

# A democracy that works for everyone: British citizens overseas

## Electoral Commission response to the UK Government's Policy Statement

8 December 2016

### Introduction

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1. The Electoral Commission welcomes the publication by the UK Government of its policy statement *A democracy that works for everyone: British citizens overseas* which sets out how it intends to approach implementing its manifesto commitment to “enfranchise any British citizen overseas who was previously resident or registered to vote in the UK”.
2. The UK Government has invited feedback on its proposals, including the application process and information needed for verification of the applicant’s identity and residence, renewal of registrations and envisaged cost implications. We have considered the practical implications of implementing the Government’s proposals for Electoral Registration Officers and the Electoral Commission.
3. As well as commenting on the detail of the proposed approach, our response also highlights two important areas where the Commission believes the Government’s proposals could have significant implications:
  - The impact of the Government’s proposals on **the control of donations to political parties and campaigners**.
  - The impact of the Government’s proposals on **the ability of overseas voters to cast their vote**.

4. Enabling overseas British citizens who were previously resident (and who were not necessarily previously registered) in the UK to register raises important questions that need to be resolved (e.g. the definition of residence).

5. We have identified a number of other technical issues which would need to be resolved prior to implementation. The Government should consider publishing a draft Overseas Voters Bill for consultation before introducing legislation to Parliament. The Government should also undertake a detailed impact assessment of the regulatory, administrative and financial implications of the proposed changes, which should be published alongside a draft Bill.

## Identity verification

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6. We note that overseas applicants will need to have their identity verified before they can be registered. The policy statement specifies the National Insurance number, or existing Government records, as the means by which an overseas applicants' identity will be checked initially. There is a need to clarify whether the Government envisages EROs using centrally held Government data to help verify overseas applicants and/or local data sources to verify the identity of applicants if this is available (as they can currently do in the case of both domestic and overseas applications).

7. If an applicant's identity cannot be verified by these methods, then they will be asked to provide a copy (or the original, at the ERO's discretion) of their current British passport as documentary evidence.

8. We support the insertion of this additional step to allow applicants to prove their identity, although we do not believe that it would be practicable or desirable for EROs to be given the discretion to request an applicant's original passport. First, the applicant will be applying from abroad and may need to retain their passport for identification purposes in the country in which they are resident, or simply to allow them freedom to travel. The sometimes unpredictable nature of international mail services mean that an applicant could be without their passport for an extended period, even months. Second, it is questionable as to whether EROs would wish to have responsibility for an original passport, given the risk of the document being lost or damaged in transit.

9. We suggest that applicants should have the option of providing a certified copy of their passport to the ERO, which can be certified by anyone in good standing.<sup>1</sup> This would be in keeping with existing attestation requirements.

10. In addition, we recommend that consideration be given to extending the range of British documents (copies in the first instance) that could be used to establish an applicant's identity to include documents, or combinations of documents, that may be used by ordinary electors using the exceptions process, e.g. birth certificate, marriage certificate, current photo driving license.

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<sup>1</sup> See <https://www.gov.uk/certifying-a-document>

11. Broadening the range of identity documents in this way should also reduce the reliance of applicants on overseas electors' attestations. We have received feedback from some overseas voters which suggests that they have struggled to find another British citizen overseas who is registered to vote in the UK to attest their application.

12. The Government intends to impose a limit of "any two attestations which an elector can make in support of an application for registration within a given period". This would represent a departure from the current system, in which there is no limit on the number of attestations a person can make in support of an overseas application.

13. If implemented, the proposed new limit would ensure consistent attestation rules across all electors and improve security in the registration system. On the other hand, overseas British citizens may find it even more difficult to find someone who is able to attest. Extending the range of acceptable identity documents along the lines set out in paragraph 10 above would also offset any risk of applicants being disadvantaged by the proposed new limit on the number of attestations that a person can make. Furthermore, the pursuant increase in the overall numbers of electors registered overseas on the introduction of this policy may make it easier for those who still require a British citizen to attest their identity to find an eligible person.

14. We support the proposed requirement for the "attestor to confirm they are aware of the criminal penalty associated with knowingly providing false information to an ERO" and that the Government has also considered the feasibility of enforcement given that any alleged offenders would (presumably) be living abroad. We would also welcome clarification from the Government as to whether the ERO would be expected to perform any steps to confirm the eligibility of the attestor – for example, by verifying their electoral registration status with the ERO for the local authority in which the attestor has claimed to be registered.

## Address verification

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15. Under the Government's proposals, "overseas electors will be entitled to be registered in respect of just one UK address", with the connection with that address being either previous registration or residence. The Government envisages most applicants (and an increasing proportion of electors over time) being "verified by the ERO checking previous electoral registers". If an applicant cannot be verified in this way, then they will be asked to provide evidence of previous residence at the named address, either by submitting documentary evidence or an attestation.

16. EROs currently retain electoral registers for 15 years in accordance with the current 15 year time limit on the voting rights of British citizens living overseas. As such, verifying applicants who have not been registered in the UK within the past 15 years may prove more of a challenge, particularly if they are unable to produce relevant documentation after such a long period has passed. In these cases, attestation will be the only remaining route to registration.

17. There is a risk that the process by which an applicant may prove their previous registration or residence will prove onerous and that attestation therefore becomes the preferred route. This scenario would introduce significant risks and an additional burden on EROs, particularly if they are required to verify the attestor's details.

18. We would therefore recommend that EROs should be required to go through a series of steps (thereby bringing the overseas process more closely into line with the standard process) when verifying an applicant's address:

**Step 1:** ERO checks past registers to confirm the applicant was previously registered at the address they have given.

**Step 2:** Where an applicant's previous registration cannot be confirmed by checking past registers, the applicant must provide documentary evidence as proof they lived at the address they have given.

**Step 3:** Where the applicant's previous registration or residence cannot be confirmed by steps 1 and 2, the applicant must provide an attestation confirming they lived at the address they have given.

19. We have previously recommended that the Government should examine how the online registration system could be developed to enable voters to check whether they are already registered and welcome its commitment to exploring this as part of the wider work being undertaken around improving registration.

20. In addition to the potential administrative savings offered from voters being able to do this, if EROs could access the system securely, in a way that enabled them to check online whether those attesting overseas voter applications were properly registered, this could reduce some of the administrative burden that may be imposed from the changes outlined in the Government's policy statement. There is already a degree of precedence within the system for EROs to carry out these sorts of checks (i.e. EROs must confirm whether a proxy is registered in another local authority area) so having such a facility would assist EROs more broadly.

21. Such a change could significantly reduce the amount of time it will take EROs under the current system to contact a colleague (and for that colleague to then manually respond) to ensure that an application is valid and can be properly processed. We would welcome a commitment from Government to expand the scope of its existing plans for looking at improvements to the online system to include consideration of this approach.

22. It will also be important for the system to be able to deal with applications from overseas electors in relation to an address in Northern Ireland as soon practicable after online registration is introduced in Northern Ireland.

23. At present, overseas electors are required to register using the address at which they (or their parent(s) for children) were last registered. We believe that this principle should also apply for those electors (under the proposed policy) who were not registered prior to leaving the UK, i.e. they should be required to register using the address at which they were last resident. While this would be difficult to enforce

(the onus would be on the elector to be honest, perhaps reinforced by a requirement for them to make a truth declaration), we think that it is important to devise a system which provides a check against applicants “cherry picking” the constituency in which they register (using another past residence, for example) so that they can register in a “marginal” constituency rather than a “safe” seat.

24. The proposal to extend the franchise to British citizens living overseas as set out in the policy statement raises a broader question as to what constitutes “residence”, particularly given that the Government intends to remove the requirement to have previously been on the register (for an adult) or to have had a parent who was previously on the register (for a child).

25. The term “residence” is not defined in electoral legislation generally; however, relevant guidance is set out at section 5 of the 1983 Act.<sup>2</sup> EROs are also assisted in verifying residence and determining applications by principles established through the common law. It has been recognised by the courts that the determination of residence and the degree of permanence is a complex one. Such guidance as to whether a particular circumstance or form of occupation constitutes “residence” for the purposes of electoral registration has tended to be fact specific, although relevant principles may be drawn:

- a. The word “residence” has no technical or special meaning but in its ordinary sense implies a degree of permanence.<sup>3</sup> Permanence, like most aspects of residence, is a question of fact and degree.<sup>4</sup>

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<sup>2</sup> *Representation of the People Act 1983*

**5 Residence: general**

(1) This section applies where the question whether a person is resident at a particular address on the relevant date for the purposes of section 4 above falls to be determined for the purposes of that section.

(2) Regard shall be had, in particular, to the purpose and other circumstances, as well as to the fact, of his presence at, or absence from, the address on that date.

For example, where at a particular time a person is staying at any place otherwise than on a permanent basis, he may in all the circumstances be taken to be at that time—

- (a) resident there if he has no home elsewhere, or
- (b) not resident there if he does have a home elsewhere.

(3) For the purpose of determining whether a person is resident in a dwelling on the relevant date for the purposes of section 4 above, his residence in the dwelling shall not be taken to have been interrupted by reason of his absence in the performance of any duty arising from or incidental to any office, service or employment held or undertaken by him if—

- (a) he intends to resume actual residence within six months of giving up such residence, and will not be prevented from doing so by the performance of that duty; or
- (b) the dwelling serves as a permanent place of residence (whether for himself or for himself and other persons) and he would be in actual residence there but for his absence in the performance of that duty.

(4) For the purposes of subsection (3) above any temporary period of unemployment shall be disregarded.

(5) Subsection (3) above shall apply in relation to a person's absence by reason of his attendance on a course provided by an educational institution as it applies in relation to a person's absence in the performance of any duty such as is mentioned in that subsection.

(6) Subject to sections 7 and 7A below, a person who is detained at any place in legal custody shall not, by reason of his presence there, be treated for the purposes of section 4 above as resident there.

<sup>3</sup> *Fox v Stirk and Bristol Electoral Registration Officer* [1970] 2 Q.B. 463

<sup>4</sup> *Hipperson and others v Newbury District Electoral Registration Officer* [1985] Q.B. 1060

- b. The right to vote is approached by the legislation from the point of view of an entitlement to vote in, and in respect of the representation of the residents of, a particular area.<sup>5</sup> Although this pre-dates the extension of the parliamentary franchise to overseas electors, such electors are still required to register to vote in a particular UK constituency.

26. Unsurprisingly, as the franchise for overseas electors has to date been limited to those previously registered, rather than resident, in a UK constituency, the case law has not touched upon the question of residence in this context. If the franchise for overseas electors is to be extended to those who were not registered on the electoral register prior to leaving the UK, we recommend that the Government consider inserting a fuller definition, or further guidance on the question, of “residence” for the purposes of overseas residents applying for inclusion on the electoral register in respect of a particular UK constituency where they were not previously on the electoral register. This would assist both overseas applicants in determining in which constituency to apply for registration and in providing evidence or an attestation in respect of their previous residence, and EROs in verifying residence and determining such applications.

27. Under the current law, electors may apply to be on the electoral register in more than one constituency or local government area where they have a second residence. It is possible that an overseas elector could have had two residences at the relevant date and that there would be more than one constituency in which he would be entitled to be registered. We recommend that the Government clarify in the proposed legislation that an overseas elector is only able to apply to register to vote in one constituency, and provide guidance to applicants and EROs as to how to determine which is the most appropriate.

## Registration by children of British citizens overseas

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28. The policy statement is unclear how the proposed policy will apply to the children of British citizens who were raised abroad. For example, would a child born abroad to British parents and who, if born in the UK, would have been automatically eligible, become eligible to register when they reach 18 despite having never having lived in the UK?

## Renewal of registrations

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29. The Government proposes to retain the current registration period for overseas electors, which is 12 months. We recommend that the Government considers changing its policy to allow overseas electors to remain on the register for a five year period, providing a greater degree of alignment with the length of a UK Parliamentary

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<sup>5</sup> *Hipperson and others*

term, although the expiration of any overseas registration would depend on the timing of the application. This would allow overseas electors to participate in a by-election or in a UK general election called under the terms of the Fixed Term Parliaments Act 2011 without needing to re-register. It would also reduce the administrative and financial impact on EROs by reducing the amount of staff time required to administer (a larger number of) renewals every year and in the run up to an unscheduled UK general election.

30. Ideally, sending renewal reminders electronically should be the default method of contact with overseas electors. At present the registration application form (both the online and paper versions) includes a “contact details” section, which asks for the applicant’s telephone number(s) and an email address if they have one, although this is optional. We recommend that this section of both versions of the form be amended to make clear that an email address must be supplied by the applicant if they have one, with an explanation that reminders will be sent by this method unless advised otherwise. Both versions of the form should also still ask for a telephone number as this would be useful to have in the event of any queries. While we would expect the majority of applicants to have an email address and be contactable through this method, EROs should still have the option to contact an overseas elector using their postal address if they do not have an email address.

## Costs and public awareness

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31. We are pleased that the Government intends to fund the additional registration costs of EROs and election costs themselves under the new burdens doctrine, and has acknowledged that it expects “there to be some costs associated with communications and awareness raising campaigns targeting newly eligible electors”.

32. We ran a survey of UK citizens living overseas as part of our campaign to encourage them to register to vote ahead of the referendum on the UK’s membership of the European Union.<sup>6</sup> The results suggested that there was a lack of clarity on registration processes and requirements, with half of respondents not knowing that they could register online to vote in Great Britain.

33. As part of our public awareness campaigns ahead of elections and referendums where UK citizens living overseas are eligible to vote, we will run activities overseas and work closely with the Foreign and Commonwealth Office and others to ensure that newly eligible British citizens understand what they need to do to register.

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<sup>6</sup> UK citizens who live overseas are a particularly challenging audience to reach. The dispersed nature of and lack of data on UK citizens living overseas mean it is extremely challenging to conduct a study that would be reliably representative of this group as a whole. Consequently, the results should be treated as indicative only.

[http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0004/215788/Electoral-Commission-Survey-of-UK-citizens-living-overseas-summary-of-findings-Sep-2016.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/215788/Electoral-Commission-Survey-of-UK-citizens-living-overseas-summary-of-findings-Sep-2016.pdf)

34. As well as these costs (and those associated with IT system changes mentioned in the policy statement), there may be others to be assessed and fully and properly funded – for example, the cost implications of EROs keeping electoral registers for more than 15 years in future.

## Determination of applications

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35. The deadline to submit an application to register to vote is currently 12 working days prior to polling day. Once an application has been received it may be determined without a hearing after five clear working days have passed since the application was listed and where no objections have been received.<sup>7</sup>

36. At present the extent to which newly enfranchised overseas British citizens will register under the proposed new rules is unknown (there are estimated to be more than 5 million British citizens living abroad; at the May 2015 UK general election there were almost 106,000 overseas electors on the registers; in advance of the June 2016 EU referendum, almost 136,000 overseas electors were added to the registers).

37. As highlighted in paragraph 5 of this response, the Government should undertake an impact assessment of the proposed changes. This should include an assessment of the extent to which EROs would be able to carry out potentially more time-consuming checks on overseas applicants' previous registration or residence, or to confirm the eligibility of an attestor, within the existing timetable for processing and determining registration applications.

38. We would only consider supporting any proposal to move the registration deadline further away from polling day if significant evidence emerged to suggest that EROs would be unable to process and determine the volume of expected applications as a result of the proposed changes, with the risk that electors would be disadvantaged. More broadly, we believe that the Government should consider ways to improve the accessibility of voting processes for overseas voters, a point explored in more detail at paragraphs 54-58.

## Impact of the Government's proposals on the control of donations to political parties and campaigners

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39. Under the Political Parties, Elections and Referendums Act 2000 (PPERA), a permissible source of a donation to a political party includes an individual on a UK

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<sup>7</sup> In the case of applications accompanied by an application for anonymous registration, it is not necessary to wait five days and the Electoral Registration Officer can allow the application without a hearing at any time.

electoral register at the time the donation is made. This includes overseas electors. The Government's proposals will increase the number of overseas British citizens who can register to vote, and, once registered, will be eligible to make political donations.

40. Parliament will therefore want to consider the proposals, which effectively expand the definition of a permissible donor passed in 2000. It will also be relevant to consider the conclusions of the Committee on Standards in Public Life in 1998. When examining the case for a ban on foreign donations, the Committee concluded that it was "*right to take the opportunity to lay down the principle that those who live, work and carry on business in the United Kingdom should be the persons exclusively entitled to support financially the operation of the political process here*"<sup>8</sup>. However the Committee also noted the practical challenges of defining what is 'foreign' and concluded that those entitled to vote from overseas at that time should be permitted to donate. When the Political Parties, Elections and Referendums Bill was introduced in 1999, the Government proposed that only those registered to vote (rather than those eligible to vote) should be permitted to donate, and that approach was agreed by Parliament.

## An opportunity to clarify the legal position on impermissible donations

41. The forthcoming legislation to implement the overseas voter proposals will be a good and important opportunity to reconfirm the legal position in relation to impermissible donations. Reconfirming the legal position will ensure that the straightforward test of permissibility introduced in 2000 is not undermined by a Supreme Court decision in 2009.

42. Under PPERA, if a political party or other regulated entity accepts an impermissible donation, for example, from a person not on a UK electoral register, the total value of the donation must be forfeited. However, a Supreme Court decision in 2009 undermined that position by ruling that the donor's eligibility to be on a register was a significant factor in deciding whether to order forfeiture, and how much of the donation should be forfeited.<sup>9</sup> This effectively limits the penalty for accepting an impermissible donation.

43. We have recommended that the law should be reconfirmed beyond doubt that a person must be on a UK electoral register at the point when a donation is made. This is a much simpler test for parties and other recipients of donations to check, compared to eligibility to be on a register. We recommend that eligibility to be registered or lapsed voter registration should not be taken into account, and that the law should reflect what Parliament agreed when PPERA was passed in 2000. The Committee on Standards in Public Life recommended the same in its 2011 report.<sup>10</sup>

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<sup>8</sup> Committee on Standards in Public Life, 1998, *The Funding of Political Parties in the United Kingdom*, paragraphs 5.16, 5.2 and 5.23

<sup>9</sup> Supreme Court Judgment: <https://www.supremecourt.uk/cases/docs/uksc-2009-0205-judgment.pdf>

<sup>10</sup> Committee on Standards in Public Life, November 2011, [Political Party Finance: ending the big donor culture](#), recommendation 13, page 79

44. If implemented, the Government's proposals could increase the potential for donations to be made where a person is not on the electoral register but is eligible to be.

- First, this is because registration for overseas electors lapses unless the registration is reconfirmed every year. If the number of registered overseas voters increases, the number of people who need to reconfirm their registration annually in order to continue to be eligible to vote or donate will increase.
- In addition, the policy statement refers to a number of ways that an individual will be able to demonstrate their eligibility to register, including giving documentary evidence or providing an attestation from someone else if such evidence is not available. If this range of methods to demonstrate eligibility is taken together with the Supreme Court judgement, we are concerned that this could introduce grey areas about what kind of proof of eligibility to be registered should be taken into account in a court-ordered forfeiture case about an overseas donor.

45. In view of the uncertain legal position in relation to forfeiture of impermissible donations and the long standing recommendations of the Electoral Commission and CSPL, we recommend that any forthcoming Bill should be used as an opportunity to reconfirm the legal position in PPERA. This could be done by amending s54 PPERA to make the intent of the provision absolutely clear, or by some other suitable parliamentary mechanism, such as a statement by the Minister.

## Eligibility to register as a referendum campaigner or non-party campaigner in elections

46. Only individuals on an electoral register are entitled under PPERA to register as a non-party campaigner or referendum campaigner. The government's proposal would have the effect of increasing the number of individuals living overseas that are entitled to register as one of these types of campaigner. As with any campaigning conducted from overseas, the Commission and Courts' ability to regulate this spending and carry out enforcement action will be lower compared to campaigners within the UK.

47. If unregistered, campaigners are only allowed to spend up to £10,000 in a UK-wide referendum or up to £20,000 in UK Parliamentary general election. Registered campaigners can spend much higher sums of money:

- At the EU referendum, registered campaigners were permitted to spend up to £700,000.
- At elections, registered non-party campaigners are permitted to spend varying sums, including up to £450,000 at UK Parliamentary general elections.

48. Where registered campaigners outside the UK spend money on campaigning at a UK election or referendum, their spending is covered by the limits and reporting requirements in the PPERA framework. However, the application and enforcement of

the PPERA rules is less clear if the campaigner is based outside of the UK compared to campaigners in the country.

49. The proposals will mean that a greater number of individuals from overseas will be entitled to spend significant sums of money in UK elections, although the enforceability of the regulatory framework is unclear in relation to campaigning conducted from overseas. The potential increase in registered campaigners from abroad should therefore be noted as a consequence of the proposals.

## Impact of the Government's proposals on the ability of overseas voters to cast their vote

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50. British citizens living overseas who are registered can either vote by post, proxy or in person at a designated polling station in their constituency (if they happen to be visiting the UK on polling day).

51. Our guidance for Returning Officers states that postal ballot packs that are to be sent overseas should be prioritised in order to allow as much time as possible for the ballot pack to reach the elector and to be completed and returned. As part of their preparations for the issue of postal votes, we advise Returning Officers that they should agree with their printers a process that will enable them to do this.

52. Despite this, the current electoral timetable continues to present particular challenges for the timely delivery and return of postal ballot packs to overseas voters. We have previously highlighted the implications for overseas voters, including the problems which some voters found in receiving, completing and returning their postal ballot packs in time to be counted, in our reports on the May 2015 UK Parliamentary general election and the June 2016 EU referendum.<sup>11</sup>

53. We also recommend that EROs should consider advising the elector to appoint a proxy as an alternative where it may not be realistic for a postal ballot pack to be despatched, completed and returned before the close of poll. It is important that electors are fully advised of the circumstances surrounding their choice so that they can make an informed decision.

54. The proposed changes set out in the Government's policy statement are intended to increase the number of overseas voters, who will also be affected by these challenges. The Government has not, however, set out any proposals in this policy statement to improve the accessibility of voting processes for overseas voters.

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<sup>11</sup> Electoral Commission [The May 2015 UK elections: Report on the administration of the 7 May 2015 elections, including the UK Parliamentary general election](#) (July 2015) and [The 2016 EU referendum: Report on the 23 June 2016 referendum on the UK's membership of the European Union](#) (September 2016)

55. Our report on the May 2015 UK Parliamentary general election highlighted the need for the Government to work with the Commission and others to identify changes to improve access to the voting process for overseas electors at the next scheduled poll where they are entitled to vote. This would include increasing the funding provided to Returning Officers for future electoral events to ensure the correct postage is included on postal ballot packs for overseas electors, so that they can be delivered to voters and returned as quickly as possible before polling day.

56. Other options that could be considered might include: (a) enabling British citizens overseas to vote at British embassies, high commissions and consulates where practicable. Many other states provide such a service for their citizens; (b) the role of digital communication technologies. For example, while there are challenges and risks associated with secure online voting that would need to be overcome, the Government should consider the practical and technical implications of other approaches such as enabling overseas voters to download their blank ballot paper (or receive it by email) while still requiring the completed ballot paper to be returned by post.<sup>12</sup>

57. Each of these options will have their respective pros and cons. There will no doubt be other reforms that could be considered. The aim should be to ensure that overseas electors are given a range of voting options which enables them to cast their votes in time for them to be counted.

58. Any changes requiring legislation should be included in the forthcoming Bill to ensure a coordinated approach, and should also be included in the impact assessment we recommend. The Commission will continue to work with the Elections Coordination and Advisory Board to consider how technology might be introduced into a wider range of election activity.

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<sup>12</sup> See for example, Federal Voting Assistance Program [Voting Assistance Guide](#) for US federal elections: "All States must allow you to receive your blank absentee ballot electronically, when requested. This may include email, fax or online download."