

HOUSE OF LORDS

Select Committee on the Constitution

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23rd Report of Session 2010–12

# Voting at the Close of Poll

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Lord Goldsmith  
Lord Hart of Chilton  
Lord Irvine of Lairg  
Baroness Jay of Paddington (Chairman)  
Lord Norton of Louth  
Lord Pannick  
Lord Powell of Bayswater  
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# Voting at the Close of Poll

1. In June 2011 the Constitution Committee heard oral evidence from the Chair and two other senior members of the Electoral Commission. A transcript of that session is reproduced here as Appendix 1.
2. A matter that arose in the course of that evidence was the legal position regarding voting at the close of poll (at 10.00pm). During the General Election of May 2010 a number of voters queuing at polling stations at 10.00pm were unable to cast their ballots. It seems that as many as 1200 voters were affected, at 27 polling stations in 16 different constituencies.<sup>1</sup>
3. In the view of the Electoral Commission, the legal position is clear: votes may be cast immediately after the close of poll at 10.00pm but only if a ballot paper has been formally handed to the voter before 10.00pm. Ballot papers cannot be handed out after 10.00pm to voters who are queuing outside their polling station. The view of the Electoral Commission is set out in its *Interim Report on the 2010 UK Parliamentary General Election: Review of Problems at Polling Stations at Close of Poll*. This *Interim Report* was published on 20 May 2010 and is available on the Electoral Commission's website.<sup>2</sup>
4. We are not persuaded that the legal position is as clear-cut as the Electoral Commission makes out. The Electoral Commission relies principally on two precedents, one of which dates from as long ago as 1901. The case law, such as it is, is largely focused on the statutory duties of presiding officers rather than on the right to vote.
5. Suppose that a voter (such as one of the 1200 affected in May 2010), who had presented herself at the polling station before 10.00pm but who was denied her vote because a long queue prevented her from being handed her ballot paper before 10.00pm, sought a legal remedy. Do the precedents cited by the Electoral Commission clearly establish that such a voter would be denied a remedy? Our answer is that they do not.<sup>3</sup> The legal analysis that led us to this conclusion is fully set out in a letter from our Chairman to the Chair of the Electoral Commission (Jenny Watson) dated 14 July 2011<sup>4</sup>.
6. The Electoral Commission responded to our letter, including a note from their legal counsel dated 19 July 2011<sup>5</sup>.
7. While the Electoral Commission disagrees with us on the clarity (or otherwise) of the law, we agree that the current state of the law is unsatisfactory. **The law should be amended so as clearly to provide that voters who are present, or in a queue, at a polling station at the close of poll are entitled to vote.**
8. We note that the House of Commons Political and Constitutional Reform Committee has adopted a different view. In its recent report on *Individual Electoral Registration and Electoral Administration*, the Committee said:

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<sup>1</sup> See [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0010/99091/Interim-Report-Polling-Station-Queues-complete.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/99091/Interim-Report-Polling-Station-Queues-complete.pdf), para 1.6.

<sup>2</sup> *Ibid.* The Electoral Commission's view is based on a legal opinion dated 10 May 2010. The Committee is grateful to the Electoral Commission for sending us a copy of this legal opinion: Appendix 2.

<sup>3</sup> Our position is that the law is unclear. We express no view on whether such a voter would have a legal remedy.

<sup>4</sup> Appendix 2

<sup>5</sup> Appendix 2.

“On the issue of close of poll the Minister set out the Government’s position that the issues around close of poll in the 2010 election were ‘largely around poor planning, poor resource management’ and that an attempt to legislate in this area could create more problems than it solved. We agree with the Minister that in this area careful planning and allocation of resources are likely to be more effective in ensuring all those who are eligible can access their vote without resorting to legislation.”<sup>6</sup>

We disagree. Whilst careful planning and allocation of resources are of course essential, there is an underlying point of principle which requires to be addressed through legislation.

9. The Law Commission has announced that a review of electoral law is to feature in its current programme. Its timetable, however, envisages a final report to be published only in 2017 (and even this is contingent upon a decision being taken after a scoping exercise to move to a substantive project).<sup>7</sup>
10. While we welcome the announcement by the Law Commission that electoral law is to be included in its current programme of work, **the Government should bring forward amendments to the law relating to voting at the close of poll, to be brought into force before the next General Election.**<sup>8</sup>

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<sup>6</sup> 10th Report (2010–12) (HC Paper 1463), para 98.

<sup>7</sup> See <http://www.justice.gov.uk/lawcommission/areas/electoral-law.htm>.

<sup>8</sup> Under the Fixed-term Parliaments Act 2011 it is expected that the next UK General Election will take place in May 2015.

## APPENDIX 1: TRANSCRIPT OF ORAL EVIDENCE

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WEDNESDAY 22 JUNE 2011

Members present

Baroness Jay of Paddington (Chairman)

Lord Crickhowell

Lord Hart of Chilton

Lord Irvine of Lairg

Lord Norton of Louth

Lord Pannick

Lord Rennard

Lord Renton of Mount Harry

Lord Shaw of Northstead

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### Examination of Witnesses

**Jenny Watson**, [Chair, Electoral Commission], **Andrew Scallan**, [Director of Electoral Administration, Electoral Commission], and **Tony Stafford**, [Head of Guidance and Policy, Electoral Commission].

**Q1 The Chairman:** Good morning and welcome. Thank you all for coming. Thank you also for the very helpful letter that you sent prior to this meeting, and I think most of us had the opportunity to read your speech to the Constitution Unit, which was also very helpful indeed. I understand this is the first formal question and answer hearing that you have done since the referendum—both the referendums—and we are particularly pleased that you are with us this morning. As I explained outside, this is a slightly peculiar meeting, in that there is a debate going on on the Floor of the House at the same time and some Members are coming and going to that.

But I think you did say, Jenny, that you had some opening remarks, so perhaps the best thing to do is if you would just introduce yourself and your colleagues for the record, and then if you would like to just make your opening remarks, that would be very helpful.

**Jenny Watson:** Yes, I will, and I will be brief. Thank you, my Lord Chairman, for the opportunity to come and talk to the Committee. I am Jenny Watson, and I chair the Electoral Commission. On my left, I have Andrew Scallan, who is the Director of Electoral Administration, and on my right, Tony Stafford, who is Head of Guidance and Policy in the Party and Election Finance Team at the Commission.

On 5 May, of course we had the first UK-wide referendum since 1975, only the second ever UK-wide referendum, the first under the framework established by the Political Parties, Elections and Referendums Act 2000, and we also ran the Wales referendum on 3 March in relation to the powers of the Welsh Assembly. There were also scheduled national elections in Scotland, Wales and Northern Ireland, local elections in many parts of England and all of Northern Ireland, parish council elections in England, five mayoral elections, a mayoral referendum and a by-election for the Westminster Parliament. So 5 May was, as our public information campaign reminded people, a big day for voters.

Under PPERA, unlike at elections where returning officers are independently accountable for the polls in their area, for referendums, as Chair of the Commission, I was the chief counting officer responsible for its overall conduct and ensuring the accuracy of the overall result, and none of that would have been possible without the work of local authority staff, who worked so hard to help us deliver those polls. This chief counting officer role brings with it powers that I was able to exercise at the referendum that are currently not available in relation to elections, so to put it simply, we have the power only to issue guidance at elections, but at a referendum, I can issue directions, which makes it easier to ensure that voters get a consistent service. I hope that we might explore in more detail why that matters during this session.

In terms of both planning and delivery, we worked closely with the steering group of the 11 regional counting officers and the chief electoral officer for Northern Ireland, as well as holding seminars throughout the UK for counting officers themselves, and the Commission also took an active performance monitoring role, requiring counting officers to draw up detailed plans for how they would deliver for voters at the referendum.

Another change from the usual way of doing things was the introduction of standardised forms in a range of areas. Perhaps that does not sound very exciting but, for example, it meant that poll cards, postal ballot packs and polling station notices were all tested on voters, easier to understand and consistent, unlike at elections. We also, of course, had responsibility for testing the question, for running a public awareness campaign and for regulating and designating campaigners.

Our detailed report on the 5 May polls will be published in the autumn, but I think we now have enough distance from the event to say confidently that, on the whole, voters received the best possible service that they could have had, and now we have a real opportunity to learn the lessons from the referendums and elections earlier this year and to make sure those lessons are taken on board in time for the next set of polls, because of course they apply just as much to elections as referendums. As I say, we will be publishing our report in the autumn, so what we say to you here today should be heard as early and developing thinking. We are still receiving feedback, including from parliamentarians at a Westminster seminar next week, so perhaps if I say that once now, what we say can be heard in that context. Thank you.

**Q2 The Chairman:** Well, that is extremely helpful. Do you, on reflection, have immediate thoughts about what in hindsight you might have done differently? We are accepting, I think, that you recognise that this was a largely successful administrative exercise.

**Jenny Watson:** Yes. I think there are some things for us that we think we might have done differently, so if I perhaps start with those and then go on to the wider lessons. I think our communication with regional counting officers was very good right from the start. We had a steering group with them, helping us plan from, I think, September of 2010. I think we might perhaps have communicated directly with counting officers earlier, but we put that in place and so I am confident that we tackled that problem when it started to arise.

I think that we are now in fact—and Andrew might want to say more about this—doing a project internally to put all of our guidance and our directions for running a referendum in one place, so that there is one place that local authority staff could go to find that information. I think if we were to do the same in future, we would want to think a bit about which directions were essential and which directions are, if you like, the nice directions to have. We will be developing our performance standards as we go forward, taking those directions forward as performance standards to think about, and we can think a bit about what will be nice to have and what would be essential in that regard.

I think one of the big lessons though is almost not a question for us but a question for legislators that the passage of this legislation was perhaps unprecedented. I think a number of you will have been involved in the various debates that took place here and, because of the time at which that legislation was passed, it did present challenges for all of us in terms of planning to deliver the poll. For example, local authority staff were wary of incurring costs before they knew that a referendum was definitely going to take place.

We have recommended in the past that there should be generic legislation in relation to the conduct of referendums. I think the experience with the passage of this legislation makes us think even more strongly that having generic legislation for the conduct of a referendum—and indeed, the conduct of all elections—would be desirable, because it would allow parliamentarians to have the scrutiny of the rules and ensure that those are passed in good time, and then to separate out, if you like, the distinctive political issues which it is right that will be considered—such as the date in the question—from the passage of the detailed rules.

Andrew, I do not know if you want to say anything on that?

**The Chairman:** I think, if I may say so, we will come back to the question of generic legislation, but if we could just focus for the moment on the administrative, if I can call it that, lessons learnt or things that you feel with hindsight were things you would seek to change.

**Andrew Scallan:** I think that one of the things that Jenny mentioned were the directions that we issued to counting officers, and the nature of those directions. For example, we issued a series of modules that we thought was a sensible approach, so that people were not bombarded with all the directions at one time. We issued a series of directions, and they were designed in a particular way that at the front of each module, there was a summary and then a detailed explanation of what went on.

The feedback we have had is that actually some people found them repetitious, and as Jenny said, they needed to be located in one place. It was complex. Because of the combination of rules, there were five different sets of rules that had to be created, and there was an incredible volume of materials created, both in terms of advice and instructions to counting officers, but also materials for use in polling stations. So our review that is currently going on is to simplify all those processes and make them more accessible through the website.

**Q3 Lord Norton of Louth:** Just on the AV referendum, as you mentioned, it is the only UK-wide referendum that you have been responsible for since the Act was passed, and I think there was general agreement on both sides of the campaign it was not the most edifying of experiences. Now, are there lessons that one can draw from that in terms of your powers and responsibilities as presently constituted? Is there a case for change, or is it simply the fact that the nature of the subject matter of the referendum was what caused the nature of that particular campaign?

**Jenny Watson:** I do not think I could draw a conclusion that it was the subject matter because, as you say, I do not have anything with which to compare. I do think though that I would want to think very carefully before asking the Electoral Commission to take on a role of regulating in any way campaigners' arguments, because that is political debate. I think the design by PPERA is that there is that political debate and people can put propositions and rebut propositions. I would want to think very carefully before the Commission had a role in regulating that. It occasionally happens that after an election, people call for us to have more of a role in what is said in candidates' statements. I think that partly because I think the principle of political speech is pretty fundamental, but also because as the body that is independent and running the referendum and responsible for the conduct of the poll, to do anything that would pull us more into, if you like, the kind of partisan nature of the political debate I fear could have an impact on people's perception of our independence, which I think is a very important thing.

**Q4 Lord Norton of Louth:** So would you regard your extant powers under the 2000 Act as broadly appropriate, and therefore the issues for you are working within the Act, rather than seeking any change to your powers in relation to referendums?

**Jenny Watson:** As I say, we are still collecting feedback, but I think at this time, in relation to the regulation of the campaign arguments and the way that campaign is conducted, I would say that is where we are.

**Q5 Lord Renton of Mount Harry:** It is extremely interesting to hear what you are saying, and of course this was, in a sense, the first time, wasn't it? Do you think that the very fact that the Parliamentary Voting System and Constituencies Bill only received Royal Assent on 16 February, 11 weeks before, in a sense made things more difficult for you than they would be otherwise, just because the Act was so new and so fresh?

**Jenny Watson:** The framework is set in PPERA, so that is a good thing from the outset. When the proposal came through for the polls to be combined, we set a number of tests which had to be met in order for us to be confident that we could have the referendum on 5 May, and one of those was that the rules had to be clear six months in advance. Now, the rules were clear and we were able to work within that, and as Andrew says, we were able to share our assumptions about directions with those local authority staff.

But I do not think that any of us expected that it would go to the stage that it did, and there are two ways to look at that. One is to say if we had had generic legislation which set out the conduct, the rules for running of the referendums, that would have made life a lot easier in that situation. The other is to look at things from Tony's side of the

House, which is to think about how it has impacted on the campaigners themselves. One of the things we had said was that we thought at the minimum there should be a four-week campaign period to allow for voters to hear the arguments. So, working back, if you like, from 5 May, right to left, what that meant was that the last date, given parliamentary recess, for passage of the legislation had to allow not only for that four-week period but for us to take applications and designate campaigners.

Tony, you may want to say a little bit about that process.

**Tony Stafford:** Yes. I think just in terms of the overall timetable, clearly we were very conscious that the campaigners in some cases were new to having to comply with PPERA; because it is not an election, you do not have the party structures that are there. The fact that we had no certainty about when the regulated period would actually start until Royal Assent—because it was Royal Assent that triggered it—meant that we had to do a lot of initial guidance for campaigners and then establish contact with them over a period of several months before the Bill was finalised, and essentially sort of give them guidance on what the rules meant in increments as the legislation progressed. That is certainly something I think we will want to look at in reporting on the regulation of campaigning.

The other aspect, as Jenny says, is that the timetable for designating the lead campaigners then became very tight. That has implications for us in terms of needing to organise things, but I think much more so for the campaigners in that first of all if they apply and are successful, as happened in the case of the voting system referendum, they then have really a very short space of time to make use of the benefits that come from being designated in terms of the public mailings and the broadcasts and so on. If we had not been able to designate, which is what happened at the Welsh referendum in March, there is then a very limited timetable for anyone to do anything about the consequences of that. So the legislation timing has all kinds of implications.

**Jenny Watson:** I think to go back to your original question of whether it made life more difficult, there is no question that it made it more challenging, but with the underlying framework that is set out in PPERA, I have a power of direction. There is an ability to ensure consistency and we were able to plan well in advance for those polls, even though the legislation finally was passed late in the day.

If I can take another bill that is currently making its way through the House, though I know that that has been amended by this House, the Police Reform and Social Responsibility Bill creates new elections for police and crime commissioners, which it is anticipated will be held next May, with no underlying framework to ensure consistency in the way those elections are run, and the constituencies where candidates will stand may well include more than one local authority in that one constituency. So there could well be different ways that those local authorities run the poll and there is, as I say, no underlying framework. We have a real concern that that legislation needs to come through both Houses early enough to be sure that we can plan and that local authorities can plan with confidence, and in that case, that means that legislation being in force from November. Part of the reason for that is it is entirely new, entirely untested and there is no overall power to ensure co-ordination and consistency.

**Q6 Lord Renton of Mount Harry:** If I may, are you not in fact at a very difficult position in this history, the change in the constitution, in that as you said you would wish to see a generic legislative framework for the conduct of all future referendums? But is it not then almost inevitable that a generic legislative framework for ordinary elections—not of referenda—is bound to follow? This is something of course that local authorities will never enjoy because they do it very much like they have done it in the past, in a sense, and want to go on that way.

**Jenny Watson:** Well, that is two questions, if I may. One is how much challenge does one give to established practice, and so perhaps I can give you a practical example—and, Andrew, if you supplement it if you think I am not quite answering the question. At the 5 May polls, I directed that poll cards informing electors of the polls were sent out earlier than is usually the case. That is important for two reasons: one is because if you are going to be on holiday, you can realise that and apply for a postal vote early enough, and the other is if you realise that you are not on the register at all but somebody else in your house is, you can put yourself on the register. In Northern Ireland, for example, we saw 17,000 voters added to the register between the time the poll cards went out and the day of the poll. So in terms of the elector, that it is an extremely good outcome, because people who wanted to vote could find that they did not have that chance and put themselves on the register.

So that is part of the challenge to how local authorities might have done things in the past. I should say that the majority of our directions had always been contained in our guidance that we had issued, but of course our guidance at elections is, if you like, voluntary. Many people do follow it, but there is no compulsion.

The second question I think relates to the underlying framework of the law which governs elections, and there I think there is no doubt we have said for some time that we would like to see a review of electoral legislation, because it is extremely complex. I do not know if you are able to tell us, Andrew, how many different bits of legislation might have been involved in running those polls on 5 May, but to have a generic bit of legislation that says, “this is the Westminster general election; this is the way local elections are run” with consistency between them would be a very big step forward.

**Andrew Scallan:** I cannot give you a number, but you will appreciate that there were different rules: there are principal area rules; parish and community rules; rules relating to Welsh local areas, which are slightly different, so there is a vast range of legislation that is required to be looked at. It is a real challenge to create generic rules, as the Committee will appreciate, but it is something that we think is a good thing, and certainly from within the electoral administrator community, simplification wherever possible is considered to be something to strive for.

**Jenny Watson:** We have suggested that this is an area which the Law Commission could look at, looking at the whole gamut of the legislation to see what is still needed, what is redundant, what could be reshaped, and I think one of the things that could follow from that could be generic legislation for different elections.

**Q7 Lord Renton of Mount Harry:** What is the Law Commission’s reaction, or have you not really had one so far?

**Andrew Scallan:** The Law Commission are very supportive. I cannot remember precisely where our proposal is in their round of submissions, but they are very supportive indeed.

**Q8 Lord Hart of Chilton:** Just one question arising from what you said earlier: in your lecture, you said, “During the final weeks before Royal Assent, there were quite significant amendments made to the Bill, including attempts to introduce a threshold for the referendum and a provision to allow flexibility for the date on which it could be held. The overriding concern for us was that it created uncertainty for everyone planning the polls.” Then you say, “We need to find a way to avoid this for elections as well as referendums without lessening parliamentary scrutiny, and I will share with you our initial thoughts on how things might be done when I turn to the lessons learned in my conclusion.” When I looked at that, I saw again the reference to this generic legislation. Am I to assume from that that as part of this generic legislation, you would assume a threshold provision?

**Jenny Watson:** Well, I think we have probably discussed with this Committee before—though, forgive me, I cannot remember if you have been part of those discussions—the fact that a threshold is a matter for Parliament to decide.

**Lord Hart of Chilton:** So it was, and that is what happened.

**Jenny Watson:** Indeed, and we would not take a view on whether or not a threshold is desirable. That would be for Parliament to discuss and decide, and what we would want to be clear was that if you gave us that responsibility, we could carry it out properly, and that we had clarity in the amendment, in the provision that introduced the threshold. So I do not think that what I am saying assumes that there would or would not be a threshold. For example, if you separate the generic rules for conduct of the poll from questions specific to a particular Bill about the question and the date of a referendum, it would be possible for Parliament to debate whether there should be a threshold at either of those stages.

But I think the point I am trying to make is that in relation to the polls on 5 May, the whole thing was rolled up into one, so we were waiting for Royal Assent for the legislation to get both the conduct rules and the date and question and go-ahead for the referendum. Parliamentary scrutiny of both of those is extremely important. But it is, and has been for some time, our view that generic conduct rules would be helpful to everybody who is involved in administering the poll, scrutinised by Parliament very properly at the time that they are passed, but not subsumed and rolled up in the wider debate about the individual referendums and elections.

**Q9 Lord Irvine of Lairg:** I gather that you feel that the components of generic legislation would not be for you to recommend on, but you would prefer the Law Commission to do the work. Is that correct?

**Jenny Watson:** I think there are some things that we would want to put to the Law Commission, but I think our proposal that the Law Commission might look at this is simply because we recognise it is an area of complex law, where there are many

different people who have an interest, and it might be something that would benefit from their scrutiny.

**Q10 Lord Irvine of Lairg:** The problem with the Law Commission is that it needs to have a high priority given by Government to any proposed legislation before it will prioritise itself, and do you think that what is required is to get a commitment in principle from Government to the need for generic legislation? Then of course the Law Commission will prioritise.

**Jenny Watson:** Well, the point about looking again at a review of electoral legislation is something that we have been talking to Governments about, both with the previous Government and with this Government, so I of course would welcome any Government in committing itself to do that. The Law Commission, I think, is a good vehicle to help to make that happen.

**Lord Irvine of Lairg:** Yes, but my point is that the commitment by Government comes first and only secondly will the Law Commission give it priority.

**Jenny Watson:** Of course a commitment from Government would be welcome, as would the support of this Committee for the Law Commission to do something further. As I say, we have been raising that issue about looking fundamentally at the law that we have inherited with Governments for some time.

I do not know, Andrew, if there is anything that you want to add to that in terms of where we are now?

**Andrew Scallan:** I think the only thing to add is that we had the ongoing discussions with the Law Commission and with Government and they are running in parallel at the moment, and I think it would be ideal. I think Lord Irvine has said that if Government gives its commitment, but I do not think Government have indicated they would not support it yet.

**Lord Irvine of Lairg:** The most you will get is a commitment in principle.

**Andrew Scallan:** Yes.

**Q11 The Chairman:** Perhaps I am being stupid about this, but to me, you have not quite covered the point how all of these matters—whether it is about the police commissioners, which you raised, or about the proposed increase in the number of referendums relating to European matters—could be politically or in policy terms covered by one umbrella bit of legislation related to referendums. Can you explain the way you would see that happening?

**Jenny Watson:** I can try and be clearer. I think we are trying to separate out the rules which govern the administration of the poll on the ground from those which lead us to have a referendum at any one time. So to use the polls on 5 May as an example, I think that would mean had we had that generic legislation that the rules which govern the conduct of the poll would already have been set out, but the question of what does the

question look like and is the referendum on 5 May would have been covered in a separate piece of legislation. That would mean that in terms of our planning and the directions that I was able to issue, I would have had clarity about the rules for the running of the poll and therefore could have issued those directions. Probably I would still have needed the legislation to come into force, but we could at least have been clearer in the planning mechanism. Is there anything else you can say that will help us?

**Andrew Scallan:** I think the sort of administration of the rule that Jenny has referred to—for example, the conduct for the referendum—includes things like how a ballot paper is issued in the polling station. We do not think that that is significantly different for any electoral event that is taking place, so is it really the best use of Parliament’s time in some ways? But also there is certainty that if these processes are going to be the same for every type of event then there is certainty in advance. It also clarifies the issue around combination so that there is an understanding about what happens in relation to things like postal votes and other election material when there is more than one event taking place on the same day.

**The Chairman:** Now, you raised the point, I think, earlier about the specific issue in Wales, about the lead organisations. I think Lord Crickhowell may want to follow up on that.

**Q12 Lord Crickhowell:** Well, you are unable to designate official yes and no campaigns, and in your speech to the Constitution Unit, you point out that, “Designation was an important part of the referendum process, as lead campaigners have access to higher spending limits, some public funding campaigns, board cost slots and a free mailout to voters”. We have now learned, as you say, that it is not an entirely straightforward process and you suggest again in your speech that the failure to proceed down this road may be based on tactical decisions by campaigners. Clearly this was a very unsatisfactory situation that developed in Wales, and you had to provide guidance and so on.

What would you like to see happen? Is this the sort of thing that perhaps ought to go into generic legislation to avoid this kind of situation happening before? Do you think that people should be free not to? What are the arguments in favour of, “Well, we don’t want to have an official yes or no campaign and we are not prepared to do it” or the argument that perhaps there should be some kind of compulsion? What general conclusions do you draw from your experience in Wales?

**Jenny Watson:** I think we are still reflecting on that in the light of both referendums. It is clear that PPERA is based upon a fundamental principle that you either designate on both sides or you do not designate at all. I think one of the things that we are still reflecting on is whether in every circumstance one might assume that there are people who want to come forward, bearing in mind Tony’s earlier point that they may not already be active campaign organisations, they may just feel strongly about something. But they have to put themselves in the public eye to the degree that they may not have fully thought through, so it may not be the case in every case that we have those volunteers able and willing to come forward. It is clear that in the case of Wales we could not designate because we had applicants on both sides but on one side they did not meet the statutory test that was set out. It is clearly open to campaigners and there

is speculation already, it was one of the things that was thought about in the May referendum but in fact we were able to designate and I am very pleased that we were.

I do not think we have reached any firm conclusions about that beyond that we try to help as much as we can, and Tony can talk a little bit more about what we did in Wales with campaigners to help them understand what the regulatory regime looked like and what help and guidance we could provide to them. So, to be sure that it was not the regulatory framework that was putting people off. I think that is where our role is very important, to be clear, that we give as much help and support as we can so that people would not be put off from that side of things by coming forward. But beyond that I suspect it is a political choice and that might be something that Parliament would want to reflect on in terms of thinking about PPERA and whether that still is the right framework.

**Q13 Lord Crickhowell:** Did you have any strong representations from those who wanted designation but you were not able to proceed because one or more parties had not? Were there any strong views expressed to you by the parties taking part in the referendum or was it something that just sort of happened and then everyone had to live with?

**Jenny Watson:** By its nature I think it is something that happened and everyone had to live with. We did in fact in the case of Wales have 23 registered campaigners. We were not able to designate lead yes and no, but we did have 23 registered campaigners, which I think is a manifestation of the fact that there was no lead campaign organisation. I do not know if there is any more detail, Tony, that you want to add to that.

**The Chairman:** I think we are going to come on to talk about information in getting the public education correct. I know Lord Shaw wants to talk about that more generally but, Lord Rennard, did you want to make a point on the designation?

**Q14 Lord Rennard:** Well, particularly how it relates to the funding rules. It seems to me unfair to expect the Commission to have a view on whether or not there should be a level playing field and issues like that, so I will not ask you on that. But just on the practicalities, would it be possible for the Commission to be perhaps more proactive in publishing figures, if Parliament approved, week by week during the course of a campaign, about funding towards organisations, expenditure, things like that?

**Jenny Watson:** In terms of where we do designate the funding of those organisations I think it would not be a surprise if you were to turn to our report in the autumn and find that we did have something to say about the transparency of the funding of lead campaign organisations. Again I am mindful of the fact that parties have established mechanisms for doing this and campaign organisations may be very new and set up only for the purpose of campaigning in a referendum, so we need to balance the wish for greater transparency with what organisations can realistically be expected to achieve. But I think it would not be a surprise if you looked at the report in the autumn and we had more to say about that.

**The Chairman:** We will move on to public education.

**Q15 Lord Shaw of Northstead:** I imagine that much will be revealed in September when your report comes out. What assessment would you make of the Commission's public education activities in the run-up to both referendums? Do you feel that you got it right at the time? Because this is all about procedure and there is a danger in formulating that that you may give favour to some political view rather than another one. Is it entirely due to the political parties to take that up, which I assume it is? In other words, is there a check on your work to make sure that there is no political influence built in to your recommendations?

**Jenny Watson:** That is something that we are acutely conscious of at every step of the way of our public awareness work. Perhaps I can just explain to the Committee what we did. We chose in both the case of Wales and the case of the UK-wide referendum to produce public information material that aimed to tell people that there was a referendum, and in the case of 5 May that there were also elections; to explain to them what a referendum was, because of course not everybody knows that; to explain to them the question, so they knew what they would see on the ballot paper, and how they would cast their vote in terms of how you mark the ballot paper. We then chose to provide some additional information, so if I focus on the 5 May polls we aimed to tell the voter how they would cast their vote under first past the post and the alternative vote and how their vote would be counted under first past the post and the alternative vote. We did not go any further than that.

We tested all of our material on voters themselves. We had neutral academics give us input who were not involved in either of the campaigns in any way and we consulted plain-language experts in both English and Welsh. I think the most important part of that, though, is the voter testing. Because the aim of our public information material was to see if people understood that there was a referendum and the date and that they found that they could cast their vote with confidence. I have some early data from our monitoring of that—sorry, I should say we delivered that to every household in the UK through a door-drop and we also had alternative formats, for example, if you needed a larger print version or a British Sign Language version, and we had various translations on our website. We had a phone number that you could phone if you did not get your booklet, so we had two waves of advertising, one saying, "There is a referendum, look out for your booklet" and another saying, "You should have had it, if you haven't this is how you get one."

So, for example, before the campaign in relation to May, 9% of people knew there was a referendum and the date. After the campaign 60% of people knew. Before the campaign 30% of people knew that there was one question and how that would be asked, after the campaign 60% of people, and those rates were higher among those who recognised our advertising. So, we are monitoring specifically the reach of our advertising and public awareness campaign.

In Wales that was very similar I think. Before our campaign started only 20% of people could say something about what the referendum was about, after it 67%. So, I would say that money was well spent, we will have more data about that in our report in the autumn, and I think it showed the wisdom—while we published text on our website for people to look at and give us any comments—of not trying to agree something by negotiation between campaign groups. I think that would have been the wrong thing to do and would have dragged us into the politics of it.

**Q16 Lord Shaw of Northstead:** After it then, is that to say you received no adverse comments on the way you conducted it?

**Jenny Watson:** I understand we had some about the grammar in various parts of the material, and I think we did have calls to our public information helpline and I am sure some of those might have commented on one aspect or the other. But I have seen nothing that suggests that we were biased in one way or another, neither in the case of Wales nor in the case of the 5 May polls. I am very pleased about that because certainly our intention was to give accurate information to voters to enable them to cast their vote with confidence. That is absolutely our role and I would want to be robust about suggesting that anything we did was biased in any way.

**Q17 Lord Rennard:** There was a theme from the debates, in this House in particular, in regard to the referendum. Great anxiety was expressed by many members that there would be huge confusion in the polling stations, partly by presiding officers it was alleged, in terms of who they give ballot papers to, given the different electoral lists, and also confusion by the voters who it was assumed could not cope with two or three different pieces of paper all in the space of several minutes. I just wonder if you found any significant evidence at all of any of these sorts of problems that it was alleged repeatedly there would be if we had combined elections?

**Jenny Watson:** I will give you the short answer, which is no, and I will give you the longer answer which enables me to perhaps make some more points. No, we did not. I think part of that was because the directions that I issued did set out clearly things like the ratio of electors to polling stations and the number of staff in polling stations, and the fact that those staff had to be trained. So we did not have any issues around confusion or queues, which was a good thing. I also think the public awareness material helped. I think there were some examples on the day of in a few places people asking electors if they wanted all the ballot papers but we were able to get on to that very, very quickly and make sure that they knew that they offered all the ballot papers. But, no, we did not have any examples of confusion.

**Q18 Lord Rennard:** On the general issue of direction, if I may. I think you made a very powerful and very strong case for the Commission having greater powers of direction in general to ensure consistency in the standards of democracy, which we know depends on 400 training officers so sometimes there is inconsistency. I think it is particularly welcomed for example by disabled groups that things were tested and they were accessible and so on.

One particular point you made was very interesting to me in a slightly wider context. You said in Northern Ireland, because you were able to direct the polling cards to be delivered at an earlier point, 17,000 extra people were entered on to the electoral register. In the context of concerns in future it will be individual voter registration, which many of us strongly support, but we have fears of people dropping off the register of course at that time. Could you just tell us a little bit more about how, by doing the polling cards early in Northern Ireland, it is that if you notify some people they are on

the register and entitled to vote that more people then find out there is an election happening and go on the register?

**Jenny Watson:** Well, partly that would depend on your circumstances. I guess if it is coming through the same door and you are living in a house with other people and you do not have a poll card that is what prompts you. Or perhaps your parents get one and you have not had one.

But if I can perhaps take you back one step, which is to the issue of the forms and the notices, I think I said in my opening remarks that for the first time we had forms, notices, that had been tested on voters and therefore were easy to understand. I think that also speaks to the point about a lack of voter confusion. The posters in polling stations for the first time were consistent. They had been tested on voters. They would use pictures rather than having lots of confusing type fonts. We can provide the Committee with some examples of that. In postal ballot packs, we were able to do more to say, “This is the size of the font that you should be using. These are the kind of clear instructions that you should be giving.” Again that speaks to a lack of confusion.

In terms of poll cards—Andrew may want to supplement my memory—we were able to put on the poll cards not only the date of the poll, and therefore prompting people to go on the register, but also tell people, critically, that the polling stations closed at 10pm and you had to finish with your ballot paper by 10pm That is again giving people that information that they needed consistently, right throughout the country. Do you want to say a little bit more about the poll cards issue?

**Andrew Scallan:** I think in terms of the poll card issue and the point about who else might have been aware of it; if people have moved and they receive poll cards for previous occupants that may also be a trigger for people to get on the register. The poll card contains very simple information, it is not complicated, but when you do analyse what the statutory provision was it is more complicated than it needs to be. So, we were able because of the power that the Chief Counting Officer had for the referendum and these combined elections to simplify these forms and notices—and it will not be the same at next year’s elections—we were able just to make that very simple clarification that previously it said the hours of polls are 7am to 10pm and now it was 7am to 10pm but you need to be issued with your ballot paper before 10.00pm, which is a very simple message. We have not tested how many people have picked it up but it is a crucial clarification of what the law is so that people were aware of the need to be there.

**Q19 Lord Rennard:** If I can just focus on this. In Northern Ireland you estimated about 17,000 extra people went on to the electoral register as a result of these improvements in the methodology. Have you any estimate for the UK as a whole and, if not, if we could have that at some point, perhaps in your report in September, it would be very helpful in future.

**Andrew Scallan:** Northern Ireland, because it stands alone, is a lot easier to gather that information from one unit. Each of the counting officers will be reporting to us on the people who registered after the issue of poll cards, so we will have figures.

**Jenny Watson:** Just to return very briefly, if I may, to something that Andrew said. It is very important I think for me to get across to the Committee that we had this power

because of my role as the Chief Counting Officer and to be able to modify those forms and notices. That is another thing that Government could do, which would not be difficult to do, which would add greatly, I think, to voters' experience of a consistent service at elections, which would be to give the Commission the ability to modify forms and notices in the interests of the voter through the kind of work we have done on voter testing. It would not be difficult to do that in relation to all elections. It does not only have to be something that voters get in a referendum and do not get at any other time.

**Q20 Lord Crickhowell:** One specific point about multiple elections. An elector may be entitled to vote in two separate local authority elections. Are you satisfied that the instruction is clear enough that they are only entitled to vote once in the referendum? I did see it stated but I just have a doubt whether there is sufficient understanding that where there are different elections going on there may only be an entitlement to vote once on the general question.

**Andrew Scallan:** It is a very complicated issue. Because there is no central register there is no knowledge of who is registered where or how often they may be registered. Whether or not people exercise their right to vote in more than one place also will never be known unless you are aware of those particular details. So, it is not a message that is put out significantly by us because of the nature and the complexity of it. The law is clear though, that voting twice in the referendum, just as voting twice at the general election, is wrong; within each local authority area it is permitted by law. But it is an area that we have suggested previously needs to be looked at again.

**Q21 Lord Crickhowell:** Ought there not be a very clear statement made? I did see it on at least one card but I think only one, and it worries me that you may then get people voting at both ends on the referendum question when they should only vote once.

**Jenny Watson:** I do not disagree with the general point and I think, as Andrew says, it speaks to the need for a more wide-ranging look at the underlying system of running elections that we have inherited, which is largely trust-based. That is a great legacy to have but you also have to have appropriate checks and balances in place to make sure that it can endure in a different kind of society where, for example, the system is designed to work when you go in your polling station to vote and the person who is there knows you. In some parts of the country it is lovely, that happens, you will know everybody if you are the presiding officer, but in most parts of the country you will not, and that is an example of where our trust-based framework perhaps has not adapted to the needs of a 21st century society as much as it would have done. There are others; I could talk for some time about that but I will not.

**The Chairman:** There are stories about personation in Northern Ireland. The trust was not always there.

**Q22 Lord Pannick:** You mentioned a few moments ago the message that you communicated, the guidance you have given, is that because the polls close at 10pm, no ballot papers must be issued after that time. Happily, as you say in your letter, there were no reported problems about queues on 5 May, but we all know there was a problem last year and we must, of course, plan for what happens at the next general election. The law seems to me not to deal specifically with this question. All that the 1983 Act says in the schedule is that polling is between the hours of 7am and 10pm and the disadvantage of the approach that you are adopting is that the voter has no certainty as to what time he or she must arrive at the polling station in order to be able to cast their vote. My question is whether you have taken any legal advice on this specific question, may a ballot paper be issued after 10pm to a person who has turned up before 10pm but is unable to vote because of a queue?

**Jenny Watson:** I will let Andrew answer that specific point because there will be quite a bit to say on that, but I just want to make it very clear that we are not happy with the law as it stands and we would like to see the law as it stands changed to give flexibility at close of poll. There is a lot one can do in the planning process to make sure that you get as far as you can in planning and delivery not to have queues, but if you do have people turning up just before 10pm for whatever reason the only way that they can get to vote is for there to be flexibility, as many other democracies have, so that if you are in a queue at 10pm there is flexibility at that close of poll to—

**Q23 Lord Pannick:** So, you think that is desirable?

**Jenny Watson:** Absolutely desirable.

**Lord Pannick:** But you think the law at the moment stops returning officers adopting that sensible approach?

**Jenny Watson:** Yes, it is very clear.

**Andrew Scallan:** There are decided cases from 1901 and 2001, which are the precedents that we looked to to give the interpretations of the law. So there are cases that were decided. The law talks about the issuing of the ballot paper and the nature of the issue and there is a process that has to be gone through, and those decided cases say those processes need to be gone through. It is not about being within the confines of the polling station.

**Q24 Lord Pannick:** And you have asked Government to amend the law in this respect, have you?

**Jenny Watson:** Yes, we have.

**Lord Pannick:** And have you had a negative response?

**Jenny Watson:** I think it is fair to say that so far the response has been, “We don’t quite see the case as made” and I think we will continue to make the case.

**Lord Pannick:** But you say the case is based upon judicial precedent.

**Jenny Watson:** Well, the case is based upon the fact that you cannot issue a ballot paper after 10pm and therefore, to be sure that we can avoid a situation as happened in May 2010, we have to have flexibility at close of poll. Many other democracies have it. It is not something that is problematic to operate.

**Q25 Lord Pannick:** Have you published any paper that summarises what you see as the legal impediment to you giving guidance to returning officers that they can issue papers after 10pm? Have you published any submission you have made to Government? Have you published their response?

**Jenny Watson:** They could not issue a ballot paper after 10pm as the law currently stands and I think our guidance is extremely clear—

**Q26 Lord Pannick:** I am asking if there is any background paper that explains the problem as you see it and the submission that you have made to Government as to why the law needs to be changed, just so we can be informed as to what the problem is.

**Andrew Scallan:** Yes, we did. We reported on the queue issue within two weeks of the last general election. In that paper we set out precisely what had happened across the 27 authorities and also set out the legal position and explained in terms why we think that it is about managing people who are there at 10pm, because of the very point you made, how can anyone know what time they need to be there?

**Q27 Lord Pannick:** Could I just ask one more? Have the Government responded to that formally?

**Andrew Scallan:** No, they have not responded to that report formally.

**Q28 Lord Pannick:** You have chased them for a response, and it is now a year later?

**Andrew Scallan:** We chased Government on this point at briefings through the legislation before the House on the voting system Bill. It is a point of contention with Government and we raise this at every available opportunity.

**Jenny Watson:** I would be happy to send you a copy of that report.

**Lord Pannick:** Please.

**Q29 The Chairman:** That would be very helpful. May I just ask you also—I think it would be useful if you can perhaps summarise it briefly now—if we could know

something of the flexibility which you describe which happens in other jurisdictions. What sort of flexibility? Because I can imagine all kinds of legal disputes about the organisation of polling stations. Is someone queuing on the premises or in the street and so on? I just wondered if you could give us a flavour of the other flexibility.

**Andrew Scallan:** I think it is very often authorities in jurisdictions which do not have the same length of polling hours that we have. We do have very long polling hours. What will happen typically is that as the time for close of poll approaches a member of the staff in the polling station will position themselves at the door and watch what is happening. If a queue is created that extends outside the polling station then they position themselves at the end of the queue.

**Q30 The Chairman:** The polling officer does?

**Andrew Scallan:** Yes, and in the scenarios that we offered to Government as alternative ways of managing this queue, if necessary, depending on the circumstances, then we would hope that the returning officer in their usual contacts with the police would involve the police to help should the situation involve huge numbers of people or people who are in a particular mood.

**The Chairman:** That was the problem, wasn't it?

**Jenny Watson:** I think if I may, you have just illustrated one of the reasons why perhaps Government is still taking its time to think some of this through. I am firmly of the mind that that flexibility is desirable and other democracies do manage it and seem to manage it without any degree of difficulty, and we will continue to make the case for that flexibility.

**Q31 Lord Irvine of Lairg:** I am rather puzzled because it seems to me that one of two principles might be correct. First of all, provided you present yourself at the polling station before 10pm then you have a right to vote. The alternative proposition is you have to succeed in voting by 10pm. Then you are dependent upon the vagaries of the situation in relation to queuing and you mentioned bringing the police along. Well, I do not really know what the police are meant to do because you have to resolve this question of entitlement. Lord Pannick asked you whether or not you had received any legal advice on this, by which some lawyer, highly experienced in electoral law, would have given you his or her opinion on the decisions to which you refer. What is the answer to that question?

**Andrew Scallan:** I think the decided cases—

**Lord Irvine of Lairg:** But you need advice on it.

**Andrew Scallan:** We have had internal advice on the decided cases.

**Lord Irvine of Lairg:** From a lawyer?

**Andrew Scallan:** Yes.

**Lord Irvine of Lairg:** And that is a lawyer that is employed directly by the Commission, is it?

**Andrew Scallan:** Yes, and the decided case says, just to clarify, that if the ballot paper is issued by 10pm the voter can then take almost as long as they like to complete it, but it is the interpretation that has been taken about the issuing of the ballot paper that needs to be completed before 10pm.

**Q32 Lord Irvine of Lairg:** But the issue is whether if somebody pitches up before 10pm he is entitled to receive a ballot paper and therefore entitled to vote, or not entitled to receive a ballot paper despite having turned up before 10pm, in which case the voter is completely dependent upon the discretion of the officials on site. It just does not work.

**Jenny Watson:** Precisely, and that is why we have argued that the flexibility at close of poll is needed because the decided cases make it clear that if you turn up and there is a queue and therefore you do not get issued with your ballot paper by 10pm you are not entitled to receive one and to cast a vote, so in order—

**Lord Irvine of Lairg:** Even if you have turned up on time?

**Jenny Watson:** Yes. It is extremely clear, and it may be—

**Q33 Lord Irvine of Lairg:** You say it is extremely clear. To whom is it extremely clear?

**Jenny Watson:** Through the decided cases it is extremely clear to us.

**Lord Irvine of Lairg:** At what level are these cases?

**Jenny Watson:** We will have to check and will write to the Committee formally about that. I am afraid I cannot remember.

**Lord Irvine of Lairg:** I think if you could assist us by giving us a note on the decisions and the internal advice you have received within the Commission, I am sure that would aid our deliberations.

**Q34 The Chairman:** It certainly would, because in the description you gave in answer to my question on the potential for flexibility where a polling officer, for example, stood at the end of the 10pm queue, that polling officer could equally well, as he walked down the queue, hand people a ballot paper. I am not sure whether that would be regarded under the present law as appropriate and legal or not.

**Jenny Watson:** Except that would not count as the legal issuing of a ballot paper. When we first discussed this, some of the questions we were asking internally were precisely these questions and having worked those through and given what has to be done legally

to issue a ballot paper it would not be possible for that to happen as somebody is going down a queue.

**Q35 The Chairman:** Yet it would be possible for a polling officer to stand at the end of the queue?

**Jenny Watson:** And say, “This is the end of the queue and at this point, at 10pm, these people can proceed through and be issued legally with a ballot paper. These people arrived after 10pm and could not.”

**Q36 Lord Irvine of Lairg:** That would be fine if people pitched up to vote before 10pm, stood in a queue, were not dealt with but they have an entitlement to receive a ballot paper by reason only of having pitched up before 10pm. Is there any uniform practice across the country in relation to that issue?

**Jenny Watson:** Yes, it is extremely clear. If you turn up before 10pm and you are issued with a ballot paper you can vote. If you are not you cannot be entitled to vote.

**Q37 Lord Irvine of Lairg:** Pausing there, the point of principle should not be whether you are in fact issued with a ballot paper; the point of principle should be whether you have pitched up in time to be entitled to a ballot paper.

**Jenny Watson:** I entirely agree with you and that is why we need the flexibility at close of poll to enable those who pitch up and are entitled to be issued with a ballot paper, even though the 10pm moment has passed.

**Q38 Lord Irvine of Lairg:** But you do appreciate that I am for my part calling in question the proposition that it is dependent on whether you have been issued with a ballot paper before 10pm. My question is whether it is sufficient to turn up and be entitled to a ballot paper, therefore, before 10pm.

**Jenny Watson:** We will write to you and perhaps come and have a conversation with you outside of this forum. That would be very useful.

**The Chairman:** As you said in an earlier response to Lord Irvine you are working on the basis of judicial cases in the past. But as Lord Irvine also asked, at what level were these cases and are they in fact now challengeable in some sense? Because I think that is obviously the nub of what you are discussing with the Government. Thank you very much, that would be very helpful.

**Q39 Lord Renton of Mount Harry:** I would only say first, I having fought many elections and so forth, have never known a case in which someone who turned up

before 10pm was not given a ballot paper and allowed to go into the booth after time. But beyond that can I just make the point, before we change the law too much, that there is a very good reason for ending at 10pm, which is simply that if you do not a lot of people will turn up later and later knowing that they are going to get a vote, whereas in point of fact what the vast majority want to do is get on with counting the result, meet in the town hall and decide by 1am or 2am who is going to be their next MP. That is the drive behind this of course, because everyone who has been involved since 7am thinks it has all gone on far too long already and the first thing now we want to do is to meet in the town hall and decide who is going to be the next MP, and do it in time for the next day's newspaper.

**Jenny Watson:** Those are some of the things that Parliament would want to discuss if this proposal were brought before it, I am sure.

**Lord Renton of Mount Harry:** This is the meat of the thing or if you like the dirty meat of the matter, but by and large it has worked extremely well.

**Q40 Lord Irvine of Lairg:** Contrary to what Lord Renton has said, citizens have an interest in not being disenfranchised if they turn up before 10pm.

Do you have any experience of there being a want of resources in the polling station? Let us suppose the queues have been there from before 10pm; are people in such queues in practice being denied ballot papers or not?

**Jenny Watson:** If I can perhaps remind us of what happened in the Westminster general election in May 2010 where there was a great deal of publicity given to the fact that I think in 27 polling stations there were queues. That is a small number of polling stations out of the full number but there were people in queues, some of them for some time, who were unable to cast their vote.

**Q41 Lord Irvine of Lairg:** Did they get ballot papers?

**Jenny Watson:** They were not issued with ballot papers because they were still queuing by the time 10pm came.

**Q42 Lord Irvine of Lairg:** But pausing there, they had presented themselves to the polling station before 10pm.

**Jenny Watson:** Yes. We are not in dispute about that. Our point following from that is one of the reasons we issued the directions we did this year for the election and referendums was so that some of the planning would be done differently. For example you would have more staff in polling stations. You would have fewer electors. Our guidance has always said 2,500 electors. The particular polling station in Sheffield had 4,500 electors. Things like that can be put right well in advance of 10pm. There is no need to get to that stage. However, if you do find yourself in a situation where there is then a queue at 10pm, if you have not been issued with a ballot paper, under the law as

we understand it and as the settled cases say, you cannot be issued with a ballot paper and you cannot vote. So yes, I am afraid that there has been that experience and there were people—we think around 1,200 people in May 2010—who were not able to cast their vote. That is, again, not a significant number of people but for those people and for the health of our democracy that cannot be a good thing.

**Q43 Lord Irvine of Lairg:** Absolutely, but the way you describe the law is as if the risk of want of resources in the polling station is on the elector who turns up in time.

**Jenny Watson:** In the majority of cases the reason that queues arose was due to poor planning assumptions on the basis of those delivering the poll. Say for example, they had estimated a very much lower turnout than happened; they did not have enough staff; they did not have the right number of electors per polling station. I do not disagree with you that better planning can help to put that out of play.

It is worth reminding the Committee that of course we have the ability to prevent a lot of that happening through working with local authority staff with directions this time around. For the next Westminster general election for example we will not, under the current plans, have the ability to issue directions and it will again be open to returning officers to make their own judgements and their own assumptions about some of those issues. There will be more that we can do with the development of our performance standards to try and prevent that happening but without that clear legal direction, it is possible for that situation to arise again.

**Q44 Lord Pannick:** Would you agree that however good the planning, the issue of principle still arises? The principle we have been discussing needs to be sorted out and that is why other countries have the flexibility mentioned.

**Jenny Watson:** I would very strongly agree with that.

**Q45 Lord Shaw of Northstead:** I was going to move to another question. After the votes have been taken, what happens about the verification of votes? You said in your speech to the Constitution Unit that you were genuinely taken aback by the readiness of some electoral administrators to write off potentially significant differences in the numbers of votes verified and the number counted as inevitable, and nothing to worry about. Why is this such a concern for you and not for the local returning officer?

**Jenny Watson:** Perhaps in order to answer that I can take you back to the point of verification because it is an important point and it is one where we place a great deal of stress in emerging democracies and transitional democracies. The point of verification is to make sure that the ballot papers arriving at the count match those that have been issued and put into the ballot box, and that the votes that are counted then can be tied back to the number of votes that you think you are counting from the verification stage. The point that is important to us is that that is a very important check in the process. Under the system that we have historically had—first past the post—it may be that the size of majorities perhaps hide some of the lack of ability to tie back from the ballots

cast to the verification record. But as we move to a situation where we have a number of different voting systems being used throughout the country and where majorities may not be so large, it is very important that there is a clear audit trail that can explain any discrepancies. I did not mean to suggest in my speech that there were huge, random differences all over the country and I should stress that we tackled it for the referendum because I had the ability to issue directions about how the verification process would be carried out. But I think the important thing in all of this is that the audit trail is clear. If you are a candidate and it is a close result and there are discrepancies, you will want to be sure that the returning officer or the counting officer can explain how those have arisen. That is what took me aback; the expectation from some people that the numbers would not match because they almost never do and we all know that. I do not think that that is the right kind of approach to be taking going into that process. So I think we will do some work more widely about what happens at counts and the timing of counts which would include explaining to everybody why verification is so important and why it is a critical part of the process.

Is there anything more you want to add to that?

**Andrew Scallan:** No.

**Lord Shaw of Northstead:** I would support that by saying that I once was about to lose a seat, or not gain a seat, by about 151 votes and it came about that on investigation a bundle of 50 had got into the wrong box which immediately reduced the whole thing to a recount again. I am afraid it ended in my not winning by 47 but a recount is absolutely essential. I have to agree with you.

Lord Hart, you had a point specifically on the verification in Northern Ireland.

**Q46 Lord Hart of Chilton:** Among our papers we have a clipping from the *Belfast Telegraph* headlined “Politicians United in Anger over Shambolic Election Count” and the problem seemed to be in relation to the ballot verification or the counting process. Can you help us a little on that? What happened?

**Jenny Watson:** I should say first of all that the chief electoral officer in Northern Ireland is conducting his own review into the processes that were used at the count and we will be part of that. I very much welcome his openness in doing that. I should say also that it is important that there is no doubt about the accuracy of the results in Northern Ireland. It is simply the question of the time that it took.

There are three polls in Northern Ireland. There was always an intention to count the local authority count starting on the Monday. It was very clear, certainly to us and I think to others, that there would never have been an expectation of having results for the full Assembly for some time on the Saturday. But there were certain aspects of that process that took longer than I think we all hoped that they would and some of those were resourcing issues and some of those would be process issues and I think we need to wait for that review to draw any definitive conclusions around that. Is there anything else you want to say?

It does enable me to make one further point though, which is we have again called for there to be some research on the combination of polls. We have asked the

Governments but particularly the Government here at Westminster to move on that research because there are issues which arise from the combination of polls not all of which are related to the practical delivery of the polls; some of which relate to voter-facing issues. I would just like to let the Committee know that we have called for that research to be carried out because there are proposals to combine elections in the future and it is possible, depending on a bill which I know is currently being debated about the future of this House, that some of those elections may happen at the same time as a Westminster general election. It would be desirable I think if that research could be conducted and published so that we can be clear about the interest of voters well ahead of that date.

**Q47 The Chairman:** That is interesting because in response to Lord Rennard earlier you said that you felt there was no confusion from the electors' point of view, from the voters' point of view, about the combination of polls but you think there are other issues which do arise.

**Jenny Watson:** Yes. I think this was in the case of a referendum and elections. I think that would not always necessarily be the case of the combination of different kinds of elections. So one of the questions that we think does need to be answered, for example, is if there are two elections to different bodies being held at the same time, can voters differentiate in their own minds who they are holding to account for what and who has the lead, if you like, on certain sorts of policy issues which might affect them. That is the sort of thing which did not arise in relation to 5 May at all and so there was no confusion. But we would like to see some research carried out on that for the future.

**The Chairman:** We would like to be kept in touch with that, too. That would be very helpful.

Now I think we should turn to Scotland; Lord Renton.

**Q48 Lord Renton of Mount Harry:** The First Minister, Alex Salmond, now has a clear majority in the Scottish Parliament and he has made it publicly known that he proposes to have a referendum—not immediately but perhaps in two or three years' time when he has been in office for longer—on Scottish independence. Now I wonder very much what your views would be about the relative responsibilities in this of the UK Government and the Scottish Government. What is your perspective and in particular what role do you anticipate yourselves having in relation to a referendum held under the legislative authority of the Scottish Parliament?

**Jenny Watson:** We are at the stage at the moment where Governments are talking to each other and that is not something to which I think I can add anything that would be helpful. I am sure at some point we will see some concrete proposals and at that point we would want to comment on those.

We now have the experience of running referendums, we have the experience of testing the question, of running public awareness, of administering a poll, of regulating and designating campaigners, and we would want to bring that experience to bear to make sure that any future referendum is conducted in the interests of voters. But I would not

want to comment further about how we might do that until we have some concrete proposals to look at. Much of what is happening at the moment is speculation and I do not really think I can add anything that is helpful to that.

**Q49 Lord Renton of Mount Harry:** I am not surprised by your answer but I think first of all that we would very much like to hear when you have thought more about this. It is not as if there is any secret about what the First Minister is proposing because he keeps on telling us. It would be very interesting to hear more of your views in due course.

**Jenny Watson:** I am sure there will be an appropriate time for us to be able to share those views with you. I would perhaps just remind the Committee that in the context of Scotland there is also an electoral management board which is established in statute with powers at the moment to run local authority elections. We very much welcome that fact that that has been established in statute. It has the power of direction for those local authority elections which goes to the wider point perhaps about why we have powers of direction for some polls and not for others. That will obviously need to be factored into any future developments but we will come back when we can and tell the Committee more about our thoughts when there are some concrete proposals, if we may.

**The Chairman:** Thank you. We have all been very generous with your time but I think we would like, before we end, to get a broader perspective on the meaning behind some of the words you used both in your letter to me and in the speech you gave at the Constitution Unit about really looking for some fundamental reform of the electoral system and modernisation and so on.

**Q50 Lord Irvine of Lairg:** I found your letter to our Chairman extremely interesting. You said in the third paragraph, "First we want the Government to bring forward a comprehensive plan for ensuring consistently effective management and delivery of future elections." If there is anybody that is well able to advise Government on what the elements or principal components in such a plan would be, it is you. What in your view would be the principal appropriate components of such a plan?

Just so as not to take up too much time with separate questions, I want to ask you the same question in relation to the next paragraph of your letter, "Second, we want the Government to bring forward proposals for a comprehensive electoral modernisation strategy to set out how it intends to address significant policy issues." Again, what would the principal components of that strategy be?

**Jenny Watson:** I think I have suggested what some of those might be in relation to the second part of the question.

**Lord Irvine of Lairg:** It would be helpful if you could summarise them.

**Jenny Watson:** I think this comes back to the point that I made, I think, in answer to Lord Crickhowell's question. The system that we have, which is a great legacy to have, is largely a trust-based system. It was designed at a time when probably about 5 million

people had the right to vote. We now would expect or hope that around 45 million might exercise their right to vote. Clearly a system that is designed for that time and in that period is going to need to be developed to address the needs of a modern democracy. So one of the things that I have consistently talked about here is the need for greater consistency in the way in which elections are delivered across the country and for voters to receive a consistently good service, and I might say also for candidates to receive a consistent service and have rules that are easy to understand. So those I think are the kinds of principles, or some of the principles, that would underpin the effective management and delivery of future elections. When we have talked about this before, and you may remember, because I think we published it during the lifetime of the last Government, some proposals were made for the introduction of electoral management boards that could take on those responsibilities say on a regional basis. We now have an electoral management board in Scotland. We have in the case of the London elections in May, a Greater London Returning Officer with the power to issue directions. We have directions in the case of European elections. We have directions in the case of a referendum. I think it is now time for Government to lead a debate about whether there is a case for greater consistency in delivery of elections for the benefit of voters and of candidates. That would be one of the questions that I would want to see addressed in that kind of a debate.

**Q51 Lord Irvine of Lairg:** Just pausing there; that is you addressing the comprehensive plan for ensuring consistently effective management.

**Jenny Watson:** Yes, and if I may, at the moment what we have is the situation where these things are very often tackled on a bill by bill basis. I referred earlier on to the police and crime commissioner elections where there is no plan to have any consistency. There is no power for any kind of direction. I do not say this always has to be us. This is not a land grab. This is raising the case for a debate about the way we run elections in the 21st century and beyond.

In relation to the electoral modernisation strategy, we have a system which has fragmented accountability through those individual returning officers. Yet we also quite often have debates about, "Wouldn't it be great if we had e-voting? Wouldn't it be great if we had whatever new initiative there is?" Those things cannot be considered in isolation. They need to be part of a comprehensive look at the way we do democracy; seeing what is needed for voters in order that they can fully participate. So to give you an example of that, many democracies around the world now no longer talk about the concept of polling day. They have polling periods. They have advance voting where you can go and vote in person ahead of polling day. That is an example of something which I think Government could consider as part of an electoral modernisation strategy. We are not tying our colours to the mast and saying this is the only way to do it. I certainly think that there is a need for more advance voting. We have called for that. Another area that might be part of such a strategy might be for example whether we now think it is appropriate that voters should bring ID to polling stations. We have never historically had to do that. We are in a very different age from when everybody would expect to know you when you walked in to vote. That is another example of the kind of thing that would need to be considered in a modernisation strategy. Those things need to be considered in the round and against the backdrop of having had a debate, or having a debate, about greater consistency otherwise we simply introduce more new initiatives

into a system which is already, I think, in some cases not coping as well as it could do. Is there anything that you would like to add to that, Andrew?

**Q52 Lord Irvine of Lairg:** I certainly found that an extremely helpful answer. Now before we leave it, are there any other headline points you would like to make as to what the components of the comprehensive plan, and/or the strategy, might be?

**Jenny Watson:** I think I would refer you to some of the things that we said in our report after the May 2010 elections, which of course I helpfully do not have in front of me to run through the whole, full comprehensive list, but I would be very happy again to write to the Committee in more detail about that issue.

**Lord Irvine of Lairg:** I think that would be very welcome.

**Jenny Watson:** I would welcome the opportunity to do that and I do think the time has come for us to be addressing these questions because we need to keep the habit of democracy and the habit of participation. We do not talk very much about turnout at the Commission because it is not something by which we measure our performance. We take the view that there are candidates who are best placed to inspire that turnout but the health of our democracy is a concern to all of us. I think having a way of running our elections that best enables as many people as possible to participate must be the right thing to do.

**Q53 Lord Rennard:** Just very briefly on these issues, it is a question of what criteria you have for modernisation. Since everyone will agree the first criterion is accuracy of the poll, would you agree that the second criterion for this then is the convenience for the voter, to make the voting process as user-friendly, if you like, as it is possible to be? If you decide user-friendliness is the important thing, you can argue that it is convenient for the voter to vote early—10 days in advance—but are there not threats to the democratic process that events emerge during the election campaign, perhaps two or three days out, that mean that people who voted 10 days before polling day, as in the old polling day, cannot take their votes back? It is therefore a significant problem and, as you will know, a constant theme that I have but not everybody shares is that convenience for the voter would be maximised by saying you can vote on a non-working day. Is it not almost by definition problematic for many people who are going to work? It is difficult for them to vote when there was only one day of polling and it is on a working day and so therefore we get a disproportionate number of retired people in elections because they do not have the problems of going to work on the day. They can vote at their leisure during the day. Therefore should we be considering, more than the Commission perhaps has considered so far, the idea of voting on a Saturday and a Sunday?

**Jenny Watson:** On your first point about the accuracy of the poll, that is absolutely right. I think a number of the things one might want to look at in terms of the modernisation strategy would be about accuracy and security. It is not all about voter accessibility.

There clearly is a case. We ask voters after each poll, “Did you vote and if you did not, can you tell us the reasons why you did not?” One of the themes that comes up is, “I ran out of time”. Now, one has to take what voters say at face value in that case. For those voters who ran out of time, it clearly would be beneficial if they did not only have one day on which they could vote, assuming that they had not thought in advance about applying for a postal vote. You are right, of course, that there will be events during a campaign and I suspect that the people who might choose to utilise such an advance voting option would make their own judgement about whether they were prepared to run that risk. After all, they would have to run that risk in the case of postal votes because they would need to be filling in a postal vote and returning it sooner. I think people clearly are comfortable with that judgement.

**Q54 The Chairman:** Have you taken a view on electronic voting?

**Jenny Watson:** I was going to come to the point if I may about weekend voting and then I will come to electronic voting.

The last consultation that was held on weekend voting was not conclusive. I think, again, there are issues with weekend voting about which day of the weekend you choose, particularly in relation to people from particular faith groups where one or other days of the weekend might be perhaps difficult. In our view one might as well address some of those issues by having an advance voting period as having voting move to the weekend.

On electronic voting, Andrew, can I ask you to say a little bit about that?

**Andrew Scallan:** On electronic voting we have not formed a view per se. The previous Government had a number of pilots on various methods of electronic voting and access to the polling process. What we said at the time, when the pilots finished, was that in bringing forward any plan around electronic voting there needed to be absolute certainty and assurance about the nature of the trustworthiness of any system that was brought forward and in doing so there needed to be a question about accreditation of any suppliers. So we have certainly considered it. In terms of bringing forward a policy around electronic voting we would look to Government and we have set out for Government what we think should be the principles they would look to.

**Jenny Watson:** One of the challenges of electronic voting is if you are thinking about internet voting which I assume was behind your question—

**The Chairman:** Yes, I was.

**Jenny Watson:** —is getting a balance between having a system that is open enough for people to be able to scrutinise it and be sure the vote has been cast in the way that is intended but secure enough for you to be sure that your vote is cast in private. At the moment it does not seem to us that there is a balancing point there.

**Q55 The Chairman:** You have been very kind in saying you would let us know more about your conclusions on various matters that we have raised, thank you very much. We would look forward seeing some written material on that. You also replied to Lord

Irvine that you could let us have an overview of your comments on the 2010 election in that respect, on modernisation.

There is one further specific matter which you may indeed say you want to write to us again about which is the question about the problems in Wales after the poll about members saying for example that they had been disqualified because they had been given inadequate information by the Electoral Commission, which I understand is still a live issue. Can you comment at all on that?

**Jenny Watson:** Given that it is still a live issue and is likely to be considered by the Crown Prosecution Service I really think that it is probably not sensible for me to comment at this point but I will give you an assurance that we will write to you whenever I am in a position to be able to do so.

**The Chairman:** That would be very helpful. I am afraid this communication is going to be rather long but it will no doubt be very interesting and thank you very much. Thank you all for your extremely valuable contributions. It has been a very interesting session. We look forward to further communication from you in writing and hopefully another oral evidence session when we can pursue some of these matters at a later date.

Thank you all very much indeed.

**Jenny Watson:** It has been very useful. Thank you very much.

## APPENDIX 2: CORRESPONDENCE WITH THE ELECTORAL COMMISSION

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### Letter from Jenny Watson, Chair, 1 July 2011

#### *Follow-up to Electoral Commission Oral Evidence Session*

Thank you for allowing me and my colleagues to come and give evidence to you are your Committee last week.

At the session we undertook to write to you on a few issues in follow up to the discussions. To this end, I am enclosing a letter from Bob Posner, the Commission's internal Legal Counsel, setting out the advice we received about the issuing of ballot papers after 10pm. We have also approached Lord Irvine to offer him a meeting to talk about this issue.

I will write to you shortly with more details on our thoughts around a comprehensive electoral modernisation plan for ensuring consistently effective management and, once the Welsh Assembly have concluded their investigation, the events leading up to the problems in Wales and the potential disqualification of two Welsh Assembly Members.

We will also ensure that you are kept up to date with our thoughts on our role in relation to any referendum in Scotland and on the combination of polls and any progress we make in encouraging the Government to undertake a programme of research into the impacts of combination on the voter.

Finally, we undertook to let you know our estimate of how many voters across the UK registered to vote as a result of the early issue of poll cards. Our report into the administration of the elections and referendum, which is due to be published in the autumn, will contain statistics that will show how many people registered to vote after poll cards were issued. However, it won't be possible for us to establish how many of these late registrations were directly attributable to our direction on the delivery of poll cards. We will make sure that you and your Committee receive copies of this report as soon as it is available.

### Letter from Bob Posner, Legal Counsel, Electoral Commission, 1 July 2011

#### *The procedure in polling stations at the close of polls*

When the Chair of the Electoral Commission gave evidence to your Committee last week, it was suggested that it would be helpful if we could provide more information on the legal basis and the relevant case law on the procedure in polling stations at the close of polls.

The Commission's report on the problems with queues experienced at some polling stations at the May 2010 UK Parliamentary general election set out the statutory framework for providing and managing polling stations. Paragraphs 2.35 to 2.43, on pages 12 to 14 of the report, explained the statutory references and highlighted the relevant case law. I have enclosed a copy of the report for your information.

In summary, the Representation of the People Act 1983 sets out the legislative basis for the appointment and duties of (Acting) Returning Officers for UK Parliamentary elections, and the Parliamentary Elections Rules in Schedule 1 to the Act set out the detailed rules for the conduct of the poll. Rules 32 to 43 set out the specific procedures to be carried out by Presiding Officers during the poll.

As my colleagues mentioned to the Committee last week, the Courts have previously considered the position where electors have turned up to vote but have

not been able to cast their ballot by the stipulated time for close of the poll. The two relevant cases cited in our report were the West Division of the Borough of Islington [1901] 5 O'M & H 120; and Fermanagh and South Tyrone [2001] NIQB 36. In order to inform the Commission's report, I produced an advice note on the applicable law on 10 May 2010. In doing so, I sought input and advice from Timothy Straker QC, a leading specialist in election law. A copy of my advice is enclosed.

I hope that you and the Committee find this information useful. We would of course be very happy to provide any further information on this or any other issue arising from the evidence session last week.

**Note by Bob Posner Legal Counsel, Louise Footner Senior Lawyer, 10 May 2010**

## **THE LAW**

### **VOTERS UNABLE TO VOTE BY 10PM**

#### **CONTEXT AND SCOPE OF THIS ADVICE NOTE**

The context for this note is that at some polling stations, at the general and local elections, some voters were unable to gain access to the polling station prior to the close of poll at 10pm by reason of queues to vote having formed or, in other cases, there being an insufficiency of ballot papers.

This note does not specifically address the (similar) law applicable to local elections. However, the law relating to the process on closure of the poll is the same.

#### *Applicable law*

The law requires by section 23 of the Representation of the People Act 1983 that proceedings at a parliamentary election are conducted in accordance with the Parliamentary Election Rules set out in Schedule 1 to the Act.

Local Elections have to be conducted in accordance with rules made under section 36 of the 1983 Act. Such rules have to apply the Parliamentary Election Rules with the possibility of there being some adaptations, alterations or exceptions: section 36(2). Accordingly, the position in respect of local elections can be expected to be the same as for parliamentary elections subject only to a check of the local election rules for an alteration. In respect of the principles behind the operation of an election timetable there is no difference.

The Parliamentary Election Rules require that an election be conducted in accordance with a timetable. The timetable is obligatory. The Rules use the word shall. Polling in the case of a general election is given by the first rule, timetable, as between the hours of 7a.m and 10p.m<sup>9</sup>.

The Rules provide no scope for variation of the timetable subject only to the following point given by rule 42. If the proceedings at any polling station are interrupted by riot or open violence the presiding officer shall adjourn the proceedings till the following day and shall forthwith give notice to the returning officer. The hours for polling on the following day shall be the same as for the original day.

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<sup>9</sup> Rule 1 stipulates that polling is between 7am and 10pm on the day of the election

Given that the Rules demand and require a particular timetable and given that there is no scope for variation (other than the provision about riot or open violence) there is no scope to permit any polling outside the hours mentioned.

The Courts have made it plain that Parliament has conferred duties but not discretions on returning officers. The rationale behind that proposition is that the imposition of duties but no discretion secures that returning officers can never act in a way which is or appears to be partial, judgmental between candidates or arbitrary: *R (Begum) v Tower Hamlets* [2006] LGR 674 (paragraph 7 (precise timetable) and paragraph 21); *R (De Beer) v Balabanoff* [2002] EWHC 670 (paragraph 18 (no scope for bending the rules, give even treatment to every candidate) paragraph 28 (the fewer occasions a returning officer is called upon to exercise questions of judgment and thereby lay himself open to criticism by a candidate the better)).

Polling, which is the process by which voters vote at polling stations and which is limited to the hours of 7 to 10, is described in a sequence of rules beginning at rule 32. These rules were changed by the Electoral Administration Act 2006. However, it should be noted that the rule, 37(1)(d), as to signature is not in force.

The essence of the polling rules is as follows. Save for certain categories of people the presiding officer has to exclude all persons from the polling station. The presiding officer is required to keep order at his polling station and to regulate the total number of voters to be admitted to the polling station at the same time. (It follows that there are bound, from time to time, to be voters waiting outside). A voter applies for a ballot paper but before delivery of it certain steps have to be taken including the marking of the register. (The language of application will be capable of being traced back to the Ballot Act 1872 and the process of application with marking of the register will necessarily affect the speed at which a polling station can deal with voters. This will have a consequential effect if voters are waiting outside). A voter on receiving a ballot paper is required<sup>10</sup> by rule 37(5) forthwith to mark his paper and then having shown the presiding officer the back of the paper to put it in the presiding officer's presence in the ballot box.

The close of poll is at 10.00 pm<sup>11</sup> but because polling includes an application for a ballot paper and its issue which has then forthwith to be marked by the voter one would expect that a voter issued with a ballot paper at, say, 9.59 would be able to put it in the ballot box at say 10.01.

Accordingly, Schofield's Election Law records (paragraph 10.11) that at the close of poll no more ballot papers may be issued but when ballot papers have been issued to voters before the time for closing the poll, time must be allowed to mark them and put them in the ballot box. Reliance for that proposition is placed on a case namely *Islington* (1901) 5 O'M & H 120.

The preceding position found expression in the *Fermanagh and South Tyrone* case 2001<sup>12</sup>—Some (approximately 15 to 20—in a total of 924) ballot papers were apparently issued to waiting voters after close of poll at 10pm in a constituency

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<sup>10</sup> Voting procedure Rule 37 provides that a ballot paper shall be delivered to a voter who applies for one and sets out the process that must first occur before the ballot paper is 'delivered'. The voter, on receiving the ballot paper, shall forthwith proceed into one of the compartments and mark the ballot paper. The voter must vote without undue delay and must leave as soon as he has put his ballot paper into the ballot box.

<sup>11</sup> Rule 43 sets out the procedure on close of poll, which obliges the presiding officer (in the presence of any polling agents) to as soon as practicable after the close of the poll seal ballot boxes and take other closing down actions relating to election papers, and then deliver the same to the returning officer.

<sup>12</sup> *The Matter of The Parliamentary Election For Fermanagh and South Tyrone Held On 7 June 2001*, High Court of Justice in Northern Ireland, Unreported (this footnote added on 28.06.2011)

where the result was close. The time that last ballot papers were issued was in dispute and ranged between 10.05 and about 10.23pm. The court (relying on the *Islington 1901* case referred to above) acknowledged that so long as the voting papers were issued by 10pm, if electors marked them and deposited them in the boxes without delay the votes were valid. The court found the election to have been conducted substantially in accordance with the law as to elections, and so upheld the declared outcome of the election.

Thus, :

A ballot paper must have been delivered to an elector in accordance with Rule 37 before 10pm;

An elector is entitled to mark a ballot paper so delivered, and put it in the ballot box, provided he does so ‘without undue delay’ bearing in mind that he must on receiving the paper forthwith proceed into a compartment to mark the paper;

the returning officer must seal the ballot box ‘as soon as reasonably practicable’—this will depend on the circumstances but it would seem reasonable for him to wait until any such ballot papers had been put in the box *provided* the ballot papers had been properly issued and there was no undue delay in completing them.

Anyone who has not had a ballot paper ‘delivered’ to him by 10pm, or who has but who delays unduly in completing it, will not be able to put his ballot paper into the box.

It can be borne in mind that all are presumed to know the law and that the rules provide (rule 28) for poll cards to all electors able to vote in person, which state the times of the poll.

A Returning Officer has a general duty effectually to conduct a parliamentary election. Section 23 of the Representation of People Act 1983 on the conduct of parliamentary elections provides that:

- (1) The proceedings at a parliamentary election shall be conducted in accordance with the parliamentary elections rules in Schedule 1 to this Act.
- (2) It is the returning officer’s general duty at a parliamentary election to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by those parliamentary elections rules.
- (3) No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that—
  - (a) the election was so conducted as to be substantially in accordance with the law as to elections; and
  - (b) the act or omission did not affect its result.

#### *Provision of adequate resources for the election*

The Parliamentary Election Rules as set out at Schedule 1 of the Act include the following rules:

Rule 25 obliges the returning officer to provide a sufficient number of polling stations and to allot the electors to the polling stations in such manner as he thinks most convenient. Also the returning officer shall provide each polling station with such number of compartments as may be necessary in which the voters can mark their votes screened from observation.

Rule 26 obliges the returning officer to appoint a presiding officer and such clerks to attend at each polling station as may be necessary for the purposes of the election.

Rule 29 addresses the equipment of polling stations and obliges the returning officer to provide each presiding officer with such number of ballot boxes and ballot papers as in the returning officer's opinion may be necessary.

Accordingly, the provision of ballot papers in sufficient quantities depends upon the returning officer doing what is necessary effectually to conduct the election: section 23 of the 1983 Act and providing polling stations with a sufficient number of ballot papers as may be necessary: rule 29. (Excessive over provision might be thought unsatisfactory but plainly there ought to be a margin of comfort together with the ability of a presiding officer to telephone a returning officer for more ballot papers if he thinks there is a possibility of a deficiency arising).

In respect of polling stations it needs to be kept in mind that sections 18A to 18E of the 1983 Act deal with the place and manner of voting at parliamentary elections and provide that it is the relevant authority that must determine the polling districts and designate polling places within the district. This group of sections provides for reviews of polling districts and polling places by local authorities with provisions for representations to the Electoral Commission by specified interested parties—including 30 or more electors—capable of having been made: see section 18D.

No election is to be questioned by reason of non compliance with the provisions of those sections or any informality relative to polling districts or polling places: section 18E.

The question as to whether there was a sufficiency of polling stations is not further explored save to observe that, given those provisions just mentioned, it is difficult to sustain a criticism of returning officers in relation to the supply or number of polling stations.

Not merely must a returning officer provide each presiding officer with such number of ballot boxes and ballot papers as in the opinion of the returning officer may be necessary, he must also provide, among other things, copies of the register of electors or such part of it as contains the names of the electors allotted to the polling station: rule 29(3) of the Parliamentary Election Rules 1983.

There are detailed requirements for the compilation of the electoral register. These include at section 9(1) of the Representation of the People Act 1983 the ability for a registration officer to split a register for a constituency into different parts. However, the critical point for consideration of the ease of voting at a polling station on the day of the election is the requirement that such part of the register as contains the names of those allotted to the polling station be marked as voters proceed to vote.

Inevitably a period of time is required to undertake the voting procedure which is outlined by Schofield's Election Law at 10.13 as follows<sup>13</sup>: A ballot paper must be delivered to a voter who applies for one and, immediately before delivery

- (a) the ballot paper must be stamped with the official mark;
- (b) the number and name of the elector as stated in the copy of the register of electors must be called out;
- (c) the number of the elector must be marked on the corresponding number list;

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<sup>13</sup> This repeats some matters set out above but, it is hoped, provides a convenient summary of the process.

- (d) a mark must be placed in the register of electors against the number of the elector to denote that a ballot paper has been received but without showing the particular ballot paper which has been received. Where the poll is combined, one copy of the register may be used. If it is, one mark may be entered to show that ballot papers for all elections were issued. Where, however, a ballot paper is issued for less than this, a different mark must be used to indicate for which election the paper was issued; and
- (e) in the case of a person applying for a ballot paper as proxy, a mark must also be placed against his name in the list of proxies;
- (f) in the case of a person who has an anonymous entry in the register, only the number of the elector must be read out;
- (g) in the case of a person who is added to the register as a result of a notice issued under Section 13B(3B) or (3D), “copy of the notice of these sections” is substituted for “copy of the register”.

(The use of counterfoils has been replaced by a requirement for a corresponding number list containing the numbers and other unique identifying marks of the ballot papers to be issued. Each voter will be required to sign on the list when receiving their ballot paper. However, this requirement is not yet in force.)

On receiving the ballot paper, the voter must forthwith proceed into one of the compartments in the polling station and there secretly mark his paper and fold it up so as to conceal his vote, and then show to the presiding officer the back of the paper so as to disclose the unique identifying mark, and put the ballot paper so folded up into the ballot box in the presence of the presiding officer.

He must vote without undue delay and leave the polling station as soon as he has put his ballot paper into the ballot box.

It is the clear duty of the presiding officer to see the official mark after the voter has marked the paper. It has been held that he should see the whole paper.

### *Legal Challenge*

A parliamentary election can only be questioned by a petition complaining of an undue election or undue return (*RPA 83 s120*).

Those circumstances cover acts or omissions on the part of returning officers or presiding officers and actions by candidates such as corrupt practices. This note is only concerned with actions by officials.

Relevant cases on the matters under consideration here establish the following principles: The only remedy where a voter is unable to cast his or her vote is by an election petition. This can be brought by either a person who voted or had a right to vote (i.e. those who were in the queue), or a candidate (s 121 RPA).

By section 23 of the 1983 Act no parliamentary election shall be declared invalid by reason of an act or omission by an official if it appears to the relevant tribunal that the election was so conducted as to be substantially in accordance with the law and the act or omission did not affect its result.

It should be noted that because there is a multiplicity of rules required to be met on potentially thousands of occasions it must be seldom that there is no ‘error’ in the course of the election on the part of at least one person having an official duty in the election.

Thus, in accordance with the statute, the cases make plain that a result will only be set aside in the case of errors that might have affected the outcome of the election.

- Hackney case (1874)<sup>14</sup>—‘If I look to the whole, and to the sense of it as a whole, it seems to me that the object of the Legislature in this provision is to say this—an election is not to be upset for an informality or for a triviality, it is not to be upset because the clerk of one of the polling stations was five minutes too late, or because some of the polling papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election. I think that that is a way of viewing it which is consistent with s 13 [repealed] of the Act. So far as it seems to me, the reasonable and fair meaning of s 13 [repealed] is to prevent an election from becoming void by trifling objections on the ground of an informality, because the judge has to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a reasonable mind to produce a substantial effect upon the election (Grove J).
- Islington West 1901 case—‘*An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, ie the success of the one candidate over the other, was not, and could not have been, affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised, and acted upon, by the tribunals which have dealt with election matters*’ (Kennedy J).
- Kensington North case 1960—In determining under the Representation of the People Act, 1983, whether a Parliamentary election was so conducted as to be substantially in accordance with the law as to elections and whether an act or omission affected its result, the burden of proof is not on the respondent to the election petition, but the election court decides the questions on the evidence as a whole.
- Gunn case April 1974<sup>15</sup>—the errors which occurred at the polling station in question were of such a nature that they went beyond the trivial errors

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<sup>14</sup> It was proved that in one district of the borough containing 4,838 voters and two polling stations, the stations were closed during the whole day of the election so that none of the 4,838 voters could record his vote. It was further proved that at four other stations in the borough for a certain period during the day of election, voters were prepared to record their votes, but were unable to do so owing to the polling stations being closed: Held there was no valid election, either at common law, or under Ballot Act 1872 (c 33) (repealed).

<sup>15</sup> At a local government election the returning officer, in accordance with the requirements of the law, gave clear instructions to the staff at each of the 10 polling stations to ensure that ballot papers were stamped with the official mark as required by rr 16(1) and 33(1) of Local Elections (Principal Areas) Rules 1973. Appropriate notices were displayed at the polling stations. In the event 102 ballot papers were rejected under r 43(1) of the 1973 rules because they did not bear the official mark. Of the rejected papers 98 came from one polling station, constituting more than half of the 189 papers issued at that station. If the votes on the rejected papers had been counted, the two petitioning candidates would have been successful instead of respondents who had in fact been elected. Petitioners sought a declaration that the election of respondents

that inevitably occurred at all elections. They were substantial and such as to be likely to affect the result of the election, since they had resulted in more than half the voters who had sought to vote at the polling station being disfranchised and thus prevented from voting for petitioners. It followed that the election could not be said to have been conducted 'substantially in accordance with the law as to elections'. Since the errors had in fact affected the result, the election of respondents should therefore be declared void.

- Morgan case July 1974<sup>16</sup>—An election court was required to declare an election invalid (a) if irregularities in the conduct of the election had been such that it could not be said that the election had been 'so conducted as to be substantially in accordance with the law as to elections', or (b) if the irregularities had affected the result. Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected; (2) although the election had been conducted substantially in accordance with the law as to local elections, the omission to stamp the 44 ballot papers had affected the result of the election which would therefore be declared invalid.
- It is this last mentioned case which is taken as the modern expression of the law. It has been cited on various occasions recently.
- The consequence is that the electoral law demands that a series of detailed rules be met and allows no scope for variation of the timetable save in the case of riot or open violence. Returning Officers cannot override the timetable and case law makes plain that a want of discretion on their part is justified. It can also be noted that every election must have an end measured against time.

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was void on the grounds (i) that the election had not been conducted 'substantially in accordance with the law as to elections', within s 37(1) of Representation of the People Act 1949, and (ii) that the errors had affected the result of the election.

<sup>16</sup> At a local government election at which a total of 23,691 votes were cast, 82 ballot papers were properly rejected by the returning officer. 44 of those papers were rejected because they had not been stamped with the official mark as required by the local election rules. The 44 unstamped ballot papers had been issued at 18 different polling stations; despite notices displayed at the polling stations directing voters to see that ballot papers were stamped, the voters to whom the 44 papers had been issued had not noticed that the polling clerks had failed to stamp them. The returning officer himself had not been at fault. If the 44 ballot papers had not been rejected, but had been counted, petitioner, a candidate at the election, would have won the election by a majority of seven over respondent. In consequence of the rejection of the 44 papers respondent had a majority of 11 and so was declared to be the successful candidate. Petitioner sought an order that the election should be declared invalid under s 37(1) of Representation of the People Act 1949, on the ground that it had not been conducted 'substantially in accordance with the law as to elections'; alternatively that, even if it had been so conducted, the omissions of the polling clerks had affected the result.

## Letter from the Chairman to Jenny Watson, 14 July 2011

### *Voting at the close of poll*

Thank you for your letter dated 1 July enclosing the letter from your internal Legal Counsel, Bob Posner, setting out the advice you received concerning the issue of ballot papers after 10pm. The Committee considered this advice at its meeting on 13 July.

During the oral evidence with the Committee on 22 June, you sought to assure us that the law governing voting at the close of poll was “very clear” (for example, QQ 23 and 32), being governed by two cases, one decided in 1901 and the other in 2001. We note that the Electoral Commission’s 2010 *Interim Report* on the May 2010 election relied on the same two cases.

We have studied these materials closely. In our view, the cases are not as clear or certain in their authority as you have stated. Accordingly, we set out our understanding of the law in this letter and ask for your response.

As we understand it, the Electoral Commission’s position is that a vote may lawfully be cast after 10pm but only if the voter has been issued with his or her ballot paper before 10pm. You state that “There is no provision for extension of polling time, or for the issue of ballot papers, beyond 10pm (except in the case of riot ...)” and that, “Consequently, there is no discretion for the (Acting) Returning Officer to extend the time for polling beyond 10pm” (*Interim Report*, para 2.39). At para 4.3 of the *Interim Report*, the Electoral Commission’s understanding of the law is summarised as: “The rules ... provide no leeway to allow people who have made an effort to attend a polling station to exercise their right to vote, if they are still waiting to be issued with a ballot paper at the close of poll.”

However, even if it is the case that there is no express statutory provision for the extension of polling time other than in cases of riot etc, we do not think it follows that there is necessarily no discretion in certain circumstances to allow for this.

To turn to the two cases upon which your understanding of the law is based, the first of these is *Medhurst v Lough and Gasquet* [1901] 5 O’M & H 120, (1901) 17 TLR 210 (also referred to as the “*West Islington*” case). This case was decided under the Elections (Hours of Poll) Act 1885, section 1 of which provided that: the poll is to be kept open till 8 o’clock in the afternoon “and no longer”. We note that these three words “and no longer” do not appear in the Representation of the People Act 1983, Sched 1, rule 1.

Medhurst was the unsuccessful candidate, defeated by nineteen votes. Lough was the MP, and Gasquet the returning officer. Medhurst petitioned the election court for a ruling that the election was void. Fourteen ballot papers had been issued after 8 pm. The court held that the election was not void, even though ballot papers ought not to have been given out after 8 o’clock. The judgment of the court was given by Kennedy J. He ruled as follows: “an election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by a returning officer ... where the Court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election ... was not, and could not have been, affected by those transgressions” ([1901] 5 O’M & H 120, 125). We note that these principles are now set out in statute: Representation of the People Act 1983, section 23(3)(a) and (b).

In the course of his judgment, Kennedy J expressly rejected three submissions, each potentially relevant to the events of May 2010. The first submission to be

rejected was that no ballot may be deposited in a ballot box after 8pm. As we have seen, this submission was rejected in favour of the view that ballot papers duly received before 8pm may be deposited in a ballot box even after 8pm. Secondly, the court rejected the submission that any voter admitted to the polling station before 8pm was entitled to receive his ballot paper and deposit it in a ballot box. And thirdly, the court rejected the submission that “every voter who, either by voice or gesture or position, eg, by visibly forming part of a queue or string of voters leading up to the polling station, has given a reasonably clear indication before 8pm of his being a voter and of his desiring to vote, ought to be held entitled to receive a ballot paper though 8 o’clock had struck, and to vote by means of that paper” ([1901] 5 O’M & H 120, 128). The second submission was rejected on the basis that it would mean that the number of votes entitled to be cast would depend on the size of the polling station, and the third submission was rejected on the basis that it would lead to “intolerable uncertainty”. It is clear from the judgment, however, that this last submission was analysed by the Court in the context of a presiding officer at a polling station physically recognising the voter(s) in question, perhaps even by voice. Such, of course, is not our modern experience in the vast majority of constituencies in the United Kingdom. The “intolerable uncertainty” which the Court wanted to avoid was that which would be caused by “the varying powers of observation and discrimination” and “possibly” the “caprice” of the presiding officers (ibid, 128-9).

For these reasons the Court ruled that “the true dividing line is the delivery of the ballot paper to the voter. If he has had a ballot paper delivered to him before 8pm he is entitled in our judgment to mark that ballot paper and deposit it in the ballot box” ([1901] 5 O’M & H 120, 129). This, said the Court, was “a simple, definite and just rule of procedure” (ibid).

The second case relied upon by the Electoral Commission is *Re Parliamentary Election for Fermanagh and South Tyrone* [2001] NIQB 36, a decision of Carswell LCJ in the High Court in Northern Ireland. Like *West Islington*, *Fermanagh* was an election petition brought by an unsuccessful candidate (in this instance, the UUP candidate) who had been defeated by the winning candidate (for Sinn Fein) by 53 votes. At 10pm on polling day, there was a queue of about 40 or 50 people at a particular polling station in the constituency. Citing *West Islington*, Carswell LCJ stated without comment that “It was the duty of the presiding officer to close the poll at 10pm by ceasing to issue any more voting papers. So long as the voting papers were issued by 10pm, however, if electors marked them and deposited them in the boxes without delay the votes were valid.”

The police officer present at the polling station deposed in evidence that ballot papers continued to be issued until 10.05pm, at which point the presiding officer announced that the poll was closed. When the police officer then attempted to close the door to the polling station there was “a surge of people”, which seemed to be orchestrated by two people working for or representing Sinn Fein, who later “confronted” the presiding officer, “hectoring” him about people being allowed to exercise their right to vote. The judge reported that there was “significant tension in the room” and “a certain degree of hostility”. The polling clerks deposed in evidence that the poll closed promptly at 10pm.

At about 10.12pm or 10.15pm the presiding officer announced that he would allow a further ten minutes for voting. Further voting papers were issued but this ceased after the police officer telephoned the area electoral office (who informed the presiding officer that he was acting unlawfully). No further voting papers were issued after 10.23 pm.

Carswell LCJ found that the number of voting papers issued after 10pm could not have been “materially more than thirty”. Given that the winning margin was 53, he ruled that “the breaches of the regulations did not affect the result of the election”. He further ruled that, notwithstanding the “reprehensible” incidents at the particular polling station, “serious and intolerable” though they were, the election across the constituency as a whole was conducted “substantially in accordance with the law as to elections” and, applying section 23(3) of the Representation of the People Act 1983, he therefore ruled that the declared result should stand.

### *Analysis*

Suppose that a voter—such as one of the 1200 affected in May 2010—who had presented himself at the appropriate polling station comfortably before 10 pm but who was not issued with a ballot paper before 10pm owing to a long queue and who was therefore denied his right to vote, sought a legal remedy. Do these cases clearly establish that it is the settled law that no such remedy would be available? On our current understanding of the law, we do not consider that to be the case.

The authorities clearly do not establish that a frustrated voter necessarily would be granted a remedy. Indeed, they support the view that, absent the result of the election being affected, such a voter would be granted a remedy *under domestic law* only in the exceptionally rare case that it could be shown that the election had not been conducted “substantially in accordance with the law as to elections”. We would accept that this is a very high hurdle. But it is not completely impassable. In other words, there is, in our opinion, more uncertainty about the matter than you stated in your evidence. Additionally, however, it may be that a voter may have a remedy under European human rights law – a possibility, it seems, that has not been fully considered by the Electoral Commission.

In our opinion, therefore, the cases on which you rely may be distinguishable for the following reasons.

First, neither *West Islington* in 1901 nor *Fermanagh* in 2001 was brought by a voter who was denied the right to cast his vote. Both petitions were brought by unsuccessful candidates.

Secondly, the core argument in both cases was that votes had been cast which should not have been cast: not that votes were not cast which should have been cast.

Thirdly, the legislation governing the *West Islington* case is materially different from the legislation in force now, in that the words “and no longer” do not appear in the Representation of the People Act 1983, Sched 1, rule 1.

Fourthly, if it could be shown that failing to issue a ballot paper to voters who had presented themselves to the appropriate polling station before 10pm affected the result of the election, section 23(3)(b) of the Representation of the People Act 1983 may come into play, empowering a court to rule an election to be invalid. (As we understand it, there is no allegation that such failures affected actual results in the May 2010 General Election.)

Fifthly, if a court were to rule, examining the evidence as a whole, that systemic or widespread failures across a constituency meant that the election was not conducted so as to be “substantially in accordance with the law as to elections”, then it would have the power to declare the result invalid under section 23(3)(a) of the Representation of the People Act 1983. To be noted in this context are the Electoral Commission’s own findings in its *Interim Report* that the election of May 2010 was marked by “evidence of poor planning assumptions in some areas”, “use

of unsuitable buildings”, “inadequate staffing arrangements at some polling stations”, and contingency arrangements that were “not properly triggered or were unable to cope” (para 1.7). Could these matters not be argued to trigger the s 23(3)(a) power?

Sixthly, in none of the authorities relied upon by the Electoral Commission is there any mention of the European Convention on Human Rights. Article 3 of Protocol 1 (A3P1) of the Convention (which is a Convention right within the meaning of the Human Rights Act 1998) provides that “High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. These words have been interpreted by the Grand Chamber of the European Court of Human Rights to be sufficiently elastic to found a right of convicted prisoners to vote (see *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41). Could they not therefore be sufficiently elastic to found a right of a person who had presented himself at the appropriate polling station to vote? If so, a domestic court could apply section 3 of the Human Rights Act 1998 and rule that the provisions of the Representation of the People Act 1983 should be read and given effect so as to make them compatible with Convention rights. We were struck by the absence of any mention of either the ECHR or the Human Rights Act in the legal advice note of Bob Posner.

### *Conclusions*

In your evidence to the Committee on 22 June you repeated the argument made in your May 2010 *Interim Report* that the relevant law should be changed (eg, Q22: “we are not happy with the law as it stands and we would like to see the law as it stands changed to give flexibility at close of poll”).

The Committee is inclined to agree with you that the law is unsatisfactory, though for different reasons. We consider that (a) the law is not clear, (b) the law is based on a precedent decided in 1901 which was itself decided on the basis of a statute that is materially different from the Representation of the People Act 1983 and (c) that, in any case, the law needs to be approached in the light of contemporary understandings of *the right to vote* (rather than being based on understandings of the legal duties of presiding officers).

We agree with your assessment that “there would be clear benefits for voters if the rules for all UK elections were revised to provide clarity that those who are present, or in a queue, at a polling station at the close of poll are entitled to vote” (*Interim Report*, May 2010, para 4.5). However, we would also be inclined to argue that this point of law should be reformed without delay and that it would not be preferable to wait for this matter to be considered (whether by the Law Commission or others) as part of a longer review of electoral law.

We look forward to your response to the points raised above.

## **Comments on legal points raised in Baroness Jay’s letter**

### **Procedure in polling stations at the Close of Poll**

The Committee states that it is inclined to agree with the Commission that the law as it stands is unsatisfactory, and provides three reasons.

The Commission’s comments on the Committee’s three reasons:

(a) **The law is not clear.** Having carefully considered the analysis of the legislation and cases in the Committee’s letter, the Commission remains of the

view that in the absence of any decided case to the contrary, or legislative change, the law is sufficiently certain for presiding officers to be right in their present approach. That is, the law as it presently stands requires polls to close at 10pm; save that any persons entitled to vote at that time who have a properly issued ballot paper may complete their vote providing this is done promptly.

This is because:

- Delivering elections in accordance with the statutory rules is important in reaching fair democratic outcomes;
- The conduct of elections is closely controlled by legislation. The rules on elections expressly state what happens on close of polls;
- Decisions in cases that have considered circumstances where electors have either sought to vote, or have apparently voted, after the time stipulated for close of poll, are consistent in supporting the above approach, notwithstanding the Committee's comments regarding the extent to which the circumstances of the cases may differ from the circumstances at the poll in May 2010;
- The Courts have made it plain that Parliament has conferred duties but not discretions on returning officers. The rationale behind that proposition is that the imposition of duties but no discretion secures that returning officers can never act in a way which is or appears to be partial, judgmental between candidates or arbitrary;<sup>17</sup>
- This approach is consistent with the wider interests of voters, providing certainty, transparency and fairness.
- Accepted practice by elections practitioners is to proceed in this way. Schofield's Election Law records (paragraph 10.11) that at the close of poll no more ballot papers may be issued but when ballot papers have been issued to voters before the time for closing the poll, time must be allowed to mark them and put them in the ballot box.
- The legislation makes express provision for the pursuit of petitions in the courts to challenge election results, and for criminal offences. In the event, there were no challenges against the results or pursued allegations of breach of statutory duty (a criminal offence) by returning officers, based on the issue of queues at polling stations in 2010. Had there been, legal submission points as made in the Committee's letter may have been raised by those legally representing a petitioner, but as matters stand these possible points have not been considered by a court and it would be conjecture how and if such points would affect the current approach to close of polls. We are not persuaded that they would.

(b) The law is based on a precedent decided in 1901 which was itself decided on the basis of a statute that is materially different from the Representation of the People Act 1983. The Committee's analysis refers to the present statute omitting the words "and no longer" from the time of close of polls, and the provisions at sections 23(3)(a) and (b) of the 1983 Act that address some fundamental failures in elections process.

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<sup>17</sup> R (Begum) v Tower Hamlets [2006] LGR 674 (paragraph 7 (precise timetable) and paragraph 21); R (De Beer) v Balabanoff [2002] EWHC 670 (paragraph 18 (no scope for bending the rules, give even treatment to every candidate) paragraph 28 (the fewer occasions a returning officer is called upon to exercise questions of judgment and thereby lay himself open to criticism by a candidate the better)).

We do not consider that these matters have impact on the duties of presiding officers as we have set them out. The 1983 Act, using the words 'shall', stipulates a strict timetable and specific requirements for election processes, including what happens on close of polls. We agree with the Committee that in the event of legal challenge a court may - set against certain facts - find section 23 circumstances applicable. However, as noted above, there were no such challenges based on the facts relating to queues for the 2010 elections and we are not aware of circumstances that would have been likely to persuade a court. As the Committee notes, there is a high hurdle here, and we would expect this to be one for a court to decide, not a presiding officer, nor indeed the Commission.

The 2002 Balabanoff and 2006 Begum cases provide clear statements as to duties on those administering electoral processes, be they returning officers or presiding officers. That is, they do not and should not have discretion to depart from clear rules governing the administration of elections, which includes the rules on close of poll.

We have considered the Committee's analysis of the 2001 Fermanagh case and, whilst acknowledging that the case (like the 1901 Islington case) was brought by an unsuccessful candidate rather than a voter denied a ballot paper, in our view the decision remains relevant in this context.

(c) In any case, the law needs to be approached in the light of contemporary understandings of *the right to vote* (rather than being based on understandings of legal duties of presiding officers). The Commission too places great emphasis on the rights of the voter and that election processes should be run with the interests of the voter put first. For the reasons we have given under paragraph (a) above, and consistent with the interests of the voter, we also place considerable importance on the fundamental principle of election process requiring certainty, both for those entitled to vote and those with responsibility to administer the process. For that reason we would add that any change in the law needs to achieve rules that maintain this principle of certainty, with clarity in the legal duties on presiding officers.

The Committee asks in its letter how far the Commission considered the impact of human rights law. The Commission certainly considered these aspects fully.

Specifically on the issue of queues at close of poll the Commission's legal counsel advised the Commission on the human rights aspects immediately following the elections queues issue in 2010, and during the preparation of the Commission's subsequent report on this consideration. He also discussed the impact of Convention rights on the law on close of poll with Mr T. Straker QC. The Commission, consistent with legal advice received, did (and does) not consider that Convention human rights have the effect of providing discretion to presiding officers in the circumstances of queues after 10pm, when there are clear rules on close of poll, and case law indicating how to handle completion of voting process by voters who already have lawfully issued ballot papers at that time.

The obligation entered into by the United Kingdom was an obligation to hold free elections under conditions which will ensure the free expression of the people in the choice of the legislature. This requires conditions under which the freedom of expression is given. The Courts have made plain, and it is recorded in the

Commission's interim report, that there has to be strict and impartial operation of the rules under which the franchise is exercised. This prevents arbitrary or partial action by electoral officials. Further, any departure from the rules by individual presiding officers issuing ballot papers after 10pm would create unfairness in the electoral process which could of itself amount to a ground for challenge.

We note that even if a court found that the statutory rules on closure of polls was incompatible with a Convention human right, a presiding officer would still be obliged to comply with the rules until and if the law was changed.

It is worth noting in addition that the Commission's Legal Counsel and the Chair of the Commission made contact with Liberty, who represented the interest of some people who could not vote because of the queues, shortly after polling day in May 2010. The Commission also liaised with the Equalities and Human Rights Commission. Liberty did commence pre-action legal process against certain returning officers, but in the event did not proceed.

19 July 2011

### **Letter from Jenny Watson, 19 July 2011**

Thank you for your letter of 14 July. I am pleased that both the Constitution Committee and the Electoral Commission share the view that the rules for all UK elections should be revised to clarify that those who are present, or in a queue, at a polling station at the close of poll are entitled to vote.

We agree with the Committee that this issue needs to be addressed as a matter of urgency. In our 20 May 2010 interim report on problems at polling stations at the 6 May UK Parliamentary general election, we argued for **urgent** changes to ensure that such problems could not arise at future elections. We specifically recommended that the legislation should be amended immediately and that changes should be introduced in good time for the May 2011 polls.

Since making our original recommendation, we have taken regular opportunities to call on the Government to take action to implement this important change, and naturally we are disappointed that while the Government has indicated that it will consider our recommendation it has not yet responded formally. We welcome your support in seeking an early change to the law, and I hope that we will be able to work with the Committee to identify appropriate opportunities for the election rules to be changed as soon as possible.

Although we share the view that the law as it currently stands should be revised as soon as possible, you have raised some interesting points about our view of the current law. I have attached to this letter a note with detailed comments on the points you raise, which I hope will be helpful.

On another matter we discussed when I gave evidence to the Committee, you may be aware that the Law Commission today announced it has agreed to our submission to include a project on the reform of electoral law in its 11th programme of law reform.

### **Letter from the Chairman to Jenny Watson, 14 September 2011**

Thank you for your letter dated 19 July. The letter and the attached comments have been circulated to Members of the Constitution Committee. However, the Committee was not able to consider this at their meeting today and will not be meeting again until 5 October.

I wanted to let you know that the Committee appreciates your quick response and that we will consider the points raised as soon as possible.