Supporting the Northern Ireland Assembly and local elections, 5 May 2011

The Electoral Commission

Dealing with doubtful ballot papers

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1   Introduction

1.1   This booklet is designed to assist Deputy Returning Officers in adjudicating doubtful ballot papers at the Northern Ireland Assembly and local elections on 5 May 2011. It contains principles and examples of allowed and rejected votes that you should follow when adjudicating any doubtful ballot papers. The examples have been developed in consultation with the Chief Electoral Officer for Northern Ireland.

1.2   When undertaking the adjudication of doubtful ballot papers it is important to ensure that the process is carried out in full view of any counting and election agents present, as well as in the presence of any Commission representatives and accredited observers in attendance.

1.3   You should adjudicate doubtful ballot papers regularly as the count proceeds and not leave the adjudication of doubtful ballot papers until the end of the count.

1.4   Once any doubtful ballot papers have been dealt with, those deemed to be allowed must be included in the count. You are required by law to mark those ballot papers that have been rejected with the word 'rejected' and if a designated counting agent objects to a particular rejection, then the ballot paper must be marked 'rejection objected to'.[1]

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1   Rule 44C(2), Schedule 1 of The Northern Ireland Assembly (Elections) Order 2001 (as amended) and Rule 46(2), Schedule 5 of The Electoral Law Act (Northern Ireland) 1962 (as amended).

1.5   In addition, you are legally required to prepare a statement showing the number of ballot papers rejected under each of the following headings:

- want of official mark and unique identifying mark
- no first preference
- more than one first preference
- the voter can be identified
- unmarked or void for uncertainty

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2   Rule 44C(3), Schedule 1 of The Northern Ireland Assembly (Elections) Order 2001 (as amended) and Rule 46(3), Schedule 5 of The Electoral Law Act (Northern Ireland) 1962 (as amended).

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2   Legislation

Decisions of the Returning Officer

2.1   Your decision is final, subject only to review on election petition.[3]

2.2   However, your discretion is limited to rejecting votes solely on the grounds listed in the election rules.

The election rules

2.3   The relevant rules on adjudicating doubtful ballot papers are contained, for the Assembly election, in Schedule 1 of The Northern Ireland Assembly (Elections) Order 2001 (as amended by The Northern Ireland Assembly (Elections) (Amendment) Order 2009). For the local elections, the rules are contained in Schedule 5 of The Electoral Law Act (Northern Ireland) 1962 (as amended).

Rejected ballot papers at the Assembly election

44C (1) Any ballot paper—

(a) which does not bear the official mark and other unique identifying mark;
(b) on which the figure "1" standing alone is not placed so as to indicate a first preference for any candidate;
(c) on which the figure "1" standing alone indicating a first preference is set opposite the name of more than one candidate;
(d) on which anything (other than the printed number on the back) is written or marked by which the voter can be identified; or
(e) which is unmarked or void for uncertainty,

shall be void and not counted, but the ballot paper shall not be void

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3   Rule 44C(4), Schedule 1 of The Northern Ireland Assembly (Elections) Order 2001 (as amended) and Rule 46(4), Schedule 5 of The Electoral Law Act (Northern Ireland) 1962 (as amended).

by reason only of carrying the words "one", "two", "three", (and so on) or any other mark instead of a figure if, in the opinion of the returning officer, the word or mark clearly indicates a preference or preferences.

(2) The returning officer shall endorse "Rejected" on any ballot paper which under this rule is not to be counted and if an election agent objects to his decision shall add to the endorsement the words "rejection objected to".

(3) The returning officer shall prepare a statement showing the number of ballot papers rejected by him under each of sub-paragraphs (a), (b), (c), (d) and (e) of paragraph (1) above and shall, on request, allow any candidate or agent to copy that statement.

(4) The decision of the returning officer on any question arising in respect of a ballot paper shall be final but shall be subject to review on an election petition.

[...]

44G (4) Where a ballot paper is so marked that it is unclear to the returning officer at any stage of the count under rule 44F or 44H for which candidate the next preference is recorded, the returning officer shall treat any vote on that ballot paper as a non-transferable vote; and votes on a ballot paper shall be so treated where, for example, the names of two or more candidates (whether continuing candidates or not) are so marked that, in the opinion of the returning officer, the same order of preference is indicated or the numerical sequence is broken.

Rejected ballot papers at the local elections

46 (1) Any ballot paper—

(a) which does not bear the official mark; or

(b) on which the figure 1 standing alone is not placed so as to indicate a first preference for some candidate; or

(c) on which the figure 1 standing alone indicating a first preference is set opposite the name of more than one candidate; or

(d) on which anything (other than the printed number on the back) is written or marked by which the voter can be identified; or

(e) which is unmarked or void for uncertainty,

shall be void and not counted, but the ballot paper shall not be void by reason only of carrying the words 'one', 'two', 'three', (and so on) or any other mark instead of a figure if, in the opinion of the returning officer, the word or mark clearly indicates a preference or preferences.

(2) The returning officer shall endorse 'rejected' on any ballot paper which under this rule is not to be counted and if an election agent objects to his decision shall add to the endorsement the words 'rejection objected to'.

(3) The returning officer shall prepare a statement showing the number of ballot papers rejected by him under each of sub-paragraphs (a), (b), (c), (d) and (e) of paragraph (1) and shall, on request, allow any candidate or agent of a candidate to copy such statement.

(4) The decision of the returning officer on any question arising in respect of a ballot paper shall be final but shall be subject to review on an election petition.

[...]

50 (4) Where a ballot paper is so marked that it is unclear to the returning officer at any stage of the count under rule 49 or 51 for which candidate the next preference is recorded, the returning officer shall treat any vote on that ballot paper as a non-transferable vote; and votes on a ballot paper shall be so treated where, for example, the names of two or more candidates (whether continuing candidates or not) are so marked that, in the opinion of the returning officer, the same order of preference is indicated or the numerical sequence is broken.

3 Principles of adjudication

3.1 Any doubtful ballot papers should be placed in a tray for the supervisor to take to the Deputy Returning Officer for adjudication. The front of ballot papers should be carefully checked for any marks, in case the voter has made any marks outside the voting boxes. The following ballot papers require further consideration:

- those that do not have the official mark (and unique identifying mark in the case of Assembly ballot papers)
- those where a voter appears to have indicated more than one first preference
- those with broken numerical sequences or where the same order of preference appears to be indicated
- those where the voter's intention is uncertain
- those having any writing or mark by which the voter can be identified
- any paper torn or damaged in any way
- any paper with anything unusual about it (for example, any paper that appears to have been altered, either with a clearly different writing instrument or with correction fluid)

3.2 In the case of ballot papers that appear to have been altered, you should consider packaging them separately in case of later challenge or investigation.

3.3 Unless the marked ballot paper identifies the voter, a ballot paper should not be rejected if the voter's intention is clear[4] – even if the ballot paper is:

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4   Rule 44C(1), Schedule 1 of The Northern Ireland Assembly (Elections) Order 2001 (as amended) and Rule 46(1), Schedule 5 of The Electoral Law Act (Northern Ireland) 1962 (as amended).

- not marked in the proper place
- marked other than by numbers

Want of official mark and unique identifying mark

3.4   Absence of the official mark on the local election ballot paper and lack of either the official mark or unique identifying mark on the Assembly ballot paper must lead to an automatic rejection.[5] You have no discretion in this regard.

3.5   However, where a stamping instrument has been used instead of a pre-printed official mark, a partial piercing or embossing of the ballot paper should not in itself result in a rejection. As long as it is clear that the ballot paper has been stamped by polling station staff, the fact that not all the pins have stamped through the ballot paper or that the perforation is not wholly on the paper is immaterial.

Ballot papers with more than one first preference

3.6   You will need to make a judgment about whether a voter has indicated more than one first preference on the ballot paper.

3.7   Additional marks should not lead to a rejection if it is clear that those marks were not intended as a vote. But if, for example, the ballot paper is marked 1, 1, 2, 3, 4, etc., it should be rejected as having more than one first preference.

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5   Cirencester case, Lawson v Chester-Master (1893) 4 O'M & H 194 and South Newington case, Lewis v Shepperdson (1948) 2 All ER 503.

Ballot papers with broken numerical sequences or where the same order of preference appears to be indicated

3.8   If, for example, the ballot paper is marked 1, 2, 3, 5, 6, 7, etc. (i.e. there is no fourth preference indicated), the paper must be adjudicated as good for the first three preferences, after which the ballot paper becomes an exhausted ballot and non-transferable. The same applies to a ballot paper marked 1, 2, 3, 4, 4, 5, 6, 7. Ballot papers such as these are referred to in this booklet as partially accepted.

Writing or mark by which the voter can be identified

3.9   There are two aspects to this:

• either any writing or mark on the ballot paper which, of itself, identifies the voter, or
• the voter can be identified by such writing or mark

3.10 It is important to bear in mind that the legislation states that the voter **can be**, not may be or might possibly be, identified.

Writing or mark which, of itself, identifies the voter

3.11 A ballot paper should be rejected if:

• the electoral number of the voter written on the ballot paper unequivocally identifies the voter
• it may reasonably be held to bear the name (or signature) or unique address of the voter on its front

7   Rule 44G(4), Schedule 1 of The Northern Ireland Assembly (Elections) Order 2001 (as amended) and Rule 50(4), Schedule 5 of The Electoral Law Act (Northern Ireland) 1962 (as amended).

The voter can be indirectly identified by any writing or mark on the ballot paper

3.12 You are not required to investigate the matter or require evidence to be produced to identify the writing or mark, but you should consider any evidence that is given to you when adjudicating.

3.13 Where there is doubt about the identity of the person who marked the ballot paper, you should allow rather than reject the ballot paper.

Unmarked ballot papers

3.14 Unmarked ballot papers should be rejected, even if a mark on the back of the ballot paper shows through on the front.

3.15 A ballot paper marked by means other than a pencil should not be rejected simply because of that.

3.16 Marks other than a number, however faint, may still be valid.

Void for uncertainty

3.17 Establishing voter intention is crucial when determining doubtful ballot papers. The key phrase in the rules is: 'the ballot paper […] shall not […] be deemed to be void if […], in the opinion of the returning officer, the word or mark clearly indicates a preference or preferences'.

3.18 Each ballot paper should be considered on its own merits and decisions should be taken on a case-by-case basis.

3.19 The key question you should ask is whether the voter has, on the face of the paper, indicated a reasonably clear intention to indicate a preference for a candidate.

4   Summary

4.1   The principles to be applied are set out above. In practical terms, the general approach can be summarised as follows:

- always be clear and consistent
- take time to ensure that a considered decision is given in every case
- attempt to allow, not reject
- when considering the refusal grounds that the ballot paper has been marked by more than one first preference or is void for uncertainty:
  - endeavour, wherever possible, to discern the intention of the voter and to give effect to it
  - attempt to allow where the voter's intention is reasonably clear, rather than reject the ballot paper

5   Examples

5.1   The examples provided here under the 'allowed' and 'rejected' headings are based on previous case law or taken from the specific rules for the elections. Ultimately, the decision on any particular ballot paper rests with the Deputy Returning Officer and it is for them to determine their own view of the application of the law.

5.2   References are made to Schedule 1 of The Northern Ireland Assembly (Elections) Order 2001 (as amended) ('The Assembly rules') and Schedule 5 of The Electoral Law Act (Northern Ireland) 1962 (as amended) ('The Local rules').

Case law references

5.3   Abbreviated case law references have been used throughout this booklet. The following table lists the full case law references.

Abbreviation	Full reference
Berwick-upon-Tweed case	Berwick-upon-Tweed case [1880] 3 O'M & H 178
Buckrose case	Buckrose case, *Sykes v McArthur* [1886] 5 O' M & H 110
Cirencester case	*Lawson v Chester-Master* [1893] 4 O'M & H 194
Cornwell v Marshall	*Cornwell v Marshall* [1977] 75 LGR 676 DC
Eley v Durant	*Eley v Durant* [1900] 4SJ 430

Levers v Morris	*Levers v Morris* [1971] 3 All ER QBD
Rowe v Cox	*Rowe v Cox* [2001] QBD, Case M/294/01
Ruffle v Rogers	*Ruffle v Rogers* [1982] QB 1220
South Newington case	South Newington case, *Lewis v Shepperdson* [1948] 2 All ER 503
West Bromwich case	West Bromwich case, *Hazel v Viscount Lewisham* [1911] 6 O'M & H 256
Woodward v Sarsons	*Woodward v Sarsons* [1875] LR 10 CP 733

Allowed votes

The following are suggested examples of allowed votes.

Mark order of preference in space below	
	◈ 1 CANDIDATE A A Party
	4 CANDIDATE B Independent
	▣ 3 CANDIDATE C C Party
	◉ 2 CANDIDATE D D Party

Allow. Assembly rule 44C(1) and Local rule 46(1).

Mark order of preference in space below		
1	◈	CANDIDATE A A Party
~~4~~ *3*		CANDIDATE B Independent
2	▣	CANDIDATE C C Party
4	◉	CANDIDATE D D Party

Allow. Assembly rule 44C(1), Local rule 46(1) and Cirencester case, Eley v Durant.

Mark order of preference in space below		
	◈	CANDIDATE A A Party
✗		CANDIDATE B Independent
	▣	CANDIDATE C C Party
	◉	CANDIDATE D D Party

Partially accept – allow for candidate B as first preference. Assembly rule 44C(1) and Local rule 46(1).

Mark order of preference in space below		
✗ ✗	◈	CANDIDATE A A Party
✗		CANDIDATE B Independent
✗✗✗	▣	CANDIDATE C C Party
✗✗✗✗	◉	CANDIDATE D D Party

Allow for candidates B, A, C and D as first, second, third and fourth preference respectively. Assembly rule 44C(1) and Local rule 46(1).

Mark order of preference in space below		
III	◈	CANDIDATE A A Party
II		CANDIDATE B Independent
I	▣	CANDIDATE C C Party
IIII	◉	CANDIDATE D D Party

Allow for candidates C, B, A and D as first, second, third and fourth preference respectively. Assembly rule 44C(1) and Local rule 46(1).

Mark order of preference in space below		
one	◈	CANDIDATE A A Party
four		CANDIDATE B Independent
three	▣	CANDIDATE C C Party
two	◉	CANDIDATE D D Party

Allow. Assembly rule 44C(1) and Local rule 46(1).

Mark order of preference in space below	
b	◈ CANDIDATE A A Party
a	CANDIDATE B Independent
c	▣ CANDIDATE C C Party
d	◉ CANDIDATE D D Party

Allow (in preference order of a–d). Assembly rule 44C(1) and Local rule 46(1).

Mark order of preference in space below		
✕	◈	CANDIDATE A A Party
2		CANDIDATE B Independent
3	▣	CANDIDATE C C Party
4	◉	CANDIDATE D D Party

Allow for candidates A, B, C and D as first, second, third and fourth preference respectively. Assembly rule 44C(1) and Local rule 46(1).

Mark order of preference in space below		
✔	◈	CANDIDATE A A Party
2		CANDIDATE B Independent
4	▣	CANDIDATE C C Party
	◉	CANDIDATE D D Party

Partially accept – broken numerical sequence. Allow for candidates A and B as first and second preference respectively. Assembly rules 44C(1) and 44G(4). Local rules 46(1) and 50(4).

Mark order of preference in space below		
1	◈	CANDIDATE A A Party
3		CANDIDATE B Independent
	▣	CANDIDATE C C Party
	◉	CANDIDATE D D Party

Partially accept – broken numerical sequence. Allow for candidate A as first preference. Assembly rules 44C(1) and 44G(4). Local rules 46(1) and 50(4).

Mark order of preference in space below		
0	◈	CANDIDATE A A Party
0		CANDIDATE B Independent
2	▣	CANDIDATE C C Party
1	◉	CANDIDATE D D Party

Partially accept – broken numerical sequence. Allow for candidates D and C as first and second preference respectively. Assembly rules 44C(1) and 44G(4). Local rules 46(1) and 50(4).

Mark order of preference in space below		
1	◈	**CANDIDATE A** A Party
2		**CANDIDATE B** Independent
3	▣	**CANDIDATE C** C Party
3	◉	**CANDIDATE D** D Party

Partially accept – same order of preference indicated. Allow for candidates A and B as first and second preferences respectively. Assembly rules 44C(1) and 44G(4) and Local rules 46(1) and 50(4).

Mark order of preference in space below		
0	◈	CANDIDATE A A Party
0		CANDIDATE B Independent
0	▣	CANDIDATE C C Party
✕	◉	CANDIDATE D D Party

Partially accept – allow for candidate D as first preference. Assembly rule 44C(1) and Local rule 46(1).

Mark order of preference in space below	
	◈ CANDIDATE A A Party
1	CANDIDATE B Independent
	▣ CANDIDATE C C Party
2	◉ CANDIDATE D D Party

Partially accept – broken numerical sequence. Allow for candidates B and D as first and second preferences respectively. Assembly rules 44C(1) and 44G(4). Local rules 46(1) and 50(4). See also Woodward v Sarsons.

Mark order of preference in space below	
	◈ CANDIDATE A A Party
	CANDIDATE B Independent
	▣ CANDIDATE C C Party
	◉ CANDIDATE D D Party

Partially accept – allow for candidate C as first preference. Assembly rule 44C(1), Local rule 46(1) and Levers v Morris. See also Schofield's Election Law, Volume 5, Appendix E, E20 (Shaw & Sons, 2008 as updated by supplement issue no. 1).

Mark order of preference in space below		
yes	◈	CANDIDATE A A Party
		CANDIDATE B Independent
	▣	CANDIDATE C C Party
	◉	CANDIDATE D D Party

Partially accept – allow for candidate A as first preference. Assembly rule 44C(1), Local rule 46(1) and Ruffle v Rogers.

Mark order of preference in space below		
	◈	CANDIDATE A A Party
		CANDIDATE B Independent
Candidate C!	▣	CANDIDATE C C Party
	◉	CANDIDATE D D Party

Partially accept – allow for candidate C as first preference. Assembly rule 44C(1), local rule 46(1) and Ruffle v Rogers (provided there is no other candidate by the name of C).

Mark order of preference in space below		
1	◈	CANDIDATE A A Party
2		CANDIDATE B Independent
✕	▣	CANDIDATE C C Party
✕	◉	CANDIDATE D D Party

Partially accept – broken numerical sequence. Allow for candidates A and B as first and second preferences respectively. Assembly rules 44C(1) and 44G(4). Local rules 46(1) and 50(4).

The following are examples of rejected votes.

Mark order of preference in space below		
1	◈	CANDIDATE A A Party
1		CANDIDATE B Independent
2	▣	CANDIDATE C C Party
3	◉	CANDIDATE D D Party

Reject – first preference opposite more than one candidate. Assembly rule 44C(1)(c) and Local rule 46(1)(c).

Mark order of preference in space below		
2	◈	CANDIDATE A A Party
3		CANDIDATE B Independent
4	▣	CANDIDATE C C Party
5	◉	CANDIDATE D D Party

Reject – no first preference. Assembly rule 44C(1)(b) and Local rule 46(1)(b).

Mark order of preference in space below	
	◈ CANDIDATE A A Party
J.Smith 24 Acacia Grove Belfast.	CANDIDATE B Independent
	▣ CANDIDATE C C Party
	◉ CANDIDATE D D Party

Reject – voter can be identified. Assembly rule 44C(1)(d), Local rule 46(1)(d) and Woodward v Sarsons, South Newington case.

Mark order of preference in space below		
2	◈	CANDIDATE A A Party
		CANDIDATE B Independent
1	▣	CANDIDATE C C Party
3	◉	CANDIDATE D D Party

Reject – void for uncertainty. Assembly rule 44C(1)(e), Local rule 46(1)(e) and Buckrose case.

Mark order of preference in space below		
	◈	CANDIDATE A A Party
		CANDIDATE B Independent
	▣	CANDIDATE C C Party
✗ *None of the above*	◉	CANDIDATE D D Party

Reject – void for uncertainty. Assembly rule 44C(1)(e) and Local rule 46(1)(e).

Mark order of preference in space below		
1	◈	CANDIDATE A A Party
2		CANDIDATE B Independent
	▣	CANDIDATE C C Party
✗	◉	CANDIDATE D D Party

Reject – first preference opposite more than one candidate / void for uncertainty. Assembly rules 44C(1)(c) and (e), Local rules 46(1)(c) and (e).

Mark order of preference in space below	
	◈ CANDIDATE A A Party
	CANDIDATE B Independent
	▣ CANDIDATE C C Party
	◉ CANDIDATE D D Party

Reject – void for uncertainty. Assembly rule 44C(1)(e), Local rule 46(1)(e) and Rowe v Cox.

Mark order of preference in space below	
	◈ CANDIDATE A A Party
	CANDIDATE B Independent
	▣ CANDIDATE C C Party
	◉ CANDIDATE D D Party

Reject – ballot paper unmarked. Assembly rule 44C(1)(e) and Local rule 46(1)(e).

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