



**Office for Democratic Institutions and Human Rights**

**LAWS FOR ELECTIONS TO THE LEGISLATIVE BODIES  
OF NORTHERN IRELAND, SCOTLAND AND WALES**

**UNITED KINGDOM**

**OSCE/ODIHR REVIEW**



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# LAWS FOR ELECTIONS TO THE LEGISLATIVE BODIES OF NORTHERN IRELAND, SCOTLAND AND WALES

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### OSCE/ODIHR REVIEW<sup>1</sup>

14 April 2003

#### I. INTRODUCTION

Elections to the Scottish Parliament and the National Assembly for Wales are scheduled for 1 May of this year, and elections to the Northern Ireland Assembly are planned for 29 May. The OSCE Office of Democratic Institutions and Human Rights has been invited by the Government of the United Kingdom to organize an assessment mission for these elections. The elections to the legislative bodies of the devolved administrations will be held concurrently with local elections.

This review of the laws of the United Kingdom governing elections to the legislative bodies of Northern Ireland, Scotland and Wales is based primarily on an examination of the Northern Ireland Assembly (Elections) Order 2001<sup>2</sup> (“NI Elections Order”), as amended. The other statutes and materials listed in the references hereto have also been consulted.

The NI Elections Order has been selected for special attention due to reports that a significant level of fraudulent activity has occurred during past elections in Northern Ireland. These reports led Parliament to enact the Electoral Fraud (Northern Ireland) Act 2002,<sup>3</sup> and have also led the UK government and Northern Ireland authorities to take other actions, particularly with respect to voter registration and identification. The extent of fraudulent activities which are reported, as well as the effect of the new remedial measures, during the upcoming elections in Northern Ireland will also affect the perceived legitimacy of the elections to the Assembly and the potential reinstatement of its powers by Parliament as part of the process of peaceful resolution of inter-communal tensions.

#### II. EXECUTIVE SUMMARY

##### A. POLITICAL SYSTEM

Elections to the legislative bodies of the devolved administrations in Northern Ireland, Scotland and Wales are based on a variety of systems:

- *Northern Ireland:* The NI Assembly consists of 108 elected members. The members are elected, six apiece, from the same 18 constituencies which are used for UK Parliamentary elections. Voting is for individual candidates, either from parties or independents, and the results are obtained by proportional representation (PR) using a single transferable vote (STV) system.
- *Scotland:* Elections to the Scottish Parliament are through a parallel system, which uses both first-past-the-post (FPTP) and PR and two separate ballots. The 73 “constituency”

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<sup>1</sup> This review has been prepared for OSCE/ODIHR by a consultant, Dr. Daniel P. Finn.

<sup>2</sup> *Op. cit.*

<sup>3</sup> *Op. cit.*

members are elected through FPTP, and an additional 56 members of the Scottish Parliament (MSP) are elected from eight electoral regions, seven *per* region, based on PR.

- *Wales*: Elections to the National Assembly for Wales are also through a parallel system involving two ballots. The first ballot is cast to elect 40 constituency assembly members through FPTP. The second ballot is used to elect 20 members from five regions based on existing constituencies for European Parliament elections. On the second ballot, electors vote for a party or independent candidacy rather than a particular individual, and the results are reached through PR.

## **B. ELECTION ADMINISTRATION**

UK election administration is strongly oriented toward the “neutral, professional” model, under which election posts are filled by professionals who are supposed to adopt a strictly impartial attitude to their responsibilities. In the UK these individuals are actually government officials, who are identified in the election laws only with respect to their electoral functions; they include “Chief Election Officer”, “(Electoral) Registration Officer”, “Returning Officer”, “Presiding Officer”, and “clerks”.

This method of administration for elections is of course rooted in historical traditions. Its continuation, however, also reflects the reverence for law in the country as well as respect for the judgment and neutrality of senior civil servants. While some problems always occur during elections, Great Britain has a reputation as a center of excellence and expertise in elections practice.

## **C. ELECTION PROCEDURES**

Some of the major elements in election procedure in the UK differ from those in many other countries. This section will examine some of the main elements that appear to have become problematic to some degree in view of recent experience.

### **1. Voter Registration**

The process of voter registration in the UK is primarily the responsibility of the State. The official in an area who is serving as its Electoral Registration Officer (ERO) is mandated to prepare the register and to take the necessary steps to obtain the required information about persons residing in the area. These include annual canvassing of residences, which involves dropping off and picking up registration forms for completion by the residents. Despite the compulsory nature of registration in Northern Ireland, a significant number of voters may still not have registered.

From the year 2000, voluntary “rolling” registration was added to the annual canvas, to enable people to add or change their registration anytime. While this process is very user-friendly, it may have been misunderstood by voters, some of whom may have assumed that they could register anytime right up to the election.

### **2. Candidacies**

At a general election nomination of candidates is a simple matter. Candidates must be proposed and seconded by two registered voters and supported by eight other voters. Candidates are required to make a relatively small financial deposit, of 150 pounds sterling. The deposit is returned if they

obtain a number of votes equaling at least one-quarter of the number required to obtain a mandate in the first stage of counting.

### **3. Candidate Agents**

At a general election, each candidate must appoint an election agent, but may choose to serve as his or her own election agent. In addition, candidates may appoint polling agents to be present during the voting, and a counting agent for the count.

### **4. Campaign Finance**

Legal responsibility for complying with financial regulations lies with a candidate's election agent. The limitations and reporting requirements on campaign finance are very detailed, and have been extended beyond candidates to cover their parties and other persons, under the Political Parties, Elections and Referendums Act 2000.

### **5. Media**

As with respect to election participants themselves, there is relatively little in the election laws that address the conduct of the media during an election period. Broadcasting authorities are, however, required to adopt a code of practice with respect to the inclusion of candidates in items about the local constituency or area.

### **6. Voter Identification**

Various forms of identification are accepted for voter identification, although concerns have arisen in recent years about the acceptance of non-photographic ID. If the Presiding Officer at a polling station believes that the circumstances warrant – or if it requested by a candidate's polling agent – the PO may put certain statutory questions to an individual seeking a ballot.

### **7. Voting**

Voting may be performed in person or through "absent" (absentee) voting. Absentee voting, which is widely available upon request, may be accomplished by postal voting or voting through a proxy. Voters whose ballots have been received by post are struck from the voter register at the polling place, but voters who have requested to vote by proxy may vote personally if the proxy has not already cast their vote.

In Northern Ireland, due to reports concerning abuse of the absent voting system, further requirements have been put into place. There, in order to be permitted to vote by post or through a proxy, a voter must explain why absent voting is necessary and submit an attestation by another confirming that it is in fact the case. In addition, voters seeking to vote as absentees must also provide certain further information, and this and their signature are checked upon receipt of the application.

### **8. Polling Stations**

The Presiding Officer has broad authority at the polling station, including for maintaining order. The PO has a duty to keep order at the station, and may order the removal of persons who fail to obey his lawful orders. Such action may be taken by a constable or by an authorized representative of the Returning Officer – and, if carried out by a constable, could constitute an arrest.

Recent reports by election authorities indicate that voters are subject to considerable political activity outside the polling station, including at the entrance to it. In addition to ordinary campaign activities, voters may be approached by persons attempting to keep track of who has voted (or not). In addition, the authorized presence of candidates and their election and polling agents at the polls could create a politicized environment in the polling station.

## **9. Ballot Secrecy**

Persons attending at polling stations and counting centers are supposed to maintain the secrecy of voting, and not communicate before the closing of the polls which voters have or have not requested a ballot. Such persons must also not interfere with voters, attempt to obtain information about how they have voted, or communicate such information to others.

It is possible – but unusual – for a particular counted ballot, identified by its number, to be retrieved in connection with a judicial appeal. For this to occur, the court must conclude that a vote has been fraudulently cast, and the result of the election could be affected.

## **10. The Count**

Counting of the votes and determining results is done at counting centers and supervised by the Returning Officer. In the case of elections to the legislative bodies of the devolved administrations, the count commences as soon as practicable after the closing of the polls.

There are detailed rules for counting procedures, and ballot validity. One procedure that is made possible by centralization of the count in each district is the mixing of ballots from different ballot boxes prior to counting them.

## **11. Authorized Persons**

Admission to polling stations is limited to voters (whose number permitted within at any one time is to be regulated) and certain others: Candidates and their election agents, polling agents appointed for that station, clerks appointed to attend that station, constables on duty, and the companions of voters with disabilities. For the counting, however, the RO also has discretion to permit other persons to attend.

## **12. Civil and Criminal Actions**

The election laws contain considerable detail on special civil and criminal actions that may be undertaken with reference to an election. An Assembly election may be challenged, after the fact, only through an “Assembly election petition”, presented to the court in accordance with the relevant provisions of the election laws and regulations.

## **D. RECENT EXPERIENCE**

In order to set the stage for consideration of the state of the law, and related administrative issues, with respect to the upcoming elections in Northern Ireland, Scotland and Wales, the conclusions of several recent studies have been summarized. These include the Electoral Commission’s general report on the 2001 elections and the reports of the Commission and the Northern Ireland Office on those elections.

## **E. MAIN ISSUES**

### **1. Northern Ireland Voter Registration**

Under the Electoral Fraud (Northern Ireland) Act 2002, new requirements concerning additional information to be included on the voter register in Northern Ireland made it necessary to prepare an entirely new register for elections there. Not only was a new canvas of residents required, but it would no longer be possible for a single individual (such as head of household) at a residence to register for others there.

The results of the new canvas were announced in December 2002. The new voter register that had been compiled at that time contained 1,072,346 entries; that compared with the 1,204,548 names previously on the list. Thus, the new annual register contains only 89% of the previous number of entries – or, about 11% of entries had been deleted.

If the decline in the number of names on the voter register means that a large number of qualified voters have not been registered, that would certainly tend to bring the legitimacy of the elections process in Northern Ireland into question. In particular, any indication that there was a unjustified differential in the levels of registration between voters from the two communities (Protestant and Catholic) could be a new source of political and social division that might impede the peace process and the resumption of government under devolved administration.

### **2. Northern Ireland Voter Identification**

The Government has announced that only photographic identification documents of certain types will be accepted for voter identification purposes in Northern Ireland elections, commencing with the planned Assembly elections. This policy does not yet appear in the materials available, including the Northern Ireland Assembly (Elections) Order (EONI) 2001, but would be introduced after Parliamentary approval of the necessary legislation.

As part of the plan to shift to acceptance of only photographic identification documents, a program was authorized by the Electoral Fraud (NI) Act to provide Electoral Identity Cards (EICs) to voters who did not have acceptable photographic means of identification. EONI included a box in the voter registration forms that were widely circulated by canvassing during September and October 2002 enabling voters to indicate if they wished to apply for an EIC; some 233,000 requests were received.

If problems have arisen with respect to voter awareness of ID requirements or obtaining EICs, then implementation of the new photographic requirement could result in a significant number of registered voters being unable to vote in person at their polling stations. This would inevitably lessen the perceived legitimacy of the planned Assembly elections, and – to the extent the problems applied differentially to the two main communities (Protestant and Catholic) – could have negative consequences for the peace process as well.

### **3. Inappropriate, Improper and Illegal Activities**

The reviewer is not directly familiar with practices by candidates, their agents, political parties and other interested persons during UK elections. The UK plainly has a very lively political culture, in which candidates, parties and other interested persons seek maximum advantage under election rules and practices.



The available literature appears to indicate that there is an unclear but possibly significant level of inappropriate, improper and illegal activities by those seeking to affect the outcome of elections. This includes with respect to the following elements of the voting process:

- Acquiring information about what voters have or have not cast their ballots;
- Attempting to influence voters on election day by conducting political activities nearby and sometimes within polling stations;
- Organizing applications for absent and proxy voting, and sometimes handling and even casting these votes;
- Sometimes attempting to obtain information, either from within the polling station or counting center, about how specific ballots were voted;
- Communicating voting-related information between polling stations and counting centers and outside locations.

The UK Electoral Commission recently issued a study on absent voting, which has – along with proxy voting – been a focus of concerns with respect to improper and illegal activities. The conclusions of this study not only address the concerns about postal and proxy voting, but also other aspects concerning the security of the voting process.

The Commission noted the importance of preventing undue influence on voters with respect to applying for, receiving and casting absentee ballots. The Commission also concluded that it was improper for candidates, parties and their representatives to handle ballots, as opposed to application forms. It also examined the desirability of continuing to permit postal/proxy ballots to be sent to alternate addresses.

The results of the Commission's study, and the other materials reviewed on these matters, indicate there would appear to be sufficient grounds to recommend a further look at how candidates, their agents, political parties and others interested in the outcome of the election conduct themselves during the elections – including with respect to organizing the vote (especially through absentee voting), observing voting and other polling-related activities on election day, and also thereafter (during the count). This implies that there is a need to strengthen monitoring of election-related activities by election contestants, investigation of improper and illegal activities, enforcement against both criminal offenses and civil violations, and enhanced police and prosecutorial actions.

#### **4. Observers**

As indicated earlier, UK election laws do not make provision for the presence of observers during election operations. Observers are strictly excluded as unauthorized persons in polling stations. They can be permitted to attend the count, but only subject to the discretion of the Returning Officer.

In view of what was said in the previous section about improper and illegal activities by election contestants, the process of conducting elections in the UK might well benefit from admitting observers to attend all aspects of election operations, including at polling stations.

It should also be noted – as pointed out in the Electoral Commission's report on the 2001 elections - that the UK has never implemented the commitment in the OSCE Copenhagen Document by making it possible for international observers from OSCE participating States and other accredited institutions and organizations to attend relevant election operations.

## 5. Other Issues

To a certain extent, administrative shortcomings have been noted in recent elections. For the most part, these have related to variations in the amount of funding available in different localities and the training of election workers.

## F. CONCLUSIONS

The relevant legal provisions regarding elections for the legislative bodies of the devolved administrations are rather complex. Nonetheless, significant areas of regulation – such as the role of the media, the conduct of election contestants, and administrative complaints about election violations – are not addressed in detail.

Liberal provisions in the law (except for Northern Ireland) for voting by post or proxy have led to a considerable increase in absentee voting. While this may have increased the vote, it also may have led to a higher level of fraudulent voting and increased public suspicion about the legitimacy of the electoral process.

For Northern Ireland, additional controls on voting have been introduced, which have made it necessary to re-register voters and issue special electoral identification documents for voters who do not possess the required IDs. If these programs have not been entirely successful, there could be problems at the polls and for the political process more generally.

A review of the literature indicates that there may be a significant level of inappropriate, improper and sometimes illegal activities organized by supporters of candidates and political parties. For the most part, such activities appear to involve organizing personal, postal and proxy voting in their favor. In some cases, however, persons seeking to affect the outcome of elections have apparently harassed voters and violated the secrecy of absentee balloting. They may also have communicated information about voting outside the polling stations and counting centers, or even arranged for impersonation of voters at polling places.

The UK is known for excellence in electoral operations, but its lively political culture may encourage the continuation of improper activities by candidates and parties. Greater involvement by civil society might help to address these issues, but admitting domestic observers to polling stations would require a change to the law.

## III. BACKGROUND

### A. DEVOLVED ADMINISTRATIONS

The process of devolution of powers to Northern Ireland, Scotland and Wales was advocated as part of a set of constitutional changes proposed by the UK Government. Devolution of legislative powers (with certain exceptions) was approved by Parliament after *referenda* were conducted on the question in the affected areas during 1997-98. The first elections to the devolved legislatures were held in 1998-89; the upcoming elections to these bodies will be their second.

In the case of Northern Ireland, the Assembly was elected in 1998. It actually received its devolved powers at the very beginning of 1999, as part of the peace process associated with the Belfast (“Good Friday”) Agreement between leading politicians from the Protestant and Catholic communities negotiated by UK leaders with facilitation by international figures. The powers of the

Assembly were suspended as of 14 October 2002, however, due to difficulties with respect to continuation of the process.

As is well known, UK parliamentary elections are held under the “first past the post” (FPTP), or majoritarian, system under which parliamentarians are elected from single-mandate districts (SMD) based on a relative majority of the votes received. Elections to the legislative bodies of the devolved administrations, and to local councils, in Northern Ireland, Scotland and Wales are, however, based on a variety of other systems. With respect to the legislative bodies of the devolved administrations the following systems are used:<sup>4</sup>

### **1. Northern Ireland**

The NI Assembly consists of 108 elected members known as Members of the Legislative Assembly (MLA). These members are elected, six apiece, from multiple-mandate districts (MMD), which are the same 18 constituencies which used for UK Parliamentary elections. Voting is for individual candidates, either from parties or independents, and the results are obtained by proportional representation (PR) using a single transferable vote (STV) system.

### **2. Scotland**

Elections to the Scottish Parliament are through a parallel system, which uses both FPTP and PR and two separate ballots. The 73 “constituency” members are elected through FPTP, and an additional 56 members of the Scottish Parliament (MSP) are elected from eight electoral regions, seven *per* region, based on PR.

### **3. Wales**

Elections to the National Assembly for Wales are also through a parallel system involving two ballots. The first ballot is cast to elect 40 constituency assembly members (AM) through FPTP. The second ballot is used to elect 20 AMs from five regions based on existing constituencies for European Parliament elections. On the second ballot, electors vote for a party or independent candidacy rather than a particular individual, and the results are reached through PR.

## **B. UK ELECTION LAW AND ADMINISTRATION**

UK election law is contained in a series of enactments, many of which are referred to as “Representation of the People” acts. Under these laws a characteristic type of election administration is created, which is widely emulated in other Commonwealth countries.

British election legislation is highly detailed and written in the common law style. To a considerable degree, the various components of the applicable laws are not codified into an integrated whole. For that reason, it is sometimes necessary to publish – along with the parliamentary order – a recompilation of the relevant legislation (as amended), together with additional related regulations.<sup>5</sup>

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<sup>4</sup> See Electoral Commission Factsheets, *op. cit.*

<sup>5</sup> In terms of the scheduled elections in question (for the Northern Ireland, Scottish and Wales legislatures), the order related to the Scottish elections, *op. cit.*, appears to be the best integrated. The order, *op.cit.*, related to the elections in Northern Ireland is the most difficult to analyze, as it is accompanied by a large number of special amendments to existing statutes, but does not include other amendments (such as under the Electoral Fraud [Northern Ireland] Act) which are also applicable. The order pertaining to the elections in Wales is the National Assembly for Wales (Representation of the People) Order 2003, *made* 1 March 2003. For reasons

UK election administration is strongly oriented toward the “neutral, professional” model, under which election posts are filled by professionals who are supposed to adopt a strictly impartial attitude to their responsibilities. In the UK these individuals are actually government officials, who are identified in the election laws only with respect to their electoral functions; they include “Chief Election Officer”, “(Electoral) Registration Officer”, “Returning Officer”, “Presiding Officer”, and “clerks”.

In fact the holders of these positions are commonly senior civil servants who hold specified posts in the areas where elections are held. The positions from which the election administrators are drawn are not identified in the election laws, but instead are left to the government to prescribe or Parliament to provide, in other ways. (In Northern Ireland, there is a separate Chief Election Officer.)

This method of administration for elections is of course rooted in historical traditions. Its continuation, however, also reflects the reverence for law in the country as well as respect for the judgment and neutrality of senior civil servants. While some problems always occur during elections, Great Britain has a reputation as a center of excellence and expertise in elections practice.

Perhaps the key link in UK election administration is the Returning Officer (RO), who has primary responsibility to support and conduct elections in a particular constituency. The RO has some discretion with respect to supporting and organizing elections in the constituency, but – as the term implies – has little discretion with respect to ruling on objections or ordering corrections to the reported results. Such matters are mainly reserved for the courts, either acting specially on “election petitions” or in the usual judicial manner.

Under changes of government organization in 2002, responsibility for supervising election administration was transferred to the Office of the Deputy Prime Minister (ODPM)<sup>6</sup> and Lord Chancellor’s Department (LCD). The ODPM oversees local elections in England and Wales, and is conducting a nationwide pilot program for modernization of local elections. The LCD is responsible for supervising House of Commons (Parliamentary) elections and elections to the European Parliament, in England and Wales; and for coordination on UK-wide electoral matters. The LCD also has responsibility for electoral policy, including reform and modernization. With devolution, however, primary responsibility for elections in Northern Ireland, Scotland and Wales moves to their administrations.

The Political Parties, Elections and Referendums Act 2002 (PPERA) created a number of new regulatory and other programs. Under that act, the LCD has also been made responsible, in consultation with the Scotland Office and Northern Ireland Office, for issues related to political party registration, rules on donations to political parties and other political financing, and national and regional referendums.

The newly-created UK Electoral Commission was also established through PERPA; the Commission is an independent, nonpartisan body which is directly accountable to Parliament. Its main role is to study the electoral process and make recommendations for improvements to address outstanding issues and increase public interest, confidence and participation. In that connection, it

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unknown to the reviewer, it cannot be obtained from the usual source, the website of Her Majesty’s Stationery Office.

<sup>6</sup> The information contained in this and the following paragraph is from the ODPM, available through its website: [www.local-regions.odpm.gov.uk/elections/intro/index.htm](http://www.local-regions.odpm.gov.uk/elections/intro/index.htm)

also provides support to the regulatory and other reform activities of the ODPM and LCD, which are also obliged under the Act to consult with it on these matters.

## C. ELECTION PROCEDURES

Some of the major elements in election procedure in the UK differ from those in many other countries. This section will examine some of the main elements that appear to have become problematic, to a degree, in view of recent experience.

### 1. Voter Registration

The process of voter registration<sup>7</sup> in the UK is primarily the responsibility of the State. The official in an area who is serving as its Electoral Registration Officer (ERO) is responsible to prepare the register and to take the necessary steps to obtain the required information about persons residing in the area. These include annual canvassing of residences, which involves dropping off and picking up registration forms for completion by the residents. While registration is not compulsory for qualified voters in Great Britain (England, Scotland and Wales), it is obligatory for them to return the form and provide accurate information. While financial penalties exist for individuals' failure to comply, it does not appear that they are widely applied.

From the year 2000, voluntary "rolling" registration was added to the annual canvas, to enable people to add or change their registration anytime. While this process is certainly more user-friendly, it may have been misunderstood by voters, some of whom may have assumed that they could register right up to the time of the last elections, in 2001.<sup>8</sup>

In Northern Ireland, the voter registration process has a similar overall shape – including canvassing of residences and distribution of registration forms for return to the ERO, as well as rolling registration. In Northern Ireland, however, registration is compulsory, and it is an obligation for every qualified individual to register. Canvassing is also conducted on an annual basis. Despite the compulsory nature of registration, and the potential liability for failure to register, a significant number of voters still do not register.<sup>9</sup>

The electoral register is by law a public document, and is broadly available for inspection. Until 2002, anyone (including commercial organizations) could purchase a copy of the entire register. But late the previous year, a voter successfully sued to prevent the dissemination of his personal information to commercial organizations.<sup>10</sup>

Since 2002, the register has been maintained in two separate forms – "full" and "edited". The full register contains voters' names and addresses, electoral numbers, as well as a notation if they will

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<sup>7</sup> See generally U.K. Electoral Commission, Factsheet: Electoral registration in Great Britain, *op. cit.*

<sup>8</sup> See U.K. Electoral Commission, *Election 2001: the official results*, *op. cit.*; this issue is addressed in the summary of the Commission's findings contained in section D.1, below.

<sup>9</sup> See S. Magee, Research Proposal (Draft), *op. cit.*

<sup>10</sup> *Robertson v. City of Wakefield Metropolitan Council and Secretary of State for the Home Department*, *op. cit.* (Voter complaint that making personal information obtained through voter registration available to commercial entities was a violation of his right to privacy and electoral rights under the European Convention on Human Rights, Art. 8 and First Protocol, Art. 3, and the European Commission Directive, No. 95/46/EC, "on the protection of individuals with regard for the processing of personal data and on the free movement of such data", Art. 14, was meritorious and also justiciable under the U.K. Protection of Human Rights Act, which provides for the application of international human rights instruments in U.K. law. A registered voter must have either a right of explicit consent, or notice and objection, in the event registration information is released publicly for commercial purposes.)

become 18 years of age during the period of that register. The full register is still generally available for inspection, but not copying. The edited register remains available for purchase. Individuals may choose not to have their information included in the edited register by ticking a box on their annual canvas or rolling registration forms.

## 2. Candidacies

At a general election, for the UK Parliament, nomination of candidates is a simple matter.<sup>11</sup> Candidates must be proposed and seconded by two registered voters and supported by eight “assentors” (also voters). An individual may stand as a candidate of a party only if the application is accompanied by a certificate of authorization from the party. Otherwise, an individual may be presented as an “independent” or with no description. Candidates of political parties may also include a six-word description that appears on the ballot-paper along with the party emblem.

Candidates are required to make a relatively small financial deposit, of 150 pounds.<sup>12</sup> The deposit is returned if they obtain a number of votes equaling at least one-quarter of the number required to obtain a mandate during the first stage of counting.<sup>13</sup>

## 3. Candidate Agents

At a general election, each candidate must appoint an election agent, but may choose to serve as his or her own election agent. The election agent may represent the candidate at all election proceedings, and serves as the candidate’s financial agent for the handling, accounting and reporting of campaign funds and other assistance subject to regulation under the PPERA. On election day, candidates and their agents may visit polling stations, and afterwards, during the count, may also observe. In addition, candidates may appoint polling agents to be present during the voting, and a counting agent to be present during the count.

## 4. Campaigning, Finance and Media

The primary area for regulation within the election administration system during the campaign period is finance, since other aspects of campaign conduct by candidates or their parties (including illegal activities) are addressed through the judicial and prosecutorial systems. (See section on civil and criminal proceedings, below.) There are also some provisions applicable to the media, however.

### *Campaign Finance*

Legal responsibility for complying with financial regulations lies with a candidate’s election agent, as indicated above. The limitations and reporting requirements on campaign finance are very detailed, and have been extended beyond candidates to cover their parties, under the PPERA (2000). Some of the main features include:

- a. All expenditures in excess of twenty pounds sterling must be recorded;<sup>14</sup>

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<sup>11</sup> The description here is drawn from U.K. Electoral Commission, Factsheet: Candidates at a general election, *op. cit.*

<sup>12</sup> See Northern Ireland Assembly (Elections) Order, *op. cit.*, Schedule 1, Rule 9(1).

<sup>13</sup> See *Id.*, Rule 53(4).

<sup>14</sup> See Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, sec. 73.

- b. Donations to a candidate less than 50 pounds in value shall be disregarded;<sup>15</sup>
- c. The candidate himself may not expend in excess of 600 pounds;<sup>16</sup>
- d. Third parties may not expend in excess of 500 pounds on independent activities to support a candidacy or oppose others, provided they are not made as part of a “concerted plan of action” with the candidate;<sup>17</sup>
- e. The total amount of campaign expenditures incurred by a candidate for an assembly seat may not exceed 100,000 pounds;<sup>18</sup>
- f. The total expenditure by political parties *per* constituency contested in assembly elections ranges 10-17,000 pounds;<sup>19</sup>
- g. All bills for campaign expenses of candidates must be paid within 21 days after the results of the elections are declared;<sup>20</sup> and
- h. A report of election expenses must be submitted by candidates within 35 days after the results are declared.<sup>21</sup>

### *Media*

As with respect to election participants themselves, there is relatively little in the election laws that address the conduct of the media during an election period. Broadcasting authorities are required to adopt a code of practice with respect to the participation of candidates in items about the local constituency or area.<sup>22</sup>

Issues related to media conduct could be pursued through licensing proceedings, or civil litigation (*e.g.*, based on libel). In addition, false statements concerning a candidate’s character or conduct can result in criminal proceedings.<sup>23</sup>

Other elements include: The media are specifically from reporting the results of exit polls before the end of voting. It is a criminal offense for a person to be involved in arranging inclusion of material intended to influence the voting in an assembly election in broadcasts from outside the UK.<sup>24</sup>

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<sup>15</sup> See Northern Ireland Assembly (Elections) Order, Schedule 2A, Control of Donations to Candidates, sec. 4(2).

<sup>16</sup> See Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, sec. 74.

<sup>17</sup> See *Id.*, sec. 75. This figure, applicable to elections to the legislative bodies of the devolved administrations, is greater than the 50 pound ceiling on such activities previously applicable to persons supporting or opposing candidacies in local elections. ( That limitation on the latter activities was found to be an unjustified infringement on the right to expression by the European Court for Human Rights in the case of *Bowman v. United Kingdom*, App. No. 141/1996/760/961 [19 Feb. 1998].) But the size of the constituency to be reached is also greater.

<sup>18</sup> See Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, sec. 76.

<sup>19</sup> Electoral Commission, Factsheet: Campaign expenditure, *op. cit.* (The actual amounts are 10,000 pounds for elections to the National Assembly for Wales; 12,000 pounds for the Scottish Parliament; and 17,000 pounds for the Northern Ireland Assembly. These limits apply during the period of 365 days ending on election day.)

<sup>20</sup> See Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, sec. 77.

<sup>21</sup> See *Id.*, sec. 81.

<sup>22</sup> See *Id.*, sec. 93.

<sup>23</sup> See *Id.*, sec. 106.

<sup>24</sup> See *Id.*, sec. 92.

## 5. Voter Identification

Various forms of identification are accepted for voter identification,<sup>25</sup> although concerns have arisen in recent years about the acceptance of non-photographic ID. Registered voters are mailed a polling card before the elections which, *inter alia*, informs them of the location of the polling place.<sup>26</sup> The polling card is not one of the forms of acceptable identification.

If the Presiding Officer at a polling station believes that the circumstances warrant – or if it requested by a candidate’s polling agent – the PO may put certain statutory questions to an individual seeking a ballot.<sup>27</sup> These questions concern whether the individual is the person registered as a voter corresponding to the entry contained in the register, and whether the individual has already voted, other than as a proxy. (There are two other questions for proxies.) Under the law, no further questions may be asked of the individual at that time.<sup>28</sup>

If a candidate or his agent at the polling station declares to the PO that there is cause to believe that the individual who has requested a ballot is impersonating a voter, and undertakes to substantiate that allegation in court, the PO may take further action. Under these circumstances the PO may actually direct a constable to arrest the individual.<sup>29</sup>

## 6. Voting: Personal and Absentee

Voting may be performed in person or through “absent” (absentee) voting. Absentee voting, which is widely available upon request, may be accomplished by post or through voting by a proxy. Voters whose ballots have been received by post are struck from the voter register at the polling place, but voters who have requested to vote by proxy may vote personally if the proxy has not already cast their vote.

In Great Britain, no particular grounds must be claimed in order to vote in these ways. The applicant need only provide a witnessed declaration that he is the voter in question.<sup>30</sup>

In Northern Ireland, however, due to reports concerning abuse of the absent voting system, further requirements have been put into place. There, in order to be permitted to vote by post or through a proxy, a voter must explain why absent voting is necessary and submit an attestation by another confirming that it is in fact the case. In addition, voters seeking to vote as absentees must also provide their date of birth and national insurance number (or indicate they do not have such a number), and upon receipt of the application the date of birth, insurance number (or absence thereof) and signature of the voter are to be checked.<sup>31</sup>

The UK Electoral Commission has recently issued a report on absent voting in Great Britain<sup>32</sup> (*i.e.*, not including Northern Ireland). Among its conclusions were the following:

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<sup>25</sup> See, e.g., Northern Ireland Assembly (Elections) Order, *op. cit.*, Schedule 1, Rule 37(1E). In the case of Northern Ireland, these requirements have been tightened through the Electoral Fraud (Northern Ireland) Order, *op. cit.*

<sup>26</sup> See *Id.*, Rule 28.

<sup>27</sup> See *Id.*, Schedule 1 (Assembly Elections Rules), Rule 35.

<sup>28</sup> See *Id.*

<sup>29</sup> See *id.*, Rule 36.

<sup>30</sup> See Electoral Commission, Report, Absent Voting in Great Britain, Executive Summary, *op. cit.*

<sup>31</sup> U.K. Parliament, Electoral Fraud (Northern Ireland) Act 2002, *op. cit.*, sec. 3

<sup>32</sup> Electoral Commission, Report, Absent Voting in Great Britain, Executive Summary, *op. cit.*



- “[T]here is often a tension between promoting access (by widening the availability and accessibility of remote voting methods) and protecting the democratic process and individual votes (through enhancing security and measures to combat fraud.”
- “[T]he present declaration of identity required of absent voters should be replaced with a simpler and more effective declaration, without a witness requirement”;
- Registered postal voters should continue to be able to apply for a replacement ballot, but only in person and upon proof of identity;
- There is currently no need to alter the timetable for postal voting;<sup>33</sup>
- Proxy voting should continue to remain available for the present, “despite the introduction of postal voting on demand”;
- “There should be more rigorous and routine checks for fraud after significant elections, on the basis of a random audit process.”<sup>34</sup>
- Best practices, a code of conduct or, if necessary, legislation should be developed to address the handling of postal vote applications and ballots by political party representatives. The Commission believes that candidates, their agents and local party workers should not handle ballot papers. The Commission also suggested that the offense of “undue influence” should be revised to clarify its relationship to these practices; and
- Similarly, the police power to arrest on “reasonable suspicion” of the offense of “personation” (impersonation of a voter) should be extended beyond the polling station, to any location.

## 7. Polling Stations

The Presiding Officer has broad authority at the polling station, including for maintaining order.<sup>35</sup> The PO has a duty to keep order at the station, and may order the removal of persons who fail to obey his lawful orders. Such action may be taken by a constable or by an authorized representative of the Returning Officer; if held by a constable, the person would be considered to be in warrantless custody for an offense.

Recent reports (see below) by election authorities indicate that voters are subject to considerable political activity outside the polling station, including at the entrance to it. In addition to ordinary campaign activities, voters may be approached by persons attempting to keep track of who has voted (or not). In addition, the authorized presence of candidates and their election and polling agents at the polls could create a politicized environment in the polling station.

## 8. Balloting

Ballot papers are printed according to a prescribed form.<sup>36</sup> Ballots do not contain instructions, but instructions for completing the ballot are posted at the polling place. An explanation how to vote is also given by the polling clerks, upon request.

Ballots are stamped on the reverse by a clerk at the time of issuance to voters.<sup>37</sup> When approaching the ballot box, the voter is supposed to display the reverse side of the filled-in and folded ballot, revealing the official stamp, prior to casting the ballot into the box.

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<sup>33</sup> *But see* the description of administrative difficulties caused by increased postal voting under the present timetable contained in the Commission’s overall report on the 2001 elections, below.

<sup>34</sup> It is unclear what consequences this recommendation, if implemented, would have on election appeals or the perceived legitimacy of recent elections.

<sup>35</sup> *See See, e.g.,* Northern Ireland Assembly (Elections) Order, *op. cit.*, Schedule 1, Rule 33.

<sup>36</sup> *See, e.g.,* Schedule 1, *id.*, Appendix of Forms, Form of ballot paper.

## 9. Ballot Secrecy

Persons attending at polling stations are supposed to maintain the secrecy of voting, and not communicate before the closing of the polls which voters have or have not requested a ballot. Such persons must also not interfere with voters, attempt to obtain information about how they have voted, or communicate such information outside the polling station.<sup>38</sup>

Ballot papers are torn from booklets, leaving a counterfoil (or stub). Both the ballot and the counterfoil contain a serial number, with the serial number being on the reverse of the ballot paper.<sup>39</sup>

It is possible – but unusual – for a particular counted ballot, identified by its number, to be retrieved in connection with a judicial appeal.<sup>40</sup> For this to occur, the court must conclude that a vote has been fraudulently cast, and the result of the election could be affected.<sup>41</sup> Apparently such a case has not occurred in general elections for nearly a century, although there have been occasional instances in local elections, where the winning majorities are much smaller. Under the law, ROs are required to retain voted ballots for a period of one year, and then destroy them (unless ordered otherwise by the court).<sup>42</sup>

Including the number on the ballot paper also creates opportunities to breach the secrecy of voting. It might be possible, for example, for the number to be observed when the voter has the ballot, including when he shows the reverse side to the clerk prior to casting it into box (see above).

During the count, candidate counting agents could attempt to discern how certain ballots were voted. The Returning Officer, however, is required to conceal ballot serial numbers to the extent possible during this time.<sup>43</sup> In addition, it is an offense for a person attending the count to attempt to ascertain a ballot number.<sup>44</sup>

## 10. The Count

Counting is done at counting centers and supervised by the RO. In the case of elections to the legislative bodies of the devolved administrations, the count commences as soon as practicable after the closing of the polls.<sup>45</sup>

There are detailed rules for counting procedures, and ballot validity.<sup>46</sup> One procedure that is made possible by centralization of the count in each district is the mixing of ballots from different ballot boxes prior to counting them.<sup>47</sup>

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<sup>37</sup> See Schedule 1, *id.*, Rule 37(1)(a).

<sup>38</sup> See Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, sec. 66(1) & (3).

<sup>39</sup> See *Id.*, Schedule 1, Rule 19(2).

<sup>40</sup> See generally U.K. Electoral Commission, Factsheet: Ballot secrecy, *op. cit.*

<sup>41</sup> See Northern Ireland Assembly (Elections) Order, Schedule 1, Rule 56.

<sup>42</sup> See *Id.*, Rule 57 (1).

<sup>43</sup> See *Id.*, Rule 44(b)(5).

<sup>44</sup> See Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, sec. 66(2).

<sup>45</sup> See *Id.*, Rule 44(1).

<sup>46</sup> See *Id.*, Rules 44B & 44C.

<sup>47</sup> See *Id.*, Rule 44B(2)(b).

In jurisdictions (such as Northern Ireland) where the results of the elections are decided in each district, the RO is also responsible to allocate mandates by making the relevant calculations.<sup>48</sup>

## 11. Authorized Persons

Admission to polling stations is limited to voters (whose number permitted within at any one time is to be regulated) and the following others: The candidates and their election agents, polling agents appointed for that station, clerks appointed to attend that station, constables on duty, and the companions of voters with disabilities.<sup>49</sup>

Attendance at the count is generally limited to the following persons: The RO and his clerks, the candidates and their wives or husbands, election agents, and counting agents. For the counting, however, the RO also has discretion to permit other persons to attend. Before he does so, the RO must be satisfied that efficient counting of the votes would not be impeded, and must consult the counting agents, unless it is impractical to do so.<sup>50</sup>

Thus it would appear that neither the media nor election observers may be permitted to enter polling stations, but that both could potentially be admitted to counting centers within the discretion of the RO there. The role of observers is not recognized in the laws, either with respect to domestic or international observers.

## 12. Civil and Criminal Actions

The election laws contain considerable detail on special civil and criminal actions that may be undertaken with reference to an election.<sup>51</sup> Drafted as they are, in the common law style, they cannot be presented in a systematic way in the context of the present analysis. Instead, a list of highlights concerning election petitions will be presented:

- An Assembly election may be challenged, after the fact, only through a complaint alleging “undue election” or “undue” return – referred to as “an Assembly election petition” – presented in accordance with the relevant provisions of the Act;<sup>52</sup>
- Election petitions are subject to special rules;<sup>53</sup>
- Such a petition must be presented within 21 days after the results were declared, or within 28 days of the occurrence of an illegal payment or action;<sup>54</sup>
- The case is heard by two judges of the High Court or Court of Appeals,<sup>55</sup> and is tried in open court, without a jury;<sup>56</sup>
- Witnesses may be summoned, and required to testify, except that their testimony would not be admissible in other court proceedings;<sup>57</sup>
- The results of the election would be overturned only if both judges agree that it was undue;<sup>58</sup>

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<sup>48</sup> See, e.g., *Id.*, Rules 44D – 44L.

<sup>49</sup> See *Id.*, Rule 32(1).

<sup>50</sup> See *Id.*, Rule 44.

<sup>51</sup> See generally Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, Part III (secs. 120-186).

<sup>52</sup> See *Id.*, sec. 120.

<sup>53</sup> See Northern Ireland Assembly (Elections) Order, Election Petition Rules [SR 1964/28].

<sup>54</sup> See Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, sec. 122.

<sup>55</sup> See *Id.*, sec. 123.

<sup>56</sup> See *Id.*, sec. 139.

<sup>57</sup> See *Id.*, secs. 140-141.

<sup>58</sup> See *Id.*, sec. 144.

- The costs of the proceedings are allocated according to the order of the court;<sup>59</sup>
- If the court finds that a corrupt or illegal election practice occurred, it shall communicate its findings to the prosecutors;<sup>60</sup>
- The Court of Appeal may, but is not required, to consider an appeal;<sup>61</sup>
- It is the duty of the public prosecutor to make inquiries and institute proceedings against violators,<sup>62</sup> subject to a one-year statute of limitations;<sup>63</sup>
- Upon conviction, a violator is subject to imprisonment (up to two years) and fine,<sup>64</sup>
- Conviction of such an offense may also render the violator incapable of holding public office,<sup>65</sup> including elective office,<sup>66</sup> for a period of 3-5 years.

#### **D. RECENT EXPERIENCE**

In order to set the stage for consideration of the state of the law, and related issues, with respect to the upcoming elections in Northern Ireland, Scotland and Wales, the conclusions of several recent studies are summarized in this section:

##### **1. Electoral Commission Report on the 2001 Elections**

The Electoral Commission's report, *Election 2001: the official results*, contains considerable perspective on current issues in UK election practice.<sup>67</sup> The key findings follow:

- Turnout was very low, both by UK and especially international standards. The foot-and-mouth disease epidemic in cattle, that continued to prevent travel in some rural areas, may have been a factor. More broadly, however, the electorate seemed relatively uninterested in the elections. The young in particular appeared to find the "low tech" nature of the voting process a turn-off.
- Administrative problems were created by national and local elections, for which there are different rules and practices.
- Voters may have been confused by introduction of a new, ongoing (or "rolling") registration process, which actually terminated prior to the date of announcement of elections.
- Application of PPERA (see above) provisions caused problems in the listing of candidates and political parties on election materials, including ballot-papers. Candidates could identify themselves only as representing a party, as "independent", or with no description. This led some candidates to register parties late in the election process, and after the elections to attempt to de-register them (only to discover that the registration would continue in effect for a certain time). Mistakes were made by independents and also some RO's, who interpreted the provisions as preventing more than one candidate labeled as "independent". (To address these problems, the Commission recommended re-introducing brief descriptions for independent candidates, such as the six-word captions previously permitted.)
- Liberalized postal voting, combined with public information campaigning on this subject, caused this practice to rise to 3% of the total, nearly double past experience. A flood of late

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<sup>59</sup> See *Id.*, sec. 154.

<sup>60</sup> See *Id.*, secs.158-160.

<sup>61</sup> See *Id.*, sec. 146.

<sup>62</sup> See *Id.*, sec. 181.

<sup>63</sup> See *Id.*, sec. 176.

<sup>64</sup> See *Id.*, sec. 168.

<sup>65</sup> See *Id.*, sec. 160.

<sup>66</sup> See *Id.*, sec. 173.

<sup>67</sup> *Op. cit.*, Chap. 2

applications caused administrative problems and diversion of attention from other aspects of the elections process. Finally, the increased postal voting increased the possibility of vote fraud, especially in Northern Ireland, where voters at the polls sometimes discovered that they had already been recorded as voting by post.

- Ballot-papers did not contain any voting instructions.
- Stamping of ballots by clerks at the time of issuance to voters was sometimes missed, leading to ballot invalidity. (The Commission felt that watermarking the paper instead might be preferable.)
- The activities of so-called “tellers”, or volunteers from political parties whose role is not officially described in the election laws, were problematic. (The tellers monitor the polling and attempt to identify potential supporters who have not yet voted. This would include tellers asking voters to show their polling card numbers.)
- Access for disabled voters was improved, but still needs work.
- There were staffing and funding deficiencies in some areas. There were also variations in the level of training of clerks, since training is not centrally funded.
- Neutral observers at polling are not provided for in the election laws, under which access to the polls is limited to candidates and their election agents, polling agents and poll clerks, police officers, and companions of voters with disabilities. Several requests received by various election offices to permit observation, including by foreign observers, could not be responded to positively. (In practice, however, the Commission found that occasionally observers were permitted, including the press photographing candidates voting.)
- The rules related to the presence of observers at the count are less strict, and permit the RO to provide access.
- The UK has taken no action to implement the OSCE commitment (in the 1990 Copenhagen Declaration) to invite international observation of elections. (The Commission suggested that the RO be permitted the same discretion with respect to admission of observers to polling stations as to the count.)
- Some ROs – who are responsible for conducting the counting process – rather than following the detailed provisions literally, apparently tried instead to be the first to finish.
- The extent of fraud was still not clear, since sometimes complaints are delayed. Police reports reflected few incidents at polling stations, but did refer to complaints about postal voting. By June 2001 the Royal Ulster Constabulary in Northern Ireland reported that three persons were under investigation – one for “personation” (impersonation of a voter) and the others for phony identification documents.
- There was only a short time for election authorities to respond to legislative changes made through the PPERA and Representation of the People Act 2000. There was considerable tension between central and local authorities in this respect.
- The Commission will be examining the possibility of developing a best practices guide and also training programs for election workers, and perhaps even seeking a “professional qualification” for them.
- For the first time, so-called “third parties” were required to register if they intended to devote large sums to advertising and other activities to include the outcome, regardless of whether a particular party or candidates is mentioned in the materials. Only a small number (3) of third parties actually registered after announcement of the elections, however, despite the large number of groups that previously registered, or otherwise appear to be active.
- During the campaign, various issues arose concerning free mailings, the quality and nature of campaigning, and media coverage.
- There was some evidence of “tactical voting”, facilitated by websites that enabled voters to link their votes. The Commission believed that this practice is neither illegal in itself nor

legally enforceable, and was also probably not very significant. There was also some tactical campaigning by political parties.

- New financial disclosure rules, established under PPERA, appeared to have worked well.
- Combining various kinds of elections, including with different systems of representation, created difficulties. This also involved reconciling different rules about procedure, including counting and returns. (For example, Parliamentary results are sometimes counted the day after the election.)

## 2. Northern Ireland Experience

### *Electoral Commission Report*

The Electoral Commission, in the reported quoted above, also identified a number of special issues with respect to the 2001 *Northern Ireland* elections:

- The scale of reported abuses (including election fraud and intimidation of voters) was perceived to be greater in Northern Ireland. The reported abuse of postal voting was greater there even though postal voting is restricted in Northern Ireland to those unable to cast a vote in person, and all applications must be attested by a witness. The Commission stated, “[A]buse of system is widely perceived to be a significant problem, although the scale of fraud has been hard to discern or prove.”
- In particular, the large number of applications for postal voting which arrived just before the deadline raised concerns about whether adequate checks were made.
- With respect to identification of voters voting personally, identification was required but several accepted forms were non-photographic.
- Crowding at polling stations led to concerns – and at least one complaint – about the procedure for closing the polls.
- Safety and security of the polling station and staff were also an issue. Two police officers and a voter were injured in a polling station shortly before closing.
- In general, “The Commission approaches electoral issues in Northern Ireland from the perspective that confidence in the democratic process must be sustained and enhanced.”
- The Commission reviewed a draft of the Electoral Fraud (Northern Ireland) Act, and noted that identification issues would be addressed through that act.

### *Northern Ireland Office Report*

Further with respect to recent experience in Northern Ireland, the Northern Ireland Office also issued a report on the 2001 combined (parliamentary and local council) elections. The report,<sup>68</sup> prepared by the Statistics and Research Agency, is statistically-based and contains less opinion and anecdote. Some of its main findings follow:

- Voter turnout (74%) was relatively good. Two percent (2%) of electors voted by post and 1% by proxy.
- The vast majority (96%) of voters said they had no difficulty getting into the polling place – although about a fifth of voters had to queue, especially late in the day (1900-2100 hrs), when nearly a third of them voted. Nearly all voters felt the polling stations were relaxed and well-ordered, and satisfaction levels were very high.

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<sup>68</sup> *Op. cit.*

- Similarly, a large majority of voters were satisfied with the explanation of the two different systems of voting used in the combined elections.
- Over 10% of voters felt that someone other than the Presiding Officer made a note that they had voted, with a small percentage (3%) reporting to have felt intimidated at some point in the voting process. Twice the latter number reported that something “inappropriate or caused concern” had occurred at the polling place, most commonly being obstruction of the entrance by party activists or banners. Still, 92% were satisfied with their experience and only 5% dissatisfied.
- Three percent (3%) of the voters in the survey reported having been absent voters, with illness/disability and working at the time of the elections being the reasons. Both absent and personal voters were generally satisfied with the process for absent(ee) voting, and information about it.
- A large majority of respondents felt that voters who arrive at the polling place just prior to closing (at 2200 hrs) should be permitted to vote. This view was especially predominant among Catholic voters.
- The problems most frequently cited by Presiding Officers were long queues, confusion between queues for different polling stations, crowding within the polling place, impatience among voters, and difficulty with closing the poll. Nearly three out of ten POs reported other problems, including voters without correct ID, polling agents annoyed by police presence, and confusion about the voting systems.
- POs also complained about the conduct of polling agents (representing candidates) at polling stations. In 12% of cases, POs indicated that the polling agents had caused problems, most commonly hassling or harassment, demands to know the turnout at the end of the poll, use of mobile phones, and trying to remove election registration numbers.
- One in twenty (5%) of POs said they were aware of intimidation of voters by party supporters, mainly outside the polling place.
- Almost nine out of ten (89%) of POs responding felt that the level of policing on election day was “about right”. Six percent (6%) had actually requested police assistance to control a situation – *e.g.*, crowd control (queues), removing activists attempting to distribute campaign materials, and removing non-voters at the close of polling.
- In a significant number (8%) of cases, POs reported turning away potential voters who had arrived at the polling place prior to the 2200 hrs deadline. Of these, a third had problems vacating the polling place. Others reported anger among people who did not get to vote, and verbal abuse for not processing voters quickly enough.
- With respect to suspected malpractice, 6% of POs reported that information concerning which electors had or had not voted had been transferred out of the polling place. A small number (4%) cited cases of voters being refused ballots because their vote had already been cast. Other concerns included suspected forgery of ID documents (3%), suspicion that persons had voted more than once (3%), turning away voters because a proxy had voted on their behalf (8%), and challenges to voters by polling agents (2%) on the grounds of impersonation, validity of ID documents and wrongly believing that the person had already voted.
- A large number of the POs (92%) reported turning away from one to 25 voters for having inappropriate ID, and the remainder reported turning away an even greater number. Types of inappropriate ID included: workplace passes, travel passes, student cards, gun licenses, and club membership cards.
- Generally, election staff – both at the polls and counting centers – were satisfied with the conditions and support for their work. More and better staff, and better training, were their chief suggestions for improvement.

- With respect to the count, an overwhelming majority (96%) believed that the parliamentary count went smoothly. Significant problems were reported, however, as follows – too many people in the counting center (36%), too little space (22%) and confusion over procedure (18%). A small number (2%) reported witnessing indications of electoral malpractice such as using mobile phones, political parties dictating how the papers were opened, and polling agents being too close to the count.

#### IV. MAIN ISSUES

##### A. NORTHERN IRELAND VOTER REGISTRATION

Under the Electoral Fraud (Northern Ireland) Act 2002,<sup>69</sup> new requirements concerning additional information to be included on the voter register in Northern Ireland made it necessary to prepare an entirely new register for elections there. These requirements included information on the following items:<sup>70</sup>

- Date of birth;
- National Insurance number (or a statement that the voter does not have such a number);
- Signature;
- Details of other residences in the UK at which the individual might be registered as a voter; and
- Statement that the individual had been residing in Northern Ireland for the previous three months.

Not only was a new canvas of residents required – something which would occur on an annual basis anyway – but it would no longer be possible for a single individual (such as head of household) at a residence to fill in the form for others. This is because the signature of each voter was separately required with respect to contents of the registration form.<sup>71</sup>

The results of the new canvas were announced in December 2002.<sup>72</sup> The new voter register that had been compiled at that time contained 1,072,346 entries. That compared with the 1,204,548 names previously on the list, which had been re-canvassed. Thus, the new annual register contains only 89% of the previous number of entries – meaning about 11% of entries had been deleted. (As a result of the “rolling registration” process, however, additional names could still be added prior to an election, upon request of qualified voters who had not been included.)

A variety of possible explanations have been suggested for the significant decline of the number of names on the voter register:<sup>73</sup>

- The Electoral Fraud Act was successful in removing potentially fraudulent voter names;
- Some people were averse to providing specific personal information of the type required;
- Certain people – *e.g.*, security forces – may not have registered for security reasons;

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<sup>69</sup> *Op. cit.*

<sup>70</sup> *Id.*, sec. 1; *see also* Magee, *op. cit.*

<sup>71</sup> Electoral Fraud (Northern Ireland) Act 2002, *op. cit.*, sec. 1

<sup>72</sup> Electoral Office for Northern Ireland, Press Release: Publication of the New Electoral Register, *op. cit.*

<sup>73</sup> *See* Magee, *op. cit.*



- The process was difficult to comply with for students and others temporarily residing elsewhere in the UK;
- Some potential respondents may have literacy problems;
- People with disabilities were not sufficiently targeted;
- Some of the names deleted should not have been on the register in the first place;
- People in debt, receiving benefits or active in the black economy may not have wished to provide personal information;
- The public may have been apathetic about the exercise;
- Potential voters may have had difficulty locating require information, *e.g.*, national insurance numbers;
- Registration forms may not have been delivered to some people;
- Canvassers may not have called at some residences;
- Due to security reasons, only a postal canvas could be carried out in certain areas;
- The response to canvassing could have varied due to sociological factors – such as gender or economic circumstances;
- The shift from multiple (by head of household) to individual registration led to failure to register.

If the decline in the number of names on the voter register means that a large number of qualified voters have not been registered, that would certainly tend to bring the legitimacy of the elections process in Northern Ireland into question. In particular, any indication that there was a unjustified differential in the levels of registration between voters from the two communities (Protestant and Catholic)<sup>74</sup> could be a new source of political and social division that might set back the peace process and the resumption of government under devolved administration.

## **B. NORTHERN IRELAND VOTER IDENTIFICATION**

### **1. Voter Identification (ID)**

Electors voting in person (or through a proxy) at a polling station are required to furnish one of several specified documents in order to obtain a ballot.<sup>75</sup> Some of these documents do not include a photograph of the individual, however, and their acceptance led to concern over impersonation of voters by other persons.

In response to this situation, it has been indicated that only photographic identification cards of certain types will be accepted for voter identification purposes in future. This policy does not yet appear in the materials available to the reviewer, however, including the Northern Ireland Assembly (Elections) Order 2001,<sup>76</sup> the Electoral Fraud (Northern Ireland) Act 2002,<sup>77</sup> or other materials

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<sup>74</sup> Magee, *op. cit.*, also points out that the discovery of an unequal effect on the two communities would have to be assessed under the equality impact provisions of the Northern Ireland Act 1998.

<sup>75</sup> Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, Schedule 1 (Assembly Elections Rules), Rule 37 (1A)-(1G). Under subsection (1E), the specified documents included: Current driver license, current passport, current payment booklet issued by the Department of Health and Social Services for Northern Ireland, a medical card issued by the Northern Ireland Central Services Agency for the Health and Social Services, a certified copy or extract of a marriage certificate, a British seaman's card, or a plastic card with the name and national insurance number of the person issued by the Department for Social Development, the Department of Health and Social Security or the Department of Social Security.

<sup>76</sup> *Op. cit.*

<sup>77</sup> *Op. cit.*

(including publications of the Electoral Office for Northern Ireland, or EONI).<sup>78</sup> The EONI has, however, announced that it will in fact be introduced beginning with the May 2003 Assembly elections there, upon Parliamentary approval of the necessary legislation.<sup>79</sup>

As part of the plan to shift to acceptance of only photographic identification documents, a program was authorized by the Electoral Fraud (NI) Act to provide Electoral Identity Cards (EICs) to voters who did not have acceptable photographic means of identification.<sup>80</sup> The new card would contain the full name and date of birth of the voter, a photograph, the period of validity, and possibly other information to be determined by the Chief Electoral Officer.

The program to implement this measure has been conducted by the EONI. EONI included a box in the voter registration forms that were widely circulated by canvassing during September and October 2002 enabling voters to indicate if they wished to apply for an EIC.<sup>81</sup> Some 233,000 requests were received.<sup>82</sup>

It is not known to the reviewer to what extent voters will become aware of the new identification requirements by election day, and how successful the process of issuing EICs has been. Clearly, Parliament's decision whether to enact the photographic identification requirement must be based in great part on these factors.

If problems have arisen with respect to voter awareness of ID requirements or obtaining EICs, then implementation of the new photographic requirement could result in a substantial number of registered voters being unable to vote in person at their polling stations. This would inevitably lessen the perceived legitimacy of the planned Assembly elections, and – to the extent the problems applied differentially to the two main communities (Protestant and Catholic) – could have negative consequences for the peace process as well.

## 2. Response to Impersonation of Voters

The Electoral Fraud (NI) Act 2002 also added a new question to the list of statutory questions that may be put to persons requesting a ballot. This enables the Presiding Officer (PO) to ask such persons, if he deems it appropriate, to state their date of birth.<sup>83</sup>

In connection with this change, the 2002 Act also broadens the power of the PO to refuse a ballot to a person whose ID he finds unsatisfactory, to include “the apparent age of the voter as compared with his age according to the date supplied” in connection with his voter registration or request for a mail or proxy ballot.<sup>84</sup> If such a person is refused a ballot, he shall nevertheless be given a “tendered ballot”,<sup>85</sup> or provisional ballot, for inclusion in the count in the event that further proceedings establish the right of that person to cast a vote.

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<sup>78</sup> See *Op. cit.*

<sup>79</sup> EONI, Press Release, *op. cit.* The legislation is expected to require a voter to produce one of four forms of acceptable photographic ID: a UK or Irish passport, a photographic UK driver license, a Senior SmartPass issued under the NI Concessionary Fares Scheme, or the new electoral identity card. *Id.*

<sup>80</sup> *Op. cit.*, sec. 4

<sup>81</sup> EONI Fact Sheet, The Electoral Identity Card, *op. cit.*

<sup>82</sup> EONI Press Release, *op. cit.*

<sup>83</sup> Electoral Fraud (NI) Act 2002, *op. cit.*, sec. 2(2) (amendment to Rule 37 of Schedule 1 [Assembly Elections Rules] of Schedule 1 to the Northern Ireland Assembly [Elections] Order 2001, *op. cit.*)

<sup>84</sup> Electoral Fraud (NI) Act 2002, *op. cit.*, sec. 2(3) (further amendment to Rule 37; *see supra.*)

<sup>85</sup> *Id.*, sec. 2(3)

Sanctions against persons falsely holding specified documentation intended to enable them to impersonate a voter were already provided for.<sup>86</sup> In addition, a new offense and associated sanctions were created through the Electoral Fraud Act related to provision of false information in connection with voter registration and identification.<sup>87</sup>

### C. INAPPROPRIATE, IMPROPER AND ILLEGAL ACTIVITIES

The reviewer is not directly familiar with practices by candidates, their agents, political parties and other interested persons during UK elections. The UK plainly has a very lively political culture in which candidates, parties and other interested persons seek maximum advantage under election rules and practices.

A review of the literature (see References, below) appears to indicate that there is an unclear but possibly significant level of inappropriate, improper and illegal activities by those seeking to affect the outcome of elections. This includes with respect to the following elements of the voting process:

- Acquiring information about what voters have or have not cast their ballots;
- Attempting to influence voters on election day by conducting political activities nearby and sometimes within polling stations;
- Organizing applications for absent and proxy voting, and sometimes handling and even casting these votes;
- Sometimes attempting to obtain information, either from within the polling station or counting center, about how specific ballots were voted;
- Communicating voting-related information between polling stations and counting centers and outside locations.

The UK Electoral Commission recently issued a study on absent voting,<sup>88</sup> which has – along with proxy voting – been a focus of concerns with respect to improper and illegal activities. The conclusions of this study not only address the concerns about absent/proxy voting but other aspects concerning the security of the voting process. The relevant conclusions can be summarized as follows:<sup>89</sup>

- “The security and secrecy of the vote are key building blocks for any electoral process. Systems should be designed to prevent interception or alteration of the vote, personation and multiple voting. Voters should also feel able to make their choice and cast their ballot free from duress and undue influence.”
- “[I]t is clear that not all electors and political parties are confident that the controls in place at present are sufficiently robust. This lack of confidence is damaging for the electoral process and could, if not addressed, impact on the turnout.”
- The Commission is concerned that current complaint and appeal mechanisms are not sufficiently flexible to address improper or fraudulent practices. The election petition procedure is said to be “costly, legalistic and time-consuming”, and available only to

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<sup>86</sup> See, e.g., Elections (Northern Ireland) Act 1985, sec. 3 (appended to the Northern Ireland Assembly [Elections] Order 2001. This made it an offense to engage in such activity and gave the police rights to search and seizure, in some cases without a judicial warrant.

<sup>87</sup> *Op. cit.*, sec. 7

<sup>88</sup> Absent Voting in Great Britain, *op. cit.*; see especially Chap. 3, “Building Public Confidence”.

<sup>89</sup> See generally *Id.*

- election participants (including voters) when the challenge could affect the outcome. Criminal prosecutions could not be brought in cases where criminal intent cannot be proved.
- The extent of fraud in postal and proxy voting cannot be assessed since there are no records. Police and other reports suggest that fraud in these regards is not widespread, but is also under-reported. Specifically, victims of fraud may be reluctant to complain, or uncertain whether an offense has been committed.
  - “In the areas where fraud is known to have taken place, it appears to have been conducted in a determined and comprehensive manner. In certain areas it is alleged that new candidates adopt the fraudulent practices of their predecessors and opposing candidates perpetuate the same frauds because they believe it is the only way to keep pace with the other side.”
  - Allegations of fraud with respect to absentee voting tend to focus on candidates or party workers who: Register fictitious or unentitled voters; gain control of electors’ postal votes by having them delivered to addresses of their choosing; gain control of proxy votes by providing proxies of their own choosing; forge signatures on postal or proxy vote applications; appropriate partially completed postal ballots; or persuade voters to complete forms in the belief that they were signing up to something else.
  - Commission recommendations include: More rigorous and routine checks for fraud, based on random audits; a protocol among election officials, the police and criminal prosecutors concerning their roles in pursuing allegations of election fraud; development of best practice and a code of conduct related to the handling of postal vote applications and ballots by political party representatives (but not legislation at this time); enactment of a new criminal offense for fraudulently intending to apply for a postal or proxy vote; revising and elaborating the law against undue influence on voters; and extension of the police power to arrest suspects on reasonable cause of the offense of “personation” to areas outside polling stations.

The Commission also noted the importance of preventing undue influence on voters with respect to applying for, receiving and casting absentee ballots. The Commission also concluded that it was improper for candidates, parties and their representatives to handle ballots, as opposed to application forms. It also examined the desirability of continuing to permit postal/proxy ballots to be sent to alternate addresses, but made no recommendation for change on this point. With respect to the election appeals process, the Commission suggested that an additional 12 month period (for a total of 24 months) be made available to commence prosecutions in exceptional circumstances.

The results of the Commission’s study, and the other materials reviewed on these matters, indicate there would appear to be sufficient grounds to recommend a further look at how candidates, their agents, political parties and others interested in the outcome of the election conduct themselves during the elections – including with respect to organizing the vote (especially through absentee voting), observing voting and other polling-related activities on election day, and also thereafter (during the count). This implies that there is a need to strengthen monitoring of election-related activities by election contestants, investigation of improper and illegal activities, enforcement against both criminal offenses and civil violations, and enhanced police and prosecutorial actions.

#### **D. OBSERVERS**

As indicated earlier, UK election laws do not make provision for the presence of observers during election operations. Observers are strictly excluded as unauthorized persons in polling stations. They can be permitted to attend the count, but only subject to the discretion of the Returning Officer.

It must be pointed out that the Final Document of the 1990 Copenhagen Meeting of the Conference of the Human Dimension of the Conference for Security and Cooperation in Europe (“Copenhagen Document”) provides:<sup>90</sup>

“The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavor to facilitate similar access for elections proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.”

In view of what was said in the previous section, about improper and illegal activities by election contestants, that the process of conducting elections in the UK might well benefit from admitting observers to attend all aspects of election operations, including at polling stations. The presence of domestic observers in particular might tend to discourage the contestants from attempting to exercise undue influence on voters, violating the secrecy of their votes (including through proxy and absent votes executed by other persons), and casting ballots in fraudulent ways.

Finally, it should be noted – as pointed out in the Electoral Commission’s report on the 2001 elections<sup>91</sup> -- that the UK has never implemented the commitment in the above-cited section of the Copenhagen Document by making it possible for international observers from OSCE participating States and other accredited institutions and organizations to attend all relevant election operations.

## **E. OTHER ISSUES**

The materials discussed in the current review also indicate that there are additional issues in election administration that should be addressed. One of these, pointed out by the Electoral Commission in a recent report,<sup>92</sup> includes the variable quantity of funding for election operations in different areas and quality of training for election workers. It is noteworthy that the Commission has committed itself to addressing the latter needs by developing a guide to best practice as well as training materials.

## **V. CONCLUSIONS**

UK general election laws are highly detailed and comprehensive, but are largely limited in scope to operational matters, such as the duties of election officials, specific election procedures, and civil and criminal enforcement proceedings. While elections to the legislative bodies of Northern Ireland, Scotland and Wales are based on the Parliamentary election laws, additional legislative orders have been enacted to address the different methods of election as well as other relevant circumstances.

The relevant provisions regarding elections for the legislative bodies of the devolved administrations are therefore somewhat complex. Nonetheless, significant areas of regulation – such as the role of the media, the conduct of election contestants, and administrative complaints

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<sup>90</sup> *Op. cit.*, sec. 8

<sup>91</sup> *Op. cit.*

<sup>92</sup> *Id.*

about violations of election regulations – are not addressed in detail. In recent years, however, additional rules on political finance have been adopted and applied.

Liberal provisions in the law (except for Northern Ireland) for voting by post or proxy have led to a considerable increase in absentee voting. While this may have increased the vote, it also may have led to a higher level of fraudulent voting and increased public suspicion about the legitimacy of the electoral process.

For Northern Ireland, additional controls on voting have been introduced, such as inclusion of birth date in absentee applications and the voter registry, and a requirement to bring photographic identification to polling places. These controls have made it necessary to re-register voters and issue special electoral ID documents for voters who do not possess the required IDs. If these programs were not entirely successful, there could be problems at the polls and for the political process more generally.

A review of the literature, including reports by the newly-formed UK Electoral Commission, indicates that there may be a significant level of inappropriate, improper and sometimes illegal activities organized by supporters of political parties and candidates. For the most part, such activities appear to involve organizing personal, postal and proxy voting in their favor. In some cases, however, persons seeking to affect the outcome of elections have apparently harassed voters and violated the secrecy of absentee balloting. They may also have communicated information about voting outside the polling stations and counting centers, or even arranged for impersonation of voters at polling places.

The UK is known for excellence in electoral operations, but its lively political culture may encourage the continuation of improper activities by candidates and parties. Greater involvement by civil society might help to address these issues, but admitting domestic observers to polling stations would require a change to the law.

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## ABOUT THE OSCE/ODIHR

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The ODIHR, based in Warsaw, Poland, was created as the Office for Free Elections by the OSCE Heads of State or Government at the 1990 Paris Summit. In 1992, the name of the Office was changed to reflect an expanded mandate to include human rights and democratisation. Today it employs over 80 staff.

The ODIHR is the lead agency in Europe in the field of **election observation**. It co-ordinates and organizes the deployment of thousands of observers every year to assess whether elections in the OSCE area are in line with national legislation and international standards. Its unique methodology provides an in-depth insight into all elements of an electoral process. Through assistance projects, the ODIHR helps participating States to improve their electoral framework.

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