

GUIDANCE ON THE DISPLAY OF FLAGS AND POLITICAL MATERIAL AT OR NEAR POLLING PLACES

In this response I will attempt to summarise the principles that apply to the approach to flags and more broadly the display of other overtly political material, in your capacity as Returning Officer and separately in your role as Chief Executive. In the light of these principles I will then cover the four specific points on which you asked for advice from the EMB.

The Governing Principle: the Returning Officer has control of the Polling Place

With respect to campaign material in and in the vicinity of a polling place, the fundamental principle is that the polling place itself, which is under the authority of the Returning Officer exercised through the Presiding Officer, is to be a politically neutral space. It is a place in which voters should be able to cast their vote without any influence or sense of unease.

The Returning Officer must maintain a clear neutrality and independence from the political process. As such the polling places under the control of the Returning Officer cannot be identified with any of the candidates, parties or political campaigns. A similar constraint extends to polling staff who are expected to avoid wearing or carrying anything which would identify them with a political view or position.

Broadly, the authority for these statements comes from The Scottish Parliament (Elections etc.) Order 2015, Article 31 (which draws from Article 66 of the Representation of the People Act 1983). It is a criminal offence to interfere with voters or to attempt to influence them while voting. This is enforced by the Presiding Officers, acting under the Conduct Rules for each Election.

The *polling place* is the building in which the polling stations are situated. It includes any entrance hall and may include a car park and surrounding grounds, what is generally termed the “curtilage” of the building. In a school for example, the polling place would include the playground and school gates, walls and fences.

The Application of the Principle: removing material within or attached to the Polling Place

There must not be any political material displayed on or within the polling place: no posters, no party emblems and no campaign literature. This is not just *within* the building, but also in the grounds and on any railings, walls or fences that form the boundary of the property, ie, within the curtilage of the polling place

The nature of *political material* will be for the Returning Officer to determine, and it may be context dependent. Material promoting a particular candidate or party would

certainly be prohibited. The prohibition would extend to material publicising a point of view that is clearly identifiable as the position of one candidate, party or campaign.

There is heightened sensitivity about certain material on polling day, which would otherwise not be considered political. You rightly identify flags as a concern. Generally, a national flag, certainly the national flag of the UK or of Scotland, would not be considered overtly political, or identified with a particular candidate or campaign. The display of flags within or at a polling place *could* be perceived as political, in certain contexts, if they are perceived at that place and time to imply support for a particular political campaign or position. In that case the Returning Officer would wish to remove the flags from areas within their control including the polling place.

In a nursery or school, for example, coloured bunting would not be considered campaign material, so there would be no reason for it to be taken down. There would only be an issue if the bunting contained political statements, the symbols or names of political parties and /or candidates.

Some campaigners have used chalk and temporary markings on pavements on the approach to polling places or stations. If within the curtilage of the building – for example the path leading into a church hall, or within a community centre car park – then these would be prohibited. Similarly, political graffiti on the walls of polling place would need to be removed to ensure that the building maintains its neutrality and to avoid any intimidation or influence of the voter.

Material and behaviour outwith the polling place is for the Council and Police to control and enforce

Any area outside the polling place is a public area. It is not under the control of the Returning Officer and is not a “politically neutral zone”. In public areas, campaigning can take place and is lawful. However, campaigning should be reasonable and neither aggressive nor intimidating. For example, the display of campaign posters in windows of shops or houses, or on street furniture if the Council permits such displays, close to the polling place would be reasonable and not the concern of the Returning Officer.

The Code of Conduct agreed by political parties confirms that no-one should campaign near a polling place in a way that could be seen as aggressive or intimidating. This is a public order matter for the police to enforce rather than an electoral conduct issue for a Returning Officer. For example, large groups of supporters carrying banners, or heavily branded vehicles with loudspeakers may be considered intimidating in many circumstances. The Police may intervene to maintain order, but the Returning Officer has no power to intervene.

A-boards, banners, posters or indeed flags in the area around a polling place will be subject to normal Council control through the application of Council policy. The control of such would be a Council roads /planning restriction policy with regard to [Town and Country Planning \(Control of Advertisements\)\(Scotland\) Regulations 1984](#) and similar local regulations. Councils may have policies about the use of on street advertising. Similarly there would be public safety rules to be applied where any material was positioned dangerously. These are for the Council to enforce.

The [Code of Conduct for Campaigners](#) at Scottish Parliament, Senedd Cymru, Scottish Council and Welsh Local Elections has a section on campaigning outside polling places. Campaigners should be allowed to put their messages to voters on polling day, including in public spaces outside polling places. Polling station staff and police officers should not seek to discourage or remove campaigners who are otherwise peacefully communicating with voters, provided that they are not within, or impeding access to, the grounds of the polling place. Campaigners should be careful to ensure that their approach is proportionate and should recognise that groups of supporters may be perceived as intimidating by voters. Any persistent problems should be reported to the Police.

Campaigners should keep access to polling places and the pavements around polling places clear to allow voters to enter. The Presiding Officer is responsible for maintaining order *within* the polling place, and campaigners may be asked to move by polling station staff or by police officers if they are impeding access by voters to a polling place.

Specific Issues on which advice is sought

I recognise the contentious nature of the erection of flags in many areas of the country and the political and cultural messages that they are intended to convey. I am also aware of the challenges that have been faced by Council officers or contractors across Scotland in trying to remove them from street furniture. There are certainly issues here for Returning Officers, Chief Executives and for Police Scotland.

Advice was sought from the EMB on these four questions:

1. *What position I should adopt as Returning Officer where, despite reasonable and documented efforts, it is not possible to secure removal of flags displayed on lampposts or other street furniture adjacent to polling stations or count venues?*

As your responsibility as Returning Officer extends only to the polling place, the building and the curtilage of the building, there are no immediate issues for you in your capacity as Returning Officer. As Chief Executive of the Council you may wish for the purposes of public safety or to support the enforcement of rules around the use of street furniture for advertising, to remove flags, but such action is not specific to the Election.

- 2. Whether the Board would expect mitigation measures short of removal (for example, screening, entrance re-routing, signage, or recording of risk and decision-making) to be regarded as sufficient in such circumstances*

The same principle applies. With respect to the conduct of the Election, as Returning Officer you have no responsibility for areas outwith the Polling Place. The Police may take a view that certain material on polling day may be intimidating, but that is not in your remit as Returning Officer. As Returning Officer you would have to remove material from a polling place. Any issues noted and/or decisions taken regarding material within the polling place should be recorded by the Presiding Officer and passed to the Polling Station Inspector as soon as possible, for example, on his/her next visit to the polling place.

- 3. What level of documentation or escalation would be considered appropriate to demonstrate that I have taken all reasonable steps within my control?*

As Returning Officer, operating through the Presiding Officer in charge of a polling place, your responsibility is for that place. You would need to demonstrate that the polling place is not being misused by the display of campaign material and that any such material is removed as soon as you or your staff become aware of it. Should there be issues of non-compliance, the Presiding Officer will have to consider whether to exercise powers to order the removal of individuals from a polling station or place. Enforceability of such an order may be difficult in certain circumstances, but to disobey such an order is a criminal offence and the Presiding Officer should remind offenders that the matter will be reported in due course to Police Scotland and that prosecution may follow. Offending material should, if at all possible, be removed for the duration of the Election and returned to party agents at its conclusion. Material which it is difficult to remove should, if at all possible, be covered up or otherwise obscured so that the effect of the political messaging is negated. Assistance should be sought by the Presiding Officer from Polling Station Inspectors, the Election Office and Police Scotland, and every opportunity should be taken for early engagement on this subject with candidates and agents, both at briefings and individually.

If there is resistance, verbal or physical, to the reasonable instructions of the Presiding Officer, the Polling Station Inspector or Election Team staff, employees of the Returning Officer are no different from other employees as regards safety, risk assessment and the need not to place themselves in a position of reasonably foreseeable danger. Assistance should be sought as appropriate and dependent who is present in the polling place at any particular time, including from Police Scotland. The Presiding Officer and other election staff must explain in firm terms the law and the need, for example, to remove and obscure material and that failure to comply with instructions, including an instruction under Rule 42 [reproduced at the end of this letter] of Schedule 2 of the Conduct Rules that an individual leave the polling place, are criminal offences

and will be reported to Police Scotland. It is of course difficult to give definitive advice since all cases will turn in their own facts and circumstances, and the relationship which can be established between the Presiding Officer and the offending individuals. Every effort should be made to maintain a working relationship to ensure the integrity of the polling place if that is possible.

In other words, Returning Officers and their employees should take all reasonable measures to ensure the integrity of the polling place but, in the even that they are temporarily unable to do so, the matter should be noted in full and reported to the Election Office as quickly as possible.

4. *Whether there is any recommended Scotland-wide approach or precedent that could assist Returning Officers facing similar conditions?*

With respect to a Scotland-wide position, the principles of election law and the Conduct Rules are clear and should be consistently applied by Returning Officers. There is guidance from the Electoral Commission and in the agreed Codes of Conduct for Campaigners. I will seek to remind RO colleagues of these Rules in the coming weeks. In areas outwith the polling place, the responsibility for control and enforcement lies with Councils and Police Scotland.

Engagement with Police Scotland

As explained above, Police Scotland have a role in ensuring that there is no intimidation of or obstruction to voters or indeed other members of the public, in public areas. I have regular engagement with Police Scotland's Gold and Silver Commands regarding the policing of Elections, and these discussions cover current concerns. In addition, the EMB is represented, with the Scottish Government and the Electoral Commission, on a Police Scotland Inter-Agency Committee planning for the policing and security of the Election. Police Scotland is very acutely aware of current community tensions in some areas and are receiving regular briefings from specialist officers monitoring these issues, including on the display of flags.

Given the concerns expressed by colleagues at SOLACE, I will advise Police Silver Command accordingly and will request that their policing plans anticipate the approach that they would take towards flags and to potentially intimidating campaigning on polling day. I will report on the response. I would also suggest that you raise the concerns directly with your local Police Scotland SPOC to gain clarity on the approach that will be taken locally in light of the Division's own intelligence and experience with different communities. Recent experience in Local Government by-elections in two areas of central Scotland can be cited. **Summary**

The Returning Officer has a clear responsibility under the statutory rules governing the Election to ensure there is no campaign material within or affixed to a polling

place. Anything perceived to be promoting the position of one (or more) candidate, party or campaign should be removed.

Campaigning in public areas is permitted and lawful but needs to avoid anything that would intimidate voters or hinder their access to the polling place. Enforcement here would be by the Police or the application of Council rules about material erected on the public highway in breach of local Council rules. The EMB is engaging with Police Scotland to raise awareness of these issues and I will encourage local Returning Officers to do so with their SPOCs. However as Returning Officer your responsibility extends **only** to the Polling Place.

You may also wish to seek your own legal advice on these issues.

MALCOLM BURR, Convener,

and Chris Highcock, Secretary

Electoral Management Board for Scotland

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