather evidence and take advice. This should be balanced against the need for the validity of the election to be resolved as soon as possible.
- The procedure for challengers to follow, from bringing the challenge up to its determination, should be simple. It is necessary to eliminate formalism and avoid decisions of inadmissibility on account of a challenger's procedural error.
- Wherever possible the challenge procedure should be accessible without charge to the challenger. Where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint.
- Mechanisms for resolving election disputes should be governed by a coherent body of law and preferably, in a distinct chapter or section of the law. The terms, wording and legal scope of the election dispute provisions for different elections should be mutually uniform so as to secure their consistency and completeness. The language used throughout the law should be clear and consistent so as to eliminate arbitrary interpretation.

- The challenge process should be transparent and easily understandable. Those who have standing to issue challenges should have awareness of their right to do so and information on the procedure.

B. The proceedings: promptness, sanctions and appeals

- The body determining a challenge should issue its decision promptly, within a specified time that is ideally not longer than two months unless there are exceptional circumstances.
- The body determining the challenge should have authority to impose appropriate sanctions in the event the challenge is upheld, namely to annul the election result and order a new election to be held.
- The electoral law should provide a right of appeal to an appropriate higher level with authority to review and exercise final jurisdiction in the matter. The decision of the court of last resort must be issued promptly.
- The electoral law shall secure a clear demarcation of the respective jurisdictions of the courts.

Compliance of the UK's election petition system with international principles

35. In this main part of the report, we list the international principles, which reflect the international community's view as to the best practice, which are set out at the end of the preceding section, and assess whether the UK's system complies with each principle. Though we have undertaken a broad review of the international guidance and the UK's petition system, we recognise that this report does not deal with every relevant international principle nor does it discuss each aspect of the UK's petition system.

36. It is useful to bear in mind that the UK's modern petition system was created in 1868 and has altered little since. The international principles are based on international laws that protect the right to free and fair elections. Both the standards and the international laws on which they were based were created long after the UK's petition system was created. The high standards by which elections throughout the world are now assessed did not exist in 1868. Therefore, it is unsurprising that in the case of most of the international standards, the UK's system fails to comply.

37. It is not argued that achieving compliance with principles drawn from the international standards is worthwhile for its own sake; rather, compliance with the principles will ensure that the UK's system for challenging elections serves the interests of all those with an interest in elections, especially voters. The standards have been developed, drawing on international best practice and expertise, to ensure elections are free, fair and serve the interests of voters.

38. This report is limited to assessing whether the UK's petition system's complies with the standards. Although in some places we have suggested possible options for how the UK system might be made more compliant, suggesting changes is not the purpose of this report. The report does not set out recommendations for a new system for challenging elections or for reforms of the existing system. Such work should follow the publication of this report, which will hopefully be a useful starting point in considering reform of this area.

A. Accessibility and transparency

Who may bring a petition?

Principle - Standing in challenges to the outcome of elections should be granted as widely as possible.

Candidates and electors

39. An election petition in the UK can be brought by an elector or candidate at the election⁴⁶. It should be noted that there will not always be a candidate at the election to bring a petition for example, in uncontested elections. It is also worth noting that although one elector may challenge a parliamentary election⁴⁷, at least four electors must agree to submit a petition to challenge a local election⁴⁸. The reason for this inconsistency is not clear; if one elector has a legitimate complaint that falls within the permissible grounds for a petition, why should the petition proceedings be subject to the elector being able to persuade three others to support the petition? To draw a parallel in judicial review challenge, there is no requirement for multiple applicants; rather the court, using the 'permission to proceed' process, ensures only applications with arguable merit go forward.

40. The UK's system is compliant with the principle that candidates and electors should be able to bring challenges to elections. However, it may be argued that restricting standing to those two categories of persons is not wide enough to allow all legitimate complaints to be considered and to make petitioning accessible.

41. Constraints such as requiring that petitions may only be presented by individuals (electors or candidates) and that a successful candidate is made a respondent (as well as the obligation to issue and serve numerous court forms and pay fees and a surety into court) make the petition process closely analogous to a private legal action. This may be a consequence of the period in which election petition law originated; in the 1860s seeking elected offices was an individual endeavour and seats were sometimes passed from father to son as if a property right⁴⁹. Although the nature of elections has changed considerably since 1860 and elections are now typically contested by parties rather than individuals, the essential features and structure of the law has not developed and so election petitions remain a private matter⁵⁰.

42. Casting the petition process as such appears outdated and wholly unsuited to modern elections. As long ago as 1947, a report produced by a committee considering electoral law reform commented that, 'Irregularities in elections should not be regarded as a private wrong which an individual must come forward to remedy, but as attempts to wreck the machinery of representative government and as an attack upon national institutions which the nation should concern itself to repel'⁵¹. The committee also noted that, 'the integrity of elections...concerns the community as a whole and not merely the electors of a particular constituency'⁵². More recently, Mr Justice Blake in the case of *Pilling and others v Reynolds* [2008] EWHC 316 (QB) stated that, 'there is an important public interest in clarifying the legitimacy of the ballot'.

43. Given the clear public interest, it seems inappropriate to place the burden to initiate petitions solely on individuals as if elections were private disputes. The Election Commissioner in *Simmons v Khan* [2008] EWHC B4 (QB) (the Slough case) stated, 'the election petition is both inadequate and inappropriate as a method of controlling fraud. For electoral policy to be policed by what are, in effect private civil law actions brought at the expense of the litigant cannot be acceptable'⁵³.

44. Under the present system which imposes barriers in the way of individuals (especially electors) bringing petitions, not least the cost of petitioning, Heather Lardy concludes that the possibility of an elector proceeding with a petition 'may be determined solely by the availability of financial resources'⁵⁴.

45. In light of the above, there may be a case for also allowing petitions to be brought by other persons and organisations.

Returning Officers

46. Returning Officers are unable to initiate petitions in the UK. Even if the Returning Officer is aware that they or an electoral administrator has made an error that has affected the result, unless a candidate or elector is prepared to take the risk and responsibility of lodging a petition, the error could remain uninvestigated and a flawed election result could stand. As discussed below (see paragraph 174), there seems to be a strong argument in favour of Returning Officers being able to correct an obvious error after the declaration or at least to be able to bring a petition.

Political parties

47. In effect, many petitions are brought by parties, who support their aggrieved candidate with financial and legal resources. The fact that political parties cannot bring a petition in the UK appears inconsistent with the principle stated by the IDEA (see paragraph 19) that every political party should have the right to lodge a complaint to the central electoral body or the court. In countries such as New Zealand and Portugal, a political party may issue a petition.

48. If many petitions are already effectively brought by parties, consideration may be given to whether parties themselves should be permitted to petition directly, rather

than requiring them to do so via a candidate. The fact that parties are essentially able to petition means that this may not make it easier to bring petitions. In any event, even though parties are likely have greater financial resources to bring a petition than most individuals, as shown by the section dealing with the cost of petitioning (see pages 28 to 34), even large political parties are regularly deterred from launching petitions on account of the cost of doing so. In addition, political parties might be reluctant to petition because they do not want to be seen as ‘sore losers’⁵⁵. Therefore, it remains to be seen whether allowing political parties to petition in their name would lead to more legitimate petitions being brought.

An independent election body / observer

49. Some have suggested that the UK’s Electoral Commission should be entitled to initiate petitions⁵⁶. Caroline Morris in *Parliamentary Elections, Representation and the Law* considers whether there is a need for a ‘public interest petitioner’ rather than leave challenges ‘to the initiative of private litigants’⁵⁷. Such practice exists elsewhere, for example, the Australian Electoral Commission (AEC)⁵⁸ is entitled to bring a petition on its own initiative⁵⁹ as well as being obliged to in the case of recounts⁶⁰. Precedent also exists in the UK for independent bodies to initiate legal proceedings on matters relevant to their statutory remit. For example, the Commission for Equality and Human Rights 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’⁶¹.

50. Morris notes that:

Although the UK’s Electoral Commission is not responsible for the conduct of elections itself, it does already play a significant role in ensuring that elections are conducted properly through its work in registering parties and overseeing the political donations regime. It is not a large step giving it a further role in maintaining the integrity of elections by granting it standing before an Election Court, as with the Australian model. Choosing the Commission rather than the Ministry of Justice has the advantage that not only is the Commission a strictly non-partisan body, it is also independent of government⁶².

51. A similar view is expressed by John Stewart in his article *A Banana Republic?* Stewart states that the Commission could be given a role in ‘initiating hearings by election courts without the severe time constraints applied to petitions.’⁶³ Stewart also suggests that the Commission could be given a role in taking over responsibility for cases⁶⁴.

Conclusions

1. The UK complies with the expectation of international bodies that electors and candidates should be able to challenge the result of an election.

2. However, the UK does not grant standing any more widely than these two groups. The UK's system may be open to criticism that international standards expect standing to be granted more widely.
3. The relatively limited groups of those with current standing to lodge a petition, together with the obstacles (particularly financial and procedural) that candidates and electors will face in bringing a petition (discussed later in this report) have led some commentators to suggest that there may be a role for others such as Returning Officers, political parties and relevant independent electoral bodies to play a part in the petition process.

Grounds

Principle - The electoral law should clearly state the grounds upon which an election result can be challenged.

Clarity of the grounds

52. The OSCE / ODIHR state that, 'electoral law should lay down the grounds upon which complaints and appeals are admissible'⁶⁵. The jurisdiction of the election court should be set out clearly in legislation so that a potential petitioner on consulting the relevant legislation would be sure as to on what grounds they may challenge the result of an election.

53. The grounds for bringing an election petition in the UK are not clearly defined in legislation. Section 120(1) RPA 1983 states that, 'No parliamentary election and no return to Parliament shall be questioned except by a petition complaining of an undue election or undue return... presented in accordance with [Part 3] of this Act'. The terms 'undue election' and 'undue return' are not defined in the RPA 1983 and so a reader must refer to case law⁶⁶ to understand their meaning. Section 120, therefore, offers little assistance to a potential petitioner trying to establish whether their complaint is a valid ground on which to challenge the election.

54. A little more guidance is supplied in relation to local government election petitions. Section 127 RPA 1983 states that an election under the local government Act may be questioned on the grounds that the person whose election is disputed was disqualified or was not duly elected. In addition, Section 127 states that the election may be challenged on the grounds that it was void due to corrupt or illegal practices or on the grounds provided by Section 164 RPA 1983 (general corruption⁶⁷) or Section 165 RPA 1983 (employing corrupt agent).

55. Even though a potential petitioner may understand the term 'disqualified' in this context and will learn that there are further permissible grounds relating to corrupt or illegal practices (the meaning of which may cause the lay reader some confusion, even though defined in the RPA 1983), the meaning of the term 'duly elected' is not

immediately clear. Again, reference would need to be made to case law to determine whether a complaint is admissible⁶⁸.

56. Furthermore, although a prospective petitioner may allege that corrupt or illegal practices have occurred, he or she is unlikely to be able to assess whether this results in the election being 'void'. Without expert legal advice, the potential challenger is unlikely to know whether their concern is an admissible ground of challenge.

57. For a potential petitioner to establish whether any concern they have about an election is a ground for bringing a petition, they would have to consult the entire of Part 3 of the RPA 1983 (particularly to identify the election court's powers) and to review a large body of case law dating back to the mid-nineteenth century. Few potential petitioners would have access to electoral law guides prepared for electoral practitioners (such as Schofield's Election Law or Parker's Law and Conduct of Elections) and many choose to make contact with either, or both, the Electoral Commission and the Administrative Court Office to seek clarification on whether their concern is admissible.

58. The lack of clarity in the RPA 1983 on the grounds on which a petition may be based, appears to be a substantive shortfall in the current arrangements. A system that places the burden on petitioners to ascertain the grounds for bringing a petition, rather than setting them out in clear, unambiguous terms in legislation, is not reasonably accessible to all. The Commission agrees with the Law Commission's provisional view that the clarity of the grounds of challenge is a key issue for reform⁶⁹.

Are additional grounds required?

59. As well as seeking to clarify the grounds for bringing a petition, consideration ought to be given to whether the current grounds, pieced together from statute and case law, are sufficient.

60. An example of a ground on which a petition may not be based is an error in the administration of an election where the error would not have affected the result. A Parliamentary or local election will not be declared invalid by reason of any act or omission of the Returning Officer or any other person in breach of his official duty in connection with the election or otherwise of the relevant election rules if:

- (a) the election was so conducted as to be substantially in accordance with the law as to elections; and
- (b) the act or omission did not affect its result⁷⁰.

61. This means that procedural errors are only likely to be investigated where there is a close contest. In elections where there is a large majority of votes for one candidate, there may be any number of such errors but a petition is unlikely to be lodged because the result would not have been affected. This means that those practices may continue until or unless a close election occurs. Those responsible are never held accountable, lessons are not learned and good practice is not established.

62. Where errors in the conduct of an election do not affect the result it seems disproportionate to cancel the election result and call a by-election, however, it could still be argued that allegations of errors made by election officials during an election ought to be independently investigated. This would ensure that any bad practice can be identified and rectified. It could also help to protect public confidence in the electoral process if voters knew that errors on the part of election officials could be identified and addressed in all circumstances so that processes can be improved for future elections⁷¹.

Disqualified candidates

63. Some argue that where a Returning Officer believes that a candidate at a local government election is disqualified this should be dealt with before the election rather than in a petition following an election, in the event that an elector or candidate presents a petition. Apparent disqualification is not a ground for invalidating the candidate's nomination⁷², so the candidate may be elected even though they may be disqualified.

64. The Commission is aware of cases where apparently disqualified candidates have been elected and no petition or Section 92 proceedings⁷³ were brought. In one case, a Returning Officer has expressed to the Commission his dissatisfaction with the current law which renders him powerless to prevent a candidate, whom he considers to be disqualified, from being elected and serving as a councillor. In the Returning Officer's view, this is a serious flaw in the legislation and he has asked the Commission to draw attention to the issue⁷⁴.

Conclusions

4. Inconsistent with international recommendations, the UK's electoral law does not clearly set out the grounds upon which an election result can be challenged. This is likely to impede access to the petition process significantly. There appears to be a clear need for electoral law to be clarified in this area.
5. Consideration may be given to whether the grounds for bringing challenges to elections in the UK should be extended to such potential complaints as administrative errors that did not affect the result of the election.

Time

Principle - There should be sufficient time for the challenger to bring a challenge, considering the need to gather evidence and take advice. This should be balanced against the need for the validity of the election to be resolved as soon as possible.

65. Disputes as to the validity of an election should be resolved as swiftly as possible. Candidates and electors need certainty in the outcome of elections. In addition, it is undesirable for doubt over the legitimacy of members of legislatures or councils to persist for any significant length of time (see paragraph 22); in any event, natural justice requires speedy resolution of disputes. There is a balance to be struck between ensuring that disputes can be resolved as soon as possible after an election and giving potential petitioners sufficient time to submit a petition.

66. Subject to some exceptions, in the UK petitions must be initiated within 21 calendar days of the date of return or election⁷⁵. Though this ensures that petitions are submitted promptly, petitioners may struggle to gather all evidence necessary to support their case or compile sufficient evidence within that period to make an informed decision on whether presenting a petition is worthwhile.

67. As well as collecting evidence, the potential petitioner would be sensible to take legal advice on:

- whether there are any grounds for bringing a petition,
- whether the potential petitioner is eligible to present a petition,
- the onerous and complicated legal requirements for serving a petition,
- the content of the petition,
- the cost of bringing and conducting a petition, and
- the prospects of success.

68. The potential petitioner may also need a period of time to reflect on the evidence and advice obtained and to raise funds to pay for the petition. Taken together, 21 days appears to be an insufficient time to present a petition.

69. In the UK, extra time (up to 28 days in total) may be available for petitions brought on the grounds of corrupt or illegal practices involving the payment of money or other reward, or in connection with election expenses⁷⁶. The provisions allowing for additional time are complex and may prove difficult for an elector to comprehend without access to legal advice and so there is likely to be confusion about which time limits apply in the case of a proposed petition. This complexity and uncertainty could act as a barrier to a legitimate petition being brought within the correct time limit.

70. These time limits are strict and may not be extended by a court. Brown LJ in *Ahmed v Kennedy* [2002] EWCA Civ 1793 [2003] 1WLR 1820 CA stated that, ‘the question whether there should be ‘some limited judicial discretion to extend time’ in cases like this (as suggested by the Divisional Court in *Absalom v Gillett* [1995] 1 WLR 128) can only be for Parliament. Petitioners and those advising them will henceforth know that under the existing law only strict compliance will do’.

71. It is relevant to note that in Australia, any petition to challenge the results of a federal election must be filed within 40 days following the return of the writs for an election or referendum⁷⁷. Even though this is nearly twice the amount of time available for petitioners in the UK, concern has been expressed in Australia that it is too short; it has been argued that 40 days does not allow sufficient time to investigate the facts surrounding the potential petition and that irregularities may only be detected after the 40 days has elapsed⁷⁸. In New Zealand, the period for filing a petition is within 28 days after the day on which the Electoral Commission has publicly notified the result of the poll⁷⁹.

72. In Europe, time limits vary considerably; from three days in countries such as Estonia, Latvia, Malta and Switzerland, ten days in France, Sweden, the Czech Republic and Slovakia, 25 days in Greece, 28 in Austria, up to one month in both Bulgaria and Cyprus and two months in Germany⁸⁰.

73. The short deadlines set in Estonia, Latvia, Malta and Switzerland are achievable because complaints are made to a central electoral body, which considers the challenge. This is likely to mean that the requirements for presenting and serving petitions may be less stringent and individuals would not have to raise funds nor consider the financial consequences of losing the petition; preparing to present a challenge to such a body will therefore take significantly less time. Where an appeal must be made to a court, as in the UK and Germany, the time limit must be longer to allow a potential petitioner time to take legal advice, investigate whether a petition is worthwhile (e.g. by obtaining an order for the inspection of ballot papers), raise funds and comply with the rules of issuing a petition.

74. In the UK, the grounds of a petition may not be amended once submitted. Once the 21 days have passed, further grounds may not be added to an existing petition nor any issues that arise be investigated (except by way of a criminal investigation) even if they cast doubt on the validity of the result.

Conclusions

6. It appears that 21 days allows insufficient time in which to present a petition in the UK, as petitions are heard in a formal court system which requires the petitioner to expend up to £5,500 up front, obtain legal advice, collect evidence and comply with time-consuming procedural requirements. We are further concerned by the fact that the time limit cannot be extended.

7. This conclusion is supported by the fact that comparable states such as Australia (40 days) and New Zealand (28 days) allow their petitioners more time than petitioners are given in the UK.
8. It is also concerning that the grounds of a petition cannot be altered as new information that casts doubt on the validity of an election comes to light.

A simple procedure?

Principle - The procedure for challengers to follow, from bringing the challenge up to its determination, should be simple. It is necessary to eliminate formalism and avoid decisions of inadmissibility on account of a challenger's procedural error.

Presenting and serving a petition

75. The Venice Commission's Code states that the challenge 'procedure must also be simple...It is necessary to eliminate formalism, and so avoid decisions of inadmissibility'⁸¹. In addition, the OSCE / ODIHR states that, 'The complaints procedure should be transparent and easily understandable...free of unnecessary obstacles'⁸².

76. However, the process for issuing an election petition in the UK is a highly technical and legally complex area of law known well by only a few specialists. The rules for presentation and service cannot be described as transparent or easily understandable; they are found in different statutory vehicles and use language and terminology which are difficult to comprehend. A barrister involved in a recent election petition case described the requirements as being 'of byzantine complexity'⁸³. It is difficult to imagine a more formal process for challenging elections than the UK's.

77. In summary, a petitioner must:

- present a petition using a prescribed form, giving prescribed information, by filling it and at the same time leaving three copies at the election petitions office⁸⁴; In Scotland, petitioners must submit six copies if a petition is being made to the Court of Session, or one copy if it is to the Sheriff Principal.
- make a separate application to fix the security for costs;
- acknowledge and file a recognisance (or bond of caution in Scotland) as security for costs (accompanied by an affidavit sworn by each surety)⁸⁵;
- in the prescribed manner, and within five days after giving the security, serve on the respondent and on the Director of Public Prosecutions (Lord Advocate in Scotland) a notice of the presentation of the petition and of the nature and amount of the security which the petitioner has given, together with a copy of the petition and the affidavit accompanying any recognisance⁸⁶;
- apply by application notice to a rota judge for a time and place to be fixed for the trial of the petition⁸⁷.

78. All but the most determined and well-resourced petitioners are likely to be deterred by such a process, notwithstanding the expense of presenting a petition (discussed below, pages 28 to 34) and the likelihood that it may take many months, or even over a year, to be determined (see Stoke-on-Trent case study, page 43). Such requirements are onerous and compliance will require considerable time, effort and expense. Furthermore, arcane language such as ‘recognisance’, ‘affidavit’, ‘surety’ and ‘prescribed’ may not be accurately understood by a lay reader whilst setting out the provisions in multiple places (see paragraph 136), hinders the petitioner’s attempts to identify what he or she must do.

79. Even if these barriers do not deter a petitioner, petitions may be struck out due to an error in complying with the above formalities. In the case of *Absalom v Gillett* [1995] 1 W.L.R. 128, the High Court held that it is mandatory for the petition to be served on the respondent under Section 136(3) of the RPA 1983 (see paragraph 77 above, bullet point four) and a court has no power to order service out of time. In this case, because the service was not effected within the required time (i.e. five days), the court held that it had no jurisdiction to entertain the petition.

80. In the combined cases of *Ahmed v Kennedy* and *Ullah v Pagel* [2002] EWCA Civ 1793 (*Kennedy*), the petitioner had given the respondent notice of the presentation of the petition within the statutory time limit. However, he had failed to comply with the requirement in Section 136(3) of the RPA 1983 and Rule 6(1) of the 1960 Rules to serve a notice on the respondent stating the amount and nature of the security that he had given but rather he had served a copy of the application notice relating to the security. The Court of Appeal rejected the petitioner’s argument that any failures to comply were amenable to the exercise of the High Court’s discretionary powers under the Civil Procedure Rules 1998 (CPR) to cure irregularities and extend time for compliance, holding that the RPA 1983 took precedence over the CPR and therefore strict compliance was necessary.

81. However, a subsequent case relating to a petition brought following an election held in Leominster Town Council has cast doubt on these decisions. In *Miller v Bull* [2009] EWHC 2640 (QB) (*Miller*), the High Court found that it was contrary to Article 6 and Article 3, Protocol 1 of the ECHR for the petition to be struck out for failure to only serve notice of the amount and nature of the security within the required time. The High Court allowed an extension of time for the Petitioner to remedy the procedural defects⁸⁸.

82. One of the petitioner’s lawyers was quoted as stating, ‘To have deprived Mr Miller of the opportunity to challenge the election because of a minor procedural fault would have been grossly unfair and a clear breach of his right to a fair trial’⁸⁹.

83. In the on-going petition relating to a local government election in Woking Borough Council, the Commission understands that the court decided not to strike out a petition because it was not presented using the prescribed form. This shows that the approach of the courts to defects in the procedure of issuing a petition post-*Miller* may be more lenient than the approach taken in *Kennedy*.

84. The above shows that the different decisions reached by different courts as to how strictly the requirements to serve the necessary notices must be observed introduces uncertainty as to whether errors in service will result in the petition being struck out. It remains unclear whether the *Miller* decision represents the settled view. Previous Court of Appeal decisions suggest that it is possible that were the matter to reach that Court again, a different decision may be taken; however, this would not be the case if the Court of Appeal interpreted Section 6 of the Human Rights Act 1998 in the same way as the High Court in *Miller*. Therefore, a risk remains that failure to comply with the onerous statutory requirements to present and serve a petition will lead to it being struck out. Where there are concerns about the validity of an election, it is arguable that the substantive grounds for complaint should always be considered and a decision reached. Striking out a petition for technical reasons would be unlikely to satisfy the legitimate interest of electors to see the election investigated and its validity resolved.

85. If the requirements set out above are to be retained, there would be merit in the law being clarified as to whether failure to comply with any or all of them will lead to a petition being struck out. This would achieve the certainty that those involved in bringing and defending petitions are entitled to. However, there appears a strong argument that at least some of the above requirements are unnecessary and could be removed. For example, it is unclear why a petitioner must notify other parties of various events; this could be done by the body dealing with the petition.

The role of the petitioner after presenting and serving a petition

86. Should the technical process of presenting a petition be successfully navigated, the petition will succeed or fail depending on the case put forward by the petitioner. Although the Election Commissioner may be more inquisitorial than a judge presiding over a civil trial, election courts have made it clear that the burden of proof in an election petition, including cases where allegations of corrupt or illegal practices and general corruption have been made, rests solely on the petitioner⁹⁰. The petitioner must prove to the criminal standard of proof (that is, beyond reasonable doubt) that the petition's grounds are made out. This places a large burden on someone who may not have the resources to take on such a role. It is important that any well-founded allegation of electoral offences or procedural errors by election officials be thoroughly investigated and the decision made as to whether the election should be annulled must be based on all the facts. Placing the burden solely on the person bringing the petition, who will be a concerned elector or aggrieved candidate and who may not have the capacity to construct a compelling case, does not appear to achieve that aim.

87. The Venice Commission's report shows that most member states of the Council of Europe allow the bodies determining petitions to collect evidence⁹¹. For example, there is a principle in Germany that the petitioner does not have to deliver evidence but that courts actively do so. In Estonia, the electoral body is under a duty to collect information and present it to the court. The UK is in a minority of Council of Europe member states surveyed in 2009 by the Venice Commission (along with Azerbaijan,

Finland, Hungary and Malta) in requiring the court to base its decision on evidence presented by the parties to the proceedings⁹².

88. This difference in approach between the UK and many other Council of Europe member states is likely to be reflective of fundamental differences in the wider legal system and framework. Arguably the legal jurisdictions of Australia or New Zealand are more similar to that of the UK and, like the UK, the gathering of evidence is not a function of the court or electoral body. Nevertheless, placing the burden to provide all the evidence that the election was not conducted according to the rules or that offences were committed on the elector or candidate bringing the petition, may not ensure that all the evidence in a matter is presented to the body determining the petition.

89. Proving beyond reasonable doubt that an electoral offence has been committed and, if necessary, that the acts affected the result, might challenge even the most well-resourced petitioner with access to expert legal advice. One example of the sort of difficulties that might be faced is where the petition alleges the intimidation of voters; in such a case, the victims of intimidation may be reluctant to appear as witnesses⁹³.

90. Whether or not the Electoral Commission is able to present a petition (see page 16), some have suggested that it may be appropriate for it to be added as a party to the petition and also have powers to gather factual information. Whilst the Commission takes no view on this at the stage, precedent exists overseas for electoral commissions to be parties to a petition. In Australia, the AEC may be given leave by the Court of Disputed Returns to appear as a party to petitions⁹⁴.

91. The possibility of the Electoral Commission taking on an evidence-gathering role is discussed by Morris in *Parliamentary Elections, Representation and the Law*. Morris suggests that an investigatory role could be given to the Commission in relation to 'allegations of untoward electoral conduct'⁹⁵, positing that this would not just apply to where petitions are brought but to all elections where allegations have been made of malpractice.

92. A similar point is made by Stewart, in his article, *A Banana Republic?* Stewart suggests that, 'there is a case for considering whether a wider investigation is required and whether some alternative body such as the Electoral Commission be given responsibility for investigating the general conduct of particular elections'⁹⁶.

93. Lardy writes that one of the weaknesses with the petition system is that it fails to recognise the wider perspective. The system casts petitions as private disputes between electors, candidates and Returning Officers within a self-contained electoral area. This is, arguably, unsuitable where there are widespread concerns about the conduct of numerous elections happening on the same day. Lardy cites the 2007 Scottish Parliamentary elections as an example of where similar concerns were raised throughout Scotland. Looking at each individual election in isolation may not be appropriate where the same issues occur in all or several elections, for example were an incident which affected several areas, such as severe weather necessitating the

closure of polling stations, to impact on the outcome of the election. Lardy suggests that one possible solution might be to develop a practice of accepting the submissions of neutral election observers as evidence in a petition⁹⁷.

This report presents a range of arguments to illustrate the range of views on this issue. Were such a change to be contemplated, careful consideration needs to be given to how such a role would operate, and to the resources required to fulfil it.

94. Regardless of whether the Commission has a role in presenting or collecting evidence as a party to a petition, we would argue that there should be a duty for the Commission to be notified of the presentation of petitions and be sent a copy of petition decisions. Decisions have an important bearing on the exercise of the Commission's functions, for example in monitoring performance standards and providing accurate and up to date guidance to those involved in elections. At present, the Commission is not always notified when a petition has been presented nor does it always receive a copy of the decision.

Withdrawing a petition and substituting parties

95. Although it is possible for election petitions to be withdrawn, a strict process must be followed. Since 1945, no parliamentary election petition has been withdrawn⁹⁸ and the Commission is aware of only four local government election petitions withdrawn in the last 10 years⁹⁹.

96. Under the rules for England and Wales, a petitioner may not withdraw an election petition 'without the leave of the election court or High Court on special application, made in the manner and at the time and place prescribed'¹⁰⁰. In Scotland, the application must be made to the election court or it can also be made to the Court of Session if it concerns a parliamentary election. Furthermore, the application cannot be made until the prescribed notice of the intention to make it has been given in the area to which the petition relates¹⁰¹.

97. The fee for making such an application in England and Wales is £80¹⁰². In addition, the petitioner must arrange and pay for a notice of the intended application to be published in at least one newspaper circulating in the constituency to which the petition relates¹⁰³.

98. This is another example of the formality and complexity of the election petition process. The onerous requirements which must be met to withdraw a petition appear inconsistent with the Venice Commission's Code of Good Practice which states that, 'the procedure [for challenging elections] must be simple and devoid of formalism'¹⁰⁴. However, it may be argued that withdrawing a petition, especially if the petitioner cannot be substituted, should be difficult as once a petition is withdrawn the uncertainty surrounding the validity of the election cannot be addressed.

99. Other than petitions challenging local government elections in Scotland, where a petition is withdrawn it is not possible for another person to apply to the court to be substituted as a petitioner, so that the election petition can continue even though the original petitioner(s) no longer wish to proceed. There may be many reasons why the original petitioners do not wish to continue including financial reasons or ill health; withdrawal does not necessarily indicate that the petitioners have received advice that the prospects of their petition being successful are low. There may be merit in allowing others, who would have been eligible to bring the petition, to take the place of the original petitioners so that the issues that gave rise to the petition are fully investigated and the uncertainty about the validity of the election can be resolved.

100. Although Section 150 RPA 1983 (which allowed substitution in elections in England and Wales) was repealed in 2001, Rules 12 and 14 of the 1960 Rules still refer to substitution; it appears that such references should have been removed at the same time as the repeal of Section 150.

101. The references to substitution in the 1960 Rules were discussed in the case of *Re Appleby Ward of North East Leicestershire District Council, Roberts v Blunt* (2012) EWHC 481 (QB). The Election Commissioner decided that the continued provision in Rule 12(3) of the 1960 Rules (which states that the application notice for withdrawal must contain a statement that any eligible person may apply to the court to be substituted as a petitioner) was misleading and that the problem could be addressed by either stating that the Rule had been impliedly repealed by primary legislation or that it was no longer supported by any power to require the notice¹⁰⁵.

Conclusions

9. The statutory requirements are complex and formal and failure to fully comply with them has led to decisions of inadmissibility. This is inconsistent with internationally recognised best practice.

10. There is a lack of clarity as to whether a failure to comply with a procedural requirement will lead to a petition being struck out.

11. A heavy burden is placed on a petitioner, during the course of a petition, to collect all the evidence and prove their grounds beyond reasonable doubt.

12. Withdrawing a petition is also a complex and formal process. For most elections a withdrawing petitioner cannot be replaced and the law in this area would benefit from clarification.

13. There may be merit in allowing substitution to take place so that allegations of administrative error and electoral offences are investigated.

Costs

Principle - Wherever possible the challenge procedure should be accessible without charge to the challenger. Where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint.

Cost to the petitioner

102. One of the standards set out as a minimum condition commonly accepted by the international community by the OSCE / ODIHR, is that:

the complaints procedure should be free of unnecessary obstacles, especially as regards the cost of bringing an action to court. Wherever possible the complaints procedure should be accessible without charge to the complainant. Where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint¹⁰⁶.

103. The UK's election petition system neither allows challenges to be brought free of charge nor does it appear to keep the costs of challenges to a minimum¹⁰⁷.

104. The fee payable on the issue of an election petition in England and Wales is £465¹⁰⁸. Other fees are also payable on the making of certain applications, for example a fee of £45 for making an application to fix the amount of security for costs (which is an application all petitioners must make and is dealt with in more detail below)¹⁰⁹.

105. Section 136 of the RPA 1983 provides that within three days of presenting an election petition, the petitioner must 'give security for all costs which may become payable by him to any witness summoned on his or her behalf or to any respondent'. In the case of a UK Parliamentary or European Parliamentary election petition, the security for costs must be such amount not exceeding £5,000¹¹⁰ as the High Court or judge of the High Court direct on an application made by the petitioner. At a parish or community election in England or Wales, the security must be such amount not exceeding £1,500 as the High Court directs¹¹¹; at any other local government election, the security must be such amount not exceeding £2,500 as the High Court directs¹¹². If no security is given or if the respondent objects to the security and that objection is allowed and not removed, the petition will not proceed¹¹³.

106. An official at the Administrative Court Office of the High Court, which administers election petitions in England and Wales, informed the Commission that, in his experience, judges decide to order the maximum amount of security.

107. A petitioner can apply for a remission from the fees for presenting the petition (i.e. £465 plus £45). The court will consider the petitioner's financial resources before deciding whether or not to grant remission. The Commission is aware of at least one case where a remission of fees has been granted, however, examples of remissions being obtained are rare and it is not possible for the petitioner to apply for a remission from the security for costs.

108. In addition, although some aspects of the petition process may be funded by legal aid¹¹⁴, it appears that advocacy carried out before an election court would not qualify¹¹⁵. However, evidence suggests that a petitioner will find legal aid difficult to obtain. In 2005, a petition challenging the result in a parliamentary constituency had to be withdrawn when legal aid was denied to one of the candidates¹¹⁶. Referring to the petitioners' application for legal aid in the case of *Hussein v Khan* [2006] EWHC 262, Mr Justice Ouseley commented that, 'it would not be normal for [the Legal Services Commission] to fund such a case'. Given that 'there is an important public interest in clarifying the legitimacy of the ballot'¹¹⁷, there may be a case for reforming legal aid so that it is more accessible to petitioners and covers the entire petition process, including legal representation.

109. Bringing a parliamentary election petition, therefore, except in the unlikely event that legal aid and / or a remission from paying fees is obtained, will cost a petitioner in excess of £5,500; this cost is likely to increase substantially if the petition proceeds to trial.

110. The £5,000 required as security of costs to bring a petition in the UK contrasts with approximately £330 in Australia¹¹⁸, £500 in New Zealand¹¹⁹ and £640 in Canada¹²⁰. Although a requirement to pay £330 to £640 would still act as a deterrent and hinder access to the petition system, it would obviously be far less of a barrier than the UK's requirement to pay £5,000¹²¹.

111. There has been some debate in Australia about whether the £330 security for costs when added together with the fee for filing the petition, may be 'too heavy to be borne by an individual' given the costs of legal representation and the possibility of an adverse costs order¹²². The fact that there is concern in Australia, where the cost payable to issue a petition is a fraction of that in the UK, clearly demonstrates that there is an urgent need to reconsider the amount of the security of costs (if any) in the UK.

112. We understand that in the Republic of Ireland, where the court is satisfied either that a petitioner is unable to lodge the sum of £5,000 for costs as required by legislation or that to do so would cause the petitioner serious hardship, the court may require such lesser amount as the court considers appropriate to be lodged¹²³. Though similar to the provision in the UK legislation allowing a judge to impose a security for costs up to £5,000 in the case of a UK Parliamentary election petition, it appears to be the practice of judges in the UK to order the maximum allowable amount in every case. Strengthening the provision to reflect that enacted in Ireland, may reduce the amounts ordered in some cases.

113. Concerns about the cost of bringing a petition are long-standing. There is evidence that the costs of petitions acted as a disincentive even in the late nineteenth century¹²⁴. In 1947, the Committee on Electoral Law Reform, reflecting on the fall in the number of petitions that had been brought in recent years, stated that, 'there is some reason to think that the heavy cost in petitioning acts as a deterrent'¹²⁵. However, no action was taken by the Government as a result of the Committee's report.

114. In respect of the 1959 general election, a senior party organiser has been quoted as saying, 'If we lost a seat by one vote and I could clearly prove illegal practices by the other side I wouldn't try. It would cost perhaps £5,000 and they might be able to show that our man had slipped up in some way. But worse than that, it might start tit-for-tat petitions and no party could afford that¹²⁶'. Although these comments were made more than half a century ago, the law governing elections remains largely the same today; these comments could quite easily have been made by a party official working on elections in the twenty-first century.

115. Piers Coleman, an electoral law specialist, noted that one of hurdles faced by a potential petitioner is the cost of bringing a petition. Writing in 1993 about the prospects of bringing a petition in respect of a local government by-election, at which it was alleged that some voters had been intimidated, Coleman stated that:

not only must the petitioners pay their own legal costs but they bear the risk of having to pay the respondents...legal costs, and those of the Returning Officer, and those of the DPP. Whilst legal costs insurance is available for some categories of election petition...it is unlikely to be available for a petition on these grounds...A hearing based on a dispute about the facts, which would take place probably in Bethnal Green Town Hall rather than in the High Court, would last for some days. To cap it all, the petitioners have to lodge security for costs with the Election Petitions Office up to a maximum of £2,500¹²⁷.

116. It may be said that an individual petitioner will not normally have to bear the costs themselves; petitions are often brought by candidates but financed by the political party they represented. Notwithstanding the fact that petitions can be brought by electors, independent candidates or candidates representing small parties, all of whom are unlikely to be able to afford to bring a petition, even the largest political parties have found petitioning prohibitively expensive. One solution may be for political parties or candidates to take out insurance to cover the costs of bringing (or defending) election petitions. However, in practice, this may only be a viable option for the larger parties rather than for the smaller parties or independent candidates and of course is not an option for electors.

117. Although the evidence shows that costs deter even the largest political parties, the requirement to pay thousands of pounds in order to launch a petition may disproportionately affect smaller parties, independents and electors. The Commission has looked at the petitions brought since 2007 to identify the proportion of petitions presented by candidates representing large¹²⁸ or small¹²⁹ parties, independent candidates or elector(s). This information is set out in Appendix C, which sets out the petitions presented in the last five years of which the Commission is aware. In 21 of the 23 petitions presented in this period, eleven were presented by candidates representing a large party; five by independent candidates, three by candidates representing small parties and two by electors¹³⁰.

118. Therefore, approximately half the petitions in the selected period were brought by candidates representing large parties and the remainder were brought by

candidates representing smaller parties or independents and individuals combined. Only two petitions were brought by electors, which may support the view that the cost of the petition process is a particular barrier to electors (although other factors such as the complexity and formality of the process of issuing a petition and a lack of awareness about the right to bring a petition may also be contributing factors)¹³¹. Electors are the group of persons most affected by an invalid election and have the most legitimate interest in challenging the result; it is electors that are denied representation from a duly elected candidate where there has been a departure from electoral law. Although the petition process should be accessible to all, it is particularly true for electors.

119. Since 2007, only three petitions were presented by candidates representing small political parties¹³². This suggests that small parties, which have limited resources, also find it difficult to bring petitions. The Commission is aware of a petition that was presented by a candidate representing a small party in 2009. This petition did not proceed to trial because of the failure of the petitioner to pay a security for costs¹³³. In the petition the petitioner stated that the party they represented:

...is extremely small and does not have significant financial or human resources. We barely manage to cover our expenses even when simply targeting the seats we hope to gain or hold. It is appalling to find that misconduct on the part of the local authority may have affected the outcome of the recent elections. We certainly do not have access to funds to cover the cost of this petition, and were shocked to discover that democracy comes at such a price. I ask that there be no order as to costs because this is being done in the public interest.

120. The petitioner confirmed to the Commission that the costs were not waived and that, as a result, the petition did not progress any further than it being presented. Instead, the petitioner made a complaint to the Electoral Commission about how the election was run. The Commission advised the relevant council about improvements it could make for the future; however, it could do nothing to resolve the petitioner's complaint.

121. Just as fair and level access to the electoral system is an essential feature of our democratic system, the opportunity to challenge a result where valid grounds exist must be equally so. The process needs to be accessible enough to allow those with a genuine grievance to initiate a case.

122. Given the nature of political argument and the heated context of an election campaign, losing candidates or unhappy electors may initiate frivolous or unfounded petitions for political or other purposes. It is arguable that the petition system ought to deter such petitions from being brought as they would constitute an unnecessary burden on the election court. To some extent, this may explain the expense of presenting a petition in the UK. Many ill-founded petitions will never be brought because of the cost of doing so. It could be argued that only those who have a legitimate complaint would be prepared to incur the expense of launching a petition, as there is a reasonable prospect of recovering the costs if successful.

123. However, a financial deterrent could discourage those who may have a well-founded complaint but fear costly litigation. It could be argued that a financial deterrent acts chiefly as a barrier to those without significant financial resources, regardless of the strength of their arguments. The only petitioners unlikely to be daunted are those with sufficient financial and other support, resources more likely to be available to candidates from large political parties. Rather than using fees and security for costs to discourage ill-founded petitions, a system could be devised to allow for all petitions to be brought but ensure that those that are vexatious are swiftly struck out.

124. Whereas significant fees and other costs may be incurred in order to launch and proceed with a private legal action with no wider benefit to society (for example a contract action), the expense seems difficult to justify in the case of an election petition which by its nature has a considerable public benefit; namely it allows an election in respect of which concerns have been expressed to be investigated. Mr Justice Blake in *Pilling and others* stated that:

In our judgment, public law principles for the award of costs are an appropriate guideline in the case of a legitimate and serious challenge to a ballot paper that was decisive of the outcome of an election. There is an important public interest in clarifying the legitimacy of the ballot and the vote on which the disputed paper depends. It would be contrary to the public interest to deter such scrutiny because of the disproportionate consequences in costs for any unsuccessful petitioner. There is some analogy with the court's concerns to limit the costs consequences of public interest challenges in environmental litigation or on other important [law] public law claims: see per Carnwath LJ in *R (England) v LB Tower Hamlets* [2006] EWCA Civ 1742 20th December 2006 and the report of Sir Maurice Kay *Litigating the Public Interest* (July 2006).

125. As well as the evidence set out above which shows that some petitions are not brought due the fact that for many petitioning is prohibitively expensive, there is also evidence that numerous petitions which are presented have fallen due to the failure of the petitioner to pay the required security. Appendix C demonstrates that a number of petitions have not proceeded to trial in the past five years because of the petitioner's failure to pay the security.

126. It is not in the interests of justice that well-founded complaints about the conduct of elections are not investigated and therefore flawed elections are not overturned simply because of the failure of the petitioners to pay a surety.

127. Requiring those who wish to challenge elections to pay such a sum up front is a relic that dates back to the times in which the current petition system was formed¹³⁴. Lardy states that:

The law on petitions has survived largely unchanged since the nineteenth century. Electoral systems and technology have changed, voter and candidate qualifications have altered, human rights law has entered the regulation of the

political process, but the law on petitions remains staunchly rooted in Victorian quasi-democratic precepts. Thus the capacity to challenge an election result using a petition remains a privilege of the wealthy (or those supported by the resources of a political party). Without access to funds, the petition procedure remains a possibility denied to most voters and to independent candidates and smaller parties... This patent unfairness runs counter to notions of equality of access to the political process which permeate our twenty-first century democratic system¹³⁵.

Cost to the respondents

128. In addition to the costs incurred by a petitioner in bringing and conducting an election petition, significant costs are borne both by the candidate defending their seat and the Returning Officer, who will normally be a respondent to the petition. Election petitions, as with High Court litigation, are often costly for all parties involved. The burden on election officials is stated by Morris and Monks:

...if a petition results in action in the High Court it is very serious with considerable ramifications – hence the need for insurance. High Court litigation can easily run bills up to six figures and it is simply essential to take advice at an early stage on such matters¹³⁶.

129. In the case of *Pilling and others*, a hearing which took half a day of the court's time generated Respondent's costs of £55,000 whilst in *Maley v Hackney and Sutton* (the Stoke Case)¹³⁷, the Returning Officer incurred costs of £122,000¹³⁸. An election petition in Fermanagh and South Tyrone in 2010 resulted in costs to the Returning Officer of £92,000 in addition to costs borne by the other parties involved. In Bradford in 2008, despite the failure of the election petition, less than one fifth of the Returning Officer's total costs were recovered, leaving £38,000 outstanding¹³⁹.

130. Although the Returning Officer will usually be able to recover the majority of their costs from their insurance company, it is rare that all the costs will be covered. Policies may impose an excess and making such a claim may have a detrimental effect on future policies. The Commission is aware of one insurance company increasing the excess of a Returning Officer's policy to £100,000 following an election petition; any future expenses falling under £100,000, including election petitions, will now have to be paid entirely by the Returning Officer, unless otherwise indemnified e.g. by the relevant local authority¹⁴⁰.

131. The financial burden on a candidate defending their seat is even greater than that placed on election officials; a candidate is unlikely to have the financial resources or insurance which are at a Returning Officer's disposal by virtue of the local authority's support. As with petitioners, candidates responding to a petition will find it difficult to secure legal aid.

132. Just as when acting as petitioners, candidates responding to a petition are likely to rely on their political party (where applicable) for support. Candidates representing small parties or independent candidates will not have the benefit of such support and

are likely to struggle to afford the expense incurred by defending the petition. In a petition relating to an election to the Kingstanding Ward of Birmingham City Council in 2006, the candidate who was defending her election represented a party other than the largest three UK parties. In the course of defending her election, the respondent incurred substantial costs even though the petition was resolved in around three months. The Commission has been informed that this caused such significant financial hardship to the respondent that she was ultimately declared bankrupt.

133. Even respondents representing a large political party can find themselves without any support. In 2004, a large political party had assumed responsibility for providing legal representation to its candidates, who were the respondents to a petition in relation to an election for the Aston and Bordesley Green wards of Birmingham City Council¹⁴¹. However, this support was withdrawn at a late stage (the week before the election court convened), leaving the respondents without legal representation nor the funds or time to secure it¹⁴². Despite this, the Commissioner refused to delay proceedings to allow for additional time for the petitioners to attain funding.

Conclusions

14. Challenging elections in the UK is an expensive process which deters those who have a genuine complaint about the election. The UK's system is in conflict with the international standard that challenging an election should be accessible without charge to the complainant or, where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint.

15. The cost of bringing and defending a petition in the UK is prohibitively expensive and far in excess of similar electoral systems in countries such as Australia and New Zealand.

Consistent and complete legislation

Principle - Mechanisms for resolving election disputes should be governed by a coherent body of law and preferably, in a distinct chapter or section of the law. The terms, wording and legal scope of the election dispute provisions for different elections should be mutually uniform so as to secure their consistency and completeness. The language used throughout the law should be clear and consistent so as to eliminate arbitrary interpretation.

A coherent body of uniform, consistent law

134. This report draws attention to inconsistencies in the way that petitions for different electoral events are considered, including¹⁴³:

- The grounds for bringing an election petition: For example, those set out in Section 127 (local government election petitions) differ from the equivalent provisions in Section 120 of the RPA 1983 (parliamentary election petitions).

- The minimum number of petitioners: One elector may present a UK Parliamentary election petition¹⁴⁴, whereas four electors are required to present a local government election petition¹⁴⁵.
- The categories of persons eligible to present a petition: Section 121(1) of the RPA 1983 provides that a person claiming to have had a right to be elected or returned at the election may bring a petition (in addition to electors and candidates). Section 128(1) (presentation of petition questioning local election) does not refer to such a category of person.
- The maximum amount of the security of costs: This varies depending on the type of election, from £5,000 in a UK Parliamentary election to £1,500 in a parish or community election in England or Wales.
- The substitution of parties: This only appears possible in respect of Scottish local government election petitions.
- The composition of the election court: UK Parliamentary election petitions are heard by two judges whereas a local government election petition is heard by a single barrister in England and Wales or by one of the six Sheriff Principals in Scotland.

135. Reducing inconsistency where possible between the laws relating to different electoral events would make the legislation clearer and more accessible for candidates and electors, as well as making it easier for election officials to administer. As the jurisdiction for making electoral law is divided between executives and legislatures in the UK, Scotland and Wales, there will always be differences in approach; these differences may be for good reasons dependent on factors arising from the electoral event and, it may be that allowing for differences allows for innovation and improvements to existing practice. However, as recognised by international principles, it is important, wherever possible to ensure that the law is consistent across electoral events to promote the accessibility of the electoral process. The justification for many of the differences listed above is not immediately obvious and there may be scope for greater consistency.

136. At present, the relevant provisions governing the petition process are found in case law dating back to the nineteenth century as well as in statutory vehicles including:

- Part 3 of the RPA 1983,
- the 1960 Rules,
- Chapter 69 of the Rules of the Court of Session as contained in the Act of Sederunt (Rules of the Court of Session) 1994,

- The Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999,
- the Local Elections (Parishes and Communities) (England and Wales) Rules 2006 (which amend the RPA 1983 for the purposes of parish and community elections),
- Part 4 of the European Parliamentary Elections Regulations 2004,
- the European Assembly Election Petition Rules 1979,
- Part 4 of the National Assembly for Wales (Representation of the People) Order 2007,
- Part 4 of, and Schedule 6 to, the Scottish Parliament (Elections etc.) Order 2010 (which applies Part 3 of the RPA 1983 with modifications),
- Northern Ireland Assembly (Elections) Order 2001 (which applies some of the provisions of the RPA 1983),
- the Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 (regulation 5 applies Part 3 RPA 1983),
- the Local Authorities (Conduct of Referendums) (England) Regulations 2012 (regulations 15 to 17 deal with 'referendum petitions'),
- the Local Authorities (Conduct of Referendums) (Wales) Regulations 2008 (Schedule 6 modifies the Election Petition Rules 1960),
- Part 4 of, and Schedule 9 to, the Police and Crime Commissioner Elections Order 2012 (which contains provisions relating to election petitions in such elections and applies some parts of Part 3 of the RPA 1983).

137. Many of these statutory instruments modify existing legislation, requiring those who wish to challenge an election to navigate between multiple legislative vehicles; this is not a 'user-friendly' approach. Simplifying and consolidating the law would be of benefit to all those involved in elections, especially electors and candidates who may wish to lodge a petition but find it difficult to locate and understand the correct statutory provisions for the election or referendum in question. As more new elections and referendums are legislated for (for example Police and Crime Commissioner elections, the Scottish referendum and local referendums to determine council tax increases and neighbourhood planning decisions), the need for simplification and consolidation will grow even more urgent.

A clear law that covers all eventualities and avoids inconsistent application

138. There are a number of examples which demonstrate that the law governing election petitions in the UK does not cover all eventualities and does not avoid

inconsistent application. One such example is the question as to whether Returning Officers can make another declaration having already made a declaration that they subsequently realise was incorrect. This uncertainty as to the correct interpretation of the law and the resultant inconsistency in practice is particularly concerning as it relates to a fundamental part of the electoral process: the winning candidate being declared duly elected.

139. We are of the view that once a declaration, whether accurate or inaccurate, has been made, a Returning Officer has no power to correct the error by making a subsequent declaration¹⁴⁶. Candidates often find it hard to accept that the Returning Officer cannot correct the error themselves and that the only recourse is for the candidate or an elector to bring legal proceedings against the elected candidate and the Returning Officer. At least one Returning Officer in the May 2012 elections took the view that an erroneous declaration is not in fact a valid declaration and therefore the error can be rectified by issuing a correct declaration after the first was made.

140. There is also evidence to suggest that other Returning Officers have issued corrective declarations after an initial incorrect declaration. David Monks, in his book *Practical Elections Administration*, cites an example where a Returning Officer, who had become aware soon after making a declaration that it was inaccurate, spoke to the candidates and agents concerned and simply re-read the result with the correct figures. All concerned appear to have been content with this approach¹⁴⁷. Monks also suggests that in some cases where unopened ballot boxes have been discovered after the declaration, an 'unofficial recount' may have taken place and a 'revised result' declared¹⁴⁸.

141. There are doubtless other examples of Returning Officers making an incorrect declaration and then subsequently correcting it. However, there are also many examples where the Returning Officer informs the candidates that the only way the error can be corrected is by bringing an election petition¹⁴⁹. The law does not expressly address which of these two courses of action the Returning Officer should follow; however, it is submitted that the latter is the correct approach¹⁵⁰. The inconsistency that has resulted from this ambiguity in the law demonstrates the need for it to be clarified.

142. Another example of a lack of clarity in the legislation is the use of the terms 'substantially in accordance with the law' and where corrupt or illegal practices have 'extensively prevailed'.

143. Where an election official has committed a breach of duty, Section 48(1) RPA 1983 appears to require that the election be voided if it was not conducted substantially in accordance with the law or if the breach affected the result. 'Conducted so as to be substantially in accordance with the law as to elections' is an inexact phrase which does not give electors sufficient clarity and certainty of how election challenges will be determined. There have been cases where the court has not deemed what appear to be significant breaches of electoral legislation as severe enough for it to conclude that the election failed to be conducted in accordance with the law. In the case of *Morgan v Simpson* [1975] Q.B. 151, election officials at some

polling stations issued ballot papers which did not bear the official mark. The election rules provide that such ballot papers must be rejected by the Returning Officer at the count and so a total of 44 ballot papers were rejected. Had they been valid, the second placed rather than the returned candidate would have been elected. On petition the court took the view that the election was conducted substantially in accordance with electoral law, although in this case, as the result had been affected, the court still declared the election invalid. However, *Morgan* shows that this phrase is open to wide interpretation; if an election where 44 people were disenfranchised by an error made by election officials was deemed to be conducted substantially in accordance with electoral law, it may be necessary for the law to be clearer as to when an election is to be voided¹⁵¹.

144. The same concerns may be expressed with regard to where corrupt and illegal practices 'extensively prevail'. This term, like 'substantially in accordance with the law' affords such discretion to judges that it could give rise to subjective or arbitrary interpretation. Judges could reach different conclusions based on similar cases and the term is so loose that surprising decisions could be reached, as in *Morgan*. Such terminology affords little clarity and certainty to those with an interest in the petition system.

145. Another area of concern (see page 17) is that the RPA 1983 does not fully set out the jurisdiction and powers of an election court. For example, where the petition alleges that an error has been made in the counting or adjudication of ballot papers, the election court carries out a scrutiny of ballot papers. However, neither the right to ask the court to carry out a scrutiny nor the power for the court to do so itself are clearly established in the RPA 1983 or the 1960 Rules; nor are the details about how the scrutiny is to be carried out. In addition, greater clarity in the law would also be welcome on whether errors in the presentation or service of a petition should lead to the petition being struck out (this is discussed in more detail above; see pages 22-24).

146. Also concerning is that election commissioners have on some occasions not had any statutory authority about how important questions that have arisen during the hearing of a petition should be resolved. For example, an Election Commissioner has informed the Commission that in one case, he was unclear whether or not it was possible to identify someone in court in a hearing¹⁵². Any reform of this area of electoral law should consider the extent to which the legislation lacks sufficient information to resolve all issues that may arise during the conduct of a petition.

147. As a result of numerous gaps in the RPA 1983 and the 1960 Rules, only a selection of which are set out above, it is clear that the law that governs election petitions in the UK does not address all eventualities and does not achieve consistent implementation.

A modern, simple and accessible law

148. The legislation governing election petitions is largely the same as that enacted in 1868; it is therefore unsurprising that many of the provisions in Part 3 of the RPA 1983

and the 1960 Rules appear more suited to the nineteenth rather than the twenty-first century. For example, Section 157(2) RPA 1983 provides that

the principles, practice and rules on which committees of the House of Commons used to act in dealing with election petitions shall be observed, so far as may be, by the election court in the case of election petitions, and in particular the principles and rules with regard to:

- agency,
- evidence,
- a scrutiny, and
- declaring any person elected in place of any other person declared not to have been duly elected,

shall be observed, as far as may be, in the case of a petition questioning an election under the local government Act as in the case of a parliamentary election petition.

This is a clear example of a provision which owes its provenance to the time when the House of Commons dealt with petitions and may now be obsolete.

149. In addition, some of the language used in the provisions of Part 3 of the RPA 1983 and the 1960 Rules may not be easily understood by a lay reader. This may in part be because many of the provisions were drafted in Victorian times and have been simply carried forward in consolidating legislation. A few illustrative examples include (though there are many others):

- complex, inaccessible drafting and 'legalese'; e.g. 'the recognisance shall be accompanied by an affidavit sworn by each surety and stating that after payment of all his debts he is worth a sum not less than that for which he is bound by his recognisance'¹⁵³;
- 'undue election' and 'undue return', the meaning of which is not immediately obvious and which are not defined in the RPA 1983;
- the 'avoiding' of an election, the meaning of which would not be obvious to modern readers;
- frequent references to 'prescribed' items (e.g. forms, matters, manner and officers) in the RPA 1983, requiring the reader to regularly cross-refer to the 1960 Rules, rather than setting out all the necessary information in one place¹⁵⁴;
- 'corrupt and illegal practices', which, although defined in the RPA 1983, appear to add unnecessary complexity. One of the grounds for bringing an election petition is the commission of alleged electoral offences¹⁵⁵. Each offence in the RPA 1983 is specified as being either a corrupt or an illegal practice, the former being deemed more serious than the latter and attracting a higher penalty. Such

terminology may be outdated and confusing. Whereas everyone can understand the term 'offence', the terms 'corrupt practice' and 'illegal practice' are less well understood. A lay reader could conceivably conclude that such practices do not amount to a criminal offence.

Conclusions

16. Contrary to international principles, the part of the UK's electoral law that governs election petitions is not uniform or consistent. There are significant differences, many seemingly arbitrary, between the law governing petitions in respect of different electoral events.

17. The law is not found in one place; instead it is to be found in multiple legislative vehicles, most only applying to certain electoral events.

18. The law does not cover all eventualities and some provisions may be subject to different interpretations. This has led to inconsistent or surprising interpretations of the law being taken.

19. The law is not accessible to the modern reader. The RPA 1983 and the 1960 Rules contain outdated and complex drafting. Additionally, some provisions appear more suited to the era when the House of Commons dealt with petitions.

Transparency and awareness

Principle - The challenge process should be transparent and easily understandable. Those who have standing to issue challenges should have awareness of their right to do so and information on the procedure.

150. There is little publicly available information about the petition process. Although the Commission provides some guidance to Returning Officers and candidates and their agents in relation to specific elections, in our experience, many candidates and electors do not have sufficient understanding of election petitions, with electors in particular lacking the necessary knowledge and resources to exercise their right to bring a petition. Appendix C shows that in the past five years electors have rarely presented petitions.

151. Stewart wrote in 2006 that 'the election court is a little-known institution'¹⁵⁶; this is undoubtedly correct. There is little information about its role and procedures, except that set out in the RPA 1983 and the 1960 Rules, which provides little clarity about the jurisdiction of the court (see page 17). We are not aware of any record of on-going cases or of previous decisions nor is it standard to publish a decision or report it in the case reports once made. Even the Commission, with its statutory role in respect of elections and contacts with election officials throughout the UK, has found it difficult to obtain information about on-going cases and decisions. Details of the existence of on-going petitions and a brief outline of decisions are sometimes reported by the national

or local press but by itself this does not seem sufficient to satisfy the need for transparency and an informed public.

152. Publishing more information about election petitions would improve transparency and accessibility. It would help petitioners to be sure of their grounds in bringing petitions, aid election officials in the performance of their duties¹⁵⁷ and would also help to inform debate about how electoral law and practice can be improved.

153. There are likely to be a number of ways to increase transparency, most obviously putting more information about election petitions into the public domain. For example, Stewart suggests that there is a need for the publication of an annual return setting out details of petitions and electoral courts held as well as of prosecutions for electoral matters¹⁵⁸. It seems that any such return should also include links to copies of election court decisions. There is also a need for a database giving links to previous decisions for the reasons set out above.

154. There may be other ways to improve the transparency of the petition process. Although Commission representatives are empowered by statute¹⁵⁹ to observe various aspects of elections, they are not permitted to observe scrutinies carried out by an election court. There may be merit in allowing the Commission to observe scrutinies to aid transparency and increase public trust in the petition system.

155. There appears to be no case for arguing that election petitions should be treated in anything less than a completely transparent manner. The existence of corruption or of flaws in the electoral process and the validity of elections are of fundamental public interest and importance. As noted earlier in this report (paragraph 42), the 1948 Committee on Electoral Law Reform stated that, 'the integrity of elections...concerns the community as a whole and not merely the electors of a particular constituency'¹⁶⁰.

156. Challenges to elections are an integral part of safeguarding the electoral process, ensuring that the correct person has been elected, corrupt behaviour is punished and electoral practices and the law improved. It is therefore essential that there is greater awareness of how elections can be challenged as well as the outcome of previous challenges in order to serve the 'important public interest in clarifying the legitimacy of the ballot'¹⁶¹.

Conclusion

20. The UK's petition system is not transparent; the jurisdiction and procedures of the election court are not well known. Details of the right to bring a petition, the petition process, on-going petitions and petition decisions are not widely reported. The result is likely to be that those who are able to challenge elections do not know they have the right to do so or do not know how to do so. This may mean that flawed elections do not get overturned.

B. The proceedings: promptness, sanctions and appeals

A swift resolution?

Principle - The body determining a challenge should issue its decision promptly, within a specified time that is ideally not longer than two months unless there are exceptional circumstances.

157. It is in the interests of all candidates and electors that the election petition be decided as soon as possible. However, it is also essential that the body dealing with the petition has sufficient time to consider all the issues.

158. If election challenges are not determined promptly, the prospect of many months of expensive and stressful litigation is likely to discourage potential petitioners from presenting a petition. A lengthy process clearly imposes a significant burden on all the parties to the petition, including election officials, both in terms of time spent working on a petition and the expense of staff time and instructing lawyers¹⁶².

159. International guidance favours decisions on the results of elections being made without undue delay. The Venice Commission's Code states that, 'appeal proceedings retard the electoral process'¹⁶³. Furthermore, the Venice Commission's *Report on the Cancellation of Election Results* notes that:

Although longer proceedings might give judicial bodies more time to discuss the matter, collect evidence and make more elaborated decisions, they might make the fulfilment of successful decisions more difficult, put the judiciary under political and public pressure and hamper the functioning of legislation or government. A short term may however make it difficult for the judiciary to consider all the issues raised in appeals or complaints thoroughly¹⁶⁴.

160. Similarly, the IDEA's guidelines state that, 'the law must require that the appropriate EMB [Electoral Management Board] or court render a prompt decision to avoid the aggrieved party losing his/her electoral right...The legal framework should provide for timely deadlines for the consideration and determination of a complaint and the communication of the decision to the complainant'¹⁶⁵.

161. The OSCE / ODIHR state that the procedures governing election disputes should be different from general civil disputes because the conduct of an election requires prompt decisions and actions to be taken¹⁶⁶. Therefore, the OSCE / ODIHR advise that, 'election law must guarantee the resolution of disputes within a period of time suited to the electoral process. It is crucial here to ensure that the outcome of elections is not delayed. This implies that the period between the filing of a complaint and when it is dealt with is very short'¹⁶⁷. The OSCE / ODIHR's guidance provides that, 'all complaint and appeals should be determined once and for all within a maximum of two months'¹⁶⁸.

162. Although the above guidance acknowledges the need to consider challenges carefully and that the body dealing with the petition should be given sufficient time to do so, each of the three international bodies emphasises the importance of resolving disputes promptly.

163. There is no time limit in the UK by which a court hearing an election petition must make a decision. Practice in other countries differs¹⁶⁹ but many countries impose a time limit on the body determining the challenge¹⁷⁰.

164. Although there is no time limit in Australia, Section 363A of the Commonwealth Electoral Act 1918 states that the Court of Disputed Returns must make its decision on a petition as quickly as is reasonable in the circumstances and in Canada, the law requires an application for a challenge to be dealt with without delay¹⁷¹. There is no similar provision in the UK that requires the election court to determine the outcome swiftly.

165. Given the need to achieve certainty in the results of an election, it is arguable that the UK's system for challenging elections should specify a maximum period of time within which a challenge must be resolved or at least require the court to make its decision without delay. Without such a provision, it is possible that the challenge may not be processed swiftly so to achieve a prompt decision.

166. In the UK there have been cases where it has taken over a year - and in some cases nearly two years - for a decision on a petition to be made. In the meantime, voters cannot be certain of the correct result of the election, a candidate who may have won the election (but was not declared the winner) is deprived of their office and a candidate who may have been incorrectly elected is able to act as an elected representative.

Case Study: Stoke-on-Trent City Council

An election petition was presented in respect of a local government election in Stoke-on-Trent held on 1 May 2008¹⁷²; the decision was not made until 21 months later.

This case was heard on three occasions, each time by a different High Court judge. The Commission understands from a party to the petition that this lack of continuity did not facilitate a speedy resolution of the case.

In addition to the hearings before High Court judges, there were two scrutinies of ballot papers (consisting of an inspection and recount), one of which was before a senior master and another before the Election Commissioner.

Furthermore, in advance of the trial, which itself took two days, there was a preliminary hearing before the Commissioner¹⁷³.

Case Study: Woking Borough Council

An election petition was presented in respect of a local government election in Woking Borough Council on 3 May 2012; the case is still ongoing. Allegations were made by a losing candidate that electoral offences were committed by the winning candidate or by his agents.

The Divisional Court met on 27 July and made an order requiring a scrutiny of ballot papers to take place at the offices of Woking Borough Council. However, the Commission understands that scrutinies normally take place at the High Court and that both the Election Commissioner and the Senior Master took the view that the scrutiny should be held at the High Court rather than the Council's offices. However, the availability of Divisional Court judges in August and September is limited as a result of the Court's summer recess. The matter is unlikely to be resolved before the end of September or beginning of October.

167. The number of different hearings, scrutinies and judges, along with the requirements to serve multiple notices, appears to be a significant factor explaining why petitions are not resolved swiftly. As does the Court's summer recess, which leads to cases effectively being put into abeyance over the summer (see paragraph 172 below for another recent example of this happening in Denbighshire). This is an example of the unwieldy nature of the petition system; it is not designed to ensure that decisions are made promptly. Although such a system may be appropriate for many legal proceedings, as noted by the OSCE / ODIHR, the procedures governing election disputes should be different from general civil disputes because the conduct of an election requires prompt decisions and swift action¹⁷⁴.

168. The Commission is aware of scrutinies that have lasted for a number of days (for example in a petition relating to a 2004 local government election in Birmingham¹⁷⁵). In addition, there is scope for uncertainty and delay caused by two seemingly overlapping provisions; the right to seek an order for the inspection of ballot papers¹⁷⁶ and the scrutiny of ballot papers carried out by an election court during an election petition. The Commission understands that this confusion may have caused some delay in an election petition brought in South Tyneside in 2007 (see Appendix C).

169. It should be noted that other similar petitions have been determined more quickly than the petition cited above relating to elections in Stoke-on-Trent. For example, a petition brought after the May 2010 UK Parliamentary election in Fermanagh and South Tyrone was determined in October of that year¹⁷⁷. Though the petitions in Stoke-on-Trent and Fermanagh and South Tyrone both essentially concerned a dispute as to who had the majority of votes in a close election, there was great disparity in the time taken to determine the petitions. One possible explanation is that UK Parliamentary election petitions are likely to be more high profile and politically sensitive than local government petitions and as a result they are processed with greater speed.

170. In the petition brought in relation to the UK Parliamentary election held on 6 May 2010 in Oldham East and Saddleworth, the election was voided because of illegal practices committed by the winning candidate and a by-election was held in January 2011. Although this case was also determined more swiftly than the Stoke Case, from May 2010 to January 2011 the people of Oldham East and Saddleworth were denied representation in Parliament by a duly elected and returned candidate.

171. Even a simple election petition, where the Returning Officer admits that an error affecting the result has been made and where the Returning Officer (and possibly the candidates) accept who should have been declared elected, can take several months to resolve. Appendix C shows the period within which such cases are resolved. In a petition brought in relation to the Kingstanding ward of Birmingham City Council in 2006, for example, an election was held in May and an obvious error by election officials led to a petition being brought that was not determined until August. A petition brought in relation to a local government election held in May 2010 in Waltham Forest was not determined until September despite it relating to a simple miscalculation of votes by the Returning Officer, who had already admitted to the error in a letter to the candidates on 14 May.

172. In a local government election held in May 2012 in Denbighshire County Council, it is alleged that some votes for one candidate were inadvertently counted towards another candidate with a similar surname. It is further alleged that this meant that a losing candidate was declared elected. The Commission understands that the Returning Officer became aware of the alleged error soon after making the declaration. A petition has been brought by the losing candidate. On 9 August 2012, a court order was made for a recount of the ballot papers to be carried out before a senior master¹⁷⁸. The fact that this order, which is only the first step in the petition process (the recount still needs to be held and a decision reached as to the validity of the election), was not made until over two months had elapsed since the election demonstrates how slowly even the most simple of complaints are dealt with. It has been confirmed to the Commission that the recount will take place on 29 October, nearly six months after the election was held. The Commission understands that the delay has been caused by the lack of availability of the Senior Master to attend a recount. As noted above, the availability of judges in August and September is limited by the Court's summer recess.

173. It is particularly concerning that in the UK even the most straightforward election petitions are not resolved within the maximum time limit of two months recommended by the OSCE / ODIHR. Where a simple, obvious error has been made such as declaring the wrong candidate to be elected, counting votes for one candidate towards the total of another candidate or neglecting to count a batch of ballot papers that would have changed the result, it is unacceptable that such mistakes cannot be corrected within a matter of days and instead, will only be corrected after at least three months (possibly significantly longer) and following the expense of legal proceedings. In the intervening time, electors are either denied elected representation from the candidate that ought to have been declared elected (whilst a losing candidate enjoys the position) or electors are denied any representation at all where the declared

candidate declines to take up the seat knowing that they should not have been declared elected.

174. The Commission has spoken to a number of persons involved in elections, including Returning Officers and senior members of the legal profession with expertise in electoral law. There appears to be broad agreement that reform in this area is necessary, either by giving the Returning Officer a power to correct an obvious procedural error with all candidates and agents present or for the error to be dealt with by a swift application for a court order¹⁷⁹.

175. Where corrupt or illegal practices are alleged, it is arguably even more important to determine the petition quickly. The Commission understands that some police investigations have been suspended while petitions are being considered, in order to wait for a judgement to be made. Where a petition is on-going, the Commission's understanding is that a prosecution is only likely to be pursued after the election court finds that electoral offences had been committed. As there is usually a one-year time limit¹⁸⁰ for many electoral offences, if an election court finds that a person has committed an offence it will need to do so well within the twelve month limit to ensure that a criminal prosecution can be brought.

176. The petition brought in the case of *Akhtar and others v Jahan and others Iqbal and others v Islam and others* [2005] All ER (D) 15 (Apr) (*Akhtar and others*), relating to local government elections in June 2004 was not determined until April 2005¹⁸¹. As the election court found that candidates had committed corrupt practices, time remained for a criminal prosecution to follow¹⁸². Although the petition was resolved swiftly enough to allow for the possibility of a prosecution - and in much less than the time taken in the petition in Stoke-on-Trent - the candidates and the electors in the area had to wait for nearly a year until the matter was determined by the election court and almost 18 months passed before all the issues surrounding the challenge were resolved¹⁸³.

177. It could be reasoned however, that cases involving accusations of corrupt or illegal practices require particularly thorough consideration and cannot be determined within a fixed, short time limit. Where electoral offences have been alleged, the election court will often need to consider a large amount of evidence and be mindful of securing respondents' right to a fair trial. As noted elsewhere in this report (see page 53 and endnotes 212 - 219 for details of the court's findings on judicial review), the election court's decision in *Akhtar and others* was partly reversed by the Court of Appeal in judicial review proceedings¹⁸⁴. The Court of Appeal held that the Election Commissioner failed to ensure that the respondent had a fair opportunity to deal with the case that the Commissioner concluded had been made out against him; a fundamental requirement of a fair trial. Possibly in explanation as to why errors were made in the handling of the petition, the Court of Appeal highlighted the procedural constraints that the Commissioner was bound by, stating that, 'The Commissioner was faced with a large volume of complex evidence. He was under time constraints having regard to the need to resolve an election petition promptly and the fact that there is a one year time limit for most electoral offences'¹⁸⁵. Therefore, in this case it

seems that attempting to determine the case within one year may have made securing the respondent's right to a fair trial more difficult¹⁸⁶.

178. Although in some complex cases determining a petition within a couple of months may not be possible or indeed desirable, in many cases it would be preferable for challenges to be resolved more swiftly than at present. Where a case involves a dispute as to which candidate received the most votes in a close contest, as in the petition in Stoke-on-Trent, it may be possible to reach an informed decision within the two months advised by the OSCE / ODIHR by an independent scrutiny of the ballot papers. Where a case is more straightforward, for example where the Returning Officer accidentally declares a losing candidate to be elected or discovers an unopened ballot box after the declaration, the decision should be made even more swiftly. In order to allow challenges to be determined within such short periods, it is clear that the system for bringing challenges would need to be simplified both in relation to the requirements on the petitioner to present and serve a petition as well as to how the petition is dealt with by the court.

Conclusions

21. In the UK, election challenges are not determined promptly, as recommended by international principles. The UK's electoral law imposes no time limit on courts handling a petition nor does it require them to progress the case without delay (also recommended by international principles and practiced in some other countries such as Australia and Canada).

22. Petitions can take up to almost two years after the election to be resolved. Furthermore, there is great disparity between the lengths of time taken to resolve seemingly similar petitions.

23. Petitions relating to clear administrative errors in the counting of the ballot papers or the declaration of the winning candidate, where the Returning Officer has acknowledged the error and (along with the parties) knows the correct result, are not typically determined until three months after the election.

24. Although there appears scope to reach decisions on petitions that allege administrative error much more quickly, it may be difficult to conclude petitions relating to corrupt and illegal practices more promptly and still secure respondents' right to a fair trial.

Sanctions

Principle - The body determining the challenge should have authority to impose appropriate sanctions in the event the challenge is upheld, namely to annul the election result and order a new election to be held.

179. In the UK, 'at the conclusion of the trial of a parliamentary election petition, the election court shall determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected or whether

the election was void, and the determination so certified shall be final to all intents as to the matters at issue on the petition'¹⁸⁷. The voiding of the election will trigger a by-election in the electoral area.

180. Section 159(1) of the RPA 1983 states that, 'If a candidate who has been elected is reported by an election court personally guilty or guilty by his agents of any corrupt or illegal practice his election shall be void'. In the UK, where an election court decides that a candidate is guilty of corrupt or illegal practices, the court must report¹⁸⁸ this to the High Court, the Director of Public Prosecutions (England and Wales) or Lord Advocate (Scotland) and the Secretary of State¹⁸⁹.

181. If the election court reports that a candidate or other person is personally guilty of a corrupt or illegal practice, for a period of five or three years¹⁹⁰ they will be prevented from:

- being registered as an elector or voting at any parliamentary election in the United Kingdom or at any local government election in Great Britain, or
- being elected to the House of Commons, or
- holding any elective office¹⁹¹

Furthermore, if the guilty person has already been elected to a seat in the House of Commons, or holding any such office, they must vacate it straight away¹⁹².

182. The above proceedings show that the UK system, as recommended by the international standards, allows for elections to be annulled and new elections held.

183. However, any future reform of the UK's law governing challenges to elections may consider whether the sanctions available to, and when they may be imposed by, an election court are sufficient.

184. At present, an election will only be voided where corrupt or illegal practices 'so extensively prevailed that they may be reasonably supposed to have affected the result'¹⁹³ (unless a candidate or agent is found personally guilty of a corrupt or illegal practice). Consideration could be given to whether an election should be declared void if any corrupt or illegal practices have been committed to procure the election of the returned candidate. It is arguable that, even if it cannot be established that corrupt practices affected the result, the only way to secure trust in the electoral system and ensure the election is viewed as legitimate by electors is to set aside and re-run the election. Consideration may also be given as to whether such a sanction should be mandatory or left to the discretion of the court; whether the sanction should only apply to corrupt practices (which are the most serious) or also to illegal practices; and whether the sanction should only apply where practices were used to procure the election of the winning candidate¹⁹⁴.

185. Any review of the election petition system and the powers of a court on determining a petition might include consideration of how to address broader

concerns that may cast doubt on the validity of other, or even all, elections taking place on the same day. Writing about the 2007 Scottish Parliamentary elections, Lardy states that a (radical) option for future reform could be for a court to hear combined petitions in relation to a number of different constituencies or regions and be able to declare an entire set of elections unsafe and require them to be re-run¹⁹⁵. Although a radical solution that would provoke much debate, consideration ought to be given to whether the system for challenging elections should be reformed so that it no longer sees an election in each electoral area as self-contained and allows for the possibility of combined petitions and decisions.

186. Consideration should be given to whether it is appropriate for those who are successful in a petition (including Returning Officers) to be able recover their costs in full from those who are unsuccessful. In *Pilling and others*, Mr Justice Blake stated that even where petitioners have acted reasonably, 'we do not conclude that there should be no adverse costs consequences for the outcome on the substantive issue'. However, Mr Justice Blake concluded that:

...the Court has the power and the duty to ensure that costs are proportionate in all the circumstances and do not unduly deter access to the courts in appropriate cases of dispute, and in particular the full costs of engaging experienced leading counsel should not be visited on the Petitioners. It is for these reasons as well as specific observations on the summary assessments lodged made by the Petitioners that we have made the reductions in the costs claimed on summary assessment.

187. If the system is to allow costs to be recovered from the losing party, it must recognise that in some cases this will prove impossible, for example where the unsuccessful party has insufficient financial resources to comply with the costs order. In such a case, it may be appropriate to consider whether the losing candidate's political party (if any) should be required to comply with the order¹⁹⁶. The Court of Appeal recently held that a successful petitioner who had been awarded costs by an election court which remained unpaid was not able to seek an order for costs against the respondent's political party and its local association which had not been parties to the petition¹⁹⁷.

188. Conducting an election petition can be an expensive process and if there is little prospect of recovering costs in the event of success, it could act as a deterrent; conversely, the risk of incurring a costs order in the event a petition was unsuccessful may act as an even more powerful disincentive, so a balance must be found.

189. It may be that the best way to address these issues is to adopt a system for challenging elections that determines challenges swiftly and does not require the parties to a petition to incur costs running to thousands and sometimes hundreds of thousands of pounds.

Conclusions

25. As recommended by international principles, the UK's petition system allows the court to annul elections and hold a new election.

26. In any future reform of the system, consideration may be given to reform of the possible sanctions and the situations in which they may be imposed to secure public trust in elections and also to ensure a successful party recovers their costs, without adverse impact on a petitioner who has acted reasonably and without deterring the presentation of petitions.

Right of appeal

Principle - The electoral law should provide a right of appeal to an appropriate higher level with authority to review and exercise final jurisdiction in the matter. The decision of the court of last resort must be issued promptly.

190. Guidance issued by international organisations shows that a clear system for appealing the decision on an election petition is an essential part of the process for challenging elections. The OSCE / ODIHR state that, 'electoral law should set out a clear hierarchical appellate procedure for the handling of election-related complaints and appeals...The electoral law should provide for at least one appeal procedure to ensure that a higher court or electoral body reviews all cases'¹⁹⁸. Adding that, 'Grounds for appeal should be strictly defined in the law'¹⁹⁹.

191. In the UK there is no route of appeal from the decision of an election court and there has been uncertainty about whether an election court's decision could be subjected to judicial review. Although judicial review would not constitute an appeal against the decision, such ambiguity is clearly undesirable; all those involved in a petition should have no doubt as to the grounds on which and how they may challenge the decision of an election court.

192. Following the decision in *R (Woolas) v Parliamentary Election Court for Oldham East and Saddleworth* [2010] EWHC 3169 (*Woolas*), the position appears to be settled that an election court's decision on a petition can be challenged by judicial review²⁰⁰.

193. Judicial review, however, does not constitute an appeal against an election court's decision. This is because a judicial review application can only be brought on limited grounds concerning an error in the law or process in which the decision was made; for example, where it is alleged that the election court misinterpreted the legislation or did not give a party to the petition a fair hearing. It would not be possible to bring judicial review proceedings where a party to the petition wanted to appeal based on the facts rather than the law. A court dealing with a judicial review would not be able to review all the facts and re-run the petition to reach its own decision, which would be the case in an appeal; instead, the court considering a judicial review application would be confined to examining the matter at issue, typically an alleged error of law.

194. By not allowing appeals against an election court's decision, this aspect of the UK's petition system does not comply with international guidance. Even political opponents of respondents appear to take the view that, where a respondent is found by an election court to have committed corrupt or illegal practices and is therefore removed from office and disqualified from voting and standing as a candidate for a number of years, it is unfair that the respondent does not have any right of appeal (only judicial review proceedings). In relation to the petition brought after the Oldham East and Saddleworth parliamentary election in 2010, *The Guardian* reported that, 'Even (Mr.) Woolas's enemies concede that election law is defective because he cannot appeal on disputed facts, only on process'²⁰¹.

195. It is important to ensure that decisions on election petitions are correct and that those who, as a result of being reported by an election court as personally guilty of a corrupt or illegal practice, lose certain rights (paragraph 181) are able to challenge that decision. A full appeal to a higher court, which is able to look at the petition again and exercise final judgment on both the law and the facts seems necessary. It is also important that any process for appeal be clearly set out in legislation so that it is accessible. The current arrangements for bringing a challenge to an election court's decision seem insufficient and consideration ought to be given to how this can be improved.

Conclusion

27. Contrary to international principles, the UK's petition system allows no right of appeal against the decision of an election court. The only proceeding available to a dissatisfied party is judicial review, which does not constitute an appeal as it only looks at points of law and not disputed facts.

Jurisdictions of the courts

Principle - The electoral law shall secure a clear demarcation of the respective jurisdictions of the courts.

196. As explained earlier in this report, election petitions fall within two categories: challenges relating to alleged corrupt or illegal practices and challenges relating to errors made by election officials. A petition may fall neatly within either of those two categories or be a mixture of both. Consideration ought to be given to whether the current election petition process is appropriate to deal with both categories - sometimes in the same case - as there is a considerable difference in the nature of the two types of petition.

197. Where procedural errors on the part of election officials are alleged, the nature of the case is administrative, similar to a judicial review²⁰². Where illegal or corrupt practices are alleged, the petition becomes a quasi-criminal trial of the respondent(s), for which, there may be concerns as to the whether there is a clear demarcation between petition proceedings and criminal proceedings.

198. Various aspects of the petition process bear close resemblance to a criminal trial. For example, witnesses are summoned and sworn in²⁰³; any person concerned in the election can be required to attend as a witness or face contempt of court proceedings²⁰⁴. The election court (or the Director of Public Prosecutions) is able to examine any person it has called to give evidence or any other person in court, even if the parties to the petition do not intend to do so²⁰⁵.

199. Perhaps the most significant parallel between an election petition alleging corrupt or illegal practices and a criminal trial is that at the conclusion of the petition trial, the court decides whether a person is guilty. In addition, the election court decides that question to the criminal standard of proof: beyond any reasonable doubt²⁰⁶. There is likely to be a significant amount of duplication between the petition proceedings and any subsequent criminal trial; in both proceedings the court will be examining the same facts, following a similar process and applying the same law and evidential test to decide on the guilt of the respondent / defendant.

200. Although an election court does not have a power to deprive the guilty of their liberty, it may punish respondents found to have committed an electoral offence by disqualifying them from registration as an elector and from occupying certain offices for a set period²⁰⁷. Such punishment is a deprivation of their right to vote and to take part in elections as a candidate which is protected under Article 3 of the First Protocol of the ECHR and so is a significant infringement of their rights.

201. The role of the Director of Public Prosecutions in England and Wales further demonstrates the close link between election petitions and criminal trials. The Director receives notice of the presentation of petitions and of the time and place of the trial²⁰⁸, as well as being served any notices to withdraw, stay or dismiss a petition²⁰⁹. The Director may (and if the election court so requests, must) attend the trial of every election petition²¹⁰ and at the end of the trial, the Director must be given a report where the election court has decided that corrupt or illegal practices have been committed²¹¹.

202. It is clear that when a petitioner alleges that corrupt or illegal practices have been committed, the petition trial will become closely analogous to a criminal trial, as the Election Commissioner seeks to reach a decision as to whether it is proved beyond reasonable doubt that offences have been committed. In such a case, it is essential that the petition procedure safeguards respondents' right to a fair trial. This issue came to the fore in the case of *Akhtar and others*, where the election court found that the Respondent had committed electoral offences in relation to postal voting fraud. The Respondent applied for judicial review of that decision and, on being refused permission, applied to the Court of Appeal. The Court of Appeal identified 'procedural shortcomings'²¹² in the manner in which the Election Commissioner dealt with the case made against the Respondent²¹³. The Court of Appeal held that the Commissioner failed to ensure that the Respondent had a fair opportunity to address the case that the Commissioner concluded had been made out against him, a fundamental requirement of a fair trial²¹⁴.

203. In addition, the High Court subsequently decided that the Commissioner had not complied with the requirements of Section 160(1) of the RPA 1983²¹⁵ when he named one of the witnesses in the case in his report. Although this Claimant²¹⁶ had been given an opportunity to give evidence on behalf of some of the respondents, he had not been informed that the Commissioner intended to name him in the report. In light of the serious consequences which flowed from this (i.e. the person is disqualified from taking part in elections as a candidate or elector) and the fact a fairness provision (the right to give evidence in one's own defence) had not been complied with, the naming of the Claimant in the Commissioner's report was set aside²¹⁷.

204. The two successful judicial review applications following the Commissioner's decision in *Akhtar and others* show that the current petition system does not always afford sufficient protection to the rights of the accused. It could be argued that the problems highlighted are individual errors and do not indicate any flaws in the petition system as set out in legislation. However, the Court of Appeal highlighted the 'volume of complex evidence' which the Commissioner was faced with as well as the strict time constraints²¹⁸. In such a situation, it is not surprising that procedural shortcomings occurred. The criminal law has been designed over a long period to ensure that defendants are given a fair trial, the process for conducting a petition does not appear to have been so designed.

205. Furthermore, the role of the election court in determining questions of criminal guilt may detract from its primary purpose, namely to rule on the validity of the election. Reflecting on the case of *Akhtar and others*, Stewart expresses concern at the multiple tasks carried out by an election court: 'The Court takes the form of a trial between petitioners and respondents and that may mean a neglect of the wider public interest in the electoral process'. Stewart also noted that there is a case for considering whether a wider investigation is required and whether an alternative independent body (with elections expertise) should be given responsibility for investigating the general conduct of particular elections²¹⁹.

Conclusion

28. The petition system is a combination of an administrative hearing (such as judicial review) and a criminal trial. Where allegations of corrupt or illegal practices have been made, the proceedings may be described as a quasi-criminal trial.

29. In the latter cases, the demarcation between the petition proceedings and the criminal trial may not be clear; there may be duplication, with both an election court and then a criminal court considering the same facts and law.

30. More worryingly, there is evidence to suggest that the petition system does not safeguard the rights of the accused, as would be the case in the criminal trial. An election court can impose severe penalties on a respondent found to have committed an electoral offence (namely restrictions on their civil rights to vote and hold certain public offices); respondents must therefore be guaranteed a fair trial.

Conclusion

206. This report has shown that in many respects, the UK's petition system fails to comply with internationally recognised principles. Broadly, these failings fall into two categories:

Accessibility and transparency

207. There are multiple barriers in the way of someone who is considering bringing an election petition, including:

- There is little information publicly available about the petition process and past decisions of election courts.
- The cost of bringing a petition. The initial cost of bringing a UK Parliamentary election petition is over £5,500.
- The grounds on which a petition may be brought are not clearly set out in one place in the electoral law. A petitioner would need to obtain legal advice or carry out research consulting both statute and case law to ascertain whether their concern can be presented as a petition.
- The onerous and complex requirements to present, serve and conduct a petition set out in the RPA 1983 and the 1960 Rules.
- The formality associated with legal proceedings. The practical realities of bringing legal proceedings may deter petitioners with legitimate grounds from presenting their petition. It may be that a less formal system for dealing with petitions would improve accessibility.
- Only a candidate or elector may present a petition, despite the fact that they may not have sufficient information, time or money to do so. Returning Officers, who may on some occasions be best-placed to present a petition as they have knowledge of their own error and the resources to present a petition, are not allowed to bring a petition.
- An allegation must be proved beyond reasonable doubt (the criminal standard) before a petition will be upheld, including in cases where allegations of corrupt or illegal practices and general corruption have been made. The burden of proving the allegation to this standard rests solely on the individual who has brought the petition. This is likely to be a daunting prospect for potential petitioners and could deter them from bringing petitions.
- The likelihood of a petition being dealt with swiftly is low; even a simple error in the declaration may take three months to resolve and more complex cases can take nearly two years. This could also serve to discourage a petition from being

brought; it is likely that a potential petitioner will be reluctant to take on the stress and expense of lengthy legal proceedings.

- As is typical of the petition process as a whole, withdrawing a petition is a complex, expensive and formal process. Although it may be unlikely that many petitioners have been discouraged from presenting a petition for this reason, this is an additional factor that potential petitioners should consider before launching legal action.
- The fragmentation of the legal provisions adds to the complexity of the process. Different provisions, found in separate legislative vehicles, apply to petitions in respect of different electoral events.
- There is no appeal against an election court's decision and any challenge to the decision may only be on a point of law by way of judicial review.

208. The law serves to discourage both legitimate and unfounded challenges from being brought against elections. Given the above, it is not surprising that election petitions are rare and that there are many examples of seemingly legitimate petitions not being brought and breaches of the law going unchallenged.

209. The law also places candidates from smaller political parties, independents and electors at a disadvantage to candidates from large political parties; given the complexity and cost of bringing and conducting a petition, only candidates with the support of a major party are likely to decide that a petition is worthwhile.

210. The right to challenge the result of an election is an essential part of the electoral and democratic process, as established in the guidelines and codes issued by the IDEA, the Venice Commission and the OSCE / ODIHR. The right to challenge should be accessible to all candidates and electors. If flawed election results are not challenged and swiftly corrected, the electoral process has failed the voters as the voters' choice will not have been accurately translated into the election of their representative.

The petition: promptness, sanctions and appeal

211. It is also unacceptable that the petition process does not provide the certainty of outcome required in elections. Whilst there is clearly a need to investigate matters thoroughly to ensure that poor electoral practice and corrupt or illegal offences are revealed and a correct decision on the validity of the election is reached, electors, candidates and legislatures or councils would benefit from certainty soon after the outcome of an election as to the identity of the duly elected representative for a particular electoral area. Although there are some examples of petitions being determined relatively promptly²²⁰, the majority of petitions are not resolved until many months (and nearly two years in one case) after the election.

212. This report also discusses whether the sanctions available to an election court are appropriate. Although the UK's system meets international recommendations that

the courts are allowed to annul elections, which leads to new elections being held, consideration may be given to whether there should be changes to the sanctions available and when they may be used.

213. The report finds that, contrary to international recommendations, the UK's petition process fails to give dissatisfied parties to a petition a right of appeal. Given the importance of petition decisions to the electoral process and the impact on the rights of a respondent who has been found guilty of corrupt or illegal practices, a clear route of appeal to a higher court with authority to review and exercise final judgment is necessary.

214. Finally, the report raises concerns about the demarcation between petition trials and criminal trials and questions whether election courts are able to guarantee respondent's right to a fair trial.

215. In a number of important areas, this report demonstrates that the approach in the UK (established many years ago and with its roots in the 19th Century) has not been adequately reviewed to enable it to develop coherently. Consequently it is unsurprising that the UK approach does not meet many of the principles for how elections should be challenged set out by international bodies. This should be of concern to all interested persons and organisations and should be especially concerning to voters. The need for reform is clear.

216. The Law Commission's review of electoral law represents an ideal opportunity to address these issues. The starting point for considering change should be to ensure that challenging the results of an election is easily accessible. The system should not deter (either by complexity, expense or otherwise) any legitimate challenges from being brought. A reformed system should also ensure that challenging elections is (as far as is consistent with the need to ensure that decisions on challenges are sound and based on all the relevant information) not overly formal, expensive or slow. Although making petitions more accessible may lead to more petitions being brought and consequently more delays and uncertainty over the outcome of elections, this would be mitigated by reforms that allowed or required petitions to be determined more speedily than at present.

217. This report is confined to discussing the problems with the current system; it does not seek to identify detailed proposals for reform, although it does, in assessing problems, indicate possible options for further consideration.

218. It is anticipated that this report will add to the debate on how elections in the UK should be challenged, and not least be of interest to all those who have involvement in electoral challenges, government and the Law Commission in its review of electoral law; the Commission has approached the issue with the interest of the voter foremost in consideration.

Appendix A: List of conclusions

A. Accessibility and transparency

Standing in challenges to the outcome of elections should be granted as widely as possible.

1. The UK complies with the expectation of international bodies that electors and candidates should be able to challenge the result of an election.
2. However, the UK does not grant standing any more widely than these two groups. The UK's system may be open to criticism that international standards expect standing to be granted more widely.
3. The relatively limited groups of those with current standing to lodge a petition, together with the obstacles (particularly financial and procedural) that candidates and electors will face in bringing a petition (discussed later in this report) have led some commentators to suggest that there may be a role for others such as Returning Officers, political parties and relevant independent electoral bodies to play a part in the petition process.

The electoral law should clearly state the grounds upon which an election result can be challenged.

4. Inconsistent with international recommendations, the UK's electoral law does not clearly set out the grounds upon which an election result can be challenged. This is likely to impede access to the petition process significantly. There appears to be a clear need for electoral law to be clarified in this area.
5. Consideration may be given to whether the grounds for bringing challenges to elections in the UK should be extended to such potential complaints as administrative errors that did not affect the result of the election.

There should be sufficient time for the challenger to bring a challenge, considering the need to gather evidence and take advice. This should be balanced against the need for the validity of the election to be resolved as soon as possible.

6. It appears that 21 days allows insufficient time in which to present a petition in the UK, as petitions are heard in a formal court system which requires the petitioner to expend up to £5,500 up front, obtain legal advice, collect evidence and comply with time-consuming procedural requirements. We are further concerned by the fact that the time limit cannot be extended.
7. This conclusion is supported by the fact that comparable states such as Australia (40 days) and New Zealand (28 days) allow their petitioners more time

than petitioners are given in the UK.

8. It is also concerning that the grounds of a petition cannot be altered as new information that casts doubt on the validity of an election comes to light.

The procedure for challengers to follow, from bringing the challenge up to its determination, should be simple. It is necessary to eliminate formalism and avoid decisions of inadmissibility on account of a challenger's procedural error.

9. The statutory requirements are complex and formal and failure to fully comply with them has led to decisions of inadmissibility. This is inconsistent with internationally recognised best practice.
10. There is a lack of clarity as to whether a failure to comply with a procedural requirement will lead to a petition being struck out.
11. A heavy burden is placed on a petitioner, during the course of a petition, to collect all the evidence and prove their grounds beyond reasonable doubt.
12. Withdrawing a petition is also a complex and formal process. For most elections a withdrawing petitioner cannot be replaced and the law in this area would benefit from clarification.
13. There may be merit in allowing substitution to take place so that allegations of administrative error and electoral offences are investigated.

Wherever possible the challenge procedure should be accessible without charge to the challenger. Where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint.

14. Challenging elections in the UK is an expensive process which deters those who have a genuine complaint about the election. The UK's system is in conflict with the international standard that challenging an election should be accessible without charge to the complainant or, where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint.
15. The cost of bringing and defending a petition in the UK is prohibitively expensive and far in excess of similar electoral systems in countries such as Australia and New Zealand.

Mechanisms for resolving election disputes should be governed by a coherent body of law and preferably, in a distinct chapter or section of the law. The terms, wording and legal scope of the election dispute provisions for different elections should be mutually uniform so as to secure their consistency and completeness. The language used throughout the law should be clear and consistent so as to eliminate arbitrary interpretation.

16. Contrary to international principles, the part of the UK's electoral law that governs election petitions is not uniform or consistent. There are significant differences, many seemingly arbitrary, between the law governing petitions in respect of different electoral events.
17. The law is not found in one place; instead it is to be found in multiple legislative vehicles, most only applying to certain electoral events.
18. The law does not cover all eventualities and some provisions may be subject to different interpretations. This has led to inconsistent or surprising interpretations of the law being taken.
19. The law is not accessible to the modern reader. The RPA 1983 and the 1960 Rules contain outdated and complex drafting. Additionally, some provisions appear more suited to the era when the House of Commons dealt with petitions.

The challenge process should be transparent and easily understandable. Those who have standing to issue challenges should have awareness of their right to do so and information on the procedure.

20. The UK's petition system is not transparent; the jurisdiction and procedures of the election court are not well known. Details of the right to bring a petition, the petition process, on-going petitions and petition decisions are not widely reported. The result is likely to be that those who are able to challenge elections do not know they have the right to do so or do not know how to do so. This may mean that flawed elections do not get overturned.

B. The proceedings: promptness, sanctions and appeals

The body determining a challenge should issue its decision promptly, within a specified time that is ideally not longer than two months unless there are exceptional circumstances.

21. In the UK, election challenges are not determined promptly, as recommended by international principles. The UK's electoral law imposes no time limit on courts handling a petition nor does it require them to progress the case without delay (also recommended by international principles and practiced in some other countries such as Australia and Canada).

22. Petitions can take up to almost two years after the election to be resolved. Furthermore, there is great disparity between the lengths of time taken to resolve seemingly similar petitions.
23. Petitions relating to clear administrative errors in the counting of the ballot papers or the declaration of the winning candidate, where the Returning Officer has acknowledged the error and (along with the parties) knows the correct result, are not typically determined until three months after the election.
24. Although there appears scope to reach decisions on petitions that allege administrative error much more quickly, it may be difficult to conclude petitions relating to corrupt and illegal practices more promptly and still secure respondents' right to a fair trial.

The body determining the challenge should have authority to impose appropriate sanctions in the event the challenge is upheld, namely to annul the election result and order a new election to be held.

25. As recommended by international principles, the UK's petition system allows the court to annul elections and hold a new election.
26. In any future reform of the system, consideration may be given to reform of the possible sanctions and the situations in which they may be imposed to secure public trust in elections and also to ensure a successful party recovers their costs, without adverse impact on a petitioner who has acted reasonably and without deterring the presentation of petitions.

The electoral law should provide a right of appeal to an appropriate higher level with authority to review and exercise final jurisdiction in the matter. The decision of the court of last resort must be issued promptly.

27. Contrary to international principles, the UK's petition system allows no right of appeal against the decision of an election court. The only proceeding available to a dissatisfied party is judicial review, which does not constitute an appeal as it only looks at points of law and not disputed facts.

The electoral law shall secure a clear demarcation of the respective jurisdictions of the courts.

28. The petition system is a combination of an administrative hearing (such as judicial review) and a criminal trial. Where allegations of corrupt or illegal practices have been made, the proceedings may be described as a quasi-criminal trial.
29. In the latter cases, the demarcation between the petition proceedings and the criminal trial may not be clear; there may be duplication, with both an election court and then a criminal court considering the same facts and law.

30. More worryingly, there is evidence to suggest that the petition system does not safeguard the rights of the accused, as would be the case in the criminal trial. An election court can impose severe penalties on a respondent found to have committed an electoral offence (namely restrictions on their civil rights to vote and hold certain public offices); respondents must therefore be guaranteed a fair trial.

Appendix B: List of cases cited

Case Reference	Abbreviated Reference
<i>Absalom v Gillett</i> [1995] 1 W.L.R. 128	
<i>Ahmed v Kennedy</i> [2002] EWCA Civ 1793 [2003] 1WLR 1820 CA and <i>Ullah v Pagel</i>	<i>Kennedy</i>
<i>Re Appleby Ward of North East Leicestershire District Council, Roberts v Blunt</i> (2012) EWHC 481 (QB)	
<i>R. (on the application of Conservative and Unionist Party) v Election Commissioner</i> , [2010] EWHC 285 (Admin).	
<i>Hussein v Khan</i> [2006] EWHC 262	
<i>Maley v Hackney and Sutton</i> [2008] M/332/08	the Stoke Case
<i>Miller v Bull</i> [2009] EWHC 2640 (QB)	<i>Miller</i>
<i>Morgan v Simpson</i> [1975] Q.B. 151	<i>Morgan</i>
<i>Pilling and others v Reynolds</i> [2008] EWHC 316 (QB)	<i>Pilling and others</i>
<i>R v Rowe, ex parte Mainwaring</i> [1992] 1 WLR 1059	
<i>Simmons v Khan</i> [2008] EWHC B4 (QB)	the Slough case
<i>R (Woolas) v Parliamentary Election Court for Oldham East and Saddleworth</i> [2010] EWHC 3169	<i>Woolas</i>
Akhtar and others	
<i>Akhtar and others v Jahan and others Iqbal and others v Islam and others</i> [2005] All ER (D) 15 (Apr).	<i>Akhtar and others</i>
Judgment affirmed by Divisional Court [2005] EWHC 2365	
Judicial review of Akhtar and others	
- <i>R (on the application of Afzal) v Election Court and others</i> [2005] EWCA Civ 647.	<i>Afzal</i>
- <i>R (on the application of Khan) v Election Commissioner</i> [2005] All ER (D) 203 (Oct).	<i>Khan</i>

Appendix C: Table of petitions from 2007 to 2012

Year	Electoral area	Allegation	Person presenting the petition	Outcome	Time taken	Costs (where known)
2007	Aston Ward Birmingham City Council	An allegation that the successful candidate and his agents were guilty of illegal practices, i.e. making false statements of fact about personal conduct during the election.	Candidate representing a large party ²²¹ .	The petition failed: the First Respondent was duly elected. The illegal practices did not prevail whether extensively or at all.	The petition was issued on the 24 May 2007. The Judgement was given on 2 April 2008.	The costs to the Returning Officer are estimated to be somewhere between £50,000 to £100,000. The Returning Officer now has a high excess on their insurance which means that the first £100,000 of any claim is not covered.
	Rosegrove and Lowerhouse Ward Burnley Borough Council	It was alleged that the Returning Officer had included a vote for one party which had been rejected.	Three people who voted in the local government election and one who was entitled to vote in the election.	The court decided that the outcome should stand.	Petition was presented on 23 May 2007 and a decision made on 8 February 2008 ²²² .	Mr Justice Blake discussed the costs in his decision. The actual costs in the case were £40,589 for the second Respondent (the Returning Officer) and £15,000 for the first Respondent. The court awarded

						reduced costs against the Petitioner of £20,000 to the Second Respondent and £10,000 to the First Respondent because it was felt that it 'would be contrary to the public interest to deter such scrutiny because of the disproportionate consequences in costs for any unsuccessful petitioner.' (paragraph 39)
	Park Ward Calderdale Metropolitan Borough Council	After the election, the candidate who came second was found to be disqualified. The Returning Officer notified the other candidates and invited them to present a petition.	Candidate representing a small party ²²³ .	The petition did not proceed to trial because of a failure to provide security for costs.		
	Abbey Ward	After the	Candidate	The petition was	Petition was	No information

	Leicester City Council	declaration it was discovered that two ballot boxes had not been counted. Following an unofficial count of the additional ballot papers which found that the result would not have been affected, the Returning Officer informed the candidates on 8 May.	representing a large party.	rejected on the grounds that the election was substantially in accordance with the law. The result was confirmed.	presented on 24 May 2007. Hearing took place on 25 February 2008. Final Judgement was given on 1 April 2008.	available about costs.
	Central Borough Ward Slough Borough Council	It was alleged that corrupt or illegal practices had been committed in the election for the purpose of promoting or procuring the election of the Respondent.	Candidate representing a large party.	The election of the Respondent was found to be avoided by corrupt and illegal practices pursuant to Section 159(1) of the RPA 1983 and also to have been avoided on the ground of general	The Petition was presented on 24 May 2007. The Commissioner for the trial of the Petition was appointed on 30 July 2007. On 4 and 11 October, the Scrutiny took place. The trial of the Petition was	No information given about costs.

		The corrupt practices related to applications for registration and postal voting.		corruption pursuant to Section 164(1)(a) of the RPA 1983.	held on 10 days between 28 January and 25 February 2008. The Judgement was delivered on 18 March 2008.	
	Crowland and Deeping St Nicholas ward South Holland District Council	Shortly after the Returning Officer had made the declaration, he discovered that there were still a number of votes waiting to be counted.	Candidate representing a large party.	Heard as a special case. The court declared that the First Respondent was not duly elected and the Petitioner was instead declared duly elected.	Petition presented 24 May 2007. The findings of an Inspection and recount held on 17 May 2007 were submitted to the court. Application made on 22 June 2007 by Petitioner that the case should be heard as a Special Case on 29 June 2007 and judgement given immediately afterwards.	The Returning Officer paid the Petitioner's costs of £4507.99 and the Petitioner's security was repaid.
	Beacon and Bents Ward South Tyneside Council	A number of allegations were made.	Independent candidate.	Shortly after presenting the petition, the Petitioner sought a court order to examine the rejected postal	Petition presented 24 May 2007. South Shields County Court dismissed the Petitioner's	The Court found in favour of the local authority and awarded them costs.

				<p>ballots. The petition was put into abeyance pending the outcome of this. South Shields County Court dismissed the Petitioner's application to examine the ballots on the basis that the application was 'misconceived', because an inspection would, in the Court's view, have no bearing on any of the allegations made in the petition.</p>	<p>application to examine the rejected postal ballot papers on 12 November 2007.</p> <p>The Petitioner subsequently withdrew the petition on 12 May 2008.</p>	
	<p>Central Borough Ward</p> <p>Southsea Town Council</p>	<p>It was alleged that a false statement had been made in election material.</p>	<p>Candidate representing a large party.</p>	<p>Petitioner was given leave to withdraw on the grounds that they were satisfied that, in the event that the Petitioner would have been able to prove the factual matters stated in the petition, the</p>	<p>Petition presented 24 May 2007. Motion to withdraw heard 6 December 2007. Order to withdraw given on 11 January 2008.</p>	<p>Ordered that the Petitioner's security of £2,500 should be paid to the Respondents in equal shares as full and final payment. No order as to costs given, save for a legal aid assessment of the costs of the Petitioner.</p>

				petition would nonetheless fall and be dismissed by the Court.		
2008	Manningham Ward Bradford Metropolitan District Council	It was alleged that the Petitioner had been unlawfully arrested and imprisoned by West Yorkshire Police to prevent him campaigning for votes. It was further alleged that when the Petitioner handed a draft copy of his petition to the Deputy Returning Officer at the count that he was threatened with further arrest and prevented from examining the	Candidate representing a small party.	Petition was dismissed by the Commissioner as wholly misconceived because, even if the Petitioner had proved his allegations, he would have had no grounds for setting aside the election of the winning candidate. The matters that the Petitioner was complaining about did not amount to a corrupt or illegal practice nor were they sufficient to create 'general corruption'. The Commissioner would therefore be powerless to void the election. Also,	Petition presented on 20 May. The Petitioner applied to amend the petition by removing the Returning Officer as defendant on 29 September 2008. The Returning Officer also applied to strike out the Petition on the grounds that it had not been properly served. These applications were held on 31 October 2008 and a judgment rejecting all these applications was handed down on 26 November 2008. The Election Commissioner was appointed on 13 February 2009. The case was heard on 6 and 7 May 2009 and	Petitioner applied for remission of court fees of £360 and was successful. Petitioner ordered to pay security of £2,500 and further £45,871.29 in costs.

		'spoilt' ballot papers.		the Petitioner admitted that his allegations did not affect the result of the election.	final judgement given on 7 May 2009.	
	Northwood and Birches Head Ward Stoke-on-Trent City Council	After a number of close recounts, the Petitioner, who had won the count and the first recount but lost the second and third recounts by one vote, alleged that the Returning Officer and his staff had carried out the electoral process in a defective manner and that there was a possibility that one or more votes might have gone astray.	Independent candidate.	The Commissioner was unable to conclude that any votes had gone astray and therefore held that the Petition failed and must be dismissed. The Second Respondent was declared and certified elected.	Petition presented on 22 May 2008. First hearing on 30 October 2008 which ordered a recount before the Senior Master and Prescribed Officer on 19 March 2009. Second hearing on 16 July 2009. On 27 July 2009 the Commissioner was appointed. 20 October 2009 a further scrutiny took place before the Commissioner. A two day trial was held before the Commissioner and the final judgement was given on 26 January 2010. The whole process took 21 months.	No order was made for costs except the £2,500 security for costs which was to be paid to Stoke-on-Trent City Council. The overall cost to the authority was £122,000 most of which was covered by insurance.

2009	Bassishaw Ward City of London Corporation	It was alleged that 17 postal votes had not been counted in a close election.	Candidate.	The petition was never at issue due to failure to provide valid security.	Petition was presented on 2 April 2009.	
	Coleman Street Ward City of London Corporation	17 postal votes were uncounted in a very close election.	Candidate.	The petition was never at issue due to failure to provide valid security.	Petition was presented on 2 April 2009.	
	South Ward Leominster Town Council Also <i>Miller v Bull</i> [2009] EWHC 2640 (QB) – a High Court case concerning defective service of the petition.	The Petitioner alleged that he was given the wrong advice when completing his nomination.	A person who had applied to be an independent candidate.	Initially the case did not proceed because the Petitioner failed to give notice of the amount and nature of the security given within the time allowed (it was a week late). This was the subject of a separate hearing (<i>Miller v Bull</i> , discussed in the report - see page 23). The High Court held that for an election petition to be struck out only	The election was held on 25 June 2009 and the petition was presented on 15 July 2009. The High Court heard the case on 9 October 2009 and delivered its judgment on the late service of the notice of the nature of amount of a security for costs on 28 October 2009. The petition was heard on 26 April	It was ordered that the Returning Officer should pay the Petitioner's costs and that any security paid by the Petitioner to the Court should be repaid.

				<p>for failure to serve timeous notice of the nature and amount of the security given would be contrary to Article 6 and Article 3, protocol 1 of the ECHR. The High Court allowed an extension of time for the Petitioner to cure the procedural defects.</p> <p>Following the petition being heard, the election court made an order declaring the election void and stating that a new election should be held.</p>	2010.	
	<p>West Central Oxford</p> <p>Oxfordshire County Council</p>	The Petitioner alleged that a large number of voters did not receive poll cards and this	Four local government electors.	The petition was never at issue due to failure to provide valid security.	The petition was presented on 22 June 2009.	

		had affected the turnout in the election.				
2010	Fermanagh and South Tyrone Parliamentary constituency	The Petitioner claimed that the Returning Officer, Deputy Returning Officer and their servants and agents committed breaches of the statutory rules governing the conduct of elections. Further that the Petitioner had a majority of the votes cast and therefore ought to have been returned.	Candidate representing a small party.	The Election Court concluded that the breach of the rules did not affect the election result as there had been 'extensive' opportunities for parties to examine and make representations about doubtful ballot papers at the third recount. Found that the First Respondent was duly elected.	The election was held on 6 May 2010. The decision was issued on 22 October 2010.	No information about costs given.
	Oldham East and Saddleworth Parliamentary constituency	Petitioner alleged that the Respondent was guilty of an illegal practice contrary to Section 106 of	Candidate representing a large party.	The Election Court found that the Respondent's election was void because the Respondent was guilty of an illegal	The election was held on 6 May 2010. Petition presented on 27 May 2010. Hearing date for the election court was 13-16 September	No information as to costs given in judgement.

		the RPA 1983, namely, before the election and for the purpose of affecting the return, he made or published several false statements of fact in relation to the Petitioner's personal character or conduct which he had no reasonable grounds for believing to be true and did not believe to be true.		practice. The court hearing a judicial review application following the decision upheld the decision of the Election Court.	2010. Judgement given 5 November 2010. On the same day the Respondent applied for permission to bring judicial review. This application was refused on 8 November 2010. An appeal application was made. The hearing date for this was 16 and 17 November 2010 and the appeal judgement was given on 3 December 2010.	
	High Street Ward London Borough of Waltham Forest	The Returning Officer admitted that he had made a miscalculation of votes and wrote to	Candidate representing a large party.	A recount was ordered by consent of all parties (Lib Dem candidate Petitioner, Labour candidates and Returning Officer	Election held on 6 May 2010. The petition was presented on 26 May 2010. A scrutiny took place on 30 July 2010 but the	The Returning Officer was ordered to pay all costs subject to detailed assessment if not agreed. Costs were agreed.

		candidates on 14 May 2010 to tell them so.		respondents); Following the recount and the master's report, an order was made, again by consent, setting aside the originally declared result and declaring the correct result.	Commission understands that the court's decision was not issued until 8 September 2010.	
	Waddon Ward London Borough of Croydon	The petition alleged failings by the Returning Officer in performing his duties particularly relating to the provision of equipment and staffing of polling stations. Further, that voters were unlawfully denied their right to vote by acts or omissions by the Returning	Candidate representing a large party.	Petition was withdrawn after six months. The Commission understands that this may have been at least partly because the Legal Services Commission decided it could not fund a full election court hearing.	Election held on 6 May 2010. Petition issued on 26 May 2010. The local authority worked on the case for about six months until it was withdrawn.	Petitioner was ordered to pay local authority's costs - no information as to amount available.

		Officer or Presiding Officers. It was also alleged that the votes were not added up or counted correctly.				
2011	South Ward Great Cornard Parish Council	A candidate who had received 259 votes was declared the winner despite another candidate having received 287 votes.	Independent candidate.	The petition was heard as a Special Case. The court ordered that the First Respondent was not duly elected and should not have been returned as a parish councillor. The Petitioner was duly elected.	Election held on 5 May 2011. Petition presented 26 May 2011. Judgement given 29 July 2011.	The Petitioner's costs were paid by the Returning Officer. Security was repaid to the Petitioner.
	Eastwood North and Greasley (Beauvale) Borough Ward Broxtowe Borough Council	A husband and wife stood for election. The husband received more votes but the wife was declared elected. The error occurred because the	Candidate representing a large party.	The petition was heard as a Special Case. The declaration in favour of the wife was set aside and the husband declared the winner.	Election held 5 May 2011. Petition presented on 25 May 2011. Judgement given on 22 July 2011.	Costs paid by the Returning Officer. Security was repaid to the Petitioner.

		two candidates had the same surname and the Returning Officer incorrectly transposed results when transferring votes cast to the declaration form because the names were listed in a different order.				
	Appleby Ward North West Leicestershire District Council	It was alleged that the elected candidate was not qualified to be a candidate at the local government election under Section 79(1)(b) of the Local Government Act 1972.	Independent candidate.	The Petitioner sought leave to withdraw the petition from the High Court.	The election was held on 5 May 2011. The petition was presented on 26 May 2011 and notice of withdrawal presented in January 2012.	
2012	Prestatyn North Ward	The Petitioner alleges	Candidate representing	The petition was issued on 24 May		

	Denbighshire County Council	confusion at the count where bundles of ballot papers were incorrectly assigned to the successful candidate. The surnames of the two candidates were similar.	a large party.	2012. On 9 August the High Court ordered a recount in this case. No date was given in the order for when the recount would be held. The Commission has been informed by the court that the recount will take place on 29 October 2012. The case is currently on-going.		
	Sheerwater Ward Woking Borough Council	The Petitioner lost by 17 votes. The Petitioner has identified a growing list of voters (currently about 75) who the	Candidate representing a large party.	The election was held on 3 May 2012. The petition was issued on 24 May 2012. The case is currently on-going.		The Commission understands that the initial cost of bringing the petition was approximately £20,000 to £25,000 ¹ .

¹ Rachel Saker, "Candidate Ali confident of victory in election fraud case", *Woking News and Mail*, 28 September 2012, <http://www.wokingnewsandmail.co.uk/?p=2493> (viewed on 5 October 2012).

		Petitioner alleges were not eligible to vote. It is also alleged that there were instances where postal votes were submitted although the elector was abroad and undue pressure on some electors.				
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Endnotes

¹ D Petit, *Resolving Election Disputes in the OSCE Area; Towards a Standard Election Dispute Monitoring System*, Office for Democratic Institutions and Human Rights, Warsaw, 2000, p. 6.
<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019060.pdf>

² Some petitions will fall into both categories.

³ These petitions will normally be heard at the same time as an associated police investigation to establish whether an offence was committed; this may lead to prosecution. The purpose of the petition is not to punish the candidate or agent for an offence but rather to establish whether an offence was committed and, if so, void the election.

⁴ Returning Officers would only be able to bring a petition if they also happened to be an elector in the relevant electoral area; any such action could only be taken as a private individual and not in their capacity as Returning Officer. We are unaware of this having occurred.

⁵ See case study: Stoke-on-Trent, page 44.

⁶ Law Commission, *Electoral Law in the United Kingdom: A Scoping Consultation Paper*, 15 June 2012, http://lawcommission.justice.gov.uk/docs/electoral_law_scoping_consultation.pdf

⁷ Electoral Commission, *The Law Commission Review of Electoral Administration Law - Our preliminary views on the scope of the review*, 7 November 2011, section 7.1.5, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/148425/Preliminary-views-on-project-scope.pdf

⁸ The amendments that have been made have increased the complexity of the provisions and in some cases led to contradictory provisions and drafting errors. For an example, see paragraph 1100.

⁹ C Morris, *Parliamentary Elections, Representation and the Law*, Hart Publishing, Oxford, 2012, p. 91.

¹⁰ *ibid.*, p. 92. Whereas elections in the nineteenth century could be described as essentially private contests between wealthy individuals (albeit often representing political parties), elections in the twenty-first century are generally contests between highly organised and often well-resourced, political parties.

¹¹ Such as the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1950 European Convention (together with its Protocols) for the Protection of Human Rights and Fundamental Freedoms and the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Co-operation in Europe. See bibliography for full references.

¹² Returning Officers are required by law to declare the candidate with the majority of votes elected (Rule 50(1)(a) of the Parliamentary Election Rules, Schedule 1 to the RPA 1983). In practice, declarations are made orally by the Returning Officer following the conclusion of the count and any recounts. This is separate from the legal requirement to give public notice of the result (Rule 50(1)(c)). A candidate is not declared elected by giving public notice of the results; the declaration of the elected candidate takes place separately of that public notice.

¹³ Challenged elections were originally heard as petitions (hence the term 'election petition') to the House of Commons, initially by select committees, then afterwards by the committee of privileges and elections, and ultimately by the whole House. However, under the Grenville Act of 1770, and other later acts, challenged elections were considered by select committees, constituted to form a more judicial tribunal.

¹⁴ Part 3 of the RPA 1983 derives from the relevant provisions in the Parliamentary Elections Act 1868 and little has been changed from the original legislation.

¹⁵ An 'undue election' refers to flaws in the process whereas an 'undue return' refers to an error in the outcome (*Charles Edward Irwin and Another v William Mure* (1874) 1 R. 834 at 836 by Lord Neaves).

¹⁶ This list of grounds is similar to those put forward by others, including the Law Commission in *Electoral Law in the United Kingdom: A Scoping Consultation Paper* p. 64 and Morris in *Parliamentary Elections, Representation and the Law*, p. 88.

¹⁷ Of the 4,876 elections held in May 2012, only two have been challenged by election petition (there were 4,773 seats contested in scheduled elections in May 2012. There were also 103 uncontested seats, giving a total of 4,876). In London: 16 elections (all contested: one mayoral, 14 constituency, one list). In England: 2,409 elections (plus 4 uncontested). In Wales: 1,125 elections (plus 99 uncontested). In Scotland: 1,223 (all contested).

¹⁸ C Rallings and M Thrasher, *British Electoral Facts*, Total Politics, London, 2006, p. 245.

¹⁹ Section 136 RPA 1983.

²⁰ Section 139(1) RPA 1983.

²¹ Section 144(1) RPA 1983 for a UK Parliamentary election petition and for a local government election petition.

²² Section 145(1A) RPA 1983

²³ The IDEA is an intergovernmental organisation that supports democracy worldwide by providing comparative knowledge, assisting in democratic reform and influencing policies and politics. The IDEA produces comparative knowledge in its key areas of expertise, which include electoral processes and political participation and representation. The IDEA is an impartial organisation and a Permanent Observer to the United Nations. Although the UK is not a participating state, a number of long-established democracies are including Australia, Canada and the Netherlands. For more information, see *The International Institute for Democracy and Electoral Assistance at a glance*, available at http://www.idea.int/about/upload/idea_ataglance2012_final.pdf.

²⁴ The European Commission for Democracy through Law, more commonly known as the Venice Commission, is a Council of Europe independent consultative body on issues of constitutional law, including electoral law. Its members are independent experts in the area. The UK is a member state of the Council of Europe. For an overview of the Venice Commission's role and recent activities, see its 2010 Report: [http://www.venice.coe.int/docs/2010/CDL-RA\(2010\)001-e.pdf](http://www.venice.coe.int/docs/2010/CDL-RA(2010)001-e.pdf)

²⁵ The ODIHR is the specialist institution of the OSCE dealing with elections. It is Europe's leading agency in the field of election observation. Observations aim to assess electoral processes in accordance with OSCE election-related commitments and to offer recommendations, where necessary, to bring electoral processes into line with those commitments. The UK is an OSCE participating state. For more information on the ODIHR, see <http://www.osce.org/odihr/elections/72781>

²⁶ International Institute for Democracy and Electoral Assistance, *International Electoral Standards Guidelines for reviewing the legal framework of elections*, pp. 93-94, http://www.idea.int/publications/ies/upload/electoral_guidelines-2.pdf

²⁷ Venice Commission, *Code of Good Practice in Electoral Matters*, 23 May 2003, CDLAD(2002)023rev, p. 29, [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.pdf)

²⁸ *ibid.*, pp. 29-30.

²⁹ *ibid.*, p. 30.

³⁰ Venice Commission, *Report on the Cancellation of Election Results*, 14 December 2009, CDL-AD(2009)054, p. 10, [http://www.venice.coe.int/docs/2009/CDL-AD\(2009\)054-e.pdf](http://www.venice.coe.int/docs/2009/CDL-AD(2009)054-e.pdf).

³¹ Venice Commission, *Code of Good Practice in Electoral Matters*, p. 30.

³² *ibid.*

³³ *ibid.*, p. 31.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ Petit, *op. cit.*, pp. 9-10.

³⁷ *ibid*, pp. 10-11.

³⁸ *ibid*, p. 11.

³⁹ *ibid*.

⁴⁰ *ibid*, p. 13.

⁴¹ *ibid*, p. 11.

⁴² *ibid*, pp. 11-12.

⁴³ *ibid.*, pp. 7 and 12.

⁴⁴ *ibid.*, p. 13.

⁴⁵ 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' Council of Europe, 'European Convention on Human Rights' 2010, p. 34, <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf>.

⁴⁶ Section 121(1) (presentation and service of parliamentary election petition) and Section 128(1) (presentation of petition questioning local election) RPA 1983. These Sections provide differently for whom may bring a petition in respect of these elections. Section 121(1) provides that a person claiming to have had a right to be elected or returned at the election may bring a petition (in addition to electors and candidates). Section 128(1) does not refer to such a category of person.

⁴⁷ Section 121(1)(a) RPA 1983.

⁴⁸ Section 128(1) RPA 1983.

⁴⁹ Morris, *Parliamentary Elections, Representation and the Law*, p. 92.

⁵⁰ *ibid*.

⁵¹ Home Office, *Final Report of the Committee on Electoral Law Reform* Cmd. 7286, HMSO, London, 1947, p. 18.

⁵² *ibid*.

⁵³ *Simmons v Khan* (Slough, 18 May 2008), R.20. <http://www.slough.info/law/law41/law41p101.html>

⁵⁴ H Lardy, 'Challenging Elections', *SCOLAG*, vol. 357, July 2007, p. 139.

⁵⁵ *ibid*.

⁵⁶ Any consideration of a possible role for the Commission should take into account the Commission's role in elections. The Commission produces guidance to assist election officials to administer elections and it may be that grounds for a petition would arise from an alleged error in the Commission's guidance.

⁵⁷ Morris, *Parliamentary Elections, Representation and the Law*, p. 92.

⁵⁸ The powers of the AEC should be considered in light of the fact that the AEC administers federal elections in Australia. This arguably makes the AEC presenting petitions more akin to Returning Officers bringing petitions in the UK (which is not allowed under the UK's system).

⁵⁹ Section 357(1) of the Australian Commonwealth Electoral Act 1918. The AEC has used its power to bring a petition at least five times since 1984, including four challenges based on officials' administrative errors and one challenge based on a candidate's disqualification; see Morris, *Parliamentary Elections, Representation and the Law*, p. 94, ff. 186.

⁶⁰ Section 357(1A) Commonwealth Electoral Act 1918. http://www.austlii.edu.au/au/legis/cth/consol_act/cea1918233/

⁶¹ Section 30(1) of the Equality Act 2006; *Morris, Parliamentary Elections, Representation and the Law*, p. 94, ff. 188.

⁶² *Morris, Parliamentary Elections, Representation and the Law*, p. 94.

⁶³ J Stewart, 'A Banana Republic? The Investigation into Electoral Fraud by the Birmingham Election Court', *Parliamentary Affairs*, vol. 59(4), No. 4, 2006, p. 666.

⁶⁴ *ibid.*

⁶⁵ Petit, *op. cit.*, p. 13.

⁶⁶ *Charles Edward Irwin and Another v William Mure* (1874) 1 R. 834 at 836 by Lord Neaves. See ff. 15.

⁶⁷ 'Where on an election petition it is shown that corrupt or illegal practices or illegal payments, employments or hirings committed in reference to the election for the purpose of promoting or procuring the election of any person at that election have so extensively prevailed that they may be reasonably supposed to have affected the result'.

⁶⁸ For example, the term includes claims for a scrutiny or for a recount of ballot papers (*Greenock Case* (1892) Day 20).

⁶⁹ Law Commission, *op. cit.*, p. 67, paragraph 4.30.

⁷⁰ Sections 23(3) and 48(1) RPA 1983

⁷¹ Consideration is given to the issue of whether challenges should be possible regardless of the effect on the result in Australian Government, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, September 2009, p. 202.

http://www.dpmc.gov.au/consultation/elect_reform/strengthening_democracy/docs/strengthening_austrialias_democracy.pdf

⁷² Rule 8(2) of the local government principal area election rules (Schedule 2 to the Local Elections (Principal Areas) (England and Wales) Rules) states that the Returning Officer is only entitled to hold a nomination paper invalid on one of the following grounds: (a) that the particulars of the candidate or the persons subscribing the paper are not as required by law; and (b) that the paper is not subscribed as so required. However, disqualification is a relevant consideration for a Returning Officer at a parliamentary election (Rule 12(2)(c) of the Parliamentary Election Rules (Schedule 1 to the RPA 1983). It is a well-established principle in case law that the Returning Officer is limited to looking to see if the nomination paper is good in form and is not carrying out enquiries to ascertain the accuracy of the paper's contents (for example see *R v Election Court, ex parte Sheppard* [1975] 2 All ER).

⁷³ Under Section 92 of the Local Government Act 1972, an elector in the electoral area can bring proceedings where a person who is not qualified or is disqualified from being a councillor has acted or claims to be entitled to act as a councillor. If the proceedings are successful the court could make an order declaring the seat to be vacant and could grant an injunction restraining the individual from so acting.

⁷⁴ Information provided to the Commission.

⁷⁵ Section 121 and Section 128 RPA 1983.

⁷⁶ Section 122(3)(b) and 129(2) RPA 1983.

⁷⁷ Section 355(e) of the Australian Commonwealth Electoral Act 1918. The 40 day time limit has been adopted in most of Australia's states and territories with the exception of Queensland (seven days), Tasmania (90 days) and the Northern Territory (21 days). Australian Government, *Electoral Reform Green Paper*, p. 197.

⁷⁸ M Cooke, *Address to the HS Chapman Society*, 12 August 1999, as cited in A McGrath, *The Case for an Electoral Ombudsman*, HS Chapman Society, undated. See also Australian Government, *Electoral Reform Green Paper*, p. 202.

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- ⁷⁹ Section 231(1) of the Electoral Act 1993, <http://www.legislation.govt.nz/act/public/1993/0087/latest/DLM307519.html>
- ⁸⁰ Venice Commission, *Report on the Cancellation of Election Result*, p. 10.
- ⁸¹ Venice Commission, *Code of Good Practice*, p. 30.
- ⁸² Petit, *op. cit.*, pp. 10-11.
- ⁸³ D Lock, 'Public / Human rights: Unconventional?', *New Law Journal*, Vol. 159, Issue 7397, 11 December 2009, p. 1727.
- ⁸⁴ Section 121(3) and (4) and Section 128(3) RPA 1983; Rule 4 of, and the Schedule to, the 1960 Rules.
- ⁸⁵ Section 136 RPA 1983.
- ⁸⁶ Section 136(3) RPA 1983 and Rule 6(1) the 1960 Rules.
- ⁸⁷ Rule 9(1) the 1960 Rules. Within twenty-eight days after the first day on which a petition is at issue the petitioner shall apply by application notice to a rota judge for a time and place to be fixed for the trial of the petition and, if the petitioner fails to do so, any respondent may, within a further period of twenty-eight days, apply in the same manner as the petitioner could have done
- ⁸⁸ See Appendix C. The *Miller* case is notable as it is an example of a lower court issuing a decision that contradicted that of a higher court (namely the Court of Appeal in *Kennedy*). The High Court did so because it felt that the duty on judges to comply with the ECHR in Section 6 of the Human Rights Act 1998 overrode the doctrine of precedent. Although the *Kennedy* decision was made after the 1998 Act came into force, the Act was not considered in the case. See Lock, *op. cit.* p. 1727.
- ⁸⁹ No 5 Chambers, 'High Court Judge "overturns" Court of Appeal Decision in "Parliamentary Expenses" Election Petition Case', 2 November 2009, <http://www.no5.com/news-publications/news/high-court-judge-%E2%80%9COverturns%E2%80%9D-court-of-appeal-decision-in-%E2%80%9Cparliamentary-expenses%E2%80%9D-election-petition-case>
- ⁹⁰ See for example, R Mawrey QC 'Report to the High Court of Justice: *Simmons v Khan* (Slough, 18 May 2008)' <<http://www.slough.info/law/law41/law41p101.html>>.
- ⁹¹ These countries include Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Latvia, Slovakia, Sweden and Switzerland. See p. 11, paragraph 66.
- ⁹² Venice Commission, *Report on the Cancellation of Election Results*, p. 12, paragraph 67. Election courts in the UK do have some inquisitorial powers, including the power to require persons concerned in the election to attend and to examine them and the power to conduct a scrutiny.
- ⁹³ P Coleman, 'The fading prospects of a petition', *New Law Journal*, vol. 143, issue 6621, 22 October 1993, p. 1487.
- ⁹⁴ Section 359. The powers of the AEC to take part in petitions should be considered in the context of its broader role as administrator of federal elections in Australia.
- ⁹⁵ Morris, *Parliamentary Elections, Representation and the Law*, p. 96. This argument is put forward over pages 94 to 97.
- ⁹⁶ Stewart, *op. cit.* pp. 666-667.
- ⁹⁷ Lardy, *op. cit.*, p. 140.
- ⁹⁸ Rallings and Thrasher *op. cit.*, p. 245.
- ⁹⁹ These relate to petitions brought in Surrey Heath in 2003, Southsea in 2007, Croydon in 2010 and North West Leicestershire in 2011.
- ¹⁰⁰ Section 147(1) RPA 1983.
- ¹⁰¹ Section 147(2) RPA 1983.

¹⁰² Fee 2.6 (on an application on notice where no other fee is specified), Schedule 1 to the Civil Proceedings Fees Order 2008.

¹⁰³ Rule 12(2)(b) of the 1960 Rules.

¹⁰⁴ Venice Commission, *Code of Good Practice*, p. 11, paragraph 3.3(b)

¹⁰⁵ R Price (ed.) *Parker's Law and Conduct of Elections*, LexisNexis, London, 2012, issue 39, paragraph 19.23. This error in the legislation is a good example of the complexity of the provisions and the difficulties posed for those attempting to engage in the petition process. It shows that a fundamental review and consolidation exercise of the provisions is essential to make presenting petitions accessible.

¹⁰⁶ Petit, *op. cit.*, p. 11, paragraph 15.

¹⁰⁷ An alternative view, not based on international guidance, is that petitioning should be expensive to reduce numbers of vexatious or ill-founded petitions (see for example Australian Government, *Electoral Reform Green Paper*, p. 200). However, seeking to restrict access in such a way does not allow for equality of access to the system and will allow wealthy candidates, electors and parties to challenge elections and not those who have limited financial resources. More discussion of this is found later in this section.

¹⁰⁸ Fee 1.5 (starting proceedings in the High Court for 'any other remedy'), Schedule 1 to the Civil Proceedings Fees Order 2008.

¹⁰⁹ Fee 2.7 (on an application by consent or without notice where no other fee is specified), Schedule 1 to the Civil Proceedings Fees Order 2008.

¹¹⁰ Section 136(2)(a) RPA 1983 and regulation 94(2).

¹¹¹ Section 136(2)(b) RPA 1983 as amended by Rule 6(b) of the Local Elections (Parishes and Communities) (England and Wales) Rules 2006.

¹¹² Section 136(2)(b) RPA 1983.

¹¹³ Section 136(8) RPA 1983.

¹¹⁴ The costs incurred in obtaining legal advice in relation to bringing an election petition is not excluded under paragraph 1 of Schedule 2 to the Access to Justice Act 1999, so a solicitor could provide advice under legal aid arrangements (subject to the client's financial eligibility). However, if legal representation is required, there must be an application or proceedings within a court or tribunal listed in paragraph 2 of Schedule 2. An election petition is presented to the High Court which then convenes an election court to hear the case. Although the High Court is listed in paragraph 2, an election court is not listed.

¹¹⁵ Section 123(2) of the Representation of the People Act 1983 states that the election court has, subject to the provisions of this Act, the same powers, jurisdiction and authority as a judge of the High Court (or, in Scotland, a judge of the Court of Session presiding at the trial of a civil cause without a jury) and shall be a court of record. However, it appears that an election court is a separate court, albeit with the same powers, jurisdiction and authority as the High Court and therefore, as it is not listed in paragraph 2, advocacy carried out before an election court would not be covered by legal aid.

¹¹⁶ Morris, *Parliamentary Elections, Representation and the Law*, p. 98.

¹¹⁷ Mr Justice Blake in *Pilling and others*.

¹¹⁸ Section 356 of the Australian Commonwealth Electoral Act 1918 provides that when filing a petition relating to a federal election, the petitioner must deposit \$500 as security for costs. The amount of security varies across Australia's states and territories from \$100 (around £65) in Western Australia to \$2,000 (around £1,300) in the Australian Capital Territory. Australian Government, *Electoral Reform Green Paper*, p. 198.

¹¹⁹ Section 232(2) of the NZ Electoral Act 1993 provides that the security shall be an amount of \$1,000, and shall be given by recognisance to the Crown entered into by any number of sureties not exceeding 5 or by a deposit of money, or partly in one way and partly in the other.

¹²⁰ Section 526(1) of the Canada Elections Act 2000 provides that an application to challenge an election must be accompanied by security for costs in the amount of \$1,000.

¹²¹ £465 to issue a petition, £45 for making an application to fix the amount of security for costs, £5,000 security of costs.

¹²² C Hughes, 'The Illusive Phenomenon of Fraudulent Voting Practices: A Review Article', *Australian Journal of Politics and History*, vol. 44, no. 3, 1998, p. 477, citing C Copeman and A McGrath (eds.), *Corrupt Elections: Recent Australian Studies and Experiences of Ballot Rigging*, Tower House Publications, Kensington, 1997. Also see Australia Government, *Electoral Reform Green Paper*, p. 200.

¹²³ Section 132(3)(a) of the Irish Electoral Act 1992.

¹²⁴ K Rix, 'The Elimination of Corrupt Practices in British Elections? Reassessing the impact of the 1883 Corrupt Practices Act', *English Historical Review* cxxiii.500, February 2008.

¹²⁵ Home Office, *op. cit.*, p. 18.

¹²⁶ D Butler and R Rose, *The British General Election of 1959*, Macmillan, London, 1960, p.280.

¹²⁷ Coleman, *op. cit.*, p. 1487.

¹²⁸ The Conservative Party, the Labour Party or the Liberal Democrats.

¹²⁹ Any other registered political party.

¹³⁰ The petitioners in the remaining two cases were identified simply as 'candidate'. Both were in regards to elections to the Corporation of London. See Appendix C.

¹³¹ It could be argued that electors are less well-placed than candidates to become aware of a departure from electoral law during an election and that this may, at least partly, explain why so few electors have brought petitions. However, electors are still close to the election – they receive communications from candidates, follow the election in the local media and vote on polling day and may still be in a position to learn of grounds for bringing a petition.

¹³² It should be noted that large political parties contest more elections than small parties, so (to some extent) it would be expected that they bring proportionally more petitions than small parties. Further work is necessary to determine whether the eleven petitions brought by large parties compared to three by small parties reflects the difference in the number of seats such parties contest.

¹³³ West Central Oxford ward, Oxfordshire County Council, see Appendix C.

¹³⁴ The modern petition system was created by the Parliamentary Elections Act 1868 and is largely unchanged today.

¹³⁵ Lardy, *op. cit.*, p. 139.

¹³⁶ R Morris and D Monks, *Running Elections 2011*, SOLACE Enterprises, London 2011, p. 169.

¹³⁷ *Maley v Hackney and Sutton* [2008] M/332/08 in respect of Northwood and Birches Head Ward, Stoke-on-Trent City Council.

¹³⁸ The Commission understands that although the majority of this figure was paid by the Returning Officer's insurance, the insurance company did not pay for some items of expenditure such as travel and accommodation for attending proceedings in London where numerous separate hearings were held.

¹³⁹ *Scarth v Amin and Reeves* [2008].

¹⁴⁰ Information provided to the Commission.

¹⁴¹ *Akhtar and others v Jahan and others Iqbal and others v Islam and others* [2005] All ER (D) 15 (Apr). Judgment affirmed by Divisional Court [2005] EWHC 2365.

¹⁴² Stewart, *op. cit.*, p. 658.

¹⁴³ An overview of further inconsistencies is available at The Law Commission, *op. cit.*, pp. 70-74, paragraphs 4.41 to 4.55.

¹⁴⁴ Section 121(1)(a) of the RPA 1983.

¹⁴⁵ Section 128(1) of the RPA 1983.

¹⁴⁶ However, the Returning Officer may be able to quickly correct any slip of the tongue during the making of the declaration. See Price, *op. cit.*, paragraph 17.39.

¹⁴⁷ D Monks, *Practical Elections Administration*, Shaw & Sons Ltd, Crayford, 2008, p. 92.

¹⁴⁸ *ibid.*, p. 93.

¹⁴⁹ Roger Morris and David Monks, both with significant experience of acting as Returning Officers, state in *Running Elections 2011* that, 'the general rule is that once the result of an election has been declared, if it is to be questioned the procedure will have to be by way of election petition.' p. 166.

¹⁵⁰ The Commission's view is that once any declaration has been made, even if it contains errors, the only way the declared result can be altered is by an election court dealing with an election petition.

¹⁵¹ For a consideration of *Morgan* see B Watt, *UK Election Law: A Critical Examination*, Glass House Press, London, 2006, pp. 163-172.

¹⁵² Information provided to the Commission.

¹⁵³ Rule 5(3) of the 1960 Rules.

¹⁵⁴ For example, see Section 121(3) to (5) and 136 RPA 1983.

¹⁵⁵ Section 120 (this falls within the meaning of the term 'undue election') and Section 127 RPA 1983.

¹⁵⁶ Stewart, *op. cit.*, p. 665.

¹⁵⁷ Election court decisions may clarify important areas of electoral law. For example, the 2010 petition in Fermanagh and South Tyrone clarified that, at least in respect of some elections, recounts could reconsider the validity of ballot papers.

¹⁵⁸ Stewart, *op. cit.* pp. 665-666. If this suggestion is to be adopted, there would presumably need to be a legal duty on the election court to provide the necessary information to the Commission.

¹⁵⁹ Sections 6A and 6B PPERA

¹⁶⁰ Home Office, *op. cit.* p. 18.

¹⁶¹ Mr Justice Blake, in *Pilling and others*.

¹⁶² The Chief Electoral Officer for Northern Ireland at the time of the 2010 election petition in Fermanagh and South Tyrone has informed the Commission that a significant amount of staff time was taken up in working on the petition. For example, the disclosure of documents was a particularly time consuming process, requiring a comprehensive search of all local offices in the event that any disclosable documents were held there.

¹⁶³ Venice Commission, *Code of Good Practice*, p. 30, paragraph 95.

¹⁶⁴ Venice Commission, *Report on the Cancellation of Election Results*, p. 11, paragraph 60.

¹⁶⁵ IDEA, *op. cit.*, p. 93.

¹⁶⁶ Petit, *op. cit.*, p. 11.

¹⁶⁷ *ibid.*, p. 7. Also see p. 12, paragraph 23.

¹⁶⁸ *ibid.*, p.13.

¹⁶⁹ In France there is no time limit on the court hearing the appeal however an appeal is usually determined within one year. There is no time limit in Germany and cases sometimes are still pending after the following election.

¹⁷⁰ Venice Commission, *Report on the Cancellation of Election Results*, p. 11, paragraph 63. Lithuania - three days; Latvia - seven days; Estonia - three days for the review of complaints by electoral bodies and

seven working days by the Supreme Court; Czech Republic - 20 days for the Supreme Administrative Court to issue its decision; Austria - within four weeks; Bulgaria – one month; South Korea – 180 days.

¹⁷¹ Section 525(3) of the Canada Elections Act 2000.

¹⁷² See Appendix C.

¹⁷³ Paul Hackney (Returning Officer for Stoke on Trent), 'Being on the Wrong End of an Election Petition: A Case Study' slides from presentation delivered on 12 September 2011 to the Association of Electoral Administrators' Annual Seminar, http://www.aea-elections.co.uk/annualseminars/downloads/greenwich_2011/election_petition_paul_hackney.pdf

¹⁷⁴ Petit, *op. cit.*, p. 11.

¹⁷⁵ *Akhtar and others v Jahan and others Iqbal and others v Islam and others* [2005] All ER (D) 15 (Apr).

¹⁷⁶ See for example, Rule 56 of the Parliamentary Election Rules. Schedule 1 to the RPA 1983.

¹⁷⁷ As the High Court in Northern Ireland does not sit in July and August, it is conceivable that this petition could have been resolved even earlier.

¹⁷⁸ M Shipton, 'High Court orders recount after vote mix-up, 27 July 2012', *Wales Online*, <http://www.walesonline.co.uk/news/welsh-politics/welsh-politics-news/2012/07/27/high-court-orders-recount-after-vote-mix-up-91466-31488956/>

¹⁷⁹ There are also published comments in support of reform, see, for example, Monks, *Practical Elections Administration*, Crayford, Shaw & Sons Ltd, 2008 p. 92 and Morris, *Parliamentary Elections, Representation and the Law*, p. 99.

¹⁸⁰ It may be possible for the 12 month time limit to be extended in some cases.

¹⁸¹ *Akhtar and others*.

¹⁸² In this case a prosecution was not brought for reasons relating to the provision of further evidence.

¹⁸³ An application for judicial review of the election court's decision followed and the Court of Appeal issued a decision allowing the application on 26 May 2005. A further application for judicial review of a decision to name a ward organiser for a political party in the report under Section 160 RPA 1983 was successful on 19 October 2005.

¹⁸⁴ *R (on the application of Afzal) v Election Court and others* [2005] EWCA Civ 647 (in *Afzal*).

¹⁸⁵ *ibid*, paragraph 46.

¹⁸⁶ It should be noted that the Court of the Appeal also stated that, 'The procedural shortcomings that we have identified in relation to the manner in which he dealt with the case made against Mr Azfal should not be permitted to distort the overall picture painted by the Commissioner's otherwise admirable judgment'.

¹⁸⁷ Section 144 of the RPA 1983. See also Section 145(1) in respect of a local government election petition.

¹⁸⁸ This report must include: whether any corrupt or illegal practice has or has not been proved to have been committed and the nature of that practice; whether that practice was committed by or with the consent of a candidate at that election; whether a candidate's agent has been guilty of a corrupt or illegal practice; the names of any persons who have been found to be guilty of a corrupt or illegal practice at that election.

¹⁸⁹ Section 144(4) and 145(3) of the RPA 1983.

¹⁹⁰ Five years in the case of a corrupt practice and three years in the case of an illegal practice.

¹⁹¹ Section 160(4) and (5) RPA.

¹⁹² Section 160(4)(b) RPA.

¹⁹³ Section 164(1) of the RPA 1983.

¹⁹⁴ For a consideration of these issues, see Watt, *op. cit.*, pp.160-161.

¹⁹⁵ Lardy, *op. cit.*, p. 140.

¹⁹⁶ This would not assist if the losing candidate was an independent.

¹⁹⁷ *R. (on the application of Conservative and Unionist Party) v Election Commissioner*, [2010] EWHC 285 (Admin). The only circumstances in which someone who was not a party to a petition could be liable to pay the costs of the successful party are set out in Section 156 RPA 1983.

¹⁹⁸ Petit, *op. cit.*, p. 10.

¹⁹⁹ *ibid.*, p. 14.

²⁰⁰ Morris, *Parliamentary Elections, Representation and the Law*, p. 90.

²⁰¹ M White, 'Were all those Lib Dem MPs lying about fees if they meant it at the time? 9 November 2010', The Guardian, <http://www.guardian.co.uk/commentisfree/2010/nov/09/lib-dems-fees>.

²⁰² As explained above, such petitions could often be avoided if the Returning Officer had a power to correct obvious procedural mistakes or make an application to a court to do so; only contentious and complex cases of alleged errors on the part of election officials would then proceed to a petition.

²⁰³ Section 140(1) RPA 1983

²⁰⁴ Section 140(2) RPA 1983

²⁰⁵ Section 140(3) and Section 140(6) RPA. The Lord Advocate in Scotland has no such power under Section 140.

²⁰⁶ This was definitively decided by the Court of Appeal in *R v Rowe, ex parte Mainwaring* [1992] 1 WLR 1059. The same burden of proof applies even if the election court is determining the validity and outcome of the election and not conducting a criminal trial.

²⁰⁷ Section 160 RPA 1983

²⁰⁸ Rules 6(1) and 9(3) of the 1960 Rules.

²⁰⁹ Rules 12(2) and 13(2) of the 1960 Rules.

²¹⁰ Section 181(2) RPA 1983

²¹¹ Section 160(3) RPA 1983

²¹² The Court of Appeal concluded that if the Commissioner had been minded to prefer the evidence of one witness who testified that she had seen one of the respondents at the warehouse rather than that of those who said that the respondent was not there (which was supported by the police memorandum), the Commissioner should have made this plain and given the Respondent's solicitor the chance to ask for the witness to be recalled. Equally, if the Commissioner was minded to conclude that the most probable explanation of the conflict of evidence was that the Respondent had sought to pass himself off as someone else, he should have made this plain so that counsel could have had the chance to make submissions about this. The Court of Appeal was also concerned that the Commissioner's judgment misrepresented the Respondent's evidence by erroneously stating that the Respondent had disavowed his own evidence and that the Respondent's evidence was inconsistent with another's evidence.

²¹³ In *Afzal*, paragraph 46.

²¹⁴ *ibid*, paragraph 42.

²¹⁵ *R (on the application of Khan) v Election Commissioner* [2005] All ER (D) 203 (Oct) (*In Khan*). Section 160(1) RPA 1983 applies where the election court's report will name a person who has been proved at the trial to have been guilty of any corrupt or illegal practice, but who is neither a party to the petition nor a candidate on behalf of whom the seat or office is claimed. In such a case the election court must first cause notice to be given to him, and if he appears in pursuance of the notice, shall give him an opportunity of being heard by himself and of calling evidence in his defence to show why he should not be so reported. The High Court held that the purpose of this provision was to give any person against

whom the Commissioner was minded to make a finding, opportunity to give evidence and make representations as to why they should not be named in the report. It was deemed a fundamental issue of fairness: no finding akin to a criminal finding of guilt should be arrived at without the subject having had opportunity to address the allegations against him or her.

²¹⁶ A political party's ward organiser for a local election in the Aston ward in Birmingham held in June 2004.

²¹⁷ In *Khan*.

²¹⁸ In *Afzal*, paragraph 46.

²¹⁹ *Stewart, op. cit.*, p. 667.

²²⁰ However, there are no petitions that the Commission is aware of that were determined within two months, the period set out as a maximum by the OSCE / ODIHR.

²²¹ The term 'large party' refers either to the Conservative Party, the Labour Party or the Liberal Democrats.

²²² The Petitioner applied for a scrutiny and recount. The first hearing on 30 July 2007 was adjourned. At a hearing on 12 September 2007, it was ordered that the scrutiny should take place. On 21 September 2007, a recount took place which determined that two votes for the returned candidate might be disputed and the respondents were advised to get further legal advice. On 2 January 2008, the Fourth Petitioner issued an application to have the case stated as a special case. The case was heard on 11 January 2008. An order under Section 146 can only be made by a Divisional Court which was sitting next on 8 February 2012. The case was therefore adjourned to this sitting and heard as a special case on that date followed by the judgement.

²²³ 'Small party' refers to a registered political party other than the Conservative Party, the Labour Party and the Liberal Democrats.

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