

IMPLEMENTING ELECTRONIC VOTING

**A REPORT ADDRESSING THE LEGAL ISSUES RAISED
BY THE IMPLEMENTATION OF ELECTRONIC VOTING.**

**PREPARED BY BOB WATT, BA, BCL.
SENIOR LECTURER IN LAWS
DEPARTMENT OF LAW
UNIVERSITY OF ESSEX.**

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Having acknowledged the kindness of others, any and all errors of analysis, substance or style, and any and all opinions, in this Report remain the sole responsibility of the author.

Bob Watt. March 2002.

1. Introduction

1.1 How can one define a ‘democratic election procedure’ in the light of proposals to introduce Remote Voting by Electronic Means (RVEM)? Are there any general characteristics of an election procedure which define it as democratic?

1.2 The central question is quite separate from ‘how can one define a democracy?’ A crude definition of a democracy is a state in which the rulers are chosen by the people and exercise power with their consent.¹ More sophisticated definitions require, at least, a definition of ‘people’, ‘ruler’, ‘power’ and ‘consent’ and it would seem that a number of politically acceptable definitions of each of these terms exist in the world or even within a single polity. For example, there is no single definition of ‘people’ in the United Kingdom which takes into account the different groups who may, or may not, vote for representatives in the various tiers of local government, the Westminster Parliament, the Scottish Parliament, the Welsh Assembly, the Northern Ireland Assembly and the European Parliament.² Within the electorates for those bodies there are a number of differing qualifications to be registered as a voter and the methods of election differ one from another.

Furthermore there may be arguments about the basis of representation; there may be arguments about the size and shape of electoral divisions. If one turns to the question of defining ‘political power’ the problem is exacerbated or multiplied for each of these organs has its own measure of political potency. Fortunately the definition of a ‘democratic election procedure’ is simpler. We need to accept, if only for the purposes of this project, that the extant political system or systems of the United Kingdom fully accord with the ideal of democracy.

1.3 What are the general technical requirements of a voting system which can, irrespective of the basis of calculation, accurately deliver the voters’ choice? The project team is charged with evaluating proposals to introduce Remote Voting by Electronic Means (RVEM).

- **Firstly, the implementation of any such proposal will require a small technical amendment to s5 of the Representation of the People Act 1985 which prescribes the manners of voting in elections.**

This section is applied to voting in European elections by the European Parliamentary Elections Regulations 1999. The amendment need only add a list of approved electronic means of voting.

¹ See Article One of the Declaration on criteria for free and fair elections; Inter-Parliamentary Council 154th session (Paris 26 March 1994): In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage. This Article derives from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and a number of other universal and regional human rights Instruments. Many of these Instruments will be discussed below.

² For some interesting comments regarding the ‘right to vote’ see the beginning of the judgment of Sir John Donaldson MR in *Hipperson v ERO Newbury* [1985] 1 QB 1060 (CA). This contrasts with the position in, e.g., France and Greece where the right to vote is to be found in the Constitution. For the importance and relevance of this point, see section 3.4 second bullet point below.

In our Proposal we identified six principles which form the minimum requirements of a democratic election procedure. There is no authoritative source in national or international law which sets down these principles in a simple form. These are:

- 1) *That those wishing to cast a vote are positively identified as eligible voters and that no voter is able to cast more than a single ballot in a given election;*
- 2) *That safeguards against personation are maintained;*
- 3) *That the free exercise of the vote is safeguarded, both in terms of the opportunity to cast a ballot and that voters are free from duress and unlawful undue influence;*
- 4) *That secrecy regarding how an individual elector has, or has not, voted is preserved save in the face of a proper order of a competent Court;*
- 5) *That the voting process is protected against tampering after any vote or votes have been cast;*
- 6) *That the counting procedure is verifiable, transparent and open to scrutiny, and accurate.*

1.4 There has been no sustained challenge to these principles throughout our extensive discussions within the Project Group, with the Steering Group and the Stakeholders (qv). Our consultations with the public lead us to conclude that the principles have wide popular support. However our discussions have lead to some reformulation and simplification of the principles. It will be seen that these underlying principles are reflected and developed in the law.

1) The doorkeeper principle.

Each person desirous of voting must be personally and positively identified as an eligible voter and permitted to complete no more than the correct number of ballot papers.

2) The secrecy principle.

Admitted voters must be permitted to vote in secret.

3) The verification, tally and audit principle.

There must be some mechanism to ensure that valid votes, and only valid votes, are received and counted. This system must be sufficiently open and transparent to allow scrutiny of the votes and subsequently the working of the political process.

Given these three central principles it seems sensible to organise the work around them. Firstly the underlying democratic principle and the relevant legal principles will be set out and explored by application to the current practices of in-person voting and, where it may be of assistance, postal voting. Proposals will then be made to apply these legal principles to RVEM.

2. The doorkeeper principle.

2.1 Personation

Pretending to be another person for the purposes of voting is described as 'personation'. It is one of a number of 'corrupt practices' defined by the Representation of the People Act 1983 and is itself defined by s60 of the Act. The Representation of the People Act 1983 provides that a person who is reported guilty of personation by an Election Court under s144 (Parliamentary election) or s145 (Local Government election) is subject to electoral penalties as set out in ss 159-160 and is also subject to criminal penalties upon subsequent conviction in a criminal court under s 168. In the absence of an Election Petition a person may be prosecuted under s168 RPA 1983 and is then liable to the electoral penalties set out in sections 159-160. The relationship between these provisions is well set out in *A-G v Jones*³ which followed on from the conviction of Fiona Jones MP, and her subsequent acquittal on appeal, of the corrupt offence of submitting a false return of election expenses. It is quite clear from three decided cases⁴ that the legal test to be applied to an allegation of personation, whether that allegation is heard in an Election Court or a criminal court, is the criminal standard of proof. This means that it must be shown beyond reasonable doubt that a person tried to personate another.

Reported cases suggest that personation is a very rare event in Great Britain. Most cases containing allegations of personation are over a century old and contain no conceptual issues; they are matters of fact. More recently, an allegation of personation was made in *Re Local Government Election for Eel Brook Electoral Division Hammersmith and Fulham Council; Thompson v Dann & Another*⁵ and rejected on the facts. One *Catherine Kay Phillips*⁶ was convicted of personation in 1984 and was sentenced to two months imprisonment; the Court of Appeal commenting that the sentence was light and that persons convicted of personation should normally expect a substantial prison term. However in the well publicised but unreported Hackney case, arising from the election held in 1998, two councillors who conspired to invent voters were imprisoned for similar lengths of time. The case which has been described as 'Britain's largest election fraud' involved perhaps more than one hundred personations.

The author is aware that allegations of personation have been made in other elections in Great Britain, for example in the Sparkhill Ward during the Birmingham City Council Elections of May 2000. A Petition was issued, but it was served upon the First Respondent one day out of time and was dismissed by the High Court on 12 July 2001.

Personal discussions with Returning Officers lead me to the view that there is a small amount of personation in most elections. Those to whom I have spoken would welcome a more vigorous and sustained attack on this corrupt practice.

Many people involved in politics in Northern Ireland recount anecdotes suggesting that personation is rife within the province. The evidence of reported cases is scarce

³ [1999] 3 WLR 444

⁴ *Re Local Government Election for Eel Brook Electoral Division Hammersmith and Fulham Council; Thompson v Dann & Another* (Unreported, QBD (Crown Office List) M/0273/94, 20 Oct 1994) citing the *Finsbury, Central Division Case* (1892) 4 O'M & H 171 and the *St Andrew's Borough Case* (1886) 4 O'M & H 32.

⁵ See n4 above

⁶ *R v Phillips (Catherine Kay)* (1984) 6 Cr App (S) 293

but it should be recorded that there are two relatively recent cases: *Blaney v McAllister & Another*, *McGuinness v Martin & Another*⁷ and *Davey v CC RUC*⁸. In the latter of these cases some 52 people were arrested at one polling station on allegations of personation and some were convicted of the offence. Many of those convicted received small fines, in contrast to the result in *Phillips*, so it could be concluded that personation is indeed a regular feature of elections in the province. The Northern Ireland (Electoral Fraud) Bill may well deal with some of the difficulties encountered in the province.

2.1.1 In-person voting by paper ballot

In the United Kingdom a person wishing to vote applies to the Presiding Officer at a Polling Station for a ballot paper, his or her identity then may be checked. There are often representatives of the candidates outside the Polling Station who may alert the Presiding Officer of any irregularity such as a person entering the Polling Place twice. Usually checks on a person who wishes to vote are quite informal, but in cases of challenge the Presiding Officer must put certain questions (described as the Statutory Questions) to the applicant. These questions are to be found in Rule 35 of the Parliamentary Election Rules (which are also effective in European Elections) (see Schedule 1 of the Representation of the People Act 1983) and in Rule 29 of the Principal Areas Rules (see Local Elections (Principal Areas) Rules 1986 SI 1986/2214). Giving an untrue answer to these questions is an offence under s5(a) Perjury Act 1911 and a person who has applied for a ballot paper whilst personating another is guilty of a corrupt practice under s60 Representation of the People Act 1983.

The Parliamentary Election Rules (Schedule 1 Representation of the People Act 1983) at Rule 36 provides that a Presiding Officer in a Polling Station may order a constable to arrest a person properly challenged as a personator.

These legal provisions apply, mutantibus mutandis, to proxy voting.

These provisions, as could be said of so many like provisions of electoral law are cumbersome and could, with great advantage be simplified.

2.1.2 Postal Voting

Postal votes may now be obtained on demand as a result of changes introduced by s12 and Schedule 4 of the Representation of the People Act 2000. Press reports around the June 2001 General Election suggested that postal votes could be obtained with ease in respect of dead or otherwise non-existent voters. This does not necessarily mean that false postal votes were submitted because Rule 19 of the Principal Areas Rules (see Local Elections (Principal Areas) Rules 1986 SI 1986/2214) provides that 'ballot papers and a declaration of identity' shall be sent to those desirous of voting by post. No reports of false postal votes being made were made public. The Rules for postal

⁷ [1988] NI 442

⁸ [1988] NI 139

voting are set out in Part V of the Representation of the people Regulations 1986 as amended and the Declaration of Identity is described in Rule 79.

The return of a marked ballot paper by post is sufficient, provided the other necessary elements of personation are present, for the offence to be made out by virtue of s60(3) Representation of the People Act 1983

2.1.3 Analysis and recommendations for RVEM.

All manners of voting are susceptible to personation. The evidence of reported cases is that the incidence of personation is low. Anecdotal and unsubstantiated claims suggest a higher incidence, which is impossible to quantify. The English courts have stated that they view the offence of personation as serious. The circumstances in which one could accidentally or mistakenly commit the offence of personation are difficult or impossible to imagine; the average person simply does not, without nefarious purpose, describe him or herself as someone else. The honest voter if faced with a notice saying 'It is a criminal offence to give a false name or identifier whilst voting by electronic means.' is likely, it is submitted to approve of such a notice and is unlikely to feel constrained by it or be inhibited from voting. According it is

- **Proposed that some form of warning be issued to electronic voters that it is a criminal offence to personate another.**

This could be accomplished by means of an amendment to s60 Representation of the People Act 1983 providing that personation in electronic voting is an offence. It seems that the electronic means of voting readily admit the attachment of warnings or notices as described. For the sake of consistency such warnings could displayed in Polling Stations and added to the Declaration of Identity form sent out with postal votes and described in regulation 79 of the Representation of the People Regulations 1986.

This would be in addition to any electronic security measures used to prevent personation. Furthermore, given the suspicion that personation is more widespread than the reported cases admit and RVEM gives a greater opportunity for personation, it is

- **Proposed that the penalties, either as laid down by statute or imposed in fact, are increased to serve as a real deterrent.**

2.2. Offences akin to Personation

Section 61 Representation of the People Act 1983 creates a number of other offences related to voting. These are said to be *illegal*, as opposed to *corrupt*, practices and prosecution for participating in them is authorised by s169 of the Act. These offences include, a) voting whilst suffering from a legal incapacity, b) voting other than as a proxy more than once, c) voting personally at an election in which one is entitled to vote by post d) voting in person when one's proxy has voted or is entitled to vote by post. There are other offences, but the important principle set out by s61 is that it is an offence to vote twice in the same ballot or poll.

2.2.1 Personal and Postal Voting

The essence of s61 is that it prevents double voting. S61(2)(b) (i.e. c) in 2.2 above) is key in that it provides that it is an offence to vote in person where one is entitled to vote by post. The point of this provision is to place a legal deterrent to people voting by post and then going to the polling station. It makes life easier for Presiding and Returning Officers because they do not have to maintain a check on all the registers in a busy polling station. The only register they have to keep in view is that of people expected to vote in person.

2.2.2 Analysis and recommendations for RVEM

Legal obstacles are placed to prevent people voting more than once. Clearly any RVEM system must have similar obstacles, because no system that appeared to permit or condone multiple voting would command public support.

- **Section 61 would need amendment to facilitate a change in the law covering multiple electronic voting.**

A further sub-division of the registers would be necessary to cover personal, proxy, postal and electronic voting. The core provisions are to be found in s12 and Schedule 4 of the Representation of the People Act 2000. The colleagues writing the Technical Report have proposed (qv) that single on-line real-time Registers be developed. Given the work on the LASER project this appears to be a viable option. There do not seem to be any legal impediments so far as election law is concerned to the scheme; no doubt data protection lawyers will scrutinise it closely.

Some caution would need to be exercised however. It seems advisable that any RVEM system should confirm that a vote has actually been received otherwise honest voters might be tempted to 'try again' in cases of doubt; furthermore any amendment to the law would have to take account of message duplication caused by an electronic malfunction. The Focus Group research contained in this Report (qv) indicates that voters do not have sufficient trust in electronic systems to allow the submission of an electronic vote to go unconfirmed; voters would like a certificate confirming their vote showing that they voted for a particular candidate or party. It should be noted that the Technical Report cautions strongly against the issue of a voting certificate because of the worries set out here and because the sending of certificates increases the likelihood of breaches of security.

However there are difficulties which arise in the event that a certificate is electronically sent to confirm that a voter has voted for a particular party or candidate. It would facilitate the buying or selling of votes for a person could simply go to a vote-buyer and show his or her vote certificate and claim the fee offered.

- **This practice could be strongly discouraged by an amendment to section 66(3)(d) of the 1983 Act by making it an offence to 'directly or indirectly induce a voter to display his voting certificate' and furthermore by making it an offence to show another person one's voting certificate. This**

could be facilitated by attaching a warning of the criminal nature of the activity and the penalties to a voting certificate.

Furthermore it is proposed that the Government should consider legislation to prevent ‘vote bartering’. During the last General Election there were reports of vote bartering (if you vote for Party X in your constituency, so that they might win, I’ll vote for Party Y in my constituency to give your party a chance. This will stop Party Z whom we both dislike) and there were websites set up to facilitate the practice. Without a voting certificate such enterprises depended entirely on trust and one might well think that people who are prepared to engage in dishonesty are ‘low on trust’. Clearly a voting certificate would increase trust in vote bartering schemes.

- Outlawing vote-bartering schemes would minimise their impact. The Government may wish to consider legislation

‘Vote buying’- paying money or other valuables to secure the election of a candidate is also facilitated by the issuing of voting certificates since, as has been set out above, a certificate does provide a check on how a vote has been cast. Vote buying is a species of bribery, which is set out as a corrupt offence by s113 of the 1983.

- It is recommended that if any voting certificate is issued that it contain a warning that the use of such a certificate to obtain money in consequence of returning a vote for a particular candidate or party is a serious criminal offence. If voting certificates are issued, it would be preferably that they should be issued solely in electronic form such that (if the technology were available) they could not be printed. Furthermore such certificates should contain the bare minimum of information.

2.3 Other door-keeping offences

Tampering with nomination papers, ballot papers and other specified election materials is an offence punishable by imprisonment or a fine by virtue of s65 of the 1983 Act. Election officials are liable to heavier penalties than ordinary members of the public. Similarly interfering with a voter when recording his or her vote is an offence by virtue of s66(3)(a) of the Act. No reported cases have been located dealing with such matters. On the assumption that, irrespective of the voter interface (PC, ATM, interactive digital TV, telephone), votes are collected and tallied on a ‘computer’ it is likely that unauthorised entry to, or tampering with, voting data will be a problem. It is well known that ‘hacking’ is a popular pastime in some quarters. Thus hacking could amount to one of these offences.

Furthermore, in the context of paper polling, Presiding Officers are charged with keeping order at Polling Station under Rule 33 of the Parliamentary Election Rules.⁹ Would a ‘virtual polling station’ be covered by the same provisions? Probably not, because it is to be presumed that a hacker’s entry and exit is almost instantaneous and more importantly, since the statute appears to be penal it would be strictly construed.

⁹ Similar rules apply to other elections.

Hacking in all its manifestations is a criminal offence under the provisions of the Computer Misuse Act 1990. Sections 1-3 of the Act set out the various offences, which can easily be described as ‘unauthorised entry’, ‘unauthorised entry with intent to commit a further offence’ or ‘tampering’ respectively. The penalties for these offences are quite low, ranging from a maximum of six months imprisonment for the least serious to a maximum of five-year imprisonment and a fine for the most serious. Given the comments of the Court of Appeal in *Phillips*¹⁰, the cost of re-running a poll and the political embarrassment caused, and public and judicial attitudes in general¹¹ to abuses of the electoral system it is submitted that these potential sentences are too low. Accordingly it is

- **Proposed that consideration be given to amending the Computer Misuse Act 1990 to create a specific offence of tampering with the computer system used for voting.**

The advantage of a narrowly drawn offence in this area is that it would minimise possible challenges under Article 10 (the ‘freedom of speech’ provision) of the European Convention of Human Rights.

2.4 ‘Bad Votes’

One might well call a personated or duplicated vote a ‘bad vote’. ‘Bad votes’ may arise in other ways, such as by the bribing of,¹² the treating of,¹³ or the exercise of undue influence upon,¹⁴ voters but these offences do not seem to raise special issues in the context of RVEM.¹⁵ Bad votes are struck off the poll by virtue of s166 of the 1983 Act. It is clear that individual bad electronic votes can and should be treated in the same way. The problem arises in relation to the avoidance of an election as a whole under s164 of the 1983 Act. This states:

164 (1) Where on an election petition it is shown that corrupt or illegal practices or illegal payments, employments or hirings committed in reference to the election for the purpose of promoting or procuring the election of any person at that election have so extensively prevailed that they may be reasonably supposed to have affected the result--

(a) his election, if he has been elected, shall be void, and

(b) he shall be incapable of being elected to fill the vacancy or any of the vacancies for which the election was held.

(2) An election shall not be liable to be avoided otherwise than under this section by reason of general corruption, bribery, treating or intimidation.

¹⁰ See n6 above.

¹¹ See, *inter alia*, the reports of *R v Duffy* (1994) 15 Cr App R (S) 677, *R v Returning Officer for Barnet & Finchley ex parte Bennett v Thatcher* [1983] CA Bound Transcript, 3 June 1983

¹² Section 113 Representation of the People Act 1983

¹³ Section 114 Representation of the People Act 1983

¹⁴ Section 115 Representation of the People Act 1983

¹⁵ There are few modern cases on these sections. The clearest modern example of such a case is *R v Rowe, ex parte Mainwaring and others* [1992] 4 All ER 821, [1992] 1 WLR 1059. See here the remarks of Nolan LJ who recognises that the law is seriously outdated.

The problem with the section is that it implicitly assumes that a person who corruptly or illegally influences the result of an election does so with the intention of securing the election of one candidate over the others; it further appears that an assumption is made that the candidate knows of, endorses, or would endorse the practice. These assumptions may well be false. A person may wish to disrupt an election because he sees the entire election as a ‘frightening farce’, and wishes to make ‘the electoral process more farcical’.¹⁶ If such a person succeeds in an election in voting a number of times by multiple personations, it is quite plain that the election ought to be avoided unless all those purported votes can be removed. Indeed it might be argued that from the perspective of public confidence a badly tainted election ought to be avoided whether or not the result is affected by the taint. Accordingly it is recommended that:

Section 164 of the Representation of the People Act 1983 is amended to read, either:

- **(1) Where on an election petition it is shown that corrupt or illegal practices have so extensively prevailed that they may be reasonably supposed to have affected the result, the election shall be adjudged void.**
- (2) An election shall not be liable to be avoided otherwise than under this section by reason of general corruption, bribery, treating or intimidation.**

Or

- **1) Where on an election petition it is shown that corrupt or illegal practices have extensively prevailed, the election shall be adjudged void.**
- (2) An election shall not be liable to be avoided otherwise than under this section by reason of general corruption, bribery, treating or intimidation.**

It has been suggested in the Technical Report that the use of a duplicate system of acceptance, decryption, storage and counting of votes may be sufficient to stop one form of ‘hacking’ – the corruption of the dataset after it has been assembled. The specific suggestion being that an open system computer source code be used to aid transparency and audit with a bespoke system being used as a check. The closed system being authoritative as to votes cast and opened to inspection if it were used. This may be a way forward; if it were adopted specific statutory authority would be needed. It will be seen below (see the second bullet point at 4.1(1)) that there are further advantages relating to the use of open source code.

2.5 Conclusion

It seems that comparatively little needs to be done to amend election law in order to permit RVEM. If the Government wishes to proceed it may do so by the passage of a number of small technical amendments and by drafting some new sections to existing Acts, although it is clear that a root and branch redrafting of electoral law would be

¹⁶ See the election address of one ‘Margaret Thatcher’ (né Colin Hanoman) in *R v Returning Officer for Barnet & Finchley ex parte Bennett v Thatcher* [1983] CA Bound Transcript, 3 June 1983

very welcome.¹⁷

3. The secrecy principle.

Secrecy of voting is a defining principle of modern democracy. International norms recognizing the central value of secrecy include:

Universal Declaration on Human Rights

Article 21.

(1) ...

(2) ...

(3) *The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*

International Covenant on Civil and Political Rights.

Article 25.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

...

To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

...

European Convention on Human Rights.

(For special relevance see *R v Wakefield MDC ex parte Robertson*, The Times Nov 27 2001, [2001] EWHC Admin 915)

Protocol 1. Article 3

The 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.

Organisation for Security & Co-operation in Europe: Copenhagen Document of 1990

¹⁷ See the judicial comments in *R v Rowe, ex parte Mainwaring and others* [1992] 4 All ER 821, [1992] 1 WLR 1059, and *R. v Jones (Fiona)* [1999] 2 Cr App R 253.

(5) *[The participating States] solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and unalienable rights of all human beings are the following:*

(5.1) *- free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;...*

(6) ...

(7) *To ensure that the will of the people serves as the basis of the authority of government, the participating States will*

(7.1) ...

(7.2) ...

(7.3) ...

(7.4) *- ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;*

Inter-Parliamentary Union Declaration on Criteria for Free and Fair Elections (Paris 154th Session, 26 March 1994)

2. Voting and Elections Rights

(1) ...

(2) ...

(3) ...

(4) ...

(5) *Every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote.*

(6) ...

(7) *The right to vote in secret is absolute and shall not be restricted in any manner whatsoever.*

3. ...

4. The Rights and Responsibilities of States

(1) ...

(2) ...

(3) ...

(4) ...

(5) *States should take all necessary and appropriate measures to ensure that the principle of the secret ballot is respected, and that voters are able to cast their ballots freely, without fear or intimidation.*

(6) –(9) ...

3.1.1 In-person voting by paper ballot

Under English law if an individual voter goes to vote and obeys the procedure set down in Rule 37 of Schedule 1 of the 1983 Act, it is clear that secrecy is preserved. This rule provides inter alia that

2) *The voter, on receiving the ballot paper, shall 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 shall then show to the presiding officer the back of the paper, so as to disclose the official mark, and put the ballot paper so folded up into the ballot box in the presiding officer's presence.

It is recognised that persons with disabilities may be accompanied to the polling booth; this represents an attenuation of the strict secrecy rule and is discussed below. There does not seem to be a mechanism for checking that a blind voter's companion has marked the ballot paper in accordance with his or her wishes; indeed this could not be achieved without a breach of the secrecy requirement. This rule has been amended by s13 Representation of the People Act 2000 which amends Rule 29 of the Parliamentary Election Rules to require the supply of equipment to make it easier for people with disabilities to vote without a companion or the assistance of the Presiding Officer. Similarly a voter who appoints a proxy must rely upon the trustworthiness of the proxy.

There have not been any legal challenges to the UK practice of requiring, at least in practice, some form of assistance to voters with disabilities. Some research conducted by SCOPE may, with advantage, be quoted here.

*'A member of (polling station) staff then took me to the polling booth and positioned the (tactile) template¹⁸ over the ballot paper for me. I found it difficult to hold it still whilst lifting up the little tab against the number of the candidate I wished to mark, and as a result the template moved slightly. The result of this was that I had to get the member of staff to check the ballot paper for me and put the mark more accurately in the box, thus making a complete mockery of the whole process which was supposed to allow me to vote in private.'*¹⁹

It may be that it is only a matter of time before such a challenge emerges. The likelihood of success of any such challenge may be estimated by a consideration of the result of *Nelson & Others v Miller (in official capacity as Secretary of State for the State of Michigan)*.²⁰ In a representative action a number of blind voters impugned the State of Michigan's practices in failing to provide blind voters with any means whereby they could vote without a companion as outwith the provisions of the Constitution of Michigan and the provisions of the Americans with Disabilities Act 1990. The plaintiffs failed, it being said that according to the applicable law – Art. 2 §4 of the Michigan state Constitution and Mich. Comp. Laws Ann. §168.786 (the voting law) – the phrase 'secrecy of the ballot' was not to be interpreted as 'absolute secrecy from everyone in all instances'. Thus the Sixth Circuit of the Court of Appeals, a division of the second highest court in the USA, held that there was no absolute requirement of secrecy that had to be guaranteed by the state. Individual voters must be taken to bear some responsibility for keeping the ballot secret.

A similar conclusion can be reached on the basis of the Scottish case of *Nicolson & Others v The Provost, Magistrates, Councillors of Wick and Others*, [1922] S.C. 374. The relevant issue is whether the polling booths provided were sufficient for the purposes of secrecy as required in Rule 16 of the First Schedule to the Ballot Act of

¹⁸ A device to assist blind voters authorised by s13 RPA 2000.

¹⁹ Scott R., & Morris G., *Polls Apart 3*, Campaigning for accessible democracy (London; Scope 2001) p.20

²⁰ 170 F.3d 641 (USCA 6th Cir. 1999)

1872. The First Division of the Court of Session heard the case and the four judges, the Lord President (Clyde), and Lords Mackenzie, Skerrington, and Cullen were unanimous in their view that, to use the words of Lord Mackenzie: ‘(t)he provisions of the Ballot Act (1872) clearly show that there must be co-operation on the part of the voter to secure secrecy in voting’. Lords Cullen and Skerrington make plain their view that the construction of the voting booth must provide the voter with sufficient facilities so that she or he may, with reasonable care, keep their vote a secret.

3.1.2 Postal voting and RVEM

Postal voting or RVEM represents a radical step. Here voting papers are marked outside of an environment regulated so as to ensure secrecy. A person may mark the ballot paper privately or publicly. There are no penalties for voting publicly.

In the case of postal voting each elector in a household desirous of voting by post receives a separate ballot envelope. On voting she or he must, if it is desired to conceal the marked ballot from other members of the household, personally take steps so to do. It would seem that this comes within the rule as established in *Nicolson* and in the USA in *Nelson v Miller*. That is to say a person can keep their vote secret.

Suppose that a family member did compel another to vote for a candidate of his choice rather than a candidate of the voter’s own choice. Section 115 of the Representation of the People Act 1983 provides that it shall be a corrupt practice to exercise undue influence upon another in the process of voting.

(2) *A person shall be guilty of undue influence-*

- (a) *If he, directly or indirectly, by himself or any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any other person in order to induce or compel that person or refrain from voting, or on account of that person having voted or refrained from voting; or*
- (b) *if by abduction, duress or any fraudulent device or contrivance, he impedes or prevents the free exercise of the franchise of an elector or proxy for an elector, or so compels, induces or prevails upon an elector either to vote or to refrain from voting.*

Whilst the language is elegant it is unclear; I am uncertain how many modern voters can readily distinguish between a spiritual and a temporal injury or, indeed, would feel them to be in proximate breach of the Fifth Commandment for failing to vote in accordance with their parents’ wishes. It is proposed that

- **Section 115 of the RPA 1983 is in urgent need of redrafting.**

This is probably sufficient as far as postal voting is concerned because it does take some positive effort on the part of a person intending to exercise undue influence upon a person marking a paper ballot to stand over them and force them to vote other

than in accordance with their own wishes. Similar considerations apply to the operation of a ‘touch-tone’ telephone. The ballot paper and the telephone are essentially one-person devices. That is not to underestimate the difficulty of enforcing the law.²¹ If a person is compelled by a parent or spouse to vote in a particular way, and yet still remains in the household because of economic or other pressure, it is surely wholly unrealistic to expect them to make a complaint of a corrupt electoral practice. Nonetheless it could be argued that since the state does not intervene to prevent all instances of, e.g., domestic violence it is unrealistic to expect it to intervene to prevent all instances of domestic electoral malpractice. It has been indicated to the author that complaints have been made about the exercise of undue influence in postal voting and at least one leading practitioner has considered whether to bring the matter to the attention of the police. It was decided not to do so on the basis of evidential difficulties.

The difficulty seems to arise in the cases of interactive digital television and the Internet or other computer based systems. Where these are in the home they are usually or often seen as family resources. The television, and perhaps increasingly with the advent of broadband communication – the computer, are central features of the family’s living space. This raises the issue of ‘family voting’.

Clearly there are policy debates to be conducted around this issue and it is no part of this section of the Report to engage with these issues. This part of the Report focuses upon the legal issues and analyses those debates which have been conducted in legal or semi-legal fora. There is no clear-cut ‘legal answer’ to these concerns; they are raised to facilitate that which promises to be a lively political debate.

Firstly there are the Organisation for Co-operation and Security in Europe, Office for Democratic Institutions and Human Rights, Guidelines for reviewing a legal framework for elections, adopted in Warsaw in January 2001.²² These clearly cannot be legally binding because they set out to provide a benchmark for an election observer to judge municipal law. The Introduction to the document needs to be set out in full so that the authority of the paper can be judged.

I. INTRODUCTION

These guidelines are intended to set forth the basic components of a legal framework governing elections, and the minimum standard relevant to each component, that are necessary in order for a country’s legal framework to ensure democratic elections. They are further intended to provide the examiner of the legal framework with an approach that will contribute to uniformity, reliability, consistency, and accuracy in the review of election related text. These guidelines will also provide guidance to national parliaments when they are drafting or amending election related text. The guidelines were developed by the OSCE Office for Democratic Institutions and

²¹ Furthermore it has been suggested that this view is unduly trusting or optimistic, some people may feel pressurised on the telephone or in exercising a postal vote. The practice in the state of Oregon, set out in the ERS report, of providing ‘secrecy booths’ for all postal ballots has much to commend it.

²² See http://www.osce.org/odihr/documents/guidelines/gl_rlfr_eng.pdf last inspected on 4 February 2002.

Human Rights (ODIHR) in collaboration with the International Institute for Democracy and Electoral Assistance (International IDEA).

The chapters are presented in an order intended to facilitate methodical review and assessment of the legal framework. The heading of each chapter, beginning with chapter three, identifies the subject matter of the legal framework addressed in the chapter. Following the chapter heading is a statement of the objective of the minimum standard relevant to that particular component of the legal framework.

Discussion of that particular component of the legal framework follows. The chapter concludes with a checklist of issues relevant to the component. The examiner may use this checklist to confirm that the legal framework has addressed all issues related to that particular component of the legal framework.

The material dealing with secrecy of the ballot and family voting is as follows:

XII. BALLOTING PROCEDURES

OBJECTIVE: The legal framework should ensure that secrecy of the vote is guaranteed, and that all votes are counted and tabulated equally, fairly, and transparently.

A. Secrecy of the Vote

Secrecy of the vote is a minimum standard for a democratic election. Illustrative of this minimum standard is Paragraph 7.4 of the OSCE 1990 Copenhagen Document, which requires that votes be cast by secret ballot.

The examiner should carefully review provisions in the legal framework regulating control and security of the ballot, as well as the provisions governing the casting of a ballot at the polling station. The legal framework should provide for ballot security, while at the same time ensuring that no individual ballot can be identified as being marked by a specific voter.

Under no circumstances, except for counting of ballots after close of the polling, should a polling station committee member or other person be allowed to see a voter's marked ballot. Obviously, this prohibition does not apply to a person legally authorized to assist a blind voter or a voter requiring assistance due to physical infirmity. However, it is unacceptable for a member of a polling station committee to handle or control the voter's marked ballot before it is placed in the ballot box.

The principle of secrecy of the vote requires that election regulations underline that secret voting is not only a right on the part of the voter, but an absolute obligation. In this regard the most frequent abuse is "family voting", which is still a relatively common practice in many OSCE countries. The legislation should make clear that every voter's ballot must be marked and cast secretly. Election officials should under no circumstances accept deviations from the principle of secrecy of the vote.

The principle drawn from this is clear. Sooner or later there will have to be a review of the various electoral laws operating in the UK; to continue with the present nineteenth century structure is untenable, if for no other reason than it is outwith the present Government's agenda of modernisation. As a matter both of law and politics the International Human Rights Instruments set out above and documents such as the ODIHR guidelines are going to be used as the benchmark against which the new electoral law will be judged. Even if this prediction of a root and branch review is wrong, it is beyond doubt that someone will raise the issue of 'family voting' and suggest that RVEM makes 'family voting' very easy.

If 'family voting' is unlawful and a provision to permit RVEM was passed into law against political challenges, it is beyond doubt that a legal challenge by way of judicial review would soon be mounted. The argument would be that family voting is outwith the provisions of Article Three of the First Protocol of the European Convention of Human Rights because it does not guarantee secrecy in voting, but the Government had implemented a course of action which made it difficult to avoid family voting and therefore the loss of secrecy.

The Government would presumably argue in response that:

- 1) There is no requirement for people to vote at home using the RVEM system because there are plenty of other voting mechanisms available – in person voting in the polling station, postal voting, or RVEM from a site which guarantees privacy. This seems to be a strong argument.
- 2) Interfering with another person's right freely to vote is a criminal offence under the provisions of s115 RPA 1983 and the police will take reports of interference very seriously. One could perhaps use the issue of 'domestic violence' as a model; clearly people have a right to their private and family life under Article 8 of the ECHR, but violence does occur in the home. The police are ready to investigate and submit the results for the consideration of prosecution in those circumstances, why should they not be prepared to act in cases of intimidation regarding voting? The problems with this argument are: a) that it may well be that those intimidated are simply too frightened to make a complaint, b) that whilst the level of pressure used is sufficient to produce the desired result it does not amount to 'undue influence' and the authorities have nothing on which to base a prosecution, c) problems of evidence make any prosecution unlikely to succeed. It could be that the courts will take the view that the law does not provide sufficient safeguards in fact.
- 3) Linked to this second reason it could be argued that the reason for protecting secrecy of the ballot is to protect citizens from prior intimidation or later reprisal if it became known how a person was going to vote or had voted. The problem with this argument is that it by no means certain that the reason for the secrecy rule is to protect citizens from intimidation, undue influence or reprisal; it could be argued that the intention of the rule is simply to preserve privacy or a space for independent individual consideration about how to vote.

This debate resolves into two questions. The authorities are not wholly helpful on either question.

The first question is whether the real issue is 'secrecy per se' or 'secrecy to avoid intimidation or reprisal'. In the *County of Down* case²³ the judges divided on this important question, Fitzgerald B²⁴ holding that the real issue was one of secrecy to avoid intimidation or reprisal, whilst Barry J²⁵ held that the reason for the rule was for the maintenance of secrecy per se.

The second question which flows in part from this issue is whether, in the time leading up to the moment of voting all pressures ought to be removed from the mind of the voter; that is to ask whether the voter ought to be able to vote solely according

²³ (1881) 3 O'M&H 115

²⁴ *ibid* p125

²⁵ *ibid* pp 125-129.

to the dictates of his or her own conscience. The matter is discussed in *County of Down* and in a number of other cases.²⁶ The terms of the discussion would, if it were conducted today, seem to admit only one answer which is the precise opposite of the answer reached in most of the cases. In raising the issue there is a danger that rehearsing the hundred-plus year old debate will influence the result of the present considerations, however it must be drawn to the attention of those commissioning this Report.

The issue in these old cases was whether the advice of respectable, rich and powerful people, such as their landlords, their employers and their own clergy ought to be made available to voters. The judges generally took the view that it would be a pity if the ordinary voter did not take the advice of their, to be blunt, ‘betters’, provided that the advice did not amount to undue influence.

It is difficult to tease out the criteria used to distinguish ‘proper’ from ‘undue’ influence in the nineteenth century cases. The view seems to have been that it was the responsibility of ‘better’ (richer, more highly educated, more successful?) citizens to guide their less exalted fellows. To use undue influence would be a breach of trust. Could it be argued that parents should influence their children in this way? It could, on the other hand, be argued that today’s electorate is of such sophistication, and today’s children so dismissive of their parents, so as to eliminate this concern.

An argument which could be raised against the cautious view set out in this paper is a variant of the argument which I have suggested could be raised by the Government in 1) above. It might be said that we already have postal voting, which is susceptible to this sort of challenge and yet no challenges have arisen. The answer to that point is that no challenges to the selling of electoral registers²⁷ arose before *Robertson*, and

²⁶ Notably *Blackburn* (1870) 1 O’M&H 198; *Waterford* (1875) 2 O’M&H 24; *Galway* (1870) 1 O’M&H 303; *Bolton* (1875) 2 O’M&H 31.

²⁷ That is to say that no litigation was brought prior to *Robertson*. However the memorandum from the Registrar of Data Protection, included as Appendix I to The Final Report of the Working party on Electoral Procedures chaired by Mr George Howarth MP, makes plain the Commissioner’s view that the sale of the Register was unlawful. Her points were as follows:

- the existing arrangements whereby the Register is sold, without restriction, for non-electoral purposes should be discontinued;
- if any arrangements for sale are to continue individuals providing their details to an ERO should be told the purposes for which the Register might be sold;
- individuals’ details should not be sold on unless they have signified agreement either generally or for specific purposes;
- the Data Protection Registrar recognises the possibility that the Register might be sold for purposes where the public interest in having a complete information set overrides individual preferences. In the light of the criminal penalty for individuals failing to provide their details any case needs to be particularly convincing;
- even if such a case be made in relation to some purposes individuals should still have a choice over the sale of their data for other purposes particularly the compilation of direct marketing lists;
- the Register should not be sold for purposes which individuals have not been advised of.

There might be some purposes for which, even if individuals were advised of them, sale would be inappropriate;

- where the Register is sold there should be an obligation on EROs to meet standards which ensure the personal data are adequate and sufficiently accurate for the purposes for which they are sold;

yet he was successful. Some people might argue that Mr Robertson was somewhat eccentric; most people just cope with the avalanche of ‘junk mail’ partly occasioned by the sale of the Register by consigning it to the waste bin. The argument would therefore run – many people would find it much more convenient to vote from home using a computer based system or interactive digital television and would not experience difficulties in so doing, why should a minority prevent the majority from taking advantage of this improvement?

The answer is two-fold. The third Article of the First Protocol to the European Convention on Human Rights provides simply for secrecy of voting; it does not, unlike Article 8 of the Convention which was at issue in *Robertson*, contain a clause admitting derogation (i.e. Article 8(2) derogates from 8(1)) in accordance with the well known principles of proportionality and the margin of appreciation afforded to High Contracting Parties. The Article appears clear on its face – secrecy is paramount; there is no room for any derogation.

If this suggestion is wrong and there is room for a balancing test between the convenience of the many and the possibility that some may be coerced in the home, it would seem from the judgment of Maurice Kay J in *Robertson* that the test would be applied such as to weigh the convenience of the many against the possibility that some would be coerced in their homes.²⁸ The application of such a test tends to the result that the balance would be struck in favour of a system which led to the lowest number of opportunities for unduly influencing voters.

One might therefore argue that this apparently ‘knock-down’ argument is in fact rather weak if it measures the convenience of voters against the opportunities for undue influence. It suggests that both RVEM and ‘all postal’ ballots are susceptible to challenge.

If, on the other hand the Court was compelled to weigh the facility to vote at all against the opportunity unduly to influence voters it is clear that the opposite result would be reached.

3.1.3 Workplace voting by RVEM.

Much of the foregoing debate would apply to workplace voting. An additional concern might be that if a person were to vote by electronic means in the workplace some employers might be minded to take punitive action were the employee to vote

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- if, despite the assistance technology might provide, the Government decides it is too difficult to cater for individual choice the Register should be withdrawn for sale.

It would seem that the interests of commercial concerns and charities set out in the succeeding Appendices persuaded the Working Party and hence the Government that the sale of the Register should continue.

²⁸ See Maurice Kay J’s discussion of the hypothetical problem in which the owners of residential facilities write to elderly people in their own homes asking them if they wish to take advantage of their services.

for a candidate disfavoured by the employer. This is especially the case in local government elections where the employer might well be a candidate.

3.2 Statutory amendment.

If the Government were minded to go ahead with the introduction of RVEM it would seem that the following laws would require amendment to accord with the requirements of secrecy. In this section I have focussed upon the major legislative amendments which will be required. Some explanation of the amendment has been given and some changes to the words have been proposed.

Representation of the People Act 1983

S66. Requirement of Secrecy.

If everyone's sitting room or workplace becomes, in effect, a polling station, it would seem that the duty upon presiding officers and clerks 'to maintain and aid in maintaining the requirement of secrecy' ought to be extended to all those who see another's electoral details. This will require a substantial amendment to s66. The precise subsections requiring amendment are starred.

66(1) The following persons--

*** (a) every returning officer and every presiding officer or clerk attending at a polling station,*

*** (b) every candidate or election agent or polling agent so attending,*

Substitute 'Every person'

shall maintain and aid in maintaining the secrecy of voting and shall not, except for some purpose authorised by law, communicate to any person before the poll is closed any information as to--

(i) the name of any elector or proxy for an elector who has or has not applied for a ballot paper or voted at a polling station;

(ii) the number on the register of electors of any elector who, or whose proxy, has or has not applied for a ballot paper or voted at a polling station; or

(iii) the official mark.

(2) Every person attending at the counting of the votes shall maintain and aid in maintaining the secrecy of voting and shall not--

(a) ascertain or attempt to ascertain at the counting of the votes the number on the back of any ballot paper;

(b) communicate any information obtained at the counting of the votes as to the candidate for whom any vote is given on any particular ballot paper.

(3) No person shall--

(a) interfere with or attempt to interfere with a voter when recording his vote;

*** (b) otherwise obtain or attempt to obtain [in a polling station] information as to the candidate for whom a voter [in that station] is about to vote or has voted;*

Delete the words placed in []

*** (c) communicate at any time to any person any information [obtained in a polling station] as to the candidate for whom a voter in that station is about to vote or has voted, or as to the number on the back of the ballot paper given to a voter at that station;*

Delete the words placed in []

*** (d) directly or indirectly induce a voter to display his ballot paper after he has marked it so as to make known to any person the name of the candidate for whom he has or has not voted.*

Note, furthermore than amendments to subsection (3)(d) have been proposed in 2.2.2 above.

This will be very difficult to enforce if RMEV is accomplished by means of a computer or interactive television based system. Everyone in the room can see the screen. An amendment to the Act would, presumably, need to encompass the criminalization of setting 'traps' to record marked ballot papers.

(4) Every person attending the proceedings in connection with the issue or the receipt of ballot papers for persons voting by post shall maintain and aid in maintaining the secrecy of the voting and shall not--

(a) except for some purpose authorised by law, communicate, before the poll is closed, to any person any information obtained at those proceedings as to the official mark; or

(b) except for some purpose authorised by law, communicate to any person at any time any information obtained at those proceedings as to the number on the back of the ballot paper sent to any person; or

(c) except for some purpose authorised by law, attempt to ascertain at the proceedings in connection with the receipt of ballot papers the number on the back of any ballot paper; or

(d) attempt to ascertain at the proceedings in connection with the receipt of the ballot papers the candidate for whom any vote is given in any particular ballot paper or communicate any information with respect thereto obtained at those proceedings.

Insert new subsections dealing with electronic voting

4A No person shall, except for some purpose authorised by law,

- (a) *divulge any PIN-number, authorisation code or other form of identifier used in connection with electronic voting to facilitate entry into system, verify the identity of the voter, or facilitate the auditing of votes*
- (b) *voluntarily transmit to any other person details of any PIN-number, authorisation code or other form of identifier used in connection with electronic voting to facilitate entry into system, verify the identity of the voter, or facilitate the auditing of votes*
- (c) *make any record of PIN-number, authorisation code or other form of identifier used in connection with electronic voting to facilitate entry into system, verify the identity of the voter, or facilitate the auditing of votes except for his own number*
- (d) *operate the electronic voting system allocated to another person*

(5) *No person having undertaken to assist a blind voter to vote shall communicate at any time to any person any information as to the candidate for whom that voter intends to vote or has voted, or as to the number on the back of the ballot paper given for the use of that voter.*

(6) *If a person acts in contravention of this section he shall be liable on summary conviction [to a fine not exceeding level 5 on the standard scale or] to imprisonment for a term not exceeding 6 months.*

[(7) In their application in relation to an election of the London members of the London Assembly at an ordinary election, the preceding provisions of this section shall have effect with the insertion, after the words "the candidate for whom", in each place where they occur, of ", or the registered political party towards the return of whose candidates,".

(8) In relation to an election of the London members of the London Assembly at an ordinary election, any reference in this section to the return of a registered political party's candidates is a reference to the return of candidates included in the list of candidates submitted by the registered political party for the purposes of the election.]

Section 115 dealing with **Undue Influence** has already been discussed but it is plain that a person may well suffer loss as a result of pressure being put upon him or her. In the nineteenth century the usual forms of pressure were to threaten to evict a tenant or dismiss an employee if he failed to vote in the way desired by the landlord or employer. Whilst it is a criminal offence to exercise undue influence the exercise of undue influence might well leave the tenant or employee homeless or jobless. Some form of compensation ought to be provided for those injured. In relation to eviction the lodger (or licensee) is much less well protected than the tenant.²⁹

In order to deal with this problem

- **it is proposed that suitable legislation be drafted to ensure that employers and landlords are financially liable to their employees or tenants if they**

²⁹ For an explanation of the distinction and the remedies available to lessees and licensees see *Street v Mountford* [1985] AC 809

injure them for electoral reasons. In relation to employees it seems that an appropriate section could well be modelled upon s152 of the Trade Union and Employment Relations Consolidation Act 1992, although it is clear that the section would need to be placed, by amendment, in part X of the Employment Rights Act 1996.

A draft section is included to demonstrate kinds of problems which would need to be addressed.

- 1) *For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee--*
 - (a) voted, or attempted to vote, at an appropriate time by remote electronic means from his or her workplace, or*
 - (b) had at that time voted or attempted to vote for any particular candidate or candidates or party or parties, or*
 - (c) had not voted or attempted to vote or had not supported any particular candidate or candidates or party or parties.*
- (2) In subsection (1)"an appropriate time" means--*
 - (a) a time outside the employee's working hours such as lunchtime or immediately before or after work, or*
 - (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is was permissible for him or her to vote*

Difficulties may arise in relation to this section in that employers may decide that they do not want some employees to vote at all from the workplace and use this means to attempt to influence the result of the ballot. For example, suppose that the employer is the candidate for the X party in a tightly fought local government election and one of his employees is the candidate for the Y party. The employer would need to be prevented from enforcing rules to prevent Y's supporters voting. In the context of trade union activity and other activities this is known as 'action short of dismissal' and is set out in s146 of the 1992 Act and sections 44 to 47C of the Employment Rights Act 1996. Perhaps the best way round this problem is to grant a right to use RVEM modelled upon s50 of the 1996 Act. This is not altogether satisfactory because some employers may not have equipment of software suitable for RVEM because they may have computers which run highly specialised software or may, for security reasons, forbid outside access. Accordingly it may be that a qualified right to use RVEM is the best that may be provided.

3.3. Two alternatives

Most of these difficulties could be overcome by placing electronic voting machines in traditional polling stations. This would mean little or no amendment to the law would be needed. If suitable computer based Registers (e.g., LASER) were available it would mean that a voter could vote at any polling station.

Many of these difficulties could be resolved by having polling booths fitted with suitable equipment in a variety of public places. Merely to comply with the law, as set out in *Nicolson* would be simple, the booth need provide no more shielding than most ATM machines. However it has been observed that a minority of voters attempt to engage in family voting, sometimes successfully, in traditional polling stations. It would therefore be appropriate to consider whether individual carrels or booths are provided with some mechanism to ensure that only one person was present.

3.4 Assessment and summary.

There are difficulties to be overcome regarding the introduction of electronic voting.

Firstly the Government would need to be satisfied that the requirement of secrecy imposed by our international obligations could be satisfied. On the authorities and the international instruments and commentary set out above it seems unlikely that the requirement of secrecy would be satisfied if RVEM were the only available method. If there were a section of the population who were able to show that household influences prevented them from voting or tending to prevent them from voting in accordance with their own conscience, there is likely to be a significant challenge. On the evidence of the *Robertson*³⁰ case it is possible that such a challenge would be brought by an individual citizen with a particular concern for the issue even though the majority of citizens have no particular worry. Recall that Mr Robertson brought the case to prevent the sale of the electoral register although it is the general view, possibly the general cynical view, of Elections Officers that many people ensure that their name is on the Electoral Register for the sole purpose of obtaining consumer credit.

Accordingly RVEM needs to be introduced as an option for voting amongst a number of other options.

Secondly it is beyond doubt that Parliament and the polity in general will wish to debate the social consequences of potentially turning every home and workplace into a polling station.

If the legislature wished to press ahead it would be necessary to amend sections 66 and 115 of the Representation of the People Act 1983 and to make smaller consequential amendments in other electoral legislation.

Fourthly there would need to be amendments to labour law and probably housing law to compensate pressurised voters.

The most important recommendation which must come from this section of the Report is that the Government takes steps to satisfy themselves of the acceptability or

³⁰ *R v Wakefield MDC ex parte Robertson*, The Times Nov 27 2001, [2001] EWHC Admin 915

otherwise of RMEV with respect to the issue of secrecy and family voting against the standards set by the European Convention of Human Rights.

- **It is recommended that since this is a matter of great constitutional significance that the advice of Leading Counsel is taken before proceeding further. Indeed it could be argued that such a step is itself insufficient. The ‘big principle’ contained in RVEM is ‘home voting’. ‘Home voting’ and the preservation of secrecy seem inimical. If they were to be combined it would need some form of legislative interference with the privacy of the home which is protected by Article 8 of the European Convention of Human Rights.³¹ Clearly the legislature would need to move very carefully in this area and whilst any Bill would be scrutinised by the Joint Select Committee on Human Rights (with the assistance, of course, of the Parliamentary Commissioner) it may be that the issue would benefit from open ventilation before the Judicial Committee of the Privy Council. The rarely used section 4 of the Judicial Committee Act 1833 allows for Her Majesty to be petitioned to ‘refer to the said Judicial Committee for Hearing or Consideration any such other Matters as Her Majesty shall think fit, and such Committee shall thereupon hear or consider the same and shall advise Her Majesty thereon in manner aforesaid.’³² This will allow proper ventilation of the issues. There seems to be little difficulty in framing an appropriate question.**
- **It is asserted that election law is central to the constitution of the United Kingdom. It is strongly recommended that the latter course of action (i.e. ventilation before the Judicial Committee) be taken. Experience has shown that the provisions of electoral law remain in effect without fundamental change for more than a century. Indeed it could well be said that there is a special need for stability in electoral laws and that justifies their longevity to the point where they attract occasional judicial criticism. Surely no Government would wish to be seen to alter electoral law in a way which could lay it open to challenges based upon Human Rights legislation. It is argued that the courts ought to have a powerful input into deciding matters of electoral law. This point seems to have been recognised in *A-G v Jones*³³ where the Attorney-General referred the question of whether Fiona Jones MP’s seat had been vacated to the High Court (on the Crown side) for decision although it might be considered that answering such a question fell well within the compass of experienced Counsel. Whilst the s4 provision is cumbersome it is secure. Furthermore it must be recognized that RMEV proposals are under consideration in other High Contracting Parties to the European Convention and it is beyond doubt that citizens in these states may challenge their provisions;**

³¹ *Article 8 Right to respect for private and family life*

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

³² For the use of this procedure, indeed in an election case, see *Re MacManaway* [1951] AC 161.

³³ N3 above.

proper ventilation of the matter in the UK will emphasize the Government's commitment to the developing human rights agenda.

4. The verification, tally and audit principle.

4.1 Introduction

At each stage of the voting process the progress of an individual ballot paper may be checked. Ballot papers are numbered so that, in the event of inquiry, a ballot paper may, provided certain safeguards are observed, be traced back to a named voter. Ballot papers are stamped with an authenticating mark. The counting process is invariably attended by representatives of the candidates. In the counting process ballots are counted so that it may be determined whether papers are missing or have been added to the boxes. The votes are then counted and the result publicly declared. Much of the law is to be found in Schedule 1 of the Representation of the People Act 1983, in particular in Part III of the Schedule.

Within a few years there need be no **technical** distinction between the counting of votes in an e-election in, say Piddletrenthide, Westminster or Ouagadougou. Clearly there are advantages in determining the poll for a Parish Council election in rural Dorset as close to home as possible; for example, there may well be political reasons why counting the votes in, say, Tolpuddle would not be socially acceptable. If Tolpuddle were unacceptable presumably Ouagadougou would be even less acceptable.

Following the process of centralisation of central party control over candidates by the Registration of Political Parties Act 1998, and the Political Parties, Elections and Referendums Act 2000 with the need for auditing authorisations of candidates and expenditure by the parties as set out in those Acts, there may be an argument for conducting counts for General elections to the Westminster parliament in Westminster itself. This may have the effect of further weakening the connection between individual MPs and their constituencies. However if the National Lottery can be shown live on television, why cannot the voters of Piddletrenthide see their MP being elected? It could be said that they would be more likely to watch their 'own' election result if it were televised in accordance with a published schedule.

Many leading Firms are outsourcing their IT Departments, sometimes to the Indian sub-continent or the Philippines, for reasons of cost. With the onset of Best Value Reviews and the drive towards increased economic efficiency at all levels of government it may be that there is a financial case for performing the count of a UK election in, as my example suggests, Burkina Faso. If the result could be more cheaply obtained without losses of security or speed it may be attractive to conduct the electronic count there. It must be noted that financial considerations are not paramount for it would seem that the statutory duties of election officers do not permit financial considerations to detract from their responsibilities to ensure that adherence to the democratic process is maintained.³⁴ The Technical Report contains some

³⁴ See *R v Milton Keynes Borough Council & Another, ex parte Wilson* Unreported CO/178/93.

strong recommendations concerning the location of the count and the measures which will need to be in place to secure it. Furthermore it makes recommendations regarding (1) the security of supply and integrity of the supplier of electronic voting services, (2) the freedom of the voting system from other materials, and (3) the internal security and transparency of the voting system. Two of these points are addressed here, the final point made by the authors of the Technical Report has been addressed in the section dealing with ‘hacking’ to be found at 2.4 above

(1) Security of supply and integrity of the supplier of electronic voting systems.

If RVEM is implemented by means of interactive digital television or a telephone based system the state will need extensively to rely upon the external provision of the voting system. The current pilot schemes rely upon partnerships of local authorities with a range of private concerns. No doubt the contractual arrangements between the Authorities and the system providers are as robust as possible but there is nothing in principle to prevent any one of these suppliers from, on the day of the election, deciding that the ‘deal’ is better abandoned and damages paid. Clearly if a voting system supplier were to threaten to withdraw from a contract at the last moment the Local Authority or the state would immediately seek an Order for specific performance of the contract. Such an Order would probably be granted. On the other hand the supplier would no doubt, during the contractual negotiations, point out that the Crown has the legal power to annul any contract it enters at will³⁵ and seek a premium to guard against that eventuality. No doubt there will be more ‘puff’ than substance in this area, but the point is plain.

- In order to secure the integrity of any RVEM system the government ought to consider placing the contractual arrangements for supply on a statutory footing.
- All RVEM associated systems need to be operated with open source code (in accordance with the suggestions made in the Technical Report) in order to reduce the likelihood that the Government (or Local Authority) will find itself stranded with unusable systems in the event that a supplier is liquidated.

(2) Cleanliness of electronic voting systems.

All users of electronic systems are used to receiving unwanted advertisements. Clearly the intrusion of such material into the ‘electronic polling booth’ is unacceptable. Experience has shown that it is not only overt party political advertising which needs to be controlled for material produced by trade unions³⁶ and other pressure groups and commercial concerns³⁷ may also exert an influence. There seems to be a strong case for such material to be controlled; although one might reflect that were voting to take place in the home there would almost certainly be paper materials present urging voters to support one or other party. It is indeed likely that the political parties would design paper materials which voters could have in

³⁵ *Rederiaktiebolaget ‘Amphitrite’ v The King* [1921] 3 KB 500

³⁶ See the case arising from the January 1987 NALGO campaign which was designed ‘to increase public awareness about the importance of public services and the implications of government cuts’, *Paul v NALGO* [1987] IRLR 413 ChD

³⁷ The well-known ‘sayings’ of ‘Mr Cube’ on Tate & Lyle sugar packets are famously said to have helped in the defeat of the Attlee government

front of them when they marked the electronic ballot. In any case it is clear that the specifications for the supply of RVEM equipment and systems need to be contained in primary or, perhaps more helpfully, secondary legislation

Clearly there are important political debates in this area and there is no doubt that the Government will wish to listen to public opinion in this matter, however this debate is not part of the present Report. The present legal regime for ensuring the transparency and accuracy of the count is examined.

4.2 The principle of a transparent count.

The policy that the count should be open is well set out in the OSCE ODIHR document referred to above.³⁸ The text is reproduced below:

XIII. TRANSPARENCY IN COUNTING/TABULATION OF VOTES

OBJECTIVE: The legal framework should ensure that all votes are counted and tabulated accurately, equally, fairly, and transparently.

A. General Principle

A fair and honest count of the votes is a cornerstone of democratic elections. Illustrative of this minimum standard is Paragraph 7.4 of the OSCE 1990 Copenhagen Document, which requires that votes “are counted and reported honestly with the official results made public.” This requires that votes be counted and tabulated in the presence of observers, and that the entire process by which a winner is determined be fully and completely transparent. The legal framework should provide for the presence of observers, domestic and foreign, and representatives of the media, political parties and candidates, during the counting and tabulation of votes.

The legal framework must clearly state the electoral formula that will be used to convert votes into mandates. Thresholds, quotas, and all details of the electoral formula must clearly be stated and all possibilities, such as ties, withdrawals, and death of a candidate must be addressed. The law must clearly define valid and invalid ballots. Rules for determining the validity of ballots should not be so stringent as to unreasonably disenfranchise a voter. The paramount principle should be that if the will of the voter is clear, the ballot should be counted. For example, if a voter circles his or her choice rather than placing a cross next to it, this should not invalidate the ballot. Prior to voting, the law must be clear as to what ballots will be considered valid and how valid ballots will be converted into mandates.

B. Counting of Ballots

Regardless of whether ballots are counted at the polling station or a central counting location, ballots must be counted in the presence of observers. The legal framework, in addition to ensuring the presence of observers for the counting of ballots, should also provide safeguards where technology is used and ballots are counted other than manually. Provisions must be in place in the legal framework so that independent verification of the accuracy and soundness of hardware and software used for

³⁸ See above n20.

counting ballots can occur. Whether manual, mechanical, or electronic counting is used, procedures for audit and inspection to ensure accuracy and reliability must be in place. Procedures must also be in place to allow objections to counting procedures, including objection to criteria used to determine the validity of ballots. The legal framework should clearly specify that observers can make copies, or shall be given copies, of all protocols, tabulation and tally sheets. The law must also clearly specify what government authorities, if any, are entitled to receive this information prior to certification of the election results by the Central Election Commission.

C. Tabulation of Results

The legal framework should provide, in clear and objective language, the procedures for transferring the protocol results of counting, ballots, and election materials from lower election commissions to intermediate and higher election commissions for tabulation and safekeeping. The law should require that all tabulations of results be available in tables or a similar format that allows observers to trace the results of each counting location or polling station up through all levels of aggregation to the final results. The tabulations should contain detailed information, including the number of ballots used and unused, the number of invalid ballots, and the number of votes for each political party or candidate. This information should also be broken down for alternative methods of voting, such as postal or mobile voting. This degree of detail is necessary to enable observers to track results and locate specifically where fraud has occurred if the numbers are unlawfully changed during the tabulation processes.

A strictly defined division between election administration bodies and state authorities is vital also during the process of tallying the results. Election legislation should underline the principle that only election commission members should be involved in the process of tallying election results. It is also important that observers are given access to all stages of the process of counting and tallying of results to ensure this.

D. Public Announcement and Publication of Counting/Tabulation of Results

The legal framework should clearly state whether election authorities might announce partial or preliminary results prior to final certification. If results can be announced prior to final certification, then the legal framework should clearly regulate the process for making such announcements.

The legal framework should require that all relevant electoral documents be publicly accessible, including election protocols, tabulation and tally sheets, and decisions determining or affecting election results. Such electoral documents should be publicly posted at all levels of election administration, including polling, municipal, and state election commission levels. Detailed tabulations of overall results, including the voting results in each polling station, should be posted at each election commission. These detailed tabulations should also be published in state owned or controlled print media as soon as the results are certified.

Fraud can occur too easily if the legal framework fails to require public posting of vote counts and tabulations at each level where the count or tabulation occurs. The possibility of fraud exists where an intermediate commission is not required to

publicly post the tallies and tabulations. The examiner must carefully evaluate legal provisions governing counting of ballots and tabulations of results.

E. Effective Date of Certified Results

The legal framework should clearly specify the dates for final certification of the election results, how the process of final certification is to occur, including public announcement and notification to candidates of their election, and the terms of offices of elected candidates. Additionally, the law must be clear as to what circumstances require a recount or new election in any or all polling stations. The law must be clear as to who can request a recount or new election, the deadline for the request, all necessary procedures to make the request, the deadline for adjudicating the request, and the date and procedures that will govern a recount or new election.

The legal framework must provide for secure storage of all ballots and election materials until the deadline for making legal challenges to the certified results has passed.

F. Personal Safety Exception

In extreme circumstances, publication of election results at the polling station level might jeopardize the safety of voters or electoral commission members in that community. This possibility exists where an election is held after civil conflict and tensions remain high. The examiner should be sensitive to this issue and understand that in extreme circumstances the law may provide limited exceptions to these principles so as not to place the voter at risk to personal harm.

It is clear that UK election law is not presently, at least on its face, fully compliant with the ODIHR guidelines. One illustration of this mismatch will suffice: the guideline proposes that

The legal framework should provide for the presence of observers, domestic and foreign, and representatives of the media, political parties and candidates, during the counting and tabulation of votes.

Rule 44 of the Parliamentary Election Rules provides that:

(2) *No person other than-*

- (a) the returning officer and his clerks,*
- (b) the candidates and their wives or husbands,*
- (c) the election agents,*
- (d) the counting agents,*

may be present at the counting of the votes, unless permitted by the returning officer to attend.

Clearly the returning officer has discretion which most returning officers exercise generously, but it is clear that they would have the power to exclude many of those whom ODIHR consider essential. Accordingly,

- **It is recommended that the opportunity afforded by the introduction of RVEM be utilized to update many of the provisions of election law.**

The law as it is currently drafted deals with the handling of paper ballots, whether these are delivered in person at a polling station or by post. The principle of scrutiny is well set out by Rules 44-48 of the Parliamentary Election Rules and the appropriate legislation dealing with other polls.

Given that the current recommendation is that RVEM is introduced alongside other means of voting, such as in person voting in a polling station and postal voting, it is recommended that votes electronically cast are downloaded onto paper and are counted in the same way as paper votes. It is recognized that there may be a move with the passage of time to exclusively electronic voting and, at that point, the downloading of electronic votes to paper to be counted by hand or even by machine will be akin to stepping off a supersonic aeroplane and mounting a donkey. In light of this recommendation the view is taken that there is no need to revise the Rules dealing with the counting of the votes.

5. Overall Assessment and Summary Recommendations

Parker's Law and Conduct of Elections makes the point that '... much of the 1983 (Representation of the People) Act derives from legislation enacted in the nineteenth century'.³⁹ Thus the major legislation dates from a time when only a minority of (only) men possessed the vote, before radio and television, before our modern political parties, before many of the institutions for which it is now possible to vote for the membership thereof existed. This cannot be wholly satisfactory.

- It is accordingly recommended that a major revision of electoral law be undertaken.

Despite that fact many of the principles contained in the law remain vital.

- **It is accordingly recommended that RVEM could be introduced without too great a disruption to the law, save in one essential area.**

The real difficulty is with the concept of family voting and the secrecy of the vote.

- **It is therefore recommended that legal opinion of the highest authority be taken on whether RVEM is compatible with the Third Article to the First Protocol of the European Convention on Human Rights and that any proposed legislation be generally compatible with the Convention.**⁴⁰

³⁹ Clayton ed. *Parker's Law and Conduct of Elections* (London: Butterworths 2000) at 1.2.

⁴⁰ I will add, at this point, one single expression of opinion: in my view it is likely that home voting by means of RVEM is outwith the provisions of the Third Article to the First Protocol of the European Convention on Human Rights.