ARRANGEMENTS FOR ABSENT VOTING:
MEMORANDUM FROM THE CLERK OF THE HOUSE

Introduction

1. This memorandum was originally submitted to the Procedure Committee in the 2015 Parliament in response to a request from the Chair of the Committee on 13 April 2016 for a paper setting out the practical and procedural issues the Committee might consider in its inquiry into arrangements for absent voting by Members who through illness or other incapacity are unable to be present in the precincts on a sitting day. It has been formally resubmitted to the Committee in the 2017 Parliament at the request of the Chair. I have included some reference to those who if employed might be in some circumstances be on a recognised form of leave, in the light of reference to that issue in the Chair’s letter of April 2016.

2. I assume throughout that the current system of voting by attendance in a division lobby is broadly to continue, whatever the means used to register and record the vote. If remote voting elsewhere in the precincts or beyond were introduced, “absent voting” would of course have a very different, if any, meaning. It also assumes that any arrangements would only apply – as now – in the House itself and not in committees.

3. I have been invited to make recommendations for desirable change. The only firm recommendation I wish to put to the Committee is at para 20: for greater transparency, whether or not new arrangements are made. This might cover both description of current special arrangements, and revelation of when they have been used. That might help allay some concern that current arrangements are time-expired and insufficiently reflective of the changing pattern of membership of the House, and in particular that they make little or no allowance for nursing mothers. I would also hope that the Committee might consider some way to end the practice notorious from the late 1970s of bringing seriously sick Members into Westminster in order to vote. This would carry severe reputational risk if repeated nowadays.
**Current practice: nodding through**

**Divisions**

4. The only current provision at Westminster for absent voting is the informal practice of “nodding through”, in essence an informal proxy vote. It is described in May:

“If any members who are disabled by infirmity from passing through the lobby are present in the precincts of the House and wish to vote, their names are communicated to the clerks and to the tellers, and are included in the numbers counted” [May page 413]

The footnote to that passage notes that the Chair is not concerned with who may be “nodded through”, but tellers must agree. [ibid fn 152] The normal practice is for the whip to inform the tellers of the identity of the Member being nodded through, having already told the Division Clerk so that their name is registered. The precise arrangements by which the parties agree to nod through a Member are for them. As described in memoirs, they comprise a visit by whips of the principal parties to assure themselves that the Member is alive and in the precincts, and wishes their Whip to cast their vote.

5. There is no formal record of how often, or on what occasions, nodding through is used in divisions in the House. The lists of Members voting do not indicate who has been nodded through. Anecdotal evidence suggests that it is rare. In recent years it has also been reported that nursing mothers have been nodded through, rather than being obliged either to pass through the lobbies with their infant children, or to leave them in the care of others. That practice goes beyond the conventional limitation to infirmity or incapacity. The Whips may be able to give more information to the Committee.

6. It is worth noting that the nodding through system is not error-proof. In July 1974 Harold Lever, then a Government Minister, told the House that he had been inappropriately nodded through at several votes in a previous sitting, since he had not in fact been in the precincts. As a result, two apparently tied votes on Amendments on the Report stage of the Trade Union and Labour Relations Bill, which the Chair had in accordance with precedent used their casting vote to defeat, were in fact carried. The Bill had to be called back from the Lords, read a third time with those two amendments inserted, and sent back to the Lords.
Secret ballots

7. Nodding through is also possible for the secret written ballots first used in 2009 for the election of the Speaker and subsequently for the Deputy Speakers and select committee Chairs. In 2009 successive votes were cast by a senior clerk on behalf of an infirm member in the precincts, to whom a duly stamped blank form was brought for completion and then placed in the ballot box, ensuring complete secrecy. The provision of this service does not require the prior agreement of the Whips. By the nature of the ballot, and the privacy accorded to the lists of those who voted, there is no formal record of the fact that the Member concerned voted in this way.

Deferred divisions

8. In deferred divisions, a duly signed paper has to be submitted to the division clerks in the division lobby. This can be done by a Whip who has the paper signed by the absent Member, with the permission of the other party or parties.

Pairing

9. Pairing is quite distinct from proxy voting, but related by fact of its being used to address some of the issues which might also be resolved by proxy voting, ie the absence of a Member who wishes to vote. Pairing – the system now largely handled by the party whips whereby a member who if present would vote one way agrees with another member who would be voting the other way that both will be absent, thus neutralising the ultimate effect of their absence – is not officially recognised in any way. The Speaker has ruled that they are private arrangements between members. It is not a transparent system, and of course unlike a proxy vote the members concerned are not able to actually register their vote on the public record. In the US House of Representatives one or both of a set of paired Members may if present declare how they would have voted.
**Proxy voting**

**Past practice**

10. In past centuries proxy voting was known at Westminster. May records that until 1868 Lords who were not present could vote by proxy. Since then no attempt has been made to suspend Lords Standing Order No 60 so as to allow the revival of “the ancient practice of calling for proxies”. In the Commons proxies were allowed in the medieval Parliament. There was considerable discussion in Tudor times of whether sick members or those on a long absence should be replaced, but not so far as I have discovered by temporary substitutes. But in neither House has there been formal proxy voting in modern times.

**General**

11. There are two points of principle which are worthy of consideration.

(a) A Member’s mandate from the electorate, which confers membership of the House and so the right to vote, is often described as individual, personal and therefore not transferable. This is in distinction to, for example, proxy voting by shareholders or members of societies.

(b) There is also a view that only those who at least in theory can have heard the debate and at least in theory are present when the question is put should be able to vote [eg Mason’s Legislative Manual Sec 538]. Webcasting of proceedings of course means that the first condition could easily be met save in cases of serious incapacity.

**Elections etc**

12. Proxy voting is, as Committee members will know, permitted in public elections and referendums in the UK. Applications have to be made 6 days in advance of the day of poll, and reasons given. The “question” is of course known in advance and so instructions can be given to the proxy voter, although not enforceable.
Other parliaments etc

13. On 13 February 2008 the Australian House of Representatives adopted a Resolution allowing a Member who is a nursing mother to vote by proxy given to the Chief Government Whip or Chief Opposition Whip. I understand that this provision is in use.

14. The only parliamentary example of widespread proxy voting known to me is New Zealand. Most votes in the New Zealand Parliament are now cast by a whip of each party casting in essence a bloc vote. The member casting the vote takes responsibility for the presence in the precincts of at least 75% of those members whose votes he is casting. There are arrangements for independent Members which have to be agreed by the Speaker.

15. If the Committee seeks more information on the practical operation of these systems I am sure my colleagues in Australia and New Zealand will be happy to supply details.

16. Committees of the US House of Representatives were allowed to adopt their own regimes for proxy voting: since 1995 this has been explicitly disallowed. I have been unable in the time available to discover if proxy voting is – or indeed legally can be – allowed by local authorities.

Possible regime: general

17. It may assist the Committee in considering whether to adopt formal arrangements for absent voting to contemplate what such a system might look like, and what choices would have to be made. I assume that what is contemplated is in essence proxy voting, since postal voting is obviously not an option. Rather as in an auction, where bids can be conveyed in a number of ways, it is important that the route is clearly authorised in advance, and trusted by all participants. Whatever the means of conveying an instruction to a proxy [eg Skype or telephone or email], and whether in real time or by an enduring instrument of delegation, someone has to be responsible for actually casting the vote in the relevant Lobby at the right time. The proxy could be, as might be expected, a fellow Member: or conceivably an officer. Some sort of valid authorisation, possibly written and signed, would be desirable. If the
Committee wishes to pursue the matter, there may be useful lessons to be learned from proxy voting in a range of other contexts.

Possible regime: requirements

18. I suggest that a system of absent voting by proxy would need
   • clear, objective and published criteria for the circumstances in which individual members would be permitted to nominate a proxy to vote on their behalf, and some system for validating that these criteria were being met
   • transparency on which members had given to which other member[or conceivably which officer] a proxy, on what criteria they were relying, and for how long the proxy was in force; and transparency as to how and when a proxy vote had been cast
   • maintenance of at least the current level of confidence in the accuracy and validity of votes in the House.

Criteria

19. Below is a rough list of categories which the Committee may wish to consider in determining how a formal proxy system might operate, together with a few thoughts on the issues which may arise. This is of course not intended to be definitive or exclusive but merely illustrative, based only on some general knowledge of the circumstances of Members, and the main categories of leave recognised in the public service.

   (i) Hospitalisation or equivalent, including post-operative recuperation: under current nodding through conventions the Member would be unable to vote as being unable to reach the precincts: their infirmity could readily be demonstrated on the basis of some sort of medical certificate that the individual could or should not be moved: that in turn would be likely to reveal the cause, which may at present not be widely known; but there would be no [formal] obligation to seek a proxy in circumstances where the Member preferred privacy, and the justification need not be published, so long as accepted by whoever was responsible for authorising the proxy
(ii) **Temporary incapacity or infirmity**: broadly those for whom nodding through currently operates, so that the individual can readily reach the precincts, but the act of walking through the lobbies is painful, or even risky; some of the same privacy considerations apply as in para (i) above; a similar certification regime could be developed, but with greater definitional difficulties over the level of seriousness of the incapacity or infirmity required

(iii) **Caring responsibilities limited to mothers of young infants**, potentially on a parallel to ordinary maternity leave: this would require clear start and end times, possibly reflecting the statutory regime and so allowing for antenatal leave

(iv) **Other caring responsibilities** eg paternity or parental leave equivalent, adoption leave, or care of elderly or disabled family members or family responsibilities: this might be thought to require some close definition: by its nature it may be that these are likely to be much longer –term and so foreseeable, and in some cases seasonal [eg school holidays or school start/end times for parents with caring responsibilities]

(v) **Compassionate**: this is to a degree an extension of caring leave, but usually in connection with an unforeseen event such as bereavement, serious illness of a partner or dependant etc

(vi) **Special**: this covers a multitude of events such as graduation of children, or other one-off domestic or family commitments or short-term emergencies

(vii) **Parliamentary**: it may be argued that Members absent on parliamentary business abroad or in the UK – select committee visits, international parliamentary assemblies etc – should be able to cast a vote by proxy; others might extend that to the mass of activities parliamentarians carry out which require their presence other than at Westminster, including in the constituency, and strict definitions are not likely to be easily agreed

(viii) **Public duties**: there are also non-parliamentary public duties requiring absence from Westminster which are carried out by parliamentarians, eg jury service or service with reserve forces
Transparency

20. Whether or not the Committee wishes to pursue formal arrangements for absent voting, it might in any event conclude that inquiring into the issue provides an opportunity to bring some greater transparency to the existing informal system: and specifically that where a member has not in fact passed through the lobbies but has voted in essence by informal proxy, that fact should be recorded in the Division lists published in Hansard and on the website. That need not require publication of any details of the personal circumstances of the Member concerned.

21. If a formal scheme is envisaged it will be a matter of some significance as to how far the justification for the use of a proxy is published, as suggested above. It could involve the release of sensitive personal data. But without some transparency, there may be a public perception that those Members not recorded as voting *either* in person or by proxy, whether paired or unpaired, could have sought a proxy or have been refused one, and are therefore in some way on an unauthorised or “less authorised” absence.

Voting validity

22. The 1974 Harold Lever case [para 6 above] is a stark reminder of the importance of the House and the whole system of parliamentary democracy being able to rely on the accuracy and validity of the results of votes as declared by the tellers. This applies not only where votes are very close, as many were in 1974; not only as in 1974 where the result was that a controversial Bill was sent to the Lords in a form that had to be altered; but also now, where a vote to bring a Parliament to a premature end under s2 (1) of the FTPA requires not a simple majority but that at least two-thirds of the membership of the House votes in favour – so that each vote counts. The House cannot have a system open to challenge as being invalid.
Conclusion

23. The Committee may wish to consider –

(i) Whether it is generally acceptable to rely on the current mechanisms of (a) nodding through infirm Members required to be in the precincts and (b) pairing, in view of the range of circumstances in which absent Members may wish to register a vote

(ii) Whether as recommended in para 20 a greater degree of transparency would in any event be desirable on the exercise of the nodding through system

(iii) If formal arrangements for absent voting were to be established, the boundaries of the regime and the respective roles of the Chair and the Whips in policing it.

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