

# National Assembly for Wales Election: 5 May 2016

Guidance notes on the process for investigating services rendered by a Returning Officer (RO) which may have been inadequately performed and the making of any recommendation to the Secretary of State that an RO's fee should be withheld or reduced

## Purpose

1. In order to ensure consistency and fairness, the Commission has developed this note to set out the process we intend to follow when we become aware of a service rendered by a Returning Officer (RO) which may have been inadequately performed. It also establishes the process for making any subsequent recommendation as to the fees that the RO should be entitled to.
2. While acknowledging that each case must be dealt with on its individual facts and circumstances, this paper aims to provide an indication of what factors and processes the Commission would expect to take into account and follow in determining whether a service has been inadequately performed and in forming a recommendation as to whether the fee should be withheld or reduced and, if so, by how much.

## Background summary

3. ROs are legally entitled to recover their charges in respect of services rendered, or expenses incurred, for, or in connection with, a National Assembly for Wales election if:
  - the services were necessarily rendered, or the expenses were necessarily incurred, for the efficient and effective conduct of the election; and
  - the total of their charges does not exceed the overall maximum recoverable amount specified in, or determined in accordance with, an order made by the Secretary of State.
4. The order made by the Secretary of State may specify, or make provision for determining in accordance with the order, a maximum recoverable amount for services or expenses of any specified description and, generally, the RO may not recover more than that amount in respect of any such services or expenses.<sup>1</sup>
5. The Fees and Charges Order for the 2016 National Assembly for Wales election came into force on 16 March 2016 and is available at:  
[http://www.legislation.gov.uk/wsi/2016/417/pdfs/wsi\\_20160417\\_mi.pdf](http://www.legislation.gov.uk/wsi/2016/417/pdfs/wsi_20160417_mi.pdf)
6. The Order specifies the overall maximum recoverable amount for each constituency, which is comprised of two elements:
  - A maximum amount **recoverable** by an RO in respect of specified services rendered (provided those services were necessarily rendered for the efficient and effective conduct of the election). The Order lists the specified services as:

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<sup>1</sup> Section 23 of the National Assembly for Wales (Representation of the People) Order 2007 (“NAW Order 2007”) (as amended by the National Assembly for Wales (Representation of the People) (Amendment) Order 2016)

- making arrangements for the election;
- conducting the election; and
- discharging all of the returning officer's duties in respect of the election.

Additionally it is the ROs general duty at a National Assembly for Wales election to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by the election rules.<sup>2</sup>

- A maximum amount recoverable by ROs in respect of specified expenses incurred in connection with the election (provided those expenses were necessarily incurred for the efficient and effective conduct of the election).
7. This first element is commonly referred to as the RO's 'personal fee' and is the subject of this guidance note.
  8. Section 23A of the National Assembly for Wales (Representation of the People) Order 2007 states that the Commission may make recommendation in relation a ROs fee for service, if in our opinion that service was inadequately performed.
  9. In these circumstances the Commission **may** recommend to the Secretary of State that the RO is entitled to no more than a specified amount (which may be nil) in respect of that service. Effectively, the Commission may make a recommendation to the Secretary of State that the ROs personal fee should be reduced or withheld (and therefore be less than the maximum amount recoverable set out in the Order) where the Commission thinks that the RO's performance has been inadequate.
  10. In making a recommendation, the Commission must have regard to:
    - Any report prepared under Section 5 of the Political Parties, Elections and Referendums Act 2000 (PPERA) on the administration of the election concerned
    - Any assessment of the level of performance of the RO in relation to that election under Section 9B(4) of PERA
    - Any representations made to the Commission by the RO in respect of the performance of the service
    - Any other information relating to the performance of the service by the RO that has been provided to the Commission
  11. In cases where the Commission decides to make a recommendation, the RO will be entitled to no more than the amount (which may be nil) determined by the Secretary of State (having regard to the recommendation by the Commission).

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<sup>2</sup> Schedule 4, 4A and 5 of the NAW Order 2007

## Process

12. The Commission could become aware of an issue regarding potential inadequate performance by an RO through a variety of routes including, but not limited to, the following:
  - monitoring as part of the Commission's performance standards framework
  - observations by Commission representatives
  - enquiries or complaints made to the Commission
  - media reporting
13. Where the Commission becomes aware of an issue in the period before the conclusion of the election, the priority will be to take steps to ensure the successful delivery of the poll. In these cases, our team in Wales will contact the local authority in question as soon as practicable to discuss the issue and the potential courses of action to remedy the situation. The Commission will seek to provide support where needed to enable the provision of a high-quality service to voters and those standing for election. This does not, however, prevent the Commission subsequently investigating the matter and making a recommendation to the Secretary of State in connection with the RO's personal fee. The Commission will record any such discussions and the support provided.
14. The Commission could also become aware of an issue in the period after the election.

### **Gateway assessment**

15. Enquiries, complaints and performance monitoring information received by the Commission are routinely logged by our teams across England, Scotland and Wales and then reviewed by our Electoral Performance team. In reviewing these logs or upon referral from our teams, the Performance team will refer any matter **which appears** to indicate that there may be a **significant** performance issue with regard to a particular RO (having regard to the factors set out in Appendix 1 of this document) to the Head of Performance

### **Initial investigation and determination as to whether a formal investigation is required**

16. In relation to those matters which are referred to the Head of Performance, (s)he will determine whether, **on the face of the matter**, the service rendered by the RO may have been inadequately performed and if so whether a formal investigation is required. To assist the Head of Performance in making this determination an initial investigation co-ordinated by the Head of the Wales office will be carried out.

17. The initial investigation will involve the Commission:
  - contacting the RO and/or their staff to discuss the matter and seeking an explanation as to what has happened (if contact has not already been made as part of providing support as per paragraph 13 or where further information is required). The RO will not be required to make any formal representations at this time
  - identifying any other available information relating to the performance of the service by the RO
18. In reaching a determination as to whether a formal investigation is required the Head Performance will:
  - consider the evidence gathered via the initial investigation
  - have regard to the factors set out in Appendix 1 and any other relevant matters
19. In particular where an RO has managed to satisfactorily resolve an issue prior to the May polls (with the support of the Commission or otherwise) and where as a result there has been no or negligible impact on the May polls, the Head of Performance may decide that a formal investigation is not required.
20. If the Head of Performance determines that no formal investigation is required:
  - the RO in question should still consider any issues as part of their post-election evaluation to identify what, if any, lessons can be learnt and reflected in their arrangements for future elections, and
  - the Commission may still provide suggestions as to how similar issues could be avoided in the future. In these circumstances, the RO should address these suggestions as part of their post-election evaluation
21. The timing of any formal investigation will depend on when the issue arises during the election period. As set out in paragraph 13, the priority at all times will be to take steps to ensure the successful delivery of the poll and the Commission will seek to provide support to resolve any issues prior to the May polls, which may mean that the formal investigation is not initiated until after the election.

### **Formal investigation**

22. Where the Head of Performance determines that there is on the face of the matter apparent inadequate performance by an RO and that a formal investigation is needed (s)he will notify the Director of Electoral Administration who will be responsible for conducting the formal investigation and preparing the preliminary report (see below).
23. The Director of Electoral Administration will:

- telephone the RO in question to inform them that a formal investigation will be taking place and to discuss with them what this will involve.
  - write to the RO:
    - notifying them that a formal investigation will be taking place
    - summarising the process for that formal investigation
    - summarising the issues
    - requesting that the RO provides any information, material or copy documentation that the Commission believes may be relevant to the investigation within 10 working days of receipt of the letter
    - inviting the RO to provide written representations (which may include any explanation or mitigating factors) and to provide any relevant information, material or copy documentation in support of those representations within 10 working days of receipt of the letter
    - offering the RO the opportunity to meet in person with a representative from the Commission to discuss the issues
  - write to any other party or parties who may have relevant knowledge relating to the performance of the service by the RO:
    - requesting that they provide any information, material or copy documentation that the Director of Electoral Administration believes may be relevant to the investigation within 10 working days of receipt of the letter
    - inviting them to provide written representations and to provide any relevant information, material or copy documentation in support of those representations within 10 working days of receipt of the letter
24. The Commission will notify the Cabinet Office whenever a formal investigation has been commenced given one potential outcome is that further to this they may make a recommendation to the Secretary of State that the RO's personal fee should be reduced or withheld (and therefore be less than the maximum amount recoverable set out in the Fees and Charges Order for the 2016 National Assembly for Wales election).

### **Preparation of the preliminary report**

25. Once the Director of Electoral Administration considers that (s)he has all the information necessary to fairly and properly proceed, including having sought further clarification where necessary, (s)he will prepare a preliminary report.
26. The preliminary report will contain:
- a summary of the issues
  - a summary of any representations and information, material or copy documentation provided by the RO in respect of the performance of the service

- a summary of any representations and information, material or copy documentation provided by any other parties relating to the performance of the service
  - where available, a copy of any assessment that has been made as to the level of performance of the RO in relation to that election under Section 9B(4) of PPERA
  - where available, a copy of the relevant extracts of any report prepared under section 5 of PPERA 2000 on the administration of the election concerned
  - a preliminary decision as to whether the service rendered by the RO was inadequately performed and the reasons for that decision (with reference to the factors set out in Appendix 1 of this guidance note and anything else that is considered relevant)
  - if the conclusion is that the service was inadequately performed, a preliminary decision as to whether a recommendation should be made to the Secretary of State regarding the fee and the reasons for that decision (with reference to the factors set out in Appendix 2 of this guidance note and anything else that is considered relevant)
  - if the conclusion is that a recommendation should be made to the Secretary of State, a preliminary decision as to the fee that it is considered appropriate to recommend and the reasons for that assessment (with reference to the factors set out in Appendix 3 of this guidance note and anything else that is considered relevant)
27. The Director of Electoral Administration aims to complete the formal investigation and preparation of the preliminary report within 20 working days of notifying the RO that a formal investigation is to be carried out.
28. Once the Director of Electoral Administration has prepared the preliminary report, (s)he will provide it to:
- the RO and give the RO the opportunity to make any further representations (including any representations that the Commission have failed to take into account all relevant factors) within 10 working days of receipt of the preliminary report
  - any other party the Director of Electoral Administration believes appropriate and give that party the opportunity to make any further representations within 10 working days of receipt of the preliminary report
29. The Director of Electoral Administration will provide a copy of the preliminary report and any further representations received from the RO or other parties to the Chief Executive of the Commission in order that (s)he can prepare a final report.

### **Final recommendation/response**

30. The final report will contain:
  - A copy of the preliminary report
  - The Chief Executive's decision as to whether the services rendered by the RO were inadequately performed and the reasons for that decision
  - The Chief Executive's decision on whether to make a recommendation to the Secretary of State that the RO is entitled to no more than a specified amount of their personal fee (which may be nil) in respect of that service, and the reasons for that recommendation
  - If the Chief Executive has decided to make a recommendation to the Secretary of State, his/her recommendation as to the fee that (s)he considers appropriate in all the circumstances, and the reasons for that recommendation
31. The Chief Executive will provide a copy of the final report to the RO.
32. The Chief Executive aims to make a final recommendation within 10 working days following receipt of the preliminary report and further representations.

### **Recommendation to the Secretary of State by the Commission**

33. If the Chief Executive of the Commission decides that the services rendered by the RO were inadequately performed and that it is appropriate to make a recommendation to the Secretary of State regarding the RO's 'personal fee' the Chief Executive will write to the Secretary of State on behalf of the Commission with his/her recommendation as to the appropriate fee and the reasons for it. In such cases the RO will be entitled to no more than the amount (which may be nil) determined by the Secretary of State (having regard to the recommendation by the Commission).

### **Reporting on the election**

34. As part of our election reporting, we will continue to publish information about the performance of ROs against our performance standards. This reporting may also make reference to any instances where the Commission has determined that an RO's performance has been inadequate and has made a recommendation to the Secretary of State that the ROs personal fee should be reduced or withheld.

### **Putting the process on hold**

35. At any stage the Commission may put an investigation or the production of a preliminary or final report on hold pending the outcome of any criminal investigation or other legal proceedings (such as an election petition), in order to ensure that the criminal investigation / legal proceedings are not prejudiced.



## **Combined polls**

36. The 2016 National Assembly for Wales elections are combined with other polls. In circumstances where the inadequate performance relates to one of the other polls but also has an impact on the National Assembly for Wales election - for example, where it has been decided to combine the issue of postal votes for the National Assembly for Wales and Police and Crime Commissioner (PCC) elections, and after the postal ballot packs have been printed and distributed it comes to light that there are candidates missing from the PCC ballot paper due to inadequate proofing and all the packs need to be re-printed and re-issued resulting in them being received by electors only a few days before the election - although the mistake was on the PCC ballot papers, the services rendered in respect of the National Assembly for Wales election in relation to postal voting may be deemed to have been inadequately performed as the two are inextricably linked.

## **Voluntary reduction in claim**

37. ROs may opt to claim less than the maximum amount in circumstances where they consider that they have performed inadequately. Provided the Commission considers the amount of the voluntary reduction appropriate in all the circumstances, and the RO has provided a written statement that a voluntary reduction in fees has been taken, we may decide that a recommendation to the Secretary of State is not required. In all cases, we will continue to work with ROs to support them with their evaluation, providing them with feedback and support as appropriate, to ensure that lessons learnt can be identified and taken forward into the planning for future polls.

## Appendix 1

### Factors for consideration in determining whether a service rendered by a RO was inadequately performed

Each case will need to be considered on its own merits taking into account the circumstances that existed at the time. However, in determining whether the service provided by the RO was inadequately performed, the Commission expects to have regard to some or all of the following:

- Has the RO:
  - inadequately performed in making arrangements for the election?
  - inadequately performed in conducting the poll?
  - failed to discharge the RO's duties at the election?
- Has the RO failed to do such acts and things as may be necessary for effectually conducting the election in the manner provided by the National Assembly for Wales election rules?
- Was the gravity, extent and impact of any act or omission so great as to suggest that the RO must have performed inadequately? So for example:
  - How many people have been adversely affected by the act or omission?
  - Does the act or omission result in inconvenience to stakeholders or are the consequences more serious e.g. disenfranchising voters?
  - Does the act or omission affect the integrity of the whole election?
  - Is the act or omission likely to result in public confidence in the electoral process being undermined?
- Was the service rendered at a standard below that of a reasonably competent RO (the Commission produces guidance, endorsed by the Electoral Advisory Board, which reflects what a RO should do to deliver a well-run election)?
- Did the RO fail to do what a reasonable RO would have done in the same situation or do something that a reasonable RO would not have done in the same situation?
- Were the consequences of any act or omission foreseeable by a reasonably competent RO?
- Did the RO take steps to remedy the situation such that the impact on the election was negligible?
- Did the RO meet the objectives in the Commission's performance standards?
  - Has the RO failed to undertake one or more of the actions detailed in the performance standards which would have achieved the outcomes detailed in those standards?

- If the Commission have intervened as a result of performance standard monitoring what was the response to the Commission's advice / guidance (e.g. was that advice / guidance taken on board)?

## Appendix 2

### Factors for consideration in determining whether to make a recommendation to the Secretary of State as to whether the RO's fee should be reduced or withheld

Each case will need to be considered on its own merits taking into account the circumstances that existed at the time. However, in determining whether to make a recommendation to the Secretary of State as to the RO's fee, the Commission expects to have regard to some or all of the following:

- Has the Commission found that the services rendered by the RO were inadequately performed?
- Was the gravity, extent and impact of the inadequate performance such to suggest that a recommendation to the Secretary of State should be made?
- Was the inadequate performance due to wilfulness or recklessness on behalf of the RO, or were there any other aggravating factors?
- What mitigating factors exist (for example, was the RO complying with common practice in rendering their service (unless the common practice is negligent))?

## Appendix 3

### Factors for consideration in determining what the appropriate fee should be

Each case will need to be considered on its own merits taking into account the circumstances that existed at the time. However, in determining how much to recommend the fee should be reduced by or if it should be withheld altogether, the Commission expects to have regard to some or all of the following:

- What was the gravity, extent and impact of the inadequate performance?
- Were there any aggravating factors, such as wilfulness or recklessness on behalf of the RO?
- What mitigating factors exist?

## Appendix 4

### Process and timeframe for determining whether to make a recommendation to the Secretary of State that a ROs fee should be withheld or reduced

