

Where should electoral forms and notices be set out in the law?

An Electoral Commission paper submitted to the Law Commission

1. Executive summary

1.1. We welcome that the Law Commission will be considering the proper and consistent place of election forms and notices in the hierarchy of electoral laws.

1.2. In considering this question we would suggest that the following principles should be taken into account:

- flexibility for forms to be corrected and improved,
- certainty as to the content and design of forms,
- ease of use for those producing and using forms, and
- consistent high standards of form design.

1.3. The current law has three main approaches to the position of forms and notices in the hierarchy:

- Prescribing the exact content and format of the form in legislation,
- Setting out the minimum information that a form or notice must contain but giving the Electoral Commission a duty to design the form,
- Setting out what a form or notice must contain but allowing discretion as to the exact wording and format of the form that is used.

1.4. In our view the approach of prescribing the content and format of a form or notice in legislation does not serve the interests of anyone participating in elections, most notably voters. In particular, it does not provide for sufficient flexibility to ensure that problems with forms can be rectified before they adversely affect voters or candidates. This also leads to uncertainty as to whether forms should or could be amended by EROs or ROs to address any problems. This lack of flexibility to modify the prescribed form also results in forms that are not always easy to use for all those taking part in elections. Prescription also presents problems for administrators as it results in significant costs associated with reproducing prescribed forms for their local areas (as opposed to being provided with amendable template forms in Word documents). In addition, prescription has not achieved consistency in the quality of forms as there is scope for great variation in how they are reproduced locally.

1.5. Therefore we would not support retaining this approach in the reformed electoral law produced by the Law Commission. Instead we would prefer the

legislation to set out what must be contained in a form or notice and then leave it to the Electoral Commission to set the exact content and format by producing templates for EROs and ROs to adapt and use locally.

2. The purpose of this paper

- 2.1. This paper is prepared by the Electoral Commission in the context of the review of electoral law being carried out by the three UK Law Commissions¹. The Law Commissions are currently formulating recommendations for electoral reform, which will be subject to a consultation beginning in October 2014. This paper aims to inform consideration of one part of electoral law, namely where electoral forms and notices should be set out in the law. The Law Commission has noted that the review will consider ‘the proper and consistent place of rules and forms within the hierarchy of legislative measures’². We understand that this means that the review will consider whether forms and notices should be set out in (primary or secondary) legislation or whether they should be placed in what may be termed ‘tertiary law’ (for example, they could be designed by an electoral body such as the Electoral Commission).
- 2.2. Currently the majority of forms and notices that must be used in elections (both their content and design) are ‘prescribed’ (i.e. set out in) legislation. We have previously argued that this approach is not necessarily in voters’ best interests and that legislation should only prescribe key information to be included. In our view the standard design (including both the format and wording of the paper) should be performed by a single body or officer such as the Greater London Returning Officer, the Electoral Management Board for Scotland or, as was the case in the May 2011 referendum, the Electoral Commission³. We argued that this approach would allow for flexibility but also ensure consistency of approach and quality across particular electoral events.
- 2.3. This paper sets out our views in more detail. It draws on our experience of producing guidance (including our *Making Your Mark* guidance and template forms for specific electoral events), working with administrators and accessibility experts, setting and monitoring performance standards, being consulted on draft legislation and reporting on the administration of elections since our creation in 2000. The design of forms and notices is an integral part of the election process; well-designed forms have the potential to increase levels of participation and improve the voter’s experience of, and promote confidence in, elections. However, poorly-designed voter materials can inhibit participation, cause confusion and ultimately (in the case of ballot papers) can lead to votes being rejected and the outcome of the election not being a

¹ For further information on the review see <http://lawcommission.justice.gov.uk/areas/electoral-law.htm>.

² Law Commission, *Electoral Law in the United Kingdom: A Scoping Report*, p. 50, http://lawcommission.justice.gov.uk/docs/electoral_law_scoping_report.pdf.

³ Electoral Commission, *Response of the Electoral Commission to Law Commission Review of Electoral Law - Consultation Scoping Paper*, pp. 12-13.

true reflection of the electorate's choice⁴. This paper's aim is to inform the reform of this important aspect of electoral law, in particular to draw attention to the problems with the current approach of prescribing the content and format of most forms in legislation and also to suggest ways in which those problems could be avoided in a reformed electoral law.

3. Principles

3.1. The key principles that should be borne in mind when deciding where forms and notices should be placed in the legislative hierarchy in our view are:

- **Flexibility:** forms should be capable of being amended quickly where necessary, especially where an error or lack of clarity that could adversely affect voters and candidates is identified.
- **Certainty:** forms should be settled well in advance of an election and where problems with them are subsequently identified they should be quickly resolved without any uncertainty as to whether they can be changed and, if so, how.
- **Ease and use:** forms should be easy for administrators to reproduce in their electoral area and, most importantly, easy for voters and candidates to use and understand.
- **Consistency:** voters and candidates should have a similarly good experience wherever in the UK they are taking part in an election.

3.2. The optimal position of forms and notices in the hierarchy of electoral laws appears to us to be the position that best fulfils the above principles.

4. The current position of forms and notices in the hierarchy

4.1. The election rules for each type of electoral event require a number of forms and notices to be produced. For example, at a UK parliamentary general election the following forms and notices are set out in legislation (some others are not set out in the law, such as the statement of candidates standing nominated, and instead the RO has discretion to create their own version):

- Form of writ
- Label or direction of writ
- Endorsement
- Certificate endorsed on writ
- Form of nomination paper
- Form of ballot paper

⁴ Electoral Commission, *Making Your Mark: Good practice for designing voter materials: guidance for government policy makers*, 2009, p. 1, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/151088/Making-Your-Mark-Design-Guidance-For-Government-Policy-Makers-Web-Final-2.pdf

- Form of directions for the guidance of the voters in voting
- Form of declaration to be made by the companion of a voter with disabilities
- Poll card, postal poll card, proxy poll card and proxy postal poll card
- Return of expenses
- Declaration as to expenses
- Proxy paper
- Certificate of employment
- Various forms of postal voting statement depending on whether the election is standalone or combined
- Statement as to postal ballot papers
- Various forms of corresponding number list depending on whether the election is standalone or combined⁵.

4.2. For UK parliamentary elections most forms are prescribed in primary legislation; for all other elections, forms are mostly set out in secondary legislation. We are not aware of any good reason for this difference. There are numerous other differences depending on the electoral event. For example, at local government elections the consent to nomination form is also prescribed. At European Parliamentary elections neither the nomination paper nor the consent to nomination form is prescribed. Parties wishing to stand for election to European Parliamentary and regional Scottish Parliamentary elections must submit a list of candidates but the format of this list is only prescribed at Scottish Parliamentary elections. The Scottish Parliamentary election rules also contain an 'information for voters' notice; other election rules only set out what this notice must contain rather than its exact wording and format⁶. Many other discrepancies between the various election rules in how they deal with forms and notices could be cited; the above is only a brief selection.

4.3. There are also forms and notices that are required to be produced for various other parts of the electoral process, including electoral registration, polling district and place reviews and election petitions. We hope that the Law Commissions' review will result in a reduction in the number of forms and notices required to be produced, in addition to records kept⁷, and also greater consistency across different election types.

4.4. All electoral forms and notices (including the ballot paper) must be available to voters in Wales in both English and Welsh so that voters in Wales are able to participate through the medium of Welsh should they choose to do so. To achieve this, the UK Government makes a statutory Order for each election, prescribing the materials in Welsh. However, the Order has frequently been

⁵ Appendix to Schedule 1 to the Representation of the People Act 1983 and Schedule 3 to the Representation of the People (England and Wales) Regulations 2001.

⁶ For example rule 29(5) of the parliamentary election rules.

⁷ For example there are numerous different records of absent voters that are required to be kept by Schedule 4 of the Representation of the People Act 2000 and the Representation of the People (England and Wales) Regulations 2001.

late, causing significant problems for ROs in Wales in arranging printing of the necessary materials, which we discuss below.

- 4.5. Both the content and the format of most forms and notices are set out in legislation. However, there are two exceptions to this general approach. Firstly, the Electoral Commission has recently been given a duty to produce forms relating to electoral registration that must be used by EROs as a result of reforms made by and under the Electoral Registration and Administration Act 2013. In addition, the Electoral Commission designed forms and notices at the May 2011 polls.
- 4.6. Secondly, as mentioned above, in some cases election rules simply set out what a form or notice must contain, without prescribing the exact wording and format that must be used. For example, at some elections the rules say what the nomination paper and / or the consent to nomination must contain but do not set out the exact wording and format. Most election rules also only state what wording must appear in polling station compartments, without prescribing the exact format of that notice; the Electoral Commission provides suggested notices to assist ROs, which have been user-tested to ensure they are clear and accessible. There are a number of other examples, for example the statement of candidates standing nominated.
- 4.7. Therefore, there are already a number of different approaches used in the legislation in respect of the production of forms and notices, including:
- Prescribing the exact content and format of the form in legislation,
 - Setting out the minimum information that a form or notice must contain but giving the Electoral Commission a duty to design the form or notice that must be used,
 - Setting out what a form or notice must contain but allowing discretion as to the exact wording and format of the form that is used by electoral administrators or candidates.
- 4.8. The approach of statutory prescription of both content and format in our experience leads to numerous significant problems, which are described below with reference to the principles set out at the beginning of this paper. These problems must be offset against the advantages of forms and notices being set out in legislation. It could be said that where forms are included in legislation, it allows for parliamentary scrutiny of form design. However, it is not clear to us what is gained by providing for parliamentary scrutiny of the exact format and wording of a form that is set out in an appendix to legislation, in addition to scrutiny of the required contents of the form that is set out in the body of the legislation. If legislation sets out the required contents and this is subject to parliamentary scrutiny, why does the legislature also need to scrutinise the exact format and wording? We would be surprised if prescribing the content and format of administrative forms was the norm in other areas of law.

4.9. It could be argued that as a minimum the ballot paper, the effective design of which is of fundamental importance to democracy, should be given parliamentary scrutiny. However, we are not convinced that parliamentary scrutiny of any forms or notices is useful when their required contents and, in the case of the ballot paper, arrangement is set out in the legislation and which will therefore be subject to parliamentary scrutiny.

4.10. In addition, it could be argued that prescribing a form in legislation ensures consistency. However, our experience is that this approach has in fact led to inconsistency and the use of poor quality forms, as discussed in more detail below.

5. Assessing the approach of legislative prescription against the principles

5.1. Flexibility

Rectifying errors on the form or notice

5.1.1. In our experience the most significant problem caused by prescribing the exact content and format of forms and notices in legislation is the resulting lack of flexibility to amend the form where necessary. A form that is prescribed in legislation can only be amended by making further legislation, which is often not practicable unless a problem arises well in advance of an election and the Government decides to make amending legislation. In practice most problems are identified shortly before or during an election because it is at this time that forms and notices are being prepared. Therefore many problems do not get resolved, which is not in the best interests of voters and candidates. There is provision in some cases to use a form to the 'same' or 'like effect' and there is normally a power to adapt the form as far as circumstances require. However, the extent of these powers is not clear. There is a risk that any change to a form means that it is not in accordance with the law and that the election official is in breach of official duty. Therefore, there is a reluctance to depart from the prescribed form even where it contains errors of law.

5.1.2. Problems with the content and design of statutory prescribed forms arise at every set of national elections. We set out here a few examples for the purpose of illustrating the nature of this problem. We would be happy to provide further detail on any of these examples or provide further examples.

5.1.3. Well in advance of the legislation being drafted for police and crime commissioner (PCC) elections, the Electoral Commission recommended that based on our past experience the best way to achieve forms that are easy for voters to use and understand was for the legislation to specify the required content (though not necessarily detailed wording) and any key formatting requirements, and then for the Commission to have a power to provide example design templates. The templates would specify the design and format of the forms and notices and could be used by

Returning Officers to produce forms and notices locally. However, this recommendation was not followed; English language versions of all voter forms and notices were prescribed in legislation. During the production of our guidance for the PCC elections we came across the following problems with the prescribed forms:

- Candidates' nomination forms are required to be signed by 100 subscribers, each of whom must be a registered elector. Rule 7(5) defines 'elector' as a person who, on the last day for the publication of notice of the PCC election, is registered in the register of electors. In contrast, prescribed form number 6 (nomination paper), note 5 states that the electoral number that should be added to the nomination form of each subscriber is the number in the electoral register to be used at the election. This referred not to the register as it was on the last day for the publication of the notice of election (E-28) but instead the revised register which was published later. This drafting error caused confusion as to which register the candidates should use when filling out their nomination forms and which register should be used by the RO when validating them.
- Form 2 (postal voting statement for standalone PCC election) and Form 4 (combined postal voting statement where issue and receipt of postal ballot papers are not combined) state that if an absent voter misses the post they could still hand in the postal voting statement 'at any polling station in your police area'. This is inconsistent with rule 49(2)(b), which states that it must reach the local returning officer or a polling station in the *voting* area for which the officer acts. This appeared to be a drafting error in the form and caused confusion as to where the statement could be returned to. It is essential that this statement clearly and accurately stated where it must be returned to as if it was returned elsewhere it will not be a validly cast postal vote.
- Form 3 (combined postal voting statement) states that 'If you miss the post, you can hand it in at our office or at any polling station in your local authority'. However, rule 39 of Schedule 4 (combined rules) states that the statement must be returned to the relevant returning or counting officer or a polling station in the appropriate area. 'Appropriate area' is defined as the area which is common to the areas in which the polls at the PCC election and the relevant election or referendum are being taken together and in respect of which polls the voter has been issued with a ballot paper.

5.1.4. None of these errors were rectified by amending the prescribed form in the legislation before the poll; this was because there was insufficient time to do so. When these problems were identified, the Commission provided further guidance to LROs and PAROs on how to address them.

5.1.5. However, relying on ROs and the Electoral Commission to identify and deal with errors in the prescribed forms in order for them to be fit for purpose does not seem to be a satisfactory position, especially as the extent of the RO's power to change the prescribed forms is unclear and the Commission has no power to require any change to be made. As we stated in our PCC election report, if the UK Government had followed our recommended approach such errors could have been rectified easily and immediately, and without the need for legislative change⁸.

5.1.6. There were also problems caused by the wording used in the prescribed annual canvass form that was used in Northern Ireland during the 2013 annual canvass. During consultation on the draft canvass form the Chief Electoral Officer for Northern Ireland expressed concern that the canvass form included a separate box in which a person was required to confirm by ticking 'yes' or 'no' whether they had lived in Northern Ireland for the three months prior to 15 October 2013⁹. This was a new addition to the form and he felt that it had the potential to cause confusion and could also be controversial amongst some sections of the community in Northern Ireland¹⁰.

5.1.7. Despite these concerns, the canvass form was prescribed in law with the box mentioned above. The canvass began on 26 August, with many canvass forms being completed and returned in September. Being asked on the canvass form to tick 'yes' or 'no' in response to the statement 'I have lived in Northern Ireland for the three months prior to 15 October 2013' caused confusion to many voters who completed the form well before 15 October. They were being asked to confirm that they had lived in Northern Ireland during a period that included the future. We understand that around 120,000 canvass forms were returned in an incomplete state, most of which because the elector had failed to tick 'yes' or 'no' in the residence box.

5.1.8. Despite a recent Government review of some prescribed forms and notices, we came across a number of issues with the forms at the elections held on 22 May 2014. In early April of this year we noticed errors on the prescribed postal voting statement:

- Instruction 6 wrongly stated: 'After receiving this postal vote, you cannot vote in person at a polling station'. Where postal votes are issued and received before the eleventh day before polling, this statement is not correct as the voter could decide to change their absent voting arrangements.

⁸ Electoral Commission, *PCC Election Report*, pp.22-23, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0003/154353/PCC-Elections-Report.pdf

⁹ The form was prescribed by regulation 3 and 5 of, and the schedule to, the Representation of People (Northern Ireland) (Amendment) Regulations 2013.

¹⁰ Electoral Commission, Report on the Northern Ireland electoral registration canvass 2013, April 2014, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/166999/Report-on-the-Northern-Ireland-electoral-registration-canvass-2013.pdf

- The standalone and combined (joint issue) versions have a line to say 'Please call the helpline if you require copies of this form or guidance in Braille or languages other than English'. But this line was omitted in the combined (separate issue) version.

5.1.9. The Government confirmed that these were errors but informed us that the legislation could not be amended in time for the May 2014 elections. We issued guidance advising that ROs should change the statement so that it stated 'Once you complete and return this postal vote, you cannot vote in person at a polling station' and also to add in the missing wording relating to the helpline. Both errors had the potential to significantly harm voters' interests by misinforming them about the law on how they can cast their vote and also by not providing them with information to ensure they could get assistance where needed. However, the lawfulness of changing the prescribed form even in these circumstances is not clear. In addition, we have no power to mandate that wording is changed, so our advice may not have been followed in every instance, for example because some ROs may have been reluctant to depart from the prescribed wording or because in some cases the forms may have been printed or sent to printers.

5.1.10. Where errors are identified on a prescribed form and there is time for Government to amend the form, having to produce amending legislation is an inefficient way to achieve the change. For example, in producing our guidance for this year's European Parliamentary elections we noticed that at a European Parliamentary election the words that must appear at the top of the enlarged sample copy of the ballot paper were "Vote once (X) in one blank box" (regulation 122A(6)(a) of the European Parliamentary Elections Regulations 2004). This was inconsistent with the new wording for the top of the ballot paper in the new Form A in the European Parliamentary Elections (Amendment) Regulations 2013, i.e. "Vote only once by putting a cross (X) in the box next to your choice". In this case the error was corrected by regulation 3 of the European Parliamentary Elections (Amendment) Regulations 2014. Even though the error was rectified, producing amending legislation at short notice is not an efficient way to do so as it involves a cost to Government, Parliament and those consulted on the amending legislation such as the Commission and the AEA.

5.1.11. It is inevitable that forms and notices will occasionally contain a mistake; although many issues will be resolved during the drafting of, and consultation on, election forms, others will not become apparent until shortly before the election as they are being produced. Many of the mistakes referred to above harmed voters' or candidates' interests, especially by making taking part in the electoral process more difficult. Therefore, it is important that they can be swiftly rectified before they can have such an impact.

5.1.12. We do not argue that the position of forms and notices in the hierarchy of laws needs to change in order that fewer mistakes are

made. Instead, our view is that the position of forms and notices in the hierarchy should reflect the need to ensure that they can be easily and quickly corrected. Placing forms in legislation does not provide for the necessary flexibility to achieve such changes quickly and as a result does not promote effective administration or the interests of voters or candidates. It is in the interests of everyone involved in elections that where an error is identified the form is quickly amended before it impacts on the delivery of the election.

Promoting participation

5.1.13. Setting out forms and notices in legislation also creates inflexibility by making it more difficult for them to be modified to promote participation in elections. If prescribed design requirements prove to hinder the participation of some voters, there is little scope to modify them. This concern has been raised by Diverse Cymru, whose response to the Law Commission's scoping consultation stated that requirements regarding a specific font and size and format of instructions to voters contributed significantly to the issues that many disabled electors experienced in understanding how to vote and reading ballot papers without assistance¹¹.

5.1.14. Scope and Mencap also stated in their response to the Law Commission that the detailed prescription in law of forms and notices has limited the ability of electoral administrators to cater for the needs of disabled voters¹². They add that 'This has made revising the prescribed design, even with the intention of ensuring that it better conforms to accessibility norms, overly cumbersome'¹³.

Reviewing and improving forms

5.1.15. Whatever position is given to forms and notices in the hierarchy it should allow for them to be continuously kept under review so that improvements can be made, especially following their use in elections. Currently no single body is responsible for producing, reviewing, improving and rectifying errors with forms; instead it is a combination of Governments, EROs and ROs, the Commission and the AEA. No single body is responsible, and therefore accountable, for ensuring that forms are kept under review and changed where necessary.

5.1.16. At present most forms are prescribed by Government well before an election. Although they are consulted on, many problems with the forms will not be evident so far out from an election. During an election the forms are then reproduced by EROs and ROs (with support, for example, from the Commission, AEA and the EMB). Where problems are identified with a form, Governments often do not amend the form because it is often not practicable to change legislation at short notice.

¹¹ Law Commission, *Electoral Law in the United Kingdom: A Scoping Report*, p. 48.,

¹² Scope and Mencap, *Joint Response to Law Commission's Scoping Consultation*, p. 1.

¹³ *Ibid.*

Instead, resolving the issue is left for the Commission and AEA, who advise ROs on what, if anything, can be done.

5.1.17. There are one-off reviews of statutory forms carried out by the Government from time to time; however there is no continuous process for their review. There are also no 'lessons learned' exercises following elections; the Commission will report any concerns to the Government but these may not result in the prescribed forms being changed quickly, possibly because it is difficult to find time in the Government and parliamentary schedule for legislative changes to forms. There would also be benefit from ensuring that forms and notices could be reviewed across all electoral events in the UK, to ensure that learning can be applied consistently.

5.2. Certainty

5.2.1. Forms and notices must be set out well in advance of an election to allow for administrators to have sufficient time to arrange for their reproduction in their area and also for the Commission to prepare guidance and suggested templates. Regardless of where forms are placed in the legislative hierarchy it should be possible to ensure they are produced in a timely manner. However, our experience is that the process of making legislation is time consuming and can be subject to delays.

5.2.2. For example, the Police and Crime Commissioner Elections (Welsh Forms) Order 2012, which prescribed the bilingual ballot paper, was laid in the UK Parliament on 29 October 2012, and came into effect on 31 October 2012, only two weeks before polling day. If the Order had come into effect any later, voters in Wales would have had to cast their vote on an English-only ballot for the first time since the passing of the Welsh Language Act in 1993. However, as a result of the delays, no other forms and notices were prescribed in Welsh for this election.

5.2.3. The delays to the Welsh Forms Order meant that PAROs had to put in place contingency arrangements, printing both bilingual and English language ballot papers so that postal ballot packs could be issued promptly. The UK Government agreed to provide additional funding to cover the additional cost of printing duplicate postal ballot packs with UK Government sources estimating an additional cost of £350,000. Also, ROs had to rely on their own translations of forms and notices and on resources from the Commission, which we provided bilingually at short notice, such as the nomination form for candidates.

5.2.4. This problem is not confined to the PCC elections. For example, the Local Elections (Principal Areas) (England and Wales) (Amendment) Rules 2014, which updated the rules and forms for the administration and conduct of local government elections, were laid on 7 March 2014 and came into force on 6 April 2014, just over six weeks before polling day. The late laying of this legislation provided uncertainty and planning

issues for ROs, particularly in relation to electoral forms and stationery. There had also been uncertainty that the order would be made in time.

5.2.5. The Welsh Forms Order for this year's European Parliamentary elections came into force on 1 April 2014, less than two months before polling day and four months after the publication of the European Parliamentary Elections (Amendment) Regulations 2013, which provided for the forms, notices and ballot paper in English. Many electoral administrators in Wales had to delay the printing of postal vote stationery, poll cards and notices as a direct result of the late legislation.

5.2.6. The above examples show that prescribing forms and notices in legislation, which is often not in place well in advance of an election, is not helpful for administrators, suppliers and printers who need to know both what types of forms and notices will need to be produced and also their content and design well before an election in order to be able to make the necessary arrangements for their printing and distribution.

5.2.7. The ERO or RO should also have certainty as to what extent, if at all, forms and notices can be modified, both when the form is initially reproduced by them and where errors are noticed. Prescribed forms and notices must be used by electoral administrators with little discretion for any amendment. The legislation sometimes provides that a prescribed form must be used or a form to the same effect. Elsewhere, the law says that the form must be used or a form to the like effect. It is unclear whether there is a difference between the effect of these two forms of wording; for example it may be that a requirement to use the prescribed form or a form to the 'same effect' confers less discretion to amend the form than where the legislation refers to 'like effect'. In most cases the legislation allows the forms to be adapted so far as circumstances require. The result of these provisions is considerable confusion as to the extent to which prescribed forms and notices may be changed, as noted by the AEA in its response to the Law Commission's scoping consultation¹⁴. In particular there is confusion as to whether it is possible to:

- Change the wording and format to improve their clarity and accessibility
- Add wording to make the form or notice more informative
- Change the wording to remove an error of law.

5.2.8. At present wherever an error or lack of clarity is identified on a form, there is considerable uncertainty about what, if anything, can be done if the legislation is not amended.

¹⁴ AEA, *Formal response to the Law Commission Scoping Consultation Paper: "Electoral Law in the United Kingdom"*, p. 8, http://www.aea-elections.co.uk/downloads/consultations_and_responses/aea_resp_lawcomm_law_review_170912.pdf.

5.3. Ease of use

Ease of use for voters and candidates

5.3.1. The design of forms and notices should not impose barriers for those wishing to take part in elections. Instead they should be designed so as to be clear and easy to use for all those who may use them, including those whose communication needs may be different for reason of disability, level of literacy or because someone is a new voter and is not used to the electoral process. The aim should be to meet the needs of as many voters as possible in a single form or notice. In order to do so, every detail of the content and format needs to be carefully considered including, for example, the font and font size, spacing, numbering, alignment, language and tone, bold and italics, pictorial images, colour, contrast etc. A minor technical aspect of a form or notice could contribute to excluding certain voters. Given the importance of these details, it seems to be inappropriate that in many cases the form or notice itself is set out in legislation, meaning that any errors cannot be easily amended before, or improvements be easily made after, an election. No matter how well designed a form or notice is in the first instance, our experience is that there will often be areas for improvement following their use in electoral events.

Ease of use for administrators

5.3.2. Forms and notices must be easy for electoral administrators to reproduce. When reporting on the administration of the PCC elections in 2012 we received feedback from electoral administrators suggesting that the PDF format in which the prescribed statutory forms and notices were provided could not be easily edited, requiring that they spend considerable time on producing new versions ‘to like effect’ as the prescribed form. We also received feedback that the file format provided was incompatible with some printers’ systems¹⁵. This was also reflected in the AEA’s report on the PCC elections, which stated that ‘the quality of the images of the prescribed forms contained in the legislation was poor’¹⁶.

5.3.3. These issues are not confined to PCC elections, they occur wherever legislation sets out a prescribed form or notice, including form designs for electoral registration which the Commission is required to make available to EROs. Prescribed form designs are not always user-friendly for administrators or their printers and can generate significant costs for administrators to prepare fresh versions of them.

5.3.4. It would be preferable if designs for forms and notices could be produced in such a way that the necessary variable details, such as the name of the constituency or ward, could be added electronically by

¹⁵ Electoral Commission, *PCC Election Report*, p. 23.

¹⁶ AEA, *A question of timing? The administration of the Police and Crime Commissioner elections in England and Wales*, February 2013, p. 31, http://www.aea-elections.co.uk/downloads/reports/aea_post_elections_report_2013.pdf

electoral administrators, potentially through their electoral management software (EMS). The form could then be printed without having to produce a completely new form. However, our experience to date in respect of the new individual electoral registration forms and notices suggests that there is significant variation between EMS suppliers in the way forms and notices are created, managed and produced, which means that it is unlikely that a single template would be workable for all systems currently used by EROs.

5.3.5. This also means that it is difficult to be certain that ROs and EROs are always producing forms and notices which are fully compliant with legislative requirements. ROs and EROs can be heavily dependent on and limited by what their EMS supplier provides. The Commission does not have a role (and is not resourced to deliver such a role) in proof-checking draft forms or notices produced by EMS systems or by ROs and EROs themselves.

5.4. Consistency

5.4.1. The position of forms and notices in the legislative hierarchy should promote consistency of design. As noted by the UK Government, consistency of form design can help avoid voter confusion¹⁷. It also helps to ensure that elections are conducted fairly as all voters have the same information and creates a sense of shared participation¹⁸. Voters and candidates should have a similarly good experience wherever in the UK they are taking part in an election. Forms that have been professionally designed, rigorously user-tested with a range of different voters with different needs and developed in a consultative manner with those involved in the electoral process, and as a result are easy to use and understand, should be used consistently across the UK in any given electoral event.

5.4.2. Prescribing forms and notices in legislation has not achieved consistency; in our experience there are wide variations in the quality and accessibility of forms and notices produced across the UK in respect of the same election. This is a result of how EROs and ROs reproduce the prescribed form locally in a version to the 'like' or 'same' effect.

6. Solutions

6.1. We support the inclusion of the proper and consistent place of rules and forms within the hierarchy of legislative measures in the Law Commissions' review of electoral law and would request that the information presented in this paper is taken into account. For the reasons outlined above we consider that there are numerous and significant disadvantages with the existing position of many forms and notices in the hierarchy of electoral law. Most

¹⁷ Northern Ireland Office, *Forms for Elections in Northern Ireland: A Consultation Paper*, April 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/304263/Consultation_Paper_-_Forms_for_Elections_in_Northern_Ireland_-_April_2014_-_extended_consultation_period.PDF

¹⁸ Ibid.

importantly, an approach which requires legislation to be made in order to change a form or notice is not flexible enough to ensure that forms are fit for purpose.

6.2. We have set out our recommendations as to an alternative approach in previous election reports and also in submissions to the Law Commission¹⁹. In particular, we stated in our report on the PCC elections in 2012:

based on our past experience, the best way to achieve (forms and notices that are easy for voters to use and understand) in practice (is) for the legislation to specify the required content (though not necessarily detailed wording) and any key formatting requirements, and then for the Commission to have a power to provide example design templates which would specify the design and format of the forms and notices and could be used by Returning Officers to produce forms and notices locally.

We considered that this approach would be user-friendly for Returning Officers (ROs) and electoral administrators and providers of electoral stationery, and was the most effective way of achieving consistency and compliance from PAROs and LROs. This was also the approach that the Commission took at the May 2011 referendum on the UK Parliamentary voting system and was successful in achieving clear, consistent and user-friendly forms and notices. We have since built on this approach to provide templates for Returning and Counting Officers to use at other elections and referendums, and since December 2011 these have formed part of our performance standards for Returning Officers, designed to ensure that electors receive information that is clear and easy to understand and use²⁰.

6.3. We remain of the view that this is a better approach than the current one of prescribing most forms and notices in legislation. It will provide flexibility to amend forms and notices swiftly where circumstances require. It will ensure that there is a single body able to produce, quickly rectify errors and continuously review forms and notices to ensure that improvements are made after each election, in time for the next one.

6.4. We also consider that this approach would achieve more consistency and better quality forms than at present, where inconsistency and poor quality largely arises from the different ways in which prescribed forms are reproduced locally to the 'like' or 'same effect'. Template forms and notices produced by the Commission would only leave the ERO or RO with the task of adding the relevant details into the form such as the name of the local

¹⁹ For example: Electoral Commission, *The Law Commission Review of Electoral Administration Law: Our preliminary views on the scope of the review*, pp. 17-18, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/148425/Preliminary-views-on-project-scope.pdf.

²⁰ Electoral Commission, *Police and Crime Commissioner Elections in England and Wales: Report on the administration of the elections held on 15 November 2012*, p. 22 http://www.electoralcommission.org.uk/_data/assets/pdf_file/0003/154353/PCC-Elections-Report.pdf.

government ward before printing them. This would also be a significant cost saving for staff working in electoral administration.

6.5. Furthermore, we would anticipate that taking forms out of legislation would increase certainty for the users of forms. Making new electoral legislation is frequently subject to delays, including but not limited to legislation providing for Welsh forms. Although delays may occur wherever forms and notices sit in the electoral law hierarchy, the process of making legislation is particularly liable to be affected by delays, so we would expect that an alternative approach would allow for all forms to be produced earlier. In addition, the suggested approach would avoid the current uncertainty as to what extent prescribed statutory forms and notices can be amended.

6.6. This position also supported by Scope and Mencap in their joint consultation response to the Law Commission's consultation on the scope of the electoral law review. They state that

We believe that consideration of the most effective way in which [setting forms and notices] can be addressed should include the possibility of assigning responsibility in relation to designing forms and notices to the Electoral Commission. This could help ensure sufficient flexibility for accessibility issues to be adequately taken into account, while ensuring consistency and high standards for all voters.

6.7. The Commission already has the role of designing registration forms. The Commission also was given responsibility to design forms and notices for the parliamentary voting system referendum and combined polls held in 2011. We designed these documents with input from accessibility and usability professionals and carried out our own research.

6.8. The May 2011 polls was the first set of polls where key materials were consistently designed and produced across the UK, according to a single set of specifications issued by the Chief Counting Officer²¹. There is evidence from our public opinion research to suggest that voters found these revised materials more useful than the prescribed statutory forms and notices which were provided by ROs at the UK Parliamentary general election in 2010²². The AEA reported that these forms and notices were much simpler and better designed compared with prescribed versions and stated that there was positive feedback from administrators about their design²³. For example, the CO for the South East was quoted as saying that 'In particular, I would like to be able to use (the Commission's) prescribed PVS (or very similar) in the future but the legislation prevents this'²⁴. We also received similar feedback²⁵.

²¹ Electoral Commission, *Report on the May 2011 referendum*, October 2011, p. 79, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0019/141328/Final-PVS-report.pdf.

²² Ibid.

²³ AEA, *The administration of the referendums and elections across the UK in 2011*, July 2011, pp. 72-73, http://www.aea-elections.co.uk/downloads/reports/aea_election_referendum_report_2011.pdf.

²⁴ Ibid, p. 73.

²⁵ Electoral Commission, *Report on the May 2011 referendum*, p. 80.

6.9. To build on the good practice that was established in 2011 and help ROs to produce consistent and well-designed voter materials for future elections, the Commission developed templates that can be used at future polls, based on those produced in 2011²⁶. This also builds on our detailed guidance on the design of voter materials, *Making Your Mark*, published in 2009. The Commission has done this under its power to provide advice and assistance to ROs under section 10(3) of the Political Parties, Elections and Referendums Act 2000. There is however no duty to use a template form provided by the Commission. Also, the Commission must ensure that the template form is in accordance with the law, for example that the form is to the 'like' or 'same effect' as a prescribed form. It is a time consuming and complex task for the Commission to produce these templates, especially given the uncertainty as to the extent to which a prescribed form's content and format can be modified, and there is no guarantee that it will be used by a RO. We have received positive feedback on our template forms. For example, the AEA's PCC election report states that the majority of the feedback that the AEA received from electoral administrators 'indicates good levels of satisfaction with the materials provided by the Electoral Commission for the PCC elections'²⁷.

6.10. A better position would seem to be for the law to state what must be included in a form or notice as a minimum and then give the Commission a duty to provide templates for ROs, who could then add in the necessary details (e.g. ward name) and arrange for printing. There would also need to be a duty to use the Commission's form, although the nature of that duty and the extent to which local modifications are possible would need to be considered.

6.11. Given that we already have a duty to produce designs for registration forms in Great Britain, have previously been given a duty to produce all forms at the parliamentary voting system referendum and are providing template forms under our general power to provide assistance and advice, the reform suggested in this paper may not be considered to be a major change. Instead the change would ensure that the law takes a more consistent approach and also better reflects and supports what is happening in practice.

6.12. We noted in our response to the Law Commission's consultation that there are others such as the Greater London Returning Officer and the Convener of the Electoral Management Board in Scotland who may also be well placed to design forms and notices at certain elections. Alternatively there could be a duty on the Electoral Commission to consult such persons and bodies prior to producing forms and notices at those elections. This would preserve the benefits of having a single body entrusted with this task, which could achieve greater consistency and also ensure that learning was reflected across all electoral events, whilst at the same time giving others a formal opportunity to provide their expertise. Whether or not there was a legislative duty to consult others, whoever is responsible for the design of

²⁶ Ibid.

²⁷ AEA, *A question of timing?*, p. 37.

forms and notices should consult others to ensure they meet accessibility standards and also that they are clear, accurate and user-friendly.

6.13. In addition to deciding where is the best place for forms and notices to sit in the legislative hierarchy, we also anticipate that the Law Commissions' review will make the law more consistent and logical. As mentioned earlier in this paper, there are many discrepancies between the various election rules in how they make provision for forms and notices, many without any obvious explanation. There are also a range of different and unhelpful provisions regarding how they can be amended ('like' or 'same effect' and 'adapted as far as the circumstances require'). The Law Commissions' review should aim to produce a more consistent electoral law, with differences only where there is good reason, and also a clearer, less ambiguous law.

7. Conclusion

7.1. We hope that this paper is useful in informing the Law Commissions' review of this part of electoral law. The proper place of forms and notices in the hierarchy of laws has an important effect on the ability of voters and candidates to participate in elections and also on how easily elections can be administered. The Law Commissions' review is an opportunity to consider this matter and achieve a better position.

7.2. In our view the approach of prescribing the exact content and design of forms and notices does not serve the interests of anyone participating in elections. Most importantly, it does not provide for sufficient flexibility to ensure that problems with the content and design of forms can be remedied before they adversely affect voters or candidates.

7.3. The Electoral Commission would not support retaining the approach of prescribing forms and notices in legislation in the reformed electoral law that will be produced by the Law Commissions. Instead we would prefer the legislation to set out what must be included in a form or notice as a minimum and then leave it to the Electoral Commission to set the exact content and design by producing templates for EROs and ROs to adapt and use locally.

7.4. We would be happy to provide any further information on this topic that would assist the Law Commissions.

**Electoral Commission
July 2014**