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# RESEARCH PAPER: THE REGULATION OF THE CAMPAIGN AND ELECTORAL OFFENCES

The law stated in this research paper may be in parts out of date.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

## INTRODUCTION

- 1.1 The classical law governing electoral campaigns developed in the 19th century for UK Parliamentary elections. The modern law is principally set out in Part 2 of the 1983 Act, which also governs local government elections in England and Wales and elections to the Greater London Authority. For other elections, discrete legislative measures refer to the 1983 Act and apply some or all of its regulatory provisions, with or without modifications. Some of the main modifications relate to voting systems involving the closed party list system.
- 1.2 We shall consider the regulation of the campaign in three parts. First, there is the regulatory structure – the way in which electoral law lays down and seeks enforcement of its rules. Secondly, there are the offences themselves which vary in range and content. We have included these in the table at Appendix A to this paper. We consider in detail some of the offences, particularly those that seek to govern how electoral campaigns are run, and to protect the integrity of the election. Finally, an important part of regulating the campaign involves laying down detailed rules governing election expenditure, which we turn to in the third part of this paper.

### **Electoral offences and their place within the regulatory structure**

- 1.3 Electoral law lays down detailed rules. Some are administrative in character, and their breach can be a ground for invalidating the election, although it is also an offence for electoral administrator knowingly to breach such rules. Others relate to the conduct of the public generally, and candidates and campaigners in particular. It is the regulation of the campaign that we focus on in this paper.
- 1.4 Elections excite strong feelings and tension and when the classical election law was laid down violence, rioting, largesse and intimidation were serious concerns. The modern regulatory structure is a consequence of these concerns. It seeks to regulate public conduct at election time (and thus the election campaign) by laying down criminal offences. We refer to these generally as “election offences”, and set them out appendix A to this paper.

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

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- 1.5 Some general criminal offences may be relevant in the election law context, such as offences against the person, public order offences and bribery under the Bribery Act 2010, but this project is not concerned to review the criminal law generally. Our focus is on the special offences that exist to regulate electoral conduct.

#### PROSECUTION OF ELECTORAL OFFENCES

- 1.6 Criminal offences need to be prosecuted, and election law specifically directs public prosecutors to consider bringing prosecutions. The Directors of Public Prosecutions (“DPP”) for Northern Ireland and England and Wales respectively, and the Lord Advocate for Scotland, have a duty under section 181 of the 1983 Act to consider making inquiries and instituting prosecutions where information is given to them that an electoral offence has been committed.<sup>2</sup>
- 1.7 There is no public regulator for electoral conduct at the campaign level. At the national level, the regulation of political parties is overseen by the Electoral Commission, which can also impose civil penalties for wrongdoing. Other than private enforcement through the election petition jurisdiction, criminal prosecutions are thus the chief way of enforcing election law’s regulation of campaign conduct.

#### *Time limit for prosecutions*

- 1.8 The time limit for commencing proceedings is one year from the commission of the offence, which in exceptional circumstances can be extended to 24 months on application to a magistrate’s court, provided an application to extend time is made within the year.<sup>3</sup>

#### *Prosecutorial discretion*

- 1.9 Allegations of electoral offences often originate from returning officers, rival candidates or their respective staff. If the primary information indicates that an offence may have been committed police enquiries will normally be requested. The police will take statements from the complainant and the returning officer and interview the alleged offender. If the police make arrests it will fall to the Crown Prosecution Service (CPS) to decide whether to prosecute. The prosecutor must consider whether a prosecution is in the public interest and whether there is sufficient evidence to provide a realistic prospect of conviction.
- 1.10 In its guidance to prosecutors the CPS states that purpose of the relevant legislation is to maintain the integrity and probity of the electoral process. A prosecution for major infringements will normally be in the public interest. A prosecution may not be in the public interest, and a caution administered by the police or the provision of advice as to future conduct may suffice in the following circumstances:

<sup>2</sup> Representation of the People Act 1983 s 181 read with ss 204(5) and 205(1)(aa)

<sup>3</sup> Representation of the People Act 1983, ss 176(1), (2A) (2B) and (2F)

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- (1) The offence is of a "technical" nature which does not infringe the spirit of the legislation;
  - (2) The offence was committed as a result of a genuine mistake or misunderstanding;
  - (3) The offence could not have influenced the result of the election process; or
  - (4) The offender has remedied any breach of the law.

1.11 The guidance adds:

In practice, it may be difficult to prove that the result of an election has been affected by an infringement. However, the fact that a breach has or may have affected the result of an election is a factor to be taken into consideration in deciding whether proceedings should be instigated. Whilst every case will of course turn on its own facts, where there is clear evidence that a breach has affected the result or is likely to have done so, the public interest is more likely to require a prosecution - even if the infringement itself is relatively minor.<sup>4</sup>

- 1.12 Plainly public prosecutors will take into account a balance of factors when deciding whether to use public resources to bring an apparent wrongdoer to account. However, it is worth noting that if a wrongdoer, for example a candidate who has failed to submit a return of expenses, has not won the election, it is difficult or even impossible to show that the breach affected the result. Some electoral offences seek to regulate electoral conduct irrespective of whether it affects voting. Those who do not win the election but are wrongdoers cannot be challenged by election petition, and so criminal prosecution is the only way of giving bite to the law they have infringed.

***Judicial relief from offences***

- 1.13 Quite apart from the question whether it is in the public interest to prosecute, a person may proactively apply for relief under section 167 of the 1983 Act. The application is to the High Court or Court of Session, an election court or it is if in respect of the time for the sending in and payment of election expenses, a county court or sheriff. The application for relief is on notice to the Director of Public Prosecutions or Lord Advocate in Scotland, who may attend the proceedings and make representations. Under this jurisdiction the court has a discretion to exempt an innocent act, payment or employment from being an illegal practice if it is shown that it arose from inadvertence, accidental miscalculation or some similar other reasonable cause. Notice of the application must have been given in the relevant constituency or authority as the court seemed fit.

<sup>4</sup> Crown Prosecution Service Legal Guidance "Code for Crown Prosecutors - Considerations" [http://www.cps.gov.uk/legal/d\\_to\\_g/election\\_offences](http://www.cps.gov.uk/legal/d_to_g/election_offences) (last visited 18 August 2014)

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*Relief from non-compliance with duties as to expense returns*

- 1.14 A court may also grant relief to a candidate or election agent under section 86 of the 1983 Act in respect of any failure to deliver the return or declarations as to election expenses, or in respect of any error or false statement in them, by reason of illness, death, misconduct or inadvertence. It must grant relief to a candidate for acts and omissions of the election agent in relation to the return and declarations where these are without the sanction or connivance of the candidate and the candidate took all reasonable steps to prevent it. One major point of difference is that where a candidate proves that the offending conduct of his agent occurred without his sanction or connivance, and that he took all reasonable means for preventing it, relief is not discretionary and must be granted.<sup>5</sup>
- 1.15 The concept of inadvertence has received judicial consideration. It was held that it included a negligent act or omission in good faith, but not a reckless and plainly not a dishonest flouting of the law.<sup>6</sup> Even experienced professionals and lawyers could be excused for their inadvertence in failing to consult the legislation. It is a question of fact in every case whether the degree of carelessness involved in committing the offence was such that professionals could not have committed the offences inadvertently.<sup>7</sup>
- 1.16 A successful applicant for relief under sections 167 is not subject to any of the consequences under the 1983 Act of the offending conduct. That person is effectively immune from criminal prosecution and a winning candidate avoids the invalidity of the election. Although worded differently, excuse or relief under section 86 has the same effect.

***The regulatory significance of the labels “corrupt” and “illegal” practice***

- 1.17 All electoral offences are criminal and subject to prosecution and trial under ordinary criminal procedure. Some have no other public law significance. Others, however, are also labelled as “corrupt” or “illegal” practices. Offences which have this label gain special significance in public law terms:
- (1) they vitiate the validity of an election if an election petition is brought.
  - (2) they have special consequences for the offender.
    - (a) If the convicted offender is the winning candidate, as well as being guilty of a crime, they vacate their elected post, and a new election must be held.<sup>8</sup>

<sup>5</sup> Representation of the People Act 1983 s 86

<sup>6</sup> *McCrorry v Hendron* [1993] NI 177 (QBD of Northern Ireland) at p 224 (Kelly LJ)

<sup>7</sup> *Finch v Richardson* [2008] EWHC 3067 (QB) [2009] at [49], 1 W.L.R. 1338 at p 1348.

<sup>8</sup> Representation of the People Act 1983 s 173(1)(b) read with s 173(4) to (8).

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- (b) Those convicted of corrupt or illegal are in general disqualified for election for a period of 3 years (for illegal practice) or 5 years (for corrupt practice).<sup>9</sup>
  - (c) A person convicted of personation or postal voting offences (which are corrupt practices) under sections 60, 62A and 62B of the 1983 Act, or the voting offences under section 61 (which are illegal practices), is additionally disqualified from being registered and voting at any election for a disqualification period.<sup>10</sup>
  - (d) Some discrete consequences of conviction for a corrupt or illegal practice are spelt out in the 1983 Act:
    - (i) in the case of holders of licences under the Licensing Act found guilty of bribery or treating on their licensed premises, the conviction must be considered by the licensing authority when the licence comes to be renewed.<sup>11</sup>
    - (ii) the conviction results in incapacity for “any public or judicial office” in Scotland, and holders of such an office must, on conviction, vacate it. We can see no corresponding provision elsewhere.<sup>12</sup>

1.18 Corrupt practices are offences triable “either way”, attracting a maximum sentence upon conviction on indictment of one year’s imprisonment (two years for personation and postal voting offences), or a fine, or both, and on summary conviction six months’ imprisonment, or a fine not exceeding the statutory maximum, or both. Illegal practices are summary offences attracting a fine not exceeding level 5 on the standard scale.<sup>13</sup>

<sup>9</sup> Representation of the People Act 1983 s 173(1)(a) read with s 173(2) and 173(3).

<sup>10</sup> Representation of the People Act 1983 s 173(1)(a)(i) read with s 173(2), referring to offences under ss 60, 61, 62A and 62B of the 1983 Act.

<sup>11</sup> Representation of the People Act 1983 s168(7). This applies to those guilty of bribery or treating only.

<sup>12</sup> Representation of the People Act 1983 s 173A.

<sup>13</sup> Representation of the People Act 1983 ss 168 and 169.

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- 1.19 These are not particularly severe maximum sentences given the seriousness of some of the offences and the potential scale of wrongdoing.<sup>14</sup> Properly understood, however, corrupt and illegal practices are special electoral offences the punishment for which includes not only the fine or custodial sentence, but also the nullity of the election and disqualifications from future election. These are likely to be strong incentives for candidates and political campaigners to comply with the law.
- 1.20 Sometimes, corrupt or illegal practice is a merely a label applied to an offence if it is committed by the candidate. At other times, it is an offence that can be committed by the public generally, and thus a mark of a serious electoral offence.

#### EXAMPLES OF CORRUPT AND ILLEGAL PRACTICES AS A LABEL ONLY

- 1.21 Some corrupt and illegal practices are so labelled because an electoral offence is committed by the candidate or agent. Into this category fall “illegal payments” and illegal employment under sections 107, 111 and 112 of the 1983 Act. Section 175(1) of the 1983 Act governs the simple offences while a candidate or election agent who is personally guilty of the offence commits an illegal practice under section 175(2) of the 1983 Act. The sentence is the same, but the vitiating and disqualifying consequences of guilt are triggered.
- 1.22 The same can be noticed in relation to the offence contrary to section 110 of the 1983 Act of publishing election literature without complying with the legal requirements to include various other persons’ names and addresses. If the offence is committed by a candidate or agent it is under section 110(12) labelled an illegal practice. Again, a single offence is labelled “illegal” practice if committed by candidates or agents.

#### CORRUPT AND ILLEGAL PRACTICES TO MARK SERIOUSNESS OF AN ELECTORAL OFFENCE

- 1.23 Other special offences are such because of the serious nature of the wrongdoing, or its centrality to the regulation of electoral law. Thus offences of bribery, undue influence, personation or postal voting offences or multiple voting are marked out as more serious offences than simple electoral offences, irrespective of who commits them. Others can only be committed by the public as opposed to the candidate and their campaign: for example, providing money or property in support of a candidate’s election expenses otherwise than to the agent, contrary to section 71A of the 1983 Act.

<sup>14</sup> Level 5 on the standard scale and the statutory maximum are currently both set at £5,000. From a date to be appointed, both will increase to a fine of any amount: Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85(1).

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### ***Difference between corrupt and illegal practices***

- 1.24 As the labels indicate, there was once a qualitative difference between “corrupt” and merely “illegal” practices. The 19th Century legislation put the common law offences of bribery, treating, and personation on a statutory footing in an attempt to rein in corruption at elections. By 1883 electoral offences included two key categories of offences. Corrupt practices involved an element of intentionality in the wrongdoer. Illegal practices involved the commission of acts, even honestly, which the legislation sought absolutely to prohibit.
- 1.25 This rationale has not survived the passage of time and the creation of further offences. For example, it is a corrupt practice to incur certain expenses without the authority of the election agent contrary to section 75(5) of the 1983 Act. We consider this further below in this paper. This imposes strict liability for campaign spending by those unaffiliated to the candidate and unauthorised by the election agent (third persons), beyond a legally permitted sum. It is designed to protect the efficacy of the law’s limitation on campaign expenditure by candidates, which might otherwise be evaded through spending by sympathetic third persons. It is not a defence that a third person did not know that they have exceeded the legal limits. Were it an illegal practice, an accidentally overspending third person would be able to apply for relief of the offence, and to rely on innocent mistake to evade punishment.
- 1.26 By contrast, it is an illegal practice “corruptly” to induce or procure any other person to withdraw from being a candidate at an election in return for payment, or for such a person to withdraw in consequence of the inducement.<sup>15</sup>
- 1.27 The difference between the labels “corrupt” and “illegal” when it comes to the criminal practices now lies only in the severity of the criminal sentence and the length of time that disqualifications from the electoral process consequent on conviction last. Corrupt practices attract a custodial sentence, and are thus the most serious offences in the scheme. Indeed, we have noted that some corrupt practices, like postal voting offences contrary to section 62A, attract a two year maximum sentence. As we have noted, there is provision for applying for relief for innocent commission of illegal practices, but there is no equivalent provision for corrupt practices.

### **Electoral offences**

- 1.28 The table at Appendix A sets out electoral offences, and their classification as corrupt or illegal practices (or as a general offence), sentences, and mode of trial. One of the chief problems with electoral offences is that these are repeated in each discrete election-specific measure. We refer here to the 1983 Act provisions, which are applied or repeated in the discrete legislation governing other elections. The problem of election-specific legislation therefore persists in relation to electoral offences, although the complexity of the offences also arises from difficult and outdated drafting and case law.

<sup>15</sup> Representation of the People Act 1983 s 107

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### ***Complex or outdated drafting***

- 1.29 Electoral offences vary greatly. Some date back to the very first attempts to place common law offences on a statutory footing. Others were devised as a response to the Victorian problem of electoral corruption. Some were introduced more recently as a response to more contemporary problems with electoral fraud. This means electoral offences under the 1983 Act range from bribery, an ancient common law crime, to the postal and proxy ballot offence in section 62A of the 1983 Act which was created by the Electoral Administration Act 2006 in the wake of a number of cases of postal ballot fraud.
- 1.30 As a result, the 1983 Act lays down offences with differing drafting styles, and which are contained in different parts of the statute. There is no consistent way to describe the mental state rendering conduct criminal. Older provisions tend to describe what in law is called the mental element of the offence using words such as “corruptly”- for example in section 107 (corrupt withdrawal of candidature), section 114 (treating) or section 113 (bribery). Case law established that this connoted a specific intent to break the law, although some cases still described doing something done corruptly as done with an “evil mind or intention”. Modern offences designed to combat malpractice use specific intent to commit the offence to describe the mental element of the crime. For example a person commits an offence if he performs the certain prohibited acts to do with postal or proxy voting and
- intends, by doing so, to deprive another of an opportunity to vote or to make for himself or another a gain of a vote to which he or the other is not otherwise entitled or a gain of money or property.<sup>16</sup>
- 1.31 While this may be characterised as an “evil intent” or corruption, this does not affect the way the offence is drafted. We note for the present that this is an issue that occurs in several offences, and is chiefly to do with the pedigree of the offence – whether it is a classical one that emanates from the Victorian era, or a recent one.
- 1.32 Part of the problem is that the vast majority of the case law interpreting the classical offences dates back to the “golden age” of election petitions, between 1868 and 1911. A subsequent decline in the frequency of election petitions and of criminal prosecutions for electoral offences means that old statutory language has not had benefited from frequent interpretive modern guidance by the judiciary.

<sup>16</sup> Representation of the People Act 1983, s 62A(1)(b)



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- 1.33 There are examples where the problem with the mental element of the offence is not poor description but rather that a case has been made that it should be changed. For example the offence under section 65A(1A) of the 1983 Act of knowingly making a false statement as to one's qualification for being elected requires proof of actual knowledge of the disqualification by a candidate. Prosecutors may find it hard to prove. Yet the consequence of disqualification is stark, as we noted in our research paper on legal challenge. Falsely declaring oneself free from disqualification will result in the absolute nullity of the election if challenged or successfully prosecuted. It might encourage candidates to be more rigorous in checking their eligibility for an election if the mental element of the offence included circumstances where they ought to have known of the disqualification, or where they had no reasonable excuse; but we have not proposed to make that change in our research paper on legal challenge.

***The classical campaign offences: bribery, treating, and undue influence***

- 1.34 Some of the offences are long established. Their 19th Century origin results in the use out of date language and archaic concepts. They are best understood as a response to contemporary problems faced by Victorians: those of violence and intimidation, treating the franchise as a commodity to be sold or bought, and the ancient view that elections could be influenced by those with land or some other source of power. The Victorian reforms sought to transform election into expressions of the democratic will fought on the issues. They strictly prohibited bribes, or the buying of votes with money or employment; largesse in the form of food or drink (a form of buying of votes, but also one which led to the forming of mobs on polling day) intimidation and undue influence, which was targeted at reducing the effect of the powerful and influential on the electorate. These proscriptions continue in the form of the corrupt practices of bribery, treating, and undue influence, which we presently turn to.

**BRIBERY**

- 1.35 Before it was laid down in statute it had long been an offence at common law to commit bribery at an election. Bribery is now set out in section 113 of the 1983 Act. The full provision on bribery is extensive and rather detailed, because it seeks to encompass within the offence both the donor and the recipient of a bribe, and seeks widely to describe what amounts to a bribe so that as well as money and "office", gifts, loans, offers, promises of money and valuable consideration, a "place" or "employment" can be bribes. The bribe may be directed at one person but the incentive given to another. A bribe may be given "directly or indirectly, by [the briber] or any other person on his behalf".
- 1.36 There is also a temporal dimension to the offence. A person commits bribery if he or she –
- (1) gives any money to a voter in order to induce him to vote or not to vote. (section 113(2)(a) of the 1983 Act), or
  - (2) "corruptly does any such act as mentioned above on account of any voter having voted or having refrained from voting." (section 113(2)(b) of the 1983 Act)

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1.37 If an inducement is offered ahead of the election, it constitutes the offence provided the mental element of intent to procure a vote is proved. If the inducement occurs after the election, the word “corruptly” qualifies the giving of the inducement. No material change in the drafting of the offence of bribery has occurred in this respect since the election courts first started to try election petitions alleging bribery.

1.38 The old cases seemed to regard the use and place of the word “corruptly” in the second part of the offence as significant to the issue of proof of the offence. This understanding persists in modern practitioners’ works which rely on these cases for authoritative guidance on the law. So, for example:

(1) The use of the word “corruptly” in section 113(2) meant that if the act of bribery occurred shortly before the voter voted then bribery would be assumed until the contrary was shown, whereas if the act was done after the election, it had to be shown to have been done corruptly in pursuance of a previous understanding.<sup>17</sup>

(2) Proving a payment before an election was a bribe is harder the more distant from the election date the act is. Schofield notes:

It does not matter how long the corrupt act was before the election; it is just as much bribery as if it were offered at election time. However, where a considerable period elapses between the bribe and the election, the matter of proof becomes more difficult. The burden of proof is somewhat shifted where the bribery takes place at the election. It then becomes more the onus of the person charged to prove that it was an innocent act.<sup>18</sup>

1.39 It is unlikely the legal burden of proof shifts to an accused to prove they did not have the requisite intent, and the books do not go so far as to say that. Recent case law has treated attempts to reverse the burden of proof in more explicit legislative terms as imposing an evidential burden only.<sup>19</sup> Article 6(2) of the European Convention on Human Rights guarantees the presumption of innocence until proven guilty in criminal proceedings.

<sup>17</sup> R Price (ed) *Parker’s Law and Conduct of Elections*, looseleaf, issue 37, vol 1 at para 20.12. The editors cite *Borough of Bradford case*, *Storey v Forster* (1869) 1 O’M&H 34 at p 36

<sup>18</sup> P Gribble (ed), *Schofield’s Election Law*, looseleaf 6<sup>th</sup> reissue volume 1 at para 13-005

<sup>19</sup> *R v Webster* [2010] EWCA Crim 2819, [2011] 1 Cr App R 207.

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- 1.40 It is much more likely that the earlier election courts, who were primarily concerned with establishing the validity and outcome of the election, were establishing when inferences of an inducement could be made. The further back into the past the incentive occurred, the less likely it was to be a bribe aimed at that election. Contrariwise the more contemporary the incentive, the more likely it is that the payment will be taken to be a bribe. As to bribes after the election, it is impossible to incite someone to do something in the past, so that evidence of an arrangement or deal was required.
- 1.41 Another illustration of the difficulty with bribery is the notion that a bribe must be “operative” at the time of the election. The same is true of undue influence by the making of a threat. Repenting and handing back the bribe before the election will not upset the election.<sup>20</sup> There is in principle no distinction between bribery as a criminal offence and bribery as a factor which invalidates elections, so the assumption must be that a bribe inoperative at the time of voting is not a crime. This is despite the fact that the candidate or someone on their behalf has offered a bribe, so that, even if ineffective, their conduct is tainted.

#### UNDUE INFLUENCE

- 1.42 Section 115(2) of the 1983 Act states that a person is guilty of undue influence
- (1) if he, directly or indirectly, by himself or by 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 person to induce or compel that person to vote or refrain from voting or on account of that person having voted or refrained from voting; or
  - (2) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents or intends to impede or prevent the free exercise of the franchise of an elector or proxy for an elector, or so compels, induces or prevails upon, or intends so to compel, induce or prevail upon an elector or proxy for an elector either to vote or refrain from voting.

<sup>20</sup> *Third Borough of Stroud case* (1874) 2 O.M. & H 181 at p 183 as to bribes; *Windsor case*, *Herbert v Richardson Gardner* (1874) 2 O'M & H 88 at p 91 as to a threat of throwing tenants out. See also P Gribble (ed), *Schofield's Election Law*, looseleaf 6<sup>th</sup> reissue, volume 1 at para 13-005; R Price (ed) *Parker's Law and Conduct of Elections*, looseleaf, issue 37, vol 1 at para 20.11

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- 1.43 This offence is widely drafted and some of the conduct caught by it is already criminal. The use of force or violence is, of course, the subject matter of many criminal offences. The catch-all nature of the offence reflects its origin in an era when armed mobs and the like were not unknown at elections.<sup>21</sup> While the general criminal law might serve to deal with members of the mob, the electoral law approach was to criminalise the organisers who “directly or indirectly” and by themselves or others committed such acts. As a crime it was aimed at candidates and their agents, and its status as a corrupt practice meant, as we mentioned above, that it had a dual function as a ground for invalidating an election as well as being a crime. Prosecuting the general crimes is an oblique, and incomplete enforcement of election law. Those who use violence, intimidation, or trickery to get elected should be labelled corrupt practitioners, and suffer the consequences in public law of disqualification and vacation of their seat if elected. It is important therefore that offences such as undue influence are capable of being enforced and prosecuted.
- 1.44 Section 115(2)(b) of the 1983 Act was amended in 2006 to include within the second limb of the offence conduct intended to “compel, induce or prevail” upon an elector or proxy, irrespective of success, to impede or prevent the free exercise of the franchise. This covers certain instances of electoral fraud, including the opening of postal votes with a view to changing the marks on the ballot paper, even if the fraudster does not do so. A recent example of undue influence in the electoral law context includes the “contrivance” of distributing a leaflet claiming it to be from a rival party, even if it did not contain lies about the party’s policy.<sup>22</sup>
- 1.45 The reference to “spiritual” injury was a 19th Century attempt to catch abuses of authority by members of the clergy. Undue influence by threat of spiritual injury avoided an election in the Meath Southern Division Case *Dalton v Fulham* (1892) 4 O’M & H 130. O’Brien J said:

Whatever might be the view taken at one time of the question of the right of the State to step into the domain of human conscience and to say that a person should not be influenced who had himself the power of resisting the influence, we must take the law to be settled by [express terms of statute in this country.] ...

The real principle is not that of intimidation in the proper sense, because intimidation in the spiritual relation assumes to be for the benefit of persons intimidated; but it is that of undue influence, which by common law us allowed to void all private acts and [is] applied to the public act of the exercise of the franchise.

<sup>21</sup> See for example *Drogheda Borough case*, *McClintock v Whitworth* (1869) 1 O’M & H 252 and *Stafford Borough case*, *Chawner v Meller* (1869) 1 O’M & H 228

<sup>22</sup> *R v Rowe, ex parte Mainwaring* [1992] 1 WLR 1059, CA. It is important to note that this was not a criminal case, nor was it an election petition. It was an injunction in the high court to prevent the dissemination of the leaflet on the basis that it amounted to undue influence.

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- 1.46 A bishop's pastoral letter was held to have exerted undue spiritual influence after it was read at the altar and the full organisation and power of the clergy was found by the election court to have been deployed in support of one candidate.<sup>23</sup> No definitive test was laid down or exists as to where the line between undue influence. Such cases were most frequently brought in Ireland, where the influence of the clergy was most strongly felt.
- 1.47 The reference to the common law has been persistent in election cases considering undue influence by persons in religious authority. The reference is to the principle that undue influence will vitiate a private transaction, such as a contract or, which is the context more relevant, a will. Those with religious authority exert undue influence if they “make use of their power to excite superstitious fears or pious hopes, to inspire... despair or confidence...” in such a way that it amounts to an abuse of that authority and power.<sup>24</sup>
- 1.48 No recent case of undue influence by threat of spiritual injury has been reported. However, the recent election petition arising out of the Tower Hamlets Mayoral elections has alleged undue influence by statements seeking to influence muslim voters to back one candidate over another. It is questionable whether a public prosecution would be brought on this basis, and clarification of what amounts to undue influence by spiritual injury in the modern era is sorely needed.<sup>25</sup>

#### TREATING

- 1.49 Section 114(2) of the 1983 Act sets out the corrupt practice of treating.
- (1) 1) A person shall be guilty of treating if he corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any meat, drink, entertainment or provision to or for any person –
  - (2) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or
  - (3) on account of that person or any other person having voted or refrained from voting, being or being about to vote or refrain from voting.

<sup>23</sup> See also the Northern Division of Meath case (1892) 4 O'M & H 186

<sup>24</sup> *The Galway Case* (1869) 1 O'M&H 303 at 305 to 307, citing the old (private law) case of *Huguenin v Baseley* 14 Ves 288.

<sup>25</sup> “Muslim told to “vote for mayor or be damned”, the Times, 21 August 2014  
<http://www.thetimes.co.uk/tto/news/politics/article4181614.ece>

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- 1.50 This offence was targeted at election-time largesse. It seeks to prevent its direct influence on voters which might be akin to a bribe. However, unlike bribery, there need not be a prior arrangement. It is a crime of influence rather than agreement. Furthermore, the offence of treating also sought to combat the indirect consequence of largesse on elections in the 19th Century, the problem of violent or intimidating inebriated mobs at elections.
- 1.51 By and large these problems have not persisted at UK elections, but nevertheless the proscription has been strictly applied and seasoned politicians understand the dangers of giving hospitality near the time of an election. An MP was unseated in 1911 for giving coal to the poor and sweets to schoolchildren in celebration of his twenty-fifth year in Parliament.<sup>26</sup>
- 1.52 At a more local level, among communities where hospitality may be expected, whether in the form of a meal at a community centre or tea and biscuits at a meeting, there is a risk that the criminal law is intervening in circumstances well short of the initial mischiefs: the buying of elections through largesse, and the creation of conditions out of which drunken mobs arise. The offence of treating is not constituted by the offer of meat and drink, but by corruptly so offering it, seeking to influence the election. There is arguably a need for a more nuanced in its attempt at criminalising electoral largesse in the form of food and drink.

#### ILLEGAL PRACTICES TARGETING CAMPAIGN CONDUCT

- 1.53 Other criminal offences are directed at regulating campaign conduct, but are labelled illegal practices. These include disturbing lawful election meetings, falsely stating a candidate has withdrawn, and making false statements about the private character of a candidate.

#### *“Imprinting” electoral campaign material: section 110 of the 1983 Act*

- 1.54 One of the most frequently alleged offences, however, relates to the obligation to “imprint” campaign material with certain details. Section 110 of the 1983 Act applies to “any material which can reasonably be regarded as intended to promote or procure the election of a candidate at an election”.
- 1.55 Material which is in a printed document which is one side of printed matter or more, or an advertisement in a newspaper must include the name and address of the printer, the promoter who caused it to be published, and the person on whose behalf the material is being published (in practice, the candidate).<sup>27</sup> Failure to do so is an offence by the printer, the promoter and the candidate and their election agent, subject to a defence that the contravention was beyond the control of the accused, and they too “all reasonable steps, and exercised all due diligence” to ensure the contravention would not arise. Insofar as the offence is committed by the candidate or election agent, it is an illegal practice.

<sup>26</sup> *Kingston-upon-Hull Central Division case, Morely v Seymour King* (1911) 6 O'M & H 372

<sup>27</sup> Representation of the People Act 1983 s 110(2)(a);(3) to (6); (13).

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- 1.56 The Secretary of State may, after consulting the Electoral Commission, make regulations regarding “any other material” not subject to requirements in section 110. No such regulations have been made, but presumably they could seek to regulate online publications, since only “printed” material and newspaper adverts are covered by section 110.
- 1.57 The section 110 offence is best understood as an instrumental one. It exists to make sure that campaign material is on its face traceable to the candidate and printer, so that campaign conduct norms (such as the offence in section 106, which we consider below) can be enforced.

*Disturbing lawful meetings*

- 1.58 It is an illegal practice under section 97 of the 1983 Act to disturb “a lawful public meeting” (a political or election meeting after issue of the writ). A key ingredient of the crime is that the meeting must be lawful. If it is not lawful no crime is committed by disturbing it. Section 97(3) confers on constables a power, on reasonable suspicion of the offence, to ask for a person’s name, and, if the person refuses, to arrest them. Turning to the practitioners’ books it is not clear what makes a meeting unlawful, other than the meeting amounting to an obstruction of the highway or breach of byelaw at a public park. For example, Schofield’s Election Law states that one must consider the object of those present at the meeting to establish its lawfulness. If that object is expressly to incite discontent or disaffection against the government, there is authority to suggest that is an unlawful purpose. The inference is that the meeting is can therefore lawfully be disturbed. It would be surprising if this represented the law today, as opposed to that of 19th Century Britain.<sup>28</sup> The real purpose this offence is to deter campaigns from exciting tensions at rival campaign meetings, and thus to avoid violence or disorder at election time, a problem which was pertinent in the 19th Century when rival mobs frequently clashed.

*False statements as to candidates*

- 1.59 Section 106 of the 1983 Act makes it an illegal practice to make or publish false statements of fact in relation to the personal character or conduct, unless they had reasonable grounds for believing, and did believe that the statements are true. Any person can commit this offence, but it is plainly targeted at candidates and those affiliated to their campaign. Section 106(2) says a candidate shall not commit the offence by an agent other than the election agent unless the candidate authorised or consented to the statement or the court can find that the election of the candidate was “procured or materially assisted” in consequence of making the false statement. Section 106(3) expressly provides that a person guilty of this conduct may be restrained by interim or perpetual injunction.

<sup>28</sup> P Gribble (ed), Schofield’s Election Law, loose-leaf 6th reissue, volume 1 at para 14-018. Two cases are cited as to unlawful purpose which are concerned with the general criminal law on unlawful assembly. These are *R v Fursey* (1833) 6 C and P 81, 172 E.R. 1155, and *R v Hunt* (1820) 3 B and A 566, 106 E.R. 768.

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- 1.60 This offence was recently considered in the case of *Watkins -v- Woolas* [2010] EWHC 2702 (QB). Phil Woolas, the elected candidate, was found in his election publications to have made false statements about the petitioner contrary to section 106. These included saying that Watkins had expressly sought the support of violent and extremist Muslims and had illicitly received funds from a foreign donor. There was also an allegation that Watkins had gone back on a promise to live in the constituency. Woolas' election was held to be void. The case was the first since 1911 to have found a Member of Parliament guilty of making a false statement about a candidate at his election. However the Divisional Court upheld only the statements relating to the extremist and violent support of the petitioner. That was an attack on his private character. The allegation that he had gone back on a promise to live in the constituency was political, even if it raised doubt as to whether he was trustworthy or kept his word. The Divisional Court emphasized the division between the public or political sphere and private character, and the need to enable political debate in campaigns to continue.<sup>29</sup>
- 1.61 A distinct offence concerns that of falsely stating, before or during an election, that a candidate has withdrawn from the election, for the purpose of promoting or procuring the election of another candidate. Section 106(5) of the 1983 Act has been replicated at other elections. It seems irrelevant to the modern circumstances where false news is less likely to have a lasting impact, and most of the electorate is literate and able to tell who is standing for election.

<sup>29</sup> R (on the application of Woolas) v The Parliamentary Election Court [2010] EWHC 3169 (Admin), [2011] 2 WLR 1362 at [109] to [124]



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## Combating electoral malpractice

- 1.62 Most modern legislative efforts to amend existing electoral offences or to create new ones have been concerned with combating electoral malpractice. The emergence of postal voting on demand in 2000 led to a perceived risk of resurgence in electoral malpractice in the UK. The risk of fraud was considered particularly high as regarded postal and proxy voting and fraudulent registration and the resulting risk of personation.<sup>30</sup> The response by legislators, administrators, police and prosecutors led to increased activity in the field of election petitions and the prosecution of electoral offences. Analyses of allegations of electoral malpractice at elections in June 2009 and May 2010 were carried out jointly by the Electoral Commission and the Association of Chief Police Officers. The 2010 analysis concluded that there was no evidence of widespread malpractice, noting that there had been a legislative and institutional response to prevent and deter electoral malpractice<sup>31</sup>
- 1.63 The Electoral Administration Act 2006, for example, created the new postal and proxy voting offences contained in section 62A of the 1983 Act. These offences, as well as personation, have a maximum sentence of two years' custody, whereas other corrupt practices attract a 1 year maximum sentence. They also attract an additional disqualification for five years from being registered as an elector or voting at any parliamentary election or local government election.

<sup>30</sup> S Wilks-Heeg for the Joseph Rowntree Reform Trust, *Purity of elections in the UK: causes for concern*, April 2008 <http://www.jrrt.org.uk/publications/purity-elections-uk-causes-concern> (last visited 27 January 2012); decision of Commissioner Richard Mawrey QC in *Re Bordesley Green and Aston Ward of Birmingham City Council petition*, 4 April 2005 (unreported, but transcript available in online legal databases); Library of the House of Commons Briefing Paper, "Postal Voting & Electoral Fraud" (last updated June 2011) <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-03667.pdf> (last visited 6 February 2012)

<sup>31</sup> Electoral Commission and ACPO, *Analysis of allegations of electoral malpractice at the June 2009 elections*, (January 2010) [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0020/83702/063-Allegations-Report-final.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0020/83702/063-Allegations-Report-final.pdf) (last visited 6 February 2012); *Analysis of allegations of electoral malpractice in 2010*, (February 2011) [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0013/109012/Integrity-report-FINAL-no-embargo.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0013/109012/Integrity-report-FINAL-no-embargo.pdf) (last visited 6 February 2012)

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1.64 There have been instances where sentences available for offences under the 1983 Act have been thought insufficient to address the degree of criminality involved. For example, in a case of widespread electoral fraud, the sentences for individual offences of up to two years may be inadequate. We have accordingly included in the Table of Offences at Appendix E to this report three crimes of general application that may be relevant in the electoral context, including forgery and perjury. One of them in particular, however, has been of particular interest to prosecutors. Conspiracy to defraud is a common law offence which attracts a maximum sentence of ten years. The offence involves an agreement by two or more persons dishonestly to deprive another of something which is his or to which he is or would be entitled, but includes causing a person charged with a public duty not to carry out that duty. Since returning officers and electoral registration officers have official duties which electoral fraudsters seek to evade, conspiracy to defraud has been used in the electoral context.

1.65 *R v Hussein* [2005] EWCA Crim 1866<sup>32</sup> was such a case. The Court of Appeal including the Lord Chief Justice upheld a deterrent sentence of 3 years and 7 months' custody. A former councillor on Blackburn Council, Mohammed Hussain, had admitted to completing 233 electors' postal votes in 2002, which he had obtained from them by deception. In upholding the sentence, the Lord Chief Justice said:

The message is that that sort of conduct which undermines our system of democracy will not be tolerated. If those who commit offences of this nature are detected and brought to justice they will receive from the courts punishment which makes that clear.<sup>33</sup>

1.66 The need for recourse to the common law offence of conspiracy to defraud in order to impose the sort of the sentences that will send a message to electoral fraudsters may indicate that there should be a more serious offence with a longer custodial sentence to cater for electoral fraud. On the other hand it may be that prosecutors have found a perfectly adequate way to deal with serious attacks on the democratic electoral process.

### **Regulating campaign expenditure**

1.67 The key features of the classical regulation of campaign conduct, and in particular of expenditure, are as follows.

- (1) The mandatory office of election agent was introduced in 1883 to channel responsibility for election expenditure into a single person. Subject to limited exceptions, no other person may incur expenses to promote or procure the election of a candidate without the agent's authority. That

<sup>32</sup> [2006] 1 Cr. App. R

<sup>33</sup> [2005] EWCA Crim 1866 , [2006] 1 Cr. App. R at [20]

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approach persists today.<sup>34</sup>

- (2) Expense limits are prescribed by law as fixed ceilings or formulas. The election agent must complete and deliver to the returning officer a return and declaration of expenses signed by the candidate.<sup>35</sup>
- (3) Breaches by candidates or their agents of expenditure regulations (whether to do with expense limits or accuracy of the returns reporting spending) are corrupt or illegal practices. The consequences of breach include:
  - (a) conviction for a criminal offence or report by the election court of guilt of a corrupt or illegal practice, disqualifying the candidate and agent from involvement in elections for a defined period;
  - (b) constituting grounds for the invalidity of an election if challenged by election petition.

1.68 The onus is therefore on candidates and their election agents to comply with the law in order to avoid the criminal, disqualification, and public law repercussions of breaching it.

#### **The scope of reform of campaign conduct rules**

1.69 The legal framework for regulating campaign conduct generally, and that of candidates in particular – what is sometimes described as the local campaign – is part and parcel of electoral administration law. Our consultation during our scoping phase revealed a general consensus that the focus should be on clarification and simplification of laws which had grown complex over time. This review should eliminate inconsistencies and reduce fragmentation but not overhaul the regulation of campaigns, set or change expense limits, or revisit the separate legal treatment of national campaigns. These are political policy matters which it is not appropriate for the Law Commission, as a non-political body, to review.

1.70 In this paper we describe the law regulating campaign expenditure and donations to candidates. Our reform suggestions are limited to the simpler and clearer implementation and enforcement of current policies in the regulation of campaign conduct. The existing regulatory framework was designed long ago but its content has developed significantly by accretion. As a consequence, some of the legislation has grown very complex or out of date. In order that it should effectively govern the conduct of candidates and election agents, however, the law must be capable of being accessed, understood and applied by candidates, including some who may be independent or do not have experience of electoral campaign laws. Put simply, from a basic rule of law viewpoint, the law must be clear enough that it can achieve its policy aim of ensuring that candidates'

<sup>34</sup> Representation of the People Act 1983, ss 70, 70A, 71, 75. Parish and community council elections do not require an agent.

<sup>35</sup> Representation of the People Act 1983, ss 81 and 82.

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conduct conforms to its requirements.

#### DEFINING THE “CAMPAIGN” IN CONTRAST TO NATIONAL POLITICS

- 1.71 The legislative approach which survives and underpins the 1983 Act is of 19th Century origin. The modern role of the political party as organiser of a centralised, national campaign, and modern media as the main platform, had yet to emerge. In law a campaign relates to a parliamentary election at the local constituency level and the law regulating candidates’ conduct does so within the boundaries of the constituency. As centralised, party-run campaigns gained prominence, there was a regulatory vacuum because in the eyes of the law the campaign was the constituency campaign. Spending outside that sphere was not regulated by electoral law.<sup>36</sup> Political parties are now regulated under the Political Parties Elections and Referendums Act 2000. Their regulation and that of national campaigns is outside the scope of this review which we established in our scoping report. In this paper we are thus concerned with the legal notion of the campaign within constituency or electoral area boundaries rather than the “national” campaign run centrally by political parties. References to the campaign must be understood to be subject to this geographical restriction.

#### ***The fundamental role of election agents in campaigns***

- 1.72 The election agent was introduced by the Corrupt and Illegal Practices Act 1883, which aimed to tackle the problem of corruption and its consequence of driving up the cost of election campaigns. Part of the solution was to make mandatory the appointment by a candidate of an election agent who was responsible for ensuring that expenditure was within stipulated maximums that provided a level playing field for candidates. The election agent was required after the election to give an account of election expenditure.

#### THE ELECTION AGENT FUNCTIONS OF CHANNELLING, LIMITING AND REPORTING EXPENSES

- 1.73 This remains the case today, and the election agent is the key mechanism for:
- (1) channelling election spending so that, so far as possible, it is done by a single person; (the “channelling” function)
  - (2) ensuring that this person is responsible for keeping campaign spending within the stipulated limits; (the “limiting” function) and
  - (3) ensuring that this person gives an account of spending, evidenced by receipts, in a return and declaration of expenses. (the “reporting” function)

#### THE MEANING OF REGULATED “ELECTION EXPENSES”

- 1.74 The scheme under the 1983 Act is hard to understand from a reading of its provisions. The important point to note is that the 1983 Act’s regulation aims to

<sup>36</sup> *R v Tronoh Mines Ltd* [1951] Cr App R 196, *Grieve v Douglas-Home* 1965 SC 315.

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channel election spending through the election agent, to limit spending by candidates, and to ensure spending is reported after the election. Some items of expenditure are regulated only in respect of some of those functions. For example “personal expenditure” by the candidate can be paid by the candidate, not the agent. It does relate to the election, since it includes, for example, accommodation or travel on the campaign trail. Nevertheless that expenditure is not to be taken into account when ensuring spending is within prescribed limits. Yet it must be reported in the return of election expenses. However, our distinction between the three “functions” of the election agent and the regulation of election expenditure is a gloss on the law, and the provisions of the 1983 Act have developed piecemeal and are very complex.

- 1.75 The starting point is that “election expenses” is defined by section 90ZA of the 1983 Act, which refers to schedule 4A to the 1983 Act.

**90ZA Meaning of “election expenses”**

- (1) In this Part of this Act “election expenses” in relation to a candidate at an election means (subject to subsection (2) below and section 90C below) any expenses incurred at any time in respect of any matter specified in Part 1 of schedule 4A which is used for the purposes of the candidate’s election after the date when he becomes a candidate at the election.
- (2) No election expenses are to be regarded as incurred by virtue of subsection (1) above or section 90C below in respect of any matter specified in Part 2 of schedule 4A.
- (3) In this section and in section 90C below “for the purposes of the candidate’s election” means with a view to, or otherwise in connection with, promoting or procuring the candidate’s election at the election.
- (4) For the purposes of this Part of this Act, election expenses are incurred by or on behalf of a candidate at an election if they are incurred –
  - (a) by the candidate or his election agent, or
  - (b) by any person authorised by the candidate or his election agent to incur expenses
- (5) A reference in this Part of this Act to a candidate at an election, in relation to election expenses, includes (where the context allows) a reference to a person who becomes a candidate at the election after the expenses are incurred.

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- (6) In this Part and in Part 3 of this Act, any reference (in whatever terms) to promoting or procuring a candidate's election at an election includes doing so by prejudicing the electoral prospects of another candidate at the election.<sup>37</sup>
- 1.76 Section 90C includes property, goods and services which are provided free of charge or at a discount of 10% or more. Part 1 of schedule 4A sets out the regulated expenses. They include in outline:
- (1) advertising;
  - (2) unsolicited materials sent to electors ;
  - (3) transport (other than the transport acquired by a person for personal use);
  - (4) public meetings;
  - (5) cost of agents and other staff; and
  - (6) accommodation and administrative costs.<sup>38</sup>
- 1.77 Part 2 of schedule 4A lists the excluded matters, including the deposit for the election, and exceptions to regulated expenses, such as accommodation which is the candidate's sole or main residence. A new addition seeks to exclude expenditure facilitating disabled access provided it is incurred under a particular scheme called the "Access to Elected Office for Disabled People Fund."<sup>39</sup>
- 1.78 The Electoral Commission may give guidance in a code of conduct as to matters falling within either Part of schedule 4A, subject to a detailed procedure, and the Secretary of State may by order amend Parts 1 and 2 of schedule 4A.<sup>40</sup>
- 1.79 Section 90ZA and the schedules define election expenses and any reference in Part 2 of the 1983 Act to "election expenses" must be construed accordingly. Not all provisions use that expression, however. Section 75, prohibiting the incurring of expenses in support of a candidate not authorised by the election agent, uses the expression "expenses [incurred] with a view to promoting or procuring the election of a candidate." We consider this provision further below.

#### THE TIME WHEN A PERSON BECOMES A CANDIDATE

- 1.80 A person becomes a candidate for the purpose of expenditure provisions:

<sup>37</sup> In *DPP v Luft* [1977] AC 962 the House of Lords considered the meaning of "disparaging" under the predecessor provision to section 75(1) of the 1983 Act, and held that it had to be given its ordinary and natural meaning, such that it was not limited to attacks of a personal character but may extend to attacks on political views. In our view the use of the term "prejudicing" more clearly extends to political views.

<sup>38</sup> Representation of the People Act 1983, sch 4A pt 1.

<sup>39</sup> Representation of the People Act 1983, sch 4A pt 2 para 7A.

<sup>40</sup> Representation of the People Act 1983, sch 4A pt 3 paras 14 and 15.

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- (1) at a parliamentary election:
    - (a) on the date Parliament is dissolved or a vacancy occurs (for by-elections), if they or others have declared their candidacy on or before that date; or
    - (b) alternatively, on the date when the candidate or others actually declare the candidate's candidacy, or when the candidate is nominated, whichever is the earlier; and
  - (2) at a local election:
    - (a) on the last day for publication of notice of the election if the candidate or others have declared the candidate's candidacy on or before that date; or
    - (b) on the date when they or others declare the candidacy or the candidate is nominated (whichever is earlier).<sup>41</sup>

1.81 The above is a paraphrase of the language used by section 118A of the 1983 Act, which has been criticised by some as unclear, in particular, as to what a declaration of candidacy "by himself or others" means. It appears to us to be recognising that candidacy is a matter of fact and that a person may be taken to be a candidate by virtue of the declarations of others which he, in due course, acquiesces by accepting nomination and standing for election. No person is in truth regulated as a candidate merely due to some other person's declaration if they do not later consent to be nominated.

1.82 As we saw from section 90ZA, the regulation of an item of expenditure turns not on when an expense is incurred but whether it is used for the purposes of the candidate's election once they become candidate. A person cannot circumvent the rules on expenses by spending money before becoming a candidate under section 118 above.<sup>42</sup> The relevance of when a person becomes a candidate is thus to when expenditure incurred prior to the candidacy becomes regulated because of its use for the purposes of the candidate's election.

#### THE REQUIREMENT TO APPOINT AN ELECTION AGENT

1.83 Section 67 of the 1983 Act requires that an election agent be appointed in writing by the candidate no later than the time for giving notice of withdrawal. In practice this is the deadline for nominations at UK Parliamentary elections. The appointment must set out the address of the election agent's office, where claims for expenses are made.

1.84 A candidate may appoint themselves their election agent, and will be deemed to be so if they fail duly to appoint another person. No agent is required at parish and community council elections, where the responsibility for election expenses

<sup>41</sup> Representation of the People Act 1983, s 118A.

<sup>42</sup> Representation of the People Act 1983, s 118A.

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falls on the candidate individually.<sup>43</sup>

1.85 A single election sub-agent may be nominated in county constituencies at UK Parliamentary elections and Greater London Authority elections.<sup>44</sup> Although not stated, the reason for this facility must be historical. County constituencies were geographically greater, and must have posed greater challenges in the 19th Century in complying with strict obligations to acquire and keep receipts of expenses. Enabling the appointment of sub-agents appears to be a concession to the practical problems of requiring a single person to carry out the election agent task over a geographically wide electoral area. The power to name a sub-agent is repeated in elections using the additional member or party list system, as well as Police and Crime Commissioner elections and Northern Ireland Assembly elections.

1.86 These transpositions for other elections of the classical sub-agent provisions have, we understand, caused difficulties of interpretation. For example, at Police and Crime Commissioners elections, the classical provision is repeated in terms, with minor adaptation:

An election agent for a candidate at a PCC election may appoint to act in any part of the police area one, but not more than one, deputy election agent (in this Order referred to as sub-agent).<sup>45</sup>

1.87 Police areas reflect county boundaries, and elections are run by the Police Area Returning Officer (PARO); it is that officer to whom expense returns must be sent.<sup>46</sup> The police area divides into local government areas whose local returning officers run the election under the direction of the PARO. We understand that the power to appoint sub-agents has been interpreted by one PARO so that it is limited to local government areas, not any part of the police area – so as to prevent appointing a sub-agent to oversee a part of the police area which is a Parliamentary constituency. If there are pragmatic reasons for this interpretation, they are not obvious. It would appear to us that, no matter the election, if a deputy may be appointed for part of the area, the geographical extent of it is a matter for the election agent.

1.88 The election agent provisions are repeated in every election's discrete governing legislation. At party list elections, where the party is standing as a candidate, one election agent is appointed for the whole list of candidates. In default of an appointment the candidate highest on the list will be deemed to be the election agent, except in the case of European Parliamentary elections held in Great

<sup>43</sup> Representation of the People Act 1983, ss 67 to 70 and 71.

<sup>44</sup> Representation of the People Act 1983, ss 67 to 70.

<sup>45</sup> Police and Crime Commissioner Elections Order SI 2012 No 1917 art 27(1).

<sup>46</sup> Police and Crime Commissioner Elections Order SI 2012 No 1917 art 40(1).



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Britain where the party's nominating officer is held to be the election agent.<sup>47</sup>

#### CHANNELLING EXPENSES THROUGH THE ELECTION AGENT

- 1.89 The channelling function, and the consequent restriction on spending by those not authorised to spend by the election agent, seeks to ensure that campaign expenditure is routed through the person of the election agent. Others (including the candidate) are severely restricted in spending to promote or procure the election of a candidate without the agent's authority.<sup>48</sup>
- 1.90 This means that so far as possible, payments should be made by the agent, and claims and demands for money addressed to the agent. Section 73 of the 1983 Act provides that no payment is to be made by the candidate or any other person in respect of election expenses by or on behalf of the candidate unless it is made through the candidate's election agent.
- 1.91 There are strict exceptions to the above requirement, so that prohibition against payment of expenditure by someone other than the election agent does not apply to the following:
- (1) personal expenses of the candidate connected to the election (including reasonable travel and living expenses at hotels or elsewhere), which must not exceed a prescribed maximum;<sup>49</sup>
  - (2) petty expenses authorised in writing by the election agent which are necessary for "stationary, postage, telegrams (or any similar means of communication) and other petty expenses."<sup>50</sup> At European Parliamentary elections no such restriction applies. Thus it appears that for these elections an agent may authorise any person to pay expenses up to any specified limit, for any reason;<sup>51</sup>
  - (3) expenses incurred with the leave or by order of the Court (which has to do with late or disputed claims);<sup>52</sup>

<sup>47</sup> Representation of the People Act 1983, ss 67, 70, 70A and 71; European Parliamentary Elections Regulations 2004 SI 2004 No 293, regs 33, 34, 37, 38 and 41; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, regs 34 and 37; Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, arts 32 and 35; National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, arts 37 and 40; Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, ss 67 and 70); Electoral Law Act (Northern Ireland) 1962, ss 35 and 37; Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, arts 26 and 29.

<sup>48</sup> Representation of the People Act 1983, s 75.

<sup>49</sup> Representation of the People Act 1983, ss 74(1) and 118

<sup>50</sup> Representation of the People Act 1983, s 74(3).

<sup>51</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, regs 44(4); European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, regs 40(4).

<sup>52</sup> Representation of the People Act 1983, ss 78(5) and 79(2).

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- (4) expenses included in a declaration made by the election agent as expenses incurred otherwise than for the purposes of the candidate's election but which relate to property, services or facilities in respect of which they were incurred being used for the purposes of the candidate's election;<sup>53</sup>
  - (5) expenses falling due before the appointment of the election agent, since these cannot be paid by the agent;<sup>54</sup>
  - (6) election expenses which pre-date candidacy but are nevertheless regulated by virtue of section 90ZA(5) of the 1983 Act.<sup>55</sup> Plainly these cannot be paid by the agent, although the agent will have to account for them once appointed. This appears to be superfluous, since the exception at (5) above necessarily must extend to expenses incurred before candidacy.

#### PROVISIONS ON THE PAYMENT OF CLAIMS

- 1.92 As well as routing payment through the election agent, the law requires claims for expenses to be sent within a certain time. This is because the election agent must establish the expenses in time to report them in an expense return. The time limit for claims is always ahead of the deadline for submitting expense returns.
- 1.93 For UK Parliamentary elections claims against a candidate or his or her election agent in respect of election expenses must be sent to the election agent within 21 days of the day on which the result of the election is declared, and must be paid not later than 28 days after that day. The expense return is due on day 35. If a claim which arrives after the 21 day deadline is paid, or the agent pays an election expense outside the 28 day window, this constitutes an illegal practice, although a candidate's election will not be held void where payment was made by the agent without the sanction or connivance of the candidate. However, a court may grant leave to pay a claim received later than 21 days after the result was declared.<sup>56</sup> It may also adjudicate and determine any "disputed claim" in which case the claim will be payable.<sup>57</sup>

<sup>53</sup> Representation of the People Act 1983 s73(5) and 74A.

<sup>54</sup> Representation of the People Act 1983 s 74(1B).

<sup>55</sup> Representation of the People Act 1983 s 73(5)(d)

<sup>56</sup> Representation of the People Act 1983, s 78; European Parliamentary Elections Regulations 2004 SI 2004 No 293, reg 48; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, reg 44; Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, art 44; National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, art 49; Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 78); Electoral Law Act (Northern Ireland) 1962, s 43; Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, art 37.

<sup>57</sup> Representation of the People Act 1983 s79, replicated in other provisions.

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- 1.94 It appears that these provisions extinguish claims for money which are not made within the prescribed time, or through the courts. Section 116 of the 1983 Act preserves the rights of creditors who at the time they entered into a contract or the expense was incurred were ignorant of the contract or expense being in contravention of the 1983 Act.

***Spending by third persons of a permitted sum***

- 1.95 Another exception to the general rule that spending is through the election agent applies to spending by persons not connected to the candidate or their campaign, or authorised to spend by the election agent. It is also, in substance, an exception to regulated spending; it need not (and indeed, cannot) be reported nor is it taken into account for the purposes of limiting expenses.
- 1.96 Unchecked expenditure by persons or groups unaffiliated with the campaign risks rendering the control of election expenditure through the election agent nugatory. It is therefore a criminal offence and a corrupt practice for a person to spend more than a permitted sum, and the exception applies only to spending up to that sum. Section 75(1ZZB) and (1ZA) of the 1983 Act also exclude from the exception spending within the permitted sum which is part of a “concerted plan of action”, defined as a plan or arrangement to incur expenses with a view to promoting or procuring the election of the same candidate. This is also to protect the control of spending from communal spending amounting to significant sums by aggregating spending within the permitted limits by each part by individual members. The effect is that several persons, acting in concert, are subject to the same permitted sum as a single individual.
- 1.97 The permitted sum for UK Parliamentary elections is £700 while for local elections it is calculated according to a formula depending on the number of registered electors at the time of notice of election.

***Power to require a return of third person expenses***

- 1.98 The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (“the Transparency Act 2014”) amended the 1983 Act to include new provisions intended to bolster the policing of the regulation of spending by third persons. The returning officer or the Electoral Commission may up to six months from the poll request a return from a third person (that is, someone who is not a candidate, election agent, or person employed or engaged by them, or authorised to incur expenses). If requested, that person must, within 21 days of receipt, deliver to the officer or the Commission a return and declaration of permitted expenditure in relation to a candidate at the election who is specified in the request. Failing to comply or knowingly making a false declaration are illegal and corrupt practices respectively. The court may mitigate or remit any incapacity resulting from a finding of guilt of these offences.<sup>58</sup>

<sup>58</sup> Representation of the People Act 1983 ss 75ZA and 75ZB.

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### **Expense limits**

- 1.99 As well as channelling expenditure through the election agent, the law also limits overall expenditure by or on behalf of candidates, irrespective of whether it was paid by the election agent. Table B sets out the various expense limits for all elections.
- 1.100 For European Parliamentary elections in Great Britain, and the regional contests in Scottish Parliamentary and National Assembly for Wales elections, any expenses in relation to party list candidates which are paid by the election agent are dealt with as part of a party's campaign expenditure as regulated by the Political Parties, Elections and Referendums Act 2000.<sup>59</sup>
- 1.101 An election agent or candidate who incurs or authorises the incurring of expenses in excess of the maximum amount, or knows or ought reasonably to know that the maximum will be exceeded, commits an illegal practice.<sup>60</sup>
- 1.102 Expenses which are not for election purposes are nevertheless regulated and subject to accounting by the election agent and expenditure limits. This is so if the property, services or facilities in respect of which the expenses were incurred were used for the purposes of the candidate's election. They must be declared by the election agent, and the amount declared counted towards the expense limit.<sup>61</sup> What does not count towards the limit, however, are the candidate's personal expenses,<sup>62</sup> and unauthorised spending by a third person. Both are subject to prescribed limits, and in the latter case, the election agent is not accountable for spending by others.
- 1.103 While there is no specific provision excluding third person spending from the scope of expense limits, section 76(1) applies these to expenses incurred "by or on behalf" of the candidate. It would furthermore be unworkable to subject election agents to a duty to keep spending under prescribed limits if persons beyond their control are able to spend a permitted sum to support or undermine a candidate or rival. Nevertheless, the law could be clearer on this point.

<sup>59</sup> Political Parties, Elections and Referendums Act 2000, pt 5 and sch 9 paras 4 to 6.

<sup>60</sup> Representation of the People Act 1983 s 76(1B).

<sup>61</sup> Representation of the People Act 1983, s 74A; European Parliamentary Elections Regulations 2004 SI 2004 No 293, reg 45; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, reg 41; Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, art 40; National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, art 45; Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 74A); Electoral Law Act (Northern Ireland) 1962, s 40A; Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, art 33.

<sup>62</sup> Representation of the People Act 1983 s 76(5).

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## FIXED EXPENDITURE LIMITS AND LEGISLATIVE FORMULAS

- 1.104 Expense limits are prescribed by law as fixed ceilings or formulas. These are set out in Tables A1 and A2 below. Where a formula is prescribed, the number of electors is taken as the number on the register on the last date for publication of notice of election.
- 1.105 By way of example, at a UK Parliamentary by-election the maximum regulated expenditure is fixed figure, currently £100,000.<sup>63</sup> At a General election the maximum is calculated by adding to a fixed amount, currently £8,700, a further sum calculated by multiplying the number of entries in the register for the constituency by nine pence in county constituencies, and six pence in borough constituencies.<sup>64</sup> The maximum for local government elections in England and Wales is similarly constructed from the fixed figure of £740 and a rate of six pence for every entry in the register in the electoral area in question.<sup>65</sup>
- 1.106 On first impression, the difference in rates being determined by the – often historical – character of a constituency is a little surprising. Whatever differences led to different rates being applied to county and borough constituencies, they are likely to be less pronounced in modern times. It may not be clear to a candidate whether a constituency is a borough or county one and the Electoral Commission guidance to candidates at the last General election advised candidates to ask the returning officer what type of constituency the candidate is standing in.<sup>66</sup>
- 1.107 Similarly, the formulas are calculated by reference to the state of the register on the day notice of election is given. When the classical law was laid down, the register was fixed and determined long in advance of most regular elections. Nowadays it is constantly shifting and developing up to the deadline for last registration applications, 12 days before the poll. Some candidates' election agents may find it difficult to determine exactly what the expense limit is in advance of spending.

<sup>63</sup> Representation of the People Act 1983, s 76(2)(aa)

<sup>64</sup> Representation of the People Act 1983, s 76(2)(a)

<sup>65</sup> Representation of the People Act 1983, s 76(2)(b); "electoral area" is defined by section 203.

<sup>66</sup> For example, for Greater London Authority elections the maximum is prescribed by the Secretary of State: Representation of the People Act 1983, s 76(2A).

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*Reduction of maximums for jointly campaigning candidates at local elections*

- 1.108 Section 77 of the 1983 Act makes provision for reducing expenses limit for “joint candidates” for local government election. Candidates are joint if they appoint the same election agent or jointly use “clerks or messengers”, hire “committee rooms” or publish joint addresses, circulars or notices. Joint candidacy can start or cease during the election. If on ceasing to be a joint candidate one exceeds the reduced expense limit, section 77(3) prescribes circumstances, including good faith and reasonable overall expenditure beyond the absolute (that is, unreduced) expense limit, where the excess is deemed to have arisen from a reasonable cause for the purposes of relief from sanction under section 167. The candidate must still apply for relief.
- 1.109 The references to the shared resources which constitute “joint candidacy” appear limited and potentially out of date. The policy behind this provision is that candidates for local government election (which should be read and understood to refer to candidates at the *same* election) should not be able to aggregate their expense limits if they are sharing campaign resources. The drafting could be simplified and modernised, with detailed exegesis left to secondary legislation or even tertiary guidance. In its recent report on election finance, the Electoral Commission suggested this provision had failed to keep up with modern campaign practices, while also pointing out that expense returns should indicate whether candidates campaigned jointly.

PRE-CANDIDACY EXPENSES REGULATION FOR PARLIAMENTARY GENERAL ELECTIONS

- 1.110 In certain circumstances, defined by section 76ZA of the 1983 Act, a pre-candidacy period is also subject to regulation as to expenses. Regulation commences when a point in time is reached at which Parliament has not been dissolved for over 55 months since it first met. At the eventual general election the pre-candidacy spending limit is £30,700 plus nine pence for every entry in the register in county constituencies, and six pence for every borough constituencies. That limit is tapered so that the full amount is available when Parliament is dissolved in the 60<sup>th</sup> month, 90% of the amount if dissolved in the 59<sup>th</sup> month, 80% for the 58<sup>th</sup> month, 70% for the 57<sup>th</sup> month, and 60% for the 56<sup>th</sup> month.
- 1.111 Pre-candidacy expenses maximums are additional to the ordinary, post-candidacy amount, and apply only in respect of expenses incurred between the period after the 55<sup>th</sup> month and the date when the person formally becomes a candidate at the election.<sup>67</sup> Similar provision is made in relation to Scottish Parliamentary elections for separate expenses limits to apply in the four months preceding an ordinary general election and the period between announcement of the date of poll at an extraordinary general election and the date at which the person becomes a candidate, but not for any other UK election.<sup>68</sup>

<sup>67</sup> Representation of the People Act 1983, s 76ZA(1)(c) and s 76ZA(3).

<sup>68</sup> Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, art 43.

1.112 It is worth noting that the exact upper limit (100%) cannot be precisely known by candidates, since it falls to be determined according to a formula using the number of registered electors on the day of notice of election, well after the section 76ZA regulation starts. Pre-candidacy expenditure regulation did not apply at the last General election, and will be in effect for the first time at the next General election.

TABLE A1: PERMITTED SUMS (FORMULA)

Election		Permitted sum for candidates	Permitted sum for third parties	Candidates' personal expenses
UK Parliament	County constituency	£8,700 and 9p for every entry in the register of electors.	£500	£600
	Borough constituency	£8,700 and 6p for every entry in the register of electors.		
	By-election	£100,000		
Local government in England and Wales		£740 and 6p for every entry in the register of electors.	£50 and 5p for every entry in the register of electors.	TBC
Mayoral elections in England and Wales		£2,362 and 5.9p for every entry in the register of electors. <sup>69</sup>	£50 and 5p for every entry in the register of electors.	TBC
Local government in Scotland		£705 and 5p for every entry in the register of electors.	£50 and 0.5p for every entry in the register of electors.	TBC
Scottish Parliament	County constituency	£7,150 and 7p for every entry in the register of electors	£500	£600
	Burgh constituency	£7,150 and 5p for every entry in the register of electors		

<sup>69</sup> Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007 SI 2007 No 1024, sch 2.

Election		Permitted sum for candidates	Permitted sum for third parties	Candidates' personal expenses
	Region (individual candidate)	Total of maximum amounts for a single candidate for each constituency in the region.	£500	£900
	Constituency vacancy	£100,000	£500	£600
National Assembly for Wales	County constituency	£7,150 and 7p for every entry in the register of electors	£500	£600
	Borough constituency	£7,150 and 5p for every entry in the register of electors		
	Region (individual candidate)	Total of maximum amounts for a single candidate for each constituency in the region.	£1,000	£900
	Constituency vacancy	£100,000	£500	£600
Northern Ireland Assembly		Rules for UK Parliamentary elections applied.		
Local government in Northern Ireland		£600 and 5p for every entry in the register of electors	£50 and 0.5p for every entry in the register of electors	£100

TABLE A2: PERMITTED SUM (FIXED CEILING)

Election		Permitted sum for candidates	Permitted sum for third parties	Candidates' personal expenses
Greater London Authority	Constituency candidate	£35,000	£1,800	£600
	Individual London candidate	£330,000	£25,000	£900
	Entire party list	£330,000	£25,000	£900



Election		Permitted sum for candidates	Permitted sum for third parties	Candidates' personal expenses
	Mayor of London candidate	£420,000	£25,000	£5,000
European Parliamentary elections		£45,000 multiplied by number of MEPs to be returned for the region.	£5,000	£900
Police and Crime Commissioner		Varies depending on the police area: between £72,231 and £357,435.	Varies depending on the police area: between £2,024 and £10,080.	£5,000

TABLE B: OTHER PROVISIONS ON PERMITTED SUMS

Election	Permitted sum for candidates
Joint candidates at local elections	Maximum amount for each candidate is reduced by a quarter (in the case of two joint candidates) or a third (in the case of more than two). <sup>70</sup>
Death of a rival candidate causing a new poll (with further campaign) (does not apply to European Parliamentary elections)	Double or (if there has already been an increase for reason of death) triple what it would have been if there had been no deaths at all. <sup>71</sup>

<sup>70</sup> Representation of the People Act 1983, s 77; Electoral Law Act (Northern Ireland) 1962, s 42(3)(b).

<sup>71</sup> Representation of the People Act 1983, s 76(6); Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, art 42(7); National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, art 47(6); Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 76); Electoral Law Act (Northern Ireland) 1962, s 42(7); Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, art 35(5).

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## EXPENSE RETURNS AND DECLARATIONS

- 1.113 The election agent must complete and deliver to the returning officer a return and declaration of expenses, signed by the candidate.<sup>72</sup> A sub-agent and authorised third person must also do so, although the election agent's return must deal under a separate heading with any expenses in respect of which a return is required in respect of authorised third persons.<sup>73</sup> The expenditure limits above will apply to the overall amount, not in respect of each discrete return.
- 1.114 The return as to expenses must be a "true return" containing:
- (1) a statement of all election expenses incurred by or on behalf of the candidate; and
  - (2) a statement of all payments made by the election agent together with all bills or receipts relating to the payments.
  - (3) a statement relating to "such other expenses in connection with which provision is made by [Part II of the 1983 Act]" or claims (whether paid, unpaid or disputed) as the Electoral Commission provide in regulations;
  - (4) a statement relating to "such other matters as is prescribed". We can find no such prescription.
- 1.115 The return must contain certain specified information about the candidate and the poll in respect of which it is made, and the Electoral Commission has a power to prescribe a form of return which may be used.<sup>74</sup> The reference to "regulations" by the Electoral Commission is not clear. We are not aware of any regulations, or indeed any prescription under section 81 of the 1983 Act, save for a regulation by the Electoral Commission prescribing the form of expense returns for local government elections.<sup>75</sup>

<sup>72</sup> Representation of the People Act 1983, ss 76, 77[??], 81 and 82; European Parliamentary Elections Regulations 2004 SI 2004 No 293, regs 47, 51 to 53; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, regs 43, 47 and 48; Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, arts 42, 47 to 49; National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, arts 47, 52 to 54; Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, ss 76, 77 and 81 and 82); Greater London Authority Elections (Expenses) Order 2000 SI 2000 No 789; Electoral Law Act (Northern Ireland) 1962, ss 42, 46 and 47; Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, arts 35, 40 and 41.

<sup>73</sup> Representation of the People Act 1983 s81(3A)(c).

<sup>74</sup> Representation of the People Act 1983, s 81; European Parliamentary Elections Regulations 2004 SI 2004 No 293, reg 51; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, reg 47; Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, art 47; National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, art 52; Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 81); Electoral Law Act (Northern Ireland) 1962, s 46; Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, art 40.

<sup>75</sup> Candidate's Return as to Election Expenses (Prescribed Form) Regulations 2007.

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- 1.116 The rules on what the return must contain are formulated slightly differently for different elections. Some state explicitly what must be included, while others refer to matters that may be prescribed in regulations made by the Electoral Commission. The legislation for National Assembly for Wales elections gives a clue as to the difference; it notes that matters prescribed in regulations must be included, but until such time as regulations are made, the specific listed matters should be included. We are not aware that any such regulations have yet been made – our assumption is that when they are, the legislation would be rationalised to reflect this.
- 1.117 The return must also be accompanied by declarations made by the election agent and candidate, which are in a prescribed form. Failure to comply with the rules in sections 81 and 82 on returns and declarations is an illegal practice, and knowingly making a false declaration is a corrupt practice.<sup>76</sup> Thus, the onus of providing a good and true return is placed firmly on the candidates and their election agents; the validity of their election, if successful, will be tainted by non-compliance.
- 1.118 The returning officer and their staff have no substantive role to play in advising candidates on their duties with respect to the regulation of the campaign, including expenses. Nor do they have any duty to enforce the law, save that of every person to raise a matter with the police if they suspect a criminal offence has been committed.
- 1.119 However, there is a formal and limited role to accepting, retaining and making available for inspection by the public of expenses returns and declarations from candidates and election agents. The returning officer must retain and make the documents available for inspection for a period of two years from the date of receipt of the return, which is the time limit for prosecuting electoral offences.<sup>77</sup> The Electoral Commission must be sent a copy of returns or declarations as soon as reasonably practicable.

*Publicising expense returns*

- 1.120 Returning officers have, under section 88 of the 1983 Act, a duty ten days after the deadline for submitting them to publish the availability of returns for inspection “in not less than two newspapers circulating in the constituency or electoral area”, and to likewise to notify election agents. If any return has not been received, they must publicise that fact in the published notice.

<sup>76</sup> Representation of the People Act 1983, ss 82 and 84; European Parliamentary Elections Regulations 2004 SI 2004 No 293, regs 52 and 54; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, regs 48 and 49; Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, arts 48 and 51; National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, arts 53 and 56; Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, ss 82 and 84); Electoral Law Act (Northern Ireland) 1962, s 47 and sch 9 paras 6 and 16; Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, arts 41 and 43.

<sup>77</sup> Representation of the People Act 1983, ss 87A and 88.

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- 1.121 Section 89 of the 1983 Act requires officers to make a copy of expense returns and declarations available for inspection for a period of two years beginning with the date of receipt. This fits the limitation period for prosecuting electoral offences. There is a duty to exclude donors' addresses from statements of donations. The Electoral Commission's guidance to candidates points returning officers to the need to redact all documents in accordance with data protection legislation. After the two years have elapsed, there is a power to destroy the documents, or return them to the candidate or election agent if requested. The Electoral Commission must be sent copies of expense returns and declarations on request, under section 87A.

***Enforcement of the law***

- 1.122 Like all of electoral law, the regulation of campaign expenditure is enforced by election petitions. Criminal prosecutions may also result from the commission of a corrupt or illegal practice. Candidates may proactively apply for relief from sanctions for committing an illegal practice under section 167, as well as under section 86 relating to failures as to expense returns and declarations. There are, however, two other groups of measures worth noting in this context.

*Penalties for failure to return declarations*

- 1.123 At all elections except those for the European Parliament, Northern Ireland Assembly, London Mayor and Police and Crime Commissioners, if the candidate sits or votes in the body they have been elected to, notwithstanding a failure to return the return and declarations in time, they must pay a fixed sum for every day they contravene the requirement not to take up their elected position until the return and declaration have been delivered.<sup>78</sup>
- 1.124 In the case of elections for Police and Crime Commissioners and the Mayor of London, if a candidate's return and declarations are not submitted in time they are disqualified from being elected, although they may still apply to the courts for relief for authorised excuse.<sup>79</sup>

<sup>78</sup> Representation of the People Act 1983, ss 85 and 86; European Parliamentary Elections Regulations 2004 SI 2004 No 293, reg 55; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, reg 50; Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, arts 52 and 53; National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, arts 57 and 58; Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 86); Electoral Law Act (Northern Ireland) 1962, ss 48 and 49.

<sup>79</sup> Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, arts 44 and 45; Representation of the People Act 1983, s 85A.

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*The role of the Electoral Commission in enforcing regulation*

1.125 The Electoral Commission acts as the public regulator of campaign finance in the national context. That means party spending and donations, and spending by permitted participants in referendums. However its role also extends to candidates. Section 145(1)(b) of the 2000 Act confers on the Electoral Commission the function of monitoring and taking such steps as it considers appropriate with a view to securing compliance with:

the restrictions and other requirements imposed by “other enactments” in relation to -

- (i) election expenses incurred by or on behalf of candidates at elections, or
- (ii) donations to such candidates or their election agents.<sup>80</sup>

1.126 Section 146 of the 2000 Act gives investigatory powers to the Commission which are set out in Schedule 19B to the Act. These include a power to make a disclosure notice including one requiring the provision by a candidate or an election agent “any information or explanation which relates to their *income* and expenditure which are reasonably required by the Commission for the purposes of carrying out their functions. This is presumably a reference, in this context, to the Commission’s function under section 145(1)(b) to monitor take steps to secure compliance with restrictions relating to election expenses and donations.<sup>81</sup>

1.127 Schedule 19B makes it an offence for a person to fail, without reasonable excuse, to comply with any requirement imposed under the schedule, or intentionally to obstruct compliance with a requirement. The penalties for these offences are a level 5 fine. Knowingly or recklessly providing false information in purported compliance with a requirement is also an offence, subject to a fine up to the statutory maximum or a custodial sentence of up to 12 months. We stress that these offences are aimed at non-compliance with the Electoral Commission’s disclosure notice, rather than any initial non-compliance with expense or donations regulations, which can only be enforced by criminal prosecution.<sup>82</sup>

<sup>80</sup> Political Parties, Elections and Referendums Act 2000 ss 22(5), 40 and 145(1)(b). This power does not presently extend to Scottish local government elections, unless and to the extent that the Scottish Ministers by order so provide.

<sup>81</sup> The reference to income, and the function of monitoring and securing compliance with restrictions and requirements relating to donations to candidates, leads us to conclude that the Electoral Commission can seek information and explanations from candidates relating to donations.

<sup>82</sup> Political Parties, Elections and Referendums Act 2000 s 146, sch 19B para 1 and sch 20.

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## EXPENDITURE AT PARISH AND COMMUNITY COUNCIL ELECTIONS

- 1.128 Separate provision in relation to election expenses is made for elections for parish and community councillors in England and Wales. We have already noted that there is no requirement to appoint an election agent at those elections. The provisions on controls of donations and expense limits for candidates' personal expenses and third parties do not apply, although the general expense limit still applies. Claims must be submitted within 14 days of the day of election, and paid within 21 days of that date; the return and declaration must be submitted by the candidate within 28 days of the day of election. If the candidate sits or votes in the council notwithstanding their failure to submit the return or declaration they forfeit £50 for each day they do so.

### ***The control of donations***

#### THE LEGISLATIVE PROVISIONS ON DONATIONS TO CANDIDATES

- 1.129 Section 71A of the 1983 Act regulates gifts and donations for the purpose of meeting election expenses. Donations are defined as money or other property (widely defined) provided for the purpose of meeting election expenses. Schedule 2A has effect and contains detailed provisions on the control of donations which mirror those that apply to the regulation of political parties: in essence they promote transparency and limit permissible donors to registered electors. Unlike expenditure regulation, therefore, they do not impose limits on donations.
- 1.130 Other elections' discrete legislative provisions apply or copy section 71A and schedule 2A exactly, although for Scottish Parliamentary and National Assembly for Wales elections they only apply to constituency and individual regional candidates, since donations to parties are regulated by the Political Parties and Referendums Act 2000 ("the 2000 Act").<sup>83</sup>

#### *A gap in the legislation for Scottish local government elections?*

- 1.131 Section 71A does not extend to Scottish local government elections, and we could not find any provision so extending it or replicating its content. Nevertheless, section 81(3)(e), as it extends to Scottish local government elections, clearly requires a statement as to donations to be contained in expense returns, leading us to conclude that the absence of a provision controlling donations is an accidental drafting slip.

<sup>83</sup> European Parliamentary Elections Regulations 2004 SI 2004 No 293, reg 42 and sch 6; European Parliamentary Elections (Northern Ireland) Regulations 2004 SI 2004 No 1267, reg 38 and sch 4; Scottish Parliament (Elections etc.) Order 2010 SI 2010 No 2999, art 36 (applying sch 2A of the Representation of the People Act 1983); National Assembly for Wales (Representation of the People) Order 2007 SI 2007 No 236, art 41 and sch 6; Northern Ireland Assembly Elections Order 2001 SI 2001 No 2599, sch 1 (applying Representation of the People Act 1983, s 71A and sch 2A); Electoral Law Act (Northern Ireland) 1962, s 37A and sch 3A; Police and Crime Commissioner Elections Order 2012 SI 2012 No 1917, art 30 and sch 5.

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## SUBSTANCE OF REGULATION OF DONATIONS

- 1.132 Section 71A provides that any money or other property provided as a gift or loan for the purposes of meeting election expenses incurred by or on behalf of the candidate must be provided to the candidate or his or her election agent, unless the donation was provided for the purpose of meeting expenses which may lawfully be paid by a person other than the candidate or agent (for example, under sections 74(3) and 75 of the 1983 Act). Any person who provides money or property in contravention of this requirement commits an illegal practice. It is important to note that the illegal practice is targeted at donors only.
- 1.133 Schedule 2A regulates controls on donations, aiming to apply the policy under the 2000 Act to local campaigns. It describes what is to be regarded as a donation or sponsorship, and how donations should be valued.<sup>84</sup> Where a candidate receives a donation, he or she must deliver it to the election agent along with any accompanying information about the donor(s).<sup>85</sup> Donations from impermissible donors – those who are not permissible donors under section 54(2) of the 2000 Act at the time of making the donation, or where the identity of the donor is not known – must not be accepted.<sup>86</sup> Sections 56 to 60 of the 2000 Act on the acceptance or return of donations are applied to donations received by a candidate or election agent as they apply in relation to those received by registered parties.<sup>87</sup> These require donations made by unidentifiable donors to be returned where possible or paid into the Consolidated Fund. A donation by an impermissible donor must also be returned. If either of these prohibited donations is accepted by a candidate or election agent, an offence is committed, but it is not labelled a corrupt or illegal practice and thus cannot invalidate the election. A court may also order the forfeiture of an amount equal to that donation.

<sup>84</sup> Representation of the People Act 1983, sch 2A paras 2 to 5.

<sup>85</sup> Representation of the People Act 1983, sch 2A para 8.

<sup>86</sup> Representation of the People Act 1983, sch 2A para 6.

<sup>87</sup> Representation of the People Act 1983, sch 2A para 7.

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## DUTY TO INCLUDE DONATIONS STATEMENT IN EXPENSE RETURN

- 1.134 A statement of relevant donations must be made by the election agent; this must include details of the nature and amount of the donation and specified information about the donor in respect of both permissible and impermissible donations. Notably, schedule 2A requires that statement to be included in the return of election expenses.<sup>88</sup> However section 81 of the 1983 Act, which governs the content of expense returns, does not mention a statement as to donations. In provisions governing other elections, there is such a requirement – for example, at National Assembly for Wales elections, or Scottish local government elections.<sup>89</sup>
- 1.135 It appears that under section 81 of the 1983 Act as amended in 2006 it was envisaged that the requirement to include a statement of donations within the return of expenses would be contained in regulations or would be “prescribed” under section 81(3A). The practical effect of the omission is that it is strongly arguable that a failure to include a statement of relevant donations in the expense return does not amount to an illegal practice. It would be a breach of schedule 2A with no stipulation of the consequence of breach. It would not, however be a failure to comply with the requirements of section 81 or 82 of the 1983 Act, which is how section 84 frames the illegal practice for failures as respects returns or declarations.
- 1.136 We doubt that this was an intentional policy, as opposed to a drafting slip due to the complexity of the legislation and its structure. This is evidenced by the specific inclusion of the requirement to include a statement as to donations within the return in other elections. It appears to us that the intended policy was to make the *reporting* of donations according to the guidance in schedule 2A mandatory as part of the duty to submit expense returns. That accords with the policy generally on donations, which is designed to promote transparency.
- 1.137 There is a counter argument about the policy on donations. The 2000 Act, on which schedule 2A is based, was introduced to prevent the acceptance of donations from persons outside the UK, and thus avoid foreign funding of elections.<sup>90</sup> Under schedule 2A there is no upper limit on the value of donations that candidates and election agents can receive, and in any case they are limited by the rules on expenses in respect of what they can disburse in an election. Donations only favour one candidate over another, if certain candidates are unable to fund their campaign up to the specified expense limit. If so, a civil penalty or simple criminal offence for failure to comply with the requirement should suffice.

<sup>88</sup> Representation of the People Act 1983, sch 2A para 10.

<sup>89</sup> National Assembly for Wales elections (Representation of the People) Order SI 2007 No 236 art 52(4)(f); Representation of the People Act 1983 s81(3)(e) (as it applies to Scottish local government elections pending commencement of provision inserting section 81(4A), which would mirror s 81(3A) save that it would refer to orders of the Scottish Ministers instead of regulations by the Electoral Commission.

<sup>90</sup> Political Parties, Elections and Referendums Act 2000, Explanatory Notes.



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1.138 However, the 2000 Act policy, which is extended to candidates campaigning for election, seeks to make donations transparent, and the classical way electoral law regulates candidate conduct at elections is through electoral offences which, through the label “corrupt and illegal practice”, can have the effect of vitiating the candidate’s election.

## APPENDIX A ELECTORAL OFFENCES

Category	Offence	Statute RPA 1983 unless otherwise stated	Sentence	Notes
<b>Corrupt practices</b>  Disqualification period 5 years	Bribery	s 113	1 year maximum custodial sentence, an unlimited fine, or both if convicted on indictment	All corrupt practices are either way offences.  A candidate or person reported personally guilty of a corrupt practice is disqualified from being elected to parliament or holding any elective office for five years from the date of conviction or report by an election court.  A candidate or person reported personally guilty of s.62A or s.60 offences is, additionally to the above, disqualified from being registered as an elector or voting at any
	Treating	s114		
	Undue influence	s115		
	Prohibition of publication of exit polls	s 66A		
	Wilfull false declaration on return as to: <ul style="list-style-type: none"> <li>- election expenses incurred by agent</li> <li>- authorised election expenses</li> <li>- permitted expenses, as requested by Electoral Commission</li> </ul>	s 82(6) and sch 4 para 5  s 75(5) and 75A  s 75ZB	6 months maximum custodial sentence, a statutory maximum fine, or both on summary conviction	
Unauthorised expenses  <i>Including aiding &amp; abetting, counselling or procuring</i>	s 75			

Category	Offence	Statute RPA 1983 unless otherwise stated	Sentence	Notes
	Wilfully making false statements or signatures in nomination papers	s 65A		parliamentary election or local government election.
	Postal and Proxy voting offences	ss 62A and 62B	As above save for a 2 year maximum sentence	
	Personation <i>Including aiding &amp; abetting, counselling or procuring</i>	s 60		
<b>Illegal Practices</b>  Disqualification period 3 years	Providing money for illegal purposes (illegal payments)	s 175(2) and s 112	Fine not exceeding level 5 on the standard scale	All illegal practices are summary offences.  On a prosecution, it is sufficient to allege that the person charged was guilty of an illegal practice s.169 RPA 1983 (i.e. the precise illegal practice alleged need not be named in the Information or Summons)  A person charged with a corrupt practice may be convicted of an illegal practice instead and in such circumstances the trial will proceed as if the illegal practice were an indictable offence.
	False statement as to candidate	s 106		
	Illegal employment of canvassers by agent or candidate	s 175(2) and s 111 together		
	Paying an elector for exhibition of election bills and notices	s 109	Fine not exceeding level 5 on the standard scale	
	Election literature not bearing printer's name and address (candidate or his agent only)	ss 110(12) and 110A(14)		

Category	Offence	Statute RPA 1983 unless otherwise stated	Sentence	Notes
	Unauthorised broadcasts	s 92	Fine not exceeding level 5 on the standard scale	Illegal practices result in disqualifications from elective office for three years from the date of conviction or report by the election court.
	Disturbing election meetings	s 97		
	Standing as a candidate in more than one Member State at European elections	Reg. 4, European Parliamentary Elections (Changes to the Franchise and Qualification of Representatives) Regulations 1994/342		
	False statement about withdrawal of candidate	s 106(5)		
	Imitation poll cards	s 94		
	Breach of rules on candidate's expenses including: <ul style="list-style-type: none"> <li>- Return /declaration of election expenses</li> <li>- Expenses maximum</li> <li>- Expenses through election agent only</li> </ul>	ss 81 and 82 and sch 4 para 5  ss 76 and 76ZA  s 73		

Category	Offence	Statute RPA 1983 unless otherwise stated	Sentence	Notes
	<ul style="list-style-type: none"> <li>- Election expenses must be paid within the permitted time for such payments.</li> </ul>	ss 78 and 90 and sch 4 para 1	Statutory maximum fine or 6 months (summary); fine or 1 year indictment)	
	Evasion of controls on and misleading the election agent as to donations	sch 2A para 9 applying s 61 of PPERA 2000		
	Failing to submit declaration on return as to: <ul style="list-style-type: none"> <li>- election expenses incurred by agent</li> <li>- authorised election expenses</li> <li>- permitted expenses, as requested by Electoral Commission</li> </ul>	s 82(6) and sch 4 para 5  s 75(5) and 75A  s 75ZB		

Category	Offence	Statute RPA 1983 unless otherwise stated	Sentence	Notes
	Donation made otherwise than to candidate or agent	S 71A		
	Voting or inducing/procuring vote at certain elections under the Local Government Act knowing of statutory disqualification from vote	s 189		
<b>Other Electoral Offences</b>	Voting offences including - multiple voting violations of proxy or postal ballot other than those in s.62A	s 61	Fine not exceeding level 5 on the standard scale	Summary offence
	Illegal payment	s 175(1) and s 112		
	Inducing withdrawal of candidate	s 107		
	Illegal employment of canvassers (other than by election agent or candidate)	s 175(1) and s 111		

Category	Offence	Statute RPA 1983 unless otherwise stated	Sentence	Notes
	Election literature not bearing printer's name and address	s 110 RPA 1983, Political Parties, Elections and Referendums Act 2000 s 143		
	Fraudulent tampering with or unauthorised dissemination of election materials e.g. nomination papers, ballot boxes,	s 65	2 years and/or fine on indictment,  6 months and statutory maximum fine in summary trial	An either way offence if committed by returning or presiding officer or their poll clerks.
Fine not exceeding level 5 on the standard scale			If committed by any other person, a summary offence.	
	Breach of secrecy	s 66	Fine not exceeding level 5 on the standard scale or 6 mths custodial term	Summary offence

Category	Offence	Statute RPA 1983 unless otherwise stated	Sentence	Notes
	Declaration offences (service or local connection)	s 62	Fine not exceeding level 5 on the standard scale	Summary offence
	False information (register) (applies to all applications to register and applications for a postal or proxy vote under RPA 2000 sch 4, requires knowledge or reasonable suspicion of falsehood)	s 13D	51 weeks (England and Wales) or 6 months (Scotland and Northern Ireland) max custodial term, fine not exceeding level 5 on the standard scale, or both	Summary offence
	False information (absent voting applications for Scottish local government elections, requires knowledge or reasonable suspicion of falsehood)	s 13CA	6 months max custodial term, fine not exceeding level 5 on the standard scale, or both	Summary offence
	False information / failing to respond to registration	Representation of the People (England	Fine of level 3 on the standard	Summary offence



<b>Category</b>	<b>Offence</b>	<b>Statute</b> RPA 1983 unless otherwise stated	<b>Sentence</b>	<b>Notes</b>
	request (strict liability)	and Wales) Regulations 2001 SI 2001/341, regulation 23	scale	
	Defacing notices (register)	As above, regulation 11	Fine of £1,000	Summary offence
	Disclosing information given on a registration application other than for the purpose of determining that application or civil or criminal proceedings	As above, regulation 29ZB(6)	2 years and/or a fine on indictment  12 months and/or statutory maximum on summary conviction	
	Breach of official duty	s 63	Fine not exceeding level 5 on the standard scale	Summary offence
	Prohibition of administration officers acting as candidate's agent	s 99	Fine not exceeding level 4 on the standard scale	Summary offence
	Illegal canvassing by police	s 100	Fine not	Summary offence

Category	Offence	Statute RPA 1983 unless otherwise stated	Sentence	Notes
			exceeding level 3 on the standard scale	
	Sitting or voting after failing to transmit expense returns/declarations	s 85	£100 fine per day  £50 fine per day (local govt candidates)	Civil proceedings for a penalty  Summary proceedings in Magistrates Court
	Failure of agents to comply with court order to supply information	s 87(3)	Fine of up to level 5 on the standard scale	Summary offence
	Making an overseas electors' declaration while knowing it to be false	RPA 1985, s 12(1)	Fine of up to level 5 on the standard scale	Summary offence
	Attesting an overseas electors' declaration while knowing it to be false	RPA 1985, s 12(2)	Fine of up to level 5 on the standard scale	Summary offence
	Making a false statement or false attestation/declaration in relation to an application to vote by post or proxy	RPA 1985, s 12(3) and RPA 2000, sch 4 para 8	Fine of up to level 5 on the standard scale	Summary offence
	Miscellaneous offences in relation to dealing with the register of electors	Representation of the People (England and Wales)	Fine not exceeding level 5 on the	Summary offence

Category	Offence	Statute	Sentence	Notes
		RPA 1983 unless otherwise stated Regulations 2001 SI 2001/341, reg 115	standard scale	
	Copying the full register or recording its particulars other than by means of hand written notes	As above, reg 7	Fine not exceeding level 5 on the standard scale	Summary offence
	Refusal to give name and address where suspected of causing a disturbance at an election meeting	s 97(3)	Fine not exceeding level 1 on the standard scale	Summary offence
	Prohibition on exit polls	s 66A	Fine not exceeding level 5 on the standard scale, or 6 months custodial term	Summary offence
	Failure to respond to a requirement to register	s 9E(7) and Representation of the People Regulations (England and Wales) 2001 SI 2001/341, regs 32ZF and 32ZE	Civil penalty of £80	

<b>Category</b>	<b>Offence</b>	<b>Statute</b> RPA 1983 unless otherwise stated	<b>Sentence</b>	<b>Notes</b>
	Breach of control of documents post election	s 66B	Fine not exceeding level 5 on the standard scale	Summary offence
<b>RELEVANT GENERAL OFFENCES (not restricted to elections)</b>	Forgery and using false instruments	ss 1 & 2 of Forgery and Counterfeiting Act 1981	10 years maximum custodial term or unlimited fine or both (indictment)  6 months custodial term or fine up to the statutory maximum or both	Either way offence
	Perjury	s 5 Perjury Act 1911	2 years maximum custodial term, a fine, or both	Indictable only
	Conspiracy to defraud	Common law offence	10 years maximum sentence, a fine or both	Indictable only



