Local Government and Communities Committee

Payments to Returning Officers in Scotland

Written Submission from the Electoral Management Board for Scotland

Note: This response is submitted by the Electoral Management Board for Scotland but is also endorsed by SOLACE Scotland.

Background

The Local Government and Communities Committee is undertaking a short-focused inquiry to explore the purpose and appropriateness of providing payments or fees to Returning Officers (principally Local Authority Chief Executives) in Scotland in relation to Local Government, Scottish and UK elections and referenda. The Committee has invited the Convener of the Electoral Management Board for Scotland (EMB) to give evidence to the Committee on the morning of Wednesday 30 November 2016. The Committee also intimated that they would welcome written views provided to the Committee ahead of the session. This paper provides a brief outline of key issues to be considered in any review of the nature and appropriateness of fees that are payable to Returning Officers.

Overview

The duties of the Returning Officer (RO) - The RO is the person with the sole legal responsibility for running an election. Their role is to ensure that the election is administered effectively to deliver a result in which the voter can have full confidence. This involves a complex range of tasks, completed to a strict timetable, within a limited budget to facilitate the fundamental democratic function in civic society.

The nature of the RO role as discrete from the role of Chief Executive - Both in law and in principle the duties of the RO must be separate from any of an individual’s duties as a local government officer. This follows from Section 27(1) of the RPA 1983, which makes the office of RO totally distinct from the office by virtue of which an individual has become RO. However it is the principle not the law that is to be emphasised. A local government officer, even a Chief Executive, is responsible to their Council, a set of elected politicians. The individual delivering elections must be independent of political control. Hence ROs are directly accountable only to the Courts as an independent statutory office holder. These cannot be duties rolled into the Job Description of the Chief Executive or other local government officer as this would place the administration of elections under some degree of political control.
The fee for RO services – it would be wholly inconsistent with practice elsewhere in public life were duties of the scale, degree of responsibility and civic importance of ROs to be left without remuneration. The role is important in civic life and is undertaken at the personal risk of the RO who is answerable to the Courts for the delivery of the associated tasks. The scale of the remuneration should be determined through an evaluation of the duties, as with other jobs. Currently the fee payable to the RO for their services in the delivery of Parliamentary elections is fixed by Parliament as part of the funds allocated for running elections and is proportional to the size of the electorate in the constituency adjusted by other relevant factors. Referendums are administered by the RO as Counting Officer, but otherwise the issues are the same. As Returning Officer in local government elections any fee is determined by the individual councils. This paper considers only the current position with respect to Parliamentary elections and Referendums.

Alternative models - there are alternative approaches, e.g. with elections being delivered by an independent body totally separate from local government e.g. the Canadian or the Northern Ireland model. However when alternative models have been considered in the past the status quo has prevailed. Where the administration of elections is totally removed from local authorities it can be a challenge to access the resources and staff that are necessary to deliver the polls and the count. The establishment of an additional public agency would also be an additional cost to the public purse and would not necessarily what are already high standards of performance of ROs in Scotland.

The Duties of the Returning Officer

This paper focuses on the role and duties of the RO in statutory elections. The issues raised apply to European Parliamentary Elections, UK Parliamentary Elections, Scottish Parliament Elections and Local Government Elections. The same principles also apply to referendums where the equivalent role is that of Counting Officer (CO). In some of these polls there may also be a broader governance structure, for example in European Parliamentary Elections there is a Regional Returning Officer (RRO) appointed for the electoral region delivery tasks such as the oversight of nominations with Local Returning Officers (LROs) responsible for the polling and the count in each area.

Every council must appoint an officer of the council to be the RO for any elections of councillors to the council. The RO for a UK Parliamentary election in Scotland is the same person who has been appointed RO for the election of councillors in the local authority in which the constituency is situated. Similarly, for Scottish Parliament Elections the local government RO also acts as Constituency RO.
The RO is the official charged with conducting an election in a particular area and making a “return” of the result. This is a central role in the democratic process. The RO is in oversight of the delivery of an election for the electors in their voting area. Their role is to ensure that the election is administered effectively and that, as a result, the experience of voters and those standing for election is positive. The election must be delivered in accordance with the law but also in such a way that the interests of the voter are held central to all planning and operations. Their ultimate objective is that there will be confidence in the result. This confidence is predicated on promoting confidence from all stakeholders in all stages of the process from nominations through polling to the count.

**A Complex and Extensive Work Programme**

The range of tasks that fall within the remit of the RO for a typical election will include:

- A communications programme to build awareness of and promote participation in the electoral event, developing strategies to target groups who often fail to turnout, such as young people, home movers and new voters;
- The publication of all relevant statutory notices relating to the election, for example the Notice of Election and the Statement of Persons Nominated/Notice of Poll (if a poll is needed);
- The nomination process;
- The production, dispatch and verification of postal votes;
- The identification, booking and equipping of polling places;
- The recruitment, appointment, training and remuneration of Presiding Officers, Poll Clerks and other polling staff;
- Securing a suitable count venue and its operational set up including cabling and media;
- The recruitment, appointment and training of count staff and security;
- The secure transfer of ballot boxes from polling places to the count venue;
- The verification and counting of the votes;
- The declaration of the results;
- Holding for public inspection relevant documentation around the election process, including candidates’ election expenses and the marked registers.

The RO has an important role also in building effective relationships with candidates and agents during the electoral process. A professional relationship from a competent RO does much to engender confidence in the outcome of an election. When candidates and agents have confidence in the approach, experience and skill of the RO they will become able advocates in support of the integrity of the process. Acceptance of this integrity is vital to the health of the democratic process.
The scale, complexity and variety of these tasks should not be underestimated. For an electoral event in many constituencies this set of tasks will involve:

- The management of a substantial budget, often over £1m;
- The recruitment and training of hundreds of staff to act as polling and count staff;
- Inspecting, booking and setting up scores of polling places;
- Liaison with Police Scotland to manage the security of the process;
- Ensuring that political neutrality is maintained in all elements of the process; and
- Managing a complex legal process – from nomination through to the declaration of results.

**Management Responsibilities**

The RO role is of such variety and scope that the tasks involved need to be delivered by a team of staff. The RO will therefore have a set of management responsibilities including:

- Commanding the required staff and resources to deliver a well-run election;
- Drawing in the necessary support, skills and expertise from across the local council;
- Overseeing the planning, project management and risk management of the election and incorporating lessons learnt from previous polls;
- Identifying any actions necessary to mitigate any issues arising;
- Ensuring that staff are appropriately trained to deliver the roles required of them;
- Maintaining an effective working relationship with the ERO;
- Maintaining an effective working relationship with the police Single Point of Contact (SPOC); and
- Ensuring that election accounts are completed in a timely manner.

**Time Critical Tasks**

Theses tasks are all time-critical. Elections are governed by a body of electoral law that dictates a clear and strict timetable for the delivery of key tasks and processes. Should ROs fail to comply with the timetable the electoral process would be open to legal challenge. Indeed it is the RO as an individual that would have to answer to the courts in such a challenge.
**Quasi-Judicial Decisions**

A further element to be recognised is that in delivering many of these tasks the RO is acting in a quasi-judicial role. For example in determining the validity of a nomination paper or in verifying the personal identifiers on a postal vote statement, the RO is taking decisions that would otherwise be the responsibility of the courts. These are major responsibilities that relate to the exercise of an individual’s franchise or to the names that ultimately appear on a ballot paper. Affecting the fundamental operation of civic society, these decisions far exceed the normal responsibilities of a local government officer.

When such decisions are challenged it is the RO personally, not the local authority, who must answer to the courts for their decisions. If the RO is, without reasonable cause, guilty of any act or omission in breach of their official duty, they are liable on summary conviction to a fine not exceeding £5,000.

**Understanding the legislation**

These responsibilities require a substantial knowledge of the legislation governing the conduct of the election. In addition to having a clear understanding of their own particular statutory functions, the RO must have an overview of what the legislation contains and an understanding of how it affects the administration of the election, so that they can review, question where necessary, and quality-assure the whole process.

| The Nature of the RO role as discrete from the Role of Chief Executive |

The principle of the independence of the RO demands that the role is separate from the Chief Executive or other local government officer who is RO. For free and fair electoral events the RO cannot be accountable for electoral duties to those whose election s/he administers.

**A Legal Separation of Duties**

The duties of a RO are separate from an individual’s duties as a local government officer. The RO is not responsible to their council but is directly accountable to the courts as an independent statutory office holder.

This separation follows from Section 27(1) of the Representation of the People Act (RPA) 1983, which has the effect of making the office of Returning Officer totally distinct from the office by virtue of which an individual has become Returning Officer.
As a consequence of this personal liability for the conduct of the election the RO must ensure that as an individual they are appropriately insured. They need to be able to demonstrate robust planning and decision-making processes in the event of any challenge to the election as a claim would be against the RO personally, not against the Council.

*An Independent Role*

In making the RO duties separate from duties of a local government officer the law is only making explicit what is a natural consequence of the need to ensure that elections are and are seen to be free of political control. Since the RO is the official charged with conducting an election in a particular area it is not appropriate that they are responsible to those who are elected. As such the RO role cannot be part of the duties of a council post. Including RO duties within the job description of a council employee would make the RO ultimately responsible to those who are themselves elected. This would remove the autonomy and independence of the RO and put in question the integrity of the electoral process. It is a fundamental principle that a robust and sound electoral process must be administered outwith the control of politicians and those who are themselves elected.

*ROs and Local Authorities*

Every council must appoint an officer of the council to be the RO for any elections of councillors to the council. This gives the RO easier access to the resources, staff and infrastructure of the council to be used in the delivery of the election. However, these resources are not made available as a consequence of the RO being a Chief Executive of the council. Councils must make available to the RO the necessary resources to enable the RO to discharge their functions.

The Returning Officer is not bound by a Council’s normal procedures in terms of conducting the election or subject to direction or instruction from members of the Council in respect of the discharge of the responsibilities falling to the statutory office. This reflects a position enshrined in statute that an independent officer is responsible for the proper conduct of the election “without fear or favour”.

**The Fee for RO Services**

The position stated above therefore is that:

- The duties of the RO are complex, time-critical and fundamental to the delivery of sound elections; and
- The RO duties must be legally separate role from the duties of a local government officer to preserve and demonstrate the integrity of the electoral process.

It would be highly unusual for such duties not to be remunerated. Indeed it would be inconsistent with practice elsewhere in public life were such complex and important tasks to be undertaken without remuneration. The role is fundamental to civic life and is undertaken at the personal risk of the RO who as discussed above is answerable to the Courts for the delivery of the associated tasks. The responsibilities of the RO are over and above those of the Chief Executive of the local authority and require significant time and effort.

As is the practice for any other public job, the scale of the fee or remuneration should be determined through an evaluation of the duties. There are recognised job evaluation frameworks for such posts and it would be consistent if the RO role was subject to evaluation under such a scheme.

Currently the fee paid for the services of a Returning Officer is determined by Parliament for parliamentary elections or referendums. This fee is derived from a model that considers several factors but is driven primarily by the size of the electorate in the constituency or voting area.

**Other Matters for Consideration by the Committee**

**Alternative Models**

Alternative models do exist for the delivery of parliamentary elections e.g. the Electoral Office of Northern Ireland (EONI). However in assessing such models in the past the preference has been to maintain the status quo.

To shift the RO function outwith councils might raise questions around cost effectiveness. The RO will always need staff, budget and other resources. Currently councils are required by law to release resources to allow the RO to deliver the election. There may be barriers to the release of council resources when there is no direct relationship with the local authority. Even now, this is becoming more challenging with reducing resources within councils as a result of budget cuts, with remaining resources under significantly greater pressure.

**Performance of Returning Officers**

This paper has considered the current governance structure for electoral events in Scotland and in particular the role and remuneration of the RO. These governance structures should be seen in the context of the performance of ROs and their teams.
Independent objective assessments of the performance of Returning Officers in recent years have recognised that Scotland’s ROs and their administrators generally have an excellent track record of delivering electoral events to the highest standards of integrity and efficiency, focussed on the interests of the voter.

The delivery of the Scottish Independence Referendum in 2014 saw an unprecedented turnout from a highly engaged electorate through a process that was recognised by Scottish, UK and International politicians, observers and commentators as a “gold standard” in the delivery of democratic events. ROs were united in their objective of delivering a result in which there would be full confidence, built on the principles of accessibility, consistency, efficiency and integrity. Indeed the Chief Counting Officer for the recent EU Referendum explicitly stated that she based the governance structures and her overall approach on the “Scottish Model” delivered by the Counting /Returning Officers.

The regular assessments of ROs undertaken by the Electoral Commission for each election against their performance standards have indicated a high level of performance in Scotland in recent years. Similarly the high levels of performance have also been recognised by academics some of whom have also submitted evidence to this committee.

These high standards should not be taken for granted. The quality of Scotland’s electoral administration has been well recognised across the UK, with some of the regions in England and Wales looking to learn from the structures and approaches of this nation, for example in the establishment of regional Electoral Management Boards and increased consistency. The achievement of these high standards flows from the commitment, professionalism and expertise of the ROs.

**Summary**

In summary I would emphasise three points for consideration by the Committee:

1. The planning and delivery of an election involves a complex set of tasks to be completed to a strict timetable;
2. The officer responsible for these tasks must be independent of political control; and
3. The remuneration for these tasks needs to be determined objectively consistent with the approach for other such roles in public life.

The current model in the UK is that the RO role is taken by a senior officer of a local authority with fees paid to reflect the scale of the tasks and to recognise the personal accountability of the individual to the courts. Other models could be considered but assessments of the performance of ROs and their teams in Scotland over recent
years have recognised the very high standards achieved in the delivery of electoral events.

Under the current governance structure the EMB believes that remuneration for ROs is clearly justified, although it may need to be reviewed to ensure that the fees reflect the responsibilities of the role.

Mary Pitcaithly
Convener of the Electoral Management Board for Scotland (EMB)

The Electoral Management Board for Scotland (EMB) was created by the Local Electoral Administration (Scotland) Act 2011, which gave the Board “the general function of co-ordinating the administration of Local Government elections in Scotland.” This involves two specific roles:

- assisting local authorities and other persons in carrying out their functions in relation to Local Government elections; and
- promoting best practice in Local Government elections by providing information, advice or training (or otherwise).

The Board is composed of eight members; five are Returning Officers (or their Deputes) and three are Electoral Registration Officers. These are appointed by a Convener, who is in turn appointed by Scottish Ministers following a process of open competition. Advisors from the professional associations working in electoral administration, SOLAR and the Association of Electoral Administrators (AEA), also attend the Board meetings. The Electoral Commission, the Scottish Government, Scotland Office and COSLA also have representatives at each meeting, acting as official advisors to provide support and advice.

The EMB’s prime focus is ensuring that the interests of the voter are kept at the centre of all elections planning and administration. Much use is made of the close community of electoral professionals in Scotland and it seeks to operate by consensus rather than formal direction, wherever possible. However, the Convener does have a power to issue directions to Returning Officers and Electoral Registration Officers in relation to their duties around Local Government elections if required.

There is no remuneration made to any member of the EMB or to its Convener.