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# RESEARCH PAPER

## THE COUNT AND DETERMINATION OF THE RESULT

The law stated in this research paper may be in parts out of date. This paper is made available online for the benefit of those who are interested in fuller exposition of electoral law than is contained in our Consultation Paper.<sup>1</sup> Our definitive statement of the law is contained in that paper, however, and readers should beware that the law and citations in this paper may not be fully up to date, as our work researching electoral law commenced in 2012.

### INTRODUCTION

- 1.1 Upon the conclusion of the poll, the immediate task is to determine the result, declare the winners, and ensure an orderly transition to new elected representation.

#### Principles underpinning the count

- 1.2 As is the case with polling, certain principles underlie the current rules on counting votes and determining the outcome of the election, and should inform any reform of the law. These include:

- (1) Certainty and swiftness of outcomes – the count should not be delayed. The speed of the transition from polling to assumption of office depends on a country's political traditions. The UK's political tradition favours a swift and certain shift of public power, and election law, to an extent, reflects that tradition, particularly in the context of UK Parliamentary elections.
- (2) Accuracy and the audit trail – the result should be an accurate reflection of the votes cast in polling stations, and the election paperwork at the count – notably ballot papers (used, unused, spoiled and tendered), must match the paperwork sent to polling stations before the election.
- (3) Transparent neutrality – the count must be conducted neutral, impartially, and according to the rules; and must be capable of oversight by the candidates and their representatives.
- (4) Maintaining voter secrecy – it must not be possible for those observing the count to identify how a particular elector voted.

<sup>1</sup> Electoral Law: A Joint Consultation Paper ( 9 December 2014)

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### **The classical rules: first past the post contests**

- 1.3 The classical counting rules are those that apply to first past the post elections. We refer here primarily to the Parliamentary Elections Rules. These rules form the template for every other election's rules, albeit adapted to fit different voting systems.
- 1.4 The rules on the count and declaration of result at UK Parliamentary elections are found in rules 44 to 50 of the Parliamentary Elections Rules. Similar provisions are found in the elections rules for principal area and parish and community elections in England and Wales. They deal in outline with:
  - (1) logistics and timing of the count, including who may attend;
  - (2) how to count, including a requirement to verify beforehand and suggesting a possible counting method;
  - (3) the grounds on which ballot papers can be rejected; and
  - (4) how to determine and announce the result.
- 1.5 It is worth noting at the outset that, unlike the rules on polling, the classical counting rules do not seek to govern in exhaustive detail how a count is to be conducted. It is the responsibility of returning officers to organise the count as they see fit. Extensive guidance produced by the Electoral Commission suggests the processes which returning officers should follow. The lack of exhaustive prescription can be contrasted to the counting rules governing single transferrable vote elections, which we will consider further below. The obvious rationale for the difference is that first past the post is a relatively comfortable voting system to understand and use.

### **Logistics of the count**

- 1.6 Minimal guidance is given on the logistics of the count in elections rules. They state that the returning officer must make arrangements for counting the votes as soon as practicable after the close of poll, and must give the counting agents notice of the time and place at where the count will take place.<sup>2</sup>

<sup>2</sup> Representation of the People Act 1983, sch 1 r 44(1); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 44(1); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 44(1).

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### **Where to count**

- 1.7 *Schofield's Election Law* notes that the returning officer is completely free to choose the count venue, which need not be located within the constituency.<sup>3</sup> For Northern Ireland Assembly and local government elections in Northern Ireland, the Chief Electoral Officer may use school rooms and other buildings available to returning officers for the purpose of taking the poll.
- 1.8 The discretion given to returning officers also allows them to opt for multiple counting venues rather than a single central venue. While the latter option is more prevalent in practice, it may be sensible to count in different venues where part of the electoral area is contained on an island or is otherwise remote.

### **Who can attend the count**

The returning officer must determine who can attend the count, and ensure that only those who have been permitted to attend are allowed into the count venue. The law provides that the following persons may be present, and must be admitted to the count venue:<sup>4</sup>

- (1) the returning officer,
- (2) the counting clerks,
- (3) the candidates, and one person chosen by them,
- (4) the election and counting agents, and
- (5) electoral observers appointed by the Electoral Commission,

### **APPOINTING COUNTING AGENTS**

- 1.9 Counting agents are persons appointed by candidates or their election agents to supervise the count. They must be appointed in writing in advance of polling day. The deadline for this is two days before polling day for UK Parliamentary elections and five days for local elections. Following the implementation of the Electoral Registration and Administration Act 2013, the deadline for UK Parliamentary elections is now also 5 days before polling day.<sup>5</sup>

<sup>3</sup> P Gribble (ed), *Schofield's Election Law*, loose-leaf 16th release vol 1 at para 11-001.

<sup>4</sup> Representation of the People Act 1983, sch 1 r 44(2); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 44(2); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 44(2).

<sup>5</sup> Representation of the People Act 1983, sch 1 r 30(3); Electoral Registration and Administration Act 2013, s 14(4); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 27(5); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 27(5).

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- 1.10 The returning officer can limit the number of counting agents, but this number must be the same in the case of each candidate, thus ensuring equality of arms between candidates. Another requirement is that the minimum number of agents which should be allocated to each candidate is calculated by dividing the number of counting clerks by the number of candidates. This means that every member of counting staff can be supervised by an individual counting agent.<sup>6</sup>
- 1.11 At the scoping stage, the Chief Electoral Officer for Northern Ireland told us he had experienced a conflict between health and safety legislation and electoral law. The maximum capacity of the count venue, under health and safety law, would not allow the legislatively prescribed number of counting agents to attend. As a result, the Chief Electoral Officer chose to limit the number of counting agents per candidate below the required level.
- 1.12 Given the scarcity of public buildings suitable for counting, it would be advisable for the law to offer some flexibility in this area, subject to a provision that each candidate should be allocated an equal number of counting agents. An example of how this might be done can be seen in the rules for Greater London Authority Elections, where a returning officer can choose to authorise fewer than the required number of counting agents in special circumstances.<sup>7</sup>

#### OTHER PERSONS ATTENDING THE COUNT

- 1.13 The returning officer may permit other persons to attend the count, for example media representatives and police officers, and other members of a candidate's campaign team. However, the returning officer should only do so if satisfied that it will not obstruct counting, and after having consulted the election agents, unless the returning officer thought it impracticable to do so.<sup>8</sup> Such other persons could gain entrance to the count venue by applying to the Electoral Commission to become an accredited electoral observer, in which case they would not need to seek the returning officer's permission.<sup>9</sup>

<sup>6</sup> Representation of the People Act 1983, sch 1 r 30; Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 27; Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 27.

<sup>7</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 r 30(6)(b), sch 2 r 31(6)(b), sch 3 r 30(6)(b).

<sup>8</sup> Representation of the People Act 1983, sch 1 r 44(3); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 44(3); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 44(3).

<sup>9</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 2.2.

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- 1.14 Returning officers have a power under section 6E of the Political Parties, Elections and Referendums Act 2000 to limit the number of accredited Electoral Commission observers present at the count venue at any time. This power does not apply to other persons listed in section 44 of the Parliamentary election rules as entitled to attend the count. They are either necessarily a limited group (those specified in the legislation) or already subject to the permission of the returning officer.
- 1.15 Electoral Commission guidance emphasises that there should be security measures in place to prevent and monitor unauthorised access to the count venue, such as providing a list of names to door staff, and name badges.<sup>10</sup> The law requires any persons attending the count to be supplied with a copy of the secrecy provisions in section 66(2) and (6) of the 1983 Act.<sup>11</sup>
- 1.16 A modern aspect of counts, particularly at elections with significant media coverage, is the availability of portable photography and the ability to publish pictures and footage online of almost everyone at the count. Plainly the rules envisage that only a limited range of persons can attend the count, where they are subject to the classical regulation to preserve secrecy. The ability to take pictures of the front or the back of ballot papers by using a mobile phone, and ease with which it can be uploaded to the internet instantly, means some persons attending the count might be unwitting breaking their obligation under section 66 of the 1983 Act. It is an offence to attempt to ascertain the number or other unique identifying mark on the back of the ballot paper, or to communicate information obtained at the counting of the votes as to the candidate for whom any vote is given on a particular ballot paper.

#### ***Layout of the count venue***

- 1.17 The law does not prescribe the layout of the count venue. Rather it lays down a duty to give counting agents all information regarding the count, and all reasonable facilities for overseeing count proceedings, as are consistent with the orderly conduct of proceedings.<sup>12</sup>
- 1.18 Emerging from that obligation (which seeks to ensure that the count is transparently fair), and as a matter of good practice, returning officers need to plan the layout of the count venue to ensure the count proceeds efficiently, accurately, and strikes accommodate the need for oversight by contestants and their agents.

<sup>10</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 2.3.

<sup>11</sup> Representation of the People Act 1983, sch 1 r 31(b); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 28(b); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 28(b).

<sup>12</sup> Representation of the People Act 1983, sch 1 r 44(4); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 44(4); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 44(4).

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- 1.19 *Schofield's Election Law* suggests that “oversee” need not mean that counting agents should be permitted to stand behind the staff and look over their shoulders, as this may impede the counting process. It recognises that in “an atmosphere of excitement and tension” it may be necessary to specify some separation of counting agents and counting staff, such as asking agents to remain seated opposite staff.<sup>13</sup> Electoral Commission guidance suggests that counting agents should be invited by the returning officer to watch the process of adjudication, which we discuss further below.
- 1.20 The layout should ensure that counting staff do not feel threatened or obstructed by those observing the count, while counting agents must be able to scrutinise the count. This is not an easy balance to strike. One of the consultees at the scoping stage noted that the practice of counting in an “inner” ring of tables can make it difficult for candidates to observe the accuracy of the count.<sup>14</sup>
- 1.21 It is our view the returning officer should remain free to decide on the layout of the counting venue, subject to statutory principles of transparency, accuracy and swiftness. Legally relevant guidance might suggest models for the layout of the venue, but these should not be binding as the best layout will depend on the nature of the count venue and the resources of the returning officer. Their responsibility will be to strike the balance between transparency and efficiency.

### ***Timing of the count***

- 1.22 The legal requirement is for the returning officer to make arrangements for counting the votes “as soon as practicable after the close of poll”.<sup>15</sup> This does not require the votes to be counted on the same day as the poll, and although it was customary to do so, returning officers could instead choose to postpone the count until the following day.<sup>16</sup> When the close of polls was extended, in 1969, from 7pm to 10pm, it was accepted that this was bound to lead to more counting on the following day.<sup>17</sup>

<sup>13</sup> P Gribble (ed), *Schofield's Election Law*, loose-leaf 16th release vol 1 at para 11-006.

<sup>14</sup> Response to our Scoping Consultation Paper from Councillor Gareth Randall.

<sup>15</sup> Representation of the People Act 1983, sch 1 r 44(1); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 44(1); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 44(1).

<sup>16</sup> Electoral Commission, *The timing of election counts* (July 2012), paras 3.20 to 3.21 and 3.47 to 3.49.

<sup>17</sup> Parker's Conduct of Parliamentary Elections, first edition (1970), p206. The editor cites Home Office Circular R.P.A. 154, which we have not seen.

- 1.23 At Parliamentary elections, the rule which excludes non-working days from the election timetable does not mention the count.<sup>18</sup> Thus a returning officer who has begun to count for Parliamentary elections must continue the count on a Saturday and Sunday if counting has not finished by that stage. Almost all other election rules state that the returning officer is not obliged to count on non-working days. The one exception is elections to the Northern Ireland Assembly, which simply apply the UK Parliamentary election rule. It is not clear whether this is something that should be the same for all elections – bringing elections in line with the Parliamentary rule – or whether the special nature of Parliamentary elections, and the need for a swift result, justifies continuing the count on non-working days for those elections.<sup>19</sup>

#### CONTINUOUS COUNT AT PARLIAMENTARY GENERAL ELECTIONS

- 1.24 Shortly before the May 2010 General election, the Parliamentary election rules were amended. The media had reported that many returning officers had planned to hold a count the following day rather than proceeding overnight. Rule 45(3A), which returning officers must have regard to in deciding when to count, requires reasonable steps to be taken to commence the count within four hours of the close of poll. An officer who is unable to do so must report the time that counting did commence, and the reason for the delay, to the Electoral Commission. In their post-election report the Electoral Commission must set out the names of constituencies which did not commence counting within four hours of the close of polls.<sup>20</sup>
- 1.25 While the duty is merely to have regard to the requirement to complete the count within four hours, in practice returning officers who do not do so will be named and, perhaps in their view, shamed. We are not aware of any Friday count at the last General election. The duty also applies to by-elections, although the Electoral Commission are not obliged to produce an election report after a by election.<sup>21</sup> However, the amendment does not apply to any other election in the United Kingdom.

<sup>18</sup> Representation of the People Act 1983, sch 1 r 2(1), as amended by the Fixed-term Parliaments Act 2011, sch 1 para 11(2).

<sup>19</sup> European Parliamentary Elections Rules SI 2004 No 293, sch 1 r 2(1); Scottish Parliament (Elections etc.) Order SI 2010 No 2999, sch 2 r 2; National Assembly for Wales (Representation of the People) Order SI 2007 No 236, sch 5 r 2(1); Greater London Authority Elections Rules SI 2007 No 3541, sch 1 r 4(1), sch 2 r 4(1), sch 3 r 4(1); Local Elections (Principal Areas) (England and Wales) Rules SI 2006 No 3304, sch 2 r 2(1); Local Elections (Parishes and Communities) (England and Wales) Rules SI 2006 No 3305, sch 2 r 2(1); Local Authorities (Mayoral Elections) Regulations SI 2007 No 1024, sch 1 r 4(1); Police and Crime Commissioner Elections Order SI 2012 No 1917, sch 3 r 3; Scottish Local Government Elections Order SSI 2011 No 399, sch 1 r 2(2); European Parliamentary Elections (Northern Ireland) Regulations SI 2004 No 1267, sch 1 r 2(1); Electoral Law Act (Northern Ireland) 1962, sch 5 r 2.

<sup>20</sup> Representation of the People Act 1983, sch 1 rr 44(6), 45(3A) and 53ZA.

<sup>21</sup> Political Parties Elections and Referendums Act 2000, s 5(2A).

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- 1.26 The 2010 amendment has been criticised for putting returning officers under time pressures, for example where a large electoral area requires ballot boxes to be transported long distances to the count, or where a large number of ballot papers must be verified.<sup>22</sup> This pressure is intensified where polls are combined, as verification must occur for all elections before the ballot papers given for one can be counted.
- 1.27 As we note above, swiftness and certainty of outcomes are among the principles which underpin the counting rules. In relation to UK Parliamentary elections, it can be argued that the fact the election will determine who will form the Government means the result should be announced as quickly as possible. This allows more time for discussions to take place within a party or between parties where the election produces a hung Parliament, before the newly elected MPs to take their seats on the Monday.
- 1.28 Postponing the count could also have an impact on media coverage on the poll. An announcement of the count result may attract more attention if it occurs in the early hours of the morning, rather than in the middle of a working day. Broadcasters have noted that covering the count in the daytime would disrupt their programme schedules, whereas it is easier to allocate airtime overnight. Similar considerations apply to the count venue, which may be required for other uses during the day. MPs have suggested that the pressure experienced by returning officers when counting overnight could be alleviated by employing more staff at the count for Parliamentary elections.<sup>23</sup>

#### PAUSING THE COUNT

- 1.29 A returning officer should carry on counting continuously, only pausing for refreshment. However, where the counting agents agree, the returning officer may pause the count between hours of 7 pm and 9 am. If they choose to do so, the ballot papers and other documents relating to the election must be put away securely; the legislation requires the returning officer to put his seal on the papers and allow the counting agents to do so as well if they wish.<sup>24</sup>

<sup>22</sup> Electoral Commission, *The timing of election counts* (July 2012), para 3.7. The report notes in particular that problems might be faced if the Northern Ireland Assembly election is combined with the UK Parliamentary election in 2015.

<sup>23</sup> Electoral Commission, *The timing of election counts* (July 2012), para 3.10.

<sup>24</sup> Representation of the People Act 1983, sch 1 r 45(6) and (7); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 45(8) and (9); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 45(8) and (9).



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- 1.30 This provision originated in the Parliamentary election rules appended to the Ballot Act 1872, which specified the same hours between which a count may be paused.<sup>25</sup> At the time, polling closed at 4pm. What the rule therefore meant, was that, with the agreement of agents, the returning officer might commence the count, stop at 7pm, and resume at 9am the next day. At its inception, therefore, this provision was perfectly reconcilable with the separate requirement that counting should proceed continuously after the poll. The rule has not been updated since, even though polling hours were extended to 7 pm, and then to 10 pm.
- 1.31 While the rule still functions, as it would permit counting to be halted between 10 pm and 9 am, and could be applied to subsequent days if counting continues, these are awkward interpretations and it is strange that the rule does not reflect current polling hours.
- 1.32 Instead of linking this rule to polling hours, which might conceivably change in future, the returning officer should be given a general power to pause the count, and to resume on the following morning. This is the way that the classical rule for Parliamentary elections is transposed for other elections. For example, at STV elections in Northern Ireland, the count must be paused between 11pm and 9am the following morning (a duty, not a discretion).
- 1.33 At local elections, the returning officer may pause the count without the agreement of the counting agents.<sup>26</sup>
- 1.34 It is questionable whether counting agents should be able to veto the decision of the returning officer to pause counting overnight. This decision is an administrative one which the returning officer must take based on the number of staff and other resources available.

<sup>25</sup> Ballot Act 1872, sch 1 r 35.

<sup>26</sup> Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 45(8); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 45(8).

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## **The count**

### ***Arrival of presiding officers***

- 1.35 Unless prior arrangement has been made with the returning officer, presiding officers must personally transport the ballot boxes and other election documents from their polling station to the returning officer after the close of poll.<sup>27</sup> Electoral Commission guidance recommends that presiding officers should not be allowed to leave the count venue until all the documents and packets they have brought have been checked off, and at least a cursory check of the ballot paper account has been made to identify any arithmetical errors.<sup>28</sup> This recommendation aims to catch potential discrepancies between the ballot paper account and the ballot papers which might arise at verification, and which the presiding officer might be able to explain.

### ***Verification***

- 1.36 Before the votes given for each candidate can be counted, the ballot papers must first be verified. In this context verification means accounting for all the ballot papers handed out, and making sure that they have arrived safely at the count venue. It aims to ensure that any ballot paper cast in a polling station is included in the count, thus producing a result which reflects the votes cast in polling stations. Both verification and the count involve counting processes: verification involves the counting of ballot papers, the count refers to the counting of votes cast on valid ballot papers.
- 1.37 The rules state that this should be done by:
- (1) counting and recording the number of ballot papers in each ballot box;
  - (2) comparing ballot paper accounts with the number of ballot papers recorded, the unused and spoilt ballot papers and the tendered votes list; and
  - (3) producing a statement as to the result of verification, which may be copied by the counting agents.<sup>29</sup>

<sup>27</sup> Representation of the People Act 1983, sch 1 r 43(1); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 43(1); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 43(1).

<sup>28</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 3.6.

<sup>29</sup> Representation of the People Act 1983, sch 1 r 45(1)(a), (1)(b) and (5); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 45(1)(a), (1)(b) and (7); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 45(1)(a), (1)(b) and (7).

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- 1.38 The rules require step 1 to occur in the presence of the counting agents, whereas step 2 should be done in the presence of the election agents. This division is sensible as the counting of ballot papers will be spread across a number of counting tables, and will require a greater number of people to supervise it, whereas comparing ballot paper accounts with the totals actually counted only involves looking at two documents for each polling station.
- 1.39 There is also a general obligation of the returning officer, while verifying and counting, to keep ballot papers facing up, and to take precautions so that those attending the count cannot see the numbers or other unique identifying marks printed on the back of the ballot papers.<sup>30</sup> Exposing the numbers can be problematic, as verification occurs before ballot papers are mixed in order to be counted. Mixing ballot papers before they are counted is intended to reduce the risk of indirectly revealing how an elector voted.<sup>31</sup>
- 1.40 At the verification stage, unlike the count, the object of the exercise is not to count how voters voted, but the total number of ballot papers cast in ballot boxes, for the purpose of verifying the ballot paper account for the polling station in question. In practice, however, candidates' agents are recording the vote as it emerges from the ballot papers exposed face up. Their purpose is not to deduce how a particular elector voted, but to get an early idea of the running at the election. Since ballot papers are counted at speed with no regard for how any one voter voted, it is a necessarily imprecise undertaking.

#### ELECTORAL COMMISSION GUIDANCE ON VERIFICATION

- 1.41 Guidance suggests that verification should be conducted in the following way:
- (1) the counting supervisor should open the ballot box in the presence of the counting agents, indicating, where seals have been placed on the box, that these are still intact. Once ballot papers have been tipped out, the empty ballot box should be displayed to the counting agents.<sup>32</sup>

<sup>30</sup> Representation of the People Act 1983, sch 1 r 45(4); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 45(6); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 45(6).

<sup>31</sup> An example mentioned in the case law is the member of the Communist party who verbally promised his vote for the Labour party candidate; if the votes were counted and it was seen that there were no votes cast for the Communist party candidate from that polling station, then the voting intentions of the said constituent would become apparent and the said voter is thereby severely embarrassed (vis a vis other members). The example is derived from *Macmanomy v Westley* (The Walsall case) (unreported) 4 July 1986, and cited in *Gough v Local Sunday Newspapers* [2003] 1 WLR 1836 at [25]. In the event, in the *Walsall* case, Saville J ordered a single ballot box opened and its votes counted, subject to undertakings of secrecy by the parties.

<sup>32</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 3.17.

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- (2) Ballot papers should then be counted into pre-determined numbers, such as 10, 20 or 50. The guidance emphasises that since accuracy is vital at this stage, ballot papers should be passed to another counting assistant for checking.
  - (3) Any tendered ballot papers inadvertently inserted into a ballot box should be removed; these will be readily identifiable as they will be a different colour to ordinary ballot papers.
  - (4) The unused and spoilt ballot papers should also be counted.

#### COMPARING BALLOT PAPER ACCOUNTS

- 1.42 The total numbers of marked, unused and spoilt ballot papers for each polling station should be compared with those on the ballot paper accounts produced by the presiding officer. Guidance advises counting supervisors not to inform those carrying out verification of the expected totals as found on the ballot paper account, to avoid this affecting the totals reached by counting staff.

#### *If the totals do not match*

- 1.43 Guidance also suggests a procedure to follow if the totals resulting from the ballot paper process and those noted on the ballot paper account do not match.
  - (1) First, returning officers should check the ballot paper account for arithmetical errors.
  - (2) Then they should check the unused, spoilt and tendered ballot papers and other packets of returned materials, as well as any log that may have been kept by the presiding officer recording irregularities in the polling station.
  - (3) Returning officers should check whether more than one ballot box was issued to the polling station, and if so, whether any further ballot boxes have been opened and accounted for.
  - (4) Finally, returning officers should check whether the ballot box has come from a multiple polling station location and if so, whether there is a compensating error in another ballot box from that station. In order to allow such errors to be identified quickly, the guidance recommends that ballot boxes from multiple polling station locations should be verified next to one another, either simultaneously or by the same counting staff one after the other.
- 1.44 If these steps do not resolve the issue, the ballot papers should be recounted at least twice or until the same figure is counted on two consecutive occasions.
- 1.45 If a discrepancy nevertheless remains, guidance suggests that the returning officer use the figure of the number of ballot papers counted and recounted as the verified figure. This figure should be recorded on the ballot paper account, and the statement as to the result of verification should record the new figure and if possible any explanation for the variance.

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- 1.46 Once verification is complete, a statement as to verification must be produced, which election agents are entitled to copy. Guidance suggests that at this stage the percentage turnout should also be calculated.<sup>33</sup>

### ***How to count***

- 1.47 After verification, the returning officer can begin the counting of the votes. The legal provision on how to count ballot papers is also limited. Expression is given to the principle of secrecy of the vote through the obligation to keep ballot papers face up, as explained above, and by a requirement to mix ballot papers with those from at least one other ballot box before they are counted.<sup>34</sup> This also applies to postal ballot papers which are handed in at polling stations on the day of the poll and sent from there to the count venue for verification and counting.
- 1.48 No particular method of counting is legally prescribed, although the rules make reference to one method, which involves sorting ballot papers according to the candidate for whom the vote is given and then counting the ballot papers for each candidate.<sup>35</sup> This is also the method suggested by Electoral Commission guidance.<sup>36</sup> Setting out a specific method for counting would be unduly prescriptive, preventing returning officers from choosing a method that best suits them. However, returning officers could be required to consider principles such as accuracy, efficiency and transparency when choosing how to count votes.
- 1.49 At local government elections where multi-member wards are contested, counting becomes more complicated as ballot papers cannot be sorted into votes cast for particular candidates. Instead, ballot papers with “block votes” – where all votes have been given for the same party – will be separated from the other ballot papers. The votes for each candidate on the rest of the ballot papers are counted and a tally is kept on a separate table of the candidates’ names. Sometimes the ballot papers are stuck together to form a “grass skirt” of a predetermined number of ballot papers as the votes on them are counted; this makes conducting re-counts more straightforward.

<sup>33</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 3.17(9).

<sup>34</sup> Representation of the People Act 1983, sch 1 r 45(1A) and (4); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 45(2) and (6); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 45(2) and (6).

<sup>35</sup> Representation of the People Act 1983, sch 1 r 44(5); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 44(5); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 44(5).

<sup>36</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 3.30.

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- 1.50 Guidance states that doubtful ballot papers should be passed to the returning officer for consideration.<sup>37</sup> We discuss this in more detail below.

***What to count***

- 1.51 There is more provision in the legal rules on what to count, meaning when a ballot paper or a vote on a ballot paper will be considered valid.

POSTAL BALLOT PAPERS

- 1.52 The rules on the count state that the number of postal ballot papers which are “duly returned” should be counted and recorded. Duly returned is defined further down in the provision, and has a different definition for Great Britain and Northern Ireland.<sup>38</sup>
- 1.53 In Great Britain, a postal voting statement and ballot paper must be returned in time, in the prescribed matter – meaning either by post to the returning officer or by hand to the returning officer or to any polling station. They need not be returned together. In Northern Ireland the postal ballot paper must be returned in the “proper envelope” accompanied by a witnessed and authenticated declaration of identity. Reference is also made to personal identifiers in both rules.
- 1.54 It is not clear that this rule is correctly placed within the taxonomy of electoral law. The rules on when a postal ballot paper is considered validly returned have prior relevance for the return of postal votes and their verification in advance of the poll. Administrators need to know well before the count begins which postal ballot papers they are entitled to hold are validly returned. In other words, these rules are the postal voting analogue of when a ballot paper may be handed out to a voter at a polling station, and allowed to be placed in the ballot box.
- 1.55 Indeed, the rules on return of postal ballot papers in Northern Ireland make reference to this provision of the counting rules, requiring the 2008 Regulations and Parliamentary election rules to be considered side by side when dealing with postal ballot papers which arrive before the count.<sup>39</sup> This is strange given that very few postal ballot papers, if any, will be opened at the count, as in Northern Ireland postal ballot papers can only be returned by post and not in person at polling stations.

<sup>37</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), paras 3.30 and 3.34

<sup>38</sup> Representation of the People Act 1983, sch 1 r 45(1)(c), (1B), (2) and (2A); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 45(3) and (4); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 45(3) and (4).

<sup>39</sup> Representation of the People (Northern Ireland) Regulations 2008 SI 2008 No 1741, reg 87(1).

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*Verification of postal ballot papers*

- 1.56 Guidance states that, once all postal ballot envelopes have been processed, postal ballot papers must be verified in the same way as ordinary ballot papers.<sup>40</sup> However, it is not clear what the numbers of ballot papers should be verified against, as no ballot paper accounts are produced for postal vote ballot boxes.

VOID OR DOUBTFUL BALLOT PAPERS

- 1.57 The law also sets out when a ballot paper should be considered void and any vote made on it disregarded, although it does not make explicit provision on the process by which decisions should be made as to validity. This process is known by administrators as adjudication. In order to understand that process, it is important to consider the early history of the ballot system, and the particular importance of the balance between secrecy and allowing as many ballot papers to count as is possible.

*The particular importance of secrecy*

- 1.58 Secrecy is one of the major principles underpinning the law governing the count. Many procedural rules – to keep ballot papers facing up, for example, at the verification and count stages – are intended to protect the secrecy of the ballot. Some of the rules, and case law, governing the grounds upon which a ballot paper must be rejected, are also concerned to preserve secrecy.
- 1.59 The Ballot Act 1872 introduced the Australian ballot to the UK. It was mechanism for neutralising corruption by making its efficacy inherently uncertain. A contestant might bribe or intimidate voters, but could not be sure that, in the privacy of the ballot box, they would vote as instructed. One of the procedural rules in polling, the requirement to show the back of the ballot paper to the presiding officer, was concerned to eliminate an evasion of this protection (the so-called “Tasmanian dodge”). A similar concern lies behind the rule that ballot papers lacking the official mark should be rejected. The rules governing the count were also concerned with other evasions, including:
- (1) discovering the serial number on the back of the ballot paper, and somehow reconciling that to a particular elector;<sup>41</sup> and
  - (2) identifying a voter from the mark on the ballot paper.
- 1.60 The last evasion in particular led early election courts to take a relatively strict line on deviations from the requirement to mark a ballot paper with a cross. In the Wigtown election petition, decided in 1874, the court emphasized the object of the Ballot Act in eliminating corruption.

<sup>40</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 3.24.

<sup>41</sup> It is not clear how the reconciliation would be made without access to counterfoils (then) and the corresponding number list (now). But an elector might be asked for their ballot paper’s number; or a polling agent might be able to determine it when issued. Of course the reconciliation is only useful if the front of the ballot paper can be seen as well.

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[T]he important point is to look to the great objects and principles of the statute, and to take care that we do everything necessary to follow these out, and nothing that can defeat them or endanger them.

... the Ballot Act is the double result of facility in the exercise of the franchise and perfect secrecy as to the vote of individual voters. This double purpose by the Act sought to be accomplished by not allowing a vote to be given *viva voce*, as it used to be, nor in writing (properly speaking), in either of which cases secrecy would be impossible, or would be imperilled, for by writing ... the writer may be discovered. Nor would it have done, perhaps, to leave the voter to put any mark he pleased to show the candidate for whom he voted. A mark been pointed out and represented in the statutory directions, that of a cross, thus X. It is, I think, a mark well devised for the purpose, easy of execution by men of the most moderate intelligence, and the same time perfectly neutral in its character, so as to be practically incapable of betraying its authorship by its appearance. I think it is scarcely possible that a ballot-paper strictly in terms of the statute should lead to the voter's identification, one man's cross being in general undistinguishable from another man's.

In these circumstances, I think it essential to a good vote that the voter should make the cross thus pointed out, and that any mark materially different would be a deviation from what is prescribed, and a failure to fulfil the requirements of the statute. For anyone to put instead of a cross, a circle, or an oval, or any other geometrical or anomalous figure, would not be a compliance with the law, independently of the consideration that such a plain and wilful departure from what was intended would suggest strongly the suspicion that some sinister purpose was intended.<sup>42</sup>

- 1.61 Following the introduction of the Ballot Act 1872, election courts were understandably concerned to highlight the risks of accepting marks other than a cross as a valid vote, or a ballot paper which had extra markings on its back; they might be an agreed form of identification between corruptor and voter, designed to verify that the corruption was successful.
- 1.62 Very soon afterwards, however, the Divisional Court doubted that such a strict approach was necessary.<sup>43</sup> In the event the case law evolved to take a more permissive view of departures by voters from the prescribed way of marking ballot papers. In the *Cirencester Division* case in 1893, the court considered whether imperfect official marks on the back of ballot papers, ballot papers not marked with a cross, or those which might identify the voter, were void and not to be counted.

<sup>42</sup> The District Burgh of Wigtown case, *Haswell and another v Stewart*, O'M & H vol 2 p 215, pp 220 to 222.

<sup>43</sup> *Woodward v Sarsons* (1874-75) L.R. 10 C.P. 733, pp 746 and 750.



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[We] have looked at the face of the paper itself, with a view to see whether or not the voter has by any mark clearly indicated the person for whom he wished and intended to vote; and if we have found such a mark we have upheld the vote, regardless of the very technical, and as we think unsubstantial, objections which have been allowed in some of the earlier cases to be found in the reports of election cases, our view being that we ought to interpret the Ballot Act liberally and, subject to other objections, to give effect to any mark on the face of the paper, which in our opinion clearly indicated the intention of the voter, whether such mark were in the shape of a cross, or a straight line, or in any other form, and whether made with pen and ink, pencil, or even an indentation made on the paper, and whether on the right or the left hand of the candidate's name, or elsewhere within his compartment on the voting paper. Of course, every deviation from the course pointed out in the rules tends to create difficulties which may be avoided by a rigid observance of it. It is highly prudent therefore to adhere to it, though we do not think it essential.<sup>44</sup>

- 1.63 It is interesting to note that in the *Wigtown* case, the total number of valid votes cast was 1042 for a relatively small constituency. At the most recent local election, the analogous local government ward, Wigtown West, had 2949 valid votes, and 26 rejected ones. The equivalent constituency, Dumfries and Galloway, saw 52,271 valid votes cast at the May 2010 General election, 98 of which were rejected. It is much less likely that voters will be identified from such a large pool of votes.<sup>45</sup>

#### *Who adjudicates*

- 1.64 Although not explicitly set out, legal provisions hint at the returning officer's role in adjudication. The decision of the returning officer on any question arising in respect of a ballot paper is final and can only be reviewed by an election petition; this suggests that it is the returning officer's role to make a decision on doubtful ballot papers.<sup>46</sup> Furthermore, the returning officer must mark ballot papers which have been rejected, and also where there has been any objection to a rejected ballot paper to by a counting agent.<sup>47</sup>

<sup>44</sup> The Cirencester Division Case, *Lawson v Chester-Master*, (1893) O'M & H vol 4 p 194, pp 196 to 197.

<sup>45</sup> The data for the Dumfries and Galloway elections is obtained from the council's website: <http://www.dumgal.gov.uk/index.aspx?articleid=1317> (last accessed 27 January 2014). The classical reasoning may apply to verification, as we noted further above, although verification is not a careful process of ascertaining votes as opposed to quickly counting ballot papers.

<sup>46</sup> Representation of the People Act 1983, sch 1 r 48; Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 48; Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 48.

<sup>47</sup> Representation of the People Act 1983, sch 1 r 47(3); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 47(4); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 47(4).

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- 1.65 The lack of prescription about adjudication also means that the returning officer can choose to be the sole adjudicator, or for each of their deputies to adjudicate a portion of the doubtful ballot papers themselves. The problem with the latter approach is that it can lead to inconsistencies in decision-making, and also does not allow each counting agents to oversee the whole process of adjudication, but only a section of it.
- 1.66 However, the ability to delegate adjudication to deputies might be useful where there are a large number of doubtful ballot papers, or where the returning officer's capacity is stretched by circumstances on the day of the poll. The flexibility could be retained, but subjected to a duty to take steps to ensure consistent decision-making, for example by issuing directions on admissible and inadmissible markings on ballot papers.

*Who attends adjudication*

- 1.67 Because the legislation does not explicitly provide for an adjudication process, there is no rule stating that counting agents should be present at adjudication. However, this can be seen as part of the requirement to give counting agents reasonable facilities to oversee proceedings, and it is also implied by the provision noted above that states that any objection made by a counting agent to a rejected ballot paper must be noted.
- 1.68 Electoral Commission guidance states that adjudication should be carried out in the presence of the candidates and agents, Commission representatives and accredited observers, and that those adjudicating should give reasons for each decision.<sup>48</sup>
- 1.69 The ability of a counting agent to object to a rejection does not have any substantive weight as the returning officer's decision is final. The returning officer does not even have to take into account any objection by a counting agent when making a decision on the ballot paper. If the rejection of the ballot paper is later questioned on an election petition, the fact that a counting agent made an objection to its rejection will not have an impact on whether the rejection is upheld or the ballot paper is reinstated as valid. Nevertheless, noting that the rejection of a ballot paper has been objected to is important as it records the process, in relation to each ballot paper, by which a decision on validity has been made.

*Which ballot papers are void*

- 1.70 The law specifies four circumstances in which ballot papers are void and should not be counted:
- (1) where the ballot paper does not bear the official mark;
  - (2) where a vote has been given for more than one candidate on a ballot papers (an "over-vote");

<sup>48</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 4.3.

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- (3) where any writing or marking on a ballot paper could identify the voter; and
  - (4) where a ballot paper is unmarked or void for uncertainty.
- 1.71 However, this is qualified by a provision which states that a ballot paper will not be deemed void where the vote is not marked in the proper place, is not marked by a cross or is marked by more than one mark, so long as the voter's intention is clear and the markings are not capable of identifying the voter. The returning officer must draw up a statement showing the number of ballot papers rejected under heads of want of official mark, over-voting, identification of the voter, and unmarked or void for uncertainty.<sup>49</sup>
- 1.72 The Electoral Commission issues advice for returning officers on doubtful ballot papers, which depict example ballot papers that they suggest should be allowed or rejected.<sup>50</sup> These, as well as *Schofield's Election Law* and *Parker's Law and Conduct of Elections*, refer to cases heard by the Election Court in the late 19th and early 20th Centuries, where judges discussed in detail whether particular ballot papers should be held valid or void.<sup>51</sup>
- 1.73 The principle derived from these cases is that the intention of the voter is paramount: where this is obvious, the ballot paper should be allowed, regardless of the way in which this intention is manifested. This is subject to two caveats:
- (1) Where the voter's intention is clear, but they have voted for more than one candidate, the ballot paper is void.
  - (2) Where the voter's intention is clear, but the marks on the ballot paper, such as a signature or the name of the voter, could identify them, the ballot paper is void.

<sup>49</sup> Representation of the People Act 1983, sch 1 r 47(1) and (2); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 47(1) and (3); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 47(1) and (3).

<sup>50</sup> For example, Electoral Commission, *Supporting UK Parliamentary elections: Dealing with doubtful ballot papers* (2010).

<sup>51</sup> P Gribble (ed), *Schofield's Election Law*, loose-leaf 16th release vol 1 at 11-017 to 11-038; R Price (ed), *Parker's Law and Conduct of Elections*, loose-leaf, issue 43 at 17.24 to 17.33.

- 1.74 One example of the first category given by the Electoral Commission for first past the post elections is a ballot paper where the boxes next to two different candidates are marked, one with a cross and another with the word “yes”.<sup>52</sup> An analogous paper might have one candidate marked with a cross and another with a tick. The Electoral Commission suggests that this ballot paper should be rejected, on the grounds of voting for more than one candidate. It is unlikely that a voter would use two contradictory marks on the same ballot paper to indicate a vote for both candidates. Nevertheless, since the law, which incorporates directions for voters which must be displayed in polling stations and on ballot papers, states that voters should mark their vote with a cross, it may be that a returning officer is bound to read all crosses on a ballot paper as votes.
- 1.75 Electoral Commission guidance mentions two categories of case where it suggests that the returning officer should give a ballot paper further consideration:
- (1) where it has anything unusual about it (for example, any ballot paper that appears to have been altered, either with a clearly different writing instrument or with correction fluid); and
  - (2) where it is torn or mutilated in any way.<sup>53</sup>
- 1.76 The guidance notes that although these ballot papers cannot be rejected if they do not fall into one of the categories listed in the law, the acting returning officer may want to package these separately in case they are questioned on election petition at a later stage.<sup>54</sup>

*Elections where a voter is entitled to vote for more than one candidate*

- 1.77 At local elections in England and Wales, where voters may be entitled to vote for more than one candidate, a ballot paper may be considered partially valid. Where it is possible to say that the voter’s intention with respect to one or more of the votes on the ballot paper is sufficiently clear, that or those votes can be counted, provided the voter has not identified themselves on the ballot paper.<sup>55</sup>
- 1.78 Such a ballot paper should be marked “rejected in part” by the returning officer, who should indicate the votes on the ballot paper which have been counted. The statement of ballot papers rejected should include a record of the number of ballot papers rejected in part.

<sup>52</sup> Electoral Commission, *Supporting UK Parliamentary elections: Dealing with doubtful ballot papers* (2010) p 26.

<sup>53</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 4.1.

<sup>54</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 4.6.

<sup>55</sup> Local Elections (Principal areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 47(2); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 47(2).

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### **Reconciliation**

- 1.79 The law makes no provision for the process of reconciliation, which is nevertheless an important step in ensuring the accuracy of the result. Essentially, it involves comparing the figures received in the counting of the votes with those from verification.
- 1.80 Electoral Commission guidance explains that the total number of ballot papers counted for candidates and the number of ballot papers rejected should be added together. This figure should exactly match the number of ballot papers (excluding unused, spoilt and tendered ballot papers) counted at verification. If they do, guidance directs the returning officer to proceed with announcing a provisional result.
- 1.81 If the figures do not match up, the guidance suggests several steps which the returning officer can take to try and reconcile the figures. It emphasises the importance of this process, as the returning officer must be satisfied that the result reflects the ballots received.<sup>56</sup>
- 1.82 The returning officer should:
- (1) Check the storage area, and check to ensure that all boxes have been opened and that all boxes are empty.
  - (2) Check all floors and surfaces for ballot papers that may have been dropped in the count venue.
  - (3) Re-check the verification figures and reconciliation for calculation mistakes.
  - (4) Ensure that all rejected ballot papers are accounted for.
  - (5) Consider recounting the ballot papers in the bundles.
- 1.83 However, the law does not lay any obligation on the returning officer to reconcile the figures received in the counting of votes with the verification figure.

<sup>56</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 3.37.

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### ***Calculating the result***

- 1.84 For elections using a first past the post voting system, calculating the result is simple: the candidate to whom the majority of votes has been given is elected.<sup>57</sup> Where there is an equality of votes, lots must be drawn by the returning officer to determine which of the candidates between whom the equality exists should be elected.<sup>58</sup> Accordingly, neither the law nor guidance deals in much detail with calculating the result. That is not necessarily the case in elections using different voting systems, as we will see.

### ***Provisional announcement of the result and re-counts***

- 1.85 Once the returning officer is satisfied that the result reflects the ballots received, they should make a provisional announcement of the result to candidates and election agents. While this is not explicitly stated in the law, it is strongly implied by a provision which requires candidates and election agents to be given reasonable opportunity to request a re-count before the count is completed.<sup>59</sup>
- 1.86 The returning officer may refuse a request for a recount if in their opinion it is unreasonable – leaving them with a discretion.<sup>60</sup> This is important, as returning officers should not feel under pressure from candidates or their agents to hold unnecessary re-counts. A returning officer, having surveyed their count, will also be best placed to decide whether a re-count is reasonable. Electoral Commission guidance suggests that if a returning officer refuses a request for a re-count, they could allow candidates and agents to inspect bundles of ballot papers to satisfy themselves that the count is accurate.<sup>61</sup>

<sup>57</sup> Representation of the People Act 1983, sch 1 r 50; Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 50; Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 50.

<sup>58</sup> Representation of the People Act 1983, sch 1 r 49; Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 49; Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 49.

<sup>59</sup> Representation of the People Act 1983, sch 1 r 46(2); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 46(2); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 46(2).

<sup>60</sup> Representation of the People Act 1983, sch 1 r 46(1); Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 46(1); Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 46(1).

<sup>61</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 5.3.

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- 1.87 Once a re-count has been carried out, a further re-count may be undertaken. However, this is the limit on the number of re-counts which may be carried out. Guidance recognises that a further re-count may be desirable where there is a significant difference between the first and second counts, or there is still a very close result. While the returning officer is again free to refuse a further re-count, guidance advises them to provide a reason as to why it would not significantly change the result.<sup>62</sup>

### ***Declaration***

- 1.88 The returning officer must declare the candidate(s) elected and give notice of the total number of votes given for each candidate together with the number of rejected ballot papers under each head of rejection. Their names must be returned to the relevant official; the Clerk of the Crown for UK Parliamentary elections, and the proper officer of the relevant council for local elections.<sup>63</sup>

### **Elections using the supplementary vote**

- 1.89 For Police and Crime Commissioner and mayoral elections in England and Wales, the voting system and thus the counting procedure which is used depends on how many candidates are standing in one electoral area. If only two candidates contest the election, the first past the post system is used, and the count procedure is identical to that for UK Parliamentary elections.
- 1.90 Where three or more candidates stand for election, the supplementary vote procedure is used. Electors may cast two votes, a “first preference” vote and a “second preference” vote. If after all the first preference votes are counted and no candidate has an overall majority (which means winning more than half of all votes cast) then the count proceeds to a second round.
- 1.91 In this round the candidates with the two highest numbers of votes (which may be more than two candidates where there is an equality of votes) remain in the contest, while the rest are eliminated. Then the second preference votes cast for the two candidates remaining in the contest, where these were cast by voters whose first preference candidate has been eliminated, are counted and added to the first preference totals. The candidate with the majority of votes wins, or if there is an equality of votes this is resolved by the returning officer drawing lots.<sup>64</sup>

<sup>62</sup> Electoral Commission, *Guidance for UK Parliamentary elections, Part E: Verification and Count* (December 2009), para 5.5.

<sup>63</sup> Representation of the People Act 1983, sch 1 r 50; Local Elections (Principal Areas) (England and Wales) Rules 2006 SI 2006 No 3304, sch 2 r 50; Local Elections (Parishes and Communities) (England and Wales) Rules 2006 SI 2006 No 3305, sch 2 r 50.

<sup>64</sup> Police Reform and Social Responsibility Act 2011, sch 9; Local Government Act 2000, sch 2.

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### ***Adapting the classical rules for the supplementary vote system***

- 1.92 The Parliamentary election rules on the count are essentially applied to counting under the supplementary vote system. However, a few adaptations are necessary to take into account the different voting system. In addition, differences creep in as the rules are redrafted for different elections.

#### **A DIFFERENT VOTING SYSTEM**

- 1.93 The most obvious difference is that the counting rules for mayoral elections and Police and Crime Commissioner elections set out the circumstances in which second preference votes will be counted.<sup>65</sup>

#### **ADJUDICATION**

- 1.94 The rules on adjudication take into account the fact that two votes may be cast on each ballot paper. The provision on rejected ballot papers makes it clear that a ballot paper on which only a first preference vote is marked, or where a first preference vote is obvious though the second preference vote may be void for uncertainty, is still valid.<sup>66</sup> Conversely, a second preference vote cannot be counted on a ballot paper where there is no valid first preference vote.<sup>67</sup> The second preference vote is subsidiary to the first preference, and a voter is only entitled to have it counted where their preferred candidate (as indicated by them) has been eliminated from the contest.
- 1.95 Once a returning officer has made a decision to reject a ballot paper based on the first preference vote, they must not be required to re-examine that decision when it comes to counting the second preference votes.<sup>68</sup>

<sup>65</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 rr 51 to 61; Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 SI 2007 No 1024, sch 1 rr 47 to 53.

<sup>66</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 r 53(5); Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 SI 2007 No 1024, sch 1 r 48(2)(i) and (3).

<sup>67</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 r 60(3); Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 SI 2007 No 1024, sch 1 r 52(2).

<sup>68</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 r 60(6); Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 SI 2007 No 1024, sch 1 r 52(4).



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#### INTERIM STATEMENTS AS TO THE NUMBER OF VOTES

- 1.96 At the conclusion of each count, the returning officer must draw up a statement as to the total number of ballot papers, the total number of rejected ballot papers, the votes given for each candidate and the total number of votes where there are more than three candidates. The returning officer must notify candidates and agents present at the count of this statement, and also give public notice of its contents.<sup>69</sup>

#### PAUSING THE COUNT

- 1.97 At Mayoral and Police and Crime Commissioner Elections, the returning officer has the option to pause counting at the first, local count between the hours of 7 pm and 9 am and does not have to seek the agreement of the counting agents. However, there is no option to pause the later counts or central calculations.<sup>70</sup>

#### *Drafting differences*

- 1.98 The drafting approaches to rules governing elections using the supplementary vote differ slightly. The rules for Mayoral elections treat verification, the count of the first preference votes and (if it occurs) the count of the second preference as one event. Counting agents must be given notice in writing of the time and place for the counting of both first and second preference votes and the rules on verification are included in the rules on the first count.<sup>71</sup>

#### POLICE AND CRIME COMMISSIONER ELECTIONS

- 1.99 The Police and Crime Commissioner elections rules present verification, the first count and the second count as three separate events. They also introduce another stage into the counting procedure – a “central calculation” which takes place after the first and second counts to determine the totals of first and second preference votes.
- 1.100 There are two reasons for this difference. First, the size of police areas mean that separate counts may take place locally within the same electoral area, the results of which then need to be added together centrally to determine the result. Secondly, the two-tier administrative structure assigns different responsibilities to the local returning officer and the police area returning officer. The former is responsible for verification and the counting of first and second preference votes, whereas the latter must carry out the central calculation and resolve any equality of votes.

<sup>69</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 rr 57 and 60; Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 SI 2007 No 1024, sch 1 rr 51 and 53.

<sup>70</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 rr 52(6) and 59 to 61; Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 SI 2007 No 1024, sch 1 rr 47(9), 52 and 53.

<sup>71</sup> Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 SI 2007 No 1024, sch 1 rr 46(1) and r 47(1).

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#### DIFFERENT RULES FOR VERIFICATION AND COUNTING

- 1.101 Structuring the rules in this way allows different rules to be applied to the different stages of the count. At the first and second count, the returning officer must if practicable consult election agents before allowing persons not listed in statute to attend; no such provision exists in the rules for verification.<sup>72</sup> Unlike the classical rules, and those for Mayoral elections, there is no provision for the involvement of election agents in the verification process.<sup>73</sup>
- 1.102 Another difference is that it is the responsibility of the local returning officer to determine the hours in which verification is to take place, whereas the rules on the first and second count repeat the classical rule that counting should proceed continuously, with the possibility of excluding the time between 7 pm and 9 am.
- 1.103 The obligations to notify counting agents of the time and place for verification, the first count and the second count are all set out in separate rules. A consequent difference is that the obligation to notify agents of the time and place for the counting of second preference votes arises only once it has been determined that there is no overall majority of first preference votes for any candidate.<sup>74</sup>

#### WHO CAN ORDER A RE-COUNT

- 1.104 The two-tier system in place for Police and Crime Commissioner elections also results in a provision which states that the police area returning officer has the power to order the local returning officer to conduct a re-count.<sup>75</sup> At Police and Crime Commissioner elections it is possible for candidates to designate one of their counting agents as a person authorised to request a re-count. These counting agents, as well as candidates and election agents, may request a re-count but the local returning officer can refuse a request if in their view it is unreasonable.<sup>76</sup>

#### **Party list elections: European Parliamentary elections in Great Britain**

- 1.105 The rules for counting at European Parliamentary elections also treat verification, the local count and the allocation of seats separately. There is also division of responsibilities between the local returning officer (who is responsible for verification and the local count), and the regional returning officer ("RRO") (who is responsible for the allocation of seats).
- 1.106 The main features of the count at European Parliamentary elections, in particular where these differ from the counting rules for UK Parliamentary elections, are outlined below.

<sup>72</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 rr 48(5), 51(5) and 60(4).

<sup>73</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 r 49.

<sup>74</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 r 60(2)(a).

<sup>75</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 r 55.

<sup>76</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, sch 3 rr 54 and 31(2).

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***Verification: attendance and timing***

- 1.107 As with Police and Crime Commissioner elections, there is no rule that local returning officers must – if practicable – be consulted before other persons are permitted to attend the count. The local returning officer is also free to decide when to carry out verification.

***Verification: ballot papers to be kept face down***

- 1.108 The counting rules for European Parliamentary elections uniquely require ballot papers to be kept face down during verification (this obligation also applies where these elections are held in Northern Ireland).<sup>77</sup> As discussed above, keeping ballot papers face down during verification prevents persons attending the count from ascertaining how electors in a particular polling station voted. This is important to prevent estimates of the outcome of the election from being made while voting is still ongoing in other member states.

***Timing of the local count***

- 1.109 European Parliamentary elections take place over the course of four days across Europe, to take account of the different days for polling in different member states. Elections in the UK take place on the first polling day of the period, and so it is possible that the count could be completed before the close of polls in other member states. The rules on the count make provision to avoid the UK result being disclosed before the last poll closes.
- 1.110 The local returning officer can count before or after the last close of poll in any member state. However, they must count so that the results of the local count can be declared as soon as practicable after the last member state has closed their polls. Where counting commences before this time, any results must not be disclosed by the count staff to anyone other than the RRO and their clerks.
- 1.111 The local count is deemed to be ongoing until the last poll has closed, and any candidate, election agent or authorised counting agent can request a re-count up until this time.<sup>78</sup> After the last member state poll has closed, and the local count has been completed, the local returning officer must send a statement of the results to the RRO. With the RRO's authorisation the local returning officer must then notify these results publicly.<sup>79</sup>

<sup>77</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, sch 1 r 51(4).

<sup>78</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, sch 1 rr 53, 54 and 33(2).

<sup>79</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, sch 1 r 57.

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### ***Rejected ballot papers***

- 1.112 The same rules on rejected ballot papers apply as for UK Parliamentary elections. Additionally, the rules state that a ballot paper which is marked for a particular candidate on a party's list must be accepted as a valid vote for the party.<sup>80</sup>

### ***Allocation of seats***

- 1.113 Once the RRO has determined the total number of votes given to each party and individual candidate in the electoral region, they must allocate the seats according to the formula given in section 2 of the European Parliamentary Elections Act 2002. This requires each seat to be allocated in turn to the party or individual with the highest figure yielded by application of the formula. For the first allocation, this number is the number of votes polled; subsequently every time a party is allocated a seat their figure must be divided by the number of seats allocated plus one.
- 1.114 Once all the candidates on a party's list have been allocated seats, and in the case of an individual candidate being allocated a seat, the votes that they received are to be disregarded. Anyone present at the allocation of seats may request to have these procedures carried out again.<sup>81</sup>
- 1.115 Where two or more candidates have the highest figure and only one seat remains to be allocated, one vote must be added to the number of votes received by each of these candidates, and their figure recalculated by dividing the new number by the number of seats allocated. If there is still an equality, the RRO must decide by lot which candidate the seat should fall to.<sup>82</sup>

### ***Declaration of the result***

- 1.116 The regional returning officer must declare those candidates to whom seats have been allocated elected; they must also prepare a statement setting out:
- (1) the total number of votes given to each registered party and individual candidate;
  - (2) the number of votes that a party or candidate had at any stage where a seat was allocated to them;
  - (3) the full name and home address of each candidate filling a seat; and
  - (4) whether, in the case of a party, there are candidates remaining on the party's list which have not yet been elected.

<sup>80</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, sch 1 r 55(3).

<sup>81</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, sch 1 r 59.

<sup>82</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, sch 1 r 60.

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- 1.117 The matters to be covered by the statement curiously omit the number of rejected ballot papers under each head of rejection, which the classical rules require to be in the declaration. The declaration must be sent to the Secretary of State and the Chief Secretary of the Government of Gibraltar, and must be made public.<sup>83</sup>

### **Elections using the additional member system (“AMS”)**

- 1.118 For AMS, the classical counting rules can simply be applied to the constituency contest. For the regional contest, the counting rules must provide for a central calculation, where the totals found at the local count are added together, and the (different) rules for Greater London Authority elections and elections to the devolved legislatures are described below.

### ***Greater London Authority elections***

- 1.119 Elections to the Greater London Authority comprise three contests: a first past the post contest for the election of constituency members, a party list contest for the election of members for the whole of London (the regional element) and a supplementary vote contest for the election of London Mayor. For the most part, the rules for each contest are the same as the classical rules for Parliamentary elections. However, the counting rules are modified to reflect the different voting systems in use. They are also modified to take account of the electronic counting methods in use for Authority elections.

### **THE ELECTRONIC COUNT**

- 1.120 Some of the provisions found in the Authority counting rules relate directly to the use of electronic counting methods.

### ***Preparing for the count***

- 1.121 It is up to the Greater London returning officer (“GLRO”) to decide whether to use electronic counting; where the GLRO has provided an electronic counting system, the constituency returning officer (“CRO”) must use it unless they have written consent to count manually.<sup>84</sup> However, where one stage of the counting process has been completed electronically – whether verification, an initial count or a recount – the CRO may choose to continue the count manually.
- 1.122 The use of electronic counting means that “technical assistants” must be appointed by the CRO, and are entitled to attend the count. They are subject to the same disqualifications as those appointed as presiding officers and clerks; they must not have been employed in or about the election by or on behalf of a candidate or a registered party which has been nominated.<sup>85</sup>

<sup>83</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, sch 1 r 61.

<sup>84</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 r 48, sch 2 r 49, sch 3 r 48.

<sup>85</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 rr 25 and 47, sch 2 rr 26 and 48; sch 3 rr 27 and 47.

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*The counting process*

- 1.123 The first stage of the process – verification and the local count – is identical for all three contests. For the constituency contest, the count is concluded at this stage. The count for elections for London members and London Mayor (where there are more than two candidates) continue to a central calculation which is regulated by further rules.
- 1.124 All of the counting rules largely follow the classical, parliamentary rules, with modifications for the electronic counting system. For example, the rules state that the CRO must cause the electronic counting system to count and record the number of ballot papers and the votes given on the ballot papers. There is no obligation to keep ballot papers face up during counting, although the CRO must take proper precautions to prevent persons from seeing the numbers on the back of ballot papers. The CRO must also not mix the contents of any ballot box with the contents of another ballot box at any stage during the count.<sup>86</sup>

*Rejected ballot papers*

- 1.125 The same criteria for rejection of ballot papers apply as for parliamentary elections. However, the rules for GLA elections also specify a process for checking ballot papers which have been marked, but which the electronic counting machines identify as void:
- (1) a clerk must examine the ballot paper by looking at it on a screen so that it is visible to those attending the count;
  - (2) if the clerk considers the vote to be void they must pass the issue on to the CRO; then
  - (3) the CRO must also examine the ballot paper on screen and make a final decision as to whether it is valid or not.<sup>87</sup>
- 1.126 The CRO is also entitled to examine any ballot paper not identified as void by the machine, either the paper copy or on screen. The CRO's decisions on doubtful ballot papers must be recorded in the electronic counting system with reasons where the decision is that the ballot paper is void, and any objections made by counting agents. As for parliamentary elections, the CRO must produce a statement of rejected ballot papers setting out the numbers of ballot papers declared void under each head.

<sup>86</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 r 49, sch 2 r 50, sch 3 r 49.

<sup>87</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 r 50, sch 2 r 51, sch 3 r 50.

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- 1.127 As with other elections using the supplementary vote system, in the Mayoral contest only ballot papers with a valid first preference vote can be counted, although a ballot paper which is void as to the second preference vote will not be discounted in respect of the first preference vote.<sup>88</sup>

#### THE DIFFERENT VOTING SYSTEMS: PARTY LIST AND SUPPLEMENTARY VOTE

##### *At the conclusion of the local count*

- 1.128 For the election of London members and the Mayor of London (where there are three or more candidates), the local count does not signify the end of the counting process. Since the electoral area for these contests is the whole of London, the results of the local count must be sent to a central location so that the totals can be calculated.
- 1.129 In order to aid this process, the CRO must draw up a statement setting out the total number of votes cast and rejected ballot papers, and the number of votes cast for each candidate (including votes cast for parties standing for the London contest). In elections for the Mayor of London, the statement must set out the total number of first preference votes given for each candidate, and the total number of second preference votes for each candidate correlated with the way the first preference votes have been cast.<sup>89</sup>
- 1.130 The statement must first be communicated to the GLRO, and then on the GLRO's authorisation to the candidates and election agents and must be published.

##### *The allocation of seats and the central calculation*

- 1.131 The GLRO must then calculate the total number of votes cast across London for each candidate, and determine the result according to the voting system for the election. This may occur in the same place for the London member contest and for the Mayoral contest, as is suggested by the fact that persons permitted to attend the Mayoral central calculation may attend the allocation of seats for London members, and vice versa. Indeed, at a general election the only practical option would be to hold the two calculations in the same place, since they will be done by the same person, on the same day.
- 1.132 There are further differences in the lists of persons who may attend the central processes compared with those for the local count. Since it is the GLRO who conducts the allocation and central calculation, all the GLRO's clerks are entitled to attend, whereas each constituency returning officer may only bring one clerk or technical assistant with them. The counting agents are not permitted to attend the central processes, but for the allocation of seats at London member elections, the nominating officer of each registered party standing may attend.<sup>90</sup>

<sup>88</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 3 r 50(2)(i).

<sup>89</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 2 r 54, sch 3 r 53.

<sup>90</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 2 r 55, sch 3 r 54.

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*The allocation of seats to London members*

- 1.133 The GLRO must add up the totals provided by every CRO and calculate the “London figure” for each party and individual candidate contesting the election. This figure is, for parties contesting the election, the number of votes they received in the election divided by one plus the number of constituency members elected for that party. For individual candidates the London figure is simply the total number of votes received for each candidate.<sup>91</sup>
- 1.134 The seats are then allocated to each party by reference to this London figure. The seats are allocated in turn to the party with the highest London figure. Each time a party is allocated a seat, their London figure is recalculated by adding one to the figure by which the number of votes cast is divided.
- 1.135 A number of qualifications apply to this process:
- (1) any party or individual candidate polling less than 5 per cent of the total number of votes cast in the election for London members is excluded from the contest and thus is not considered in relation to the allocation of seats;<sup>92</sup>
  - (2) an individual candidate already returned as Mayor or as a constituency member is disregarded; and
  - (3) where a party's list has been exhausted, by the allocation of seats, votes for that party are disregarded thereafter.
- 1.136 Where the calculation of a London figure results in two or more parties or individual candidates having the same highest figure, they will each be allocated a seat. However, where there are not enough seats remaining, all the London figures must be recalculated by, for parties contesting the election, adding one to the figure by which the total number of votes is divided, and for individual candidates, by adding one to the total number of votes received. Where an equality remains, the GLRO must decide between the candidates by lots.<sup>93</sup>

*The central calculation for elections for the Mayor of London*

- 1.137 The central calculation for elections for the Mayor of London is conducted in the same way as outlined above for mayoral and Police and Crime Commissioner elections. Where an election is contested by two candidates it simply involves adding up the votes given across London for each candidate. Where an election is contested by three or more candidates, and the total first preference votes for each candidate does not produce an overall majority for any candidate, the second preference votes are counted in the same way as described above in relation to other elections using the supplementary vote system.

<sup>91</sup> Greater London Authority Act 1999, s 6.

<sup>92</sup> This hurdle only applies to elections for London members of the Greater London Assembly and no other party list elections.

<sup>93</sup> Greater London Authority Act 1999, sch 2 paras 7 and 8.



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## OTHER DIFFERENCES

- 1.138 There are other differences in the GLA counting rules which cannot be explained by reference to the voting system used or the electronic counting method.

### *Attendance*

- 1.139 At the count for constituency elections, it is the candidates who must be consulted, if practicable, where the returning officer intends to permit other persons to attend the count.<sup>94</sup> This is the only rule on attendance at the count for any election where the obligation is to consult the candidates and not the election agents. As such it is worth enquiring whether this is an error or an intentional difference.
- 1.140 The candidates may each choose one person to attend the local count and central calculation or allocation with them. This entitlement applies to both individual and list candidates.<sup>95</sup> Allowing each candidate on a list to invite another person to attend these events would be an exception to our proposition that where a party submits a list, the party is the candidate rather than the individual persons on that list. If the entitlement of each person on a list to send representatives should remain, it may be advisable to give returning officers a power to restrict entry due to the capacity of the count venue, or health and safety concerns. The power must be exercised proportionately for all candidate parties.
- 1.141 This rule is also found in the other party list elections: the regional contests for the Scottish Parliament and Welsh Assembly, and elections to the European Parliament.

### *When a count may be paused*

- 1.142 The hours between which a (local) count may be paused are extended to between 5 pm and 10 am. This is more in line with normal working hours, and suggests that the drafter has interpreted the parliamentary rule – that counting can be paused between 7 pm and 9 am – as applying to subsequent days after polling day, rather than directly after the poll.
- 1.143 The agreement of counting agents is not necessary for the count to be paused – instead, at an ordinary election, the GLRO must consent before the local returning officer may pause the count.<sup>96</sup>

### *Re-counts*

- 1.144 As with Police and Crime Commissioner elections, one counting agent per candidate may be authorised to request a re-count at the local count.<sup>97</sup>

<sup>94</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 r 47(3)(b).

<sup>95</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 r 47(2), sch 2 rr 48(2) and 55(2), sch 3 rr 47(2) and 54(2).

<sup>96</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 r 49(8) and (9), sch 2 r 50(8), sch 3 r 49(8).

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*Breakdown of totals by ward*

- 1.145 Where the CRO or GLRO has to provide a statement of the number of ballot papers, votes or rejected ballot papers, they may be required or permitted to set out the totals counted in relation to each ward. At the declaration of result for each contest, the returning officer may publish election results by ward, but where the number of votes cast in any ward is less than 500, the figures for this ward must be combined with those given for any other ward in the constituency where more than 500 votes were cast.<sup>98</sup>
- 1.146 At the conclusion of the local count for the London contest and the Mayoral contest, the CRO must where practicable show a breakdown of total numbers of votes cast and rejected for each ward in the statement to the GLRO.<sup>99</sup>
- 1.147 While this provision is not mandated by an electronic counting system, it is a consequence of its use, since ballot papers are not mixed at any stage during the electronic count. The implications for secrecy are recognised in the rule that totals of less than 500 should not be published.

MODIFICATION OF RULES FOR MANUAL COUNTS

- 1.148 The rules for GLA elections also include a table of modifications in the case of a manual count system being used.<sup>100</sup> The main modifications are:
- (1) ballot papers must be separated before verification if joint ballot boxes are used;
  - (2) the references to technical assistants are omitted;
  - (3) ballot papers must be mixed after verification and before counting; and
  - (4) the power to provide a breakdown of totals by ward is removed.

<sup>97</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 r 30(3), sch 2 r 31(3), sch 3 r 30(3).

<sup>98</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 1 r 54(2) and (3), sch 2 r 57(3) and (4), sch 3 r 57(4) and (5). Rule 54(3) of the Constituency elections rules (schedule 1) refers to the GLRO, but this must be an error since paragraph (3) is related to paragraph (2), which sets out a power of the CRO, not the GLRO.

<sup>99</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 2 r 54(2), sch 3 r 53(2).

<sup>100</sup> Greater London Authority Elections Rules 2007 SI 2007 No 3541, sch 4 para 3.

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### ***Scottish Parliamentary elections***

- 1.149 The rules on counting at Scottish Parliamentary elections essentially follow those for UK Parliamentary elections, modified as necessary for the additional member voting system. For example, the drafting takes account of the fact that a candidate may be a constituency candidate, an individual regional candidate or a candidate on a party list, and that ballot papers for the two different contests will need to be verified and counted separately.<sup>101</sup> Unlike the rules for Greater London Authority elections, the same set of rules deals with both the constituency and regional contests.

#### THE CONSTITUENCY COUNT

- 1.150 At a Scottish Parliamentary general election, ballot papers for both contests are verified and counted at constituency level. The constituency returning officer ("CRO") is responsible for this count, and the CRO's staff are entitled to attend the count venue; the regional returning officer ("RRO") may also attend without staff.<sup>102</sup>
- 1.151 The rules on the constituency count are identical to those for UK Parliamentary elections, except as follows.
- (1) The obligation to prevent those attending the count from ascertaining how particular electors voted is drafted more simply; instead of requiring the CRO to make sure ballot papers are kept facing upwards, the CRO must take all proper precautions for preventing the identification of the voter who cast the vote. In other words, the classical obligation is stated at a more general level in order to avoid being nonsensical in the context of feeding ballot papers into electronic counting machines.
  - (2) For the count of regional votes in a constituency, the persons who can request a re-count are:
    - (a) an individual candidate for return as a regional member;
    - (b) an election agent for such a candidate or for a registered party standing nominated; and
    - (c) any person authorised in writing by such an agent.<sup>103</sup>

<sup>101</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 rr 54(5) and 55(1).

<sup>102</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 r 54(2).

<sup>103</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 r 57. There is an error of drafting in this rule, with same provision being repeated twice (r 57(3)(d) and 57(4)).

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- (3) Where numbers have been written by a voter on a ballot paper apparently in a sequential order of preference, and the ballot paper would otherwise be rejected as void, the ballot must be treated as a candidate against whose name the number 1 appears.<sup>104</sup>

#### *Recounts*

- 1.152 Unlike other election rules, where (in addition to the candidate and election) agents only one counting agent may be authorised to request a recount, election agents at Scottish Parliamentary elections may authorise any person to request a re-count. There does not seem to be a pressing policy reason in favour of the differing approaches – in practice it is unlikely that returning officers would be subject to multiple requests for a recount from within the same campaign. Moreover, CROs retain the power to refuse a re-count if in their opinion it is unreasonable.<sup>105</sup> A better approach would be to apply a uniform requirement to all elections that a request for a re-count must emanate from the candidate or their election agent. If this poses a challenge in practice – for example anywhere where votes are not counted in a central venue, and authority must be devolved to a counting agent on site, a prior arrangement should be made to devolve the power to a counting agent.

#### *Numbered votes*

- 1.153 The obligation to accept a “number 1” vote as valid where sequential numbers have been marked on the ballot paper is related to the different voting system in place for local government elections in Scotland, the single transferable vote. It gives effect to votes where it appears that the voter has mistakenly used the wrong voting system. This provision is important for giving effect to the voters’ intention notwithstanding their failure to mark the ballot paper correctly. It could also be applied to the counting rules for UK Parliamentary elections held in Northern Ireland, where there is also the risk that voters might try to use the single transferable vote system that applies to all other elections in Northern Ireland. Alternatively, the legislation could simply state that where the voter’s intention is clear, a ballot paper should be held valid, with guidance making it clear that this includes the situation where a voter marks sequential numbers starting at 1.

<sup>104</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 r 58(3).

<sup>105</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 r 57(2).

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*The conclusion of the constituency count*

- 1.154 At the conclusion of the constituency count, the CRO must draw up a statement of the votes given for each party and individual candidate standing nominated in the regional contest, send this to the RRO and give public notice of the contents of the statement.<sup>106</sup> The CRO must declare the election of the winner of the constituency contest, who is the candidate with the majority of the votes. The CRO must also notify this to the Clerk of the Scottish Parliament and to the RRO and give public notice.<sup>107</sup>

THE ALLOCATION OF SEATS

- 1.155 Once the ballot papers have been counted at the constituency level, the RRO for each region must calculate the total number of votes given for each candidate in the regional contest, and allocate the seats accordingly. Similarly to GLA elections, each individual candidate and person on a party list may bring one other person with them to attend the allocation of seats. While the CROs for constituencies in the region must be notified of the time and place for the allocation of seats, they are not entitled to attend.<sup>108</sup>
- 1.156 The calculation of the regional figure and the allocation of seats proceeds in the same way as it does for GLA elections.<sup>109</sup> Any election agent or individual candidate present can request a re-calculation, but the persons on a party list are not entitled to ask for one. The RRO must then declare the results for the election of regional members in the same way that the CRO does for the election of constituency members. When notifying the result to the Clerk of the Scottish Parliament, both the RRO and CRO must use a form appended to the Scottish Parliament (Elections etc.) Order 2010.<sup>110</sup>

***National Assembly for Wales elections***

- 1.157 The counting rules at elections to the National Assembly for Wales elections also follow those for UK Parliamentary elections, and where modifications are made for the additional member voting system these largely mirror the modifications made for Scottish Parliamentary elections. There are a few differences which are highlighted here.

<sup>106</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 r 61.

<sup>107</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 r 62.

<sup>108</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 r 63.

<sup>109</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 r 64.

<sup>110</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, sch 2 rr 62(4) and 66(2).

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*The count in the constituency*

- (1) The Secretary of State may direct, up to 28 days before the day of the poll, that the counting of votes (not verification) may be delayed until the morning after the close of poll. A time to start counting must be specified, which must be between 9 am and 12 pm that morning.<sup>111</sup>
- (2) Verification and the count may take place in different locations. If so, the CRO should take proper precautions as to the security of the ballot documents.<sup>112</sup>
- (3) The persons permitted to request a recount of the regional votes counted in an Assembly constituency are candidates and election agents, or authorised counting agents where the candidate or election agent they have been appointed by are not present. Only one counting agent per candidate may be given such authorisation.<sup>113</sup>
- (4) The provisions on rejected ballot papers are identical to those for UK Parliamentary elections, with the additional rule that, at regional elections, a ballot paper which is marked for a particular party list candidate must be taken as a ballot paper marked for that party. Similarly to the provision in Scottish Parliamentary elections on numbered votes, this is an aspect of giving effect to the intention of the voter which could be contained in guidance.<sup>114</sup>
- (5) As with the rules for Scottish Parliamentary elections, the CRO must convey the results of the count of regional votes at constituency level to the RRO. However, the CRO is not obliged to give public notice of the totals at this stage, and the RRO may direct that they should not be notified until after the allocation of seats in the regional contest and declaration of result.<sup>115</sup>

1.158 Unlike Scottish Parliamentary election counting rules, the Welsh Assembly rules adopt the classical rule that ballot papers must be kept facing up during counting. The same rules on pausing the count apply as for Scottish Parliamentary elections.<sup>116</sup>

<sup>111</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, sch 5 r 54(2).

<sup>112</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, sch 5 r 55(3) and (4).

<sup>113</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, sch 5 r 57.

<sup>114</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, sch 5 r 58(3).

<sup>115</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, sch 5 r 61.

<sup>116</sup> National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, sch 5 r 55.

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#### *The allocation of seats and declaration*

- 1.159 Virtually the same rules as for Scottish Parliamentary elections apply for the allocation of seats in the regional contest and the declaration of result for both contests, including the requirement that the notification to the Clerk of the Assembly be provided on a prescribed form. However, there are also two small differences here:
- (1) the CRO can attend the allocation of seats but the party nominating officer cannot; and
  - (2) party list candidates are entitled to ask for a re-calculation, although only where their election agent is not present.
- 1.160 There does not appear to be a principled reason for these differences: they are merely a consequence of different drafters' approaches to transposition of the classical rule for party list component of the AMS voting system.

#### **Elections using the single transferable vote**

- 1.161 Four species of elections in the UK use the single transferable voting system (STV). In Northern Ireland, local elections, European Parliamentary elections and Northern Ireland Assembly elections use STV. Local government elections in Scotland use it too. We will investigate, first, the use of the STV system and how the election rules governing those elections prescribe its use. We will later consider differences more widely in how the count is conducted at those elections, and focus on the legal treatment of electronic counts at Scottish local government elections.

#### ***How STV works***

- 1.162 The single transferable vote is a proportional representation system which allows voters to rank individual candidates in order of preference. STV seeks to maximise the use of preferences to determine the outcome. Winners are elected if they meet a quota (called the Droop quota) based on the number of seats up for election, and the total number of valid votes cast. The first candidate to reach that quota is deemed elected and the ballot papers voting for them are examined for their next preference; these preferences are then "transferred" to the candidates still vying for a seat, but can only be transferred in proportion to the elected candidate's surplus of votes over the quota. Therefore each transferred vote has a "transfer value" of one or less than one, so that the total sum of transferred votes cannot be more than the surplus of votes over the quota. If no candidate has reached the quota, the lowest scoring candidate is eliminated and ballot papers voting for that candidate are examined for their next preference, and transferred to those candidates. This process of transfer and exclusion occurs until the seats are filled.
- 1.163 STV is an elaborate voting system which requires careful exposition in the law. The key element is that votes are transferred individually, and have a weighing or "transfer value" which must be carefully recorded. The count unfolds in stages marked by transfers of surpluses for successful candidates and/or exclusions of candidates at the bottom at any stage. The law governing STV counts is therefore significantly more detailed than the classical law on the count.

- 1.164 We first explain how STV is reflected in counting rules for Scottish local government elections and elections in Northern Ireland to its Assembly, the European Parliament and local elections. In large part, the rules are common, with two main differences: STV elections in Northern Ireland are counted manually, and some of the rules reflect that. Secondly, the formulae for calculating transfer values are substantively different in the two jurisdictions.

### ***Key tasks in STV counts***

#### THE TOTAL NUMBER OF VALID BALLOT PAPERS

- 1.165 Verification takes place in much the same way that it does for all other elections. At European Parliamentary elections, verification may be separated from the count by a few days, while ballot papers must be kept face down.<sup>117</sup>
- 1.166 The first step after verification is to ascertain the total number of valid ballot papers. In addition to the classical grounds for invalidity (want of official mark, voter identifiable, unmarked or void for uncertainty)<sup>118</sup> the election rules also provide that a ballot paper is void and not to be counted if the figure “1” is not placed so as to indicate a first preference for a candidate, or is placed against the name of more than one candidate. However, where sequential preferences are indicated by more than one mark, or by means other than a figure, they should nevertheless be accepted, if in the opinion of the returning officer the preference of the voter is clearly indicated.<sup>119</sup>

#### CALCULATING THE QUOTA

- 1.167 While the valid ballot papers are being counted, they can also be sorted between candidates for whom first preference votes have been given. Once the total number of valid ballot papers has been ascertained, a quota (known generally as the “Droop quota”)<sup>120</sup> must be calculated as prescribed. The following formula encapsulates those in the legislation for all STV elections.

<sup>117</sup> European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, sch 1 rr 49 to 53, 50(5).

<sup>118</sup> Curiously, the election rules for European Parliamentary elections in Northern Ireland omit the words “void for uncertainty”. European Parliamentary Elections (Northern Ireland) Regulations 2004 SI No 1267 reg 54(1)(e). It may have been concluded that the ground is a tautology, given the rest of the regulation. Instead of the reference to the official mark, the Scottish local government elections rules make reference to the unique identifying mark capable of being read by electronic means: Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 44(1)(a) and r 55(b).

<sup>119</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 44; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI No 1267 reg 54; Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 r 44C; Electoral Law Act (Northern Ireland) 1962 sch 5 r 46.

<sup>120</sup> R Rose (ed) *International Encyclopaedia of Elections*, p 293. Scottish Local Government Elections Order SSI 2011 No 399, sch 1 rr 47 and 48.



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*Calculate the quota ("q") and first allocation of seats*

$$\left(\frac{x}{y+1}\right) + 1 = q$$

x = total number of valid ballot papers

y = number of vacancies to be filled

- 1.168 The quota is derived by the formula above, disregarding any fractional remainder and taking a whole number only.<sup>121</sup> This is the number of votes a candidate will need to have allocated to them in order to be elected. It is also the number which is subtracted from their vote tally in order to determine the surplus to be transferred to candidates who continue to compete for election.

**STV COUNTS OCCUR IN STAGES**

- 1.169 A key element of STV counts is that they occur in stages. The first stage starts with counting the first preferences of all the candidates. Subsequent stages involve the transfer (crucially, at a calculated "transfer value") of surplus votes of candidates deemed elected, or the exclusion of candidates with the lowest numbers of votes (and transfer of their votes to other candidates).

*The interaction of the exclusion of lowest scoring candidates and the transfer of surplus votes*

- 1.170 Which of these two steps – transferring the surplus and excluding candidates – comes first depends on whether at the first stage any candidate has met or exceeded the quota. If they have, surplus votes must be transferred. Otherwise the candidate with the least number of votes must be excluded, and their votes transferred to the continuing candidates. These processes continue until all seats have been filled, or the number of continuing candidates equals the number of vacancies unfilled (in which case all those candidates are deemed elected).<sup>122</sup>

*Recounts and the duty to record data relating to each stage*

- 1.171 In STV elections in Northern Ireland, where votes are counted manually, there is a duty to record data at each stage where votes are transferred, whether as the result of a surplus or the exclusion of a candidate. The data include in particular the total value of votes transferred, the new total of votes for each candidate as things stand, the value of non-transferable votes in the transfer exercise and the new total of non-transferable votes as things stand, and a comparison between

- (1) the total numbers of votes then recorded for all of the candidates plus the total number of non-transferable votes, with

<sup>121</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 47.

<sup>122</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 53; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI No 1267 reg 60; Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 r 44J; Electoral Law Act (Northern Ireland) 1962 sch 5 r 52.

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(2) the recorded total of valid first preference votes.<sup>123</sup>

1.172 The legislation does not say so, but the comparison of points (1) and (2) above ought to match, and before moving on to the next stage the returning officer ought to ensure no mistake has occurred. This is important because it appears that recounts can only be requested for a particular stage. Curiously, the returning officer must comply with any request for a recount of the last completed stage of the count. The returning officer is not obliged to recount any one parcel or sub-parcel more than once.<sup>124</sup>

1.173 A different approach is taken in the Scottish local government elections' rules.<sup>125</sup> The classical rule is retained whereby the returning officer may refuse a request for a recount if it is in their opinion unreasonable. Scottish local government elections are counted electronically and so the rules do not require the recording of data at each stage. Rather the requirement is for the returning officer, in the eventual declaration, to produce the data relating to each stage, such as the number of ballot papers transferred and their transfer values at each stage.<sup>126</sup> The e-counting system must therefore enable returning officers to produce those data. Of course, if the count is conducted manually,<sup>127</sup> a returning officer has anecdotally told us that they regarded the recount provisions in Northern Ireland should be adopted, so that a complete recount was not open to them, but only one of the last stage. That appears sensible if votes are counted manually, because a complete recount would be egregious (although not impossible); however it sits ill with the generality of the recount power in the Scottish local government election rules.

#### TRANSFERRING THE SURPLUS

1.174 At the end of the first and any subsequent stage, if one or more candidate has a number of votes greater or equal to the quota, they are "deemed" to be elected. If their tally of votes includes a surplus over the quota, the surplus must be transferred to the continuing candidates proportionately to the preferences shown on all of the votes for the candidate deemed elected. The following must occur.

(1) All votes of the candidate deemed elected must be scrutinised for further preferences on them, revealing:

(a) votes that cast a further preference vote (transferable votes)

<sup>123</sup> Electoral Law (Northern Ireland) Act 1962 sch 5 rr 50(2) and 51(10); European Parliamentary Elections (Northern Ireland) Regulations 2004 SI No 1267 sch 1 rr 58(2) and 59(10); Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 rr 44G(2) and 44H(10).

<sup>124</sup> Electoral Law (Northern Ireland) Act 1962 sch 5 r 53; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI No 1267 reg 61; Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 r 44K

<sup>125</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 54(1).

<sup>126</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 56(iii) to (v).

<sup>127</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 42 (3) and (4).

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(b) votes with no valid further preference (non-transferable votes)

- (2) The transfer value for transferable votes must be calculated. This is so that all transferable votes can be transferred, but their total vote value will be no more than the surplus – that is, to achieve strictly proportional voting.
- (3) Transferable votes must be sorted into “parcels”<sup>128</sup> according to the next preference for a continuing candidate, and the transfer value recorded on each paper or parcel. Non-transferable votes must be kept in a separate parcel.
- (4) Parcels are then transferred to the new candidates, and a new stage of counting can begin at which a new count will occur, which will count the transferred votes according to their transfer value, and add them to previous totals for each continuing candidate.
- (5) At further stages which involve the transfer of votes from one candidate to another, care must be taken regarding votes that have already been transferred. Such votes, in their parcel, must themselves be divided into separate “sub-parcels” according to further preference, and a sub parcel of non-transferable votes. It is important to distinguish between those votes which have been transferred more than once because their transfer value in Northern Ireland elections may, and in Scottish local elections will, be different.

1.175 Where more than one candidate has been deemed elected, the transfer should occur starting with the ballot papers of the candidate with the highest surplus. If two or more candidates have the same surplus (what is sometimes called “equality of votes”), there is a difference in the two jurisdictions.

- (1) At Scottish local government elections, the candidate with the most votes at the previous stage takes precedence; if they had an equal number of votes, the returning officer decides by lot whose votes are transferred first.<sup>129</sup>
- (2) At Northern Ireland STV elections, regard must be had to the earliest stage of the count where they had an unequal number of votes. If the equality persists, the returning office decides the matter by lot.<sup>130</sup>

<sup>128</sup> Parcels and “packets” appear to be used interchangeably in some of the election rules. We use the term parcel here to mean both, and to distinguish it from “packets” after the counts, to be sealed and retained after the election.

<sup>129</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 rr 50 and 52.

<sup>130</sup> European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, sch 1 rr 58(1), 59(13), 62(3) and (4); Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 rr 44G(1), 44H(13) and 44L(3) and (4); Electoral Law Act (Northern Ireland) 1962 sch 5 rr 50(1), 51(13), 54(3) and (4)

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- 1.176 It is not clear why the rules on resolving equality of votes are not consistent throughout the UK. The Northern Irish approach reduces the scope for the chance element of deciding by lot, and on that basis is to be preferred – although actual instances when this difference matters are likely to be extremely rare.

#### EXCLUDING LOWEST SCORING CANDIDATES

- 1.177 If there are seats remaining at any stage, the returning officer must exclude the candidate with the lowest number of votes. The candidate's votes must be sorted into parcels of non-transferable votes (those with no further preference, or with no preference for a continuing candidate), and parcels of transferable votes grouped according to the next available preference for a continuing candidate. The latter must be transferred to the relevant candidate. Their transfer value is the same as the value they held for the transferring candidate.<sup>131</sup>

#### *Time-saving provision at STV elections in Northern Ireland*

- 1.178 At STV elections in Northern Ireland, where votes are counted manually, there is a time-saving provision which states that the transfer of surpluses should be withheld where either:
- (1) The surplus is less than the difference between the total number of votes of the lowest scoring candidate and the total votes of the candidate immediately above them in the standings;
  - (2) The surplus is less than the difference between the total votes of the two or more lowest scoring candidates and the candidate next above those.<sup>132</sup>
- 1.179 The reason for this is that the transfer of votes in such circumstances is academic; it cannot alter the relative position of candidates at the bottom of the standings in either of the situations above. Since at the next stage, one or more of these candidates will be excluded and their votes transferred, it saves time to reserve the transfer of the surplus until after such exclusions. Similarly, if only one vacancy remains, and the votes of one candidate are equal to or greater than the remaining candidates' votes together with any surplus not transferred, they are declared elected.

<sup>131</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 51(4) spells this out: the value is one or the previous transfer value to the excluded candidate, if applicable; STV elections in Northern Ireland simply refer to the value when the vote was received by the transferring candidate: European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, sch 1 r 59(7). Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 r 44H(7); Electoral Law Act (Northern Ireland) 1962 sch 5 r 51(7)

<sup>132</sup> European Parliamentary Elections (Northern Ireland) Regulations 2004 SI No 1267 reg 57(10); Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 r 44F(10); Electoral Law Act (Northern Ireland) 1962 sch 5 r 49(10)

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- 1.180 No equivalent provision is made in the Scottish local government election rules, since those are counted electronically and as such do not involve the physical manipulation of parcels and sub-parcels, and recording of data at each stage. However, the modifications of the standard rules when the count is not conducted electronically do not make equivalent provision for withholding the transfer of surpluses to candidates bound to be excluded. The returning officer must strictly transfer extant surpluses before excluding candidates.<sup>133</sup>

#### SINGLE VACANCIES IN NORTHERN IRELAND

- 1.181 At Northern Ireland STV elections, different rules apply where there is only one vacancy to be filled at the election from the outset. The returning officer may not immediately deem a candidate elected simply for exceeding the quota. Instead, the returning officer must first exclude the candidate with the lowest number of votes and distribute the ballot papers with first preference votes for the excluded candidate to the other candidates. Once the new totals have been calculated, the candidate who exceeds the quota is deemed to be elected.<sup>134</sup> This rule is presumably based on a policy specific to Northern Ireland, which we will seek confirmation of. At Scottish local government elections, no special rule exists for single vacancies; meeting the quota would be sufficient for a candidate to be elected – and the quota for a single ward would be just over 50% of the votes.

#### KEEPING TRACK OF TRANSFER VALUES OF TRANSFERRED BALLOT PAPERS

- 1.182 Whenever they are transferred, for whatever reason, ballot papers must also be marked, either individually or as a sub-parcel, with their transfer value.<sup>135</sup> This obligation does not appear in the rules for Scottish local government elections because a digital image is taken of the ballot paper and the counting system must be able to track transfer values in order to function.

#### CALCULATING THE TRANSFER VALUE FOR SURPLUS VOTES

- 1.183 A key part of the STV process is calculating and recording the transfer value (“v”) of transferable votes. That value cannot exceed one. The transfer value is calculated differently in Northern Ireland and Scotland.

#### *Transfer value at Scottish local government elections*

- 1.184 At Scottish local government elections, the transfer value of votes is calculated by a formula which means that successively transferred votes have their transfer value compounded. The formula is as follows:

<sup>133</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 55; 51(1)

<sup>134</sup> European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, sch 1 rr 56(3); Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 r 44E(3); Electoral Law Act (Northern Ireland) 1962 sch 5 r 48(3)

<sup>135</sup> European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, sch 1 r 58(3). Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 r 44G(3); Electoral Law Act (Northern Ireland) 1962 sch 5 r 50(3)

$$v = \frac{z(t-q)}{t}$$

$t$  = total number of votes credited to the transferring candidate

$z$  = for the first calculation in relation to any ballot papers being transferred, 1 and for any subsequent calculation, the transfer value of the ballot paper when it was last transferred.

$q$  = the Droop quota

- 1.185 This value is calculated to five decimal places.<sup>136</sup>

*Transfer value at STV elections in Northern Ireland*

- 1.186 For STV elections in Northern Ireland, the transfer value of a candidates' surplus ballot papers is encapsulated in the following formula:

$$v = \frac{(t-q)}{b}$$

$t$  = total number of votes credited to the transferring candidate

$q$  = the Droop quota

$b$  = total number of transferable ballot papers

- 1.187 This figure is calculated to two decimal places, which is the first difference to note.
- 1.188 The second difference is that the denominator is different at Northern Ireland STV elections. The surplus is divided not by the total votes cast for the transferring candidate, but by the total number of transferable votes. For example, rule 57(4) of the European Parliamentary election rules states:

The vote on each ballot paper transferred under paragraph (3) shall be at a value ("the transfer value") which –

- (b) ... is calculated by dividing the surplus of the candidate from whom the votes are being transferred by the total number of the ballot papers on which *those* votes are given, the calculation being made to two decimal places (ignoring the remainder if any). [our emphasis]<sup>137</sup>

<sup>136</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 47.

<sup>137</sup> European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, sch 1 r 57. The other election rules are identical.

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- 1.189 The “total number of ballot papers on which those votes are given” refers to the total number of transferable ballot papers, as defined all the election rules for STV elections in Northern Ireland. It would be simpler if the defined term were used, to avoid the risk of confusion.
- 1.190 Thirdly, unlike in Scotland, the transfer value is not recalculated at subsequent stages of the count by multiplying the numerator ( $t - q$ ) by the previous transfer value. Instead, a new transfer value is calculated based on the surplus and total number of votes of the candidate transferring the ballot papers. This value is compared with the previous transfer value, and whichever value is lower is taken as the value of the ballot paper.<sup>138</sup>

*A worked out example*

- 1.191 The following factual scenario is helpful to keep in mind how the formula works, and how it differs in Scotland and Northern Ireland.
- 1.192 In stage 1, candidate A is deemed elected with 33,000 votes in a contest for which the quota is 25,001. The surplus is 7999. 30,000 of A’s ballot papers contain a further preference, 5,000 of which vote for B as the next preference. These must be transferred to B, and their transfer value determined.
- 1.193 In a later stage, B is elected with 28,000 votes. The surplus this time is 2,999. 25,000 of B’s votes contain a further preference, and must in turn be transferred to continuing candidates. But 5,000 of those were themselves transferred to B from A, at a transfer value in stage 1. What is the transfer value of those 5,000 votes in stages 1 and 2, in either jurisdiction?
- 1.194 In Scotland, the transfer value at stage 1, applying  $z=1$  to the formula above, is 0.24239. The 5000 ballot papers, when transferred to candidate B are worth 1211 votes towards B’s total.
- 1.195 At the later stage, the transfer value B’s transferable votes which have not been previously transferred, applying the formula with  $z=1$ , is 0.10710. But for the 5000 ballot papers that were transferred to B from A, their transfer value is 0.24239 multiplied by 0.10710, or 0.02595. So the total combined value of those votes, when transferred, is 129. One can see that the transfer value formula in Scotland means that successively transferred votes result in drastically diminishing values.

<sup>138</sup> European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, sch 1 rr 57(4) and (7). Northern Ireland Assembly (Elections) Order 2001 SI No 2599 sch 1 r 44F(4) and (7); Electoral Law Act (Northern Ireland) 1962 sch 5 r 49(4) and (7)

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- 1.196 In Northern Ireland STV elections, the formula at stage 1 yields a transfer value for the 5,000 ballot papers of 0.26. Those 5000 ballot papers will count as 1300 votes for B (they counted as 1211 votes in Scotland). At the later stage, the same 5000 votes fall to be transferred from B to other continuing candidates. The Chief Electoral Office must apply the lowest of the two transfer values yielded by the formula above, which this time is 0.11. The value of the transferred votes, combined, is 550 (instead of 129 in Scotland).
- 1.197 We do not consider that the difference between transfer value formulae in Scotland and Northern Ireland is the sort of difference this project seeks to assimilate. We consider the transfer value formula, and the quota formula, to be essentially part of the voting system in use at those elections. We therefore consider that there is a strong case for the formulae to be expressed in primary legislation. If the transfer value formula is to be expressed (and alterable) by secondary legislation, primary legislation should set out that the value should be such that it is one or less, so that the total value of transferred votes does not exceed the surplus.

#### DECLARATION OF THE RESULT

- 1.198 Once all the seats have been filled, the count can proceed to declaration or result. The returning officer must declare the candidates elected, and send the declaration to the proper officer of the Council (at Scottish local government elections), or the Secretary of State (at Northern Ireland Assembly and European Parliamentary elections).
- 1.199 At Scottish local government elections, the returning officer must give public notice of:
- (1) the name of the candidates elected;
  - (2) the number of first and subsequent preferences for each candidate;
  - (3) the number of ballot papers transferred and their transfer values at each stage of the count;
  - (4) the number of votes credited to each candidate at each stage of the count;
  - (5) each unique sequence of preferences in which voters chose candidates in the ward, with the number of voters who adopted each of these sequences; (although this is not required if a manual count takes place) and
  - (6) the number of rejected ballot papers under each head.<sup>139</sup>

<sup>139</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 56.



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- 1.200 At STV elections in Northern Ireland fewer details are publicly notified. These are the name of the winning candidates, the order in which they were elected (which is determined by the order in which surpluses are transferred, and the number of first preference votes, “any transfer of votes”, and the total number of votes at each stage of the count.<sup>140</sup>
- 1.201 These differences may be due to the convenience and ease of obtaining data in an electronic count. That said, only one of the items in the declaration – the unique sequence of preferences – is omitted in the event of a manual count at Scottish local government elections. Returning officers are still expected to publish the others,

#### DETAIL IN STV ELECTION RULES

- 1.202 The foregoing material is contained, in detail, in the STV elections’ rules. Whereas classical counting rules do not specify how the count should be organised, STV counting rules, particularly those in Northern Ireland, guide administrators in detail through the task of soundly undertaking the complex executrices of translating ballot papers into an STV result.
- 1.203 Conversely, the Electoral Commission’s published guidance on STV elections, while it retains the detail in guidance on topics such as verification, does not give detailed guidance on the STV count. That might be because the view is that the election rules already cover it in significant detail. We also heard on 28 January, in our regular meeting with the Electoral Commission, that traditionally its guidance for Scottish local government elections and elections in Northern Ireland (which are managed by a central officer) has been less detailed.

#### ***Other differences at Northern Ireland STV elections***

##### TIMING OF THE COUNT AT LOCAL GOVERNMENT ELECTIONS IN NORTHERN IRELAND

- 1.204 The counting rules for local government elections in Northern Ireland make specific provision for the time when counting should take place: 9 am on the second day after the day of the poll. Saturdays, Sundays and public holidays are excluded.<sup>141</sup>
- 1.205 The returning officer still appears to have some flexibility in relation to the timing of the count: returning officers are not obliged to commence counting the votes for all the district electoral areas in any local government district at the same time. The returning officer is also obliged to give the counting agents notice of the time and place for the counting of votes: the former requirement would not be necessary if counting always began at 9 am on the second day after polling day.

<sup>140</sup> European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, sch 1 rr 62 and 64; Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 inserting rr 44L and 44M; Electoral Law Act (Northern Ireland) 1962, sch 5 rr 54 and 56.

<sup>141</sup> Electoral Law Act (Northern Ireland) 1962, sch 5 r 43.

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- 1.206 This is a rather curious provision – given that election day is usually a Thursday, the count for local government elections would not commence until the following Monday.<sup>142</sup> We will enquire as to whether some policy has been adopted which has particular relevance to STV elections in Northern Ireland, which have to be counted manually and are thus ill suited to continuous counting after polling day. That raises the question why a similar rule does not abound at elections to the EU Parliament and Northern Ireland Assembly, which are silent as to when counting day should take place, effectively giving the Chief Electoral Officer a discretion. Subject to clarification about Northern Ireland-specific policy, we would make election counts in Northern Ireland subject to the standard requirement to count as soon as practicable.

#### PAUSING THE COUNT AT STV ELECTIONS

- 1.207 The rules on pausing the count for STV elections in Northern Ireland differ from all other elections in that they require the count to be paused overnight unless the returning officer and the counting agents agree otherwise. The hours between which the count must be paused are 11 pm and 9 am the following morning.<sup>143</sup>
- 1.208 The difference in approach may be the result of a specific policy subsisting in Northern Ireland. For example, given the intricacies of a manual STV count, it may be sensible to ensure a real pause so that refreshed staff can continue the count.

#### ***Difference in counting rules governing Scottish local government elections***

- 1.209 Some of the ways in which the counting rules for Scottish local government elections differ from the classical rules are not related to the voting system or e-counting methods. These relate to attendance at the count, verification and the definition of duly returned postal ballot papers.

#### *Attendance*

- 1.210 The counting rules for Scottish Local Government elections include another category in the list of persons entitled to attend the count: “persons performing duties under a contract for services entered into in connection with the conduct of or administration of the election”. It is not clear that it is necessary to include a separate category of such persons; instead they could be grouped together with the returning officer’s staff.

<sup>142</sup> Rule 2 of the local election rules reflects the old drafting of the equivalent Parliamentary election rule, meaning that the returning officer is “not obliged” to count on Saturday or Sunday. We expect this will be updated so that a returning officer will not be able to count on a Saturday or Sunday.

<sup>143</sup> European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, sch 1 r 53(3).

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### *Verification*

- 1.211 There is a slight drafting difference in relation to verification. The returning officer must count and record the number of ballot papers in each ballot box, and check this number against the number of ballot papers recorded on the ballot paper account. However, the rule then states that the returning officer need only *verify* the ballot paper account if required to do so by a candidate or election agent.<sup>144</sup>
- 1.212 Requiring full verification only if requested by candidates and agents allows the count to proceed more quickly, while leaving the option open to scrutinise a ballot paper account more fully in the case that totals do not match up. This is another way of striking the balance between speed and accuracy of the count.
- 1.213 In the interests of avoiding differences which are unrelated to policy choices, voting systems or local factors, the obligations on the returning officer in relation to verification should be the same for all elections. If we decide to follow the Scottish approach, the returning officer could be given a discretion to verify, which becomes an obligation if a candidate or election agent requests it.

### *Duly returned postal ballot papers*

- 1.214 As elsewhere in the Scottish Local Government elections rules, the counting rules take the classical rules and reproduce them more simply. A particular example is that the rules only state that duly returned postal ballot papers must be counted. They do not set out the additional requirements and definitions, found in the classical rules, that postal ballot papers must be “duly completed”, and what this involves.<sup>145</sup>

### ***The electronic count at Scottish local government elections***

- 1.215 There are two distinguishing features of the counting rules for Scottish local government elections:
- (1) they envisage electronic counting (“e-counting”); and
  - (2) they apply the single transferable vote system.
- 1.216 The differences in the rules for Scottish local government elections related to the use of electronic counting are discussed below.

<sup>144</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 43(1) and (5).

<sup>145</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 43(2).

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## E-COUNTING

- 1.217 E-counting was introduced in Scotland in 2007 and accompanied a change in the voting system at Scottish local government elections to the single transferable vote. It was thought that it would be too difficult to count ballot papers under this voting system manually.<sup>146</sup> In this election, Scottish Parliament and Scottish local government elections were combined, and counting at both of these elections was done electronically.
- 1.218 The problems which resulted from the combination of these two elections, with very different voting systems, are well-documented, and have resulted in legislative provisions that prevent the two elections from occurring at the same time in the future.<sup>147</sup> Scottish local government elections continue to be counted electronically, whereas elections to the Scottish Parliament are now counted manually.

### *The drafting approach*

- 1.219 The rules for e-counting at Scottish local government elections adopt a slightly different drafting approach to the Greater London Authority election rules. Those rules expressly refer to the electronic nature of the count throughout. For example, returning officers must cause ballot papers to be counted by the machines, must make a note of rejected ballot papers on the machines, and use the screens on the electronic machines to adjudicate upon doubtful ballot papers.
- 1.220 By contrast, the Scottish local government elections rules principally deal with electronic counting in rule 42, which obliges the returning officer, in the case of a general election, to provide and use an e-counting system unless it is impossible or impracticable to do so.<sup>148</sup> Rule 42(2) states:

For the purposes of enabling the count to be conducted using the electronic counting system the returning officer may carry out any functions or perform any procedure to be undertaken in connection with the count by electronic means and the references to ballot papers and parcels of ballot papers shall include references to such ballot papers or parcels in electronic form.

- 1.221 Other rules are geared at e-counting – this is evident from the fact that the ballot papers are not required to be mixed before counting or kept face up during counting, and that the official mark does not need to be checked. If the returning officer decides to count manually, these requirements are brought back by rule 55.<sup>149</sup>

<sup>146</sup> Electoral Commission, *Scottish Elections 2007: the independent review of the Scottish Parliamentary and local government elections* (2007), p 92.

<sup>147</sup> Local Government (Scotland) Act 1994, s 5 as amended by Scottish Local Government (Elections) Act 2009, s 1(1).

<sup>148</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 42.

<sup>149</sup> Scottish Local Government Elections Order 2011 SSI 2011 No 399, sch 1 r 55.

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*Manual counting*

- 1.222 Another difference worth noting is when the count can be conducted manually. For Greater London Authority elections, a returning officer must use e-counting methods where the GLRO has specified that they should be used, although the returning officer can obtain the prior consent of the GLRO to conduct the count manually. However, once any of the count processes has begun, the returning officer may change to a manual count if considered appropriate.<sup>150</sup>
- 1.223 By contrast, at Scottish local government elections the returning officer must make a decision, at the outset, as to whether it would be impossible or impracticable to conduct the count or any part of it electronically. If the returning officer decides that this is the case, all or part of the count may be conducted manually. The rules do not state explicitly whether this decision can also be taken once the count has commenced, although the words “if it proves impossible or impracticable” can be interpreted to include a situation where impossibility arises during the count. This is the only sensible interpretation; in the case of, for example, machine failure, a returning officer must be able to revert to manual processes.
- 1.224 This difference might indicate a specific policy at Scottish local government elections always, where possible, to count electronically (given the complexity of the voting system) or could point to the different management structures of the two elections. While both operate a two-tier structure – the GLRO can issue directions to constituency and regional returning officers, and the Electoral Management Board can issue directions to local returning officers for local government elections – this structure is explicitly expressed in the rules for Greater London Authority elections. The focus in the Scottish local government rules is on the local returning officer.

<sup>150</sup> Greater London Authority Rules 2007 SI 2007 No 3541, sch 1 r 48, sch 2 r 49, sch 3 r 48.