

IN THE MATTER OF:

SECTION 66 OF THE REPRESENTATION OF THE PEOPLE ACT 1983

ADVICE

Introduction

1. I am asked to advise whether s.66 of the Representation of the People Act 1983 ("the RPA") applies to representatives of political parties who note totals of visible votes cast for particular candidates at:

- the count;
- proceedings in connection with the receipt of postal ballot papers and;

and then disclose the numbers of votes they have noted to party colleagues.

The relevant statutory provisions

2. RPA s.66 is in Pt 1 of the RPA which is entitled *The Parliamentary and Local Government Franchise and its Exercise*. It is one of a group of provisions under the sub-heading *Offences*.

3. In so far as relevant RPA s.66 provides:

66 Requirement of secrecy.

(1) The following persons—

(a) every returning officer and every presiding officer or clerk attending at a polling station,

(b) every candidate or election agent or polling agent so attending,

...

shall maintain and aid in maintaining the secrecy of voting and shall not, except for some purpose authorised by law, communicate to any person before the poll is closed any information as to—

- (i) the name of any elector or proxy for an elector who has or has not applied for a ballot paper or voted at a polling station;*
- (ii) the number on the register of electors of any elector who, or whose proxy, has or has not applied for a ballot paper or voted at a polling station; or*
- (iii) the official mark.*

(2) Every person attending at the counting of the votes shall maintain and aid in maintaining the secrecy of voting and shall not—

- (a) ascertain or attempt to ascertain at the counting of the votes the number or other unique identifying mark on the back of any ballot paper;*
- (b) communicate any information obtained at the counting of the votes as to the candidate for whom any vote is given on any particular ballot paper.*

(3) No person shall—

- (a) interfere with or attempt to interfere with a voter when recording his vote;*
- (b) otherwise obtain or attempt to obtain in a polling station information as to the candidate for whom a voter in that station is about to vote or has voted;*
- (c) communicate at any time to any person any information obtained in a polling station as to the candidate for whom a voter in that station is about to vote or has voted, or as to the number or other unique identifying mark on the back of the ballot paper given to a voter at that station;*
- (d) directly or indirectly induce a voter to display his ballot paper after he has marked it so as to make known to any person the name of the candidate for whom he has or has not voted.*

(4) Every person attending the proceedings in connection with the issue or the receipt of ballot papers for persons voting by post shall maintain and aid in maintaining the secrecy of the voting and shall not—

- (a) Except for some purpose authorised by law, communicate, before the poll is closed, to any person any information obtained at those proceedings as to the official mark; or*
- (b) except for some purpose authorised by law, communicate to any person at any time any information obtained at those proceedings as to the number or other unique identifying mark on the back of the ballot paper sent to any person; or*
- (c) except for some purpose authorised by law, attempt to ascertain at the proceedings in connection with the receipt of ballot papers the number or other unique identifying mark on the back of any ballot paper; or*
- (d) attempt to ascertain at the proceedings in connection with the receipt of the ballot papers the candidate for whom any vote is given*

in any particular ballot paper or communicate any information with respect thereto obtained at those proceedings.

(5) No person having undertaken to assist a blind voter to vote shall communicate at any time to any person any information as to the candidate for whom that voter intends to vote or has voted, or as to the number or other unique identifying mark on the back of the ballot paper given for the use of that voter.

(6) If a person acts in contravention of this section he shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 6 months...

4. RPA Schedule 1 contains the Parliamentary Elections Rules. Rule 21 is headed *Prohibition of disclosure of vote*. It provides:

No person who has voted at the election shall, in any legal proceeding to question the election or return, be required to state for whom he voted

Similar provisions exist in the equivalent rules for local government and other elections¹.

5. In relation to the count RPA Sch 1 para 45(4) requires that:

(4) The returning officer, while counting and recording the number of ballot papers and counting the votes, shall keep the ballot papers with their faces upwards and take all proper precautions for preventing any person from seeing the numbers or other unique identifying marks printed on the back of the papers².

6. Part V of the Representation of the People (England and Wales) Regulations 2001/341 (regs 79 – 91) deals with the receipt of postal ballot papers. Reg 86 provides for the opening of each ballot paper envelope supported by a valid declaration of identity. It provides in relation to ballot papers that are not rejected at this stage:

86. *(1) The returning officer shall open separately each ballot paper envelope placed in the receptacle for ballot paper envelopes.*

(2) He shall place—

(a) in the postal ballot box, any ballot paper the number on which is the same as the number (or one of the numbers) on the ballot paper envelope...

RPA s.66 - discussion and analysis

¹ See for example Local Elections (Principal Areas) (England and Wales) Rules 2006/3304 ("LEPAR") Sch 2 r19.

² See for the equivalent rule for local elections, LEPAR Sch 2 r45(6)

Secrecy of the voting

7. The concept of the *secrecy of the voting* (referred to in each of ss.(1)-(4) of RPA s.66 and also known as the secrecy of the ballot) is not defined in the RPA.
8. The concept is however fundamental to our election law and dates back to the Ballot Act 1872. Prior to the Ballot Act elections were in public by *viva voce* voting at a designated polling booth. The booth was, essentially, a table with chairs for the poll clerks, who would ask electors to confirm their identity and qualification (sometimes with an oath) before inquiring how they wished to vote, often surrounded by onlookers and the agents of the candidates. The voter would state his preferences and the clerk would then mark the choices in an official poll book, based on the latest electoral register. Once the poll was over, publishers and local newspapers often sold lists showing how each voter had polled, creating poll books.
9. Open voting facilitated voter intimidation, usually by landlords and employers whose representatives attended the poll, as well as creating obvious opportunities for bribing people to change their vote at later elections.
10. After the dramatic extension of the franchise by the second Reform Act of 1867 the case for secret voting became overwhelming and the 1872 Act was the consequence. The 1872 Act ensured that electors could mark a ballot paper in a private booth and place the paper into a sealed ballot box.
11. The system, or method, of the secret ballot introduced by the 1872 Act has operated in essentially the same form through subsequent Representation of the People Acts and associated electoral legislation in the twentieth and twenty-first centuries. It is intended to ensure that a voter's choices in an election or a referendum are anonymous, forestalling attempts to influence the voter by intimidation or bribery. Anonymity is the essence of the secrecy of voting.
12. Many of the legislative provisions that regulate our now much more complicated systems of voting are intended to make it harder for polling staff or activists/observers to defeat the secrecy of the ballot by identifying who a particular voter voted for, even in a system where private/secluded voting is guaranteed and sealed ballot boxes are used.
13. Most importantly the ballot paper does not itself identify the name and address of the voter. The ballot paper can only be attributed to a particular

voter by matching a unique number on it and in the *corresponding number list* maintained by the returning officer with the voter's unique number in the electoral register³. The ballot papers are sealed after they are counted and can only be opened after the election if a court orders this in legal proceedings (for example when investigating alleged voting fraud). This is the only, exceptional, circumstance in which a ballot paper can be matched to the voter number in a way which would show the vote/s cast against that elector's electoral number. In all other legal proceedings questioning the election a person who voted cannot be asked how s/he voted (see the provisions in the rules referred to above).

RPA s.66 - general

14. The principal purpose of s.66 is also to protect the secrecy of the voting as explained above.

15. In sub-sections (1) – (5) it places both general and specific obligations on persons who might, during the voting and counting process, acquire and/or disclose information which might be used to undermine the secrecy of voting. These persons are:

- Officials/candidates and agents entitled to attend at polling stations (ss.(1));
- Those attending at the count (ss.(2));
- Other persons (for example other voters or members of the public at a polling station or those present when a postal ballot is being marked) who might acquire and/or disclose such information (ss.(3));
- Those attending the proceedings in connection with the issue and receipt of postal vote ballot papers (ss.(4));
- Persons assisting blind voters to vote (ss.(5)).

16. In the cases of those persons covered by ss.(1), (2) and (4) a general obligation to *maintain and aid in the secrecy of the voting* is imposed. Specific prohibitions are also identified (see in each sub-section following the words *and shall not*).

³ For example, when an elector votes in person the ballot paper number in the corresponding number list is marked by the clerk with the voter's number in the register of electors. See for example in the RPA Sch 1, rule 37(d).

17. The principal statutory purpose of RPA s.66 is most obvious in ss.(3) and (5) (see above). Sub-section (3)(a)-(d) each prohibit acts which could undermine the right of a voter to exercise the franchise freely in a way which protects the secrecy of his/her vote. Sub-section (5) gives further bespoke protection to a *blind voter* who is being assisted to vote.
18. Any contravention of the obligations/prohibitions imposed by RPA s.66 is a criminal offence. See ss.(6).

RPA s.66(2) – persons attending the count

19. Two specific obligations (ie prohibitions) are imposed by RPA ss.(2). The first, in ss.(2)(a), compliments RPA Sch 1 para 45(4) referred to above. Not only must those counting the votes keep the ballot papers face upwards etc, others present must not try to ascertain *the number or other unique identifying mark on the back of any ballot paper*.
20. The second, in ss.(2)(b), recognises that those present at the count can see who the vote or votes are given on *any particular ballot paper* as it is being counted. This is because the ballot paper will be face upwards as required by RPA Sch 1 para 45(4). The prohibition here is on communicating information *as to the candidate for whom any vote is given on any particular ballot paper*.
21. The differing statutory language in ss.(2)(a) and (b) is important.
22. In ss.(2)(b) (the communication prohibition) the adjective *particular* is used in its usual sense to single out an individual member of the class of things concerned – the class being ballot papers with votes on them for candidates which are being counted. A synonym for the word *particular* here would be “specific”.
23. This adjective is not used in ss.(2)(a) (the ascertaining prohibition), which refers simply to *any ballot paper*. The class of things is the same (the ballot papers with votes on them for candidates which are being counted). A particular paper is also being singled out, this time by the use of the word *any*. But the emphasis on singularity given by the word *particular* in ss.(2)(b) is not needed here. This is because a different type of information is concerned. The prohibition on ascertaining relates to a number or identifying mark unique to that ballot paper. Ascertaining this will necessarily be from a particular, or specific, ballot paper.
24. The words *the candidate for whom any vote is given* in ss.(2)(b) are also important. The word *any* here is again being used to one of a thing or a

number of things. The words particular is again not needed because only one vote can be given for a candidate. The voter may, however, be allowed more than one vote for more than one candidate.

25. The prohibition on communicating *the candidate for whom any vote is given on any particular ballot paper* is therefore, as a matter of ordinary language, a prohibition on communicating how a particular voter voted – ie the voter who cast the vote on that *particular* ballot paper. It is implicit that the person prohibited has information enabling him/herself to identify the particular voter, which will most obviously be because s/he has seen the unique identifier on the back notwithstanding the prohibition in ss.(2)(a). This is a classic example of a provision intended to protect the secrecy of the voting as explained above. Information must not be communicated which may enable the actual voter to be identified, perhaps through a matching of the unique identifier with the *corresponding number list*.

RPA s.66(4)(c) and (d) – the receipt of postal ballots

26. These provisions are similar to ss.(2)(a) and (b)⁴. The main difference is that the prohibition in relation to *the candidate for whom any vote is given in any particular ballot paper* in ss.66(4)(d) is a prohibition on both *attempting to ascertain* the information as well as communicating the same. This reflects the fact that RPA Sch 1 para 45(4) does not apply at this stage so the ballots will not be face up before they are put in the ballot box.

27. The ss.(4)(d) prohibition (“attempting to ascertain”) is, however, once again applicable only in relation to *the candidate for whom any vote is given in any particular ballot paper* [emphasis added].

Statutory construction or interpretation

28. When interpreting a statute the function of the court is to determine the legal meaning of the words in issue as it applies to the facts of the case. The legal meaning corresponds to the presumed intention of Parliament in passing the legislation.

⁴ The addition of the words *except for some purpose authorised by law* at the start of ss.(4)(c) – the equivalent of ss.(2)(a) – is immaterial. This simply reflects the fact that the returning officer’s staff may have legitimate reasons for ascertaining the unique mark on the back of a postal ballot at these proceedings as distinct from the count.

29. The exercise for the court is to ascertain the facts which, indicated by the enactment in outline form, the existence of which triggers the operation of the legal rule contained in the specific statutory provision under consideration. Problems of statutory interpretation turn on when the enactment operates and how it operates. In criminal law *the legal thrust of an enactment is usually expressed by saying that when the factual outline is satisfied the person is guilty of an offence*⁵.
30. Where the enactment bears a clear literal (linguistic/grammatical) meaning established interpretative factors may allow the court to identify a legal meaning other than the literal meaning (known as a *strained* meaning). But they may also limit the scope for doing this. The interpretive factors include the principle against penalisation under doubtful law. Where a court is considering competing interpretations the court should strive to avoid adopting an interpretation which penalises the person where the legislator's intention to do so is doubtful or to penalise him/her in a way which is not made clear in the statutory provision⁶. One aspect of this principle is that the exercise of a person's freedom of speech should not be interfered with by the state except under clear authority of law⁷. There is also a presumption that provisions are to be given a purposive construction. A purpose may be found in (ie apparent from) the legislation itself⁸.

What are the postulated facts here?

31. As I understand it, these are that: a representative of political party is present at the count or the proceedings in connection with the receipt of the postal ballots. Tallies are kept by the representatives on a piece of paper during the respective proceedings of the votes s/he sees on ballot papers. This is known as "sampling" the voting (ie indicative voting trends from the votes seen on ballot papers from a particular ballot box or on the postal ballots). The sampling may be communicated to party colleagues before the result is declared.

Advice

⁵ Bennion on Statutory Interpretation 6th Ed Pt VI.144 p.401

⁶ Ditto XVII.271 p.749

⁷ Ditto XVII.277 p.762

⁸ Ditto XX.307 p.858

32. Since s.66 creates a series of criminal offences the question here is the one identified above – what is the factual outline indicated by the relevant statutory provision that has to be satisfied for the person to be guilty of the criminal offence?
33. It follows from what I have said above that a contravention of the general obligation to *maintain and aid in maintaining the secrecy of the ballot*⁹ would involve an act which risks identifying how a particular voter voted – ie removing the anonymity that should attach to a particular vote. The practices in issue do not involve any such act. They create no risk that the anonymity attaching to a particular vote will be removed.
34. As to s.66(2): There is a clear literal meaning in relation to each of these two prohibitions. These are identified above. The practices identified plainly do not involve a contravention of ss(2)(a) (re ascertaining a unique identifying mark). Nor do they involve a contravention of the communication prohibition in ss.(2)(b). This is because only vote tallies (total numbers of votes seen and noted) are communicated. There is no communication of any vote or votes on a specific ballot paper. The established interpretive factors suggest no scope for any strained interpretation of these provisions. If Parliament had intended to criminalise sampling practices at the count it should, and would, have said so clearly in the legislation. Yet it has not done even though these practices have been followed for many years. RPA s.66(2)(a) and (b) do not contain anything approaching a clear prohibition on sampling at the count. The literal interpretation of these provisions accords with the principal purpose of RPA s.66, namely to protect the anonymity that attaches to a vote or votes cast.
35. Exactly the same analysis applies to the interpretation of the equivalent provisions in RPA s.66(4)(c) and (d). As explained above the only substantial main difference between the two sets of provisions is that s.66(4)(d) contains the words *...attempt to ascertain...the candidate for whom any vote is given in any particular ballot paper*. The practices identified do not contravene the prohibition contained within these words, however, because the party representatives are not attempting to ascertain the candidate for whom a vote is given in a specific ballot paper. They are simply recording any votes that they may see on any visible ballot papers during the proceedings in connection with the receipt of the postal ballots. No doubt there will be less ballot papers seen by the party representatives than at the count because the process of opening the postal ballot papers is different and RPA Sch 1 para 45(4) does not apply. The tallies are then communicated to party colleagues but there is no communication of information about the vote/s cast on a specific ballot paper. Again if Parliament had intended to criminalise the more

⁹ See in RPA s.66(1), (2) and (4).

limited sampling practices at this stage it could and would have said so clearly in the legislation. There is again no justification for a strained interpretation of these words which would criminalise these practices, which do not in any way threaten the anonymity of the vote.

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1983**

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