

# **PRELIMINARY STUDY ON THE ESTABLISHMENT OF AN ELECTORAL COMMISSION IN IRELAND**

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Heritage and Local Government by:

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# Executive Summary

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## ***1. Introduction***

This preliminary report on the issues involved in the establishment of an Irish Electoral Commission has been commissioned by the Department of Environment, Heritage and Local Government. It takes as its starting point the commitment in the Agreed Programme for Government to establish an Electoral Commission, and notes the range of tasks that the programme for government would assign to such a commission. These tasks are listed in Appendix 1 of the present report.

## ***2. An Electoral Commission***

This report recommends the establishment of an Electoral Commission.

## ***3. Registration of political parties***

The proposed Electoral Commission should be responsible for maintaining the Register of Political Parties.

## ***4. Compilation of electoral register***

It is recommended that the Electoral Commission also assume responsibility for the electoral register, with a view to introducing a rolling, individual register. This should involve extensive consultation with electoral authorities in jurisdictions which have already moved to this registration model, and with local authorities in Ireland to ensure a smooth transfer of responsibilities. In order to ensure the minimum disruption to voters, the new Register should not be introduced until after the next Dáil election, (a) to allow sufficient time to compile the first draft of the new register, and (b) to provide sufficient opportunity to test the robustness of the new register in advance of a general election.

## ***5. Delimiting constituencies***

We recommend that the functions currently carried out by the Constituency Commission for Dáil and European elections be transferred to the Electoral Commission. We also suggest that the burden involved could be lightened by making a move to the kinds of provision that are normal in proportional representation regimes, with fixed constituency boundaries and use of a simple allocation formula for redistribution of seats following each census—an arrangement that could resolve the contentious issue of regular breaching of county boundaries.

## ***6. Administration of the election: from nominations to declarations***

Current Irish arrangements for the administration of nominations, polling schemes, the polling process and the counting of votes have several distinct advantages. In the first place, they appear to enjoy a high degree of legitimacy, an attribute that is related to the fact that they operate at a local level. Secondly, they are seen to be effective. This is partly a matter of good administrative practice. However, it is more than just a matter of good management. The fact that these functions are carried out locally has the particular additional advantage of making it possible to mobilise major local infrastructure and local human capital for what are essentially episodic events. While, no doubt, various improvements could be and should be made to the aspects of electoral administration

considered in this section of our report, our overall recommendation is that the devolved character of the process is the key to its success and should not be tampered with. This implies that the role of a new Electoral Commission in these areas would be a matter of oversight and policy development. There are good comparative models for just such a division of labour.

### ***7. Party and election funding***

We recommend that pending the outcome of a review of the law relating to the regulation of party and election funding, a single body should combine the functions currently performed by SIPO and by the Registrar of Political Parties, and that the final powers and functions of the Electoral Commission in relation to party and election funding should be determined by the Oireachtas, following a review undertaken by the commission and Oireachtas review of its recommendations in that respect

### ***8. Research and promotion***

It is clear that any body that has substantial responsibility in the areas of electoral policy and electoral management needs to have access to the best and most relevant research findings. This will not necessarily happen unless the electoral body is given the power to conduct and/or to commission research. Whichever of the latter two options is chosen, the Electoral Commission will require some in-house research expertise to, at a minimum, identify research needs and priorities and see to it that the findings feed into the policy process. A facilitation/mobilisation framework is suggested as an aid to locating the research priorities and ensuring that they are pursued in a way that is policy-relevant. Research within the framework should also contribute to the effectiveness of initiatives taken by the commission to promote both voter registration and voter turnout.

### ***9. Legislative options***

For the reasons given above, it is recommended that an Electoral Commission should be established through the enactment of an Electoral Commission Act. This Act would amend and consolidate the law to be found in the Acts and Statutory Instruments referred to in the Appendix (together with the proposed Electoral Commission Act), bringing together in one Act the law relating to referendums and elections to local authorities, *Údarás na Gaeltachta*, the European Parliament, *Dáil Éireann*, *Seanad Éireann* and the office of President of Ireland.

### ***10. Accountability, composition, and funding***

The Electoral Commission will be independent in the performance of its functions. Any such provision should not preclude an appropriate degree of accountability on the part of the Electoral Commission to the Minister for the Environment, Heritage and Local Government and to the Oireachtas.

However, certain specific policy-making functions should be reserved to the Minister, for example fixing the date of polling, deciding whether to approve a specific form of electronic voting recommended by the commission, or proposing changes to the electoral system. In those specific cases, the role of the commission would be merely to advise a course of action to the Minister, who would have final responsibility for the matter.

We suggest the drawing of a distinction between mandatory and discretionary expenditures incurred by the commission and others in connection with their functions in the electoral process. Constituency returning officers (and returning officers at presidential elections, European Parliament elections and referendums) should continue to be entitled to payment of their charges out of the Central Fund, in the established manner.<sup>1</sup> An Post should also be entitled to payment on the same basis.<sup>2</sup>

The Electoral Commission should also be entitled to claim payment from the Central Fund of the expenses which it has incurred by reason of the Chief Electoral Officer acting as the presidential returning officer, the Seanad returning officer for the election of panel members to Seanad Éireann and as the referendum returning officer at a referendum, which would reflect the existing arrangements.<sup>3</sup>

In our view all the other expenses of the Commission should be paid by the Minister for Finance out of moneys provided by the Oireachtas.

Given the nature of the functions which the new body would perform, we consider that the following *ex officio* membership would be most appropriate—

- (a) a chairperson who shall be a judge, or a former judge, of the Supreme Court or the High Court, and
- (b) the following ordinary members—
  - (i) the Comptroller and Auditor General,
  - (ii) the Ombudsman,
  - (iii) the Clerk of Dáil Éireann,
  - (iv) the Clerk of Seanad Éireann

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<sup>1</sup> In addition to the provisions already cited, see the Presidential Elections Act, 1993 s 11 (as amended by the Electoral Act, 1997 s 77(b) and the Electoral (Amendment) Act, 2001 s 52(c)), the European Parliament Elections Act 1997 s 18 (as amended by the Electoral (Amendment) Act, 2001 s 51(f) and the Referendum Act, 1994 s 16 (as amended by the Electoral Act, 1997 s 77(c) and the Electoral (Amendment) Act, 2001 s 55(c).)

<sup>2</sup> Electoral Act, 1992 s 4(2); Presidential Elections Act, 1993 s 5(2); Referendum Act, 1994 s 4(2); European Parliament Elections Act 1997 s 4(2).

<sup>3</sup> Presidential Elections Act, 1993 s 9(4)-(6) (as amended by the Electoral (Amendment) Act, 2001 s 52(b)); Seanad Electoral (Panel Members) Act, 1947 s 4(3) (and s 4(3A) as inserted by the Electoral (Amendment) Act, 2001 s 597(a)); Referendum Act, 1994 s 14 (4)-(6) (as amended by the Electoral (Amendment) Act, 2001 s 55(b).)

# 1. Introduction

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This preliminary report on the issues involved in the establishment of an Irish Electoral Commission has been commissioned by the Department of Environment, Heritage and Local Government. It takes as its starting point the commitment in the Agreed Programme for Government<sup>4</sup> to establish an Electoral Commission, and notes the range of tasks that the programme for government would assign to such a commission. These tasks are listed in Appendix 1 of the present report. However the structure of the present report has been arrived at by considering a hypothetical situation in which we assume that the first ever electoral contest (election of an office holder/holders or a referendum) is being run. Thus, we start with a blank page<sup>5</sup> and derive the elements and the structure of the report from a narrative account of what would be involved in running such an electoral contest. This is done in order (1) to maintain a critical perspective on what might be proposed and (2) to ensure that all issues are covered. The narrative account runs as follows:

1. The first step would be to register the competing political parties (or referendum groups).
2. The second step would be to compile a register of electors.
3. The third would be to establish the boundaries of the constituencies in which votes would be cast.
4. The fourth is an omnibus step comprising a series of sub-functions conducted at local level that range from accepting nominations and administering the polling process to counting the votes and allocating the seats (or reporting constituency referendum results) according to the prescribed rules.
5. Fifth, election/referendum income and expenditure would have to be monitored and agreed standards would have to be enforced.
6. Sixth, research would need to be conducted into the behaviour of the voters in order to develop evidence-based policy proposals for the conduct of future elections/referendums and to guide any promotional efforts that might be undertaken to encourage voter registration and voter turnout.
7. Seventh and finally, all of the procedures outlined would have to be incorporated into legislation using a transparent legislative approach.

These tasks are currently performed by a range of agencies and appointed officials. The question is: Should any or all of these functions be transferred to a newly constituted

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<sup>4</sup> *Programme for Government 2007-2012*, p. 86

<sup>5</sup> The page is not entirely blank as the steps outlined below assume for instance that an electoral system has been chosen and that there are legislative provisions governing election income and expenditure.

Electoral Commission? We consider this in the following sections, which address these issues in turn (numbering the present introductory section as 1):

Section 2: Registration of political parties

Section 3: Compilation of electoral register

Section 4: Delimiting constituencies

Section 5: Administration of the election: From nominations to declarations

Section 6: Party and election funding

Section 7: Research and promotion

Section 8: Legislative options

Section 9: Accountability, funding and composition

In each of the sections where we consider specific issues (2-7), we address three areas: we begin by describing present Irish practice, we set this in context by looking at the position in comparable countries, and we outline the options open to Ireland. In a final section (section 10), we summarise our conclusions.

In preparing the report we have benefited from a series of very useful meetings with a range of people with valuable experience of central relevance to this report. They are as follows:

Electoral Office of Northern Ireland: Douglas Bain.

Fianna Fáil: Deputy Mary O'Rourke.

Fine Gael: Deputy James Bannon.

Green Party: Minister John Gormley.

Labour Party: Deputy Joanne Tuffy.

Returning Officers: Mairead Ahern, John M. Fitzpatrick, Marie Garaghy, Verona Lambe, Fintan Murphy.

Standards in Public Office Commission: David Waddell, Aidan Moore.

UK Electoral Commission: Peter Wardle, Seamus Magee.



## 2. Registration of political parties

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### 2.1 Introduction

Provision for registration of political parties was first made in 1963, with a view to introducing and regulating descriptions of political affiliation on the ballot paper at Dáil and local elections.<sup>6</sup> This was not seen as a particularly significant innovation.<sup>7</sup> That provision was upheld in the face of a challenge to its constitutional validity.<sup>8</sup> However, over the years a number of other legal consequences have been attached to registration as a political party. For example, registration determines whether or not an organisation is entitled to payments from public funds on the basis of the number of votes cast for candidates it sponsored at the previous general election.<sup>9</sup> It also provides a relatively convenient method of confirming the nomination of a candidate at a Dáil election.

### 2.2 Overview of present arrangements

The arrangements for the registration of political parties were last substantially revised in 2001.<sup>10</sup> Since 1963, the Registrar of Political Parties has been *ex officio* the Clerk of the Dáil<sup>11</sup> and an appeal has been provided against his decisions under the relevant provisions. This is determined by an appeal board consisting, in normal circumstances, of the judge of the High Court (nominated by the President of the High Court), the Ceann Comhairle and the Cathaoirleach of Seanad Éireann.<sup>12</sup> Whilst this reflects the provisions made in 1963, the criteria for registration as a party, in respect of Dáil, European, local or Údarás na Gaeltachta elections have become significantly more demanding as a result of the changes made in 2001. An applicant organisation must show

- (a) that it is organised to contest all or any of those elections, and
- (b) that it has at least 300 recorded members or (for registration as a party organised to contest elections in part of the State or local elections or Údarás na Gaeltachta elections only) 100 recorded members, each of whom is 18 years of age or older, and that at least fifty per cent of the recorded members are registered in the register of electors, or that it has at least one member who is a TD or MEP, or (for registration as a party organised to contest a local election only) it has at least 3 members who are members of a local authority or (for registration as a party organised to contest an election to Údarás na Gaeltachta only) it has at least one member who is a member of the Údarás na Gaeltachta, and
- (c) that the organisation and direction of the party are governed by written rules adopted by the party, which provide for—
  - (i) an annual or other periodic meeting or conference; and

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<sup>6</sup> Electoral Act, 1963 s 13.

<sup>7</sup> For example, the Minister for Local Government devoted only two sentences to the matter in his Second Stage speech: (27 February 1963) 200 *Dáil Debates* col 448.

<sup>8</sup> *Loftus v Attorney General* [1979] IR 221 (SC).

<sup>9</sup> Electoral Act, 1997 s 16(a).

<sup>10</sup> Electoral (Amendment) Act, 2001 s 11 (Electoral Act, 1992 ss 25-25C)

<sup>11</sup> Electoral Act, 1992 ss 25(1)(a) (as inserted by the Electoral (Amendment) Act, 2001 s 11.)

<sup>12</sup> *ibid* s 25B (as inserted by s 11.)

(ii) the conduct of party business by an executive committee or similar body elected by the party.<sup>13</sup>

These more onerous requirements no doubt reflect the greater advantages which registration now confers, in comparison with the situation in 1963.

SIPO and its predecessor the Public Offices Commission (POC) has referred to the impact of omissions from or changes in the Register of Political Parties on its existing functions<sup>14</sup> and the Clerk of Dáil Éireann (*ex officio* Registrar of Political Parties) is a member of SIPO.<sup>15</sup>

There would seem to be good reasons why the maintenance of the Register of Political Parties should be a function of a single electoral management body. It is important that a regulator of electoral and party political funding should have available to it effective sanctions short of criminal prosecution in order to support its regulatory functions. It would seem appropriate to make it a condition of maintaining the registration of a political party (with all the advantages that flow from that) that it has adequately complied with its obligations under electoral legislation more generally and to give the body responsible for maintaining the party's registration the power to cancel it should it determine that a sufficiently serious breach of that legislation has occurred.

### 2.3 Recommendations

For these reasons, it is recommended that an Electoral Commission should be responsible for maintaining the Register of Political Parties and should have the power to cancel the registration of a political party in cases where the body determines that the party through its officers or other person authorised by the party to act on its behalf has, in the opinion of the body, committed serious or repeated breaches of the obligations imposed by electoral law.<sup>16</sup> The body should be entitled to refuse to restore a party to the register unless and until is satisfied that the circumstances which led to the cancellation of the party's registration have ceased to exist.<sup>17</sup> The same right of appeal against cancellation or refusal of registration should be provided as is currently set out in the Electoral Act, 1992 (as amended.)<sup>18</sup>

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<sup>13</sup> *ibid* s 25(4).

<sup>14</sup> SIPO *Annual Report 2007* (June 2008) 23; POC *Donations disclosed by political parties for 2000* Part 3.

<sup>15</sup> See generally Electoral Act, 1992 s 25 (as substituted by the Electoral (Amendment) Act 2001 s 11.)

<sup>16</sup> See, by way of comparison, the Radio and Television Act, 1988 s 14(4)(a)

<sup>17</sup> Some further provision would undoubtedly have to be made to prevent easy avoidance of this bar to registration, such as by a mere change of name or the identity of the officers of the party authorised to sign certificates authenticating candidatures.

<sup>18</sup> See n 12 above.

## 3. Compilation of electoral register

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### 3.1 Introduction

The Electoral Register is an essential component of the voting process – without a trustworthy and reliable voter list, free and fair elections are not possible.

### 3.2 Overview of present arrangements

The task of compiling the electoral register in Ireland is currently devolved to the thirty four local authorities in the state. These registration authorities are required by law to prepare and publish a register of electors every year. The conditions for registration are<sup>19</sup>:

- Persons must be 18 years or older on the day the register comes into force;
- Citizenship requirements:
  - Irish citizens may vote at all elections and referendums;
  - British citizens may vote at Dáil, European, and local elections;
  - Other EU citizens may vote at European and local elections;
  - Non-EU citizens may vote at local elections only.
- A person must be ordinarily resident at the address provided for the register on the 1<sup>st</sup> of September prior to the coming into force of the register;
- A person may be registered at one address only.

Registration authorities conduct house to house and other local enquiries to compile a draft register, which is published on November 1<sup>st</sup>. This draft can then be examined for errors over the next four weeks at post offices, public libraries, Garda stations, courthouses, and local authority offices. Between November 25<sup>th</sup> and December 23<sup>rd</sup>, County Registrars adjudicate on any claims of errors and omissions, though his or her adjudications can be appealed to the Circuit Court<sup>20</sup>.

Applications for postal voting must be received by November 25<sup>th</sup> at the latest. Whole time members of the defence forces and Irish diplomats posted abroad and their spouses are registered as postal voters. In addition, persons in the following categories may apply for registration as postal voters:

- Members of the Garda Síochána;
- Persons unable to go to a polling station because of physical illness or disability;
- Persons whose occupations are likely to prevent them from voting at their local polling station on elections day, including full-time students registered at home who are living elsewhere while attending an educational institution in the State
- Prisoners.

A person registered as a postal voter may only vote by post, and may not vote in person at a polling station<sup>21</sup>. A supplementary postal voting list is also prepared, the closing date for

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<sup>19</sup> Department of the Environment, Heritage and Local Government (2006) *Register of Electors*

<sup>20</sup> Whelan, Noel, *Politics, Elections and the Law*. (Dublin: Blackhall Publishing, 2000), p. 10

<sup>21</sup> *ibid*

which in the case of a general election is two days after the Order appointing polling day is signed, or two days after the dissolution of the Dáil<sup>22</sup>. In the cases of Dáil by-elections, presidential elections, European elections, local elections, and referendums, the closing date is the date of the order appointing polling day<sup>23</sup>.

In theory, this is a sensible delegation of responsibilities to the local level, one which should result in a higher quality register through a more efficient deployment of local knowledge and experience than would be possible via a centralised body. In reality, this is not the case. The Oireachtas Joint Committee on the Environment, Heritage and Local Government, in its First Report on The Future of the Electoral Register in Ireland and Related Matters, identified a number of problems:

- Varying degrees of priority afforded to maintaining data;
- Wide variety of practices among registration authorities;
- Insufficient field-workers and door-to-door visits to obtain the necessary information in some registration authorities<sup>24</sup>.

While great efforts have been made to improve the quality of the register in recent years, anecdotal evidence from the 2007 general election and the 2008 Lisbon Treaty referendum suggest that much more needs to be done<sup>25</sup>. Given the varying degrees of priority assigned to the task by local authorities noted above, it would appear that a new approach to the task is required.

### 3.3 Comparative models

In making recommendations on an alternative system for compiling the register, it is useful to examine models already in operation elsewhere. Some models can be dismissed without too much difficulty – in the USA, for example, the current situation is even more decentralised than in Ireland, with a wide range of voter registration processes in use. Further, unlike in many other democracies, voter registration is entirely voluntary<sup>26</sup>. Given that many of the concerns about the Electoral Register in Ireland centre on the registration and non-registration of eligible and non-eligible voters<sup>27</sup>, the American case does not provide a useful model.

At the opposite end of the scale, but perhaps equally inapplicable for Ireland, is the practice of linking voter registration to a national identification system. Countries employing this

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<sup>22</sup> See section 15A(4) of the Electoral Act 1992, as inserted by section 7(c) of the Electoral (Amendment) Act 2001.

<sup>23</sup> Whelan, p. 12

<sup>24</sup> Oireachtas Joint Committee on the Environment, Heritage and Local Government (2008), *The Future of the Electoral Register in Ireland and Related Matters*

<sup>25</sup> See, for example, Minister Gormley's appearance before the Joint Committee on the Environment, Heritage and Local Government on 18 June 2008 (<http://debates.oireachtas.ie/DDebate.aspx?F=ENJ20080618.XML&Ex=All&Page=1>)

<sup>26</sup> Achen (2008), p. 1. However note that in Ireland, while registration is not in itself compulsory, the registration authority has the power to require a person "to give any information in their possession which the registration authority may require" for the purposes of preparing the register (Rule 5(3) of the Second Schedule to the Electoral Act 1992).

<sup>27</sup> Joint Oireachtas Committee (2008), p. 7

practice include Brazil, Bulgaria, Hungary, the Netherlands, Romania, Senegal and Sweden<sup>28</sup>. In Germany, for example, all citizens must by law register their place of residence with their municipality, which compiles the local electoral register from the resulting residence register. In order for such a system to work in Ireland, a national identification/registration system would need to be put in place, which would involve a debate that is beyond the scope of this report.

In both Australia and New Zealand, the responsibility for voter registration lies with the individual voter. Both the Australian Electoral Commission<sup>29</sup> and the Elections New Zealand federation of agencies<sup>30</sup> provide a range of options for registering including, in the case of New Zealand, online registration. Some elements of this system are already in place in Ireland – it is possible to run an online search<sup>31</sup> to see if you are currently registered. If voters find that they have omitted by the house to house canvass, they have the option to download registration forms from the site, which can be manually completed then submitted directly to their local authorities. However, shifting the onus entirely over to the individual carries the risk that many voters will forget either to register or to keep their registration up to date, which could leave holes in the register come election time.

Until 1997, the Canadian electoral register was maintained through an intensive door to door enumeration campaign, carried out just before an election. This approach was replaced with a continuously updated National Register of Electors<sup>32</sup>. Elections Canada estimates that about 17% of elector information changes each year<sup>33</sup>, and compiles Register updates from a variety of national and regional agencies, including the Canada Revenue Agency, Citizenship and Immigration Canada, and provincial registrars of motor vehicles and vital statistics. Data protection is statutorily guaranteed, and the Canadian Privacy Commissioner has the right to audit the compilation of the register at any time<sup>34</sup>. While the new method of voter registration delivered savings to the taxpayer, it was also shown, at least initially, to have impacted negatively on voter turnout, with widespread confusion about the registration process right up to polling day for the 2000 election, and as many as one in ten voters arriving at polling stations to find they were not on the official voters list<sup>35</sup>. In addition, post-election analysis found significant social class differences in the voter registration experience, with lower income voters much less likely to have been correctly registered<sup>36</sup>. Subsequent to the 2000 election, additional steps were put in place to improve the register, including an agreement with the Canada Revenue Agency to amend tax forms

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<sup>28</sup> International IDEA, *Electoral management design: the International IDEA handbook* (Stockholm: International IDEA, 2006), p. 65.

<sup>29</sup> [http://www.aec.gov.au/Enrolling\\_to\\_vote/How\\_To\\_Enrol/index.htm](http://www.aec.gov.au/Enrolling_to_vote/How_To_Enrol/index.htm)

<sup>30</sup> <http://www.elections.org.nz/enrolment/how-to-enrol/how-to-enrol-to-vote.html>

<sup>31</sup> <http://www.checktheregister.ie>

<sup>32</sup> Black (2003), p. 2

<sup>33</sup>

<http://www.elections.ca/content.asp?section=ins&document=national&dir=nre&lang=e&textonly=false>

<sup>34</sup> *ibid*

<sup>35</sup> Black, Jerome H., *From Enumeration to the National Register of Electors: An Account and an Evaluation* (Montreal: Institute for Research on Public Policy, 2003), p. 24

<sup>36</sup> Black (2003), P. 27

to allow individuals to give permission to be added to the register. Research following the 2004 and 2006 elections found steady increases over the 2000 election in the proportion of voters receiving voter cards (from 80% in 2000 to 85% in 2004 and 89% in 2006<sup>37</sup>). This experience points to the need to ensure that, before any change is undertaken in the process for compiling the electoral register in Ireland, lessons are learnt from the experience of other jurisdictions where radical overhauls of the register have taken place.

Closer to home, there are currently, as the Joint Oireachtas Committee found in compiling their report on the Electoral Register<sup>38</sup>, significant differences between Northern Ireland and Great Britain in the registration processes deployed. In Northern Ireland, responsibility for the electoral register lies with the Electoral Office of Northern Ireland (EONI), and, due to ongoing concerns about voter fraud, operates a much more rigorous voter registration system. Household registration was abolished in 2002 and replaced by individual registration. This requires those registering to provide their name, address of residence, nationality, date of birth, national insurance number, and signature, with the EONI reserving the right to ask for additional evidence of identity and proof of residence<sup>39</sup>. The annual canvas was abolished in 2007 and replaced by continuous registration, with the option to conduct decennial canvasses if the CEO of EONI feels it would benefit the comprehensiveness of the register<sup>40</sup>.

As with the new process for compiling the Canadian register, EONI benefits from the statutory obligations of public bodies to provide information. The Northern Ireland (Miscellaneous Provisions) Act 2006 conferred upon the Secretary of State for Northern Ireland a power to make regulations for the provision of information. Under these regulations, EONI can request property-related information from the 26 district councils in operation in Northern Ireland, to keep the EONI property database up to date. Similarly, the Department of Work and Pensions and the Northern Ireland Central Services Agency both have statutory obligations to provide information to help EONI keep track of individuals who have changed their address and/or name. The Registrar General of Births and Deaths provides vital statistics that enable EONI to identify deaths of registered electors<sup>41</sup>. The successful implementation of these measures has helped EONI achieve an approx. 5% increase in the comprehensiveness of the register in 2007/08.

In Britain, most registration currently takes place at household level during the annual canvas, in the period between August and November when local authorities deliver registration forms to homes, though it is possible to register at any time by downloading a form from the UK Electoral Commission website<sup>42</sup> and posting it to the local electoral registration office. As local authorities are ultimately responsible for the compilation of the register, however, it suffers from the same inconsistency of quality as noted in this country

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<sup>37</sup> 2000 figure quoted in Black (2003), p. 25; 2004 (p. 13) and 2006 (p. 131) figures quoted in the *Report of the Chief Electoral Officer of Canada on the 39<sup>th</sup> General of January 23, 2006*

<sup>38</sup> Joint Oireachtas Committee (2008), p. 12

<sup>39</sup> EONI information leaflet, *The Electoral Register*, accessed at: [http://www.eoni.org.uk/information\\_leaflet\\_-\\_the\\_electoral\\_register.pdf](http://www.eoni.org.uk/information_leaflet_-_the_electoral_register.pdf)

<sup>40</sup> Joint Oireachtas Committee (2008), p.12

<sup>41</sup> EONI (2008), pp. 5-6

<sup>42</sup> <http://www.aboutmyvote.co.uk>

by the Joint Oireachtas Committee. The UK Electoral Commission is now attempting to improve this situation by setting down a series of performance standards for electoral administration<sup>43</sup>. These standards, which were first published in July 2008, have statutory force<sup>44</sup> and cover aspects such as the completeness and accuracy of electoral registration records, the integrity of the registration process, levels of public participation in and awareness of the register, and the planning and organisation of the register. As these guidelines have only recently been published, it is too early to judge their effectiveness in improving the quality of the electoral register in Britain.

More recently still, the UK Electoral Commission has indicated its preference for an even more extensive overhaul of the voter registration process by calling on the British government to consider the implications of introducing a national, individual register<sup>45</sup>. While stopping short of advocating the immediate establishment of a single GB-wide body for managing the electoral register, the Commission does advocate the establishment of six regional Electoral Management Boards, led by Returning Officers and Electoral Registration Officers, to provide a more coordinated approach to electoral administration<sup>46</sup>. It believes that the current system is “stretched almost to breaking point”<sup>47</sup>, and that change is needed to improve the capacity of election administrators to provide a high quality service to voters.

### 3.4 Options and recommendations

The main options for the future of the compilation of the electoral register in Ireland boil down to the interaction of two elements – who has responsibility for the register (local authorities or a national body), and at what level is registration information collected (household v individual registration).

Currently, in preparing the register, registration authorities make “house to house or other significant enquiries”<sup>48</sup> and forms may be signed by a member of a household.

It is clear from the Joint Oireachtas report that the current situation commands very little confidence, either on the part of the public or public representatives. The variation in quality of the register across local authorities, and the amount of anecdotal evidence pointing up glaring errors in the register, suggest that change is needed in order to restore confidence. With the UK Electoral Commission also advocating a shift from the similarly decentralised system in use in Great Britain, there seems little to support a continuation of the status quo.

It would therefore appear to be advisable to follow the recommendation of the Joint Oireachtas Committee and transfer responsibility for managing the register away from the local authorities to a new body, as a component of an Electoral Commission, which can

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<sup>43</sup> *Performance standards for Electoral Registration Officers in Great Britain*, The Electoral Commission (2008)

<sup>44</sup> Electoral Administration Act 2006, Section 67

<sup>45</sup> Sherman, Jill (2008) ‘Massive voting reform needed to block fraud loopholes’. *The Times*, 27 August 2008. Accessed online at <http://www.timesonline.co.uk/tol/news/politics/article4615384.ece>

<sup>46</sup> *Electoral administration in the United Kingdom*, The Electoral Commission (2008)

<sup>47</sup> *Ibid*, p. 6

<sup>48</sup> Electoral Act (1992), Second Schedule, Rule I (5)

dedicate more time and resources to improving the quality of the register than many local authorities currently appear to be in a position to do. Centralising the process would allow an Electoral Commission to supervise the compilation of the register more closely and be more proactive in intervening to shift resources to where they are most needed.

There are two ways in which an Electoral Commission can assume such a role. One option is for an Electoral Commission to manage at a distance, leaving responsibility for compiling the register with local authorities, while the Commission sets and monitors agreed targets and performance indicators, in consultation with the local authorities. This is similar to the procedures recently put in place by the UK Commission. The Electoral Commission could then be provided with statutory power to request and require that local authorities provide it with the information needed to evaluate their performance on these indicators, and then publish its assessments of performance standards on a regular basis. It would then be the responsibility of the Commission to determine its own policy on how to deal with or assist underperforming authorities. The other option is for the Electoral Commission to assume responsibility for every aspect of the register, similar to the situation in both Canada and Northern Ireland. Before choosing one of these options, it is necessary to consider another important question.

That question is whether an Electoral Commission should continue with the current annual canvass (as described above), or move to a rolling, individual register, a question which is relatively straightforward to answer. While moving responsibility for managing or compiling the register from local to national level ought to deliver a higher level of performance, retaining the canvass would appear to be a sub-optimal option, as it would still retain the potential for voter fraud, which was a concern of the Joint Oireachtas Committee. The experience of Northern Ireland suggests that an individual register is far preferable. By setting and enforcing strict identity standards for the individual seeking to be put on the register, electoral fraud has been greatly reduced; following the 2007 Assembly election, only five alleged electoral offences were referred to the police for investigation<sup>49</sup>.

In supporting a shift to individual registration, the Joint Oireachtas Committee recommended the use of PPS numbers as identifiers for entries on the register, citing their potential value in reducing both voter errors and voter fraud. While the PPS number would assist in improving the comprehensiveness of the register, it should not be the only element of an improved voter registration system. In Northern Ireland, the PPS equivalent, the National Insurance number, is considered a good check of the identity of the name on the register, but is only part of a range of information sources used to compile and check the register, which include the statutory provision of information by the Department of Work and Pensions, the Northern Ireland Central Services Agency, and the Registrar General of Births and Deaths in Northern Ireland. In Canada, information is provided by federal departments, particularly the Canada Customs and Revenue Agency and Citizenship and Immigration Canada, as well as provincial motor registration and vital statistics agencies<sup>50</sup>.

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<sup>49</sup> EONI (2008), p. 13

<sup>50</sup> Black (2003), p. 5



It should be noted that the use of PPS numbers and other official information sources as identifiers is not a trivial matter. As the Department of Social and Family Affairs reported to the Joint Oireachtas Committee, “privacy issues must be overcome ... information given by individuals to different State Agencies cannot be pooled or shared ... and a common PPS number may not be used to extract personal information without consent”<sup>51</sup>. The Committee took this consideration on board, and proposed that legislation be drafted to empower the use of PPS numbers in this context<sup>52</sup>. Such legislation, which should also include the use of information from other State sources, will need to be considered carefully and at length to ensure that the correct balance is struck between obtaining the information needed for this task and protecting the privacy rights of citizens.

A system along lines broadly similar to those used in Northern Ireland and Canada should be implemented, entailing the implementation of statutory obligations on a range of public bodies to share relevant information with the body tasked with overseeing the compilation of the electoral register. Identifying relevant information and pulling it together from multiple sources should reduce the likelihood of incorrectly denying Irish citizens their right to vote, or incorrectly granting non-citizens votes in electoral contests in which they are not legally entitled to participate. If properly implemented, this will deliver real long term improvements, though it should be noted that such a radical change will inevitably result in short term disimprovements as one moves from the old system to a new, radically different one.

This brings us back to the question of whether an Electoral Commission should merely set performance targets for local authorities, or assume complete responsibility for the register. As noted above, when individual registers were introduced in Northern Ireland and Canada, efficiencies were achieved through the sharing of information between the registration body and a range of relevant public bodies. If an Electoral Commission merely sets performance targets for local authorities, one would have a situation where 34 local authorities are seeking such information from a range of public bodies on an ongoing basis. This could have the potential for extensive duplication of effort. Accordingly, it is recommended that an Electoral Commission assume complete responsibility for the electoral register.

The task of reconfiguring the compilation of the Electoral Register is a complex one, involving changes in legislation, operational authority, and working practices. It is not a task to be undertaken lightly or in haste, despite the problems with the current register already noted. The experience of Canada in particular should warn against switching to a new method of register compilation too quickly. An Electoral Commission, therefore, should make the preparation of the groundwork for a new register a priority, ensuring the requisite legislation is in place, and engaging in extensive consultation with electoral authorities in jurisdictions which have already moved to this registration model, and with local authorities in Ireland to ensure a smooth transfer of responsibilities. However, in order to ensure the minimum disruption to voters, the new Register should not be introduced until after the

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<sup>51</sup> Joint Oireachtas Committee (2008), p. 13

<sup>52</sup> Joint Oireachtas Committee (2008), p. 15

next Dáil election. This is to ensure that there is sufficient time to compile the first draft of the new register, and sufficient opportunity to test its robustness.

In conclusion, it is recommended that an Electoral Commission assume complete responsibility for the electoral register, and for the introduction of a rolling, individual register. This will require extensive consultation with electoral authorities in jurisdictions which have already moved to this registration model, and with local authorities in Ireland to ensure a smooth transfer of responsibilities. In order to ensure the minimum disruption to voters, the new Register should not be introduced until after the next Dáil election, (a) to ensure that there is sufficient time to compile the first draft of the new register, and (b) to provide sufficient opportunity (for example, at a by-election) to test the robustness of this register in advance of a general election.

## 4. Delimiting constituencies

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### 4.1 Introduction

Past controversies in the Republic of Ireland over allegations of ministerial gerrymandering of constituency boundaries offer a vivid reminder of the importance of appropriate territorial arrangements in ensuring electoral legitimacy. In Northern Ireland, the civil unrest that began in the late 1960s was sparked off in part by a deep sense of grievance over the manner in which local electoral boundaries were drawn, and the advantage that this was seen as giving to the Unionist Party. In contemporary Ireland, as elsewhere, there has therefore been a particular concern to ensure fairness in this area, and in the present section we consider this sensitive topic.

Our focus in this section is mainly on the issue of Dáil constituency boundaries. If the remit of the existing Constituency Boundary Commission is, however, to be assumed by the putative new body, then we would need to consider also the implications of this new institutional architecture for constituencies used in elections to the European Parliament. Furthermore, there may be a case for also including in the remit of the new body responsibility for designing electoral areas for local authority elections. We therefore give some consideration to these issues too.

### 4.2 Overview of present arrangements

Although Ireland parted company constitutionally with the United Kingdom in 1922, it necessarily adopted and adapted a great body of pre-1922 legislation in providing a basis for new state structures. Electoral law represented an important but not entirely consistent deviation from British practice. The Government of Ireland Act, 1920, had introduced proportional representation using, of course, multi-member constituencies, and proportional representation was confirmed by the Irish constitutions of 1922 and 1937 and by the Electoral Act, 1923, and its successors.<sup>53</sup> But when it came to defining constituency boundaries, long-standing British practices continued to be adhered to. Responsibility was given to the Oireachtas, which was required to revise boundaries on the basis of census data at least once every 12 years. The process was thus essentially left in the hands of politicians (or, more specifically, in those of the ruling party), and controversy almost inevitably followed. This flared up when the first major revision of constituency boundaries was being debated in 1935, was more muted during the second such revision in 1947, but erupted again in 1959. Dáil majorities were always sufficient to ensure that the government's wishes were adhered to, and opposition complaints of unfair manipulation of boundaries, or gerrymandering, could simply be ignored.

A new actor entered the process in 1961. In piloting the 1959 act through the Dáil, the government had argued that it was appropriate that sparsely populated rural constituencies

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<sup>53</sup> The evolution of the Irish system is discussed at greater length in John Coakley, "Revising Dáil constituency boundaries: Ireland in comparative perspective", *Administration* 55 (3) 2007, pp. 1-29, and John Coakley, "Electoral district delimitation in Ireland", pp. 155-172 in Lisa Handley and Bernard Grofman, eds, *Redistricting in comparative perspective* (Oxford: Oxford University Press, 2008).

be over-represented so that “it should be made as convenient as possible for a Deputy to keep in touch with his constituents”. The government brushed aside opposition allegations that this was designed to favour precisely those areas where the party then in office, Fianna Fáil, was strong. But an opposition senator, Dr John O’Donovan, contested the constitutionality of the 1959 act in the High Court, which ruled in 1961 that the act was indeed unconstitutional, since “it has been clearly established that the form of the Act of 1959 has been such as to result in substantial departures from the stipulated ratio of members to population, causing grave inequalities of parliamentary representation, and that it has likewise been demonstrated that there are no relevant circumstances to justify these departures”.<sup>54</sup> This was a reference to the constitutional requirement that the deputy-population ratio be “as far as it is practicable” the same from one constituency to the next.

The 1961 O’Donovan case thus prevented one form of possible abuse (over-representation of areas where the governing party might have been strong), but had the unintended consequence of facilitating another: straightforward gerrymandering through boundary manipulation. The judgement was interpreted as requiring adherence to a uniform deputy-population ratio so close as to entail precise adjustment of constituency boundaries. This could be used as a cloak for boundary revision of a kind that was designed to give a clear advantage to the party carrying it out, and the three following electoral acts (of 1961, 1969 and 1974) reached the statute books only after exceptionally bitter parliamentary debates.

Already by this stage, practices in Ireland had deviated further from those in the United Kingdom. There, the boundary revision process had in effect been taken out of the hands of politicians by the House of Commons (Redistribution of Seats) Act, 1944, which established independent boundary commissions for England, Wales, Scotland and Northern Ireland. This gave responsibility for drafting a preliminary blueprint to the relevant commission, which was required to invite public comment on this (and possibly conduct oral hearings), before submitting the scheme to parliament, which was required to accept or reject it without amendment.<sup>55</sup>

Ireland moved to follow this model relatively slowly. The first step was the creation in 1977 of a commission to recommend on boundaries for elections to the European Parliament. The second was the extension of this process to the much more contentious area of Dáil constituency boundaries: five ad-hoc commissions were appointed on the same model (a judge as chair, and the Clerk of the Dáil and the Secretary of the Department of the Environment as other members), reporting in 1979, 1983, 1988, 1990 and 1995. Finally, the Electoral Act, 1997, placed the boundary commission on a statutory basis, reducing the role of the Minister for the Environment to a purely formal one. The commission is headed by a senior judge nominated by the Chief Justice, and has four ex-officio members: the Ombudsman, the Secretary General of the Department of the Environment, and the Clerks of the Dáil and Seanad. Its terms of reference are defined as follows (in addition to the

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<sup>54</sup> “John O’Donovan, Plaintiff, v. The Attorney General, Defendant”, *Irish reports* 1961, pp. 114-56, at p. 155.

<sup>55</sup> See Ron Johnston, Charles Pattie and David Rossiter, “Electoral distortion despite redistricting by independent commissions: the British case, 1950-2005”, pp. 205-224 in Handley and Grofman, *Redistricting* (2008).

overriding condition of article 16.2.3 of the constitution, which requires it to observe “as far as it is practicable” a uniform deputy-population ratio from constituency to constituency):

- (a) the total number of members of the Dáil, subject to Article 16.2.2 of the Constitution, shall be not less than 164 and not more than 168;
- (b) each constituency shall return three, four or five members;
- (c) the breaching of county boundaries shall be avoided as far as practicable;
- (d) each constituency shall be composed of contiguous areas;
- (e) there shall be regard to geographic considerations including significant physical features and the extent of and the density of population in each constituency; and
- (f) subject to the provisions of this section, the Commission shall endeavour to maintain continuity in relation to the arrangement of constituencies.<sup>56</sup>

Politicians and members of the public have criticised the process of constituency boundary revision in Ireland over the years on a number of grounds. The first, an issue now resolved, has been the extent to which the process was politicised: governments in the past have allegedly manipulated constituency boundaries to advance their own interests. But even with the establishment of an independent commission, criticisms have been made in two other areas. On the one hand, the boundaries themselves are often unfamiliar, cutting across county boundaries—notwithstanding the guideline in the 1997 act which discourages this—and based on obsolete units in rural areas (electoral divisions, last used for administrative purposes in the local elections of 1914) and on obscure imaginary lines on maps in urban areas. They thus commonly violate local sense of community and possibly alienate a significant portion of the electorate.<sup>57</sup> In addition, though, the boundaries are unstable: there is no guarantee that the painful partition of a particular county will persist in the same form, and Dáil deputies may well be tempted to pay less attention to isolated fragments of other counties tacked onto their constituencies, perhaps temporarily, for reasons of electoral arithmetic.<sup>58</sup>

There have always been fewer complaints at two other levels at which constituencies need to be delimited. First, the task of defining the boundaries of constituencies used in elections to the European Parliament has been managed by independent commissions from the outset, as we have seen, and the Electoral Act, 1997, gave responsibility for this to the Constituency Commission. This leaves only local elections lying outside the area of responsibility of the commission; this process has been carried out separately under the auspices of the Department of the Environment, and has never attracted the level of criticism engendered by Dáil constituency boundary revision.

### 4.3 Comparative models

In looking at the manner in which the constituency boundary revision process has been carried out in Ireland, we have referred to only one other country, the United Kingdom. But

<sup>56</sup> Electoral Act, 1997 (No. 25/1997), s. 6.2.

<sup>57</sup> See Adrian Kavanagh, “The constituency commission”, *Irish political studies* 18 (2) 2003, pp. 89-99.

<sup>58</sup> For examples of particularly challenging descriptions of constituency boundaries, and statistics on the instability of these, see Coakley, “Revising Dáil constituency boundaries” (2007).

there is an important sense in which Ireland's nearest neighbour is an inappropriate basis for comparison in this respect: its electoral system, the traditional plurality one, is based on single-member constituencies, not the multi-member constituencies which are required by proportional representation. In looking at models from other countries, then, we need to pay particular attention to those that use multi-member electoral districts.

An overview of the global position will help to place Ireland in context. One recent comparative survey of the electoral boundary revision process examined provisions in 87 countries using a variety of electoral systems. Of these, 29 use single-member districts (typically, but not always, with the British-style plurality formula, where the candidate with the greatest number of votes is elected), and a further 16 are hybrid systems, where a mixture of single- and multi-member constituencies is used. In all but two of these cases, provision is made for periodic revision of constituency boundaries by a specified agency, such as a dedicated boundary commission, a general-purpose Electoral Commission, or parliament itself. In the remaining 42 cases, including Ireland, constituencies are multi-member ones, and in all but three of these proportional representation is used. But in most of these cases (25 out of the 39 which use proportional representation), there is no provision at all for constituency boundary revision, and in the remaining 14 cases such revision is typically very infrequent indeed.<sup>59</sup> This may seem peculiar, but the reason will emerge if we consider some examples.

The reason that countries operating proportional representation typically do not have provisions for revising constituency boundaries is simple: no revision is necessary—the design of constituencies and the allocation of seats between them is a simple, automatic process.<sup>60</sup> In the simplest case, the basic administrative units become constituencies: in Switzerland, the cantons; in Spain, the provinces; in Belgium, the provinces, except for Brabant (which is divided into three constituencies, Brussels, Louvain, and the Francophone district, using lower-level administrative units); in Luxembourg, four groups of cantons. In each case, seats are allocated between these strictly on the basis of population as measured by the most recent census. In Portugal, administrative districts are used, and in Finland groups of municipalities (which correspond substantially to provinces); but in these two cases the allocation of seats is based on the distribution of the citizen population rather than of the overall population.

In countries with a two-tier system (where most seats are allocated to constituencies, but some are held over to a higher level), the position seems more complex but the principle is the same in allocating seats at the lower level. In Greece, seats are allocated first to 56 pre-defined "minor" electoral districts on the basis of population. In Austria, seats are apportioned initially on the basis of resident population plus registered but absent electors

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<sup>59</sup> This discussion is based on Lisa Handley, "A comparative survey of structures and criteria for boundary delimitation", pp. 265-283, and "Appendices", pp. 285-305 in Handley and Grofman, *Redistricting* (2008). Of countries which use single-member districts, two, Georgia and Guatemala, are reported as making no provision for boundary revision. Three countries which use multi-member districts with the block vote (a pre-modern electoral system whose effects tend to be grossly disproportional), Mauritius, Singapore and the Palestinian Territories, are not further discussed here.

<sup>60</sup> The following paragraphs are based on Coakley, "Revising Dáil constituency boundaries" (2007).

to 43 “regional electoral districts”, or constituencies formed by combining local government areas. In Sweden constituencies are formed out of the country’s 21 counties (though two are divided, and three cities constitute separate constituencies), and seats are allocated in proportion to the distribution of the electorate. A similar approach is adopted in Norway and Denmark, but there the allocation formula is more complex. In Norway, population density is taken into account as well as population. Denmark adds a third consideration: seats are allocated according to a proportionality formula based on population, electorate and area. In the three Scandinavian countries, a small number of seats is reserved for national level allocation, and in Austria and Greece there are two higher-level allocations based on a more complex formula.

What these systems have in common, and what distinguishes them from the Irish approach, is that in each case a two-stage process is followed: definition of constituency boundaries (typically, for the long term) on the basis of existing administrative divisions, and periodic allocation of seats to these on the basis of an automatic formula. The second process typically follows a different cycle from the first: every 10 years in Belgium, for instance (following the decennial population census), but every four years in Sweden (following the electoral cycle, and using electorate rather than population). The actual process of mathematical allocation raises some issues (since different formulas may result in different outcomes), but once agreement has been reached on the formula the exercise requires no more than a modest command of arithmetic.

It should be stressed that these arrangements operate in societies where the same requirements regarding uniformity in the deputy-population ratio apply as in Ireland: the principle of equal representation is insisted upon. But what does this principle mean? This is an important question, since it could be argued that much of the reason for the frequent adjustments to Dáil constituency boundaries may be attributed to an excessively narrow interpretation of this principle. We may go back to the 87 countries in the survey mentioned earlier, and revisit the 60 cases where some kind of provision for periodic boundary revision is made. In the great majority of these cases, neither the constitution nor electoral law defines what is meant by “equality”. But in 16 cases a margin of tolerance is defined. This is lowest in Macedonia (where the member-population ratio may not deviate by more than 3% in any constituency) and most generous in Singapore (30%). In between, the tolerance level may be set at 5% (Albania, New Zealand, Yemen), 10% (Australia, Belarus, Italy, Ukraine), 15% (Armenia, Czech Republic, Germany), 20% (Papua-New Guinea, Zimbabwe) and 25% (Canada, Lithuania).<sup>61</sup> The median deviation permitted is 12.5%.

It is worth stressing this point because the Irish constitution specifies, in its authoritative Irish language version, that the member-population ratio should “so far as it is *possible*” (“sa mhéid gur féidir é”) be the same from one constituency to another on the basis of the most recent population census—a provision that conflicts with, and is more demanding than, the

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<sup>61</sup> In addition to these requirements, specific transitional ratios may be provided for. It should be noted that although “population equality” is the shorthand term used here, total population is the decisive criterion in only 31 of the 60 cases under discussion here; in a further 21 cases, it is registered voters that are used in seat allocation, while in six cases it is the citizen population, in one it is the voting age population, and in one it is the number of voters at the previous general election.

requirement in the English language text (“so far as it is *practicable*”).<sup>62</sup> Fortunately, the courts have adopted a broad interpretation of this, seeing it in the context of the realities of a modern democracy, and have allowed a relatively large margin of tolerance.<sup>63</sup> This contrasts strongly with the position in the United States, where the courts have bizarrely insisted on mathematical equality within states in congressional redistricting, while (necessarily) ignoring huge disparities between states, and apparently accepting the most egregious forms of political gerrymandering. Thus, following the 2000 reapportionment (currently in force), notwithstanding numerical parity *within* states, there were big disparities *between* them: the gap between the largest deviation above and below the mean was 62.5%. In line with the views of earlier commentators, it has recently been observed that in the United States “the pretext of ensuring compliance with one person, one vote, can act as a disguise for the most blatant of partisan gerrymanders”.<sup>64</sup>

For elections other than those to the Dáil, Ireland has also been ploughing a lonely furrow. It is one of only six European countries which divided their territories into constituencies for European elections (in the others, the whole territory of the state is a single, multi-member constituency). In these six, in four cases constituencies are based on large regions or groups of regions; only in Ireland and Poland are lower-level units used (counties in Ireland, *powiats* in Poland). For local elections, the absence of small administrative areas below the level of the county is a uniquely Irish phenomenon, meaning that constituencies have to be formed from units which enjoy relatively little local recognition. The larger constituencies facilitated by the list system of proportional representation and the territorial boundaries generated by a more developed system of local government in continental Europe render constituency boundary delimitation at this level relatively unproblematic.

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<sup>62</sup> Strangely, the High Court ruled in 1961 that “no material discordance exists between the English and Irish texts” of the constitution in this respect; see “O’Donovan v. Attorney General”, (1961), p. 132.

<sup>63</sup> Justice Budd’s judgement in 1961 (“O’Donovan v. Attorney General” (1961), p. 155) was widely interpreted as permitting a “tolerance” level of 5% above or below the average deputy-population ratio. Mr Justice Clarke has, however, more recently noted that this interpretation (apparently based on expressing 1,000, the average population of a district electoral division, as a percentage of 20,000, the average deputy-population ratio at the time) is misleading: the figure of 1,000 needs to be expressed as a percentage of total population, which ranged at the time from about 100,000 in a five-seat to 60,000 in a three-seat constituency, giving a “tolerance” level of somewhere between 1.0% and 1.7%; see “Murphy and another v. Minister for Environment and others”, [2007] IEHC 185, ss. 3.12-13; available <http://www.bailii.org/ie/cases/IEHC/2007/H185.html> [2008-08-26]. The Supreme Court ruled in 1961 that “exact parity in the ratio between members and the population of each constituency is unlikely to be obtained and is not required”; see judgement by Chief Justice Maguire, “In re Art. 26 of the Constitution and the Electoral (Amendment) Bill, 1961”, *Irish reports* 1961, pp. 169-83, at p. 183. This view was echoed by the constituency boundary commission in 1980 (*Dáil Éireann Constituency Commission: Report* (Prl. 8878; Dublin: Stationery Office, 1980), p. 13). In its 1988 report a more specific conclusion was reached: “the Commission considered that a departure from the mathematical average of 8% or over would be unacceptable and, in all probability, contrary to the provisions of the Constitution relating to equality of representation” (*Dáil Constituency Commission: Report* (Pl. 5984; Dublin: Stationery Office, 1988), p. 28).

<sup>64</sup> Thomas Brunell and Bernard Grofman, “The partisan consequences of *Baker v. Carr* and the one person, one vote revolution”, pp. 225-236 in Handley and Grofman, *Redistricting* (2008), p. 235.



#### 4.4 Options for Ireland

Broadly speaking, in this area, as in others, we see two options regarding the role an Electoral Commission might play in constituency boundary delimitation. The first would be for it to assume responsibility for the work now conducted by the Constituency Commission: the new commission would simply inherit the terms of reference of the Constituency Commission as laid down in the 1997 electoral act. These might be amended to allow the commission more latitude. For example, the provision that no constituency be entitled to more than five deputies might be relaxed. Otherwise, though, the Electoral Commission would simply be replacing the Constituency Commission in an arrangement which has well-established precedent in other countries.

The second option, bringing Ireland into line with other countries that use proportional representation, is at the same time more demanding and less demanding than this. It is more demanding in that public and elite opinion has come to accept apparently uncritically the view that in this respect Ireland should follow the British model, rather than the continental European one which proportional representation and multi-member constituencies suggest. Since this option would also imply an end to the limit of five on the number of deputies per constituency, it would not be particularly attractive to large parties, which tend to win a disproportionate number of seats in small constituencies. But it is also less demanding, in that if constituency boundaries were to be fixed for the long term, the responsible agency would need to do little more than preside over the re-allocation of seats between constituencies after each census.<sup>65</sup> A new Electoral Commission might thus easily supervise seat reapportionment along these lines, and this role might also be extended to cover European and local elections.

#### 4.5 Conclusion

In the area of Dáil constituency boundary revision, then, we are confronted initially with two options: whether the status quo should be preserved (this would entail retention of a Constituency Commission for Dáil and European elections, with separate arrangements for local electoral boundaries under the direction of the Department of the Environment), or whether these functions should be transferred to an Electoral Commission. There are important arguments of efficiency and transparency that suggest the latter course of action. As we have also suggested, the burden could be lightened by making a move to the kinds of provision that are normal in proportional representation regimes, with fixed constituency boundaries and use of a simple allocation formula for redistribution of seats following each census—an arrangement that could resolve the contentious issue of regular breaching of county boundaries.

It is true that other observers have reservations about the merits of transferring authority for constituency boundary revision to an electoral management body (EMB) such as an Electoral Commission. As the International IDEA *Handbook on electoral management design* puts it,

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<sup>65</sup> This possible approach is elaborated further in John Coakley, “Does Ireland need a constituency commission?” *Administration* 55 (4) 2008, pp. 77-114.

There are operational and cost-effectiveness advantages in an EMB taking responsibility for electoral district boundary delimitation. Boundary delimitation is, however, a politically divisive issue, and leaves an EMB open to attack by those who perceive the results as not serving their interests. Some electoral analysts therefore argue that boundary delimitation is best handled by a body other than an EMB, to shield it from potential politically motivated attacks that may damage the EMB's credibility.<sup>66</sup>

We would not number ourselves among such sceptical analysts in this respect. We note that, in general, such bodies as Electoral Commissions are just about as common as dedicated boundary commissions in filling this role elsewhere.<sup>67</sup> Furthermore, almost all of the cases cited by International IDEA (10 out of the 12 instances they mention) are electoral systems based on single-member districts, where the location of boundaries is critical, and controversy is to be expected. But this need not be the case in Ireland. It is true that the recommendations of Irish constituency boundary commissions have not always pleased everyone; but, in particular if a policy of maximising adhesion to existing administrative boundaries were taken up we would not envisage a continuation of complaints of this kind.

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<sup>66</sup> International IDEA, *Electoral management design: the International IDEA handbook* (Stockholm: International IDEA, 2006), p. 65.

<sup>67</sup> In the 60 cases discussed above where boundary delimitation is an issue, dedicated boundary commissions operate in 22 cases, Electoral Commissions have responsibility in 21, and in 14 responsibility rests with the legislature, in an essentially partisan approach; Handley, "Comparative survey" (2008), pp. 267-271.

# 5. Administration of the election: From Nominations to Declarations

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## 5.1 Introduction

Under this general heading we include four core aspects of electoral administration. These are: accepting nominations from parties and candidates; drawing up a polling scheme; administering the electoral process on polling day; conducting the count and declaring the results. The key question is whether these functions are best performed by local agents (as they are now) or by a national Electoral Commission or whether they should be shared between the local and national levels and, if so, how. As with the other sections of this report, we proceed by considering present arrangements, comparative models and options and recommendations.

## 5.2 Overview of present arrangements

*Nominations:* Any electoral system requires candidates to be nominated according to certain procedures. In the Irish case these procedures originally included having eight “assentors” and lodging a sum of money as a deposit, the sum being forfeit if the candidate failed to reach a specified share of the vote. Following recent High Court<sup>68</sup> and Supreme Court<sup>69</sup> decisions, the current nomination requirements involve either a certificate of affiliation with a registered political party or the certified support of thirty assentors or a deposit of €500.

*Polling schemes:* As a first step in the administration of the actual voting process, local authorities are required to draw up a scheme dividing the county in question into polling districts, identifying a polling place for each district and assigning voters to the relevant polling places. The polling scheme must be revised every ten years and is subject to consultation with the Returning Officer. While, at first sight, putting together a polling scheme may seem to be a very routine task, it has implications for access to the voting process and for what we identify in Section 7 as voter facilitation. Accordingly, the nuts and bolts of the polling scheme are likely to be a matter that a new Electoral Commission will want to have some influence on. This may not require much change from present procedures since, as noted above, polling schemes are subject to national (i.e. departmental and ministerial) approval.

*The polling process:* The smooth running of the polling process involves a substantial logistical effort. This ranges from major tasks such as requisitioning the buildings in which polling is to take place and recruiting the personnel to man the polling places, to supplying the pencils for marking the ballots. All of these tasks, from the highest to the lowest, are ultimately the responsibility of the Returning Officer.

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<sup>68</sup> *Redmond v Minister for the Environment* [2001] 4 IR 61 (HC) (Electoral Act, 1992, ss 47 and 48; European Parliament, Elections, Act, 1997, s 13 and Sch 2, rr 8 and 9 unconstitutional)

<sup>69</sup> *Cooney v Minister for the Environment* [2007] 1 IR 296 (SC) (Electoral Act, 1992 s 46(4B) (as amended by the Electoral (Amendment) Act, 2002 s1(a)) unconstitutional)

*The count and the declaration of the results:* Having overseen the electoral process on polling day, the Returning Officer must turn on the following day to the task of opening the ballot boxes and counting the votes. Given the complexities of the electoral system of PR-STV, this is clearly the most demanding aspect of the whole process of Irish electoral administration. Once again, the ultimate responsibility lies with the Returning Officer who carries out his or her responsibility in the matter aided by backup, if required, from Senior Counsel and from the Franchise Section of the Department of the Environment, Heritage and Local Government. As the count proceeds, the Returning Officer is responsible for declaring candidates elected or eliminated according to the rules governing the system of proportional representation by means of the single transferable vote (PR-STV)<sup>70</sup>. This is an essential part of the drama of elections and something that an Electoral Commission would be likely to concern itself with in the context of any further consideration of a move to electronic voting<sup>71</sup>.

It is clear from the foregoing that, with the exception of the task of drawing up the polling scheme, where his or her role is purely consultative, the Returning Officer is the key individual in the administration of the electoral process. By law, the Returning Officer is the County Registrar, or the City or County Sheriff, with arrangements for deputy/assistant Returning Officers being made where constituencies are sub-divisions of counties or incorporate more than one county. Thus, by definition, the Returning Officer is a qualified and experienced lawyer. He or she also has the back-up support provided by the Department of the Environment, Heritage and Local Government. Nonetheless, what is striking in all of this is the degree to which responsibility is devolved to the local level and allocated to the Returning Officer.

### **5.3 Comparative models**

A detailed description of the ways in which these four functions are allocated between national and local levels in different jurisdictions is beyond the scope of this preliminary report. Accordingly it is useful that the International IDEA handbook on electoral management design has addressed the principles underlying the issue of concentration versus devolution of power in the management of elections. This section of our report draws on the relevant section of the IDEA handbook, which begins by noting that “vertical divisions of powers and functions may be between different branch levels of the one national EMB [electoral management body], between a national EMB and separate provincial EMBs ..., or between national and local EMBs, as in the UK”<sup>72</sup>. Current Irish practice approximates to the national-and-local model. The IDEA discussion also notes the Swedish case which “operates a highly decentralised electoral management structure which consist of a national EMB for policy coordination and local authorities which manage

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<sup>70</sup> Sinnott, Richard, ‘The rules of the electoral game’ in Coakley, John, and Michael Gallagher (eds), *Politics in the Republic of Ireland (4<sup>th</sup> edition)* (Dublin: Routledge in association with PSAI Press, 2005), pp. 105-134

<sup>71</sup> Given the history of electronic voting in Ireland, it would seem sensible to have the future of the current chosen electronic system decided separately from the work of the proposed Electoral Commission.

<sup>72</sup> International IDEA, *Electoral management design: the International IDEA handbook* (Stockholm: International IDEA, 2006), p. 17

elections”<sup>73</sup>. Interestingly, the IDEA handbook includes among its several case studies a report on the highly decentralised electoral management structure in Norway, which invokes the maxim “if it ain’t broke, don’t fix it”.

#### **5.4 Options and recommendations**

Current Irish arrangements for the administration of nominations, polling schemes, the polling process and the counting of votes have several distinct advantages. In the first place, they appear to enjoy a high degree of legitimacy, an attribute that is related to the fact that they operate at a local level. Secondly, they are seen to be effective. This is partly a matter of good administrative practice. However, it is more than just a matter of good management. The fact that these functions are carried out locally has the particular additional advantage of making it possible to mobilise major local infrastructure and local human capital for what are essentially episodic events. While, no doubt, various improvements could be and should be made to the aspects of electoral administration considered in this section of our report, our overall recommendation is that the devolved character of the process is the key to its success and should not be tampered with. This implies that the role of a new Electoral Commission in these areas would be a matter of oversight and policy development. There are good comparative models for just such a division of labour.

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<sup>73</sup> Ibid., p. 18

## 6. Party and election funding

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### 6.1 Introduction

One of the crucial elements in maintaining confidence in the democratic process is the effective regulation of the funding of political parties and candidates at elections. This regulation should ensure transparency in the sources of funding available to parties and candidates and remove any grounds for the perception of corruption or undue influence on elected representatives arising from the way in which the political process is funded. At present, a key role in this area is performed by the Standards in Public Office Commission (SIPO).

### 6.2 Overview of present arrangements

SIPO replaced the Public Offices Commission, created by the Ethics in Public Office Act, 1995.<sup>74</sup> Its initial functions related to the maintenance of the ethical standards for holders of public office which that legislation sought to establish. The functions of that Commission were extended to include the monitoring of payments to political parties, political donations and election expenditure by the Electoral Act, 1997. That body was superseded by the Standards in Public Office Commission under the Standards in Public Office Act, 2001, which has the same combination of functions in relation to ethics legislation and party and election funding.<sup>75</sup> Both the Public Offices Commission and the SIPO have produced annual and *ad hoc* reports of great value in assessing the requirements for an effective election management body in relation to party and election funding. We conclude that there is no very strong connection between SIPO's functions under the Ethics and Standards Acts and those vested in it under the Electoral Acts. It would, therefore, be a relatively straightforward matter to separate these two sets of functions and to transfer the latter set to a new electoral management body—with the appropriate degree of transfer of personnel and assets from SIPO.

At present, the Standards in Public Office Commission (SIPO) has several statutory functions that would potentially fall within the remit of a future Electoral Commission. The main relevant functions performed by SIPO are as follows—

- receiving and publishing donation statements from political parties, members of the Oireachtas, candidates at presidential, Dáil, Seanad and European elections
- receiving returns in respect of the political donation accounts which certain persons are required by law to maintain
- receiving and publishing election expenses statements from candidates at presidential, Dáil, and European elections and from the national agents of political parties at Dáil and European elections

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<sup>74</sup> Ethics in Public Office Act, 1995 s 21(1).

<sup>75</sup> Standards in Public Office Act, 2001 ss 2 and 15.

- processing applications for the reimbursement of election expenses of candidates under the Electoral Acts
- registering “third parties” for the purposes of the Electoral Acts
- receiving audited annual reports of Exchequer Expenditure from parties in receipt of public funding and audited annual reports of expenditure in relation to the Party Leaders and reporting to the Minister for Finance in this respect
- reporting annually or in respect of specific elections or where it considers it appropriate on the performance of the functions outlined above

One should also note those existing statutory functions in relation to elections which SIPO does not perform, but which are instead instructed to other bodies. SIPO does not—

- maintain the Register of Political Parties
- administer the payment of public funds to qualified political parties or of the party leaders allowance
- have any function, even of a supervisory character, in relation to the Local Elections (Disclosure of Donations and Expenditure) Act 1999 as amended by the Electoral (Amendment) Act 2001<sup>76</sup>

In its *Review of the Electoral Acts, 1997 to 2002* SIPO characterised its role and standing as follows—

Through its own research and ongoing contacts with individuals and organisations in other jurisdictions, and with bodies which have an international remit, the Standards Commission is aware that, in relation to political funding in the widest sense, the model now existing in Ireland, as outlined in the Electoral Acts, is well regarded as reflecting good practice in terms of control, supervision and transparency.<sup>77</sup>

On the other hand, SIPO has more recently voiced its concern about whether the existing regulatory framework ensures real transparency in political funding.<sup>78</sup>

Our research and consultations suggest that, within the scope of the statutory framework which it has been given by the Oireachtas, SIPO has operated in an effective and co-ordinated manner and that, in some respects, it has been more successful than its UK counterpart. Insofar as there remain problems with the effectiveness of the existing law, it is beyond the scope of the present report to evaluate the nature of the changes required in the legislation to deal with the problems identified by SIPO.

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<sup>76</sup> It is the local authorities themselves to which statements of donations or expenditure or claims for reimbursement should be made in connection with a local election. There seem to be several reasons for considering that these function should, in part at least, be vested in a single electoral management body; these are explored in more detail below.

<sup>77</sup> *ibid* 2.

<sup>78</sup> *SIPO Annual Report 2007* (June 2008) 2-3.

The final form which the organisation, powers and resources required by any Electoral Commission might take would obviously depend on the range of functions it is expected to perform in regulating party and election finance. For example, if political parties and their accounting units were—as both the Council of Europe and SIPO itself suggest—required to submit for publication not merely returns of donations, but comprehensive audited accounts of their income and expenditure, this would have major implications for the staffing and resource requirements of the new body and the enforcement powers with which it should be endowed.<sup>79</sup> Since it is envisaged that the Electoral Commission would itself review and make recommendations as to the changes required in the Electoral Act, 1997 and later amending legislation, this would seem to be an additional reason for establishing that body first on a provisional basis and confirming its final status, powers and structure only once the basic decisions have been made by the Oireachtas as to what its longer-term functions ought to be in the area of party and election finance.

The proposals which SIPO made in its *Review of the Electoral Acts (December 2003)*<sup>80</sup> and its report on the 2007 Dáil general election<sup>81</sup> and the re-iteration of these recommendations in its most recent Annual Report<sup>82</sup> provide an agenda for reform which our research and consultations strongly suggest ought to be pursued by a new Electoral Commission.

However, we suggested that no such changes in the law, if decided upon, should be made in conjunction with the creation of a new regulatory framework, but that the new electoral management body should be specifically required to undertake consultations and research on these issues and to report its recommendations within a specified time period. Only when the Oireachtas has decided what action, if any, to take on these matters, should the legislation relating to the commission be amended accordingly.

At present, the legislation imposes duties on regulated persons and bodies to make returns of various kinds to SIPO and creates criminal offences, to be prosecuted by or with the consent of the Director of Public Prosecutions (DPP), in cases where a person or body has violated those obligations.<sup>83</sup> There seem to have been a number of cases in which SIPO have been confronted with a stark choice between referring a matter to the Gardaí with a view to a criminal prosecution and doing nothing in response to an apparent violation of the legislation.<sup>84</sup> In many situations, it is SIPO's practice to give persons ample opportunity to "remedy" a breach of the legislation (in relation to the time limits for making returns, for

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<sup>79</sup> Council of Europe—Committee of Ministers *Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns* (8 April 2003) Arts 11-13.

<sup>80</sup> SIPO *Review of the Electoral Acts, 1997 to 2002* (December 2003).

<sup>81</sup> SIPO *Report on disclosure of donations and election expenses at Dáil general election of 2007* (December 2007).

<sup>82</sup> SIPO *Annual Report 2007* (June 2008) pp 35-37.

<sup>83</sup> For example, the Electoral (Amendment) Act, 1997 s 25 (as amended by the Electoral (Amendment) Act, 1998 s 8, the Electoral (Amendment) Act, 2001 ss 49(e), 50(h) and the Electoral (Amendment) Act, 2002 s 4(c)); s 43 (as amended by the Electoral (Amendment) Act, 1998 s 15 and the Electoral (Amendment) Act, 2001 s 50(n).)

<sup>84</sup> SIPO *Annual Donation Statements and Statutory Declarations, in respect of 2007, furnished to the Standards in Public Office Commission by political parties pursuant to section 24 of the Electoral Act 1997* (June 2008) 8-9;



example) before referring the matter to the DPP.<sup>85</sup> There have also been cases in which a disagreement over the interpretation of the legislation between the PCO and the DPP have meant that a prosecution has not been brought in respect of what the commission considered to be a breach of the legislation.<sup>86</sup> As the law stands at the moment, SIPO has no independent enforcement powers and there is thus no opportunity for a court to decide which interpretation of the legislation is correct in the event that such a disagreement arises.

In the case either of a complaint or of an investigation initiated by SIPO itself, the Electoral Act, 1997 provides only a rudimentary framework for conducting an investigation—

(4) The Public Offices Commission may make such inquiries as it considers appropriate and may require any person to furnish any information, document or thing in the possession or procurement of the person which the Commission may require for the purposes of its duties under this Act.<sup>87</sup>

It is SIPO's practice to notify the person concerned and to give him or her fourteen days to comment, if the commission had formed the opinion that there may have been a contravention of the Electoral Acts. Having considered any such comment, SIPO is required to furnish a written report on the matter to the DPP (via An Garda Síochána) if it remains of the opinion that the Acts may have been contravened.<sup>88</sup>

The Electoral Act 1997 makes provision for payments from public funds for each party that qualifies for them on the basis that it is (a) a registered political party in respect of Dáil elections and (b) the total first preference votes obtained by its candidates at the previous general election expressed was not less than 2% of the total.<sup>89</sup> In each year, each qualifying party is entitled to a payment of €126,973 plus a further amount in proportion to the share of the first preference votes obtained by its candidates at the previous general election, provided that the total amount paid in any one year to all qualifying parties does not exceed a sum set at £3,000,000 (€3,809,214.24) in 1997 and which was indexed to every subsequent general increase of remuneration in the civil service.<sup>90</sup> For 2006, the year for which the most recent annual statement of payments is available from the Standards in Public Office Commission (SIPO), that fund stood at a total of €4,617,807.20.<sup>91</sup>

The parties are required to spend the money received in this way on “the general conduct and management of the party's affairs and the lawful pursuit by it of any of its objectives” including general administration; research, education and training; policy formulation, and

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<sup>85</sup> SIPO *Dáil General Election 24 May 2007—Donation Statements and Statutory ... Election Expenses Statements and Statutory Declarations ...* (December 2007) 12, 15, 36.

<sup>86</sup> PCO *Annual Report of the Public Offices Commission 2000* (PN 9503, 2001) 25.

<sup>87</sup> Electoral Act, 1997 s 4(4)

<sup>88</sup> SIPO *Guide To Functions, Records, Procedures and Practices* (n **Error! Bookmark not defined.**) *ibid.*

<sup>89</sup> Electoral Act, 1997 s 16 (definition of a “qualifying party”.)

<sup>90</sup> Electoral Act, 1997 s 17(1),(2) (as amended by the Electoral (Amendment) Act, 2001 s 50(c).)

<sup>91</sup> SIPO *Annual Statements of Expenditure of Exchequer Funding and Auditors' Reports, in respect of 2006, furnished to the Standards in Public Office Commission by qualified political parties pursuant to section 20 of the Electoral Act 1997* (June 2007) Part 2.

the co-ordination of the activities of the branches and members of the party.<sup>92</sup> Such payments to a party may not lawfully be applied to cover election expenses or on furthering any particular outcome at a referendum.<sup>93</sup>

SIPO does not administer the payment of public funds to qualified political parties or of the party leaders allowance. Instead the qualifying political parties are required to account annually to SIPO, with an auditor's report for verification, for their expenditure of such funds and SIPO reports to the Ceann Comhairle on the funding received by each party and how it was spent. On the other hand, payments cannot be made to political parties by the Department of Finance, unless SIPO has certified that has received the statements and reports which the party is required to make in respect of the preceding year and certified that these comply with the requirements of the legislation.<sup>94</sup> SIPO has issued detailed guidelines on payments to qualifying political parties and on the use of public moneys for electoral purposes.<sup>95</sup>

### 6.3 Comparative models

Other electoral management bodies to which one might look for guidance (and from which much might be learned in relation to the conduct of elections themselves) often have more limited functions than SIPO already performs. The Independent Electoral Commission in South Africa, for example, has functions that correspond to SIPO's role in respect of the public funding of qualifying parties.<sup>96</sup> However, there is no requirement in South Africa of disclosure of political donations made to parties, candidates, parliamentarians, nor any limitation on the amount of such donations, or any restriction of donations by foreign donors.<sup>97</sup>

While there is a somewhat greater regulation of donations and expenditures in India, it is not as comprehensive as is required in Ireland, nor is there much confidence in the effectiveness of the regulations in practice.<sup>98</sup> While donations are limited by law they need not be publicly disclosed and while expenditures by candidates are limited, there is no restriction or on the expenditures incurred by political parties. In general terms, there is widespread criticism of the effectiveness of these controls in reality and sanctions are in practice available only against individual candidates.

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<sup>92</sup> Electoral Act, 1997 s 18(1)(a) (as amended by the Electoral (Amendment) Act, 2001 s 50(d).) They are deemed to include provision in respect of expenditure on the promotion of participation by women and young persons in political activity: *ibid* s 18(1)(b).

<sup>93</sup> Electoral Act, 1997 s 18(2).

<sup>94</sup> *ibid* s 19(4).

<sup>95</sup> SIPO *Guidelines for Political Parties on Exchequer funding under the Electoral Acts* (November 2006); *Use of Exchequer Funding for Electoral Purposes* (November 2006)

<sup>96</sup> Public Funding of Represented Political Parties Act, 1997 (No. 103 of 1997) (SA)

<sup>97</sup> Lowry, Michael P. "Legitimizing Elections Through the Regulation of Campaign Financing: A Comparative Constitutional Analysis and Hope for South Africa" (2008) 31 *Boston College Comparative and International Law Review* 185, 203-207.

<sup>98</sup> See Sangita, S.N. "India" in Grant, Thomas D. (ed.) *Lobbying, Government Relations and Campaign Finance Worldwide—Navigating the Laws, Regulations and Practices of National Regimes* (Oceana Publications, 2005) pp 169-200.

In parallel with the general statutory framework, there was a struggle between the Supreme Court and the Parliament of India between 2002 and 2003 as to whether candidates at parliamentary elections should be required to make *inter alia* a public declaration of their personal assets and liabilities (and those of their spouses and dependent children) before seeking election. The Supreme Court resolved the conflict by invalidating an amendment to the Representation of the People Act which attempted to substitute a requirement that elected candidates should subsequently make such disclosure to the presiding officer of the house to which they have been elected.<sup>99</sup> This further illustrates the difference in circumstances between India and Ireland and the limited value of experience in the former to the reform of electoral law and practice here.

These remarks can be paralleled in relation to Australia, a jurisdiction from which much can otherwise be learned as to how to organise and operate an Electoral Commission successfully. For instance, there is at federal level only a requirement of disclosure of donations received and not a limitation on the annual amount and there is no longer any limitation of campaign expenditures at federal or (with one exception) at state level. Nor are foreign donations or corporate donations prohibited. The looseness of the Australian current system has been the subject of some trenchant criticism.<sup>100</sup>

The system which SIPO has been given the function of administering is as or more ambitious and comprehensive a scheme for regulating political financing than has been attempted in the other countries to which one would otherwise look for guidance. For example, at federal level in Canada the regulation of party and election funding follows similar lines to those set out for SIPO by the relevant legislation.<sup>101</sup> Given that it does not seem to be the intention that the establishment of a new electoral management body should be accompanied by less regulation of political donations and expenditures, there does not seem, therefore, to be great point in prolonging a survey of foreign systems in this regard. In addition, there is no uniform pattern internationally as to whether an electoral management body has responsibility for the regulation of party and election finance (or the registration of political parties).<sup>102</sup>

Having surveyed a wide range of other models, current and proposed practice in this field in the United Kingdom seems to be of greatest relevance. As well as a general similarity in political culture and electoral traditions, there are strong practical reasons for looking to the UK for practices and standards which might inform the process of reform in Ireland, including the need for effective co-operation between the relevant regulatory bodies in the two jurisdictions in relation to the party political activities which straddle the border.

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<sup>99</sup> *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294; *People's Union for Civil Liberties (PUCL) v Union of India* (2003) 4 SCC 399.

<sup>100</sup> Young, Sally and Tham, Joo-Cheong *Political Finance in Australia: A Skewed and Flawed System* (Canberra, 2006) [http://arts.anu.edu.au/democraticaudit/papers/focussed\\_audits/20061121\\_youngthamfin.pdf](http://arts.anu.edu.au/democraticaudit/papers/focussed_audits/20061121_youngthamfin.pdf) (Last accessed 6 August 2008) See also Orr, Graeme "Australia" in Grant (n 98) p 14.

<sup>101</sup> See Feasby, Colin "Canada" in Grant (n 98) pp 57-95.

<sup>102</sup> International IDEA, *Electoral management design: the International IDEA handbook* (Stockholm: International IDEA, 2006), par 103.

In considering what types of investigative powers could be conferred on an electoral management body, it is useful to look to some of the main proposals which the UK government has brought forward in order to improve the effectiveness of the Electoral Commission in that jurisdiction. The Political Parties and Elections Bill, currently before Parliament, would if enacted, empower the Commission to issue disclosure notices requiring registered parties and other regulated persons and bodies to produce documents relating to the income and expenditure of the organisation or individual or to provide any information or explanation which relates to that income and expenditure.<sup>103</sup> Similar powers would exist where the Commission have reasonable grounds to suspect that a person has committed an offence under this Act, or otherwise contravened any restriction or other requirement imposed.<sup>104</sup> In particular, an investigator could request any individual who the investigator reasonably believes has relevant information to attend and answer any questions that the investigator reasonably considers to be relevant.<sup>105</sup> The Commission could also apply to a justice of the peace for a search warrant, in respect of documents which a person has not produced although required to do so or any other documents relevant to an investigation.<sup>106</sup> This would represent a significant extension of the “supervisory powers” at present conferred on the UK Commission—to require persons to produce books, documents or other records for inspection or to provide information and to enter premises occupied by a supervised organisation or individual in order to carry out such inspections.<sup>107</sup>

The Bill would go on to provide the UK Electoral Commission with a wide range of powers to impose what are termed “civil sanctions”—including fixed monetary penalties, discretionary requirements (which can take the form either of a monetary penalty or an instruction to take certain actions), stop notices (to require the recipient to cease engaging in specified conduct) and to accept enforcement undertakings in respect of breaches of the regulatory requirements.<sup>108</sup> The power to impose fixed monetary penalties or discretionary requirements is to arise where the Commission is “satisfied beyond reasonable doubt” that a prescribed offence has been committed or that a contravention of a prescribed requirement or restriction has taken place.<sup>109</sup> The power to issue stop notices is to be conferred whenever the Commission “reasonably believe” that the person concerned is committing an offence or contravening a requirement or restriction and that “the activity ... is seriously damaging public confidence in the effectiveness of the controls in this Act on the income and expenditure of registered parties and others, or presents a significant risk of

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<sup>103</sup> *Political Parties, Elections and Referendums Act 2000 (c. 41) Sch 19A par 1(3)* (proposed to be inserted by the Political Parties and Elections Bill s 2 and Sch 1.) An authorised person may, for the purposes of the carrying out by the Commission of their functions (a) at any reasonable time enter premises occupied by an organisation to which, or an individual to whom, paragraph 1 applies, and (b) having entered the premises, inspect any documents relating to the income and expenditure of the organisation or individual. (par 1(5).)

<sup>104</sup> *Political Parties, Elections and Referendums Act 2000 (c. 41) Sch 19A par 2(2)*

<sup>105</sup> *ibid Sch 19A par 2(4)*

<sup>106</sup> *ibid Sch 19A par 3(1)*

<sup>107</sup> PPERA (c. 41) s 146.

<sup>108</sup> *ibid Sch 19B pars 1-15* (as proposed to be inserted by the Political Parties and Elections Bill s 3 and Sch 2.)

<sup>109</sup> *ibid Sch 19B pars 1(1)-(4) and 5(1)-(4)*.

doing so.”<sup>110</sup> The power to accept enforcement undertakings is to arise where the Commission “have reasonable grounds to suspect” that the person concerned is committing an offence or contravening a requirement or restriction.<sup>111</sup>

The proposals to extend the UK Commission’s powers of investigation and sanction arise out of the Committee on Standards in Public Life (CSPL)’s review of the Electoral Commission, published in January 2007.<sup>112</sup> Both proposed sets of amendments reflect the CSPL’s general recommendation that the 2000 Act

should be amended to make it clear that The Electoral Commission has a duty to investigate proactively allegations or suspicions of failures to comply with the regulatory framework. ... the term “monitor” be replaced by “regulate”.<sup>113</sup>

The recommendations for enhanced powers reflected the UK Commission’s own perception of what its role should be<sup>114</sup> and have been endorsed by the UK Government, both in its response to the CSPL’s report<sup>115</sup> and in the White Paper which forms the basis of the Bill currently before Parliament.<sup>116</sup>

Some of the criticisms of the UK Commission’s performance as “regulator” of party finance would not seem to be applicable to SIPO—for example, in relation to the lack of an adequate practice of giving advice in relation to the interpretation and application of the legislation.<sup>117</sup> However, it does seem likely that the powers of SIPO do need to be enhanced, in order to perform its regulatory function.

## 6.4 Options for Ireland

It seems unlikely that the Oireachtas will choose to undertake a radical deregulation of the field of party and election funding (whether by reducing disclosure requirements, removing expenditure limits or significantly simplifying the applicable definitions and rules.) In the absence of such deregulation, a major regulatory role (and perhaps an enhanced one) will continue to fall to some public body. We have identified three main options in relation to the assignment of functions in relation to the regulation of party and election funding.

- 1) Retain the status quo
- 2) Confer additional powers and functions on SIPO

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<sup>110</sup> *ibid* Sch 19B pars 10(2).

<sup>111</sup> *ibid* Sch 19B par 15(1)(a).

<sup>112</sup> Committee on Standards in Public Life (CSPL) *Eleventh Report—Review of the Electoral Commission* (Cmd 7006 January 2007).

<sup>113</sup> *ibid* par 2.25.

<sup>114</sup> *ibid* pars 2.21, 2.49. The Commission supported these recommendations in its response to the CSPL’s report (*Electoral Commission response to the recommendations of the eleventh report of the Committee on Standards in Public Life* (March 2007) pp 2-5) and welcomed the White Paper’s commitment to give effect to them (*Party finance and expenditure in the United Kingdom: the Government’s proposals—The Electoral Commission’s response* (July 2008) pars 2.6-2.12).

<sup>115</sup> *Government Response to the Committee on Standards in Public Life’s Eleventh Report—Review of the Electoral Commission* (Cmd 7272 November 2007) pp 3-5.

<sup>116</sup> *Party finance and expenditure in the United Kingdom—The Government’s proposals* (Cmd 7329 June 2008) par 2.22.

<sup>117</sup> CSPL *Eleventh Report* (n 112) par 2.33.

### 3) Transfer SIPO's functions to a new electoral management body

We will now briefly consider the advantages and disadvantages of each of these options.

#### **1. Retaining the status quo**

The main advantage of retaining SIPO in its current form, with its existing powers and functions would be the maintenance of an existing body of expertise and practice. It seems to us that SIPO satisfactorily discharges the statutory mandate which it has been given, in light of the resources which are made available to it. There is also a risk that increasing the level of regulation would place undue burdens on political parties and their members and further discourage voluntary participation in political life, particularly at local level.

It seems less likely that it would be satisfactory to retain status quo if significant reforms were introduced to address SIPO's own criticisms of the lack of transparency in the existing regime of funding of election campaigns. In that event, it seems likely that an extension of the regulatory powers and resources available to the body would be required. Furthermore, there seems a strong case that such an extension would increase SIPO's effectiveness in discharging its existing mandate, even if it remains essentially unaltered.

#### **2. Conferring additional powers and functions on SIPO**

The main advantage of retaining SIPO in its current form, whilst increasing its effectiveness as a regulator, is that this approach would build on the organisation's existing strengths and capabilities with the minimum of disruption.

The main disadvantage is that such an enhancement of the role of SIPO might, depending on the form which it takes, require a significant increase in the personnel numbers and skills available to it and could, in some scenarios, involve the operation of regional branches, at least during election campaigns. At present, while SIPO has separate legal personality and its own secretary and personnel assigned to it, it is in many respects a division of the Office of the Ombudsman, in its accommodation, support and procurement. SIPO is serviced by civil servants of the State in the Office of the Ombudsman. (The same position pertains in relation to the Referendum Commission, which is serviced by the same civil servants.)

It is not clear that a significant increase in the range and scale of powers and functions entrusted to SIPO could be supported by the existing arrangements. The establishment of a distinct body, with its own Chief Executive, staff, budget and premises might be required, depending on the nature of the functions which are to be performed in the area of party and election funding regulation. This is even more likely if other functions, such as those of the Registrar of Political Parties and the Constituency Commission or the registration of electors are given to a single body which also takes on the functions that SIPO currently performs.

#### **3. Transferring SIPO's functions to a new electoral management body**

From the point of view of regulating party and election funding, the main advantage of establishing a new body is that it would have greater capacity and flexibility. This is particularly the case if the electoral management body has a wide range of functions,

including the registration of electors, which it performs at local as well as national level. This would mean that the body would have a staff that was sufficiently large and dispersed to perform a range of different functions at different points in the election cycle. In our view, there is no reason why the functions of SIPO under the Electoral Acts should not be separated from its functions under the Ethics and Standards Acts, so that they are carried out by different bodies.

The main disadvantage of establishing a new body would be the increased cost, in terms of greater staffing levels and overheads.

The choice therefore appears to us to lie between the second and third options identified above, conferring additional powers and functions on SIPO as currently constituted or transferring its functions to a new electoral management body. Which of these options is preferred depends largely on the range and scope of the additional regulatory powers and functions which it is thought are required in relation to party and election funding, a matter which is outside the terms of reference of this report.

It has already been suggested that a new electoral management body should, having determined that serious breaches of the party financing legislation have occurred, have the power to cancel the registration of a political party.

There also seems to be a strong case for giving a new electoral management body the power to make deductions from the amounts payable to parties under the Electoral Act 1997, in the event that the party has failed to comply with its obligations under electoral legislation, in a manner proportionate to the extent of that non-compliance. At present, there is provision for such a deduction to be made, but only in respect of the amount by which the election expenses incurred by the national agent of a political party exceeds the level permitted by law.<sup>118</sup> Similar provision is made by law for deductions from the reimbursement of election expenses to which a candidate is entitled.<sup>119</sup> A suitable statutory precedent might be the Local Government Act, 2001 section 233(1)—

. . . where in the opinion of the Minister a local authority has failed or substantially failed to comply with a statutory duty under any enactment, the Minister may reduce or withhold payment of any grant or any other money due or otherwise payable to the local authority.

As in the case of cancellation of the registration of a political party it would, of course, be necessary to provide for an appropriate appeals mechanism for those aggrieved by such decisions.

Similar provision should be made in relation to withholding, in whole or in part, reimbursement of election expenses to candidates who otherwise qualify for such a payment.

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<sup>118</sup> Electoral Act, 1997 s 40(a)

<sup>119</sup> For example, Electoral Act, 1997 s 40(b) (as amended by the Electoral (Amendment) Act, 1998 s 14.)

In relation to the regulation of local elections, SIPO in its *Submission to the Minister for the Environment, Heritage and Local Government concerning spending limits at local election* noted that—

International best practice suggests that disclosures of donations and election expenditure should be made to a body which is, and is seen to be, independent in the performance of its functions and which can investigate instances of non-compliance with the legislation. The Standards Commission recommends that where a valid complaint concerning non-compliance with spending limits at a local election is received, the matter should be investigated by an independent body and not by the local authority concerned. That independent body should also have the power to conduct inquiries or investigations in the absence of a complaint and on its own initiative.

In view of the above the Minister may wish to consider to whom statements of expenditure at local elections should be furnished and to introduce a statutory requirement on the body concerned to publicise the availability of these returns.<sup>120</sup>

We note that this reflects the options under consideration by the Department as part of its general review of local government.<sup>121</sup> The new Electoral Commission, in the initial phase of its existence, should review and make recommendations on the issue of whether the investigation of alleged or suspected contraventions of the law, on foot of a complaint or on the commission's own initiative should be a function of the Electoral Commission and whether it should monitor and give guidance to local authorities in the performance of their functions in this regard. Only when the Oireachtas has decided what action, if any, to take on these matters, should the legislation relating to the new commission be amended, if that is required.

Strengthening the investigative and regulatory powers of SIPO or any new body set up to replace it is another essential element in ensuring the actual effectiveness of and public confidence in any system of regulation of party finance. As the IDEA International Handbook on *Funding of Political Parties and Election Campaigns* puts it—

Enforcement ... is critical. Lack of enforcement is probably more dangerous than lack of rules, since it leads to disenchantment and cynicism toward democracy. Any kind of regulatory framework for political activity presupposes a minimum degree of respect for and capacity to implement the rule of law. ...<sup>122</sup>

Whatever the specific powers of investigation and enforcement that are conferred on a single electoral body, it would seem appropriate also to give effect to one of the other recommendations made by the Committee on Standards in Public Office in the UK and which has been accepted both by the UK government and the Electoral Commission—

The Electoral Commission should establish a compliance unit, separate from the administration of the regulations, which can take prompt investigative action, using the

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<sup>120</sup> SIPO *Submission to the Minister for the Environment, Heritage and Local Government concerning spending limits at local election* (September 2007) Section 2.

<sup>121</sup> *Green Paper on Local Government Reform: Stronger Local Democracy - Options for Change* (April 2008) p 132.

<sup>122</sup> IDEA International *Funding of Political Parties and Election Campaigns* (Stockholm 2003) 172.



power provided in PPERA following information received either externally or internally of possible breaches of the regulatory framework.<sup>123</sup>

The UK Electoral Commission has recognised the need for “a more proactive approach to monitoring campaign spending, including ‘on the ground’ intelligence gathering” and committed itself to “employing individuals with skills in the key areas of audit, investigation and enforcement, and completely restructuring our Party and Election Finance Team.”<sup>124</sup> The availability to a body of skills of the kind just mentioned is crucial to its success as an effective regulator of political fund-raising and expenditure.

However, in the words of the Committee on Standards in Public Life, the body responsible for regulating political and election funding should not—

continually, or disproportionately, intervene in the financial affairs of political parties.<sup>125</sup>

Unduly onerous requirements on political parties and candidates would tend to discourage voluntary participation in political life and this would not be conducive to a healthy and vibrant democracy. On the other hand, the existence of strong powers of enforcement, to be held in reserve for cases where they prove necessary, is perfectly compatible with a flexible and pragmatic approach to reporting requirements and compliance with them

We do not suggest that new investigative or enforcement powers should replace the existing criminal penalties which are laid down in the legislation. What is desirable is a graduated scale of responses, from advice and guidance through to referring a case to the Director of Public Prosecutions for consideration of a prosecution

In our view, the additional powers and functions proposed above would best be exercised by a new electoral management body, separate from the Office of Ombudsman and which was not also responsible for the implementation of the Ethics and Standards Acts. The nature and extent of these powers and functions would require a distinct agency, with its own Chief Executive, staff and budget.

On balance, therefore, we recommend the third option: transferring SIPO’s functions under the Electoral Acts to a new electoral management body.

## 6.5 Conclusion

In summary, our recommendations are as follows—

- pending the outcome of a review of the law relating to the regulation of party and election funding, a single body should combine the functions currently performed by SIPO and by the Registrar of Political Parties, with the modification that

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<sup>123</sup> CSPL *Eleventh Report* (n 112) par 2.45. At the same time, the CSPL recognised the need for “a robust system for assessing the potential seriousness, and risk to public confidence, of any allegation before launching an investigation ... [to avoid] widespread and numerous investigations into vexatious, trivial and politically motivated complaints.” (ibid)

<sup>124</sup> *Party finance and expenditure in the United Kingdom: the Government’s proposals—The Electoral Commission’s response* (July 2008) par 2.2.

<sup>125</sup> CSPL *Eleventh Report* (n 112) par 2.26.

- it should be a condition of registration of a party that it adopts a scheme setting out the arrangements for regulating its financial affairs for the purposes of the legislation and identifying any accounting units within the party that will have separate reporting requirements
- the registration authority should have the power to remove a party from the register of political parties if it is of opinion that serious or repeated breaches have occurred of the obligations imposed by electoral law in relation to the financial affairs of the party (see ...)
- the body responsible for regulating political and election funding should have a discretionary power to direct the partial or total withholding of public funds to which parties or candidates would otherwise be entitled, where in the opinion of the body the party or candidate has failed or substantially failed to comply with a statutory duty under any enactment, to the extent which the body considers proportionate to the non-compliance which has occurred
- the body responsible for regulating political and election funding should be given the full range of investigative and enforcement powers which a modern regulator is typically given—the Consumer Protection Act 2007 is suggested as a useful model
- the final powers and functions of the Electoral Commission in relation to party and election funding should be determined by the Oireachtas, following a review undertaken by the commission and Oireachtas review of its recommendations in that respect

## 7. Research and promotion

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### 7.1 Introduction

In this section of the report we address two issues: (1) whether the proposed Electoral Commission should carry out research on the behaviour of the voters and on the conduct of elections or should arrange for such research to be carried out by others, or should do neither of these things and (2) whether it should become involved in promoting voter registration and participation.

### 7.2 Current arrangements

The current situation regarding policy-relevant research on elections and electoral behaviour is not as bleak as might be assumed. Research of this kind has been funded under various PRTL (Programme for Research in Third-level Institutions) initiatives undertaken by the government through the Higher Education Authority. It has also been funded by the IRCHSS (Irish Research Council for the Humanities and Social Sciences). Research has also been undertaken by the CSO (Central Statistics Office) – partly at the behest of the Franchise Section of the Department of the Environment, Heritage and Local Government – and an extensive programme of research was supported by the Commission on Electronic Voting. The Joint Oireachtas Committee on the Constitution has also commissioned research on voting in referendums and the European Commission Representation in Ireland and the Department of Foreign Affairs have commissioned research on Irish EU referendums, especially those dealing with the Nice and Lisbon treaties. Finally, an extensive programme of research-cum-consultation was undertaken by the Government Task force on Active Citizenship and by the Democracy Commission set up by the voluntary advocacy group TASC (Think Tank for Action on Social Change) . The various efforts just noted have resulted in a series of publications and reports<sup>126</sup>. The question is whether a new Electoral Commission should support this kind of research and perhaps extend or intensify it and whether it should do so by direct involvement in the research process or by commissioning research from individuals or groups or organizations with experience and expertise in the area?

### 7.3 Comparative models

Before examining how other Electoral Commissions handle the research issue, we should address the underlying question of the need for such research and what kind of research would be involved. Given the policy-recommending role assigned to an Electoral Commission and the need for any such policy recommendations to be evidence-based, there is a clear need for an Electoral Commission to have access to the results of research in this area. In order to decide who or what body should be responsible for this research, it is necessary to examine the kinds of research issues that might arise. While a comprehensive account of the relevant research agenda is not possible within the scope of this report, we can illustrate the kinds of issues involved by taking one particular but central research problem as an example, namely the need to achieve a better understanding of voter turnout/abstention.

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<sup>126</sup> See Appendix 2

Any analysis of voter turnout must begin by distinguishing between two types of abstention, namely circumstantial abstention and voluntary abstention. Circumstantial abstention arises when an individual is prevented from voting by the circumstances they find themselves in on polling day. Examples include absence from home, lack of time due to work or other obligations, illness or incapacity and problems with voter registration. Typical sub-categories of voluntary abstention are lack of interest in politics, lack of trust in politicians/the political system, insufficient knowledge to make an informed choice and no perceived differences between the competing parties or candidates.

**Figure 1: A typology of the variables affecting voter participation/abstention**

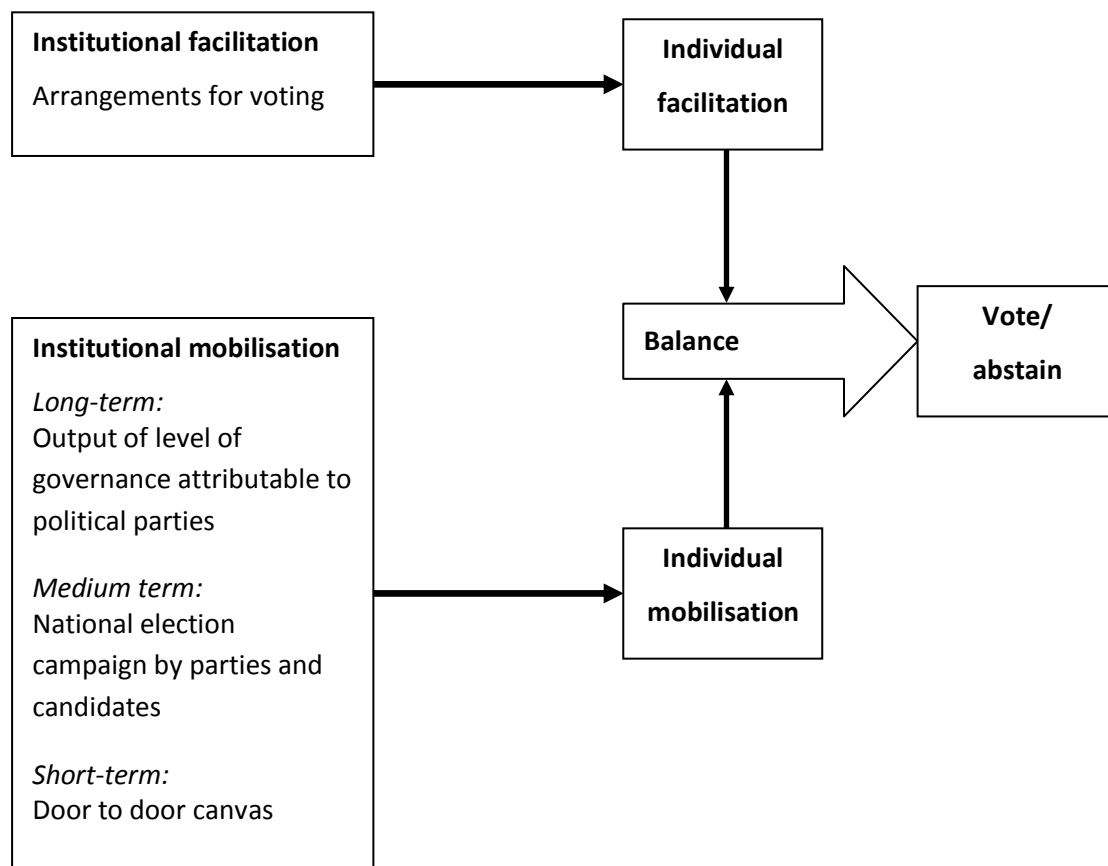
<i>Nature of the effect</i>	<i>Location of the variable</i>	
	Institutional-level	Individual-level
Facilitation	<b>Institutional facilitation</b> Attributes of the administration and regulation of elections that make it easy to vote	<b>Individual facilitation</b> Attributes of individual electors' circumstances that make it easy to vote
Mobilisation	<b>Institutional mobilisation</b> Attributes of the political system and of the political process that make people want to vote	<b>Individual mobilisation</b> Attributes of individual electors' political outlooks that make them want to vote

Identification of these two types of abstention points to two broad factors that affect voter turnout. Thus circumstantial abstention is affected by the degree of *voter facilitation* and voluntary abstention is affected by the degree of *voter mobilisation*<sup>127</sup>. It is important to note that both these factors can be attributes of institutions or attributes of individuals. Combining the facilitation/mobilisation distinction and the institutional/individual distinction leads to the four types of influences on voter turnout/abstention portrayed in Figure 1. Very briefly, the four types, starting from the top left and moving clockwise, are (a) administrative aspects that make it easy to vote, (b) individual circumstances that make it easy to vote, (c) individual attributes that make people want to vote and (d) attributes of the political system/process that make people want to vote. The value of this typology is that it identifies the kinds of research that need to be undertaken in order to understand the dynamics of turnout and abstention. Of necessity the dynamics lie in the connections between the four categories. Accordingly, Figure 2 sets out a simplified model of the

<sup>127</sup> On the distinction between circumstantial and voluntary abstention and between facilitation and mobilization, see Jean Blondel, Richard Sinnott and Pelle Svensson, *People and Parliament in the European Union: Participation, Democracy and Legitimacy* (Oxford: Oxford University Press, 1998), pp. 40-53 and 242-257.

linkages between the different kinds of facilitation and mobilisation and their effects on voter turnout. Because an Electoral Commission will have more leverage over some of these connections than over others, it is appropriate that it would direct its main research efforts towards certain areas of the model, while not of course neglecting the broader picture. Thus, Figure 2 suggests that an Electoral Commission ought to be primarily interested in research on voter facilitation, both in terms of the institutional aspects (the arrangements for voting) and in terms of the individual aspects (the ease of voting for the individual). However, the model suggests that such research would also need to take account of a range of mobilisation variables and especially of how facilitation and mobilisation interact.

**Figure 2: Basic model of the effects of facilitation and mobilisation on voter turnout**



In addition to research on the sources of voter turnout/abstention, an Electoral Commission would also probably wish to conduct or commission research on the voter registration process, on the pros and cons of electronic voting and on other issues that might arise (e.g. the extension of postal voting).

In considering comparative models of the handling of the research function, it is particularly noteworthy that the UK Electoral Commission started out in 2002 with a comprehensive research agenda. A small sample of the ensuing research output is presented in Figure 3. These examples point to the existence of a substantial body of policy-relevant research. However, the UK Electoral Commission is now in the process of phasing out its research programme in order to concentrate on what it sees as its core activities. On the other hand, several of the leading Electoral Commissions around the world continue to engage in such

research; examples include Australia and Canada. Thus, the corporate plan of the Australian Electoral Commission lists as one of its seven core business functions “to provide research, advice and assistance on electoral matters. The Canadian Electoral Commission has a “policy and research” section on its website and provides lists of research papers it has commissioned.

**Figure 3: Sample of research commissioned by the UK Electoral Commission, 2002-08**

Differential rates of postal vote rejections in England and Wales 2007 (Jun 2008)  
Completeness and accuracy of the electoral registers in Greater London - methodological report (Oct 2007)  
Public Perspectives: The future of party funding in the UK. Final Report (Nov 2006)  
Local elections 2006 - data analysis (Sep 2006)  
MORI report - attitudes to voting and the political process 2003 (Dec 2004)  
Gender and political participation (Apr 2004)  
An audit of political engagement - full report (Mar 2004)  
Political engagement among black and minority ethnic communities: what we know, what we need to know (Dec 2003)  
Turnout, attitudes to voting and the 2003 elections (Nov 2003)  
Scottish Parliament election 2003: analysis of turnout (Nov 2003)  
Public opinion and the 2004 elections (Oct 2003)  
Public opinion and the 2002 electoral pilot schemes (Oct 2002)

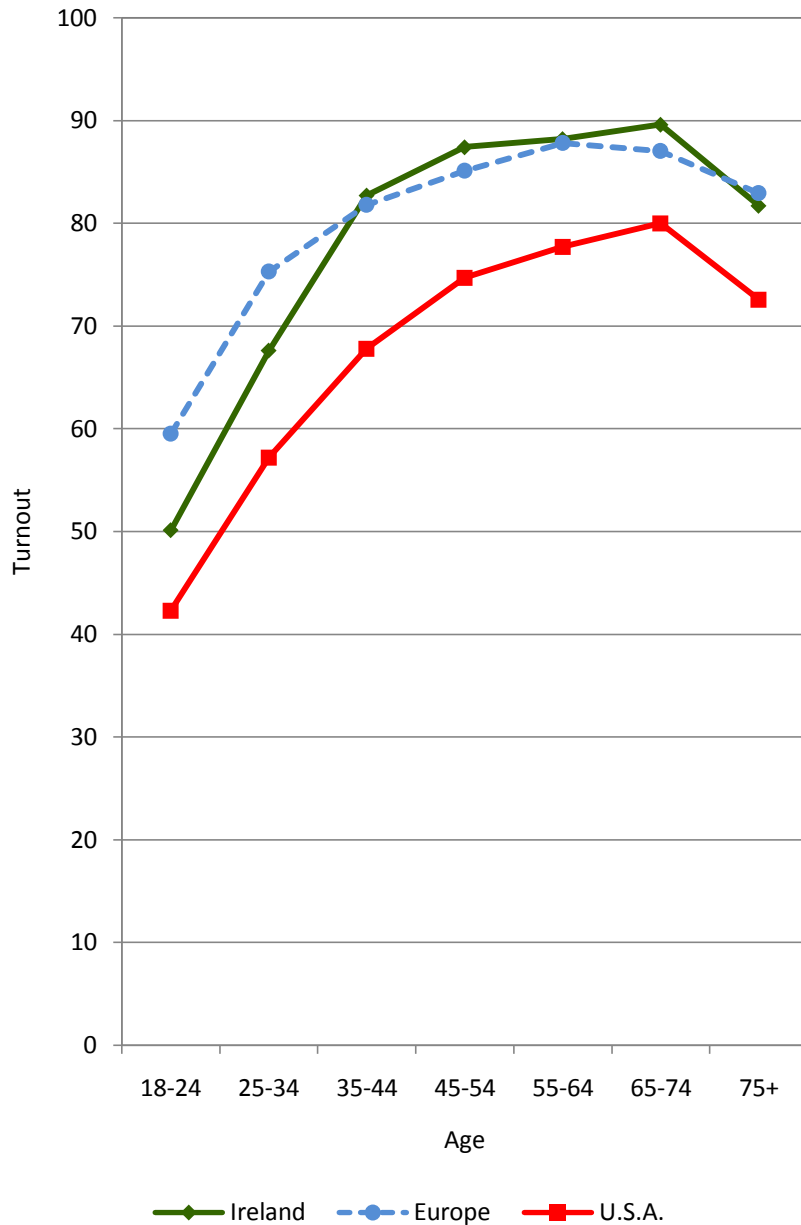
*Note:* These and other research reports are available for download at <http://www.electoralcommission.org.uk/publications-and-research/research-reports>

The concepts of facilitation and mobilisation are also helpful in discussing the potential promotional role of the commission. This report assumes that the Electoral Commission will be committed to doing everything possible to *facilitate* both registration and voter participation. Should it also have a role in promoting (i.e. *mobilising*) registration and voting?

The fact is that some individuals emerge as fully fledged would-be voters on reaching the age of eighteen. When this happens it is usually due to strong civic or partisan socialisation in the home. However, the very strong evidence of a substantial relationship between age and voter turnout that manifests itself across almost the entire age spectrum indicates that the making of a voter can take some considerable time, involving a process of learning to vote that is spread over a significant portions of the life cycle (see Figure 4). One way of speeding up this process would be for the Electoral Commission to share responsibility for mobilising both voter registration and voter turnout. Currently, the first of these functions is carried out through the annual advertising campaign mounted by the Franchise Section of the Department of the Environment, Heritage and Local Government. The second function (mobilisation of turnout) is currently limited to advertisements put out by the Referendum Commission in the context of each referendum. It could be argued that this sort of mobilisation should be extended to all electoral contests and should involve the

dissemination of information about the voting system in addition to making standard appeals to civic duty.

**Figure 4: Turnout by age in Ireland, Europe and USA**



Sources: Ireland – Quarterly National Household Survey, Q3-2002 (n=24,805)  
 Europe – European Social Survey, 2002-03 (22 countries, n=38,379)  
 USA – Current Population Survey, 2000 (n=74,174)

### 7.4 Options and recommendations

The body of policy-relevant research on Irish elections is impressive. However, it is a product of a favourable set of circumstances, some of which are entirely extraneous to the electoral policy-process, while some have grown out of specific policy issues (e.g. the problems of electronic voting). It is clear that any body that has substantial responsibility in the areas of

electoral policy and electoral management needs to have access to the best and most relevant research findings. This will not necessarily happen unless the electoral body is given the power to conduct and/or to commission research. Whichever of the latter two options is chosen, the Electoral Commission will require some in-house research expertise to, at a minimum, identify research needs and priorities and see to it that the findings feed into the policy process. A facilitation/mobilisation framework is suggested as an aid to identifying the research priorities and ensuring that they are pursued in a way that is policy-relevant. Research within the framework should also contribute to the effectiveness of initiatives taken by the commission to promote both voter registration and voter turnout.



## 8. Legislative options

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### 8.1 Introduction

At present the electoral code in Ireland is distributed over several Principal Acts, some of which have become encrusted with a series of amending measures in the course of the last fifteen years.<sup>128</sup>

### 8.2 Overview of present arrangements

The main Acts are—

The Electoral Act, 1992 and the Electoral Act, 1997

The Presidential Elections Act, 1993

The Referendum Act, 1994

The European Parliament Elections Act, 1997

In addition, the conduct of local elections is regulated by the Local Elections Regulations, 1995.<sup>129</sup>

As can be seen from the dates of the Principal Acts, the Department of the Environment and the Attorney General's Office had by the mid-1990s managed to secure an effective consolidation of each of the different branches of electoral law (except for Seanad elections) into a series of comprehensive Principal Acts.<sup>130</sup> It is clearly therefore not a prerequisite to greater clarity and transparency in the legislation that there be a single regulatory body responsible for the administration of elections.

In the course of our consultations, it was emphasised to us that “legislative hygiene” (to use a term coined in the course of one consultation session) would be of great assistance to those given the task of administering elections, as well as to candidates, their agents, the political parties and voters. By this was meant the desirability of having legislation that is comprehensive, clear and up-to-date, without constant cross-reference to several layers of later amendments being required.

As just pointed out, the establishment of an Electoral Commission is not a pre-requisite for such a “reconditioning” of the statute book, but it certainly provides an opportunity to do so

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<sup>128</sup> The relevant primary and secondary legislation is set out in the Appendix.

<sup>129</sup> Local Election Regulations, 1995 (SI No 297 of 1995). These too have been amended or affected both by primary legislation (eg Electoral Act, 1997 ss 70, 82 or the Electoral (Amendment) Act, 2001 s 54) and, to a much lesser extent, later statutory instruments (Electoral Act, 1992 (Section 165) Regulations, 1999 (SI 153 of 1999); the Electoral Act, 1992 (Section 165) Regulations, 2004 (SI No 237 of 2004)).

<sup>130</sup> Only the Electoral (Amendment) Act, 1996 interrupted this sequence, as it preceded the European Parliament Elections Act, 1997 by several weeks.

and the legislative options for establishing a new body do need to be examined in their own right.

The principal aim of the Electoral Act 1992 was clearly stated by the relevant Minister of State:

The sheer number of statutes relating to Dáil elections and the extensive amendment of the principal enactments have left the law in a very fragmented state. This is particularly inappropriate in the case of the electoral code which is of direct and immediate relevance to all citizens. It will be of benefit to everybody to have the basic law relating to the election of our national Parliament set out in a single comprehensive piece of legislation which is accessible and meaningful.<sup>131</sup>

Whilst the same level of fragmentation has not been recreated by the amendments passed to that legislation since 1992, the accessibility and usefulness of the legislation has been significantly reduced over that period.

In particular, the Standards in Public Office Commission (SIPO) has, on several occasions, placed on record its dissatisfaction both with some of the specific provisions which it is expected to monitor and enforce and with the disjointed state of the statute book in this area.<sup>132</sup>

The Commission has also made similar observations in relation to the Ethics Acts:

It requests that urgent consideration be given . . . in view of the complexity of the Ethics Acts generally, to the drafting of a consolidation Bill which would be more user-friendly.<sup>133</sup>

Several specific problems have been created by the piecemeal nature of the approach taken to the amendment of legislation over the last decade and a half. Part 3 of the Electoral (Amendment) Act, 2001 employed a method of adaptation of the existing law for the purposes of electronic voting that was particularly opaque and confusing.<sup>134</sup>

The Electoral (Amendment) Act 2004 section 33 provides a specific example of the difficulties created by the fragmented nature of the provisions in this area; the unintended consequences of the provision were pointed out by the Standards in Public Office Commission and had to be rectified by a subsequent amendment.<sup>135</sup>

In relation to the intelligibility of the language used in the Electoral Acts, the Law Reform Commission has cited several examples of inappropriate terminology and unnecessarily

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<sup>131</sup> *Electoral (No.2) Bill, 1991—Second Stage* (7 October 1992) 423 *Dáil Debates* col 14 (Mr D Wallace, TD.)

<sup>132</sup> *Standards in Public Office Commission - Annual Report 2006* (Dublin, 2007) p 23.

<sup>133</sup> *ibid* 31.

<sup>134</sup> The still-born Part 2 of the Electoral (Amendment) Act 2004 was something of an improvement but still left much to be desired in terms of clarity.

<sup>135</sup> *Standards in Public Office Commission - Annual Report 2004* (Dublin, 2005) pp 27-28; *Electoral (Amendment) Act 2005 s 6*; *Standards in Public Office Commission - Annual Report 2005* (Dublin, 2006) pp 15-16.

complicated phraseology in this area of the statute book.<sup>136</sup> Consolidation of the statute law in this area would give a valuable opportunity to address these concerns, which are applicable to the statutes of the early to mid-1990s, which themselves were the results of the last attempt at consolidation.

We considered how much scope there is for a radical simplification of the substance of the legislation. However, much of the underlying complexity arises from constitutional requirements which it is difficult to envisage being altered or policy considerations which seem likely to remain for the foreseeable future. For instance, the abolition of the four-fold distinction between presidential, Dáil, European and local government electors could only be removed in the event of a constitutional amendment which removed the requirement of Irish citizenship in relation to the first category. While the three other categories could be reduced to one, it seems unlikely that the Oireachtas would consider it appropriate, for example, for every person ordinarily resident in the State to have the right to vote in a Dáil election or to restrict the right to vote at a local election to citizens of a Member State of the European Union. Thus, even though it was reported to us that the implementation of the fourfold categorisation for registration purposes can pose significant practical difficulties, it does not seem that these can be avoided by removing it.

On the other hand, some specific suggestions were made to us in relation to changes that would simply the task of conducting elections by removing requirements that no longer fulfil any useful purpose. These included abolishing the requirement for the official mark<sup>137</sup> and abolishing the ballot paper counterfoil.<sup>138</sup> The counterfoil has been abolished in UK elections (and replaced by a note of issue of a ballot paper in a list of papers issued to electors (the “corresponding number list”).<sup>139</sup> However, the practice of making a note of the elector’s number against the number of the ballot paper issued to him or to her would be unconstitutional in Ireland.<sup>140</sup> On the other hand, the practice of replacing a perforation mark with a ballot paper bearing some sort of pre-printed mark or watermark seems to have been a modest success, where this has been tried.<sup>141</sup>

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<sup>136</sup> Law Reform Commission *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (July 1999) (LRC CP14-1999) pars 2.20, 5.27, 5.60-5.62

<sup>137</sup> Electoral Act 1992 ss 89 and 101(2)-(3).

<sup>138</sup> *ibid* ss 88 and Sch IV Part II.

<sup>139</sup> Electoral Administration Act 2006 (c. 22) s 31, Sch 1 par 75. The intention to require that each elector sign for his or her ballot paper, beside the number marked on the corresponding numbers list has not proceeded with for the time being: Department of Constitutional Affairs *Explanatory Memorandum to the Representation of the People (England and Wales) and the Representation of the People (Combination of Polls) (England and Wales) (Amendment) Regulations 2007* 2007 No. 1025 ([http://www.opsi.gov.uk/si/si2007/em/uksiem\\_20071025\\_en.pdf](http://www.opsi.gov.uk/si/si2007/em/uksiem_20071025_en.pdf) Last accessed 28 August 2008)

<sup>140</sup> *McMahon v Attorney General* [1972] IR 69 (SC).

<sup>141</sup> Electoral Commission *May 2006 electoral pilot schemes changes to the administration and security of elections – Findings* (August 2006) ([http://www.electoralcommission.org.uk/data/assets/electoral\\_commission\\_pdf\\_file/0014/13190/FindingsSecurityandAdministrationChanges\\_22989-17176\\_ENSW.pdf](http://www.electoralcommission.org.uk/data/assets/electoral_commission_pdf_file/0014/13190/FindingsSecurityandAdministrationChanges_22989-17176_ENSW.pdf) Last accessed 28 August 2008); Electoral Commission *Electoral pilot scheme evaluation – Stratford-on-Avon District Council* (August 2006) par 5.1 ( Last accessed 28 August 2008).

The underlying issue here is the legislative approach to be followed and, in particular, whether consolidation of the law is required prior to, or as part of, the legislative work associated with the establishment of the Electoral Commission.

The establishment of an Electoral Commission would certainly be a good occasion for a consolidating measure of the sort achieved as recently as the Act of 1992. It is less clear whether such a consolidation is a precondition for the creation of such a body.

For example, as regards the general provision contained in the Electoral Act, 1992 section 3(1):

3.—(1) The Minister may make regulations prescribing any matter or thing that is referred to in this Act as prescribed.

it would be relatively straightforward to substitute “the Commission” for “the Minister”, without further textual changes. However, in the first place, it may not be appropriate that the entirety of the Minister’s role in making regulations should be transferred to the new body (although it might be considered a necessary aspect of its independence that certain regulatory powers be conferred on it.) Furthermore, many specific functions are conferred on the Minister specifically. It may be the Minister will retain some of these; examples which spring to mind are the fixing of the day and times of the poll—as is specifically provided by section 96(1)—or the making of special difficulty orders—as is specifically provided by section 164(1). Since these are not matters which fall within section 3, it would be a straightforward matter to substitute “the Commission” for “the Minister” in these places. In other cases where regulatory functions are conferred—such as the function given to both Houses of the Oireachtas to prescribe a statement in relation to a referendum proposal for the information of voters<sup>142</sup>, it will also be necessary to decide whether or not the independence of the Commission or, more precisely, the rationale for establishing such a body in the first place, requires that the function be transferred to the Commission. Unless all such questions are determined in favour of the Commission’s competence, a new patchwork of powers and functions could be created by any amending legislation, giving rise to new occasions for obscurity and confusion.

This last consideration reinforces the argument for a fresh consolidation of electoral law, to establish the Commission on a transparent and efficacious basis.<sup>143</sup>

As to what the final division of functions between the Minister and the Electoral Commission should be it is suggested that the following principle should be applied: where issues of

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<sup>142</sup> Referendum Act, 1994 s 23(1).

<sup>143</sup> It is open to question whether this consolidation should go as far as incorporation what are currently separate Referendum, Presidential, European Parliament, Seanad and Local Elections Acts or Regulations into one omnibus Act. This has certainly not been considered necessary in many Australian states (eg New South Wales or Victoria) or at Commonwealth level. On the other hand, the legislative basis for the state and federal Electoral Commissions is to be found in legislation dealing with *parliamentary* elections at each level. Whilst this legislation has not generally been the subject of consolidation in the Irish sense, the publication of comprehensive, timely and authoritative compilations of the legislation in force serves the same function—and was one the models for the Statute Law (Restatement) Act 2002.

policy fall to be decided, that function should remain with the Minister, as the person directly accountable to Dáil Éireann; where administrative questions of forms or procedures are involved, the Electoral Commission should be given the power to determine these.

Under the first heading of functions appropriately retained by the Minister one might place, for instance

- having consulted the Electoral Commission, the fixing of the polling day and the hours of polling for an election or referendum (see Electoral Act 1992 s 96(1))
- the making of special difficulty orders (as has been done, for example, in relation to voters who have a religious objection to attending a polling place to cast their votes on a particular day) (see Electoral Act 1992 s 164(1))
- proposing to the Houses of the Oireachtas a form of words for the statement to be provided for the information of voters in relation to a referendum proposal (see Referendum Act, 1994 s 23(1))

The administrative functions to be devolved to the Electoral Commission might include, for example

- varying various monetary amounts specified in the Acts, having regard to subsequent changes in the consumer price index (see Electoral Act 1992 s 3(1) as amended by the Electoral (Amendment) Act 2001 s 49(a))
- making regulations as to polling schemes and deciding whether or not to confirm polling schemes proposed by local authorities (a function which was previously exercised by the Minister, but which was removed in 2001: Electoral (Amendment) Act 2001 s 12)
- prescribing the form of the nomination paper (see Electoral Act 1992 s 46(1) as substituted by the Electoral (Amendment) Act 2007 s 1(a))
- making regulations as to the form of the ballot paper (see Electoral Act 1992 s 88(2)(cc) as inserted by the Electoral (Amendment) Act 2001 s 21(b))

Such a broad division between matters of policy and matters of implementation would assist the Electoral Commission in carrying out its role in a timely and flexible manner and in establishing a clear perception of its independence and autonomy, while retaining an important element of parliamentary accountability for the broad parameters within which it operates. It would also reflect, for example, an appropriate division of functions in relation to the delivery of a system of electronic voting and vote counting. While it should be for the Oireachtas and the Minister to establish the criteria which any such system must meet, the procurement of the specific system to be used should be left to the Electoral Commission, subject to the Minister's final approval.

There are a variety of reasons why the establishment of an Electoral Commission would seem to make it highly desirable to attempt a concurrent consolidation of electoral law—

quite apart for the very strong case for this which already exists. The strength of the case for doing so depends, however, on the exact distribution of powers and functions between the Commission, local authorities, returning officers and the Minister.

### 8.3 Comparative models

At first sight there are several other countries where an Electoral Commission and a consolidated electoral law appear to occur together and which might, therefore, seem to provide a promising model. Australia is a prime example, both at federal<sup>144</sup> and state level.<sup>145</sup> However, any connection between the existence of an Electoral Commission and the accessible, up-to-date, presentation of the relevant statute law is illusory. The “consolidated” appearance of the statutes in Australia is due to the efficient mechanisms which exist at Commonwealth and state level for the frequent publication of officially authorised “compilations” of statutes as they are currently in force, which apply to all statute law and not just that dealing with elections.<sup>146</sup> The Irish equivalent in this jurisdiction would therefore be the application to the Acts referred to above of the Statute Law (Restatement) Act, 2002.<sup>147</sup> Similar comments could be made in relation to the Electoral Commissions in existence in other jurisdictions that have a legal tradition comparable to ours.<sup>148</sup>

In other cases, such as that of the United Kingdom, the degree of fragmentation of electoral law is comparable to that obtaining in Ireland.

### 8.4 Options for Ireland

The approach to the legislative changes best suited to establish an effective electoral management body depends upon the range of functions which that body will be expected to perform and upon whether those functions are to be vested in it simultaneously and, if not, what the sequence of transfer of functions is to be. A variety of approaches can be identified based on which of those basic options is chosen.

#### 1. Establish a completely new Electoral Commission, to perform from the beginning the full range of functions intended for it

The first option would be to establish an entirely new body and to confer all the functions it is intended to perform from the beginning of its operations. In practice, this would certainly require a prior consolidation of the law as a preliminary to the establishment of such a body.

<sup>144</sup> Commonwealth Electoral Act 1918 No 27.

<sup>145</sup> For example, the Parliamentary Electorates and Elections Act 1912 No 41.

<sup>146</sup> For the Commonwealth Electoral Act 1918 No 27: <http://www.comlaw.gov.au/comlaw%5Cmanagement.nsf/lookupindexpagesbyid/IP200401607?OpenDocument> (Last accessed 15 August 2008)

For the Parliamentary Electorates and Elections Act 1912 No 41: <http://www.legislation.nsw.gov.au/summarize/inforce/s/1/?TITLE=%22Parliamentary%20Electorates%20and%20Elections%20Act%201912%20No%2041%22&nohits=y> (Last accessed 15 August 2008)

<sup>147</sup> Statute Law (Restatement) Act, 2002 (No 33 of 2002). See Law Reform Commission *Report on Statute Law Restatement* (July 2008)(LRC 91-2008) and Law Reform Commission *Consultation Paper on Statute Law Restatement* (July 2007) (LRC CP45-2007).

<sup>148</sup> For example, Canada (Canada Elections Act 2000, c. 9 – <http://laws.justice.gc.ca/en/E-2.01> (Last accessed 15 August 2008).)

Whilst a new body could be established by an Act of the Oireachtas and all the necessary amendments be made to existing legislation so as to refer to it, such an approach would run strongly counter to the objective of accessible, meaningful and user-friendly legislation. On the other hand, it would entail an additional delay in the establishment of such a body, if consolidating legislation were a pre-condition.

**2. Take SIPO as the basis for a new Electoral Commission and make the necessary amendments to confer a complete set of new functions upon it immediately<sup>149</sup>**

Rather than establish a completely new body, one could take the Standards in Public Office Commission as the nucleus of a new Electoral Commission and alter the existing legislation so as to extend its range of powers and functions.

Whilst this option would be more straightforward than the establishment of a completely new body, in the absence of a re-codification, it would aggravate the problems of inaccessibility, obscurity and difficulty of use in the legislation, in the same manner as the establishment of a totally new body would, unless accompanied by a consolidation of the substantive law.

**3. In Phase One, extend the functions of the Standards in Public Office Commission so as to include those of the Constituency Commission and the Registrar of Political Parties and a new function of co-ordinating and monitoring the maintenance of the register of electors; in Phase Two, replace the existing legislation with an Act amending and consolidating electoral law (particularly as to the commission's regulatory role in relation to party and election funding and expenditure) and conferring a wider range of functions on the Electoral Commission**

The basic principles of the legislation are sound and SIPO has performed as well as could be expected within the limits of the existing law and its resources. If any body represents the "centre of gravity" in the spectrum of agencies currently responsible for elections in the broad sense, it is SIPO. It seems sensible, therefore, to make the enhancement and extension of SIPO's role the first step towards the establishment of a "full-spectrum" independent Electoral Commission. According to the Programme for Government, one of the new body's main functions will be to review the law in relation to party and election funding; for that reason also SIPO would appear to be the natural "core" of the new commission.

The conferral of a full range of functions on the Electoral Commission, in its final form, could then be undertaken through a consolidation of electoral legislation at a later date.

There are three additional sets of functions which could immediately be conferred on the SIPO in the first phase—the functions currently performed by the Constituency Commission, those performed by the Registrar of Political Parties and those performed by the Referendum Commission. In practice, the latter change would merely formalise the existing practice, whereby the two Commissions share the same support staff.

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<sup>149</sup> This is the approach proposed by the Electoral Commission Bill 2008 [PMB] (No. 26 of 2008).

The composition of the Constituency Commission and the Referendum Commission significantly overlaps with that of SIPO—the Ombudsman, the Clerk of the Dáil and the Clerk of the Seanad are members of all three commissions and the chairperson of each is a judge, though different persons has been appointed to be chairpersons of each body. The Minister for the Environment, Heritage and Local Government’s power to divide a county, city or town into local electoral areas, and fix the number of such members to be elected for each local electoral area (Local Government Act, 1994 s 24) should also be transferred along with the functions of the Constituency Commission.<sup>150</sup>

The function of Registrar of Political Parties is currently carried on by the Clerk of the Dáil who is, as noted, a member of all three bodies. Registering political parties should be combined with the functions already vested in SIPO.

In addition, the functions set out in Part II of the Electoral Act, 1997, section 25 of that Act (as amended) and in the Referendum Act, 1998 (as amended) are all relatively discrete and self-contained. Concentrating these three roles in a single body would require only minor consequential amendments and would be a step towards the establishment of an Electoral Commission with a broader range of functions.

If, as has been recommended, a decision is taken in principle to move from household to individual registration of electors, based on the use of official identifiers such as PPS numbers, the Electoral Commission should have the responsibility for making recommendations as to the form of implementing legislation required. Pending the enactment of such legislation, the interim body should co-ordinate and monitor the maintenance of the register of electors by local authorities, should set performance standards for the registration of electors and also for the conduct of elections generally and referendums and should conduct or commission research in relation to reforms which might be introduced in those two fields.

The major disadvantage of choosing Option 3 would be that conferring new functions on SIPO rather than establishing of a new body would merely aggravate the problems of inaccessibility, obscurity and difficulty of use in the legislation.

**4. As Option 3, except that the functions of SIPO, the Constituency Commission, the Referendum Commission and the Registrar of Political Parties would all be transferred in Phase One to a new Electoral Commission; replacing in Phase Two the existing legislation with an Act amending and consolidating electoral law and conferring a wider range of functions on the Electoral Commission**

For the reasons set out in Chapter 6, it would in any case be preferable to replace SIPO with a new statutory agency, with its own staff and budget and without responsibility for the

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<sup>150</sup> The Local Government Act, 2001 s 23 has never been commenced nor has the Local Government Commission to which it refers ever been constituted (see Minister for the Environment, Heritage and Local Government *Green Paper on local government, Stronger Local Democracy - Options for Change* (April 2008) pp 109-114.)



implementation of the Ethics and Standards Acts. This new regulator of party and election finance could then serve as the “seed” for the new Electoral Commission, on the basis of the phased transfer of functions outlined as part of Option 3.

Legislation to establish a new Electoral Commission as a replacement for SIPO (in respect of the implementation of the Electoral Acts), the Registrar of Political Parties, the Constituency Commission and the Referendum Commission would go further towards a consolidation of electoral law than a measure which merely transferred the relevant functions to SIPO, and so would not suffer from the disadvantages which attach to pursuing Options 2 or 3.

The implications of adopting Option 4 for the approach to be taken to the amendment or repeal of legislation are set out in detail in the next section.

## 8.5 Conclusion

For the reasons given above, it is recommended that an Electoral Commission should be established through the enactment of the following legislation:

### 1. Electoral Commission Act

This Act would—

- establish an Electoral Commission, with its own corporate legal personality, a Chief Electoral Officer as the commission’s chief executive, a staff (who would be civil servants of the State, where appropriate transferred from SIPO or the Office of the Ombudsman), its own assets and liabilities, and a budget
- provide that the members of the commission would be the same as those of the Referendum Commission
- provide that the Chief Electoral Officer would be appointed and hold office on the same terms as the Ombudsman
- provide that the Chief Electoral Officer should be *ex officio* the presidential returning officer, the Seanad returning officer (for the election of panel members of Seanad Éireann) and the referendum returning officer
- amend Parts III to VI of the Electoral Act, 1997, replacing references to SIPO with references to the Electoral Commission
- abolish the Constituency Commission and transfer its functions—along with the functions of the Minister for the Environment, Heritage and Local Government under the Local Government Act, 1994 s 24 to the Electoral Commission; replace and re-enact Part II of the Electoral Act, 1997 in an amended and consolidated form as Part of the Electoral Commission Act
- transfer the functions of the Referendum Commission to the Electoral Commission; replace and re-enact the Referendum Acts, 1998 and 2001 in an amended and consolidated form as Part of the Act

- transfer the functions of the Registrar of Political Parties from the Clerk of the Dáil to the Electoral Commission; replace and re-enact section 25 of the Electoral Act, 1992 (as amended)
- confer on the Electoral Commission the functions of
  - i. monitoring and reporting on the registration of electors and the conduct of elections and referendums
  - ii. setting performance standards for registration authorities and returning officers
  - iii. conducting research in relation to the matters referred to in paragraph i.
- provide that the expenses of the commission should be paid by the Minister for Finance out of moneys voted by the Oireachtas, except for the expenses incurred by the Chief Electoral Officer when acting as the presidential returning officer, the Seanad returning officer (for the election of panel members of Seanad Éireann) and the referendum returning officer

The particular legislative approach to be taken at this stage would depend on the specific change being made.

For example, in the case of the registration of political parties, a new section 25 could be substituted for the existing provision in the Act of 1992, as was done on a previous occasion (Electoral (Amendment) Act, 2001 s 11.) For the Constituency Commission, Part II of the Electoral Act, 1997 should be repealed and replaced with a new Part II, reflecting the changes recommended above,

## **2. Electoral Act [Consolidation]**

This Act would amend and consolidate the law to be found in the Acts and Statutory Instruments referred to in the Appendix (together with the proposed Electoral Commission Act, bringing together in one Act the law relating to referendums and elections to local authorities, Údarás na Gaeltachta, the European Parliament, Dáil Éireann, Seanad Éireann and the office of President of Ireland.

It seems desirable to include all types of election and referendum within the same Act if the administration of all of them is to be entrusted to a single Electoral Commission.

This consolidation could confer on the Electoral Commission responsibility for the registration of electors and for all aspects of the conduct of the poll and counting of the votes at referendums and elections to local authorities, Údarás na Gaeltachta, the European Parliament, Dáil Éireann, Seanad Éireann and the office of President of Ireland.

# 9. Accountability, funding, and composition

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## 9.1 Accountability

In the first place, it is important that there be an explicit statement of the general principle that the Electoral Commission will be independent in the performance of its functions.

There are many examples of this in relation to similar offices or bodies, such as—

### **Ombudsman Act 1980 s 4(1)**

4.—(1) The Ombudsman shall be independent in the performance of his functions.

### **Electoral Act 1997 s 5(2)**

(2) A Constituency Commission and its members shall be independent in the performance of their functions under this Act.

### **Courts Service Act 1998 s 4(3)**

(3) The Service shall, subject to this Act, be independent in the performance of its functions.

### **Garda Síochána Act 2005 s 67(4)**

(4) Subject to this Act, the Ombudsman Commission shall be independent in the performance of its functions.

On the other hand, any such provision should not preclude an appropriate degree of accountability on the part of the Electoral Commission to the Minister for the Environment, Heritage and Local Government and to the Oireachtas.

The Courts Service seems to be an appropriate model in this respect. It has a duty to make an annual report on its activities to the Minister for Justice, Equality and Law Reform (which is laid before the Houses of the Oireachtas) and to furnish specific information to the Minister on request. The constitutional role and status of the Electoral Commission would be broadly analogous to that of the Courts Service and so a similar form of accountability would appear appropriate.

In addition, similar provisions already apply in the Standards in Public Office Commission (Ethics in Public Office Act 1995 s 27; Electoral Act 1997 s 4(1)—under which a report on election expenses and donations is furnished to the Ceann Comhairle.) There seems no good reason to alter these accountability arrangements in the event of the establishment of a new Electoral Commission.

However, as has been recommended certain specific policy-making functions should be reserved to the Minister, for example fixing the date of polling, deciding whether to approve

a specific form of electronic voting recommended by the commission, or proposing changes to the electoral system. In those specific cases, the role of the commission would be merely to advise a course of action to the Minister, who would have final responsibility for the matter.

## 9.2 Funding

The question arises as to how a new Electoral Commission ought to be funded. We considered two main models. One is that of an annual estimate, to be determined by the Government in the normal manner, covering the entire budget of the agency. That is, the expenses of the commission would be sanctioned by the Minister for Finance to be paid out of moneys provided by the Oireachtas.<sup>151</sup> The other is that the expenses of the commission should be a charge on the Central Fund, to be paid by the Minister for Finance out of that Fund or the growing produce thereof. That is the basis on which returning officers at Dáil elections are paid in respect of their services and expenses, not exceeding the maximum charges specified in a published scale.<sup>152</sup>

Payment out of the Central Fund has the great advantage that it guarantees the independence of the recipient and reflects the fundamental constitutional importance of the function he or she is performing. However, there appeared to us to be at least one strong reason why it should not be the model adopted as regards the entire budget of the commission. The commission will be expected to perform a wide range of functions and to bring a considerable degree of discretion to bear as to how many of them should be performed—in terms, for example, of research commissioned or activities undertaken with a view to increasing turnout at elections or in providing support and oversight, at the very minimum, in relation to the registration of electors. A system which presupposes a scale of maximum fixed “charges” for “services” provided, with a possibility of taxation of charges by a judge of the Circuit Court,<sup>153</sup> could not meaningfully be applied across the whole range of the commission’s projected budget. In addition, it would be highly inappropriate to allow the commission to fix, say, an amount which it considered ought to be spent on publicity promoting electoral registration or voting and then to be entitled to demand payment of that sum out of the Central Fund, in priority to other forms of public expenditure. In broad terms, at least, such decisions about priorities in public expenditure should be made by a democratically accountable Government and the responsible Minister.

These considerations do not, however, reduce the desirability of maintaining payment of the Central Fund in respect of those functions to which such a system can sensibly be applied. What we suggest, therefore, is the drawing of a distinction between mandatory and discretionary expenditures incurred by the commission and others in connection with their functions in the electoral process.

Constituency returning officers (and returning officers at presidential elections, European Parliament elections and referendums) should continue to be entitled to payment of their

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<sup>151</sup> See, for example, the Courts Service Act, 1998 s 36.

<sup>152</sup> Electoral Act, 1992 s 32(1). See also the Electoral Act, 1997 s 77(a). Payments to An Post under the Act are made on the same basis: Electoral Act, 1992 s 4(2).

<sup>153</sup> *ibid* s 32(3)-(5).

charges out of the Central Fund, in the established manner.<sup>154</sup> An Post should also be entitled to payment on the same basis.<sup>155</sup>

The Electoral Commission should also be entitled to claim payment from the Central Fund of the expenses which it has incurred by reason of the Chief Electoral Officer acting as the presidential returning officer, the Seanad returning officer for the election of panel members to Seanad Éireann and as the referendum returning officer at a referendum, which would reflect the existing arrangements.<sup>156</sup>

In our view, however, all the other expenses of the commission should be paid by the Minister for Finance out of moneys provided by the Oireachtas. Other agencies discharging functions of constitutional importance, in the broad sense, are funded on this basis (such is the case for the office of Ombudsman, the Courts Service and the Human Rights Commission, for example.)<sup>157</sup> We see no reason why the Electoral Commission should not be funded on the same basis, with the exception of those cases where it is performing—through the Chief Electoral Officer—a necessary and specific function in relation to the administration of elections. While there might be a case for attempting a wider definition of which functions are “necessary” (in relation to the registration of electors, for example) we are not persuaded that it is possible to frame a satisfactory definition that goes beyond existing, well-established practices.

### 9.3 The composition and method of appointment of an Electoral Commission

Those bodies that it is proposed an Electoral Commission should replace—the Constituency Commission, the Standards in Public Office Commission and the Referendum Commission—are at present predominantly composed of *ex officio* members.

For example, a Constituency Commission consists of

- (a) (i) a judge of the Supreme Court, or
- (ii) following consultation with the President of the High Court, a judge of the High Court,

nominated by the Chief Justice, who shall be the chairperson of the Commission,

- (b) the Ombudsman,

<sup>154</sup> In addition to the provisions already cited, see the Presidential Elections Act, 1993 s 11 (as amended by the Electoral Act, 1997 s 77(b) and the Electoral (Amendment) Act, 2001 s 52(c)), the European Parliament Elections Act 1997 s 18 (as amended by the Electoral (Amendment) Act, 2001 s 51(f) and the Referendum Act, 1994 s 16 (as amended by the Electoral Act, 1997 s 77(c) and the Electoral (Amendment) Act, 2001 s 55(c).)

<sup>155</sup> Electoral Act, 1992 s 4(2); Presidential Elections Act, 1993 s 5(2); Referendum Act, 1994 s 4(2); European Parliament Elections Act 1997 s 4(2).

<sup>156</sup> Presidential Elections Act, 1993 s 9(4)-(6) (as amended by the Electoral (Amendment) Act, 2001 s 52(b)); Seanad Electoral (Panel Members) Act, 1947 s 4(3) (and s 4(3A) as inserted by the Electoral (Amendment) Act, 2001 s 597(a)); Referendum Act, 1994 s 14 (4)-(6) (as amended by the Electoral (Amendment) Act, 2001 s 55(b).)

<sup>157</sup> Ombudsman Act, 1980 s 11; Courts Service Act, 1998 s 32; Human Rights Commission Act 2000 s 25

- (c) the Secretary of the Department of the Environment,
- (d) the Clerk of the Dáil, and
- (e) the Clerk of the Seanad.<sup>158</sup>

The Standards in Public Office Commission consists of

(a) a chairperson who shall be a judge, or a former judge, of the Supreme Court or the High Court, and

(b) the following ordinary members—

- (i) the Comptroller and Auditor General,
- (ii) the Ombudsman,
- (iii) the Clerk of Dáil Éireann,
- (iv) the Clerk of Seanad Éireann, and
- (v) a person who—

(I) is appointed to be such a member by the Government following resolutions passed by each House approving the proposed appointment, and

(II) is a former member of one of the Houses and is not a representative in the European Parliament.

(2A) The appointment of a person to be the chairperson of the Commission shall be made by the President on the advice of the Government following resolutions passed by each House recommending the appointment.<sup>159</sup>

As for the Referendum Commission:

(5) The chairperson shall be—

(a) a former judge of the Supreme Court or a former judge of the High Court, or

(b) following consultation with the President of the High Court, a judge of the High Court,

nominated by the Chief Justice.

(6) The ordinary members shall be—

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<sup>158</sup> Electoral Act 1997

<sup>159</sup> Ethics in Public Office Act 1995 s 21(2) (as substituted by the Standards in Public Office Act 2001 s 2.)

(a) the Comptroller and Auditor General, or where the office is vacant, the Secretary and Director of Audit of the Office of the Comptroller and Auditor General,

(b) the Ombudsman, or where the office is vacant, the Director of the Office of the Ombudsman,

(c) the Clerk of Dáil Éireann, or where the office is vacant, the Clerk Assistant of Dáil Éireann, and

(d) the Clerk of Seanad Éireann, or where the office is vacant, the Clerk Assistant of Seanad Éireann.<sup>160</sup>

As can be seen, there is a large degree of overlap in the membership of the three bodies, both specifically (the Clerk of Dáil Éireann, the Clerk of Seanad Éireann and the Ombudsman) and generically (in that a judge of the High Court or the Supreme Court is the chairperson of each.) *Ex officio* membership also has the great advantage of providing a simple and transparent method of ensuring that the members of the commission are persons whose integrity and independence is not likely credibly to be called into question.

A survey of international practice also suggests that giving the position of chairperson to a senior judge is a sound practice.

It is necessary to examine, however, whether or not there is a case for appointing the ordinary members of the Electoral Commission as such, rather than providing for *ex officio* membership of the body. The new commission is likely to end up with a broader range of the functions than the three bodies it replaces and that those functions will involve it having a greater responsibility for the administration of elections and referendums. If the recommendations contained in this report are accepted, the new body will have its own dedicated Chief Executive and support staff. It will also be called upon in the interim phase to undertake extensive consultations and research with a view to making recommendations as to possible changes in the law in a number of areas, notably in respect of the registration of electors and the regulation of party and election finance. Each of these seems a strong reason why ordinary membership of the commission should represent the particular public service commitment which the individual is expected to make, rather than merely an incidental aspect of holding some other office.

On the other hand, there are considerable difficulties in devising an appropriate appointment mechanism.

A simple power of appointment vested in the Minister or the Government would not be appropriate, given the sensitivity of the functions which the body would be called upon to perform and the need to avoid giving any ground allegations of partisan bias. There are several examples of existing appointments procedures which might provide an appropriate model for choosing the members of an Electoral Commission. The appointment of the

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<sup>160</sup> Referendum Act 1998 s 2

ordinary members of An Bord Pleanála is one such case.<sup>161</sup> A more pertinent example might be the method of selecting the Director of Public Prosecutions.<sup>162</sup> This parallels the method by which the members of the South African Independent Electoral Commission. In South Africa President (or Government) appoints the members of the Commission, based on a selection made by an independent panel, as refined by nominations made by a parliamentary committee and on the basis of prior approval of those nominations by a resolution of the lower house of parliament.<sup>163</sup> By way of comparison, members of the UK Commission are appointed by the Crown, following an address from the House of Commons; a motion for such an address may be moved only with the agreement of the Speaker and only after consultation with the registered leader of each registered party to which two or more MPs belong.<sup>164</sup> Such an element of parliamentary scrutiny and confirmation of the members to be appointed to an independent office or body can also be found in some existing Irish legislation, as in the case of the Ombudsman<sup>165</sup> or, as regards the Comptroller and Auditor General, in Article 33.2 of the Constitution. If their mode of appointment is part of the reason why it is considered appropriate that the holders of each of those offices should be an *ex officio* member of one or (in the Ombudsman's case) all of the bodies to be superseded by an Electoral Commission, it would seem equally appropriate that the same element of parliamentary confirmation should apply in the event that the ordinary members of that commission were to be specifically appointed to it.

On balance, however, we formed the view that the complexity of any such appointments procedure is not required. We have already drawn attention to the fact that the current *ex officio* membership has the great advantage of providing a simple and transparent method of ensuring that the members of the commission are persons whose integrity and independence is not likely credibly to be called into question.

Given the nature of the functions which the new body would perform, we consider that the following *ex officio* membership would be most appropriate—

- (a) a chairperson who shall be a judge, or a former judge, of the Supreme Court or the High Court, and
- (b) the following ordinary members—
  - (i) the Comptroller and Auditor General,
  - (ii) the Ombudsman,
  - (iii) the Clerk of Dáil Éireann,
  - (iv) the Clerk of Seanad Éireann

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<sup>161</sup> Planning and Development Act 2000 s 106 (as amended by the Local Government Act 2001 s 247(b))

<sup>162</sup> Prosecution of Offences Act 1974 s 2

<sup>163</sup> Electoral Act, 1998 s 6 [South Africa]

<sup>164</sup> Political Parties, Elections and Referendums Act 2000 s 3

<sup>165</sup> Ombudsman Act, 1980 s 2(2).



In our view, it would not be appropriate to have a member on the new commission who is a former member of one of the Houses of the Oireachtas, given the additional range of functions which the commission will perform, in comparison with SIPO.

Particularly if the members of the commission are to be *ex officio*, we feel it is of great importance that the Chief Executive of the commission should have a strong and clearly-defined leadership role, with the commission members performing primarily an oversight and regulatory role. The precedent of the Chief Electoral Officer in Canada seems to us to be the most appropriate to follow, as adapted to reflect the method of appointment and terms of office of the Ombudsman in this jurisdiction.<sup>166</sup> We therefore envisage that—

- (a) the chief executive officer of the commission such be styled “the Chief Electoral Officer”;
- (b) the Chief Electoral Officer should be appointed in the same manner as the Ombudsman (by the President upon resolution passed by Dáil Éireann and by Seanad Éireann recommending the appointment of the person: Ombudsman Act 1980 s 2(2));
- (c) the Chief Electoral Officer should serve a term of 6 years and might be re-appointed to the office for a second or subsequent term;<sup>167</sup>
- (d) the same disqualifications as apply to holding the office of Ombudsman should apply to the position of Chief Electoral Officer, as well as those set below as being appropriate to membership of the commission, should that not be *ex officio*;
- (e) the Chief Electoral Officer should be paid the same remuneration and allowances for expenses as are paid to a judge of the High Court;
- (f) the Chief Electoral Officer
  - (1) might at his own request be relieved of office by the President.
  - (2) might removed from office by the President but shall not be removed from office except for stated misbehaviour, incapacity or bankruptcy and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal,
  - (3) should in any case vacate the office on attaining the age of 67 years.

As well as being the chief executive officer of the commission, the Chief Electoral Officer would also be *ex officio* the presidential returning officer at a presidential election, the Seanad returning officer for the election of panel members of Seanad Éireann and the referendum returning officer at a referendum.

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<sup>166</sup> Canada Elections Act (2000, s 9) ss 13-16.

<sup>167</sup> A six-year term seems particularly appropriate to us, in view of the desirability of the term of office of the CEO extending beyond the normal electoral cycle.

If specific appointments were to be made to a commission, the issue of what disqualifications might be appropriate would arise. On this score, it is suggested that the UK precedent should be followed.

- (4) A person may not be appointed as an Electoral Commissioner if the person—
- (a) is a member of a registered party;
  - (b) is an officer or employee of a registered party or of any accounting unit of such a party;
  - (c) holds a relevant elective office ...; or
  - (d) has at any time within the last ten years—
    - (i) been such an officer or employee as is mentioned in paragraph (b), or
    - (ii) held such an office as is mentioned in paragraph (c), or
    - (iii) been named as a donor in the register of donations ....

Political Parties, Elections and Referendums Act 2000 s 3(4).

The same disqualification should apply in relation to holding the position of Chief Electoral Officer.

This is more specific than the vague formulation contained in the South African legislation.

- (2) No person shall be appointed as a member of the Commission unless he or she—
- (a) is a South African citizen;
  - (b) does not at that stage have a high party-political profile;

If the commission members were to be specifically appointed as such, removal from membership of the commission should be by the President, on foot of a resolution passed by each House of the Oireachtas calling for such removal or by a procedure equivalent to that for the removal of the RTÉ Authority (by the Government, on foot of resolutions of both Houses: Broadcasting Authority (Amendment) Act, 1976 s 2.)

# 10. Conclusions and recommendations

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## 10.1 Introduction

We have sought in this report to address a range of aspects of the Irish electoral process with a view to exploring the extent to which the establishment of an Electoral Commission could significantly enhance the effectiveness, inclusiveness and legitimacy of the Irish electoral process. In looking at these aspects, we have reviewed current arrangements, described the models available in other societies as appropriate, and outlined the options that seemed to us to be available in the Irish case.

## 10.2 Present arrangements

The most obvious feature of the present system is a relatively high degree of fragmentation, with the allocation of responsibility in various areas to a range of different individuals and bodies. We drew attention to the position within specific areas:

Registration of political parties has since 1963 been the responsibility of the Clerk of the Dáil. There is an appeal board comprising a High Court judge and the chairs of the two houses of parliament (the Ceann Comhairle and the Cathaoirleach of the Seanad). Specific guidelines for eligibility are prescribed.

Responsibility for compilation of the electoral register is devolved to 34 local authorities (county or county borough councils), which face this very demanding task using a variety of instruments of varying degrees of effectiveness. There tends to be considerable variation from case to case in the accuracy of the process, as measured by exclusion of people who are entitled to be listed, inclusion of people who are not, and misclassification of individuals in relation to the purposes for which they may exercise the franchise (for example, local or European elections only, or Dáil elections and referendums also).

Until 1979, delimitation of constituency boundaries was carried out by the Minister for the Environment in a manner that was allegedly partisan and unfair. The process was then transferred to a series of ad-hoc constituency boundary commissions, of which five were appointed. In 1997, a statutory boundary commission was introduced. It comprises five members: a High Court judge as chair, the Ombudsman, the Secretary General of the Department of the Environment, and the Clerks of the Dáil and Seanad.

Responsibility for the conduct of elections is devolved to constituency returning officers, who in the case of Dáil elections are typically county registrars (who form part of the courts service).

Since 2001, responsibility for monitoring electoral income and expenditure and for enforcement of rules relating to standards in public office has lain with a Standards in Public Office Commission. Chaired by a retired High Court judge, its other members are the Comptroller and Auditor General, the Ombudsman, the Clerk of the Dáil, the Clerk of the Seanad, and one political appointee.

Arrangements for research on voter behaviour are ad hoc and most often originate from the outside, rather than from within the policy process. Promotional efforts to encourage registration and turnout are meagre, though the Referendum Commission plays a somewhat more active role in respect of referendums. Established in 1998, this is chaired by a judge of the High Court, with four other members: the Clerk of the Dáil, the Clerk of the Seanad, the Ombudsman and the Comptroller and Auditor General.

It will be seen, then, that responsibility is spread among a considerable range of agencies: three bodies with overlapping but not identical membership (the Constituency Commission, the Referendum Commission and the Standards in Public Office Commission); one individual with a specific responsibility (the Registrar of Political Parties); 34 county or county borough managers and some forty constituency returning officers or assistant/deputy returning officers. It will be noted that the Clerk of the Dáil is involved in four of these areas, the Clerk of the Seanad and the Ombudsman in three, the Comptroller and Auditor General in two, the Secretary of the Department of the Environment in one, and a retired politician is involved in one. A judge chairs each of the three bodies involved.

### **10.3 Comparative position**

Different constitutional and cultural traditions, not to mention different electoral arrangements, have resulted in considerable variation from country to country in the allocation of responsibility for the six areas we have been analysing. While there are important respects in which Ireland has followed (or sometimes lagged behind) the Westminster model as adopted in Commonwealth countries, use of proportional representation (admittedly, in its unusual single transferable vote form) gives Ireland a lot in common with continental European countries. The comparative position is as follows.

First, there is a set of countries where an integrated Electoral Commission is responsible for most or all of the functions discussed above. Such commissions follow a number of different membership models. Second, in other cases responsibility continues to be distributed between several agencies or individual office holders, and some areas may be unregulated, or lightly regulated.

### **10.4 Recommendations**

#### ***Register of political parties***

The proposed Electoral Commission should be responsible for maintaining the Register of Political Parties and should have the power to cancel the registration of a political party in cases where the body determines that the parties through its officers or other person held out by the party as authorised to act on its behalf has, in the opinion of the body, committed serious or repeated breaches of the obligations imposed by electoral law.<sup>168</sup> The body should be entitled to refuse to restore a party to the register unless and until is satisfied that the circumstances which led to the cancellation of the party's registration have ceased to

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<sup>168</sup> See, by way of comparison, the Radio and Television Act, 1988 s 14(4)(a)

exist.<sup>169</sup> The same right of appeal against cancellation or refusal of registration should be provided as is currently set out in the Electoral Act, 1992 (as amended).<sup>170</sup>

### ***Electoral Register***

It is recommended that an Electoral Commission assume complete responsibility for the electoral register, and for the introduction of a rolling, individual register. This will require extensive consultation with electoral authorities in jurisdictions which have already moved to this registration model, and with local authorities in Ireland to ensure a smooth transfer of responsibilities. In order to ensure the minimum disruption to voters, the new Register should not be introduced until after the next Dáil election. This is to ensure that there is sufficient time to compile the first draft of the new register, and sufficient opportunity (for example, at a by-election) to test the robustness of this register in advance of a general election.

### ***Boundary Commission***

In the area of Dáil constituency boundary revision we are confronted with two options: whether the status quo should be preserved (this would entail retention of a Constituency Commission for Dáil and European elections, with separate arrangements for local electoral boundaries under the direction of the Department of the Environment), or whether these functions should be transferred to an Electoral Commission. There are important arguments of efficiency and transparency that suggest the latter course of action. As we have also suggested, the burden could be lightened by making a move to the kinds of provision that are normal in proportional representation regimes, with fixed constituency boundaries and use of a simple allocation formula for redistribution of seats following each census—an arrangement that could resolve the contentious issue of regular breaching of country boundaries.

It is true that other observers have reservations about the merits of transferring authority for constituency boundary revision to an electoral management body (EMB) such as an Electoral Commission. As the International IDEA *Handbook on electoral management design* puts it,

There are operational and cost-effectiveness advantages in an EMB taking responsibility for electoral district boundary delimitation. Boundary delimitation is, however, a politically divisive issue, and leaves an EMB open to attack by those who perceive the results as not serving their interests. Some electoral analysts therefore argue that boundary delimitation is best handled by a body other than an EMB, to shield it from potential politically motivated attacks that may damage the EMB's credibility.<sup>171</sup>

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<sup>169</sup> Some further provision would undoubtedly have to be made to prevent easy avoidance of this bar to registration, such as by a mere change of name or the identity of the officers of the party authorised to sign certificates authenticating candidatures.

<sup>170</sup> See n 12 above.

<sup>171</sup> International IDEA, *Electoral management design: the International IDEA handbook* (Stockholm: International IDEA, 2006), p. 65.

We would not number ourselves among such sceptical analysts in this respect. We note that, in general, such bodies as Electoral Commissions are just about as common as dedicated boundary commissions in filling this role elsewhere.<sup>172</sup> Furthermore, almost all of the cases cited by International IDEA (10 out of the 12 instances they mention) are electoral systems based on single-member districts, where the location of boundaries is critical, and controversy is to be expected. But this need not be the case in Ireland. It is true that the recommendations of Irish constituency boundary commissions have not always pleased everyone; but, in particular if a policy of maximising adhesion to existing administrative boundaries were taken up we would not envisage a continuation of complaints of this kind.

### ***Administration of the election***

Current Irish arrangements for the administration of these aspects of the electoral process have several distinct advantages. In the first place, they appear to enjoy a high degree of legitimacy. Secondly, they are seen to be effective. This is partly a matter of good administrative practice. However, it is more than just a matter of good management or administrative procedures. The fact that these functions are carried out locally has the particular additional advantage of making it possible to mobilise major local infrastructure and local human capital for what are essentially episodic events. While, no doubt, various improvements could be and should be made to some of these aspects of electoral administration, our overall recommendation is that the devolved character of the process is the key to its success and should not be tampered with. This implies that the role of a new Electoral Commission in these areas would be a matter of oversight and policy development.

### ***Party and Election Funding***

In many respects the Standards in Public Office Commission remains well-regarded amongst its peers in the field of regulation of political and election finance. It is outside our terms of reference to consider what reforms, if any are required, to achieve full transparency and accountability in the financing of political parties and election and referendum campaigns. However, we can make recommendations as to enhancements of the powers and resources provided to SIPO or to any equivalent body, irrespective of any changes that may be decided upon in respect of its substantive functions.

In examining the options for reform, there is little evidence of a single international standard of best practice in this area on which Ireland could usefully draw, though specific lessons may be drawn from the United Kingdom experience.

In summary, our recommendations are as follows—

- pending the outcome of a review of the law relating to the regulation of party and election funding, a single body should combine the functions currently performed by SIPO and by the Registrar of Political Parties, with the modification that

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<sup>172</sup> In the 60 cases discussed above where boundary delimitation is an issue, dedicated boundary commissions operate in 22 cases, Electoral Commissions have responsibility in 21, and in 14 responsibility rests with the legislature, in an essentially partisan approach; Handley, “Comparative survey” (2008), pp. 267-271.

- the body responsible for regulating political and election funding should have a discretionary power to direct the partial or total withholding of public funds to which parties or candidates would otherwise be entitled, where in the opinion of the body the party or candidate has failed or substantially failed to comply with a statutory duty under any enactment, to the extent which the body considers proportionate to the non-compliance which has occurred
- the body responsible for regulating political and election funding should be given the full range of investigative and enforcement powers which a modern regulator is typically given—the Consumer Protection Act 2007 is suggested as a useful model
- the final powers and functions of the Electoral Commission in relation to party and election funding should be determined by the Oireachtas, following a review undertaken by the commission and its recommendations in that respect

### ***Research and promotion***

The body of policy-relevant research on Irish elections is impressive. However, it is a product of a favourable set of circumstances, some of which are entirely extraneous to the electoral policy-process, while some have grown out of specific policy dilemmas (e.g. the problems of electronic voting). It is clear that any body that has substantial responsibility in the areas of electoral policy and electoral management needs to have access to the best and most relevant research findings. This will not necessarily happen unless the electoral body is given the power to conduct or to commission research. Whichever of the latter two options is chosen, the Electoral Commission will require some in-house research expertise to, at a minimum, identify research needs and priorities and see to it that the findings feed into the policy process. A facilitation/mobilisation framework is suggested as an aid to locating the research needs and ensuring that they are pursued in a way that is policy-relevant. Research within the framework should also contribute the effectiveness of initiatives taken by the commission to promote both voter registration and voter turnout.

### ***Legislative options***

For the reasons given above, it is recommended that any Electoral Commission should be established through the enactment of an Electoral Commission Act that would, *inter alia*, establish such an Electoral Commission, with its own corporate legal personality, Chief Executive, staff (who would be civil servants of the State), assets and liabilities, and budget.

In addition, an Electoral Act [Consolidation] Act should be enacted that would amend and consolidate the law to be found in the Acts and Statutory Instruments referred to in Appendix 3 (together with the proposed Electoral Commission Act), bringing together in one Act the law relating to referendums and elections to local authorities, *Údarás na Gaeltachta*, the European Parliament, *Dáil Éireann*, *Seanad Éireann* and the office of President of Ireland.

### ***Accountability, funding and composition***

The Electoral Commission will be independent in the performance of its functions. Any such provision should not preclude an appropriate degree of accountability on the part of the Electoral Commission to the Minister for the Environment, Heritage and Local Government and to the Oireachtas.

The Courts Service seems to be an appropriate model in this respect. It has a duty to make an annual report on its activities to the Minister for Justice, Equality and Law Reform (which is laid before the Houses of the Oireachtas) and to furnish specific information to the Minister on request. The constitutional role and status of the Electoral Commission would be broadly analogous to that of the Courts Service and so a similar form of accountability would appear appropriate.

However, certain specific policy-making functions should be reserved to the Minister, for example fixing the date of polling, deciding whether to approve a specific form of electronic voting recommended by the commission, or proposing changes to the electoral system. In those specific cases, the role of the commission would be merely to advise a course of action to the Minister, who would have final responsibility for the matter.

We suggest the drawing of a distinction between mandatory and discretionary expenditures incurred by the commission and others in connection with their functions in the electoral process. Constituency returning officers (and returning officers at presidential elections, European Parliament elections and referendums) should continue to be entitled to payment of their charges out of the Central Fund, in the established manner.<sup>173</sup> An Post should also be entitled to payment on the same basis.<sup>174</sup>

The Electoral Commission should also be entitled to claim payment from the Central Fund of the expenses which it has incurred by reason of the Chief Electoral Officer acting as the presidential returning officer, the Seanad returning officer for the election of panel members to Seanad Éireann and as the referendum returning officer at a referendum, which would reflect the existing arrangements.<sup>175</sup>

In our view all the other expenses of the Commission should be paid by the Minister for Finance out of moneys provided by the Oireachtas.

Given the nature of the functions which the new body would perform, we consider that the following *ex officio* membership would be most appropriate—

(a) a chairperson who shall be a judge, or a former judge, of the Supreme Court or the High Court, and

(b) the following ordinary members—

(i) the Comptroller and Auditor General,

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<sup>173</sup> In addition to the provisions already cited, see the Presidential Elections Act, 1993 s 11 (as amended by the Electoral Act, 1997 s 77(b) and the Electoral (Amendment) Act, 2001 s 52(c)), the European Parliament Elections Act 1997 s 18 (as amended by the Electoral (Amendment) Act, 2001 s 51(f) and the Referendum Act, 1994 s 16 (as amended by the Electoral Act, 1997 s 77(c) and the Electoral (Amendment) Act, 2001 s 55(c).)

<sup>174</sup> Electoral Act, 1992 s 4(2); Presidential Elections Act, 1993 s 5(2); Referendum Act, 1994 s 4(2); European Parliament Elections Act 1997 s 4(2).

<sup>175</sup> Presidential Elections Act, 1993 s 9(4)-(6) (as amended by the Electoral (Amendment) Act, 2001 s 52(b)); Seanad Electoral (Panel Members) Act, 1947 s 4(3) (and s 4(3A) as inserted by the Electoral (Amendment) Act, 2001 s 597(a)); Referendum Act, 1994 s 14 (4)-(6) (as amended by the Electoral (Amendment) Act, 2001 s 55(b).)



- (ii) the Ombudsman,
- (iii) the Clerk of Dáil Éireann,
- (iv) the Clerk of Seanad Éireann

Particularly if the members of the commission are to be *ex officio*, we feel it is of great importance that the Chief Executive of the commission should have a strong and clearly-defined leadership role, with the commission members performing primarily an oversight and regulatory role. We therefore envisage that—

- (a) the chief executive officer of the commission such be styled “the Chief Electoral Officer”;
- (b) the Chief Electoral Officer should be appointed in the same manner as the Ombudsman (by the President upon resolution passed by Dáil Éireann and by Seanad Éireann recommending the appointment of the person: Ombudsman Act 1980 s 2(2));
- (c) the Chief Electoral Officer should serve a term of 6 years and might be re-appointed to the office for a second or subsequent term;<sup>176</sup>
- (d) the same disqualifications as apply to holding the office of Ombudsman should apply to the position of Chief Electoral Officer, as well as those set below as being appropriate to membership of the commission, should that not be *ex officio*;
- (e) the Chief Electoral Officer should be paid the same remuneration and allowances for expenses as are paid to a judge of the High Court;
- (f) the Chief Electoral Officer
  - (1) might at his own request be relieved of office by the President.
  - (2) might removed from office by the President but shall not be removed from office except for stated misbehaviour, incapacity or bankruptcy and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal,
  - (3) should in any case vacate the office on attaining the age of 67 years.

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<sup>176</sup> A six-year term seems particularly appropriate to us, in view of the desirability of the term of office of the CEO extending beyond the normal electoral cycle.

# Appendices

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Appendix 1: Statement of the tenderer's understanding of the issues and tasks involved in successfully performing the role.

Appendix 2: Research on voter behaviour in Ireland

Appendix 3: Acts and Statutory Instruments

## **Appendix 1: Statement of the tenderer's understanding of the issues and tasks involved in successfully performing the role.**

The Agreed Programme for Government envisages five tasks for the new Electoral Commission. The five, with comments on their implications for the preliminary study, are:

1. Take responsibility for electoral administration and oversight.
2. Implement modern and efficient electoral practices..
3. Revise constituency boundaries..
4. Compile a new national rolling electoral register.
5. Take over the functions of the Standards in Public Office Commission in relation to electoral spending and examine the issues involved in financing the political system.

## Appendix 2: Research on voter behaviour in Ireland

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Garry, John; Michael Marsh and Richard Sinnott, 'Second Order' Versus 'Issue Voting' Effects in EU Referendums: Evidence from the Irish Nice Treaty Referendums' in *European Union Politics*, Vol. 6, No. 2, 2005, pp. 201-221

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## **Appendix 3: Acts and Statutory Instruments**

### Acts of the Oireachtas

Seanad Electoral (University Members) Act, 1937

Seanad Electoral (Panel Members) Act, 1947

Seanad Electoral (Panel Members) Act, 1954

Electoral (Amendment) Act, 1972 ss 2 and 6

Electoral (Amendment) Act, 1973 s 3

Postal and Telecommunications Services Act, 1983 s 74

Electoral Act, 1992

Presidential Elections Act, 1993

Referendum Act, 1994

Electoral (Amendment) Act, 1996

European Parliament Elections Act, 1997

Electoral Act, 1997

Referendum Act, 1998

Electoral (Amendment) Act, 1998

Local Government Act, 1998 s 12(12)

Local Elections (Disclosure of Donations and Expenditure) Act, 1999

Local Government Act, 2001 Part 4

Electoral (Amendment) Act, 2001

Referendum Act, 2001

Electoral (Amendment) Act, 2002

Electoral (Amendment) (No. 2) Act, 2002

Local Government (No. 2) Act, 2003 s 6

European Parliament Elections (Amendment) Act 2004

Electoral (Amendment) Act 2004

Electoral (Amendment) Act 2005

Electoral (Amendment) Act 2006

Electoral (Amendment) Act 2007

## Statutory Instruments

Údarás na Gaeltachta Elections Regulations, 1979 (SI No 355 of 1979)

Údarás na Gaeltachta Elections (Amendment) Regulations, 1994 (SI No 103 of 1994)

Údarás na Gaeltachta Elections (Amendment) Regulations 1999 (SI No 341 of 1999)

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Local Elections Regulations, 1995 (SI No 297 of 1995)

European Parliament Elections (Forms) Regulations, 2004 (SI No 203 of 2004)

European Parliament Ballot Paper (Photographs and Emblems) Regulations 2004 (SI No 204 of 2004)

European Parliament Election (Reimbursement of Expenses) Regulations, 1999 (SI No 122 of 1999)

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