

Reflections on a New Structure for the United Kingdom's Electoral Law

A Report prepared for the Electoral Commission

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Thanks and my love to Gill who, as ever, patiently endures the weirdness of academia.

Whilst I am grateful for the comments and suggestions of colleagues, responsibility for any and all errors of commission and omission and all opinions in this Report remains with me.

bob Watt

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Foreword

At the Electoral Commission we put the interests of voters at the forefront of our work to support well-run elections and referendums in the UK. The law governing elections is of central importance to the way elections are run, setting out how voters are registered and how elections are held.

It is widely agreed that electoral law is now in need of fundamental simplification and modernisation. In 2011 the Law Commission of England and Wales confirmed that, with the Law Commissions of Scotland and Northern Ireland, they would be carrying out a project on reform. This followed submissions to them by the Electoral Commission and the Association of Electoral Administrators that electoral law requires reform.

The Law Commission of England and Wales describes the UK's electoral law as 'complex, voluminous, and fragmented'¹. Their review project is an opportunity to modernise electoral law and make it more accessible to those involved in elections: voters, electoral administrators and those standing for election.

Many of the present problems with our electoral law result from a structure that unnecessarily complicates the democratic process. Electoral legislation in the UK is spread out across over around two hundred Acts, Regulations and Orders. There are also inconsistencies between electoral events and a hierarchy of legislation that does not always seem logical and consistent. This hinders the delivery of, and participation in, well-run elections.

As part of our contribution to the debate around the Law Commissions' work, we commissioned this report from Professor Watt of the University of Buckingham, on how the UK's electoral law could best be structured.²

The report sets out Professor Watt's views on how our electoral law could be made simpler and more effective, so that elections can be better administered and made easier for those involved. The report does not examine the content of existing electoral law. Rather it looks solely at how it could be better organised. It draws on guidance produced by international bodies with expertise in electoral matters, especially the International Institute for Democracy and Electoral Assistance (iIDEA)³, as well as best-practice examples of how other countries have structured their electoral law. The report substantially builds on our own report *Electoral legislation, principles and practice: a comparative analysis*⁴ published last year.

¹ Law Commission of England and Wales, *Electoral Law in the United Kingdom: A Scoping Report*, 11 December 2012, p. 4.

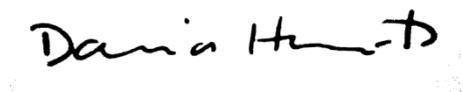
² Professor Watt is a Professor of Law at the University of Buckingham, having previously been Head of the Law School at the University of Essex. His main area of expertise is electoral law. Professor Watt has published on electoral law, for example *UK Election Law: A Critical Examination* (London: Glasshouse Press, 2006)

³ The second chapter of iIDEA's *International Electoral Standards: Guidelines for reviewing the legal framework of elections* sets out important principles which appear to be a useful starting point for thinking about reforming the UK's structure of electoral law.

⁴ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0009/150498/Electoral-legislation-comparative-analysis.pdf

The review of electoral law is in its early stages. Nevertheless it is important to consider structure as the review progresses whilst recognising that a detailed new structure can only be settled on later in the process. Reforming the organisation of our electoral laws is of fundamental importance and underpins the entire electoral law reform project. Achieving a final structure that is effective and accessible will be a challenging but essential task for the Law Commissions’.

Whilst not everyone will necessarily agree with the propositions put forward by Professor Watt (and the Electoral Commission will want to consider his views), the report is a welcome contribution to informing consideration of a better structure for the law governing elections.



David Howarth, Electoral Commissioner⁵



Bob Posner, Legal Counsel, Electoral Commission

26 June 2013

⁵ David Howarth was MP for Cambridge until 2010, having previously served as Leader of Cambridge City Council and as a local councillor for 17 years. He was Liberal Democrat Shadow Secretary of State for Justice from 2008-10, and, previously, a member of the Commons' Constitutional Affairs and Justice select committees. He is University Reader in Private Law at the University of Cambridge, a Fellow of Clare College, Cambridge and Associate Fellow of the Centre for Science and Policy at the Judge Business School, University of Cambridge. He is also a Trustee of the Collections Trust and an honorary Cambridge City councillor. He was also appointed, in March 2012, as a Member of Council of Advisers, Rand (Europe); a Member of the Advisory Board of Liberal Insight and to the Advisory Board of Women’s Parliamentary Radio.

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Executive Summary

1. We will identify the following problems in the UK's electoral law - from an analysis of the work of the Law Commission for England and Wales, the Office of the Parliamentary Counsel and from first principle. We will suggest that some of these problems may be solved by adopting a new structure for electoral law.

Type of Problem	Functional Description	Solvable by Structuring?
Volume	Too much legislation.	Yes
Quality	Poorly drafted or ineffective or inefficient legislation.	No
Complexity	Complex legal content.	No
	Difficult drafting.	No
	Difficulties in drafting stemming from amendment to old statute.	Yes
Fragmentation	Fragmentation of related provisions within a single piece of legislation.	Yes
	Fragmentation of related provisions between legislative instruments	Yes
Numbering	Non sequential numbering leading to confusion	Yes
Inflexibility	Inflexibility of 'patching' or 'make do and mend' technique	Yes
Architecture	Fragmentation in initial drafting	Yes
	Fragmentation consequent upon 'patching'	Yes
Telling the story	Incoherent story – cannot see where the legislation is going.	Yes

2. The central section of the Report contains a detailed analysis of supranational guidance (for example, the International Institute for Democracy and Electoral Assistance Guidelines) and international comparators. It discusses the relative merits of Primary Legislation, Secondary Legislation and sub-legislative guidance. It contains a discussion of the merits of placing electoral rules in each category.
3. The third section of the Report contains a number of structural proposals
 - a) A central Electoral Administration Act re-written from the existing materials which would be consolidated. The Act would contain principles and policies.
 - b) Further consideration be given to the distribution of material between such an Act (the EA 201x) and e.g. the Political Parties Elections and Referendums Act 2000.
 - c) Some features of legislative design are discussed. It is noted that much valuable groundwork has been done in Australia.

d) The principles for allocating material to secondary legislation are discussed. The rule 'principle in the Act; detail in the Regulation' is promoted.

e) The allocation of material in various forms of sub-legislative material is discussed. The use of professional Guidance by the Electoral Commission is strongly commended, but doubts are raised regarding the issue of 'good practice' Codes of Practice to political actors. The power to issue Directions should be placed on a stronger statutory footing.

4. Some sketches of an Act for the administration of elections and referendums are presented.

Reflections on a New Structure for the United Kingdom's Electoral Law

1. Introduction.

The purpose of this study

1.1.1 The purpose of this Report is to reflect upon and make recommendations towards a new structure for the United Kingdom's electoral law in the light of international best practice. For reasons which will be explained it does not recommend adopting a specific structure copied, borrowed, or even based upon the structure used in a specific country. Instead it recommends using a structure incorporating features from a variety of sources, but it does focus on the international guidelines published by the International Institute for Democracy and Electoral Assistance (iIDEA).⁶ One of these recommended features is a clear hierarchical numbering system which is used in a number of jurisdictions (including the UK); for that reason a hierarchical numbering system is used in this Report.⁷

Electoral law for the UK? The Law Commission(s) project

1.2.1 It is worth remembering that there is currently little electoral law for the United Kingdom. Elections to the Westminster Parliament could be identified as engaging UK election law, but elections to, for example, the European Parliament are governed by laws in Great Britain which differ from those in force in Northern Ireland. There is the electoral law of England and Wales which covers, for example, the elections to most local government areas in England and Wales and the election of Police and Crime Commissioners. There is English electoral law - examples of which are the law relating to the London Mayoral Election and to the London Assembly. The electoral law of Wales which covers elections to the National Assembly of Wales. The electoral law of Scotland differs in a number of respects from the law of England and Wales because, not only is it a separate jurisdiction, it also deals with elections to other bodies (the primary example is the Scottish Parliament and, for example, the

⁶ iIDEA and the authority of its publications are described below.

⁷ It is hoped that the numbering system is self-explanatory. It is not the only hierarchical numbering system available, but it was found convenient for writing this Report. Paragraphs could be added, removed, or moved without disturbing the numbering.

Crofting Commission) and there are powers for legislating for the 2014 Independence Referendum. Whilst elections to the Westminster Parliament do engage much of the same law for the whole of the United Kingdom, there are Northern Ireland-only laws relating, for example, to the proof of identity at elections in Northern Ireland.

1.2.2 This list of similarities and differences is not, and is not intended to be, exhaustive.⁸ It illustrates that there are differences in electoral laws between parts of the United Kingdom. It is important to make this point because the law reform process to which this paper aims to make a contribution will be carried out by the Law Commission of England and Wales, the Scottish Law Commission and the Northern Ireland Law Commission. They have agreed that the law reform project will be conducted as a tripartite joint project by all three Law Commissions.⁹

1.2.3 The Law Commission for England and Wales has announced that the reform project will observe the following timetable with the objectives set out in their succeeding paragraph.

Having completed the scoping phase on 11 December 2012, we have commenced work on reforming electoral law. We expect to open a consultation in late 2014. A report with recommendations to Government will be published in summer 2015.

Electoral law in the UK has grown complex, voluminous, and fragmented, with many statutes and secondary legislation governing a long list of elections and referendums. The twin aims of the project are to ensure, first, that electoral laws are presented within a rational, modern legislative framework, governing all elections and referendums under statute; and second, that the law governing the conduct of elections and referendums is modern, simple, and fit for purpose¹⁰

1.2.4 Much of the discussion in this Report is of elections. It has not been forgotten that referendums form an increasing part of the UK's democratic landscape. Much of the discussion herein applies equally to the management of the referendum process because it

⁸ *Electoral Law in the United Kingdom: a scoping report*, paras. 1.7 to 1.10 provides further information on the legislative competencies of the Scottish Parliament, the Northern Ireland Assembly, and the National Assembly for Wales.

⁹ *Electoral Law in the United Kingdom: a scoping report*, para. 1.6.

¹⁰ The Law Commission, *Electoral Law* see <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

utilises the same basic administrative and political structures. Clearly there are important differences, partly because there are no candidates in referendums, only causes, and specific consideration needs to be given to how to address these differences in the electoral law structure. Many of the principles, however, remain fundamentally the same.

Structure not content.

1.3.1 It is important to note from the outset that this paper is concerned with the ***structure*** of election law, not with its ***content***. All lawyers, and many non-lawyers in the field of electoral practice (and elsewhere), are familiar with the basic hierarchy of legislation. This is the law made by Parliament, as opposed to the interpretation of law by judges or the diminishing fraction of common law¹¹. Here we are only concerned with legislation, for that forms the heart of electoral law. That is not to disregard the judges' valuable interpretations: they are simply outside the scope of this study. Legislation comprises **Primary Legislation** - Acts of the competent legislature, and **Secondary Legislation** - delegated legislation made by Government acting in accordance with a power granted by an Act. These may be supplemented by various forms of **Instructions or Guidance**. Each of these categories is discussed below. In particular this last category (which is only tentatively named here) will be explored in detail.

Structure in this paper refers to the placing of particular substantive measures in primary or secondary legislation or guidance (howsoever titled) and the principles by which that allocation is decided.

1.3.2 For our purpose ***structure*** and ***design*** may be taken as synonymous. Howarth comments that 'little detailed work has yet been attempted' on the 'principles that emerge from engineering about how successful design can be organised' and refers to 'the various practitioners guides to legal drafting'.¹² This claim will, of course, be

¹¹ In the sense of "the universal application of the best local customs ... and rules derived from the judges own decisions in (such) cases". See Finch & Fafinski *Legal Skills* (Oxford: OUP, 2007) p. 90. Common law in this sense plays no part in modern election law, though it is sometimes said that the rule that lots shall be drawn to decide the outcome of a tied ballot, now contained in, e.g., Rule 49 of the Parliamentary Election Rules which form Schedule 1 of the Representation of the People Act 1983, is of common law origin.

¹² See David Howarth *Law as Engineering: thinking about what lawyers do* (Cheltenham: Edward Elgar 2013). Quotations from p.88. Kerry Jones' work (see below fn 48) and that of the Australian Parliamentary Counsel (see below fn 14) are not referenced in Howarth's book.

assessed in an international context throughout this Report, but it must be said that it seems to be largely vindicated at least at the level of theory. As we will see below there are practitioners' manuals which attempt to provide methods of simplification. This Report is an attempt to set out some principles of design which are 'up one level'¹³ from the issues of detailed drafting. Many of these principles are drawn from supranational guidance, some are drawn from international comparators or writing in other jurisdictions. Since, as Howarth notes, some work has been done at the level of drafting, some examples of problems deriving from drafting are included so that the issue of structure can be carefully demarcated. Some limited attempt is made to relate these higher level principles to advances in technology.

- 1.3.3 However, if one continues to look outside the specific field of electoral law it is possible to find practitioners' manuals which deal with the structure of legislation and make credible attempts at structural design.¹⁴

The place of content.

- 1.4.1 One cannot describe or design ***structure*** in a wholly abstract sense. One needs some conception of substantive content. Electoral law already has some form of content at the highest level - it deals with *electoral* regulation rather than, say, *banking* regulation or *health and safety* regulation. Some illustrative provisions must be included in a discussion of structure and these illustrative provisions must have a general, but emphatically not, a specific content. Some of these general provisions are included in this paper. Later in this paper, and following the work of the International Institute for Democracy and Electoral Assistance (iIDEA), the concept of a 'right to vote' will be introduced. This is necessary because it is hard to conceive of a democracy in which some people do not have the right to vote. However the mere positing of a 'right to vote' does not determine the character of who has the right to vote - for this is for Parliament to decide.¹⁵ Later the suggestion will be made, and

¹³ Cf Howarth p.77.

¹⁴ See, in particular, the Australian manual *Reducing complexity in legislation* at <http://www.opc.gov.au/about/docs/ReducingComplexity.pdf>. There is an extensive suite of materials dealing with this issue at <http://www.opc.gov.au/clearer/index.htm>. See furthermore the article by Jones at fn48 below.

¹⁵ See, for a trenchant statement of this view, Sir John Donaldson MR's opening statement in *Hipperson v ERO Newbury* [1985] 1 QB 1060 [Continues Pg. 13]

supported with argument, that the right to vote should be dealt with in primary legislation at the most fundamental level. The allocation of the ‘right to vote’ to primary legislation rather than, say, to guidance is an important step in describing and designing a structure for electoral law.

- 1.4.2 One might also correctly identify some of the differences between, for example, the law in Northern Ireland relating to elections to the European Parliament and the law of Great Britain relating to those elections as being one of substance rather than one of structure. In Northern Ireland Members of the European Parliament are elected by a Single Transferable Vote system, whilst in Great Britain they are elected by a Closed Party List System. However this difference in content has profound implications for structure. If we are to have any measure of unification of the electoral laws for the United Kingdom we need a structure which can accommodate both the existing differences in content and others which might arise in the future. Such widening of the substantive differences could occur because of any or some or all of an increase in devolution of powers from the Westminster Parliament, the introduction of new electoral systems, or the institution of new elected bodies.

The European Court of Human Rights.

- 1.5.1 All of the UK’s election laws are subject to the very broad supervision of the European Court of Human Rights (ECtHR) within the doctrines set down in *Mathieu-Mohin* and *Pierre-Bloch*.¹⁶ *Mathieu-Mohin* is important for the structure of UK election law; it confirms that the margin of appreciation afforded to Contracting States in interpreting Article 3 of the First Protocol of the European Convention of Human Rights is very wide. In this way the ECtHR demonstrates that it is unlikely to entertain challenges to the structure of the law provided that ‘free elections (are held) at reasonable intervals by secret ballot, under conditions which ensure the free expression of the people in the choice of the legislature’. *Pierre-Bloch* supports this doctrine by restricting the opportunity for challenge in that it makes clear that the

“Voting rights lie at the root of parliamentary democracy. Indeed, many would regard them as a basic human right. Nevertheless they are not like the air we breathe. They do not just happen. They have to be conferred, or at least defined and the categories of citizen who enjoy them have also to be defined”.

¹⁶ *Mathieu -Mohin v Belgium* 10 EHRR 1 and *Pierre-Bloch v France* ECHR 120/1996/732/938.

right established by the Article is not a civil right which falls to be determined under Article 6 of the European Convention on Human Rights (ECHR), but is a political right. This introduces important practical hurdles to the bringing of a challenge.

The way forward.

1.6.1 With these points in mind, the purpose of the following study is to provide a structure for the electoral laws of the UK drawing upon the, possibly legally binding, guidance issued by bodies with expertise in electoral law and also upon good practice observed in the structure of electoral law in other countries. Given the status of iIDEA, as a permanent observer to the United Nations, it is at least arguable that its documents have the status of customary international law. Certainly if a state were to act in flagrant contravention of iIDEA principles it is beyond doubt that the UN Human Rights Committee would address unfavourable comments towards that state when considering its Periodic Report.

A caution.

1.7.1 It is conceded in the course of the detailed argument set out below that structural changes alone may not be sufficient to resolve all of the problems with the UK's electoral law, and that some of the problems (with, e.g., complex drafting) are not structural. The thorough exploration of these problems is necessary to identify exactly what structural reforms can achieve and it is hoped that the apparent minor trespass outside the remit of this Report will be accepted as an attempt to set its bounds.

2. The problem.

International criticism.

2.1.1 The UK's election law has been criticised by international election observers. For example the OSCE/ODIHR Election Assessment Mission to the UK General Election held on 6th May 2010 made the following comment:¹⁷

¹⁷ See "United Kingdom of Great Britain and Northern Ireland General Election 6 May 2010, OSCE/ODIHR Election Assessment Mission Report. (Warsaw: OSCE/ODIHR, 9 July 2010) available at <http://www.osce.org/odihr/elections/69072> pp 4-5.

The fragmented and complex legal framework is based on legislation dating back to 1695, with most key principles having first been established in 19th century legislation. Although there have been relatively frequent changes to the legislation, especially over the past ten years, no concerted effort has been made in recent years to review the entire legal framework for elections. Most OSCE/ODIHR EAM interlocutors stressed the need to conduct such a review in order to consolidate and simplify the legal framework. Another goal of such a review would be the modernization of the legal framework as many interlocutors felt that it was not suitable to conduct a 21st century election. The (Electoral Commission) EC has been calling for such a review since 2003. The OSCE/ODIHR EAM for the 2005 general election also made such a recommendation.

The legal framework for the elections should be consolidated, simplified and modernized through the conduct of a comprehensive review of all relevant legislation and legal acts. This would improve the transparency and accessibility of the electoral legislation.

2.1.2 This criticism must be taken very seriously. OSCE/ODIHR is composed of 57 nations and its election observers are widely respected.¹⁸ The General Election scheduled for 7 May 2015 will be fought under, at best, the same basic set of election rules as the 2010 General Election. The substantive amendments made by the Electoral Registration and Administration Act 2013, which have fundamentally altered the basis of electoral registration away from a household system towards individual electoral registration, further complicate matters.

Domestic criticism.

2.2.1 It is clear from Chapter 2 of the Law Commission's report¹⁹ that the national electoral law community finds our electoral law to be cumbersome and outdated. Particular reference could be made to paragraphs 2.25 to 2.29. The problems are well summarized in para.2.25 where the Commission notes that all 68 respondents to their consultation agreed that the legislative framework should be reviewed to 'reduce the problems of volume, complexity and fragmentation'. The law governing electoral administration law is fundamentally based on three Acts – the Parliamentary Elections Act 1868, the Ballot Act 1872 and the Representation of the People Act 1918 which have been amended, consolidated, re-consolidated and added-to on a number of

¹⁸ See the OSCE Factsheet at <http://www.osce.org/secretariat/35775>. For information on their electoral monitoring programme see <http://www.osce.org/odihr/elections>.

¹⁹ *Electoral Law in the United Kingdom: a scoping report.*

occasions. The most modern fundamental reconsolidation is the Representation of the People Act 1983 (RPA 1983) which provides the framework for today's electoral administration. This has been substantially amended and added to since 1983.

Why should we take these matters seriously?

2.3.1 Why is this a problem? Why should we be concerned that electoral legislation is (*inter alia*) voluminous, complex and fragmented? The analysis in this section of the Report is directed to answering the third, fourth (and to some extent the fifth) of the iIDEA principles set out in paragraph 3.6.5 below:

A unified, consolidated electoral law is preferable to a fragmented law with separate legislative vehicles for different electoral events and dealing with different matters.

Reforms to electoral law should be undertaken with the goals of clarity and simplicity in mind.

It should, it is thought, be axiomatic that all reforms to any law should be undertaken with the goals of clarity and simplicity in mind.

2.3.2 Electoral law is intended to guide the process of elections. We wish to have democratically elected representatives and electoral law provides the mechanism for their election. If election law is defective it may discourage people from taking part in the electoral process (discouragement) or lead to economic inefficiencies by wasting time and effort (economic inefficiency). A defective electoral law has a greater potential to mislead electoral actors into accidental breaches which may amount to or lead to corruption and the degradation of the political process (degradation/corruption). Conversely deliberate (corrupt) breaches may go undetected and encourage corruption and degradation of the political process.

2.3.3.1 Electoral law has a number of subjects, and a number of problems have been identified below in respect of their respective positions. It is acknowledged that the Electoral Commission has produced helpful Guidance which goes some way towards ameliorating the problems. However, no commentary or Guidance can replace legislation which remains the primary source of obligations. Furthermore the existence of even the most helpful guidance does not mean that the law itself should remain confusing.

2.3.3.2 The electoral officers and administrators who must follow the rules. Electoral administrators exist and operate at a number of levels from full-time specialist officials who are charged with supervising elections and advising less specialist officials and members of the public about elections, to those less specialist officers. Other Local Authority officers (and indeed others) may be drafted in after training to help with elections on the day. All need to be reliably informed about their powers and responsibilities. The more senior officers may, indeed, be required to interpret the law and accordingly require law that may be easily read and assimilated. If these persons are able to resolve the problems and put the matters right before there is an impact upon the election this will simply amount to wasted time and money (economic inefficiency). However if the confusion is not resolved the election process will be degraded.

2.3.3.3 The political parties who wish to field candidates for public office. Once again there is a range of officials in political parties from National Agents (however titled) who will be expected to have a sound grasp of electoral law, to local helpers who may be recruited for their political enthusiasm rather than their knowledge of electoral procedures. All need to be advised of the law. (Problems: economic inefficiency, degradation/corruption, discouragement).

2.3.3.4 Candidates in elections who will often be supported and guided by political parties, but there are those who may be independents standing without the support of a wider network. In some elections and for some Local Authorities one might well expect the candidates to be experts in their own fields or to have good local knowledge and support but to be lacking in electoral knowledge. The law needs to be comprehensible by such people. (Problems: discouragement, degradation/corruption).

2.3.3.5 Election lawyers, who must be taken to have a full professional knowledge of the relevant law and to be experienced interpreters of legislation and case law. Election lawyers need to have physical access to the law and, when they have found it, need to have it in a comprehensible form free from ambiguity so that they may advise their clients (Problems economic inefficiency, degradation/corruption).

2.3.3.6 There are small groups of professionals, e.g. in the Electoral Commission and in the Civil Service who require specialist knowledge of election law. If they cannot find or interpret the law their work is hampered. When new legislation is added or amendments are made these professionals may find that their time is used up rewriting Guidance in order to take account of relatively small differences between different legal instruments. (Problem: Economic inefficiency).

2.3.3.7 Arguably the most important group in electoral law, certainly the most numerous, and often the most overlooked, is the electorate. Electors need to register; they may want to vote by post and need to obtain the necessary ballot paper; they may well have a clear idea for whom they wish to vote (in person or by post) but need to be guided through the procedure so that the marks on their own ballot paper correspond to their wishes. These, amongst others, are essential tasks for the law. (Problem: discouragement).

2.3.3.8 At a larger scale the aim of ensuring the free expression of the electorate in the choice of the legislature must be made effective. The legal rules must therefore reflect the United Kingdom's commitment to a democratically elected legislature made in, for example, Article 3 of the First Protocol to the ECHR or Article 25 of the International Covenant on Civil and Political Rights. There is thus a public interest, not localised to any particular person, in ensuring that the law is clear.

The Law Commission's identification of the problems.

2.4.1 The Law Commission has, rather than identifying the subjective problems faced by the users, focused on the (at first sight) objective problems with the law. This is understandable because, of course, each user of the law may identify a different problem. The identification of such problems may not help us in reforming the law. Let us look at the Law Commission's intersubjective (or objective) issues - volume, complexity and fragmentation. Before we can propose any solution to these problems we need to explore them thoroughly, not least because the exploration of the problems may tease out the threads of their complexity and facilitate solution of the problems.

2.4.2.1 It should be noted that the problems identified by the Law Commission with electoral law are not exactly the same as those identified by the UK Office of the Parliamentary Counsel (OPC) in its study of complexity in legislation generally.²⁰ They identify three problems: ‘Volume, Quality, and Perception of disproportionate complexity’.

2.4.2.2 Whilst ‘volume’ is, at first sight exactly the same problem identified by the Law Commission there are important differences between the OPC’s view of the causes of the increase in volume and the Law Commission’s view of that phenomenon because they are looking at fundamentally different areas of law. The OPC is looking at legislation generally, whilst the Law Commission is looking at electoral legislation. . The OPC points out that the ‘volume of legislation increased significantly in the inter-war period, a period of radical social and economic changes.’²¹ Furthermore whilst ‘(t)he number of Acts promulgated in recent years is consistent with trends in previous decades: in fact the number of Acts has slightly declined in recent years’. This is quite different from the situation in electoral law where there was only one electoral Act in the inter-war period - The Representation of the People (Equal Franchise) Act 1928. The Law Commission dates the increase in electoral legislation to sometime after 1983.²² In part this is because of the consequences of accession to the European Union,²³ and the first elections to the European Parliament in 1979. However much more important drivers are the political drive for greater representative democracy and devolution, the introduction of new electoral systems to supplement First Past the Post, and the introduction of new voting methods (in particular postal voting on demand). The OPC rightly relegates the increase in volume to a position of lesser importance, save where that legislation has its genesis in the European Union,²⁴ but it is one of the most pressing problems in electoral law and will be addressed below.

²⁰ *When Laws Become Too Complex: A review into the causes of complex legislation* (London: Cabinet Office, April 2013). The author finds it surprising that the OPC has not referred to the Australian study *Reducing complexity in legislation* of 17 May 2011 save *en passant* on p4.

²¹ Quotations from p.6 of *When Laws Become Too Complex*.

²² See *Electoral law in the United Kingdom: a scoping report* paras 2.19-2.20.

²³ Which, as the OPC, notes has also affected the volume of non-electoral legislation.

²⁴ See pp 6-9 of *When Laws Become Too Complex*.

2.4.2.3 The problem of ‘quality’ identified by the OPC addresses issues which are, by and large, internal to that Office. It concerns whether the legislation addresses the stated political, legal and social objectives; whether it is efficient in a number of respects (effective, well-written, well integrated with other measures), and whether its production was cost-effective. These matters are not directly addressed in this Report in the form in which the OPC poses its questions; however, the question of effectiveness is raised.

2.4.2.4 The OPC recognizes that the statute book is complex, but seems to believe that this issue is only one of a ‘perception of over-complexity’. Having noted that ‘Citizens tend to find the statutes and regulations difficult and intimidating’ they then go on to observe that ‘Even legally qualified users frequently complain about the excessive complexity of legislation and often tend to read the explanatory notes accompanying the Bill rather than the legislative text.’²⁵ Whilst the first observation does tend to suggest that the problem is perceptual, the second seems to suggest that there is a much deeper problem. When experts cannot understand the law, it suggests that there is something deeply wrong. For the present author the key to what is wrong is to be found in the later text:²⁶

Most users interviewed said that they expect legislation to be hard to read- even barristers. They found that legislation is ‘convoluted and involves a lot of going backwards and forwards.’

This suggests that, whilst there is some perceptual difficulty in reading legislation (and this point will be analysed below - because it is suggested that it is not *only* a perceptual problem) one of the real problems is in fragmentation and this is a key point identified by the Law Commission.

2.4.3 For the reasons set out in the preceding paragraphs (2.4.2.2 -2.4.2.4) it is therefore intended to use the general scheme set out by the Law Commission. However that is not to discard *When Laws Become Too Complex* because there are some valuable suggestions made in it. Chief amongst these is its discussion of the architecture of the

²⁵ Quotations from p.14 of *When Laws Become Too Complex*.

²⁶ *When Laws Become Too Complex* p.20.

statute book²⁷ and these points will be discussed after the contribution of the Law Commission has been fully analysed.

2.4.4 It is first necessary to establish some facts regarding ‘volume, complexity and fragmentation’ in electoral law. These are, it will be argued, not the only faults with the current legislation, but they represent a helpful starting point. Some other faults will be identified later. Whilst there is a good argument (which will be developed below) for re-ordering the problems which the Law Commission’s study has identified, let us initially take these matters in the original order:

Volume

2.5.1 The May 2010 elections were governed by 25 pieces of legislation and the May 2011 polls engaged 14 Acts and 26 pieces of secondary legislation (Statutory Instruments).²⁸ The May 2010 elections involved both the General Election and a number of Local Authority elections. It would have been vastly more complicated had other elections (for example, elections to the London Assembly, the election of Police and Crime Commissioners) also taken place on that day. Each of these electoral events has its own set of legislation, and often its own set of Combination Rules. Given the fact that there is a political will to hold as many elections as possible on a single day to maximise turnout and to minimise disruption (e.g., to schools and the functioning of local authorities), it is unsurprising that so much legislation is involved given the present structure.

2.5.2 Turning to individual pieces of legislation, we must note that some of these are already very large. The primary electoral Act (RPA 1983) contains 243 extant sections and 14 Schedules. One Schedule - Schedule 1 (The Parliamentary Election Rules) - contains 59 Rules which remain in force and an Appendix of forms.

²⁷ *When Laws Become Too Complex* p.14.

²⁸ *Electoral Law in the United Kingdom: a scoping report*, para. 2.27.

2.5.3 The most important question embedded here is ‘*who needs to know the law*’? The *London Elects* website, which remains online after the 2012 London Mayoral and London Assembly elections contains the following statement:²⁹

Please find below links to relevant legislation relating to the 2012 Mayor of London and London Assembly elections. Candidates, agents, electoral administrators, and other bodies involved in the elections should familiarise themselves with these.

There then follows a list of ‘*GLA specific legislation*’. This contains one Act (The Greater London Authority Act 1999 (as amended)) and eight Statutory Instruments. This is followed by a list of ‘*Other relevant electoral legislation*’ which contains, in addition to the RPA 1983 (as amended), two other Acts and three Statutory Instruments. Finally the page contains a list headed ‘*Donations and Loans (please refer to the Electoral Commission for more detailed guidance)*’, this contains two Acts of Parliament, one of which (The Political Parties Elections and Referendums Act 2000) contains more than 250 sections and 27 Schedules. One cannot be accused of hyperbole if one characterises that as an enormous heap of legislation, and one is forced to wonder how many potential candidates are put off by the stated requirement to ‘familiarise themselves with these’.

2.5.4 It will be argued later in this report that the issue of volume is one which the development of a clear structure for legislation is able to address.

2.5.5 UK electoral law is certainly not unique in being voluminous. The election laws of the Republic of South Africa which are modern (because of the reformation of the country following the demise of the apartheid system) are certainly not short.³⁰ The main Act dealing with elections - the Electoral Act (no 73) of 1998- is approximately half the length of the UK RPA 1983 and might thus be thought to be less voluminous. This is self-evidently true; however it is difficult to interpret this fact. The Republic has had some fifteen years to develop the law and it is likely that it was as well-

²⁹ <http://www.londonelects.org.uk/electoral-administrators/relevant-legislation> page last visited on 12 June 2013.

³⁰ See for a helpful overview; <http://www.elections.org.za/content/DynamicDocs.aspx?id=292&BreadCrumbId=292&LeftMenuId=251&name=home>.

crafted to fit the situation in South Africa in 1998 as the Ballot Act of 1872 was tailored to fit the UK. The Ballot Act has had some 140 years of amendment (described below as ‘patching’ and ‘make do and mend’) and it may be that the South African legislation would - if subjected to the same procedure, look just as odd in 2139. Support for this proposition is to be found in the length of the (Australian) Commonwealth Electoral Act 1918 which runs to at least 395 sections.³¹

Complexity

2.6.1 Complexity is not a simple matter because it is largely a matter of perception. It is surely beyond doubt that a piece of legislation which seems simple to an experienced Returning Officer may seem impossibly complex to the average voter, or even to a candidate. The Returning Officer and the average voter perceive it differently.

2.6.2.1 There are at least three levels at which a piece of law could be said to be complex. The first is where the legal concept contained in the law is, of its nature, complex. As an example, one might think of s115(2)(b) RPA 1983 (as originally drafted) which provides that a person is guilty of a corrupt practice

(b) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents the free exercise of the franchise of an elector or proxy for an elector, or so compels, induces or prevails upon an elector or proxy for an elector either to vote or to refrain from voting.

In *R v Rowe ex parte Mainwaring*³² it was alleged that the respondents used a mock election leaflet purporting to set out the policies of another party to unduly influence voters to vote for their own candidate. The Court of Appeal, after the matter was heard by a Commissioner and then by the Divisional Court, was asked to determine whether the distribution of such a ‘false flag’ leaflet amounted to a ‘fraudulent device or contrivance’. The Court of Appeal held that it did not because there was no evidence that anyone was deceived by the leaflet and that proof of deceit was an essential part of the electoral offence. This is a complex issue of law because the resolution of the matter requires a detailed legal understanding of the concept of ‘fraud’. So, one meaning of the word ‘complex’ is that a complex matter requires

³¹ There are ‘patched in’ sections numbered, e.g. 393A (the last at the time of writing) and it seems unproductive to count them all. For a discussion of ‘patching’ see below.

³² [1992] 4 All ER 821.

specialist knowledge and skills to resolve. Some matters of law are inherently complex in this sense.

2.6.2.2 The Court went on to say that if the statute had provided that the offence consisted of ‘using any fraudulent device calculated to impede or prevent’ that the respondents would have been guilty of a corrupt practice. No doubt it was for that reason that the statute was amended by s39(1) of the Electoral Administration Act 2006.

2.6.3.1 However that brings us to the second meaning of the word ‘complex’. The statute, amended by the measure above, now reads:

b) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents or intends to impede or prevent, the free exercise of the franchise of an elector or proxy for an elector, or so compels, induces or prevails upon, or intends so to compel, induce or prevail upon, an elector or proxy for an elector either to vote or to refrain from voting.

Nolan LJ commented that the drafting of the original section was opaque, in part because it was the product of nineteenth century drafting,³³ and it is to be wondered what he would have made of its modern counterpart. The language is the problem. The law is intended to prevent people from cheating in elections by, e.g., distributing leaflets which purport to come from a party other than their own and deliberately misstate the second party’s policies. No doubt it is difficult to express a complex concept in everyday language but, if the law is supposed to guide election candidates and their helpers, it might be expected that it would be framed in language which everyone can readily understand. The problem here is that in the early twenty-first century the word ‘device’ has quite another popular meaning; and ‘contrivance’ seems to the public mind antique and almost comic.

2.6.3.2 This criticism might seem harsh because it is certain that, whatever words were chosen to express the concept; someone would claim that they were ‘too complex’. This criticism must therefore be taken as general and conceptual rather than being aimed at a particular example of drafting.

³³ [1992] 4 All ER 821 at 827e-f.

2.6.4. One might also identify a class of complexity in which both of these undesirable features are combined; that is to say where the legal concept is itself difficult (because, e.g., the drafter wants to identify a precise circumstance unambiguously) and the wording is complex. An example of this is Rule 3 of the Local Elections (Principal Areas) (England and Wales) Rules 2006 (2006 No. 330)

3. In the application of the parliamentary elections rules to the election of councillors of the council of a principal area where the poll at that election is not taken together with the poll at another election under section 36(3), (3AB) or (3AC) of the 1983 Act or section 15(1) or (2) of the Representation of the People Act 1985, adaptations, alterations and exceptions shall be made to those rules so that the election shall be conducted in accordance with the Rules set out in Schedule 2 to these Rules.

This clearly suffers from a 'double-dose' of complexity.

2.6.5 The third level at which a piece of legislation could be said to be complex is where matters which seem to be connected are separated in the statute. For example, in the RPA 1983 there are defined a number of election offences. Conduct amounting to an election offence is then proscribed by the section. Some examples of election offences are to be found at s 13D, ss 60-66B (with the heading 'Offences'), s75, s100, s106, ss113-115 and elsewhere. This is not a complete list, the intention is to demonstrate that the offences are spread throughout the Act and it requires close reading to detect them all. A person who wished to avoid committing an election offence and therefore wanted to know what kinds of conduct to avoid might very well expect there to be a single comprehensive list, s/he would be disappointed. This may also be described as fragmentation.

2.6.6 One might argue that there is a fourth type of complexity - where similar provisions are spread between different legislative instruments. It will be argued that this problem is more accurately classified as fragmentation (and it will here be analysed under this heading), but there is no clear difference between the third type of complexity and that which has been classified as fragmentation. They merge into one another and some features of the problem might also be described as architectural. These are discussed below.

- 2.6.7 It will be argued below that the first two types of complexity are not, and cannot be, addressed by resolving the structure of election law. They are better resolved by, where possible, clearer drafting. However it must be acknowledged that some legal concepts are inherently complex and no degree of skill in drafting is likely to overcome this problem. Indeed it might well be said, when a complexity remains in a finished statute, that the drafters' skills have been exercised to their limit and yet problems still remain.
- 2.6.8 It cannot be denied that complexity (together with the problems of volume and fragmentation) are particularly undesirable in election law because of the ways in which they impede access to the law and potentially chill democratic participation.
- 2.6.9 The author of this Report takes the view that it is difficult to comment authoritatively upon the complexity of legal concepts and language in an overseas jurisdiction. Many possible comparators are originally written in languages other than English and the use of any translation introduces the risk of adding or reducing complexity artificially. When even everyday words differ widely in their meanings between the USA and the UK (sidewalk, pavement, elevator, etc) it would be foolhardy to attempt to comment on legislative language.³⁴ Furthermore to attempt such an exercise would risk straying into a consideration of content for the reasons set out above.
- 2.6.10 It must also be observed that the (UK) Office of the Parliamentary Counsel has issued extensive drafting guidance designed to address these problems.³⁵ However there is no concerted effort to reduce complexity contained in this manual. Attempts have been made to find other international efforts to reduce complexity using, in particular, the Australian OPC website which lists links to a number of OPCs worldwide.³⁶ The

³⁴ This argument is, of course, analogous to that of Legrande set out below at paragraph 3.4.1

³⁵ See *Office of the Parliamentary Counsel Drafting Guidance* (16 December 2011). This seems to address the criticism levelled by Bates in 'Legislative drafting in the UK' <http://www.oecd.org/site/sigma/publicationsdocuments/44577527.pdf>.

³⁶ http://www.opc.gov.au/draft_office/overseas.htm. This website and its links have been checked for other sources of guidance on reducing complexity. No other relevant materials have been found.

Australian manual *Reducing complexity in legislation*, which will be used later in this study, represents one of the best attempts to reduce complexity.³⁷

Fragmentation

2.7.1.1 We have already identified one kind of fragmentation in the law in the preceding section on complexity. This is where matters of a similar sort which show some common feature (such as election offences) are distributed throughout a single statute. Suppose that connected matters are distributed throughout a number of statutes, or even between primary and secondary legislation. Of course we should expect some law to be distributed between primary and secondary legislation - where the power to act is set out in the primary Act and the way in which that action is to be performed is set out in the secondary Instrument. This is discussed below. However, there are some examples in modern UK electoral law where the separation has no obvious justification (beyond, of course, the historical); three such examples of fragmentation will be set out here. The first two examples are linked in order to demonstrate the remarkable degree of fragmentation which has occurred.

2.7.1.2 It has been observed above (paragraph 2.5.2) that the RPA 1983 contains as Schedule 1³⁸ the Parliamentary Election Rules. These set out many of the Rules governing the conduct of elections to the Westminster Parliament. These include, for example, such matters as the computation of the election period, the way in which candidates are to be nominated, the way in which ballots are to be cast in a polling station, the method of counting votes and so forth. This is to be expected and it is unchallenged. One might reasonably expect the Rules governing the conduct of elections to Local Authorities to be contained in another Schedule to the Act - quite possibly in Schedule 2. It is suggested that a person seriously considering standing as a candidate in a local government election (for the purposes of our example in England or Wales) would, at some stage,³⁹ look in the Schedules to the Act in order to ascertain what they should

³⁷ See above fn 14.

³⁸ This is, of course, not the first Schedule to the Act; the first Schedule to appear in the list is Schedule A1 *Review of Polling Districts and Polling Places*. The issue of numbering will be discussed later in this Report.

³⁹ In addition to consulting the Guidance for Candidates and Agents obtainable through the Electoral Commissions portal at: <http://www.electoralcommission.org.uk/guidance/resources-for-those-we-regulate/candidates-and-agents>

do in order to obtain timely nomination.⁴⁰ However the equivalent set of Rules are not there; our putative candidate may find them in Schedule 2 to the Local Elections (Principal Areas) (England and Wales) Rules 2006 (2006 No. 3304) and, if s/he realised that there were Amendment Rules issued in 2011,⁴¹ and was not discouraged by the complex wording of Rule 3,⁴² s/he might return to the RPA 1983 saying - ‘Why are these Rules (which are all rather similar, save for the timetabling provisions) not all in one place? Why can’t we have just one set of Rules which are applied to all elections save where the circumstances require differences of treatment?’

2.7.1.3 The second example of fragmentation also relies upon the Parliamentary Election Rules to provide an example. Suppose that our (independent)⁴³ candidate realises that s/he is likely to be out campaigning on election day and decides that s/he needs to vote by post, and realising that potential voters may inquire as to the process wishes to become acquainted with the law. Given the candidate’s new found familiarity with the Parliamentary and local government election rules s/he looks in them to determine the law on postal voting. It is largely silent, for the law is mostly to be found in the Representation of the People Act 2000 and, in sufficient detail to show how the system operates in Part V of the Representation of the People (England & Wales) Regulations 2001 as repeatedly amended.⁴⁴ Our candidate has had to cover a lot of ground.⁴⁵

⁴⁰ The introduction of a hypothetical candidate at this point is not a mere trope; when we come to consider the iIDEA Guidelines at a later point in this Report we will see that s/he occupies an important place in the theory and practice of election law. The ‘iIDEA Guidelines’ is a convenient shorthand for *International Electoral Standards: Guidelines for reviewing the legal framework of elections* (Stockholm: iIDEA, 2002).

⁴¹ SI 2011/563.

⁴² See above, paragraph 2.6.4. Of course, if the election were combined with another election, such as a Parliamentary election or an election to the European Parliament, the Combination Rules would apply and there would be further fragmentation.

⁴³ The point being that party political candidates are able to rely upon a well-resourced machine to guide them round these obstacles. This fact may prove significant when we consider the iIDEA Guidelines below.

⁴⁴ There are equivalent Rules for Scotland and Northern Ireland.

⁴⁵ See the ‘back and forward’ quotation from *When Laws Become Too Complex* referenced at fn 25 above. This hypothetical case illustrates the point made there.

2.7.1.4 Another example of fragmentation can be found in the rules dealing with the (one might think, simple) matter of parliamentary polling districts and places. This matter is dealt with in a) Sections 18A to 18E RPA 1983, b) Schedule A1 RPA 1983, and c) the Review of Polling Districts and Polling Places (Parliamentary Elections) Regulations 2006. This unnecessary and confusing fragmentation makes it difficult to follow the law. Using three sources for the law rather than one makes it less likely that the law will be obeyed.

2.7.2 This is not a feature unique to UK electoral law. Quite apart from the issues of fragmentation due to federalism which will be described below, we can see examples of fragmentation in many non-UK legal systems. For example in New Zealand we can find the right to vote in s12 of the New Zealand Bill of Rights Act 1990, the right to be qualified to register under ss74 and 75 of the Electoral Act 1993. Section 80 of the 1993 Act deals with disqualifications and refers to the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, Criminal Procedure (Mentally Impaired Persons) Act 2003, the Criminal Justice Act 1985, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, and the New Zealand Trade and Enterprise Act 2003. This is inconvenient and may lead to a further problem - the possibility of a conflict between the Acts. One gives the “right to vote” and the other “the right to be registered”. This sort of problem was experienced in Canada and is set out below in the later discussion of *History of the Vote in Canada* (see para 3.3.5 and accompanying footnotes).

Comment

2.8.1 This survey of the drivers for reform identified by the Law Commission has shown a mixture of objective and subjective factors making the law difficult to understand and in need of reform. Objectively the law is voluminous and fragmented. Subjectively it is complex, but some of this complexity is objectively justified because the law must be unambiguously precise. “Good enough for everyday life” is simply not good enough when - as in criminal statutes (here matters of election offences) the livelihood, reputation and indeed the liberty of the citizen are in jeopardy. Neither is it good enough for election law when, as Sir John Donaldson MR said ‘Voting rights lie at the root of parliamentary democracy’. (Above fn15)

2.8.2 The problems identified by the Law Commission, even in the light of the comments made about general legislation by the OPC and considered above, do not exhaust the problems of UK election law. Some further problems have been identified and these are considered below. Some of these problems have been suggested by the OPC, others are novel.

Other views of the problem

Numbering

2.9.1 The OPC has, it has been noted, raised the matter of the architecture of the statute book.⁴⁶ Some of this has been dealt with under the heading ‘Fragmentation’ above, but it is suggested that there is another issue which has hitherto been overlooked. This may be referred to as the issue of ‘Numbering’. Consider the following extract from the Table of Contents to the RPA 1983:⁴⁷

Place and manner of voting at parliamentary elections

18. Polling districts and places at parliamentary elections.

18A. Polling districts at parliamentary elections

18B. Polling places at parliamentary elections

18C. Review of polling districts and places

18D. Review of polling districts and places: representations to Electoral Commission

18E. Sections 18A to 18D: supplemental

The sections 18A-E were added by s16(1) of the Electoral Administration Act 2006 in order to institute a new policy - the review of polling places. This can be seen as a ‘patch’ - the language is common to tailors and computer programmers - an addition designed to repair a fault in a pre-existing garment or programme or to add to its utility (e.g., to allow it to fulfil a function or do a task it was previously unable to do). An even more extreme example of patching is to be found in the sections from 9-13 RPA 1983 in which we find s10, s10(1), s10(1A), s10(2), s10A(2A) and so forth.

⁴⁶ When Laws Become Too Complex p.14.

⁴⁷ Source <http://www.legislation.gov.uk/ukpga/1983/2/contents>.

Tracing the pedigree of all the patches in this piece of legislation would take considerable time, so the author is content with a mere report.

- 2.9.2 The matter is further complicated by the fact that a single patch is rarely sufficient to accomplish the task. In the case of sections 18A to 18E RPA 1983 a reader must also consult Schedule A1 to the RPA 1983 and the Review of Polling Districts and Polling Places (Parliamentary Elections) Regulations 2006 to have a full understanding of this area. It is suggested that the particular problem with legislative patches is that, unlike those inserted by skilful tailors or programmers, they are all too visible. Of course, this is because each legislative provision must be indexed so that it can both be found and reference made to it.
- 2.9.3 One might say that we are designing statutes for utility rather than elegance (it is a work smock rather than a ball gown) and provided that it does its job it does not really matter. This approach is rejected; it is not simply a matter of aesthetics. First there is the general perceptual point; all of us are trained from an early age to read numbers sequentially (1,2,3, ... 100, and we become confused when other numbers are inserted, unless clear breaks and rules for breaks are used. Thus, we can understand A1, A2, A3, A4, ...A100; B1, B2, B3, B4,... B100; even when the list continues with ZA1 ... etc. much more easily than when the list goes (as RPA 1983) 7, 7A, 7B,7C, 8, 9, 9A, 9A, 9B, 9C, 10, 10ZA. This list ends with 13BB, but it is not the most egregious example.⁴⁸ This argument is supported by the arguments on page 18 of *When Laws Become Too Complex* which present the case that an improvement in the way legislation is presented would go some way to reducing the perception of complexity.
- 2.9.4 We must also observe that confusion can easily arise between, say, s13(a) and s13A of the RPA 1983. Of course, the *cognoscenti* know that s13(a) is a subsection of s13, whilst s13A is a section in its own right. However, both academics and law students will affirm the amount of time which is wasted in lectures pointing people to the

⁴⁸ Kerry Jones, the Australian Second Parliamentary Counsel points out in 'Rewriting Australia's Income Tax Laws' - see www.opc.gov.au/CALC/docs/Loophole_papers/Jones_1998.rtf that the endpoint of this process in Australia's tax law was 'that numbers like "159GZZZZH" had to be used at the end of the liability Part.'

correct section of the statute. Of course, too, the explanatory notes on the statute make it plain that the section has been inserted into the Act.⁴⁹ Furthermore, if even law students ask whether a section suffixed with a letter (such as 7A) is as valid as one without (say, s7), one is forced to wonder what the less expert user makes of the statute.

2.9.5 The reason for using the patching technique is obvious. It enables novelties to be introduced without renumbering the entire Act. If, instead of introducing a minor patch at, say s2, of an Act to create a s2A, we inserted a new section which we renumbered as s3, we would then have to renumber the entire Act - shifting all the subsequent numbers 'up one' to allow for the insertion.⁵⁰ The repeal of a section would have the opposite effect; shifting all the numbers 'down one'. This would be even more confusing because there would be no stability in the numbering system - a section which on one day was numbered say, s5, might be renumbered the next day as, say, s8 and the change would affect all subsequent sections in the statute.⁵¹ This would increase the level of difficulty and it would mean that experienced practitioners, who might otherwise be able to guide those less experienced, would find their statutory knowledge continually becoming outdated. At the very worst "no-one could find anything" for a short while after a revision and this may have catastrophic results if an amendment was made in the period shortly before an election.

2.9.6 It is not asserted that electoral law is any better or worse than any other branch of law in this particular regard;⁵² wider matters of law are not for this Report. It must also be noted that such features are common in the law of other jurisdictions. Attention has already been drawn to its presence in the (Australian) Commonwealth Electoral Act

⁴⁹ See, e.g., <http://www.legislation.gov.uk/ukpga/1983/2/section/7A>

⁵⁰ A real example can be seen with the RPA 1983 and the insertion of Schedule A1; if we adopted the alternative renumbering method all the following Schedules would have to be renumbered and the Parliamentary Election Rules would become Schedule 2.

⁵¹ For a European example, see the renumbering of the original Treaty of Rome which established the European Economic Community. Articles (the equivalent of sections) have been renumbered in some subsequent revisions and amendments of the Treaty such that the original Art. 119 (as an example) has now become Art.141.

⁵² See, for example, the Employment Rights Act 1996 and the patch introduced to deal with dismissals due to retirement ss98ZA -98ZH.

1918 (as amended). However electoral law has become structurally complex and inaccessible and the problem of numbering contributes to this difficulty.

2.9.7 It will be asserted, however, that this perceptual (which is to say, *subjective*) matter is one which could be addressed by making adjustments to the structure of electoral law. Subjective or perceptual matters are of great importance because, of course, law has to be used by those who perceive it. That argument is set out below.

Inflexibility

2.10.1 The particular problem with the ‘make do and mend’ technique is that it is relatively inflexible. It is limited to (a) the repeal of sections, (b) the addition of new sections with their unwieldy numbering, and (c) the amendment of sections which sometimes means that old and obscure wording remains on the statute book. The discussion of the issue raised in *Mainwaring* concerning s115(2)(b) RPA 1983 above illustrates this point.⁵³

2.10.2 However, the ‘patching’ or ‘make do and mend’ technique has been to some extent abandoned in Australia in favour of the ‘rewriting’ technique. Writing on, and references to, the Commonwealth Electoral Act 1918 often say that it was ‘rewritten’ in 1984. Indeed it was; in fact it appears that the whole Act was rewritten ‘completely from the ground up’ in the same way that Australia’s tax law was rewritten.⁵⁴

Architecture

2.11.1 To many a lay person ‘architecture’ sounds like something to do with the design of stately homes. It sounds like an aesthetic or presentation issue. It is, in part, an issue of presentation, but it is also a question of substantive design. Even the most modest dwelling has an architect.

2.11.2.1 Part of the problem of the presentation of legislation has been solved. Statutes are now widely available online in a clear and legible fashion. The National Archive is responsible for placing most legislation online through the medium of the valuable

⁵³ See paragraph 2.6.2.1 above.

⁵⁴ Quotation from Jones (above fn48) writing on Australian tax law.

website <http://www.legislation.gov.uk>⁵⁵. This website is, of course only concerned with the display of legislation so that it may be used by interested parties. *When Laws Become Too Complex* contains a helpful textbox at page 14 which describes the outline of the way in which ‘computational legal studies’ has shown that legislation can be analysed, organized and, above all, presented according to mathematical models.

2.11.2.2 However even the National Archive website has its limitations. Restrictions on resources impede the updating process and secondary legislation is not updated at all upon amendment; it is simply added to or replaced.

2.11.3 Perhaps this could lead to another solution of the problem of complexity; it certainly raises another aspect of the difficulty with legislation. The problem is that the architecture of many statutes is often barely discernible; there seems to be no clear plan in the statute.

2.11.4 That is often because, at least as far as election law is concerned, it has been consolidated and re-consolidated so often, and then patched (see paragraphs 2.8.1 - 2.8.5 above) that the original plan of the statute has disappeared. To use a homely (and architectural) metaphor, the original building of the statute has been extended and repaired (sometimes using modern, rather than period materials⁵⁶) so often that no coherent view of the building is possible.

2.11.5.1 For example, Part II of RPA 1983 starts with s67 - the appointment of an election agent s67(1)-, we then have to wait until s99 until we discover that certain people may not act as election agents. It would be more logical to have this as s67(2). We might then reasonably expect s68 to set out the duties of an election agent, but these are ‘spread’ between ss71A and 112 in so far as they are ever truly defined. It is

⁵⁵ The problem with the website is that the speed of amendment is so fast that the authoring team have difficulty keeping up with the latest amendments, so the potential user still has to refer to the hardcopy legislation in particular any Commencement Orders.

⁵⁶ However the result when ‘period’ (mock-Victorian) materials are used is, perhaps, unhappy. See the discussion of s115(1)(b) RPA 1983 in paragraphs 2.6.2.1 and 2.6.3.1 above.

not claimed that all of these sections are even pertinent to the office of an election agent, but many of them impinge upon his/her duties and legal responsibilities.

2.11.5.2 It is beyond any reasonable doubt that the control of election donations and expenses is essential to the office of election agent. We are told in s73 RPA 1983 that payments in settlement of election expenses must be made by the election agent, but we do not find out what an election expense is until s90ZA. Parenthetically the precise relationship between 90ZA and 90A does not become evident (but not, it is ventured, wholly clear) until one reads the notes on the <http://www.legislation.gov.uk> website.

2.11.6 The point is that the architecture of many of the statutes - principally, but not exclusively, the RPA 1983- is unclear. The solution to this problem is raised here and will be developed later in the Report. The author questioned the presenters of *When Laws Become Too Complex* at its launch and found some agreement to the proposition that not only could legislation be presented in a clear and logical fashion, it could be structured and written by means of mathematical (or, at least, logical processes). It was said that, from time to time approaches were made to the presenters suggesting that law could, in fact, be reduced to a set of 'nested if-then propositions'.⁵⁷ It will be suggested that the way forward is to adopt a planned approach. This will be set out later in the Report.

'Telling the story' or 'what happens next?'

⁵⁷ A proposition that such could be done with morality was made by the philosophical progenitor of modern computing, G.W. Leibniz, in the seventeenth and early eighteenth centuries. Leibniz conceived of the universe, in all its diversity, as being unified by a system of logical rules. He took the view that these logical rules were minimal in number and could be manipulated by mechanical operations in order to produce predictable outputs (See his *Monadology* (1714)). Whilst Leibniz went so far as to hypothesise that, by the application of his logical calculus, all the primary concepts of the universe could be ascertained, the practical results of his work were exploited by Hilbert, Gödel, Turing, and von Neumann to develop both the theory and practice of computing. See George Dyson's *Turing's Cathedral: the origins of the digital universe* (London: Penguin, 2012) at pp. 103-107. Leibniz's insight was used to develop the concept of the 'universal machine' - a device which could do anything by numbers i.e. the computer. There is a large and growing literature on this subject well recognised in the UK, see *When Laws Become Too Complex* at pp14-16 and fns 13-14, and Howarth p.85 especially fn 96 and the materials referenced therein.

2.12.1 The Office of the Parliamentary Counsel’s *Drafting Guidance* contains a valuable but understated pointer towards successful statutory drafting.⁵⁸ It urges those involved at any stage in the drafting of legislation to ‘to take the reader by the hand and lead him or her in a logical way through the story you have to tell.’ The main difficulty with the RPA 1983 is that it does not lead the reader in a logical way through the story. The fragmentation is such that s/he will be forced to (as it were) change books and change types of book back and forth. As we shall see later in the Report many of the international comparators have the necessary coherence in the story. This feature now seems to be lacking in, e.g., the RPA 1983 because of its patched structure. It might be fair to say that it had ‘lost the plot’.⁵⁹

Summary and Conclusion

2.13.1 It has now become time to summarise these findings. It is accepted that the typology introduced here is only one of a number of typologies which could be used (e.g., the OPC and the Law Commission typologies) but it is asserted that this is the most useful for addressing the problems of electoral law.

Table One: Problems of electoral law

Type of Problem	Functional Description	Solvable by Structuring?
Volume	Too much legislation.	Yes
Quality	Poorly drafted or ineffective or inefficient legislation.	No
Complexity	Complex legal content.	No
	Difficult drafting.	No
	Difficulties in drafting stemming from amendment to old statute.	Yes
Fragmentation	Fragmentation of related provisions within a single piece of legislation.	Yes

⁵⁸ See Drafting Guidance at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61010/Office_of_the_Parliamentary_Counsel_revised_guidance_16_12_11.pdf

⁵⁹ It is accepted that the language here tends to the informal. The problem is that there seems to be no middle ground language for describing this issue. It was well described in the context of case law by Ronald Dworkin in his *Law’s Empire* (Cambridge (MA): Harvard UP, 1986) where he uses the metaphor of a ‘chain novel’ to describe the story of common law adjudication. An alternative logical (using Peano-Russell notation) description of the same phenomenon is given by Robert Alexy and Alexander Peczenik ‘The concept of coherence and its significance for discursive rationality’ (1990) 3 *Ratio Juris* 130-147. The same problem besets the later comparative discussion where ‘running an election’ and ‘writing legislation’ are compared to ‘baking a cake’. See below para 3.9.4.

	Fragmentation of related provisions between legislative instruments	Yes
Numbering	Non sequential numbering leading to confusion	Yes
Inflexibility	Inflexibility of ‘patching’ or ‘make do and mend’ technique	Yes
Architecture	Fragmentation in initial drafting	Yes
	Fragmentation consequent upon ‘patching’	Yes
Telling the story	Incoherent story – cannot see where the legislation is going.	Yes

2.13.2 However there is one major principle which acts counter to any proposals for reform.

It is particularly important that electoral law is stable. Elections typically operate over a cycle of some four to five years and citizens expect the rules to remain the same over an even longer cycle.

2.13.3 Changes in substantive electoral practice may well be resisted at least passively by voters; although this may be a simple age effect because it is notorious that older people are more likely to vote than younger people.⁶⁰ With the minor *caveat* that habits become more ingrained with increasing age in mind, the *iIDEA Guidelines* make the important and fundamental point that there is something radically undemocratic about having ‘part of the electoral law enacted just before the elections without affording a sufficient opportunity for discussion and debate’.

Election legislation should be enacted sufficiently far in advance of an election date to provide political participants and voters with adequate time to become familiar with the rules of the election processes. Election legislation enacted at the last minute tends to undermine the legitimacy and the credibility of the law and prevents political participants and voters from becoming informed in a timely manner about the rules of the election processes.⁶¹

2.13.4 A similar point is made in *The Code of Good Practice in Electoral Matters* produced by the Venice Commission (the European Commission for Democracy through Law) in 2002 at paragraph 63

⁶⁰ Evidence to support Equality Impact Assessments at the Electoral Commission, October 2012. <https://admin.electoralcommission.org.uk/about-us/equality-and-diversity/?a=151776>.

⁶¹ See Chapter 2 *iIDEA Guidelines*.

Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently – and especially rules which are complicated – may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections.⁶²

2.13.5 The Electoral Commission has made a similar point on a number of occasions. For example in its Parliamentary Briefing on the introduction of legislation to facilitate the election of Police and Crime Commissioners it said:

An important factor in the delivery of well-coordinated and well-run polls will be clear legislation. We continue to highlight our firm recommendation following problems with the Scottish Parliament elections in 2007 that the rules relating to any elections must be clear from at least six months in advance. This is so that campaigners, Returning Officers and the Commission are not left with uncertainty about their respective roles and responsibilities and can undertake the necessary planning and preparation.

The proposed 3 May 2012 elections will see an entirely new legal framework being implemented to support the election of Police and Crime Commissioners, so it is particularly important to us that this principle should be observed.⁶³

2.13.6 Nevertheless it is considered that the points made by the Law Commission on the basis of its survey of electoral practitioners and by successive election observation missions make the case for reform unanswerable. This point is, of course, answered by the Law Commissions (of England and Wales, Scotland and Northern Ireland) when they set out their timetable (above paras 1.2.2 and 1.2.3). Legislation is intended to be in place for the 2020 general election since the Law Commissions hope to publish a final Report and a Bill in 2017.⁶⁴ How might we proceed with reform? Let us look at some international comparators.⁶⁵

⁶² [http://www.venice.coe.int/webforms/documents/CDL-AD\(2002\)023rev-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx)

⁶³ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0016/107215/Police-Reform-And-Social-Responsibility-Bill-Second-Reading-Briefing.pdf

⁶⁴ See <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>

⁶⁵ Once again it is useful to remind readers of the Australian attempts to remove unnecessary complexity from legislation. Their diagnosis of the problems and their proposals for solutions do, however, differ from the proposals made here.

3. International Comparators.

Introduction

3.1.1 The purpose of this section of the Report is to consider how, if at all, international guidance and the use of international comparators will assist us in designing a new structure for the UK's electoral law. It will be argued that, whilst legal content from other jurisdictions may only be used sparingly and with great care, there is no difficulty with using other sorts of international or supranational material which does provide helpful guidance. It is important to show what international comparators cannot, and more importantly, can do. Some international materials have already been used as examples of weaknesses (and, indeed, relative strengths) of the UK legislation; here they are considered in greater depth.

Constitutional effects and political culture.

3.1.2 Citizens expect that electoral law as a subunit of Constitutional Law reflects the particular political and organisational constitution of the country. We can call these the '**Constitutional effects**'. They also expect that it will reflect the historical and social structure of a country and take account of popular notions of its foundation. We can call the latter the '**political culture**'.⁶⁶ These have a number of effects upon the **structure** of electoral law which are detailed below (and, whilst it will be ignored as much as possible for the purposes of this Report, a profound effect upon the **content** of electoral law).

Constitutional effects

3.2.1 The most important distinction here is the three-fold distinction between Federal, Devolved, and Unitary structure. The structural design of electoral law must differ in some respects between Federal states (such as the USA, Canada, Australia and Germany); those states which have devolved power to sub-national parliaments or assemblies (Italy, Spain, the UK); and unitary states which often or usually have some form of subordinate local government (for example, New Zealand). That is not to say

⁶⁶ The use of the term in political science stems from Gabriel Almond and Sydney Verba, *The Civic Culture: political attitudes and democracy in five countries* (New York: Sage, 1963). The particular importance of political culture to this Report is made clear in the sections dealing with Guidelines set out below.

that the distinction between the three types of structure is always clear - one might argue that the structures in, e.g., Germany, Spain and Italy are intermediate between Federal and Devolved but the precise details are unimportant. One example is that there is a very clear distinction between the USA and the UK. Election laws in the USA are organised at State level in the various States of the Union even where the election is to national, e.g., Presidential office.⁶⁷ In the UK the election laws have, historically been made by the Westminster Parliament with, following devolution, some matters being the subject of legislation of the Scottish Parliament. Such a difference between constitutions make it difficult to transplant legal structures, and even more difficult to justify such transplantations.

3.2.2 One might also think of the division of the state into constituencies; the system of division differs from state to state. Most states divide the country into several distinct constituencies but, Israel, for example, operates as a single electoral constituency and elects members representing parties to the *Knesset* in proportion to the number of votes which each party receives.⁶⁸ This has a fundamental effect upon the structure of Israeli election law.

Political culture

3.3.1 Each state has its own history; and each state has its own set of political circumstances. There is no doubt that some of these have a profound effect upon the constitution.⁶⁹

3.3.2 Let us consider the effect of some of these circumstances upon the possible adoption of the iIDEA Guidelines. Chapter 9 of the iIDEA Guidelines deals with the issue of Democratic Election Campaigns and, in particular, with the activities of parties and candidates during election campaigns. Part of this chapter deals with the occurrence

⁶⁷ Never shown more clearly than in *Bush v Gore* 431 US 98 (2000), where although a State (here Florida) was required to use a uniform counting method across all counties (administrative electoral divisions) in the State to avoid a breach of the US Constitution, the law governing the administration of elections was held to be (Florida) State Law.

⁶⁸ For an explanation of the Israeli political system, see http://www.knesset.gov.il/description/eng/eng_mimshal_beh.htm.

⁶⁹ The Israeli website referred to above gives one example: the composition of the Knesset, the multiplicity of parties, and the proportional voting system have their origins in the practices of Jewish communities.

of violence and campaigns to obstruct the lawful activities of other parties. This is well known as a problem in some polities and will be discussed in the section below dealing with Codes of Practice and their possible use in the UK's revised election law. However, and fortunately, it is a feature which is almost entirely absent from UK elections; the only well-documented modern incidents were set out in *McCrorry v Hendron* in 1993.⁷⁰ The introduction of a structural feature, the Kenyan Electoral Offences Act 1998 (revised 2009) has been directly caused by electoral violence and this particular (Kenyan) Act will be discussed below.

3.3.3 Where there has been a history of, or the threat of, violence leading to revolutionary change in the recent past - for example in South Africa and in many of the post-Soviet states of Eastern Europe and Asia, one can see the effect of this in election rules and practices which seek to minimise electoral violence.⁷¹ Since electoral violence has played such a small part in UK electoral practice, the number of measures dealing with it is very low. From a structural point of view it would be very odd if an entire Act or even a Chapter or Part of an Act was introduced to deal with electoral violence and the volume of the law thereby greatly increased to deal with an apparently minor problem.

3.3.4 Change less radical and less immediate than wholesale revolution has been undergone in a number of countries. Sometimes this has taken the form of secession from one state to form another - such as the formation of the Irish Free State in 1922 from the former United Kingdom of Great Britain and Ireland, and the subsequent formation of the Irish Republic in 1937. Clearly the 1922 State used the extant UK election law - principally the Representation of the People Act 1918 - but slowly this evolved away from the UK model. A history may be found in the report of *McMahon v A-G* [1972] IR69.⁷² Irish electoral law required that a note be made in the electoral register of the

⁷⁰ *McCrorry v Hendron* [1993] IR 177. There are other examples; in Derry during the 2004 European Parliamentary Elections, in Fermanagh and South Tyrone in 2001, but the UK's latest serious case of election rioting seems to be that reported in *North Durham* (1874) 2 O'M&H 152.

⁷¹ For a basic introduction see Höglund and Jarstad *Strategies to prevent and manage electoral violence: considerations for policy*. http://www.accord.org.za/downloads/brief/policy_practice1.pdf.

⁷² The Electoral Act 1992 which was the governing legislation at the time of *McMahon* has, of course, frequently been amended up to the present time - the Electoral Amendment Act 2012 being, at the time of writing, the most recent amendment.

number of the ballot paper issued to the voter in order to facilitate any later scrutiny. This legal practice was challenged by McMahon who claimed that it violated the constitutional guarantee of a secret ballot. He succeeded in his claim. The structural point is that revisions to Irish Law consequent upon *McMahon* made it unlawful to use even an indirect numbering system for ballot papers such that they could be traced back to individual voters. If it was proposed to introduce a part of a new primary Act (or, as is thought more likely, a set of Regulations) to deal with the question of a scrutiny of ballot papers to replace the current law,⁷³ one could not use structures devised in countries which had an approach to ballot secrecy which differs from that used in the UK

3.3.5 Another example is to be found in the history of elections in Canada. This is pertinent because, during the preliminary discussions leading to the preparation of this Report, the Canadian legislation was suggested as a possible model for reform of the UK system. A succession of constitutional challenges has shaped the modern Canadian law and, once again, it seems difficult to transplant because the UK has simply not faced those particular challenges.⁷⁴ Possibly the one structural reform which characterises the substantive structural proposals set out later in this Report is the introduction of a right to vote. It is acknowledged that this has a substantive flavour to it, although the arguments have been made above and will be made below for this right. The right to vote was introduced in Canada as s3 of the Canadian Charter of Rights and Freedoms and has shaped the development of the Canadian law,⁷⁵ just as

⁷³ The current, unsatisfactory, law is contained in s157(2) RPA 1983. This is nugatory because no such scrutiny can have been held in the House of Commons since 1868 and the passage of the Parliamentary Elections Act that year. It is to be presumed that the procedure for a scrutiny is to be found in the 1848 Act - An Act to amend the law for the trial of election petitions. For discussion, see *Challenging Elections in the UK* (London: Electoral Commission, 2012) pp38-40.

⁷⁴ The entire history is set out by Elections Canada at *A History of the Vote in Canada* <http://www.elections.ca/content.aspx?section=res&dir=his&document=index&lang=e>

⁷⁵ See for a more complete description:

<http://www.elections.ca/content.aspx?section=res&dir=his&document=chap4&lang=e#a4>

As we will see below, when the issue of the structure of the law to deal with alternative voting methods is discussed, the Canadian experience has been used. The following extract from *A History of the Vote in Canada*, which deals with 'advance voting' (an alternative voting method) explains how the right to vote contained in the Charter required the facilitation of advance voting:

"Many Canadians probably assumed that their right to vote was assured well before 1982. As we have seen throughout this book, however, many people had been denied the franchise – some on racial or religious grounds, others because they could not get to a poll on voting day. [Continues Pg. 43]

the right to vote will shape the succeeding provisions of the Electoral Act 201x proposed for the UK in this report below. Perhaps this is an example of positive transplantability, but it depends upon the acceptability of the idea of the right to vote.

Transplantation

- 3.4.1 The Kenyan and Canadian examples notwithstanding, there remain difficulties with transplanting legal material. This difficulty is explained in far more detail by Pierre Legrande in his ‘The impossibility of legal transplants’,⁷⁶ where he advances the proposition that moving law from one jurisdiction destroys its meaning because it cannot operate in a cultural context different from that in which it was devised.⁷⁷
- 3.4.2 That is not to argue that some particular structures which have been devised in other jurisdictions could not and should not be adopted in a reformed UK law; it is simply to say that they would need to be transformed into a UK context. This is discussed below.
- 3.4.3 Neither is it to argue that the UK law is in some sense apolitical; nothing could be further from the truth. This point was made in the first chapter of my *UK Election Law: a critical examination*,⁷⁸ where I pointed out that electoral law has always had an ideological content; it is contested, it is political law. I identified the major - although not uniquely so - shaping factors as the Great Reform Act of 1832, and, more pertinently here, the Ballot Act of 1872. Both of these Acts came as the culmination of long political campaigns and it would be a denial of history to retreat from their development. One might also refer to the long-running controversy regarding UK overseas electors as being a matter of political controversy.⁷⁹

Even when improvements in election law were proposed – for instance, extending advance polling to groups other than railway workers and commercial travellers – they sometimes provoked resistance in Parliament. We have seen, for example, how it took 50 years to extend advance voting to everyone who wanted it; each time a new group was given the "privilege" of advance voting, there was opposition, generally on the basis of cost or administrative convenience. Arguments based on democratic rights and principles were heard less often.”

⁷⁶ (1997) 4 *Maastricht Journal of European and Comparative Law* 111-124.

⁷⁷ See, in particular, Legrande’s argument at §5 where he discusses culture and its effect upon rules, and §8 where he summarises his position.

⁷⁸ London: Glasshouse, 2006.

⁷⁹ See the House of Commons Library Standard Note SN05923 ‘Overseas Electors’.

3.4.4 Finally in this regard, it is unlikely that public acceptance would be secured for any import from a country which was not viewed as a full and functioning democracy.

What can be used, and what must be avoided?

3.5.1 However the argument set out above (and that of Legrande) apply most closely to the content of the law for it is this which is shaped by the constitution and the political culture. Content must be used with great care. It does not mean that structures derived from other legal systems are inapplicable to UK law despite the fact that content and structure are linked in the ways shown. Guidelines and discussions of legislative techniques, *travaux préparatoires* of various sorts, international legal Instruments (since these do not depend upon any particular country's constitution or political culture) and, above all, supranational guidelines are all valuable in the design of a structure. One might say that the further one gets from the substantive content of the law of a foreign jurisdiction the easier it is to apply to the structuring of UK electoral law.

3.5.2 For that reason we turn first to supranational materials. These are free from particular national problems (although they are designed to address them) and represent the purest form of guidance. International comparators will be used to illuminate some of the issues.

3.5.3 The use of supranational election law materials is, of course, only one way of addressing the problem. There seems to be no good reason in principle why we should not turn to more general materials (outside the field of electoral law) to address this problem. This would obviate many of the problems discussed above because even national materials would not carry the particular baggage of constitutional structure and national political culture. One might, without straining credulity, think of the electoral laws of democratic nations as the (highly fragmented and complex) laws of one country; whilst general writing on structuring legislation in general is, even though it relates to one country, more like supranational guidance. One might

think of the *Electoral Reform Green Paper: Strengthening Australia's Democracy*⁸⁰ as an example of a national (Australian) paper (but, nonetheless, of some value) whilst *Reducing Complexity in Legislation*⁸¹ is almost supranational in scope and seems more valuable.

3.5.4 One also might think of areas of law and writing about those laws from other jurisdictions quite outside the field of electoral law. One of the most valuable pieces is the piece by Kerry Jones, 'Rewriting Australia's Income Tax Laws' discussed above. Jones considers the technique of rewriting and this is discussed at paragraphs 2.10.2, and 3.8.6.3-4)

Supranational and International Comparators.

3.6.1 We first need briefly to consider the United Kingdom's binding international obligations to give a context for the discussion. These instruments do not make any demands as to the structure of election law, and the discussion of the case law surrounding one of them (Article 3, 1st Protocol ECHR) explains why and begins to explain the relevance of this discussion. The binding Instruments are (a) Article 25 of the (UN) International Covenant on Civil and Political Rights (ICCPR), (b) Article 3 of the First Protocol to the European Convention of Human Rights, and (c) the Organisation for Security and Cooperation in Europe's Copenhagen Document. Only the first two are discussed at all, but in passing it should be noted that the OSCE is the parent body of the ODIHR whose adverse report on UK electoral law is recited above.

3.6.2 Of these the global fundamental document is clearly Article 25 of the ICCPR because that is the standard to which the world is going to hold the UK and is that to which the UN Human Rights Committee will refer in its Comments on the UK's Periodic Reports.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

...

⁸⁰ Available at http://www.dpms.gov.au/consultation/elect_reform/strengthening_democracy/docs/strengthening_australias_democracy.pdf

⁸¹ See above fn14.

(b) To vote ... at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

This immediately inserts a substantive provision which must be recognised and supported in any structure of election law which is devised.

3.6.3 The General Comment to the ICCPR,⁸² which fleshes out the meaning of the Article, is not binding in itself but is highly persuasive as to state practice and might well be regarded as part of customary international law, contains extensive but general guidance as to the shape of election law. It is limited to general principles and makes no comment on the structure of the law; however, once again, it provides substantive principles have to be incorporated into any structure of law.

3.6.4 The Regional standard;⁸³ Article 3 of the First Protocol of the European Convention of Human Rights, which is binding and from which High Contracting Parties cannot derogate, likewise contains a general substantive principle similar to that contained in Article 25 ICCPR. It is not recited because the fundamental principle is stated above in the ICCPR. One might note however that, unlike the ICCPR, as a result of the Human Rights Act 1998 the ECHR is directly enforceable in the UK courts and, through s19 has an effect upon parliamentary practice. Any revision to the UK's electoral law will have to be compliant with Article 3 of the First Protocol. The case law of Art.3 1st Protocol does make a useful, albeit negative, point about structure. In *Hirst v UK (no 2)*⁸⁴ the Grand Chamber of the ECtHR made the following comment about the width of the margin of appreciation and the latitude afforded to states in designing their electoral law:

⁸² *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : . 12/07/1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments).*

⁸³ 'Regional' is used in the context of international law, rather than in the context of parts of the United Kingdom. For a list of the signatories to the Regional standard see <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=8&DF=05/06/2013&CL=ENG>

⁸⁴ [2005] ECHR 681.

61. There has been much discussion of the width of this margin in the present case. The Court would re-affirm that the margin in this area is wide (*Mathieu-Mohin*, 10 EHRR 1, and more recently, *Matthews v. United Kingdom* [GC], no. 24833/94, ECHR 1999-I; *Labita v. Italy* [GC], no. 26772/95, ECHR 2000-IV, and *Podkolzina v. Latvia*, no. 46726/99, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.

Thus the ECtHR affirms that there are no structural requirements imposed upon the UK with respect to its electoral law beyond those implied in the content imposed by the Article. This statement is consistent with the analysis of the use of international comparators set out above in the Introduction to this section of the Report.

3.6.5 It is proposed that the most helpful set of international materials are to be found in the iIDEA Guidelines. The Institute has Permanent Observer Status at the United Nations and it may be argued that, for that reason, its Guidelines have considerable authority in international law. These Guidelines represent our starting point in the discussion, and they will be discussed in depth with reference to other materials where they elucidate or add to the analysis. These Guidelines (amongst the others discussed herein and below) contain some useful pointers towards designing a structure for electoral law. The Electoral Commission in their *Electoral legislation, principles and practice: a comparative analysis*⁸⁵ have helpfully distilled the iIDEA guidelines as set out in Chapter 2 into six principles. It will be argued below that these particular principles do not exhaust the guidance given by iIDEA.⁸⁶

The iIDEA Principles

1. To achieve the benefits of clarity, certainty and accessibility the majority of electoral matters should be rendered in written law
2. An effective electoral law framework should be structured hierarchically: constitution (where applicable), primary legislation, secondary legislation, guidance, codes and instructions.

⁸⁵ See p4.

⁸⁶ Most notably iIDEA gives extensive guidance on the elements of the hierarchical structure. It will be observed that there is some debate below as to the applicability of this guidance in the context of the UK.

3. A unified, consolidated electoral law is preferable to a fragmented law with separate legislative vehicles for different electoral events and dealing with different matters.
4. Reforms to electoral law should be undertaken with the goals of clarity and simplicity in mind.
5. Election legislation should avoid conflicting provisions between laws governing national elections, sub-national (provincial or state), local elections and referendums.
6. The legal framework should require that central electoral bodies be established and operate in a manner that ensures the independent and impartial administration of elections.

3.6.6 Before starting the analysis it is important to note that the 6th principle is substantive and will not be analysed in this Report.

3.6.7. These five individual principles will be successively, and to varying extents, analysed. Whilst it introduces some untidiness to the text it will be noted that, from time to time, the iIDEA principles contain clauses to the effect that “some countries do it this way; some countries do it that way”. Where this is the case some national level provisions/comparators will be introduced and discussed. Furthermore, the second principle of hierarchical structuring will require a lengthy analysis of both the substantive categories (constitution etc.) and any principles for allocation which may be discerned. This analysis will provide some solutions to the problems identified above in section 2 of the Report. The third, fourth and fifth principles will, as noted above, be analysed together with the proposal of some structural features for inclusion in the law.

Written law

3.7.1 **To achieve the benefits of clarity, certainty and accessibility the majority of electoral matters should be rendered in written law.**

This is a particularisation to electoral law of the well-known formal requirements of the rule of law - in order to guide purposive human behaviour; law must be open, prospective and clear. Since writing provides evidence of the law and is, (thanks to the online posting of most legislation), available to all, it almost goes without saying that law should be written down. It does not seem to be any more or less true of electoral law than of any other kind of law.

Hierarchical structure

3.8.1 An effective electoral law framework should be structured hierarchically: constitution (where applicable), primary legislation, secondary legislation, guidance, codes and instructions

This is an important feature of the iIDEA framework and requires considerable discussion.

Hierarchical structure: i. Constitution

3.8.2. The highest level of the iIDEA framework is the Constitutional level. The constitution has a higher level of authority than other forms of law. It is more difficult to change than other subordinate levels and provides general, overarching principles with which lower tiers of law must comply. In some states, most notably the United States of America, it provides a standard with which other laws must comply.⁸⁷ The UK does not have a written Constitution and accordingly ‘constitutional’ provisions - such as any ‘right to vote’ would have to be included in an ordinary Act of Parliament.

Hierarchical structure: ii Primary Legislation

3.8.3.1 In the context of the United Kingdom this refers to legislation made directly by the UK Parliament or, within their competencies, by any devolved Parliament or Assembly of a part of the UK.

3.8.3.2 At present most primary legislation governing elections and referendums is made by the UK Parliament. However the Scottish Parliament has an extensive range of powers to deal with matters such as local government in Scotland, Health Board and Crofting Commission elections, and most notably the Scottish Parliament has a devolved power to make primary legislation for the 2014 Referendum on Independence.⁸⁸

3.8.3.3 The traditional view of primary legislation is that it is the prerogative of succeeding Parliaments to make or unmake any law it wishes and may do so in any manner which

⁸⁷ In accordance with the process of fundamental or constitutional judicial review as set out in *Marbury v Madison* 5 U.S. 137 (1803)

⁸⁸ See above fn 3.

it so decides. This traditional view must be modified in the light of accession to the Treaty of Rome and its succeeding Treaties, but this need not concern us here for it has very limited competence with respect to electoral law.⁸⁹ Of more concern is the fact that in 1998 Parliament did decide, by the passage of s19 of the Human Rights Act 1998, that in future all draft legislation would need to be accompanied by a written certificate stating that either it is compatible with the provisions of the European Convention of Human Rights or, that despite its non-compatibility, the Government wished the House to proceed with its passage. Turning to electoral law, the primary legislation regarding election law was, in the main, written in the middle third of the nineteenth century and its amendment has proceeded in a piecemeal fashion since then with a number of consolidations.

3.8.3.4 The last major consolidation was in 1983, giving rise to the Representation of the People Act 1983. Of course there has been a great deal of primary legislation subsequent to that date - one might mention, amongst other legislation, the Representation of the People Acts 1985 and 2000, the Registration of Political Parties Act, now repealed and consolidated into the Political Parties, Elections and Referendums Act 2000 - which is itself a highly significant piece of legislation - the Electoral Administration Act 2006 and the Electoral Registration and Administration Act 2013. This is not intended to be a complete list because the Electoral Commission's list, itself not exhaustive, takes up multiple pages of *Electoral legislation, principles and practice: a comparative analysis*.⁹⁰

3.8.3.5 One might think that the addition of new primary legislation governing elections and the frequent amendment of many of these Acts by the addition of fresh Sections indicate a clear preference to enact as much electoral legislation as Primary Legislation as possible. However when one thinks of the even larger volume of secondary legislation, some of it being lengthy and complex one might take quite the opposite view. For example one could think of the 'postal voting on demand' provisions prompted by the Howarth Review of voting arrangements,⁹¹ and the power

⁸⁹ See Treaty for the functioning of the European Union Articles 20 2(b) and 22 2.

⁹⁰ See *Electoral legislation, principles and practice: a comparative analysis* pp74-76.

⁹¹ See *Report of the Working Party on Electoral Procedures* (London: Home Office, 1999)

to introduce these changes enacted in the Representation of the People Act 2000. The actual introduction of postal voting on demand in England and Wales was accomplished by Regulations in 2001.

3.8.4 The iIDEA Guidelines provide two basic models for enacting primary electoral legislation:⁹² This has been reworded slightly to remove some ambiguities of expression from a text designed for an international audience and indexed for ease of reference.

National election legislation can be divided into two categories:

a) Generic election legislation relevant to any election. This establishes a common legal framework governing all elections, including elections to the executive and legislative branches, at national and local levels.

b) Legislation relevant to specific elected institutions. This establishes special legal provisions that govern elections to a specific body of government with provisions deviating from or supplementing the general legal framework for elections.

Whilst this division is sometimes difficult to understand and to apply to individual states, the division between type a) and type b) organisational principles falls broadly along the line of degree of devolution in a state. Unitary states seem to be type a), and highly devolved or federal states seem to be type b).

3.8.5.1 Since the greatest diversity in “local” (i.e. National, sub-National (State or Province), county, or district) seems to occur in those countries which we may describe as ‘Fully Federal States’ (such as the USA) it seems more appropriate to start the analysis at that end of the spectrum. These are the type b) states described above.

3.8.5.2 **The USA:** There seems to be little in common between the electoral laws (at the organizational level) of, say, Oregon,⁹³ Mississippi⁹⁴ and Maine⁹⁵ (States chosen at random). It would be a Herculean task to divine or determine some overarching

⁹² iIDEA Guidelines p.14.

⁹³ <http://www.oregonvotes.org/pages/publications/statutes.html>

⁹⁴ <http://www.mscode.com/free/statutes/23/015/index.htm>

⁹⁵ <http://www.mainelegislature.org/legis/statutes/21-a/title21-Ach0sec0.html>

degree of common order in these laws. It is sometimes difficult to discern any degree of high level organisation of some of these statutes. It would also seem that many of the US State election laws suffer from many or all of the problems which face UK election law set out above.

3.8.5.3 Other Federated states do adopt a central (Federal) system of election law, and devolve to individual states the power to make their own 'local' electoral law - such countries include **Australia** and **Canada**. Consideration of these countries will be included in the international comparators set out below.

3.8.5.4 Countries such as the **United Kingdom** tend to use a spinal structure. However it must be noted that, in the case of the UK a spinal structure is used with the addition of a variety of event based structures. One might, without straining the metaphor, call it a skeletal structure. Some of these event based structures deal with the effect of having more than one kind of election on that day (referred to as 'Combination Rules'). Part of the reason for the skeletal structure (as opposed to the pure spinal structure set out in respect of New Zealand below) is the fact that there have been significant additions and alterations to the numbers and types of elections since the last consolidation in 1983 and the Representation of the People Act of that year.

3.8.5.5 The spinal structure of **New Zealand** electoral law was enacted in the Electoral Act 1993 (no. 87) which has now been amended (giving rise to difficulties in the numbering system similar to those discussed above). This contains the gist of the electoral system and is supplemented by a number of other primary and secondary measures to produce a complete electoral code.

3.8.5.6 However the iIDEA framework does not complete the picture in two respects. First, some jurisdictions, here **Kenya**, have introduced another technique for using primary legislation. Rather than constructing a unitary (spinal or skeletal) framework for electoral law they have added a piece of legislation which applies to all electoral events (so spinal in the sense that it is common) but only deals with one sort of eventuality - in particular - electoral offences. Whilst this particular piece of legislation (The Election Offences Act 1998, revised 2009) has now been repealed, it does seem to have some advantages for the structure of electoral law. Chief amongst

these is the fact that electoral offences are dealt with in Election Courts and in criminal courts. If we were to have a specific statute dealing with the criminal offences it would greatly ease the work of the criminal courts. On a world stage it is judged particularly important that statutes imparting criminal culpability are of the utmost clarity.⁹⁶ Statutes which mix technical election law and technical concepts of criminal law - such as the fault condition (*mens rea*) of a criminal offence - will not assist courts or those who should design their conduct to avoid the commission of a criminal offence.

3.8.5.7 In addition, the iIDEA framework tells us very little about how we might design primary legislation. Here we need to turn to the other sort of ‘supranational’ comparator (see the discussion at paragraphs 3.5.1 - 3.5.3 above) and look at the Australian *Reducing Complexity in Legislation*.

Reducing Complexity in Legislation

3.8.6.1 The view reported in *Reducing Complexity in Legislation* is that:

Poorly structured legislation can be a cause of complexity. If the important concepts in a legislative measure are not stated as its central elements, but are obscured by other material such as procedural detail, overly complex provisions are likely to result. Adopting a clearer and more logical structure is a useful step in reducing that complexity.⁹⁷

An example of this sort of approach is given using the provisions (Part 3-2) of the (Australian) Fair Work Act 2009 which deal with the concept of ‘unfair dismissal’:

Division 1 introduces the Part
Division 2 creates a concept of a person who is protected from ‘unfair dismissal’;
Division 3 describes when a person is ‘unfairly dismissed’;
Division 4 sets out what remedies are available for an ‘unfair dismissal’;
Division 5 deals with procedural matters.⁹⁸

⁹⁶ See, e.g., Clarity in criminal offences: the void for vagueness doctrine <http://law.onecle.com/constitution/amendment-14/54-void-for-vagueness-doctrine.html>; generally in England see *R v Middleton* (1873) L.R. 2 Crown Ca. Res. 57 and for an electoral law example *R v Jones, R v Whicher* [1999] EWCA 974 CA.

⁹⁷ See p8, s3.

⁹⁸ Text adapted from p8, s3.

It is to be noted that one does not have to know what ‘unfair dismissal’ might be; one could easily substitute some electoral concept into the framework.

3.8.6.2 This way of working might well be described as adopting *modularity of structure*.

This concept of modularity differs considerably from Howarth’s concept of modularity - the ‘plug-in’ standard clause which may be re-used in a number of similar though factually different contracts.⁹⁹ Howarth’s concept of modularity might be described as *modularity of form*. One might think of Howarth’s concept as by way of a *pro-forma* in which one of a number of variations of a standard term may be inserted into an agreement. It is to be contrasted with *modularity of content* in which the whole agreement is standard subject to minimal variations.

3.8.6.3 When we turn to the actual rewriting of an Act of Parliament the most useful guidance found in the course of this study was that produced by Kerry Jones in Australia.

3.8.6.4 The core rewriting technique is well described by Jones¹⁰⁰ and the central features of it - adapted for uses in election law and supplemented by some of the other techniques discussed in this paper (e.g., ‘storytelling’) - are as follows: A “pyramid” conceptual structure should be adopted for the core statute (EA 201x). This involves the initial presentation of the central concepts which define and apply to all participants in the electoral process: (a) who can vote, (b) who can stand for election, (c) the bodies for which candidates can stand and the electoral systems which are used, (d) the bodies with responsibility for supervising and organising elections. (These four principal concepts map onto the features which iIDEA suggest should be contained in a constitution). The statute then proceeds by ‘telling a story’ - working its way through the stages of an election - much as the original legislation once did, and as we can see in many international comparators. This is outlined in the Appendix to this Report, which sets out some ‘sketches’ for how the EA 201x could be structured.

⁹⁹ See pp90-91.

¹⁰⁰ Above fn48.

3.8.6.5 The points made by Jones in his discussion of techniques of ‘presentation of concepts’, ‘orientation etc. material’, ‘guides’ and ‘signposts’ are also very helpful.¹⁰¹ These points describe how expertise developed in other fields was used to help design the legislation. It appears that experts in communication and document design were brought in to help with the actual design.¹⁰² This brief discussion of techniques of statutory presentation has not had the benefit of being informed by discussions with the National Archive presentation team and it may well be that the National Archives are already using such experts.

3.8.6.7 In regard to electoral international comparators the Swedish Elections Act 2005 is commended.¹⁰³ Whilst the difficulties with using international materials have been set out (and these are compounded by the fact that the original Swedish material is, of course, in Swedish) the (translated) Swedish material is perceptually ‘much easier to understand’. The sensory impact of the Swedish Act is, of course, quite separate from its content and, if one imagines that the material is originally from the UK, one can get an impression of its impact upon readers. Given that electoral law materials have a very wide audience it is clear that material should be presented in an accessible way. The Swedish material should, it is suggested, be *looked at* with care.

Hierarchical structure: iii Secondary Legislation

3.8.7 Secondary legislation is, of course, legislation in the form of Regulations, Orders, Rules and so forth made by the Government under powers delegated by Parliament via primary legislation.¹⁰⁴ If we take the Westminster Parliament as a model to illustrate the system, Parliament has the right to reject it (under the negative resolution procedure) or specifically to accept it (under the affirmative resolution procedure) or,

¹⁰¹ See Jones above fn48 pp. 4-6.

¹⁰² Jones’ text reads as follows: “The rewrite adopts a new format that is significantly different from that of the 1936 Act. With the exception of some minor differences, the new format has been adopted for all Acts of the Australian Parliament. The new format is the product of extensive consideration, taking into account developments in other jurisdictions as well as the advice of experts in communication and document design. It involves greater use of white space around text, greater prominence for headings and the use of running page headings”.

In his original work Jones provided a specimen but this has not been included in the online copy.

¹⁰³ http://www.val.se/pdf/2005_elections_act.pdf

¹⁰⁴ <http://www.parliament.uk/documents/commons-information-office/107.pdf>

in certain cases, the minister has to engage in consultations on the proposed legislation and then place the results of this consultation before Parliament which then considers the matter before deciding to vote to accept it (the super-affirmative procedure).¹⁰⁵ Since secondary legislation often bypasses the floor of the House it is traditionally restricted to matters of detail which can be used to fill in the gaps in primary legislation. Its advantage is that it is more easily amended and replaced than primary legislation. A potential legal problem with secondary legislation as a source of legal rules is that secondary legislation depends upon the primary - the enabling Act - and thus there is always the opportunity for litigation to be brought to challenge the consistency between the secondary and the primary legislation. There are no examples in the electoral sphere. Politically secondary legislation may give rise to greater problems stemming from ineffective scrutiny although, given the obvious sensitivities around electoral law this may not be the case. In any event, there are three parliamentary committees which scrutinise secondary legislation - the Select Committee on Statutory Instruments in the Commons, the Joint Committee on Statutory Instruments which examines Instruments subject to the authority of both Houses, and the Secondary Legislation Scrutiny Committee which is a Committee of the House of Lords. The Lords Committee does have the power to bring Instruments before the House where they think that public policy so requires and experience has shown that scrutiny is effective.¹⁰⁶

3.8.8.1 The greatest challenge is, however, how to allocate legislation between primary and secondary levels. The Australian experience is, once again, useful here.

3.8.8.2 Paragraph 3.23 of the 2009 Green Paper *Strengthening Australia's Democracy* contains the following sentence:

It could be contended that primary legislation should be prescriptive enough to ensure that electoral administrators uphold the key principles of the Australian electoral system, while more detailed administrative arrangements could be contained in subordinate

¹⁰⁵ The details of the super-affirmative procedure are set out in <http://www.parliament.uk/business/committees/committees-archive/regulatory-reform-committee/regulatory-reform-orders/>

¹⁰⁶ See below, fn 110.

legislation that would be easier to amend if change becomes necessary.

It would seem that the State of Victoria's current primary electoral legislation¹⁰⁷, which was introduced in 2002, adopted this course of action because it was said that the Victorian Electoral Commission characterised it as:

(r)etaining all essential electoral principles, while leaving more detailed administrative provisions to regulations.

Certainly the (Victorian) Electoral Act 2002 is compendious, appears to be focused on principle rather than detail, and (whilst this is not said in *Strengthening Australia's Democracy*) appears to anticipate the numbering system demonstrated in *Reducing Complexity* for the Fair Work Act 2009. It also appears to have a high level of structural modularity.

3.8.8.3 However, what *Strengthening Australia's Democracy* fails to do is provide sufficient guidance (or higher level rules) regarding what should go into primary legislation and what may be left for secondary legislation.¹⁰⁸ *Reducing Complexity* is much more helpful.

3.8.8.4 Section 6 of *Reducing Complexity* contains the following guidance:¹⁰⁹

71. Inappropriate detail can extend the length of a Bill and take attention away from core provisions, thereby creating complexity.

72. Detail can be inappropriate if:

- the detail relates to a peripheral or supporting issue, not the core policy of the Bill; or
- the detail relates to matters that are administrative or procedural in nature; or
- the detail is likely to change over time; or
- the detail relates to an issue that will arise infrequently.

¹⁰⁷ The Electoral Act 2002 http://www.austlii.edu.au/au/legis/vic/consol_act/ea2002103/

¹⁰⁸ If the author may be permitted to comment - it seems that until recently legislative drafting seems to have been regarded as "more of an art than a science". *Strengthening Australia's Democracy* is a significant step in the process of formalisation, following as it does from the Victorian (*inter alia*) development. *Reducing Complexity* and *When Laws Become Too Complex* are later steps at the codification of design. It is hoped that this Report will be seen as another step along the path towards the codification of legislative drafting.

¹⁰⁹ This has been heavily edited to remove unnecessary examples and points which do not contribute to the present discussion.

75. In some cases, if detail is required, it may be appropriate to include the detail in subordinate legislation made under an Act. This approach has the advantage of leaving the Act uncluttered to deal with the core policy, but it does result in shifting the detail to another document.

3.8.8.5 It is submitted that this is helpful guidance; especially the bullets in paragraph 72.

The design of an Electoral Act 201x will be facilitated by concentrating a) the rights and responsibilities; b) the main structures, and, c) the issues of legislative policy within the Act. It is submitted that these are the proper areas for legislative scrutiny. If the policy is drawn up in the legislature, enacted, and then detailed in secondary legislation, it is clear from the Minutes of the Secondary Legislation Scrutiny Committee, that any difficulties will soon be identified.¹¹⁰

3.8.8.6 Where ‘the detail relates to matters that are administrative or procedural in nature’ secondary legislation can fill in the procedures which are necessary to effectuate the policy. For example - if it was provided in the Act that there would be a voting channel whereby electors cast their votes secretly in a polling station, there seems to be no good reason why the procedure whereby this is done is contained (amongst other matters) in Schedule 1 of the RPA 1983 in respect of Parliamentary elections, when it has not given rise to any difficulty when it is contained in the Local Elections (Principal Areas) (England and Wales) Rules 2006 (2006 No. 330) in respect of local elections. Thus one could easily allocate the general right to the Act and leave the specific administrative procedures to secondary legislation. (In this case ‘demoting’ the Schedule 1 procedures to a common home with the Principal Areas Rules in secondary legislation). This seems to be a general principle - ‘rights’ in Acts, ‘procedures’ in secondary legislation.

3.8.8.7 If it were possible to ‘modularise’ in the sense suggested by Howarth (i.e., produce *modularity of form*) or even, in appropriate cases, *modularity of content*, one could ‘plug-in’ boxes of the appropriate size to produce secondary legislation.¹¹¹

¹¹⁰ See the scrutiny of the Police and Crime Commissioner (Functions of Returning Officer) Regulations 2012.

<http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/11/1104.htm>

¹¹¹ A computer programmer might well call these modules ‘subroutines’ or even ‘standard subroutines’ and use them again and again because [Continues Pg. 59]

Hierarchical structure: IV Guidance, Codes of Conduct / Practice and Instructions / Directions

a) Guidelines

3.8.9.1 As we consider what Guidance, Codes of Conduct / Practice and Instructions / Directions ought to do according to the supranational guidelines we should consider the role they currently fulfil in the UK. Guidance is primarily issued by the Electoral Commission using its power to give advice and assistance under s10 Political Parties Elections and Referendums Act 2000.

3.8.9.2 Guidance and non-statutory codes of practice are often important in shaping behaviour, promoting consistency and best practice in how the law is applied, and are often seen as an adjunct to legislation. Guidance is not directly enforceable; indeed it is designed not to be directly enforceable. This can be seen as both a strength and a weakness. It is a strength in that it is left to the person to whom it is directed to consider the surrounding circumstances and to decide whether or not to follow the guidance.

3.8.9.3 This introduces some necessary flexibility. The problem arises when the person decides not to follow the guidance. If all is well, there is no problem. If something goes wrong, the recipient 'should have followed the guidance'. If someone fails to follow the law, they are liable. In the case of an electoral officer this would ultimately be for breach of statutory duty,¹¹² in the case of a candidate (or his/her agent) an election petition and/or prosecution may result. If they fail to follow guidance the result is less clear, especially if the guidance says that they 'should have regard to it'. The other possibility is that the guidance is wrong. This can happen. It is argued that the guidance contained in the 1874 edition of Leigh and Le Marchant's *The Law of Elections and Election Petitions* was wrong, but it was relied upon by no less an

'there is no sense in reinventing the wheel'. The alternative way of viewing the legislative process is that it is a mechanism for turning policy inputs into legislative outputs and, as with all input > output processes, the technique of *process mapping* might be appropriate. See for a useful guide The Crown Prosecution Service's: *A Guide to Process Mapping and Improvement*.

http://www.cps.gov.uk/publications/finance/process_mapping.html#a01

¹¹² See s63 RPA 1983.

authority that Lord Denning MR.¹¹³. We need carefully to unpack the concept of guidance (howsoever titled) in order to ascertain its true role.

3.8.9.4 In a small number of cases the legislation includes such statements as ‘The (Returning Officer) must have regard to any guidance issued by the Electoral Commission’.¹¹⁴ In most cases, however, there is no requirement set out in the legislation for regard to be had to Guidance. Either way, Guidance typically begins with statements of the type:¹¹⁵

This guidance has been produced based on, and should be read in accordance with, the legislative requirements, including those set out in:

- the Police Reform and Social Responsibility Act 2011
- ...
- the Representation of the People Acts 1983, 1985 and 2000 (all as amended)

3.8.9.5 Electoral officers and administrators are busy people and the temptation must be to pay relatively little attention to the law and much more attention to the Guidance especially where that Guidance is produced by a trusted source. Raz proposes that the authority of law rests upon its ability to advise us as to that which we ought to do.¹¹⁶ Where law fails to do this, because it is pathological in the sense that it is voluminous, complex and fragmented, (or, in the words of the Office of the Parliamentary Counsel, ‘has turned septic’¹¹⁷) people turn instead to Guidance. One role, then, of Guidance is to act as ‘a handy guide to the law’.¹¹⁸ If the legislation was made easier to understand, it might well be that the role of Guidance as a crib is diminished at least

¹¹³ Lord Denning adopted the statement in *Morgan v Simpson* [1974] 3 AllER 722, for which he was criticised in *Considine v Didrichson* [2004] EWHC 2711 and in Watt pp. 170-172. Any non-legislative statement of the law is, perforce, an interpretation thereof, and save in the case of a court of final appeal, open to error.

¹¹⁴ See, e.g., Regulation 9(4E) of the European Parliamentary Elections Regulations 2004; Regulation 4(4) of the Police and Crime Commissioner (Functioning of Returning Officer) Regulations 2012.

¹¹⁵ This Guidance, and that below, is taken from the Guidance issued to Returning Officers in respect of the Police and Crime Commissioner elections of 2013. See http://www.electoralcommission.org.uk/_data/assets/pdf_file/0003/145371/Performance-Standards-for-ROs-FINAL-web.pdf

¹¹⁶ See Raz *The morality of freedom*. (Oxford: Clarendon, 1986).

¹¹⁷ See Howarth p88.

¹¹⁸ This phenomenon is well known to law teachers who often despair of their students’ reliance upon textbooks and various forms of crib to the neglect of statutes and Reports of cases. It is likely that Guidance Notes to Acts of Parliament fulfil a similar function. See <http://www.hmso.gov.uk/legislation/uk-expa.htm> for an explanation of Guidance Notes, but see the comment on p.28 of *When Laws Become Too Complex* regarding complaints about their quality.

as far as electoral officers and administrators are concerned. Candidates and agents are likely to continue to rely extensively on it because elections may not be their ‘day job’.

3.8.9.6 A ‘handy guide to the law’ does not only set it out. It also - in the words of the iIDEA Guidelines - sets out ‘a respon(se) to emergent needs and provide(s) practical solutions by way of interpreting and supplementing electoral law’ without the issuing body acting as a ‘substitute legislator’.¹¹⁹ Accordingly it is clear that the quasi legislative role of the Electoral Commission can, and should, only be interstitial or gap filling (in addition to the role set out in 3.8.9.5 above).

3.8.9.7 When applied to electoral officers, Guidelines are said to cover:¹²⁰

- what electoral officers (in this case Police Area Returning Officers) must do by law
- the requirements of the Commission’s performance standards framework as applied to electoral officers
- the principles electoral officers should follow in undertaking your role and discharging your statutory duties.

3.8.9.8 Paragraphs 3.8.9.5 and 3.8.9.6 have dealt with the law. One might speculate whether breach of a guideline might trigger, if sufficiently serious, a claim under s23(3) RPA 1983 or s48 RPA 1983 (Parliamentary or Local Government elections respectively) that the election had not been conducted substantially in accordance with the law, but it could be argued that if Parliament had not seen fit to put such rules into statutory form that their breach could never be of sufficient importance to warrant overturning an election. There is no authority on this point.

3.8.9.9 The requirements of the Performance Standards set by the Electoral Commission in pursuance of their legal duty are laid down in ss9A and 9B of the Political Parties, Elections and Referendums Act 2000 as amended by s 67 Electoral Administration Act 2006. These are helpfully set out in an Electoral Commission booklet.¹²¹ However, the degree of enforceability appears to be one of ‘name and shame’ because

¹¹⁹ Quotations from p16 iIDEA Guidelines.

¹²⁰ For source, see above fn 115.

¹²¹ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0003/145371/Performance-Standards-for-ROs-FINAL-web.pdf

the Electoral Commission has the duty to collect and publish data regarding the level of performance of electoral officers, and it is to be presumed that if electoral officers were grossly inefficient that it would be a disciplinary matter for their employing local authorities.

3.8.9.10 The principles which should be followed in carrying out public duties are much more nebulous. That is not to say that they are unimportant; indeed they are the cement which binds public service together, it is simply that they are not, and cannot be, completely defined. They derive in part from the *Nolan Principles of Conduct in Public Life*,¹²² and from the political culture of public service.¹²³ The importance of this facet of guidelines cannot be overstated; for adherence to a positive institutional culture makes the difference between a healthy and a sick institution.¹²⁴

3.8.9.11 We may then carve out the proper place for Guidance and this is consistent with the iIDEA Guidelines.¹²⁵ The following principles have to be read with the overarching principle of consistency in mind. The law is, after all, the law and must be taken to be consistent within its particular jurisdiction. One cannot doubt that individual local authorities, ‘election departments’ of local authorities and individual electoral officers do (at least some of) the following, but Guidelines provide consistency:

- Act as a ‘handy guide to the law’ suitable for busy practitioners and non-expert users. They provide a summary of, and user-friendly guide to how to apply, the law.
- Suggest application / interpretation of the law in novel circumstances.
- Act as an interstitial and gap-filling adjunct to legislation without usurping the place of the legislator.
- Provide a set of performance standards by which electoral officers’ performance can be measured.

¹²² http://www.deni.gov.uk/appendix_2_nolan_principles.pdf

¹²³ See e.g. Public Administration Committee *Seventh Report, The Public Service Ethos*, (London: HMSO, 2002) and Peter John and Mark Johnson ‘Is there still a public service ethos?’ in Park, A., Curtice, J., Thomson, K., Phillips, M., Johnson, M. and Clery, E. (eds.) *British Social Attitudes: the 24th Report*, (London: Sage, 2008). See above for a description of political culture.

¹²⁴ There is much scholarship on the phenomena of ‘sick institutions’. The most easily accessible seems to be Robert Klitgaard’s ‘Healing Sick Institutions’ at <http://www.rrojasdatabank.info/borner/borner19.pdf>

¹²⁵ See iIDEA Guidelines p.16.

- Inculcate a professional political culture or public service ethos and assist senior electoral administrators in the induction of more junior staff.

One might indeed see the Electoral Commission's work in producing Guidance as one area of the structure of UK election law which does not require attention.

3.8.9.12 There is one other point which must be made about Guidance. The Electoral Commission is a statutory body; it fulfils a public law function, and a (wider) public function. In the exercise of its public functions, the Electoral Commission is required by s149(2) Equality Act 2010 to have due regard to the duties set out under s149(1) of the Act. Most notable amongst those duties are those to:

- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

These duties are shared with other public authorities.¹²⁶ They amount to a specific statutory element of a professional ethos, and it is one in particular which need not be shared by wholly private bodies such as political parties or individual candidates in elections. Whilst private individuals are under a duty to obey the positive law - i.e. not to unlawfully discriminate and to refrain from stirring up hatred, they are under no legal duty to advance equality of opportunity or to foster good relations between people of, e.g., differing ethnic origins although they are at liberty so to do. This seems to open up a distinction between Guidance directed to public officials and Guidance / Codes of Conduct directed towards political parties and candidates and it is to this subject that we must now turn.

b) Codes of Conduct / Practice

3.8.10.1 It is taken here that there is a distinction between Guidance aimed at political parties and candidates and Codes of Conduct. Guidance on the law aimed at political parties and candidates is both useful and valuable and is to be encouraged. However Codes of Conduct are more problematic. It is taken that a Code of Conduct contains more than the law - it contains guidance as to 'good electoral behaviour'. It is taken that this involves more than the simple avoidance of electoral offences - it is 'being good'

¹²⁶ Both those listed in Schedule 19 to the Act and those exercising public functions under s149(2).

rather than ‘not being bad’. Further, as we will see below, there is an element of negotiation in Codes of Conduct. The law is non-negotiable; ‘good behaviour’ may be.

3.8.10.2 The legal status of a Code of Conduct is not clear. One might say that in general terms a Code is non-binding save between the parties to it because it usually has the status of a private law contractual agreement. It may be imposed upon parties as part of a licensing scheme - for example see the OFCOM Code,¹²⁷ whereby broadcasters who must be licensed under the Communications Act 2003 are bound by the Code. Other Codes of Practice form part of the professional regulatory framework of, e.g, solicitors.¹²⁸ Following the decision of the Court of Appeal in *R v City Panel on Takeovers and Mergers ex parte Datafin*¹²⁹ agreements between bodies of a public law nature will be examinable in the administrative courts. The point is raised because the iIDEA Guidelines take the view that the legal status of Codes varies between jurisdictions together with the consequences of a breach.¹³⁰

3.8.10.4 The *Code of conduct for political parties, candidates, canvassers and campaigners on the handling of postal vote applications and postal ballot papers in England and Wales*,¹³¹ (henceforth PV) is a good example of a Code extends to private bodies; it is subscribed by some of the parties to an election (or series of electoral events). It is used as an example, and will be contrasted with the Code of Practice for Election Observers (see below). PV exhibits all the features shown above by Guidance (save that it applies to a different sort of body) but has also been subscribed by The Conservative Party, The Liberal Democrats, The Labour Party and *Plaid Cymru* who have agreed to abide by PV for elections and referendums in 2012. PV contains two essential elements - first a guide to the law and, second, a guide to ‘good practice’. If a Code of Conduct contains no more than a guide to the law it is valuable. It is

¹²⁷ See <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/background/>

¹²⁸ See for example the Scottish Solicitors’ Code at <http://www.lawscot.org.uk/members/regulation-and-standards/standards/standards-for-scottish-solicitors>

¹²⁹ [1987] QB 815.

¹³⁰ iIDEA Guidelines p17.

¹³¹ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/108485/Code-of-conduct-postal-vote-applications-England-Wales-2012.pdf

beyond argument that a guide to the law is both useful and necessary. However it is, in the view of the author, seriously questionable whether a guide to good practice is appropriate. This argument may excite some controversy, because it defies the ‘public service ethos’ set out in 3.8.9.10 - 3.8.9.12 above, in particular because the law does not generally impose positive duties (e.g., of promoting equality, under the Equality Act 2010). The point is that there is a substantive debate to be conducted here, and, since this Report is not about substance it is important to give both points of view.

3.8.10.5 The case in favour of Codes of Practice is substantially that set out above in respect of Guidance. The case against is more complex.

3.8.10.6 First we need to recall one of the salient features of one type of Code of Conduct. This can best be done by a direct quotation from the iIDEA Guidelines at p17.

In addition to formal election legislation, other relevant electoral instructions may also be contained in the informal codes of conduct agreed among various political parties and generally overseen by the EMB (electoral management board). In some countries such codes play a more important role than in others. They may relate to a number of aspects of elections, such as for the rules of behaviour for political parties and candidates during the electoral campaign, the conduct of the ruling government party to prevent it from having an undue advantage over the other parties, or the self-regulation of the media. Sometimes a code of conduct contains a set of normative ethical principles for practical application in the field, such as a code of conduct for electoral observers or for EMB staff engaged in the conduct of elections. The legal status of such codes varies between jurisdictions, as do the consequences of breaches of them.

Clearly one type of Code is that ‘agreed between the political parties and generally overseen by the Electoral Commission’. The author suggests that this would be an unacceptable constitutional departure to allow private parties to agree a species of law between themselves and to have it policed by the Electoral Commission. This cannot be what is intended in the UK. There are examples of such Codes contained in *The Model Code of Practice in Codes of Conduct for Elections: a study prepared for the*

Inter-Parliamentary Union by Guy Goodwin-Gill.¹³² Many of the Codes cited give examples of behaviour which would, by any measure, be unlawful in the UK, and the courts would be quick to convict.

3.8.10.7 A second type of Code is that represented by PV in the UK. Here it seems that the Electoral Commission reminded the political parties of the law and asked them to conform to a Code containing the law and a number of measures which go beyond it. The parties were reminded that exerting undue influence on a voter or to bribe or treat them is contrary to ss115, 113 and 114 RPA 1983.¹³³ The author argues that the signing -up of people not to break the law is nugatory because it is redundant. If they break the law they can, and should, be prosecuted. However PV goes further and sets out what is (- a statement of opinion - *rightly*) said to be good practice. It is suggested that this is problematic.

3.8.10.6 One is obliged to ask what it is that PV is, in fact securing. By signing up to it parties are confirming that their supporters will 1) obey the law, and 2) engage in behaviour going beyond the law to behave 'well'. No doubt many of us would like to live in a country where everyone was 'well-behaved', but being 'well-behaved' is not a neutral or uncontested concept. People hold differing views on just about every political subject - the political is the contested. A Code of Conduct which goes beyond stating the law contains a statement about 'the good' which is beyond that which Parliament has provided. If Parliament wishes to provide a standard of 'the good' it should do it by means of legislation because Parliament is accountable to the people.

3.8.10.7 One can easily conceive of some future Code of Conduct which seeks to limit the way in which people might lawfully campaign for fear of causing offence to other

¹³² http://www.ipu.org/PDF/publications/CODES_E.pdf see pp 64-70.

¹³³ This is exactly what is 'agreed' under paras 9 and 10.

9. An individual may not exert, or attempt to exert, undue influence to persuade or force someone to vote, not to vote, or to vote a certain way. Someone who prevents or deters the voter from freely exercising their right to vote, or attempts to do so, may be found guilty of undue influence.

10. It is an offence to offer money, food, drink, entertainment or other gifts to persuade someone to vote, or not to vote.

citizens. *Redmond-Bate v DPP*¹³⁴ dealt with a form of campaigning in which public passions were inflamed by speeches dealing in a 'strident' but wholly lawful fashion with matters of morality. Some of a crowd of listeners became restive and abusive and the campaigners were asked to stop by the police. When they refused they were arrested. The Divisional Court in declaring their arrests unlawful said:

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers' Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of state control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power. We in this country continue to owe a debt to the jury which in 1670 refused to convict the Quakers William Penn and William Mead for preaching ideas which offended against state orthodoxy.¹³⁵

3.8.10.8 The danger with a Code of Conduct is that if it does seek to encourage 'good behaviour' rather than strict adherence to the law, and the law alone, is that it exercises a chilling effect. One can all too easily imagine the majority of political parties being prepared to sign-up against 'the 'irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative' - the problem is that the dissenters may be right and the only means they have to challenge the Code (which may not be widely known) is by judicial review. This may well be too slow and fail to reflect the political process. Furthermore some of the 'eccentric' political positions which are now considered 'mainstream' - the idea of one person - one vote; the secret ballot; the abolition of the property qualification for the franchise; votes for women; even votes for women under 30, - were once seen as dangerous, radical ideas held by a few agitators.

¹³⁴ [1999] EWHC 733.

¹³⁵ Stephen Sedley LJ at para.20.

3.8.10.9 The other form of Code envisaged by iIDEA in the quotation set out above is a Code of Practice for Election Observers in the field.¹³⁶ This has been endorsed and facilitated by the UK Parliament in s6F Political Parties, Elections and Referendums Act 2000 (as amended). This type of Code differs radically from any Code governing the activity of political parties in campaigning. It requires those acting as quasi-professionals (or quasi-officials, even if only for a limited time) to act in a professional manner consistent with the gravity and neutrality of their position.

3.8.10.10 Many of those observing will be ‘official’ election observers from, for example OSCE / ODIHR or from overseas observation missions and will rightly expect to be regulated. Other observers may be academics researching the electoral process and still others may be academics teaching their students about elections. The author has been engaged in these latter two activities in the past, and positively welcomes the current Code of Practice. It will facilitate and regulate attendance at the poll and the count.¹³⁷

3.8.10.11 It is acknowledged that the issue of Codes of Conduct / Practice is a difficult area and the iIDEA Guidelines are addressed to readers coming from a wide range of political cultures. In some of these cultures agreements between political parties are likely to be more effective than relatively weak law enforcement agencies. In these political cultures ‘pre-emptive ceasefires’ where all parties agree not to transgress the rules (which may be poorly enforced) are likely to improve electoral behaviour. In others, where there is a tradition of strong, impartial law enforcement such agreements between political parties may be nugatory, or in some cases, may chill lawful behaviour. It is judged that the UK falls into the latter category. It is, however, beyond doubt that the Electoral Commission, as the expert body, should be given appropriate powers to regulate the behaviour of those professional and quasi-professional election ‘workers’ acting in an avowedly neutral capacity.

¹³⁶ http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0004/13927/Code-of-practice-for-electoral-observers-Web.pdf

¹³⁷ The author was greatly assisted by the Returning Officer and his staff; however whilst some of the political parties were courteous and helpful, others saw the presence of any sort of observer as a trespass upon their rightful turf. Elections are public matters and, whilst it is right that observers should be regulated so as not to interfere with proceedings, these should be open to scrutiny which may lead to improvements in the law.

c) Instructions / Directions

3.8.10.12 In the Canadian Federal elections system the Chief Electoral Officer has the power to issue legally binding Instructions to more junior electoral officers in order to accomplish the purposes of the election and to remove them from office if they fail to carry them out (see ss 8, 9, 14, 16 and 22 of the Canada Elections Act 1985). One such Instruction is the Code of Professional Conduct for Election Administrators.¹³⁸

This code of professional conduct for election administrators constitutes an instruction issued by the Chief Electoral Officer pursuant to paragraph 16(c) of the Canada Elections Act. Election administrators are required by law to comply with instructions issued by the Chief Electoral Officer.

This particular set of Instructions resembles a set of UK Guidance most closely in all respects save that it is legally binding. The arguments for the use of Guidance are set out above and it is a question of pure policy as to whether or not to make them legally binding. There are a number of techniques which could be employed here and the tightness of the 'legally binding' clause is capable of almost limitless adjustment.

3.8.10.13 Not all Instructions are of this form which amounts to the issue of long-term standing order, policies and procedures (all authorised by law, in the UK, s10 PPERA 2000) and the iIDEA takes the view that there should be a power

clearly defined but sufficiently broad to enable (the EMB) to deal with gaps in the law and unforeseen contingencies. The EMB does not act as a substitute legislator, but it must be able to respond to emergent needs and provide practical solutions by way of interpreting and supplementing electoral law and the regulations...Electoral legislation should state and define clearly the EMB's residual powers (its "inherent powers") to issue instructions in emergency situations, including on election day, to meet any unforeseen contingency..¹³⁹

¹³⁸ http://www.elections.ca/emp/dsro/cod/code_e.pdf

¹³⁹ iIDEA Guidelines pp.16-17.

It is quite clear from the iIDEA Guidelines and fully consistent with the normal principles of UK public law that any such power to issue Instructions to deal with gaps in the law and unforeseen contingencies would have to be strictly limited in scope and fully in accord with the power granted. It must also be remembered that the UK Electoral Commission is supervisory rather than managerial and any managerial function (such as the power to give directions) would rest in the hands of Returning Officers, Electoral Registration Officers and, where granted by statute, Ministers. It must be emphasised that the plain and unambiguous meaning of the iIDEA Guideline concerning such powers being exercised by means of Direction is simple. These are intended to be extraordinary powers which, it is to be hoped, will never be used. The difficulty with the text is that it is not clear to the author whether the power to ‘respond to emergent needs and provide practical solutions’ is limited to its use in ‘emergency situations’ or is intended to be used more widely. These matters, and some of the existing powers to Direct, are discussed below.

3.8.10.14 Any answer to the question *what circumstances would constitute such an emergency and what would be done?* is bound to be speculative. There currently are powers for directions to be issued¹⁴⁰, and these will be discussed below and at least some of these may not be exercised in an emergency.¹⁴¹ The discussion in the following paragraphs is intended to tease out the nature of an emergency power and to facilitate consideration of what should be done. It also deals with ‘gaps in the law and unforeseen contingencies’. It is not intended to suggest substantive legislation.

3.8.10.15 Let us first consider the most extreme emergency. If there was a terrorist attack upon, say, the outgoing Cabinet (*cf* the Brighton Hotel bombing of October 1984) during a General Election campaign it is beyond doubt that the contingency arrangements for such an event during the prorogation of Parliament would be

¹⁴⁰ See, e.g., the power of the Secretary of State to issue Directions under s 52 RPA 1983 to Electoral Registration Officers. See too para 3.8.10.16 for the Fixed Term Parliaments Act 2011 power. The Parliamentary Voting System and Constituencies Act 2011 s1(4) also contains a power for a Direction to be issued.

¹⁴¹ It is, at least arguable, that the use of non-emergency Directions is a case of ‘legislative laziness’. If a Minister reasonably comprehends that powers might be needed in certain circumstances the foundation for these powers should be laid down in legislation. That seems to be the iIDEA requirement.

brought into action and the COBRA committee activated. If, in the absence of a Prime Minister (perhaps through death or injury, or simply because the office is vacant), an emergency decision was taken to postpone a General Election, it is beyond any serious doubt that it would be taken by the Privy Council and, presently, issued by Order in Council. This would be an event of the highest constitutional significance and it is not thought that the Electoral Commission or any Returning Officer would be involved save in an advisory capacity. There may well be grounds for removing the prerogative power of the Privy Council and placing this power on a statutory footing in a new Elections Act. Perhaps the Electoral Commissioners *could* exercise this power, but this suggestion may slide over the line into a substantive rather than a structural change.

3.8.10.16 To avoid that pitfall one might reflect that there may arise from time to time grounds for postponing elections. In the past these have been dealt with by statute rather than by Direction. The local government elections in England, Wales and Northern Ireland due in May 2001 were postponed until June 2001 by the Elections Act of that year due to an outbreak of foot and mouth disease giving rise to concerns about veterinary health. The Act was passed on 10 April 2001. There is also a provision under subsections 1(5) - 1(7) of the Fixed-Term Parliaments Act 2011 to allow the Prime Minister to make an Order (to be approved by affirmative resolution of both Houses of Parliament) delaying a parliamentary general election by not more than two months.¹⁴² Perhaps this could be extended to a more general power to delay elections. The second example (the delay of the General Election) seems to be a perfect example of the case for a power to direct being set out in statute. If, for example, such a power was available to the Minister to delay the local government elections (in the foot and mouth epidemic) it would have saved valuable resources of time and money. Although, if the power to Direct was set up in the way laid down in the 2011 Act, a parliamentary vote would still be needed

3.8.10.17 The problem is that decisions of this sort have a substantial political and symbolic element. One might well recall Mrs Thatcher's decision to proceed with the Conservative Party Conference shortly after surviving a serious attack on her life and

¹⁴² The Scottish Referendum Bill has a delaying power under s1(5)-(6).

Mr Blair's decision to leave the G8 summit and return to London on 7 July 2005 following the London bombings. What if the urban riots in August 2011 had taken place in early May? The postponing of an election may have an effect upon that election because voters will look at the way in which the government dealt with the emergency and may question whether the decision to postpone was itself politically wise.

3.8.10.18 Given that it is a political matter there are arguments for leaving it in the hands of politicians rather than transferring the power to e.g. Returning Officers or to the Electoral Commission. On the other hand, these may be exactly the grounds for placing the power in the hands of a neutral body. The author suggests that iIDEA's thinking on this matter might stem from the view that in some States the Election Management Body might enjoy a very much higher degree of trust than the government and that governments might have a record of manufacturing (actual or spurious) states of emergency for the precise purpose of postponing elections, perhaps indefinitely. Furthermore many EMBs are, as the term makes clear, management rather than supervisory bodies. Parliament will thus need to consider whether to leave the power to direct in the hands of a Minister (as in, e.g., s1(4) of the Parliamentary Voting System and Constituencies Act 2011) or to transfer it elsewhere.

3.8.10.19 If we turn to more local containable emergencies, we can see that Presiding Officers have the option of adjourning a poll in a particular polling station under, eg, Rule 42 of the Parliamentary Election Rules in the event of a riot. Perhaps it would be useful if Returning Officers had the power to direct that all the Presiding Officers closed their polling stations in a particular constituency (or its local government equivalent) if it appeared to them that the poll would be avoided by an application of the (rather obscure) rules in *North Durham*¹⁴³ or *Nottingham Town*¹⁴⁴ or indeed by any emergency which would prevent polling in a substantial part of the area. One might think of the Tewkesbury flood of July 2007, had that occurred in May it is clear than polling would have been impossible in the town and the District Council Offices may indeed have been completely cut off. A general power of direction to postpone

¹⁴³ (1874) 2 O'M&H 152.

¹⁴⁴ (1866) 15LT 57.

the poll may prove useful in these circumstances. This would, of course, have to be granted by statute.

3.8.10.20 A s52 RPA 1983 Direction was issued to Electoral Registration Officers with respect to the 2012/3 canvass so that it was conducted to ensure that people were enfranchised for the Police and Crime Commissioner elections on 15 November 2012. This seems to be an example of a non-emergency use of a power to direct; it is clearly an example of respond(ing) to emergent needs and provid(ing) practical solutions by way of interpreting and supplementing electoral law. Since Parliament has envisaged the possibility of *delaying* elections and referendums (as above), it could just as conveniently put such ‘direct’ clauses at relevant places in the legislation so as to *facilitate* holding electoral events. *Delaying* and *facilitating* are seen as the corresponding sides of the ‘same coin’.

A single clear consolidated Act free from conflicts.

3.9.1 We can now move swiftly through the remaining iIDEA principles because the foregoing discussion has fulfilled (rather than neutralised) their purpose:

(3) A unified, consolidated electoral law is preferable to a fragmented law with separate legislative vehicles for different electoral events and dealing with different matters.

(4) Reforms to electoral law should be undertaken with the goals of clarity and simplicity in mind.

(5) Election legislation should avoid conflicting provisions between laws governing national elections, sub-national (provincial or state), local elections and referendums

3.9.2 Precept five is addressed first. This feature has been addressed to some extent in the section dealing with complexity. However, at the risk of stating the obvious, if (as is generally agreed) the purpose of the law is to advise us authoritatively of what we should do to achieve a result or avoid a penalty, if the law tells us to do two differing (or even opposing things) in similar circumstances, it is either not the law or there is something gravely wrong with it unless there is a good reason for the difference. It should go, almost without saying that conflicts of law are to be avoided.

3.9.3 The statements in the third and fourth principles also seem so obvious and self-evidently true as not to require further exposition or analysis. If one engages in any

process from making a cake to organising an election it seems obvious that the fewer places one has to look for instructions the better. No doubt part of the reason why election rules appear in so many places is historical. Sometimes, if a new circumstance arises, it is easier to start with a blank sheet of paper and write fresh rules rather than going back and rewriting the old ones to deal with both the old (subsisting) situation and the new one. However, as set out below, there are other factors.

3.9.4 Most of us are engaged in processes which – if we were to examine them closely- we would find to be much more complex than they appear at first sight. The process of baking a cake requires a lot of infrastructure and ‘background’ to make it happen. The ingredients we use in the cake do not appear by spontaneous generation in our cupboards, any more than the infrastructure for an election appears by magic. It is suggested that the reasons the cake appears somehow easier than the election are that: i) the processes are more familiar because we engage in similar processes on a daily basis and, ii) the ‘story’ of ‘making a cake’ is more coherent than the ‘story’ of ‘organising an election’. The idea of a story was suggested by the OPC’s Drafting Guidance¹⁴⁵. It was suggested above in paragraph 2.12.1 that some UK legislative instruments had ‘lost the plot’.

3.9.5 If we examine the materials detailed in the Electoral Commission’s *Electoral legislation, principles and practice: a comparative analysis* and listed in Appendices B-G we find further support for that view. We find there that even in a comparison of the list of electoral laws for countries, sometimes (e.g. Australia and Canada) with much more complex constitutional arrangements than our own, that the structure of the legislation ‘leads us through a story’. We can almost guess ‘what happens next’ in

¹⁴⁵ See Office of the Parliamentary Counsel’s Drafting Guidance section 1.2:

1. Your reader does not know what your message is until you deliver it. This contrasts with the position of a party to a commercial agreement, who presumably knows, at least in general terms, what the agreement says. So it is especially important to take the reader by the hand and lead him or her in a logical way through the story you have to tell.
2. Different readers of a Bill (or an Act) may be interested in different aspects of the story: for example, Ministers might be interested in how the Bill fits with a general policy, but advice centre workers might be more interested in the details of the law. This may influence how you tell the story.

the legislation. This feature of ‘telling a story’ is seen in almost every piece of electoral legislation examined from Pakistan¹⁴⁶, through South Africa¹⁴⁷, to Sweden.¹⁴⁸ One might see Pakistan as an example of a turbulent state,¹⁴⁹ whilst Sweden is a model of tranquillity.¹⁵⁰

3.9.5 Given that the constitutional arrangements differ so widely between the countries in the last paragraph (and the others discussed in this Report) and the countries discussed have such widely differing political cultures one is forced to ask what it is that is causing the UK’s electoral law to be so cumbersome. Caroline Morris makes a useful suggestion as to the ultimate cause¹⁵¹.

3.9.6 Should one of the national frameworks be recommended above any other? Are there any objective criteria by which one could rank one over the other? It is argued that there are no such criteria, because it may well be that the decision is taken to ‘leave’, e.g., the foundation of the Electoral Commission in the Political Parties, Elections and Referendums Act 2000, in the same way that some of the institutions involved in employment law are ‘left’ in the Trade Union and Labour Relations (Consolidation) Act 1993 rather than being ‘transferred’ (as might have happened) to the Employment Rights Act 1996. Both of these Acts are themselves consolidations, and are rather complex for that reason. One wonders what might have happened if the Australian technique of ‘rewriting’ had been employed. The Equality Act 2010 shows some clear signs that Australian style rewriting has been done, but it is suggested that the

¹⁴⁶ See the (Pakistani) Representation of the People Act 1976 in the Electoral Commission of Pakistan’s compilation of Election Laws <http://www.ecp.gov.pk/ElectionLaws/Volume-I.pdf>

¹⁴⁷ See the Electoral Act (no 73) of 1998 as amended at <http://www.info.gov.za/view/DownloadFileAction?id=70732>

¹⁴⁸ See the (Swedish) Elections Act 2005 (no 837) at http://www.val.se/pdf/2005_elections_act.pdf. At the risk of further informality, reading the Swedish Act does not ‘feel’ like reading legislation. Whilst accepting that the law has only been read in translation the ‘feel’ is much more ‘comfortable’ than English legislation.

¹⁴⁹ See the article by Akbar Ahmed, former Pakistani High Commissioner to the United Kingdom <http://www.aljazeera.com/indepth/opinion/2013/05/2013557218572474.html>

¹⁵⁰ See the description of the Swedish system at http://www.val.se/pdf/electionsinsweden_webb.pdf

¹⁵¹ See Caroline Morris, *Parliamentary Elections, Representation and the Law* (Oxford: Hart, 2012) p157. “Paradoxically, electoral law is rarely a priority for those who owe their place in Parliament to it. It is for this reason that electoral law has developed at a very slow pace over the centuries of its existence, and reform has usually come only when the system is close to breaking down or is overtaken by political events. We should not wait for that moment.”

process could be taken further in the ways set out below. However we must first consider the general lessons.

4. Conclusion: What have we learned?

In general we have learned that:

- 4.1.1 UK election law is voluminous, complex, and fragmented. We have explored these concepts thoroughly and learnt that some of these faults may be cured by revising the structure. We have also found faults with its numbering, its inflexibility, its architecture, and its failure to tell a clear story. Again some of these problems could be resolved by attention to the structure of the legislation.
- 4.1.2 Whilst there are difficulties caused by differences in constitutions and their underlying political cultures there are clear lessons about the structure of the legislation which can be learned from international comparators and other materials. It has been found that the more general these materials - and often they derive from general comments about drafting both electoral laws and other forms of legislation - the more useful they are. Innovative techniques of statutory design based on other disciplines are briefly considered.
- 4.1.3 The iIDEA guidelines have formed a valuable tool for examining the structure of legislation. Whilst there are difficulties in the UK context with a 'constitutional' level of legislation, there are lessons which can be learned both from iIDEA and other international sources about primary legislation and secondary legislation and the principles for allocating substantive legal principles between the two.
- 4.1.4 Sublegislative material (Guidance, Codes of Conduct / Practice and Instructions / Directions) have been examined. It is argued that there is a clear place for Guidance in the UK system. Guidance is valuable and fulfils a number of clear purposes from explaining the law to inculcating a professional ethos in election management. The Electoral Commission is providing a valuable public service in producing such Guidance.

4.1.5 It is argued that Codes of Practice addressed to professionals - electoral officers and administrators - and quasi-professionals (such as election observers) are both useful and necessary. The promotion of a professional ethos of election management and observation is a valuable exercise. It is argued that Codes of Conduct directed toward private bodies such as political parties should be viewed with some caution. It is argued that political parties ought not to be 'well-behaved' beyond that which the law (such as the Public Order Act 1986 and the Representation of the People Act 1983) demands. The purpose of political parties is to bring forward new ideas, some of which may be uncomfortable, and restricting them by means of Codes may be dangerous to democratic development.

4.1.6 The position of Instructions is considered. In some jurisdictions 'instructions' are no more than legally binding guidance and the use of a variety of clauses to make guidance more or less binding should be considered. However iIDEA commends the use of **emergency** guidance. This was considered, in terms of the present position and it was suggested that the issue of Directions should be better specified in statute and provision made for Directions to be issued in clearly defined situations.

The design of primary legislation:

4.2.1 A core electoral statute is needed along the lines of a fundamentally revised ('from the ground up') Representation of the People Act 1983. Let us call it the Electoral Act 201x. It may be worthwhile reallocating material between a revised Political Parties, Elections and Referendums Act 2000 and the EA 201x. Most countries - Canada, Australia, South Africa and Sweden - seem to put everything in one Act but there is no pressing reason so to do. Given the amount of electoral legislation and the difference between the functions of the RPA 1983 and PPERA 2000, it may be worthwhile retaining two separate Acts (along the lines of, say the Employment Rights Act 1996 and the Trade Union and Labour Relations (Consolidation) Act 1992). Since international and supranational guidance is silent on this point, the precise division of material between the two rewritten Acts would need to be the

subject of further detailed study and perhaps the Electoral Commission and academic experts could be involved in this work.¹⁵² .

4.2.2 However this redistribution would be two-way. The materials dealing specifically with the conduct of referendums should be transferred into the EA 201x. Furthermore a specific statute or separate part of the EA 201x dealing with criminal offences may be useful.

Techniques of design:

4.3.1.1 The core technique is well described by Jones¹⁵³ and the central features of it - adapted for uses in election law and supplemented by some of the other techniques discussed in this paper (e.g., ‘storytelling’) - are set out in detail above.

4.3.1.2 In brief these are

- a) **A “pyramid” conceptual structure**
- b) **good inherent features of design**
- c) **professional presentation.**

4.3.2. Much has been made of the inelegance of the numbering system currently used for ‘patching’ in this report (see paragraphs 2.9.1 -2.9.7) and Jones’ paper itself provides evidence in support of this argument and outlines the approach the Australian OPC team used to address the problem. It is argued that any numbering system used needs to be simple and, above all, predictable. All real numbers in the domain $[0, \infty)$ are predictable, 10ZA is not. Any system which contains such real numbers in small blocks (with regular resets to 1) with numbering for hierarchies within the system to facilitate the introduction of fresh material (amendment) is acceptable.

4.3.3 There are strengths and weaknesses in all of these techniques. The (translated) Swedish style seems very informal to those used to dealing with Westminster

¹⁵² PPERA also contains a lot of other provisions, including the foundation and powers of the Electoral Commission and the regulation of political parties’ finances. The PPERA rules on registration of political parties have a direct impact on nomination of a candidate or list for that party. It also contains provisions on referendums.

¹⁵³ Above fn 47.

legislation and might raise the concern that the concepts are not defined with sufficient precision. The Australian tax legislation deals with numerical or financial concepts rather than political and administrative ones and some of the techniques of using tables might not be wholly appropriate.

Allocation between primary and secondary legislation

4.4.1. The key rules for allocation to secondary allocation appear to be described in section 6 of the Australian paper *Reducing Complexity* and were discussed above at 3.8.8.4. 'Detail' should be relegated to secondary legislation if (it is contended most importantly)

the detail relates to matters that are administrative or procedural in nature; or
the detail is likely to change over time.

4.4.2 It is argued that the reason that so much detail regarding the operation of the ballot in the polling station appeared in the Ballot Act 1872 was that establishing the secret ballot was the whole point of the exercise. Parliament wanted (it has to be said without much enthusiasm) to establish a secret ballot and so the rules had to be discussed and made there - on the floor of the House. This is to be contrasted with the procedure for the introduction of postal voting on demand (described above in paragraph 3.8.3.5 in which the debate in Parliament was on the principle and the administrative details and procedure were put in place by Regulations.¹⁵⁴ The point was made in paragraph 3.8.8.5 that the proper areas for legislative scrutiny and full debate are a) the rights and responsibilities of citizens and officials; b) the main structures for the organisation of elections, and, c) the issues of electoral policy. Other matters should be left for secondary legislation.

4.4.3 The author first voted in the General Election of February 1974 under the provisions of the Representation of the People Act 1948. This was, at the time of writing, 39 years ago. Postal voting was not easily available; all elections regulated by the 1948 Act and hitherto had been run on the first past the post system; elections were held to a much narrower range of types of local authority and other elected body and to the Westminster Parliament. The electoral landscape has changed much more in the past

¹⁵⁴ One might also refer again to the fact that local authority balloting procedures are in Regulations.

forty years than in the previous 40 or even 100 years. It cannot be doubted that more changes are on the way. Whilst steps have been taken to make any legislation easy to amend the greater flexibility of secondary legislation will enable the legislative code to be kept up to date.

Guidance, Codes of Practice, Directions.

4.5.1. It has been argued above that Guidance from the Electoral Commission is valuable both in ensuring that there is (i) consistency between the outcomes of the discretionary decisions of electoral officers and (ii) the promotion of a proper professional ethos amongst electoral officers. This is certainly not to diminish the status of the work done by the Association of Electoral Administrators and the Society of Local Authority Chief Executives both of which have promoted the highest professional standards. The position of the Electoral Commission to issue authoritative Guidance to professionals (and quasi-professionals such as Election Observers) could be further developed.

4.5.2 Whether 'Guidance' (extending beyond the helpful guidance on law and practice, ie Codes of Practice) should be issued to political actors needs careful consideration. The arguments have been set out above. This makes the allocation of material into guidance to non-state actors dependent upon the decision to issue guidance.

4.5.3 The use of the power to Direct to respond to emergency situations and emergent needs is clearly valuable. However one cannot give rules for allocation of material into Directions, because the power to issue Directions rests in primary legislation. The iIDEA guidelines make it plain that such powers must be clearly defined but sufficiently broad to enable gaps in the law and unforeseen contingencies to be dealt with at short notice and, perhaps only, in emergency situations. It is clear however that the body giving the Directions is not to act as a substitute legislator.

APPENDIX - Sketches of Electoral Law

The structure defined - sketches of a draft core statute.

- 5.1 It is not within the author's remit to draft electoral legislation; however it is thought helpful to provide some 'sketches' of what a draft administrative Act (the EA 201x) might contain. This is by way of illustration of the conclusion of the arguments set out above and drawn together in Section 4 of the Report. It must be emphasised and re-emphasised that there is absolutely **no** intention of legislating for substance. This is the proper function of the Law Commissions (to propose), the OPC (to produce text) and the appropriate legislative body (to enact). However one cannot produce an example of structure without putting some form of substance within it. Hence any suggestion of substance below is purely **indicative**.
- 5.2 The Appendix is headed 'sketches'. The intention is to provide some *ideas* of what *may* go into a Statute and Regulations and how it might be done. This is consistent with the 'I am not a legislator' idea set out above and intended to give the real legislators the maximum scope. Most importantly the proposed Act is not complete

The 'Constitutional Part' of the Electoral Act 201x

5.3 *The first sketch*

The Electoral Act 201x

201x Chapter x

An Act to regulate the operation of elections and referendums in the UK and for various other purposes

Be it enacted by the Queen's most Excellent Majesty

Part 1: Constitutional Provisions

This Part of the Act sets out the Right to Vote and the restrictions on that right, the Right to stand for elections and its restrictions, the list of Elected Bodies and the methods of election to those bodies, and the structure for the management of elections and referendums in the United Kingdom.

1-1 (1) Every citizen of the United Kingdom¹⁵⁵ has the right to vote in a public election or referendum in an appropriate electoral division unless disqualified from voting by one or more provisions of subsection (2) below.

(2) (a) No person may vote unless on the day of election s/he has attained the age of eighteen years;

(b) *the list of restrictions continues*

1-2 (1) Every citizen of the United Kingdom¹⁵⁶ has the right to stand for election to a public office in an appropriate electoral division unless disqualified from standing by one or more provisions of subsection (2) below.

(2) (a) No person may stand for election to public office unless s/he has attained the age of eighteen years;

(b) *the list of restrictions continues*

1-3 (1) The Public Bodies set out in the following List will have Members elected by the Voting System shown.

(2) The Minister is given power to make Regulations by the Affirmative Resolution Procedure to establish and regulate the Voting Systems.

(3) This is the List approved by Parliament. It may be varied by the passage of an Amending Act passed by both Houses and having received Royal Assent.

The List

A) Representative Bodies of the entire United Kingdom

a) By the First Past the Post System

i) Elections to the House of Commons of the Parliament of the United Kingdom

b) There are no elections for UK wide bodies by the Closed Party List System

c) There are no elections for UK wide bodies by the Additional Member System

d) By the Single Transferrable Vote System

i) *Fictitious example: Elections for the Elected Members of the House of Lords*

¹⁵⁵ It is acknowledged that some non-citizens have the right to vote, but this formulation has been used to make it clear that no attempt is being made to usurp the proper functions of the Law Commission, Parliament or the Office of the Parliamentary Counsel. They will wish to propose, enact or draft their own formulations of the words. These are inspired by the Canadian legislation.

¹⁵⁶ See the previous footnote.

- e) There are no elections for UK wide bodies by the Supplementary Vote System
 - f) *Additional voting systems could be added here*
- B) Representative Bodies of Great Britain
- a) There are no elections for Great Britain wide bodies by the First Past the Post System
 - b) By the Closed Party List System
 - i) Elections to the European Parliament.
 - c) There are no elections for Great Britain wide bodies by the Additional Member System
 - d) There are no elections for Great Britain wide bodies by the Single Transferrable Vote System
 - e) There are no elections for Great Britain wide bodies by the Supplementary Vote System
 - f) *Additional voting systems could be added here*
- C) Representative Bodies of England and Wales
Omitted
- D) Representative Bodies of Northern Ireland
- a) There are no elections for Northern Irish bodies by the First Past the Post System
 - b) There are no elections for Northern Irish bodies by the Closed Party List System
 - c) There are no elections for Northern Irish bodies by the Additional Member System
 - d) By the Single Transferrable Vote System
 - i) Elections for Members of the European Parliament
 - ii) Elections for Members of the Northern Ireland Assembly
 - iii) Elections for Members of Local Government Bodies
 - e) ***Fictitious example: By the Additional Member System***
 - i) *Health Board Members*
 - f) *Additional voting systems could be added here*
- E) Representative Bodies of Scotland
- ...
 - c) By the Additional Member System
 - i) Members of the Scottish Parliament / *Pàrlamaid na h-Alba*
- F) Representative bodies of Wales
- ...
 - c) By the Additional Member System
 - i) Members of the Welsh National Assembly / *Cynulliad Cenedlaethol Cymru*

1-4 Election and Referendum Supervision and Election and Referendum Management

(1): Election and referendum supervision – the Electoral Commission (reference to PPERA 2000)

(2): Election and referendum management – the Electoral Officers

The management of elections and referendums

5.4 The second sketch - the Management of Elections

Part 2: The Management of Elections

This Part of the Act establishes the offices for the management of elections at Local Authority level, sets out the powers and duties of such Officers and provides for their funding

2-1 Each Local Authority will appoint.....

2-2

2-3

2-n

Part 3 of the Act would contain the powers for the management of Referendums.

The Registration of Electors

5.5 The third sketch - Registration

Part 4: The Registration of Electors

This Part of the Act sets out the procedures for the Registration of Electors and provides for the making of Regulations by which this task may be accomplished

3-1 The Electoral Officer shall cause the electoral registers to be maintained in accordance with this section and the Regulations made hereunder.

3-2 Power for Regulations to be made.

3-3 (1) Residence for Parliamentary Election purposes.

(2) Residence for Local Authority Election purposes.

(3) Residence for purposes

3-4 Statutory basis of Registration procedure (as consolidation/rewrite of 2013 Act)

3-5 High level registration procedure/policies.

5.6 Regulations made under s3-2

The Registration of Voters Regulations 201y

1. These Regulations are made in accordance with the power granted by Parliament under s3-2 of the Electoral Act 201x under the Affirmative Resolution Procedure

A The registration of resident voters by name.

B The registration of persons in pursuance of declarations of local connection.

C The registration of persons in pursuance of Service Declarations.

D The registration of persons in pursuance of Overseas Electors Declarations.

E The registration of persons with anonymous entries in the register.

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