



# Select Committee on the Electoral Registration and Administration Act 2013

## Corrected oral evidence: Electoral Registration and Administration Act 2013

Tuesday 25 February 2020

4.25 pm

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Members present: Lord Shutt of Greetland (The Chair); Lord Campbell Savours; Lord Dykes; Baroness Eaton; Lord Hayward; Lord Janvrin; Lord Lexden; Baroness Mallalieu; Baroness Pidding; Baroness Suttie.

Evidence Session No. 11

Heard in Public

Questions 118 - 126

### Witnesses

I: Gavin Millar QC, Barrister, Matrix Chambers; Francis Hoar, Barrister, Field Court Chambers.

## Examination of witnesses

Gavin Millar QC and Francis Hoar.

Q118 **The Chair:** Welcome to Francis Hoar and Gavin Millar. You know what is going to happen because you witnessed our earlier evidence session. Welcome to the evidence session of the Select Committee on the Electoral Registration and Administration Act 2013. The meeting is being broadcast live via the parliamentary website. A transcript of the meeting will be taken and published on the Committee website. You will have the opportunity to make corrections to the transcript where necessary. Based on your experiences, how vulnerable do you think the electoral registration and voting systems are in the UK? Where do you see the key vulnerabilities in the registration and voting systems?

**Gavin Millar:** That is probably a question for campaigners and administrators of elections. As election lawyers, we tend to get involved in these things after the event when a problem arises. We are not involved in the day-to-day administration. It is certainly true that the sorts of cases of large-scale electoral fraud that were being tried in the 2000s—one thinks of the Birmingham cases, Aston and Bordesley Green, and the Slough case that Commissioner Mawrey decided and spoke about—have not been coming through since the 2013 Act. You can draw a conclusion that it is working to some degree.

As far as registration is concerned, the new mechanisms for verification against DWP data and the possibility of asking for identifying information are advances on the position in the late 2000s that Commissioner Mawrey described, when there was pretty well an open door to register however and whoever you wanted. You put the details down on a piece of paper and handed it in, and there you were on the register. It is an advance on that position when those cases were coming through and an advance as a defence against fraud and fraudulent registrations, but it has to be used sensitively.

I am probably the first person who will say this in this session. We need to bear in mind the risks of deterring people—particularly people from BAME communities, disabled people, all kinds of people—from tangling with the system if they think it will look at them as a potential fraudster when they make a straightforward application for registration. It has to be handled sensitively. The powers to interrogate and investigate have to be used where there are reasonable grounds for suspicion but not on a wide-scale basis.

It would be better if all the publicly available data were available and used in the process of compiling the electoral register. We have huge quantities of publicly available data these days. In a democracy, it seems odd that that information is not accessed more readily by the state in compiling the electoral register. There is no problem about data protection; GDPR would apply. It is all legitimate use of the data. With a sceptical eye, the benefits of the current system of individual registration and examination on an individual basis have to be balanced against the

disbenefits. The disbenefit is that you do not end up with that 95% register that you would want in a democracy. To be blunt about it, it makes the process of compiling the register less effective. You have to balance those benefits of fraud prevention against the disbenefits of discouraging people from registering.

There is something to be said for an arrangement where the state produces the register, as in Canada, where it is the state's responsibility in a democracy to produce the register and examine problems with it afterwards. In our system, there has always been the idea that, "If you want to vote, get your act together, get yourself registered and get down to the polling station." It is quite *laissez-faire*. There is a lot to be said for that—I am not saying that there is not—but it is not the only way to do it, and not everybody approaches it in that manner. The problems we have seen in the volume of the register and the turnout at elections suggest that traditional approach may be problematic.

If you had that sort of model, provided there is sufficient evidence in the form of primary and corroborative evidence in the hands of the state when the register is compiled to show the person you are putting on at that address is resident at that address and qualifies to vote, there is a case for doing that. If there is positive evidence that it is inaccurate, you act on that. When voting in person, there is still scope for personation at a polling station if a system of ID cards or photo identification is not introduced, which would make it much more difficult but might disinhibit people from voting. It might be problematic for some people to vote in that system.

In the digital age, it should be easy to try to organise that sort of system. There are digital photographs for everything, including my 60-plus Oyster card, which still has not arrived after three months, which is the subject of a series of complaints to Transport for London. It should be straightforward to get a digital image and for a local authority or whatever authority to provide a free card for the purposes of showing at a polling station with your digital image on it. I do not understand why you could not put a laser image on the poll card or something like that. Again, you have to be careful about not disinhibiting.

As Commissioner Mawrey said, it is not easy to engage in fraud on a large scale by personating a voter at a polling station, for all the reasons that we know. Polling stations are still relatively unregulated. I am not sure that the sanctity of the polling booth is always rigorously enforced, but I do not think there is a major problem there. They should be places where people feel comfortable to go and vote rather than places where they encounter ranks of police officers, security guards and highly trained electoral officers who are checking them every step of the way, or where they are dodging the CCTV on the way in. It should not work like that in a democracy.

With regard to postal votes, the problem is that we treat this as an administrative problem, but it is a fraud problem. The issue is not the lone fraudster; the issue is concerted fraud. People may make a

fraudulent postal vote application for whatever reason, but it will not turn an election. It will not turn even a local election of the sort that Commissioner Mawrey was talking about. I have long since advocated and said this to various people in government connected with elections since 2004 or 2005: the problems that occur with elections occur in real time. They occur in the course of the registration process and the campaign.

As Commissioner Mawrey said, one of the problems in challenging after the event is catching up and getting the evidence from what went on at the time to enable you to plead and prove a case in court, because it has gone by then. Nearly all of you are politicians or ex-politicians. You know how campaigns work and what goes on on the ground during campaigns. You can tell. In that period before the election, experienced administrators, registration officers and returning officers can and should be able to tell if something is afoot. You should be able to spot it. In Slough, you would spot the application to register empty multi-occupieds if you were looking for it, you were there and you knew what was going on. You would spot the locations, the streets and the areas where the registrations and postal vote applications were clustered. You would ask who owns and is in control of those properties.

We all know the areas where there will be a problem electorally and the areas that are marginal in national and local elections. If you had trained fraud investigators on site, as it were, spotting these problems as they arose, you could deal with the concerted fraud problem, but nobody has put that system in place. It is not the responsibility of the registration officer, the returning officer or the Electoral Commission, and the police say, "It's not our problem."

You get campaigners, such as the clients I represented in Slough, spotting this going on as the campaign and the registration process are unfolding in the months before the election. There is no statutory entity or enforcement regulation entity with the job of spotting it as it goes on, gathering the evidence, asking the questions and calling out the fraud. There are lessons to be learned from the City of London and places like that, where fraud is observed in real time and regulatory authorities move. It would not have to be anything other than a small percentage of wards and constituencies at election time where you would make these special arrangements. I think that is the answer to fraud, but it is the concerted fraud that is visible at the time that needs to be tackled.

**Francis Hoar:** I am not going to answer question 7, but I think this bears somewhat on question 7 about enforcement in the Electoral Commission. My view is that the police should do what Gavin entirely correctly said should be done, which is to investigate fraud and try to stop it as and when it happens. My experience—and Gavin's much longer experience, I am sure—has been that they do not, for a number of reasons. They do not see the seriousness of election fraud as others who have been involved in elections and as politicians see it. Richard Mawrey

correctly said they are afraid of where the race card is played, and in my experience it was played very effectively in Tower Hamlets.

Another problem is that local police constabularies and even the smaller boroughs in Greater London can have a close relationship with local authorities to the extent that it can become unhealthy. That was particularly evident in Tower Hamlets. There were a number of examples of police borough commanders who were very close to the local authority, not necessarily in a corrupt way—and that is not what I am suggesting—but having many public meetings and engagement with the mayor in the public domain.

Of course police constabularies and police borough commands must interact with local authorities, not least police associations or the boards that manage them, but there needs to be a healthy distance between the police and local politicians, particularly because it will come to police officers they control investigating malpractice that may come from those local officials. One other way of doing it would be to ask a nearby, different police borough command to investigate, but that seems unlikely to be effective. If there was a corruption investigation in a local police force, you would expect another police constabulary to inspect it.

It has to come from the police. It probably has to come locally. There needs to be a change of ethos in the police in the way that they look at election fraud. There have been a number of suggestions in some of the many reports about election laws. There have been a number of reports about election laws. Eric Pickles' is one. The Law Commission in 2014 and 2015 was another, and there have been others. Suggestion has been made about having a central directorate looking at election fraud. That is not the answer because the problem is local. As Richard Mawrey said, the problem is mainly in local government elections, but even if it is in parliamentary elections it will be a local problem and needs to be dealt with by local officers who know the ground.

One of the advantages that we had in Tower Hamlets, and I am sure that Gavin had in Slough, was having the benefit of a very large resource of wisdom and knowledge from local political campaigners who knew where the bodies were buried. Without that, it is very difficult to gather the intelligence. At a slightly more distant level, in that it is not the campaigners who might be committing the fraud, the police are the people with the local knowledge and understanding of what is going on in local communities.

It has to be the police, but it needs a change of emphasis and ethos in the police force in how seriously they take electoral fraud. There were no prosecutions that I am aware of as a result of Richard Mawrey's judgment, notwithstanding a number of serious factual findings which were made to the criminal standard. That has been a matter of complaint and is in the public record. You might think that is surprising. There may be reasons for that. It is surprising that there have been so few prosecutions about election fraud generally when we know it exists and

we know that on the basis of findings of fact made to the criminal standard of proof: beyond reasonable doubt.

**The Chair:** I have always assumed that the reason for non-involvement of the police was that there were no dead bodies.

**Francis Hoar:** The police do not see this as serious crime. When individuals are prosecuted and convicted of serious electoral fraud, as Richard Mawrey said they were in Birmingham, and possibly in Slough, they receive heavy prison sentences, which shows that committing this form of electoral fraud is a serious offence. I agree entirely with Gavin that when one talks about any measures that will act as potential inhibitors of voting, perhaps by removing a form of voting or making it more difficult to vote, even if that is to the extent of bringing an identity card to the polling station, there is a balance to be struck. It is essential to recognise that the balance is between wider engagement and cracking down on fraud.

In 2014, when the Electoral Commission recommended photo ID at polling stations, it recognised that. When the Law Commission decided not to recommend a change in postal voting availability, it expressly said that was because it was a matter for Parliament and politicians as to how they draw that balance between the availability of voting on the one hand and the availability of electoral fraud on the other.

In this particular instance with postal voting, my view is the same as Richard Mawrey's: that the problem is potentially so serious and intractable that the only way of resolving it is by making it more difficult to vote by post. That does not mean we go to a French system where it is not possible at all. I suggest it means that we go back to a pre-2000 system and a Northern Irish system. If one looks at the example of Northern Ireland, Northern Ireland has some of the highest voter engagement and highest turnouts in the United Kingdom. Northern Ireland has not had a change, as the rest of the United Kingdom has, but has got used to the fact that people are not allowed to vote with no reason. In the pre-2000 system you had to give a reason. If you were out of the country, or away on business, or any other reason, you could vote.

It is important to remember that there are laws about the availability of polling stations. Polling stations have to be close to individuals, but there will always be some people who are unable to get there. In the past, campaigners have offered lifts. Of course people should be able to vote by post. I think voting is a civic responsibility as well as a democratic right. The way I look at it is that if you vote in a polling station, you are casting a vote in a public place privately. If you vote by post, you are potentially voting in a private place, potentially publicly, because there is nobody there to enforce the privacy of a polling booth if you are voting in your own home or in a community area, which you could be if you vote by post.

The advantage of having a public area with presiding officers, polling clerks and sometimes police officers outside if there are problems is that,

because it is a public place, you can see that people are voting in private. As Richard Mawrey intimated, in Tower Hamlets there were some difficulties with individuals going into polling stations with their spouses and other members of their family or their community. Generally, that should not happen, because it can be seen and you can stop that happening. Presiding officers should stop that happening, and normally they do.

I agree there is a balance to be struck and it is important that that decision is made carefully, but, on balance, I would endorse Richard Mawrey's suggestion, based on his long experience and the horror stories that he tells in his judgments, three of them in the 2000s to early 2010s and there was postal voting fraud in Tower Hamlets, the suggestion that the pre-2000 system should be returned to.

Q119 **Baroness Pidding:** Adding to what has already been said, one of the reasons for the introduction of the ERA Act in 2013 was to tackle fraud. Specifically looking at this Act, do you think it has achieved its ambition in tackling fraud? How far has it gone to achieving that ambition?

**Gavin Millar:** I am very concerned about this. We have a saying that hard cases should not make bad law. We had some hard cases when the door was open to this sort of fraud, but we need to be extremely wary about making bad law that inhibits voting and registration just because of those cases. I understand the system was designed to tackle fraud, and there was fraud. As I said in my earlier answer, it has been reasonably successful from that point of view. Frankly, it is not more than one would expect the state to be able to do to regulate registration in a democracy. I do not think it is a big deal. It has closed off some loopholes.

I do not think there has ever been a huge fraud problem in the way that has been suggested by Commissioner Mawrey and by Francis. I think people saw a gap in that period and went through it, because people are desperate to win elections. It is a fact of life that people do bad things to try to win elections, particularly in closely contested elections. If, in a democracy, we can put a man on the moon and cannot devise a postal voting system that is fraud-free, we might as well pack up and go home.

I do not think the answer to this is to say we scrap postal voting or we revert to a system that operated pre-2001. I do not think that is progress. I think Northern Ireland is a red herring. I practise in Northern Ireland. I know it well, but not as well as I would like to. I love the place. It is a very particular case. If you look at the United Kingdom and voting in the United Kingdom, Northern Ireland has a set of historical problems we all know about that are unique. Measures are taken in Northern Ireland that are unique to deal with that problem, and have been taken since the Good Friday agreement and been relatively successful. It does not mean you need to impose them in Shrewsbury, Telford, Watford or wherever it may be. We should not be making bad law from hard cases. I am very concerned about that idea. It has made it harder for people to engage in those frauds, and that was a good thing, but I think that is as far as we should go with it.

**Francis Hoar:** Gavin's suggestions about registration are very good ones. He made two: first, the slightly less radical one; secondly, the more radical Canadian option. The less radical one is to use all forms of knowledge about identification that the state possesses to check individual registration. That is a very good idea. I would go further. I agree with Gavin that there is sense in the Canadian example, which is to give the state the responsibility for compiling an electoral register. Voting is a private activity. Whether one votes is a matter for an individual, unless you go down the Australian route, but even then you can spoil your ballot without anyone knowing about it. That is another decision for another day.

The existence of an electoral register and the engagement of, I hope, all adults who are entitled to vote is an important exercise. Those who are less likely to register themselves will often be from more marginalised communities and the people we particularly need to engage in the voting process. That seems to be a sensible suggestion—perhaps far too radical for government and Parliament, because, unfortunately, it seems that they are very reluctant to make radical decisions with electoral law, which is why they probably will not change postal voting, for example. I cannot see that happening simply because it is a radical step. Sometimes radical steps are sensible and that, in particular, seems a good idea.

As to whether it has achieved its ambition of tackling fraud, Richard Mawrey dealt expressly with this issue in the Woking election petition, I think, which was at about the same time as the Electoral Registration and Administration Act. It closes the door on one or two potential areas of fraud but not many others, because if you wish to register people who do not exist in the houses where they supposedly live—ghost voters, as Gavin coined that term—you can do so.

You register them, supposedly as an individual, provide the signatures and move on at a later date. It is right to say that some forms of identification are used to stop that. That would not necessarily stop a real individual who does not live in a property being registered, purportedly by that person, which is why using other forms of identification and access to the maximum form of data would probably be helpful in reducing potential fraud.

**Baroness Mallalieu:** Richard Mawrey described Sir Eric Pickles as "mealy-mouthed" in saying that the current election petitions and court system were useless and antiquated. What are your views, and what should be done, if anything, to improve it?

**Gavin Millar:** We know all too well, as we have been arguing in the High Court recently, that the model we have dates back to the point in the 19th century when Parliament relinquished challenges to returns to the House of Commons from the committees of the House of Commons to the judges. It was an extremely contentious reform, because parliamentarians are parliamentarians and they did not want to give it up, but felt they had to, and the judges did not want it because they felt it was too political and politicised them too much.

They devised a compromised system of this free-standing one-off election court and the designated judge or judges to hear the case, and they put into the statute a set of procedural rules. If you look at the system we have now, 160 years later, the most extraordinary thing is it has barely changed since then. It makes no sense at all. It is not fit for purpose. I do not know why it has been left to continue like that without any change, but that is where we are now.

I will put aside for one moment the question, which I think we will come to later on, of whether the Electoral Commission, in some form—maybe an expanded Electoral Commission—could have some role in taking over and pursuing election challenges of the sort that go before election courts. It must be a serious possibility. Putting that to one side, and assuming you have the system we have at the moment, you start with the question, “What is the appropriate locus for the person bringing the challenge to the election?”

This is an attempt partly to overturn an election result and partly to have a quasi-public inquiry into the election *ex post facto*, and to delve into it and investigate, through the auspices of a judge, a court and an adversarial process, to find out what went wrong and what breaches of the law there were. The principal objective, as Francis is always reminding me, is to challenge the result of the election and to overturn it. The locus has to be an elector or electors. They must have the right to at least initiate that case, and the defeated candidates must have the right. The claimant would be of that sort and you would have a statutory claimant.

Beyond that, you should be putting these cases into the standing court system, as Commissioner Mawrey says: the County Court or the High Court system, according to their gravity. Therefore, the judge that gets them should try them. You do not need a specialist judge, but, if you felt you needed that, you could have specialist circuit judges and specialist High Court judges to field them.

You should have legal aid. You should have public funding for the claimant to bring the case if they are not in a position to fund it themselves, and you should have the possibility of protective costs orders. These are public law cases. They are challenges to very important public law outcomes. We have this argument in the High Court, within the Administrative Court, with judicial review. There are access to justice issues here, and there are means that the state can adopt to ensure that people can bring these challenges.

You have to triage them. You have to filter them, as you do in the Administrative Court, to ensure there is sufficient merit in the case to go forward. Once you have overcome that problem, it is an abomination in a democracy that the inability of a claimant to fund a well-evidenced and well-pleaded case challenging an election or exposing wrongdoing at an election should prevent the case going forward. It is an outrage. There must be some form of funding arrangement.

In the Slough case, I ended up acting as prosecutor on behalf of the petitioner. As Commissioner Mawrey said, the police sergeant was sitting there taking notes through the two weeks of the case, had the benefit of our handwriting expert, our witnesses, my analysis of election law, my cross-examination and went off and prosecuted the case afterwards. We did all that. We obtained a costs order, and we could not enforce it against the respondent or any of the people who were responsible for the wrongdoing.

We went to the High Court to try to get the Conservative Party to pay our costs. This is not a party-political point. If the boot had been on the other foot and it had been Conservatives against Labour, or Liberal against Brexit Party, or whatever it was, it is your candidate, you are the party, you take the benefit and the burden of putting that candidate into the election. If they engage in a major fraud, you should pick up the costs at the end of the day. The party being responsible is a major disinhibitor for fraud. One of the biggest issues we faced in those cases we had in the 2000s was not the party looking the other way, but the party not noticing what was going on.

Parties have a big role to play in this real-time monitoring and investigation of fraud. One way to incline them to do it is to have a statutory rule that they are liable for the costs if it all goes belly-up in the election court, because they are very expensive hearings. Obviously, I have a bit of a chip on my shoulder about that because we did not get our costs and the High Court said, "As the law stands at the moment, you cannot make the party vicariously liable. You cannot make the party pay for the wrongdoing, however grievous it is, of their candidate in the election." All those things ought to be done and, if you had that investigator present in contentious elections, picking up the evidence in real time, they would have a role to play.

I do not know if you know this, but, unfortunately, the way it works at the moment is the DPP is engaged in the election court case challenge—usually, you are trying election law offences in the civil court—and can send counsel along and observe what goes on in the way that the police officer did, but that tends to be all for later, if they do turn up. They do not tend to take an active role in this. If you were going to have a different model with that statutory investigator, that could all be brought into the civil case. I used my words carefully earlier. I accept absolutely what Francis says about the police not wanting to get involved in real time in a fraud as it unfolds in election or other electoral law offences. I used my words carefully to say "investigator": some form of regulatory investigator—independent, from the outside—who is not an administrator, a returning officer or a registration officer, but somebody who is a trained investigator to spot signs of law breach. If you had that evidence and expertise, it could all be brought into the civil case. That may be for a later question.

As Richard Mawrey says, if you are not having that sort of wider system of investigators and the Electoral Commission with those sorts of

responsibilities, put it into the civil court system and make it easier for the litigation to proceed and get to the bottom of what went on. There is no problem with judges doing it. Judges do it all the time. They are skilled and competent. They have to have the case laid out before them. That is all.

**Francis Hoar:** I was thinking about Richard Mawrey's evidence about the potential of a public petitioner. As it happens, before the Sir Eric Pickles review, he received evidence from a number of people, including Professor Bob Watt, who has written a paper, which I am very happy to share with the Committee, recommending just that: a public prosecutor. I think that Bob's suggestion is it would be in pretty much all cases. You would have a two-stage test. You would apply to the court and, if your case was found to have sufficient legs, at that stage the court could appoint a public prosecutor.

I am not convinced I would go quite that far. I certainly would not stop the possibility of an individual private law action. I agree with most, if not all, of what Gavin said. I do not think Gavin was saying he would stop private actions. Although it is a public law action and involves the election result of an election by electors, it is a contest between candidates, and candidates have locus to bring challenges on the basis that they should have won, or at least there should be a new election.

They can still bring challenges saying that they should have won. For example, if three votes were discounted where there was a majority of two, that candidate can still be declared electable. That is very rare these days and was much rarer in the 19th century. I would not remove that, and I do not think it should be removed.

There are particular examples of where it might not be appropriate for a public prosecutor to intervene. One of them is the Section 106 challenge. Section 106 deals with false statements against the personal character of a candidate. Recently, there have been a number of those: the unsuccessful Carmichael case in Scotland, the Woolas case, which was a successful challenge in 2011, and Lutfur Rahman was found guilty of that particular offence. Those seem to be appropriate for a private action. I agree that it would be appropriate to put this in the normal civil court system. The recommendation of Sir Eric Pickles was High Court only. That is probably right. That would be the level of judiciary that we have currently.

It would be wonderful if legal aid was available. I agree with Gavin. Sadly, it is very unlikely that that will be provided. I cannot justifiably say the need for this is greater than criminal legal aid, for example, and civil legal aid in certain instances. However, it is important. If we could have everything that we wanted and if the court system was really able to deal with this, it would be a good idea to give legal aid to those who met a test that would be considered, as other legal aid cases are, by the Legal Aid Agency.

Being less radical for a moment, there are specific reforms to the electoral petition system that I would strongly recommend could be done by very short and easy amendments. One recommended amendment is time limits. My suggestion would be a time limit of six weeks, extendable to three months. It is 21 days now. This limit was set in 1868, when the average electorate in a parliamentary constituency was a few thousand at most, with a far smaller electorate. It is now 60,000 to 100,000. Things are far more complex.

It is far more difficult to gather evidence than it would have been back then, simply because of the quantity and size of the electorate. In my opinion, 21 days is far too short. Balanced against this is the entirely reasonable need to have certainty, which is why we ensure election petitions are heard swiftly. Sir Eric deals with this in his report. He suggests there should be a system whereby you can apply to extend the time limit, perhaps double it, if you can persuade a court you are actively investigating and receiving evidence. My suggestion is six weeks, extendable to three months. I say three months because that is the usual time limit for judicial review.

I would not change the strictness of the requirement. It is currently not possible to extend it in any circumstances, which is different from most court processes, where you can apply to extend most time limits, though not a limitation period. You cannot do this in the election court. That is right, because I believe you need that certainty. That time limit is too small, and we can deal with that quite easily.

Richard Mawrey touched upon evidence being heard in the locality. I would keep that. I would keep election petitions in the local area, in the local town hall, save in the unusual circumstances where that is inappropriate. One of them was Tower Hamlets, where there was so much evidence and intimidation that Richard Mawrey decided to move it to the High Court, which we were all relieved about because it would have been difficult to hear that case in Tower Hamlets town hall, where Lutfur Rahman was the mayor.

There will always be such circumstances that are dealt with by the current law, but I would retain the locality of it because it is an inquiry and the whole point of an election petition is not simply as a private action. It is an inquiry as well, where local people can give evidence about fraud they saw, will become aware of it and be able to turn up at the town hall to give that evidence. I believe that is valuable and should stay.

**Q120 Lord Dykes:** Coming once more to the field of electoral offences and instances of maladministration, gentlemen, I ask you the same question I asked of Mr Mawrey earlier on. If a voter or groups of voters think there is something amiss with what is going on or has gone on with an election—mostly after an election, of course, sometimes beforehand—should there be constructed a central complaints mechanism for voters to use? What would be the pros and cons of having such a system?

**Gavin Millar:** There should be. I am not sure Commissioner Mawrey quite got the point of the question. You can have rights to challenge elections through court procedures, but that is a big job. If you take that on as an individual elector, you must have a macro complaint about the way the election was run or the way a candidate ran it. It is the same for a defeated candidate. You must have a big point or big points that will win you the challenge to the election. There are lots of much smaller things that can go wrong with an election that we all know about, from the point of view of a voter or a group of voters, for which there is no avenue of redress because the election petition is not viable, there is no point in trying to overturn the election.

What do you do? You write to the returning officer, or you go to the local paper, or you write to the registration officer. Individuals ought to have a free-standing right of complaint. Somebody should be able to investigate what has gone wrong, get to the bottom of it and make a public statement, as with an ombudsman. You will remember there was a polling station in south London a few years ago, either 2010 or 2015, that had a queue outside it at 10 pm. It led to the introduction of flexible opening and closing hours and the possibility of if you are in a queue, you will get to vote after 10pm. We were involved in an election petition on that. It never went anywhere.

If you were standing in that queue and did not get through the door and did not get to vote, you are entitled to an investigation of what has gone on and an ombudsman or someone to say what has happened. In the 2000s, in the early days of postal voting on demand, particularly in the pilot schemes, there were examples of the Royal Mail not delivering on time and bags going missing. If you were one of those voters, you would want to know what went wrong and for there to be an investigation. It is a free-standing, individual complaint about your public law right, as an individual in a democracy, to participate in an election.

You will have to frame what could be the subject of a complaint, as you do with the Local Government Ombudsman and Pensions Ombudsman and so on and so forth, but absolutely you should have it. There are no cons, except it takes time and effort to investigate and to scope the initial complaint to see that it is worth looking into, to look into it and to write a short report, which is published in the local paper, saying what went wrong. It keeps administrators, returning officers and EROs on their toes. If they know they will be scrutinised and that people have that redress, it will make the system more efficient in the long run. It is beyond me why we have it in all these other areas of our public life and not in elections. It is bizarre.

**Francis Hoar:** I agree with all that. To add a little value, we would need to explore who would be registering the complaints. Another reason for the importance of that is not simply the right of individual redress or collective redress if it applies to a street, for example, that received postal votes too late. It provides a basis for gathering evidence because it is absolutely right to say the petition system will make complaints only

against winning candidates. There could easily be plenty of fraud by losing candidates.

In addition, there are problems with the oversight of elections. Petitions can be brought only when that might have affected the result or when the malpractice was so serious that the election should be voided. It is a very good data- and evidence-gathering exercise. Committees such as your Lordships' Committee will be better informed by that form of evidence being gathered. As to who should investigate, there is the complaints data-gathering and the forum for collecting those complaints.

The second question is who should investigate them. Should it be the police? Should it be the Electoral Commission? Perhaps it should be the Electoral Commission. Perhaps it should be the local returning officer, but not in cases of fraud, because it is not the province of the returning officer to investigate fraud. As with complaints to the Independent Police Complaints Commission being generally investigated by another constabulary or local police force, another returning officer may be the most appropriate investigator if it is a complaint about the conduct of a returning officer. That is my suggestion as to who should investigate. If it is a returning officer problem, another returning officer should investigate. If it is a fraud problem, perhaps the police or the Electoral Commission should investigate. If it is a wider administrative problem, perhaps the Electoral Commission should investigate. It sounds like a good idea.

**Q121 The Chair** Is there any merit in returning officers and electoral registration officers being subjected to Freedom of Information Act requirements?

**Gavin Millar:** Yes. You would need a qualified exemption under the Freedom of Information Act for confidential information or private information they hold. There are plenty of instances under the Freedom of Information Act where you have that. That will help greatly in the gathering of evidence. It will help not just voters and candidates but academics and journalists who are trying to get to the bottom of things that have gone wrong in elections.

**Francis Hoar:** Richard Mawrey is right to say that much of the evidence is available publicly—that is not necessarily known—and there is some that is not. It is my experience that registration and returning officers are extremely helpful and co-operative when requests are made. It can be difficult to frame the statutory provisions that you might argue require them to give that evidence. It would be easier and more straightforward if it was evidence that was available under an FOI with appropriate exemptions.

**Q122 Lord Hayward:** You heard my earlier question and the answer from Richard Mawrey in relation to polling stations. Should there be some formal requirement for polling stations to record information and oddities? I described them earlier as events.

**Francis Hoar:** I agree that there should. There is one example of where data will be needed that may answer your question, which is where somebody comes in to vote and they say, "Well, you have already voted," and they say, "No, I haven't. I'm Jane Jones. That person was not Jane Jones." They are given a ballot paper that is not used unless there is a petition and that comes to be challenged. Otherwise, there is not.

We had in Tower Hamlets, in fact, reams of evidence. You were present at the trial and may have seen some of this evidence. There were presiding officers and individuals present around polling stations who were giving evidence. In some cases, that evidence can be valuable. If data taken at that time is available to people investigating elections in the future, that is a more reliable form of recording it. It is a successful idea.

**Gavin Millar:** Do not overburden them, because they can get rushed off their feet at certain times.

Q123 **Lord Hayward:** I will move on to the next question, which Mr Millar implied he may want to come on to at this point. Should the Election Commission be given more enforcement powers? Should it possibly be given criminal enforcement powers?

**Gavin Millar:** I agree with Commissioner Mawrey. You need to decide what sort of Electoral Commission you are going to have in your democracy. There are different models. There are two strands to election law. There is the Political Parties, Elections and Referendums Act 2000, which is about funding of political parties and campaigns, and there is the Representation of the People Act 1983 and related bits. The Representation of the People Act splits into three parts. It regulates the franchise, campaigns and challenging elections. The last is the territory of returning officers and registration officers.

Our Electoral Commission is in the first round of law. We have seen some high-profile examples recently; for instance, party financiers, electoral campaign and referendum spending, and third-party campaign spending. There is much guidance on the website in the Representation of the People Act territory, but it is just guidance. It is not involved with running or administering the elections or adjudicating on them or taking decisions. A democracy should have a broader entity than we have. The Electoral Commission in our country has been dealt a poor hand by Parliament in terms of the status it has been given and the leadership it has had. I am not criticising the individuals.

In a democracy, a prominent judge or someone should be leading the Electoral Commission and the resources and the powers it has been given. It has been dealt a very poor hand to do a very difficult job in adverse circumstances. It is buffeted around in political debate and media debate, often very unfairly, because people think it is something it is not and that it has status and powers that it does not have. That needs to be rectified. We need a root and branch review of what sort of Electoral

Commission we want. I am afraid politicians are very scared of going there. That is the only conclusion I can draw.

Any rational, logical person, including election barristers, would say to go back to the blank sheet of paper and devise what sort of commission you want. If it is not what Commissioner Mawrey said they have in Australia, where you have a national commission running elections, if you want to keep the current model of local returning officers and registration officers, and if it is not some of them stepping out to be real-time investigators in difficult constituencies and wards during the election, there are two things that the Electoral Commission should have in its remit. One is a positive role.

It should have a positive role to promote and guarantee free and fair elections and to maximise access to and exercise of the franchise. It should have statutory duties to do that. That should be its job. There would not be as much need for us all to be sitting here, discussing this and arguing this, if we had that sort of system. I do not understand why we do not have it in our democracy. I understand parliamentary sovereignty is important and we reside a great deal of power and influence in Parliament, but elections are something different and important. Somebody outside this place should have those sorts of positive statutory duties.

The other is a negative role, which is to receive allegations of wrongdoing in breach of the law. To go back to the two strands, they should be able to receive allegations of breach of the Representation of the People Act, the sorts of things we have been talking about in the first strand. We should not confine an expanded Electoral Commission to Political Parties, Elections and Referendums Act issues about funding and campaigns. It should have the whole remit. It should field those complaints and scope them, to see if there is any merit. It should investigate them.

As I said earlier, if possible, it should have a role to step in to bring litigation even if cases have not been started by voters or candidates of the sort we have been talking about—elections or challenges. If their investigation of Representation of the People Act breaches, election offences, and maladministration gets to the point where it says there is grounds for a judge to look into this in open court and overturn the result, it should have the locus to bring the case, much like the Crown Prosecution Service does in a criminal court. That is a much more sensible way to do it. Parliament should bite the bullet and create an Electoral Commission like that.

**Francis Hoar:** The Electoral Commission already has some enforcement and investigative powers over 2000 Act matters and over funding in particular. It can investigate individuals, political parties, officers of political parties or third-party campaigners and impose sanctions on them. Those powers are subject to appeal. I was involved in one of those last year, and I regret to say the experience did not lead me to be as favourable as Gavin is about the suggestion that the Electoral Commission should have much wider powers, certainly not the Electoral

Commission as it currently is—a very different Electoral Commission maybe, but it is right to recognise that there are problems in the way that the Electoral Commission investigates matters now.

The case I was involved in is a concluded case and will not be appealed, so I can comment on it to a certain extent. The judge in that case found that the investigator had reversed the burden of proof, not just the standard of proof. The standard of proof is to the criminal standard: beyond reasonable doubt. The judge had made findings that my client, who was the person fined, had not proved something, where she should have found, “We find beyond reasonable doubt that this did not happen.” That was a concerning finding by the judge. Another concerning aspect of that case was the discussions that the commission had with complainants’ lawyers, where the lawyers met on the condition that that would not be revealed. That is concerning. There are difficulties if that current Electoral Commission as currently constituted, which is not at all what Gavin was suggesting, was to investigate.

I would row back from the suggestion that the commission should manage elections on a local level, and I do not know whether that suggestion was being made. My much more limited experience than Gavin’s, and the experience of many other electoral lawyers, is that electoral registration officers and returning officers do an extremely good job, by and large. They are on the ground and know the area. They have to be chief executives, although they can delegate their powers. The distance between them and the rest of the administration is enforced rigorously and professionally. The current system works well for managing elections on a local level. No system is infallible and could not be reformed, but it does work well. I would certainly not change that.

I would be wary of giving the Electoral Commission, even in a very different form, powers to investigate Representation of the People Act matters. Funding offences are a particular, specialist area of election law that cause so many problems that the Supreme Court disagreed with the Court of Appeal in the McKinney case that I was in two years ago on a crucial definition of expenditure law. The day-to-day offences under the Representation of the People Act—treating, bribery and false statements—are more closely related to the general criminal law. I go back to the suggestion I made earlier that the best people to investigate those are local police forces, if they are given the training and recognise the seriousness of electoral fraud and electoral offences, which, regrettably, they do not seem to.

On the other hand, if we had a completely different Electoral Commission that was rebooted and had much greater powers, perhaps those things would be treated more seriously. Perhaps there is something to be said for a very different Electoral Commission headed by a judge with different powers and different trained investigators to investigate it, but I am sceptical as to whether it would work. There is a lot to be said for local investigators and local police forces dealing with investigations of what

are very local offences by individuals and communities in their patch, as it were.

Q124 **Lord Campbell-Savours:** My questions require very brief answers. Are the Government's proposals to introduce photographic voter ID adequate? Would you go further and introduce full national identity cards to get over the problem?

**Gavin Millar:** No.

**Lord Campbell-Savours:** You would not. Are you satisfied with the Government's proposal?

**Gavin Millar:** I do not know enough about how that will work in practice, but I said at the opening of my answer I am very concerned about proposals that will disinhibit people from voting because of over-formalism.

**Francis Hoar:** I personally do not favour identity cards. When it was looking into this, the Electoral Commission sidestepped the problem quite elegantly when it said, "Well, that is a matter for another day." If you look at the Northern Irish example, you can have a non-ID card which, if you do not have one of the recognised forms of ID, you can apply for. I completely agree with Gavin that Northern Ireland is a very particular and different example from the rest of the country, but it has an example of where they introduced more rigorous ID. In its 2014 report, the Electoral Commission looked at that example and considered that the evidence was that it did not lead to a considerable drop in voting.

In that January 2014 report at appendix A, there is an example of international voting identification requirements. It will not be news to any of your Lordships in this Committee that the United Kingdom is an outlier in having no requirement for identification. There are other countries where that is the case, but most countries have a much more rigorous standard. It is right to say that this is always a balancing exercise. Before it changes the law, Parliament should look at the international examples and how changes to require greater ID affect people. It has to be said that requiring an identification to vote when you require an identification to go into a nightclub on many occasions, to give a frivolous example, does not seem too unreasonable.

**The Chair:** We are meeting in Tower Hamlets tomorrow. Is there a particular area of interest that you believe we should flag up? Gavin, you were involved there, were you not?

**Gavin Millar:** No. I was involved in a much earlier Tower Hamlets case about a fraudulent election leaflet.

**Lord Campbell-Savours:** Is there anything you think that we should be flagging up tomorrow in particular?

**Francis Hoar:** Your remit is elections and election fraud in particular. There are a number of other potential difficulties. I am in an ongoing case

involving Tower Hamlets, which I certainly cannot comment on because I am waiting for judgment, but those are matters well outside the electoral category. Tower Hamlets seems to have done quite a lot to protect the integrity of its returning officer and returning officer team since the judgment five years ago. There are other concerns that have been raised and are in the public domain about Tower Hamlets that I will not comment on, but I do not think they are within this remit. That is a rather disappointing answer from me. Sorry.

**Lord Janvrin:** I think we have probably extensively covered this, particularly what you have been saying about the engagement of the police, so I will pass on my question.

Q125 **Baroness Suttie:** I think you have touched a little bit on this already, but do you think electoral law is fit for purpose in dealing with fraud and voting offences? What changes would you like to see to protect the integrity of elections in the 21st century?

**Gavin Millar:** We have touched on this. I think the problem is we have very old legislation in the Representation of the People Act with election offences, including bearing on fraud in various forms. If you were going to describe how it has evolved, you would say 140 years of tinkering followed by the last 20 years of manic bolting-on to the structure. In the last 20 years, an incredibly complicated set of statutory instruments and subordinate legislation, devolved legislation and parallel legislation has created, from what was a relatively simple but outdated piece of legislation, this huge baroque edifice with bits hanging off it that even I, after 40 years at the Bar and 30 years practising election law, struggle with sometimes. Goodness knows what ordinary people, campaigners and others make of it.

In the midst of that, there are these election offences. They are of two types corresponding to that history. There are the old ones—that is the 140 years of tinkering—that remain exactly the same, and they are incomprehensible, and linguistically back in the 19th century and bear no relation to what we have today. In the manic legislation of the last 20 years, there are some very familiar and straightforward ones, such as in false declarations on postal voting forms and false declarations in election expense returns, which we see in all kinds of different areas, as in welfare law, and so on and so forth, and it is a complete mess.

Speaking as a part-time criminal lawyer, what you should have in any sensible system is a decision as to what the social evils are that you want to tackle through the legislation in that policy area. You should draft a set of offences that deal with those social evils and decide what the appropriate sanction is for each on a sliding scale of gravity and perhaps give some discretion to the court about how it deals with them. To do that, you have to start with a blank sheet of paper, and nobody has shown any inclination to do that since Parliament handed over jurisdiction to the judges. It is crazy.

It is not fit for purpose for fraud, and there are other forms of fraud. It is not just postal voting fraud and registration fraud. There are fraudulent statements about candidates. There is bribery and other forms of corruption. They do not address what is going on in the system today. We have sat here for more than an hour, and we have not discussed all the issues about social media campaigning and the regulation thereof, which are probably much more important than what we are talking about now.

We have imprints on the bottom of election leaflets. People get messages on social media, on Facebook, from Moscow and wherever else they may be coming from, without knowing who on earth they are coming from, whether to credit them and what to make of them. As the Electoral Commission repeatedly advises, there is nothing dealing with that. That is a classic example of: identify the contemporaneous social evil, define a regulatory system or a criminal offence to deal with it. We are way off this.

**The Chair:** On that very point about social media stuff, we are not tackling that because there is another Committee of the House doing so.

**Gavin Millar:** You are very lucky, because you have a lot on your plate and it is not straightforward. There are certain basic things that could be done, but my point is that it has to be tackled. It has to be tackled on the very simple basis that we always devise criminal offences in this country. What should be criminalised? What is the social evil? Does it merit criminalisation? If so, how do we frame the criminal offence? What is the sanction? We should do that for the problems we face now in the electoral system, not problems we faced 160 years ago.

**Francis Hoar:** I agree. One of the problems with the tinkering around and bolting-on effect that Gavin described is that it is a very linguistically complicated set of laws in the 1983 Act, which is very heavily amended by the 2000 Act and by other Acts and the 2000 Act. There are many references to other sections. To discover what a section says, sometimes you have to go back to another section, and another section and another section. It is extremely complicated, even for specialist lawyers, and that cannot be a good idea when you are running something that is one of the few things that everyone should be involved in—elections—either by voters, candidates or campaigners. That should be done.

Specifically, it is very important, in my view, to change the system of bans from the three-year and five-year fixed bans. Richard Mawrey said that. He is absolutely right. For corrupt practices, there should be a maximum much more than five years: anything up to 20 or 25 years. Lutfur Rahman could be standing in an election in only two months' time. That is concerning.

I entirely agree that judges should be able to be given discretion. Perhaps the reasoning why they were not given discretion in the first place was that it could be seen that they were getting themselves involved in a very political question by reaching a decision as to how long somebody should

be banned. I suspect that may be why that was introduced in that way. I think we can trust our judiciary to make decisions that are impartial. If we could not, they would not be our judiciary. For corrupt practices, I would maybe even have no limit. That would always be subject to appeal at a higher court if judges went wrong, but that is the same for anything and the same for criminal offences.

Q126 **The Chair:** The final question is: would you like to rate the Government's efforts to tackle fraud since Eric Pickles' report was published in 2016? A one-liner will do.

**Francis Hoar:** The most tactful thing was what Richard Mawrey said, which is they had a lot of other things on their plate. That is as far as I will go.

**The Chair:** Well, there we are.

**Gavin Millar:** Worthy.

**The Chair:** Worthy. Fair enough. Thank you very much indeed for coming along and spending well over an hour with us.