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## The Scottish Parliament Elections 2007 – what kind of hackery is this?\*

To put electoral law at the front and centre of popular discourse is no mean feat, and rarely bodes well. Before polls closed across Scotland on 3 May 2007, problems with postal voting surfaced, to be followed by concerns regarding the novel system of electronic ballot counting. With the first results in, it became clear that the quantum of spoiled ballot papers was a matter of deep concern, if not outrage. Quickly initiated were processes of reflection, recrimination and much else besides. Initial allocations of blame were tentative but questions were inevitably asked of the Electoral Commission (the public body principally charged with voter education/information, and with a significant advisory role in the administration of elections), the Scotland Office (responsible for electoral law and policy pertaining to Holyrood), its then Secretary of State (Mr Douglas Alexander MP), and the Scottish Executive (responsible for most aspects of electoral law and policy pertaining to Scotland's 32 local councils). Suspicions of venality were not far from the surface of some criticisms.

On 4 May the Electoral Commission announced that it would expand its statutory duty to report on the administration of Scottish Parliament elections<sup>1</sup> to include an independent review of the “the high number of rejected ballots; the electronic counting process; and the arrangements for postal voting”. A senior Canadian electoral administrator, Mr Ron Gould, was appointed to head the review. Before delivering its final report on 23 October 2007,<sup>2</sup> the independent review took submissions from various individuals and organisations,<sup>3</sup> engaged in a public consultation exercise,<sup>4</sup> assessed images of rejected ballot papers,<sup>5</sup> and evaluated the Electoral Commission's public awareness campaign.<sup>6</sup>

Commencing with an outline of the legal context of the Holyrood elections, this note outlines and scrutinises the principal findings of the independent review. Comprehensive and determinedly even-handed, the report contains a number of prescriptions worthy of attention, not merely for the improvements to the electoral

\* Thanks and apologies to Amy Winehouse for the subtitle.

1 Political Parties, Elections and Referendums Act 2000 s 5.

2 *Independent Review of the Scottish Parliamentary and Local Government Elections 3 May 2007* (The Electoral Commission, 2007), available at <http://www.electoralcommission.org.uk/templates/search/document.cfm/20316> (henceforth the Gould Report). The terms of reference of the review are to be found at appendix E.

3 Gould Report, appendix E.

4 Appendix B.

5 Appendix D. For reasons of voter anonymity, only images of ballot papers, not the ballot papers themselves, were viewed by the review: Gould Report 8.

6 Appendix C.

system that they may yield, but also for the looseness of certain of our constitutional arrangements that they reveal.

### A. LEGAL CONTEXT

The law pertaining to Scottish Parliament elections is, of course, specifically reserved to Westminster, in schedule 5 of the Scotland Act 1998. In and of itself, this is not a matter of great relevance for the smooth running of such elections – the contests of 1999 and 2003 were run without major incident. As has been noted, in matters relating to the franchise, electoral system, electoral administration and party finance, “[t]he Scottish Parliament must wait for Westminster to act.”<sup>7</sup> Fortunately, Westminster has indeed acted. Electoral law has been something of a growth area since 1997 with each of the above-mentioned areas being regulated by recent Acts of Parliament,<sup>8</sup> and with detailed rules to accommodate the Scottish approach to electoral administration and conduct being generated through Westminster statutory instruments.<sup>9</sup>

By contrast, the law pertaining to Scottish local government elections is a devolved matter (except for the franchise), governed principally by the Local Governance (Scotland) Act 2004, which introduced the single transferable vote system. A major innovation brought about by Liberal Democratic presence in the 2003-7 Scottish Executive coalition, the new voting system led in turn to the introduction of electronic counting for use in both Holyrood and local government elections.

A further addition to the electoral landscape since the 2003 election has been the Arbuthnott Report,<sup>10</sup> which arose from the Boundary Commission for Scotland’s 2004 review recommending a reduction in Scottish Westminster constituencies from 72 to 59.<sup>11</sup> Charged with considering the issues arising from non-coterminous boundaries as between Westminster and Holyrood constituencies, and the four different voting systems in Scottish elections,<sup>12</sup> the Commission reported in January 2006. For present purposes, the key recommendation was that the Scottish Parliament ballot papers should be redesigned to reflect better the way the additional members system of voting works.<sup>13</sup>

The Report received a somewhat tepid welcome from the then Secretary of State, Mr Alistair Darling MP, who noted that, “should I decide to take forward any

7 H Lardy, “Devolution and democracy”, in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006) 95.

8 Representation of the People Acts 1983, 1985 and 2000; Scotland Act 1998; Political Parties, Elections and Referendums Act 2000; Electoral Administration Act 2006.

9 E.g., the Representation of the People Regulations (Scotland) 2001, SI 2001/497.

10 Commission on Boundary Differences and Voting Systems, *Putting Citizens First: Voting, Boundaries and Representation in Scotland* (2006) (henceforth the Arbuthnott Report).

11 The reduction was effected by the *Scottish Parliament (Constituencies) Act 2004*.

12 Namely, the d’Hondt method of proportional representation for the European Parliament, plurality (or first past the post) for the House of Commons, additional members system for the Scottish Parliament, single transferable vote for local government.

13 Arbuthnott Report (n 10) 73, recommendation 7; para 4.52. The report made a large number of other recommendations, relating *inter alia* to voter information, “open” regional lists, and greater use of new technologies.

legislative changes these *could not be made* before the Holyrood election in 2007.”<sup>14</sup> Given that an election was less than 18 months away, this cautious approach was certainly defensible – single transferable voting was on the way in and the necessary reforms of the Electoral Administration Act 2006<sup>15</sup> were already well in train.

However, with Mr Darling’s departure from Dover House in May 2006 went the circumspection. The new incumbent, Mr Douglas Alexander, brought with him a change in approach. Indicating a desire to take forward the redesign of the ballot paper by introducing a single sheet – in the two previous Scottish Parliament elections, electors were provided with separate papers for constituency and regional list races<sup>16</sup> – the Scotland Office requested the Electoral Commission to undertake public opinion research in order to assess the impact of any possible change in format. The research was both small-scale and inconclusive (as well as returning a rejection rate of 4%),<sup>17</sup> and on 16 August 2006, the Electoral Commission highlighted the need for further consideration on the matter of a combined ballot sheet.<sup>18</sup> In a departure from the Arbuthnott Report’s suggestion that the Electoral Commission take the lead on the issue of ballot redesign, the Commission’s participation in the process ended here and the project was moved forward on an inter-party consultative basis. With the major parties in agreement,<sup>19</sup> Mr Alexander announced the combined ballot paper on 22 November 2006.<sup>20</sup> The Scottish Parliament (Elections etc) Rules 2007 were debated in Westminster in February 2007 although, contrary to past practice, the resultant Order did not include a prescribed form of the combined ballot sheet.<sup>21</sup> It is unclear why this particular recommendation of Arbuthnott was singled out for legislative attention, nor why the “no new legislation” policy of the previous Secretary of State was reversed, nor indeed why a single sheet ballot paper was thought the best way to clarify the equal status of regional list MSPs.

A possible consequence of a single sheet ballot paper is the minimisation of “leakage”. This is the process in an additional members system election whereby electors vote for one party in the constituency race, but select another for the regional list, thereby “leaking” support away from their “home” party. Larger parties suffer most from leakage, being much more likely to contest both constituencies

14 Press Release, *Arbuthnott Commission Reports to Darling*, Scotland Office, 19 January 2006. Emphasis added.

15 A response to the problems with postal voting at the 2005 general election, and the secret loans to political parties, the Act also made numerous amendments to the electoral administration and registration process. Further legislation, the Local Electoral Administration and Registration Services (Scotland) Act 2006, was required to replicate the provisions for the Scottish local government elections.

16 Press Release, *E-Counting to be Used in 2007 Elections*, Scotland Office, 9 June 2006 (“I want a single ballot paper [to remove] any confusion that a vote on the regional list is less important, or a second choice”).

17 Gould Report (n 2) 39.

18 Gould Report 39 n 10.

19 The Labour, Liberal Democratic and Scottish Nationalist Parties all approved the single ballot sheet. The position of the Conservatives is elusive.

20 Press Release, *Douglas Alexander Announces 1 Page Ballot Paper for May Elections*, Scotland Office, 22 November 2006.

21 The Scottish Parliament (Elections etc) Order 2007, SI 2007/937.

**Table 1.** Rejected Ballots in Scottish Parliament Election 1999-2007

	1999	2003	2007
<i>Constituency races</i>			
Number	9,210	12,810	85,644
% of all ballots	0.39	0.66	4.08
<i>Regional races</i>			
Number	7,268	12,482	60,455
% of all ballots	0.31	0.67	2.88

and regions. The hypothesis is that the propensity for leakage is diminished with a combined ballot paper, as electors find it cognitively difficult to mark support for different parties on a single sheet. Gould, however, finds no evidence that the inter-party discussions were motivated by such considerations.

As to the consultation process, Gould remarks that “it . . . seems that it had been the intention of the Scotland Office to proceed with using one combined ballot sheet since nearly the beginning of the planning stage.”<sup>22</sup> Moreover, the absence of a prescribed form for the combined ballot sheet<sup>23</sup> meant that the Scotland Office worked alone with the commercial company producing the ballot papers “without adequately communicating its decisions on the combined ballot paper to returning officers, who are legally responsible for ensuring that ballot papers are legally compliant.”<sup>24</sup> Indeed, it was not until 17 April 2007 – six days after the close of nominations, and a mere three weeks before polling day – that the Scotland Office provided returning officers with a written explanation of the changes to the ballot paper. This is but one instance of the damagingly compressed timetable for the administration of the election.

## B. THE MESS

Before considering whether any of the above contributed to the debacle that was the Scottish Parliament election of 2007, it is worth briefly revisiting the episode.

These simple figures capture the qualitative difference in the rate of rejected, or spoiled, ballots as between 2007 and previous Scottish Parliament elections, with rejection rates approximately five times higher than in the past. The total number of ballots cast that did not count is approximately equal to the electorate of the City of Dundee. Further, analyses show considerable variations within these figures across Scotland.

<sup>22</sup> Gould Report 40.

<sup>23</sup> In accordance with article 89 of the Scottish Parliament (Elections etc) Order 2007, the Scotland Office could change the style “with such variations as the circumstances may require.”

<sup>24</sup> Gould Report 40.

**Table 2.** Lowest and Highest Level of Rejected Ballots in Scottish Parliament Election 2007 (constituency races)

Stirling	1.90%
Eastwood	2.29%
Roxburgh and Berwickshire	2.31%
Glasgow Pollok	9.79%
Glasgow Maryhill	10.18%
Glasgow Shettleston	12.09%

In seeking to explain such wide variations, some analyses have focused on socio-economic factors.<sup>25</sup> Whilst one might hypothesise that electors in areas of multiple deprivation are more likely to spoil their ballot papers inadvertently, other factors may be at play. Election expenditure returns to the Electoral Commission show that the Labour incumbent in Glasgow Shettleston expended only one third of his limit, indicating a modest campaign. In neighbouring Glasgow Govan – a constituency with its own social challenges – the hard-fought contest was a gain for the SNP’s Ms Nicola Sturgeon MSP, whose campaign was notable for its exhaustive voter-information efforts, with an attendant low ballot rejection rate. Be that as it may, however, such factors do not explain the heightened rate of rejection as compared with 1999 and 2003. Enter Gould.

### C. GOULD’S CRITIQUE

The Gould Report has much to recommend it, not least its rigorous focus on delay as the central failing of the key players. Starting with the ill-considered decision to make a major change to the electoral system less than twelve months before polling day, delay affected all aspects of the timing and preparation of the election. It is remarkable that, even as late as 19 December 2006, the Electoral Commission was drawing the Scotland Office’s attention to the fact that key provisions in the Parliamentary Order (relating to the combination of elections) still required re-drafting.<sup>26</sup> With the Scottish Parliament (Elections etc) Order not coming into force until 14 March 2007, the implementation was only ever likely to contribute “to an air of uncertainty among all the stakeholders involved”<sup>27</sup> making it “difficult . . . to meet subsequent deadlines relating to the printing and distribution of the ballot paper”.<sup>28</sup> Most damningly (and not accounted for in the figures given above), these delays “quite probably contributed to disenfranchising a number of

<sup>25</sup> For an early, and sophisticated analysis, see C Carman, J Mitchell and R Johns, “The unfortunate natural experiment in ballot design: the Scottish Parliament elections of 2007”, presented at the EPOP group of the Political Studies Association, 2007, Bristol, England.

<sup>26</sup> Gould Report 16.

<sup>27</sup> At 29.

<sup>28</sup> At 40.

postal voters, who may not have received or been able to return their ballot papers on time.”<sup>29</sup> The report continued:<sup>30</sup>

Across Scotland, 5,413 parliamentary postal ballot papers (1.24% of those issued) and 5,204 local government ballot papers (1.2%) were too late to be included in the count. In three areas, the number of late ballot papers exceeded 5% of postal ballot papers issued.

These are remarkable figures, revealing the price electors paid for political incompetence. For this the report is not slow to attribute responsibility:<sup>31</sup>

[I]t became clear that both the Scotland Office and the Scottish Executive were frequently focused on partisan political interests in carrying out their responsibilities, overlooking voter interests and operational realities within the electoral administration timetable.

“What is characteristic of 2007”, the report added, “was a notable level of party self interest evident in Ministerial decision-making (especially in regard to the timing and method of counts and the design of ballot papers).”<sup>32</sup> As a result, “months of partisan political discussion and debate wasted valuable time which could otherwise have been used to establish a ballot paper which all voters could easily understand.”<sup>33</sup>

On the question of single transfer votes and their potential for causing voter confusion, Gould concludes that the combination of voting systems on 3 May was not responsible for the higher rejection rates in the Scottish Parliament elections, but rather, that “there is very strong evidence to suggest that the combined Scottish parliamentary ballot sheet was the main cause of this problem.”<sup>34</sup> It should be noted that the “very strong evidence” is the review’s own analysis of the rejected ballot paper images – details of which are at Appendix D of the Report. Whilst space does not permit this paper to scrutinise that analysis, its methodology and findings are deserving of further attention.

A greater cause of voter confusion, reportedly, was the use made by the SNP of party descriptions on the ballot paper – “sloganisation” in the language of the report. The practice of adopting “Alex Salmond for First Minister” to gain a favourable position on the ballot paper is described as “confusing and potentially misleading”.<sup>35</sup>

#### D. CONCLUSIONS

The above has sought to contextualise and summarise a detailed account of a complex episode. Space has not permitted consideration of numerous important issues to which Gould rightly applied his mind, such as the critical role of returning officers, and their recruitment, training and lines of reporting.<sup>36</sup> Similarly thoughtful are the

29 At 49.

30 At 66.

31 At 30.

32 At 17.

33 At 48.

34 At 52.

35 At 46, 51, 56.

36 At 25-27.

remarks on legislative and administrative practicality and the important suggestion that no new legislation comes into effect in the six months prior to polling day.<sup>37</sup> This is not to suggest that the report be swallowed whole – certain findings appear to be the product of (Canadian) cultural path dependency. For instance, the creation of a Chief Returning Officer for Scotland, responsible for the hiring and training of returning officers, the administration of elections, the public information campaign and much else besides, would generate a permanent bureaucracy somewhat at odds with the existing modes of Scottish electoral administration, without being obviously more effective. Other suggestions seem under-argued, such as the “strong recommendation” against e-voting in 2011 (as recommended by Arbuthnott), on the basis that there were problems with e-counting.<sup>38</sup> These are entirely separate technologies and to run them together is curious. Indeed, the report appears to have something of a technological blind spot, with the impact of new technologies (in voter information in particular) barely gaining a mention. Standing in a sports hall in the middle of the night waiting for results is another cultural practice on which Gould was not overly keen, calling for the abolition of over night counts. Given that the fatigue resulting from this practice very nearly resulted in the list decision being wrongly called by the returning officer for the Highlands and Islands in 2007, a bit of cultural insensitivity may, perhaps, be a good thing on occasion.

The initial response to the report from the latest Secretary of State for Scotland appears to accept the wisdom of de-coupling the Scottish Parliament and local government elections, and of returning to separate ballot papers. Rightly, the possibility of a Chief Returning Officer for Scotland is to be given consideration.<sup>39</sup> The knottier question of competence is of course left to be battled over between the governments at Holyrood and Westminster.

As to questions of constitutional governance, electoral law is foremost amongst those areas where the capacity for political self-dealing is greatest, and most damaging. The Gould Report does not accept that such practices were present in the instant case, but nor is it able to reassure us as to their absence. The Scottish Parliament elections of 2007 will long carry the connotation of politicians-as-hacks. The task of restoring confidence (and competence) must now be a priority.

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37 At 112.

38 At 120.

39 HC Deb 23 Oct 2007, cols 165 ff.