

To: Electoral and Boundary Review Committee –  
21 June 2011

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Subject: Review of the County Election Arrangements and the County  
Returning Officer's Fee

Classification: Unrestricted

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Summary This report considers the Kent Scale of Election Expenses for KCC Elections for 2011 and the issue of the payments to the County Returning Officer and KCC Election staff for the management and conduct of the KCC elections. It also considers the recommendations arising out of the Electoral Commission preliminary review of the 2010 General Election.

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## **1. Background**

1.1 At the meeting of this Committee on 8 March 2010 it was agreed that:

- the proposed Kent Scale of Expenses for KCC elections for 2011 be reviewed by this Committee at a meeting in September 2010
- the Committee would assume responsibility for authorising and approving the Kent Scale of Expenses for KCC elections each year thereafter;
- the Committee would consider and determine whether payment should be made in future to the County Returning Officer (CRO) and, if so, whether any part of that payment should be apportioned amongst KCC election staff

1.2 The staffing costs of conducting Parliamentary and European Parliamentary elections are regulated by Returning Officers' Fees and Charges Orders made by Government ("the National Scale").

1.3 In the case of District and Parish/Town Council elections, these costs have in Kent been applied (with local variations) through a scale of fees and charges ("the Kent Scale"), which since 1998 has largely mirrored the latest National Scale. The Kent Scale is revised each year in accordance with the annual National Joint Council APT&C pay award. Each year the Kent Association of Electoral Registration Officers (KAEROS) compiles and submits the Kent Scale to the Kent Association of Chief Executives for approval. KAEROS is made up of the 12 district council Electoral Registration Officers who manage the electoral roll and local elections. The Kent Scale is then used by the district councils for any District or Parish council elections falling within that year.

1.4 For County elections, the Kent Scale is supplemented annually by the Kent Scale of Fees and Expenses ("the KCC Scale") and has in the past been compiled on behalf of KCC by the Head of Registration & Coroners. The KCC Scale has traditionally replicated the Kent Scale with the exception that provision is also made for the payment of a fee to the CRO and the Deputy Returning Officers to manage the KCC election locally.

1.5 The KCC Chief Executive (now Managing Director) is the County Returning Officer and most of the Kent District Council Chief Executives are Deputy Returning Officers (DROs) for the purposes of the County elections within their district's

boundaries. This has meant that in the past the CRO and DROs have effectively determined the election fee they themselves will receive for any KCC elections. As far as the County Council is concerned, there has been no delegation to the Chief Executive/Managing Director under section 101 of the Local Government Act 1972 (or otherwise) of the authority to make such a determination. In order to introduce complete impartiality and transparency, this Committee took the decision that in future it would determine and approve the KCC Scale

1.6 The legal position surrounding the payment of election fees and expenses is complex, and a summary of the key provisions is set out in **Appendix 1**. The statutory scheme makes it clear that whilst returning officers in parliamentary elections may levy charges for their services, returning officers in local elections may not levy such charges, and may only recover “expenses properly incurred”. Indeed, it is now apparent that the past practice of the determination by the Chief Executive, acting together with the Chief Executives of district councils within the area of the County Council, of how much he himself should be paid in respect of his role as Returning Officer at a local election, is inappropriate and not permitted in law, at least as far as the County Council is concerned.

## **2. CRO/DRO Duties, Fees & Expenses**

2.1 The KCC Scale has always provided for a fee to be paid to the CRO (and DROs) for the management and conduct of the KCC election. In the past, the CRO fee has been apportioned 25:75 between the CRO and DROs respectively. Furthermore, the practice of previous CROs has been to divide the CRO retained fee 50:50 with the KCC staff who assisted with the conduct and management of the election. However, as mentioned above, it is now clear that there is no express provision in law that permits the remuneration of a Returning Officer in a local election. The only alternative is provided by section 112(2) of the Local Government Act 1972, which enables a local authority to pay its officers “such...reasonable...remuneration, as the authority appointing him think fit”. In the case of an officer appointed as the Returning Officer, this remuneration can be paid either as part of the officer’s ordinary, ongoing salary, the amount of which has been calculated by reference in part to the duties of a Returning Officer, or from time to time in respect of any duties as Returning Officer, as and when they arise (i.e. whenever there is a local election). It has been agreed that the current Managing Director’s remuneration is inclusive of her duties as CRO.

2.2 The CRO is legally responsible for the conduct of KCC elections and their main duties include the following:

- the nomination process for candidates and political parties
- provision and notification of Polling Stations
- appointment of Presiding Officers and Polling Clerks
- appropriate administration and security of Polling Stations
- preparation of ballot papers
- the count and declaration of results
- issue, receipt and counting of postal ballot papers
- candidates' election expenses returns
- presentation of final accounts

These duties are personal to the CRO but in practice are discharged by the DROs. When a district Chief Executive (or other designated senior officer) undertakes the role of DRO in county elections, they are not working for their district but for the CRO. They may have to make up for the time foregone for their employer whilst working as DRO, possibly in their own time. These duties are distinct and separate to other council officers (district and county) and members of the public who are appointed to assist in

the election process, such as Presiding Officers, Poll Clerks and Count Assistants, for whom there are specific remuneration provisions.

2.3 The CRO is an officer of the Council who is appointed under s.35(1) of the Representation of the People Act 1983 (the 1983 Act). Although appointed by the Council, the role of the CRO is one of a personal nature and is distinct and separate from their duties as an employee of the Council. The CRO may appoint one or more persons to discharge all or any of their functions. For KCC elections, by virtue of s.35(4) of the 1983 Act, the CRO appoints one DRO for each of the 12 district council areas to manage the election process locally. Like the CRO, the DRO appointment is one of a personal nature and distinct and separate from their duties as an employee of the district council. Any such appointments are in effect a personal contract between the CRO and DRO. It is therefore a matter for agreement between the CRO and DROs to determine what, if any, remuneration will be paid for undertaking these duties, which the CRO may then legitimately claim back from the County Council as expenses. In order to ensure that this process is undertaken equitably, objectively and reasonably, it may be considered helpful to do so in accordance with a fixed scale determined by this committee with reference to the nationally set scale.

2.4 However, it is not realistic to suggest this is entirely a matter between the two individuals, as to do so would mean that the CRO would be paying the DROs from their own pocket, whereas in reality this is met from KCC's elections budget. In practice, district Chief Executives are either authorised to act as a DRO for the KCC elections by virtue of a resolution of a Committee, or it is included with the terms and conditions of their appointment. The DROs will normally undertake these duties in their own time and will make up the time to their employer if they are diverted from their substantive duties. The terms and conditions of the DRO appointments are set out in a 'DRO appointment letter' which includes the current KCC Scale. In the past, this specifically included a provision that the DRO will receive 75% of the CRO scale fee. However, as the Managing Director's remuneration is now inclusive of her duties as CRO, there is no longer a CRO scale fee to apportion amongst the DROs.

2.5 Therefore, the Committee may consider it appropriate that the DROs are reimbursed for the duties undertaken in respect of KCC elections. Provision already exists within Items 23 and 26 of the KCC Scale for payments to District/Borough Councils for the use of their staff to support the CRO in the conduct of the election. However, this does not include the work of the DROs themselves and so the Committee is asked to consider including payment to them under Items 24 and 27 of the attached draft KCC Scale 2011 (as shown in **Appendix 2**), which is based on 75% of the National Scale of the Returning Officer's Fee for the conduct of the election. The table below sets out how much each DRO would expect to receive based on the current electorate:

<b>District</b>	<b>Electorate</b>	<b>Payment</b>
Ashford	86,480	£3,876
Canterbury	106,020	£4,752
Dartford	71,420	£3,201
Dover	83,340	£3,735
Gravesham	72,040	£3,229
Maidstone	115,800	£5,190
Sevenoaks	88,920	£3,985
Shepway	81,100	£3,635
Swale	96,620	£4,331
Thanet	93,580	£4,194
Tonbridge & Malling	89,140	£3,995
Tunbridge Wells	72,580	£3,253
<b>TOTAL</b>	<b>1,067,040</b>	<b>£47,376</b>

### **3. Payments to KCC Staff**

3.1 KCC staff who assist with the administrative arrangements and running of the election do not currently have those duties embedded within any of their job descriptions. The duties involve a mixture of clerical, administrative and supervisory tasks. In the past, informal provision has been made out of the fee paid to the CRO for payment to staff for election duties to reflect the additional work they undertake over and above their substantive roles.

3.2 It is now considered appropriate to make provision to embed election duties within job descriptions, in the same way as for the Managing Director, and for these to be evaluated.

3.3 It should be noted that by the removal of the CRO fee and the special payments to KCC staff from the KCC Scale will result in savings in region of £36,000 for each full KCC election.

### **4. Insurance**

4.1 KCC holds a combined liability insurance policy with Zurich Municipal for all KCC elections. There are two key sections concerning the personal acts or omissions of Returning Officers.

(a) The Public Liability section provides an indemnity of up to £50m for any one event in respect of all sums the Council and its representatives become legally liable to pay as damages and claimant's costs and expenses for accidental injury to any third party and/or accidental damage to their property. No excess will apply.

(b) The Official's Indemnity section provides an indemnity of up to £5m in aggregate in respect of all sums the Council and its representatives (all staff appointed to manage or assist in the arrangements for the election) become legally liable to pay as damages and claimant's costs and expenses for financial loss arising as a result of a negligent act or accidental error or accidental omission committed or in consequence of their assigned duties for the election process. No excess will apply.

### **5. The General Election 6 May 2010**

5.1 Following the 2010 General Election, the Electoral Commission (the independent elections watchdog) undertook a review into why voters in some polling stations were unable to cast their vote before the 10pm deadline on 6 May. Its preliminary report sets out what needs to be done to avoid a repeat of the problems. The review found:

- (a) at least 1,200 people were still queuing at 27 polling stations in 16 constituencies at 10pm in some areas the numbers of electors allocated to particular polling stations were too high and some polling stations had too few staff
- (b) in all the areas affected there were also local government elections taking place (and, in some, Mayoral elections) which meant it took longer for each voter to vote and arrangements to deal with this were inadequate

- (c) election officials did not identify and respond quickly enough to the problems that emerged on polling day
- (d) in some cases where there was a high turnout sufficient ballot papers were not available for electorate to cast their vote

5.2 The report made the following recommendations:

- (a) the law should be changed to allow people still queuing at polling stations at 10pm to be able to vote
- (b) local authorities and Returning Officers should improve their planning, review their schemes for polling districts and polling stations and make sure they allocate the right numbers of staff and electors to each polling station
- (c) the structure for delivering elections in Great Britain should be reformed so that elections are managed more consistently and professionally.

5.3 There were no reported problems in any of the Kent constituencies, but for any future KCC elections we must ensure that the recommendations above are adopted, especially as the CRO will be taking a far more proactive role in the planning and delivery of such elections. The CRO should therefore:

- (a) instruct DROs to provide sufficient ballot papers at each polling station for every elector entitled to vote in person to be able to do so
- (b) instruct DROs to consider whether the level of staffing at polling stations is sufficient for the type or types of election being held
- (c) instruct DROs to train all polling station staff prior to a KCC election in polling station procedures, including the management of queues of electors waiting to vote close to the 10pm deadline
- (d) jointly plan all the arrangements for the election with the DROs and undertake an assessment of the likely turnout for the election to inform the size of the ballot box, the location of polling stations, ensure staffing levels are adequate to cope with demand at busy times, and that sufficient ballot papers are printed (including postal voting numbers) to ensure all those electors who wish to vote, are able to do so

## **6. Recommendations**

6.1 This Committee has reserved to itself the responsibility for authorising and approving the KCC Scale. The Committee is therefore invited to resolve:

- (1) that the proposed KCC Scale for 2011 be adopted and that it be reviewed annually thereafter
- (2) that the arrangements for any payments to DROs referred to in paragraph 2.5 be determined
- (3) that KCC staff undertaking duties in respect of KCC elections should have those duties embedded within job descriptions and for these to be evaluated to reflect the additional duties (paragraph 3.2 refers)

## The Payment of the Returning Officer at a Local Government Election

### Introduction

1. This paper advises on a question of statutory interpretation regarding the payment of returning officers in local government elections (“local elections”). The question is one that has not been the subject of any reported decision. Custom and practice has evolved in different areas of the country, such that the responses of local authorities to the situation are not uniform.

2. The question is this: are Returning Officers in local elections entitled to be paid fees for each election, as and when it occurs, under any provision in the Representation of the People Act 1983 (“the 1983 Act”)?

### The factual background

3. At present, the role of returning officer is provided for in the contract of employment of the Group Managing Director (“GMD”) at Kent County Council and no part of the GMD’s salary can specifically be said to relate to that role. Historically, however, the Chief Executive has always carried out that role and one-off payments, made outside the contract of employment and based on a scale of fees settled by the Chief Executive and the Chief Executives of the district councils within the area of the County Council, have been made every four years whenever there is a local election. However, there has been no delegation, or purported delegation, by the County Council to the Chief Executive, under section 101 of the Local Government Act 1972 (“the 1972 Act”) or otherwise, of the power to make those decisions.

### The legislative background

4. The relevant legislative provisions are as follows. Section 35(1) of the 1983 Act requires every non-metropolitan county council to “appoint an officer of the council to be the returning officer for elections of councillors of the county”. The returning officer so appointed may “by writing under his hand appoint one or more persons to discharge all or any of his functions” (section 35(4)).

5. Section 36(4) of the 1983 Act provides that:

“All expenditure properly incurred by a returning officer in relation to the holding of an election of a councillor for a principal area (that is, a county, a county borough, a district or a London borough) shall, in so far as it does not, in cases where there is a scale fixed for the purposes of this section by the council for that area, exceed that scale, be paid by that council.”

6. Section 36(6) provides:

“Before a poll is taken at an election of a councillor for any local government area in England and Wales the council of that area or, in the case of an election of a parish or community councillor, the council who appointed the returning officer shall, at the request of the returning officer or of any person acting as returning officer, advance to him such reasonable sum in respect of his expenses at the election as he may require.”

7. These are the only provisions in the 1983 Act regarding the payment of a returning officer in a local election. There is therefore no express provision in the 1983 Act regarding the remuneration of a returning officer in a local election: there is

provision only for the payment of his or her expenses. This situation can be contrasted with that relating to parliamentary elections, to which I now turn.

8. Section 29 of the 1983 Act (as amended) concerns the conduct of parliamentary elections. Its terms are important for present purposes, and I shall therefore set them out here (except for the final subsection):

“(1) No consideration shall be given by or to a returning officer for the making out, receipt, delivery or return of the writ for a parliamentary election or, subject to the following provisions of this section, otherwise in connection with its execution.

(2) Nothing in subsection (1) above shall be taken as applying to any inclusive salary payable to a returning officer in respect of the office by virtue of which he becomes returning officer.

(3) A returning officer shall be entitled to recover his charges in respect of services properly rendered, or expenses properly incurred, for or in connection with a parliamentary election if -

(a) the services or expenses are of a kind specified in an order made by the Secretary of State; and

(b) the charges are reasonable.

(4) In any order made under subsection (3) above the Secretary of State may specify a maximum recoverable amount for services or expenses of any specified description and, subject to subsection (4A) below, the returning officer may not recover more than that amount in respect of any such services or expenses.

(4A) The Secretary of State may, in a particular case, authorise the payment of more than the specified maximum amount for any specified services or expenses if satisfied -

(a) that it was reasonable for the returning officer concerned to render the services or incur the expenses; and

(b) that the charges in question are reasonable.

(4B) Any order under subsection (3) above which specifies a maximum amount for services or expenses of a particular description may--

(a) provide for that amount to increase at prescribed dates, or after prescribed periods, by reference to such formula or other method of determination as may be specified in the order; and

(b) make such transitional provision in connection with any such increase as the Secretary of State considers appropriate.

(4C) The power to make orders under subsection (3) above shall be exercised by statutory instrument; and any such order may make different provision for different cases, circumstances or areas and may contain such incidental, supplemental, saving or transitional provisions as the Secretary of State thinks fit.

(5) The amount of any charges recoverable in accordance with this section shall be charged on and paid out of the Consolidated Fund on an account being submitted to the Treasury, but the Secretary of State, but the Secretary of State may if he thinks fit, before payment, apply for the account to be taxed under the provisions of section 30 below.

(6) Where the superannuation contributions required to be paid by a local authority in respect of any person are increased by any fee paid under this section as part of a returning officer's charges at a parliamentary election, then on an account being submitted to the Secretary of State a sum equal to the increase shall be charged on and paid out of the Consolidated Fund to the authority.

(7) On the returning officer's request for an advance on account of his charges, the Secretary of State may, on such terms as he thinks fit, make such an advance.

(8) Regulations may make provision as to the time when and the manner and form in which accounts are to be rendered to the Secretary of State for the purposes of the payment of a returning officer's charges."

9. It is important to bear in mind here that:

(1) by virtue of section 28 of the 1983 Act, the returning officer for a parliamentary election is obliged to act through the registration officer for a local authority (the authority in question being specified in that section), except in specified circumstances (and the registration officer is then referred to as the "acting returning officer": section 28(1));

(2) it is expressly recognised by section 29 of the 1983 Act that the returning officer for a parliamentary election may be paid his or her "charges and expenses", and not just his or her "expenses"; and

(3) although the registration officer will be an employee of a local authority (see section 8 of the 1983 Act), that officer will be paid remuneration in respect of fulfilling the role of acting returning officer by the returning officer, who will receive his or her funds for doing so from the Secretary of State, under section 29 of the 1983 Act.

10. It may be thought that there is a gap in the legislation, in that returning officers for local elections are expected to carry out their functions for no extra remuneration. However, that is clearly not so. As noted in paragraph 4 above, the returning officer in a local election must be "an officer of the council". They may in fact appoint one or more persons to discharge their functions as returning officer, but that is irrelevant in this connection. What is highly relevant is that section 112 of the 1972 Act provides for the "remuneration" of officers of local authorities. It does so in the following manner.

11. Section 112(1) provides that a local authority:

"shall appoint such officers as they think necessary for the proper discharge by the authority of such of their or another authority's functions as fall to be discharged by them".

By virtue of section 112(2) of the 1972 Act, a local authority must pay any such officer so appointed "such...reasonable...remuneration, as the authority appointing him think fit". In the case of an officer appointed as the returning officer, this remuneration, it seems clear, can be paid either as part of the officer's ordinary, ongoing salary, the amount of which has been calculated by reference in part to the duties of a returning



officer, or from time to time in respect of any duties as returning officer, as and when they arise (i.e. whenever there is a local election).

12. The statutory scheme is therefore clear: returning officers in parliamentary elections may levy charges for their services, by virtue of section 29(3) of the 1983 Act. However, in contrast, returning officers in local elections may not properly levy charges under that Act for their services as such officers. They are, however, officers of the authority to which the election in question relates, and an authority will, when determining, under section 112 of the 1972 Act, what is reasonable remuneration for an officer who is the returning officer, in practice have to take into account the fact that the officer will, whenever there is a local election, have to take on some extra responsibility.

13. The above view is consistent with the factual background to the above statutory provisions. This is that parliamentary constituencies change from time to time, and are not coterminous with local authority areas. It was therefore unlikely to be satisfactory to provide for the returning officer in a parliamentary election to be an officer (as opposed to a member) of any local authority.

## **Conclusions**

14. My conclusions on the issues raised here are as follows.

(1) In my view, the past practice of the determination by the Chief Executive, acting together with the Chief Executives of district councils within the area of the County Council, of how much he himself should be paid in respect of his role as returning officer at a local election, is unlawful in any event, at least as far as the County Council is concerned. This is because the power to make such decisions has not been delegated by the County Council to the Chief Executive. Furthermore, and in any event, even if there had been a purported delegation of that power under section 101 of the 1972 Act (which is the only provision of which I am aware which could have authorised such delegation), in my view that delegation would have been unlawful. This is because of the need for the County Council to comply with its fiduciary duty to the ratepayer. It is also because I believe that the High Court would regard such purported delegation as irrational in the public law sense and comprise a fundamental conflict of interest.

(2) Power to pay the returning officer at a local election is conferred only by section 112 of the 1972 Act: the 1983 Act confers no power to pay a returning officer at a local election, or to determine how much such officer should be paid.

(3) Remuneration in respect of the role of returning officer at a local election could be paid on an ad hoc basis or, as in the case of the current GMD, as part of the ongoing salary of the officer in question.

## THE KCC SCALE OF EXPENSES

### 1 January 2011 – 31 December 2011

<b><u>STATIONERY AND EQUIPMENT</u></b>		
1	Printing and publishing all notices, forms and other documents, providing stationery and sundries, and other miscellaneous expenditure including postage, telephone calls and faxes.	Actual and necessary cost
2	Stationery and equipment at each polling station.	
3	Hire of any building or room for the purpose of the election and the expenses attending the use of any building or room.	
4	Fitting-up polling stations including the provision, transport and erection of voting compartments, the hire of necessary furniture (where this is not otherwise available) and the return to store afterwards.	
5	Ballot Papers – provision and printing.	
6	Register of Electors – purchase.	
7	Printing or production of official poll cards.	
8	Delivery of official poll cards:  (a) by hand – at the discretion of the Deputy Returning Officer – overall maximum not to exceed  (b) by post	34p/card  Actual and necessary cost
<b><u>TRAVELLING EXPENSES</u></b>		
9	Travelling expenses to make arrangements for the poll or otherwise in connection with the conduct of the election.	KCC casual car allowance
10	Presiding Officer travelling expenses.	
11	Poll Clerk travelling expenses.	
12	Travelling expenses for staff in connection with the counting of votes at the discretion of the County Returning Officer.	
<b><u>POLLING STATION STAFF</u></b>		
13	One Presiding Officer at each Polling Station – single election.	£197.25
14	One Presiding Officer at each Polling Station – combined election or difficult station due to local circumstances (at discretion of CRO).	£242.32

15	Presiding Officer who acts as a supervisor in a Polling place where there are a number of polling stations (additional).	£9.56
16	For each Poll Clerk at each Polling Station.	£118.35
17	For each Poll Clerk at each Polling Station – combined election or difficult station due to local circumstances (at discretion of CRO).	£146.52
18	For each Presiding Officer and Poll clerk attending training	£21.89
19	For each training session provided by the DRO to Presiding Officers and Poll Clerks	£84.55
<b><u>COUNTING OF THE VOTES, POSTAL VOTING, CLERICAL &amp; OTHER ASSISTANCE, DRO EXPENSES</u></b>		
20	For the employment of persons in connection with the counting of the votes, clerical and other assistance required by the Deputy Returning Officer – for each 500 electors or part in a contested election.	£69.01
21	For the employment of persons in connection with the preparation, issue and opening of postal ballot papers – for each 100 postal voters or part.	£67.63
22	For the recount of votes – for each 500 electors or part.	£3.97
23	Contested Election – payment to District/Borough Council for the use of Council staff in the management and conduct of the election – each 500 electors or part.	£26.72
24	Contested Election – payment to DRO for the management and conduct of the election – each 500 electors or part	£22.41
<b><u>UNCONTESTED ELECTION</u></b>		
25	For clerical and other assistance required by the Deputy Returning Officer – for each 500 electors or part.	£18.77
26	Payment to District/Borough Council for the use of Council staff (management and conduct) – per division	£14.74
27	Payment to DRO (management and conduct) – single fee per division	£51.15
<b><u>COUNTY RETURNING OFFICER ONLY</u></b>		
28	In the event of an uncontested election the payment of all costs, charges and expenses whatsoever incurred in and about the conduct of the election other than those whose provision is otherwise made in this scale.	Such amount as may be approved by the Electoral and Boundary Review Committee.
29	Insurance in respect of employer's liability and for injury	Actual and necessary

	or damage to persons and property of third parties, and for such other risks as advised by the County Council's Finance Director and the insurer's to the County Council. Costs incurred by the County Returning Officer only.	cost.
30	Additional expenses (if any) involved in and about the conduct of the election including (a) professional, clerical and other assistance, (b) professional and legal advice, (c) additional costs associated with a recount of the votes and (d) other disbursements.	Such amount as may be approved by the Electoral and Boundary Review Committee.