

**Supporting the Scottish  
Independence Referendum  
Thursday 18 September 2014**

**The Chief Counting  
Officer's Guide to  
dealing with doubtful  
ballot papers**

## Translations and other formats

This document can be made available in certain alternative formats. For further information, contact Ros Wilson at [ros.wilson@edinburgh.gov.uk](mailto:ros.wilson@edinburgh.gov.uk), telephone 0131 469 3820.

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# 1 Introduction

- 1.1 This booklet is designed to assist Counting Officers and their authorised deputies in adjudicating doubtful ballot papers at the Scottish Independence Referendum on Thursday 18 September 2014.
- 1.2 One of the Chief Counting Officer's aims in producing this booklet is to help ensure a consistency of approach across the whole of Scotland in the application of the principles which the Scottish Independence Referendum Act 2013 (SIRA) sets out in [Rule 31](#).
- 1.3 This booklet contains those principles of adjudication that should be followed when adjudicating any doubtful ballot papers, and also examples by way of guidance to illustrate their application.
- 1.4 It must be emphasised that this guidance is not prescriptive. The decision on whether to accept or reject a doubtful ballot is ultimately one for the Counting Officer – or authorised deputy - whose decision is final and can be challenged only by judicial review.
- 1.5 This booklet should be read in conjunction with the Chief Counting Officer's guidance to Counting Officers – [Part E – Verifying and counting the votes](#) – and with any other guidance or directions issued by the Chief Counting Officer in relation to the conduct of the count.
- 1.6 The Chief Counting Officer, in producing this booklet, is grateful for the comments of Counting Officers and the Electoral Commission, and the advice of W. James Wolffe QC, Dean of the Faculty of Advocates.

## 2 Principles of adjudication

- 2.1 As Counting Officer, you may delegate the final decision on adjudication to one or more deputies, but this delegation must be done explicitly in writing. Since adjudicating doubtful votes is a statutory function, it must be carried out by you or an authorised deputy and not by any other member of staff employed at the count.
- 2.2 You should ensure that any deputy authorised to adjudicate doubtful votes is given a copy of this guidance so that adjudication is conducted consistently within your area.
- 2.3 Wherever possible, you should adjudicate doubtful ballot papers regularly as the count proceeds and not leave this important task until the end of the count.
- 2.4 However, it is essential to carry out this process in full view of any counting and referendum agents, Commission representatives and accredited observers and you need to ensure that these attendees are made aware of where and when adjudication is being carried out.
- 2.5 You may wish to designate a specific area of the count centre for the adjudication of doubtful ballot papers, to provide appropriate signage and to ensure that the location of the adjudication area appears on layout plans issued to counting agents. You could also make regular announcements to advise counting agents when adjudication will take place. This topic could be handled as part of your briefing for referendum agents.
- 2.6 Counting agents may object to the rejection of any ballot paper. However, Commission representatives and accredited observers do not have this entitlement.
- 2.7 When the count commences, the counting assistants should be reminded to check the ballot papers carefully. In terms of Rule 31(2), the following papers must be set aside to be passed to the Counting Officer or authorised deputy for adjudication:-

- a) any ballot paper which does not bear either of the official marks (you should be sure to advise the counting assistants that there are two distinct official marks, one for votes cast in polling stations and the other for postal votes);
- b) any ballot paper on which votes are marked for both answers;
- c) any ballot paper having any writing or mark by which the voter can be identified (other than by the unique identifying number), including those marked:
  - (i) elsewhere than in the proper place;
  - (ii) otherwise than by means of a cross; or
  - (iii) by more than one mark; and
- d) any ballot paper which is unmarked or void for uncertainty.

2.8 In addition, in order to help maintain the integrity of the referendum, the following ballot papers should be passed to the Counting Officer or authorised depute for further consideration:-

- a) those which may be torn or damaged in any way; and/or
- b) those with anything unusual about them (for example, any paper that appears to have been altered, either with a clearly different writing instrument or with correction fluid).

2.9 Ballot papers falling into any of the categories identified in paragraphs 2.7 and 2.8 above should be placed in a tray for the supervisor to take to the Counting Officer, or authorised depute, for adjudication.

2.10 When adjudicating, you must consider each ballot paper on its own merits.

- a) **STEP 1 is to consider whether the ballot paper falls within one of the categories in [Rule 31\(2\)](#):**
  - (1) not bearing the official mark,
  - (2) indicating a vote in favour of both answers to the referendum question,

- (3) on which anything is written or marked by which the voter can be identified (other than by the unique identifying number ), or
  - (4) unmarked or void for uncertainty<sup>1</sup>
- 
- b) Category (3) above should be given a wide meaning such as to encompass potentially any paper on which the vote is marked elsewhere than by a single cross in one of the voting boxes [Robertson case].
  - c) If the ballot paper does not fall within one of the above categories it must be counted. If the ballot paper does fall within one of the categories mentioned above, the Counting Officer should proceed to Step 2.
  - d) **STEP 2 is to consider whether or not the circumstances set out in [Rule 31\(3\)](#) apply.**  
  
Those circumstances are where a ballot paper is marked
    - (i) elsewhere than in the proper place;
    - (ii) otherwise than by means of a cross; or
    - (iii) by more than one mark.
  - e) If those circumstances do not apply, the paper is void and should not be counted, provided the paper has no official mark and/or is unmarked.

## Want of the official mark

2.11 Absence of the official mark must lead to an automatic rejection. The Counting Officer has no discretion in relation to this category.

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<sup>1</sup> SIRA 2013 Schedule 3 Rule 31(1) and (2)

## Unmarked

- 2.12 Any ballot paper which seems at first to be unmarked should be carefully examined to ensure that there is no marking anywhere on the face of the ballot paper to indicate the voter's preference.
- 2.13 Marks other than a cross, however faint, may still be valid.
- 2.14 A ballot paper marked by means other than a pencil should not be rejected simply for that reason.
- 2.15 If, after scrutiny, no mark is detected to indicate a preference for either answer to the referendum question, the ballot paper must be rejected.
- 2.16 If the circumstances set out in [Rule 31\(3\)](#), do apply - the paper is marked otherwise than by putting only one cross in a voting box - the Counting Officer should proceed to Step 3.
- 2.17 **STEP 3 is to consider whether one of the tests in [Rule 31\(4\)](#) is met.** These tests are concerned with whether there is anything written or marked on the paper by which the voter can be identified.

## Writing or mark by which the voter can be identified

- 2.18 The legislation provides that a ballot paper must be rejected if anything is written or marked on it by which the voter can be identified (other than the unique identifying number)<sup>2</sup>, unless Rule 31(3) applies.
- 2.19 Rule 31(3) does not apply if one of the tests in Rule 31(4) is met. Those tests are:
- (a) if the way in which the ballot paper is marked identifies the voter; or
  - (b) where it can be shown that the voter can be identified from the mark.

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<sup>2</sup> SIRA 2013 Schedule 3 Rule 31(2)(c)



If either of these tests is met, the ballot paper must be rejected. Explanations of these two tests are given in paragraphs 2.20 and 2.21 below.

2.20 Rule 31(4)(a) “the way in which the ballot paper is marked identifies the voter”

This means that a ballot paper must be rejected if there is any writing or mark on it which, **by itself**, identifies the voter, for example

- a) if the electoral number of the voter is hand-written on the ballot paper and so unequivocally identifies the voter (note that this should not be confused with the unique identifying number of the ballot paper, printed on the back); or
- b) if the ballot paper may reasonably be held to bear the name, signature or unique address of the voter.

2.21 Rule 31(4)(b) “it can be shown that the voter can be identified from it [the mark].”

This means that the ballot paper must be rejected if it can be shown that there is something about the way that the paper has been marked which enables the voter to be identified.

The mere fact that the paper has been marked elsewhere than in the proper place, otherwise than by means of a cross or by more than one mark is not enough unless it can be shown that the voter can actually be identified from the way that the paper has been marked.

Counting Officers are not required to investigate the matter nor to require evidence to be produced to identify the writing or mark, but they should consider any evidence that is given to them at the time.

2.22 If either of the two tests in Rule 31(4) is met, the paper is void and must be rejected under Rule 31(2)(c) – the paper has written on its face a mark by which the voter can be identified.

2.23 If neither of the two tests in Rule 31(4) is met – in other words the voter cannot be identified - the Counting Officer should proceed to Step 4.

2.24 **STEP 4 is to consider the statutory question in [Rule 31\(3\)](#).**

2.25 Rule 31(3) provides that a ballot paper on which the vote is marked:

- a) elsewhere than in the proper place;
- b) otherwise than by means of a cross; or
- c) by more than one mark

should not be rejected if, **in the Counting Officer's opinion**, the mark clearly indicates the voter's intention.

2.26 This does not apply if, in terms of Rule 31(4), the ballot paper is marked in such a way as to identify the voter or it can be shown that the voter can be identified by it.

2.27 **This is the key test.** The Counting Officer must be satisfied that the way in which the ballot paper is marked clearly indicates the voter's intention.

2.28 Since the question Counting Officers must ask is directed to the voter's intention, it is appropriate to have regard to the positioning and any meaning which properly falls to be attributed to the mark made on the paper, including the words "Yes" and "No", ticks or emoticons.

2.29 A key proposition which may be taken from the *Levers v Morris* case is that, as a matter of principle, a voter may clearly indicate his or her intention by exclusion. There is no reason in principle why that should not apply where there are only two options.

2.30 Counting Officers should be careful to give proper effect to the word "clearly" in the statutory test. A reasonable way of testing the position may be, as stated in the *Cornwell v Morris* case, that if there is reasonable doubt about the position, then the ballot paper should be rejected. However, Counting Officers should be careful to ensure that the phrase "reasonable doubt" is not treated as supplanting the statutory question.

- 2.31 Ultimately, discerning a clear intention from the marks on a ballot paper is a matter of first impression, as noted in *Cornwell v Morris* and the *Pilling v Reynolds* cases.
- 2.32 The following two grounds of rejection are relevant when considering whether the marks on the paper clearly indicate the voter's intention.

## Voting for both answers to the referendum question

- 2.33 This is a matter for the Counting Officer's judgment when adjudicating each doubtful ballot paper.
- 2.34 Where there are additional marks on the ballot paper, the Counting Officer should decide whether, in his or her opinion, those additional marks clearly indicate the voter's intention to choose one of the answers to the referendum question. If that is the case, then the ballot paper should be counted - unless of course the marks otherwise identify the voter.
- 2.35 If, however, after consideration, the Counting Officer concludes that the voter has voted for both answers to the referendum question, the ballot paper must be rejected.

## Void for uncertainty

- 2.36 Where the Counting Officer does not consider that any mark or marks on the ballot paper clearly indicate the voter's intention, the ballot paper must be rejected.

## Processing rejected votes

- 2.37 Counting Officers are required by law to mark those ballot papers that have been rejected with the word "rejected" and if a counting agent objects to a particular rejection, the ballot paper must be marked "rejection objected to"<sup>3</sup>.

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<sup>3</sup> SIRA 2013 Schedule 3 Rule 31(5)

- 2.38 Once any doubtful ballot papers have been adjudicated, those which have not been rejected must be included in the count.
- 2.39 Rejected ballot papers, once marked, should be separated by category of rejection and stored together in an appropriate packet.
- 2.40 At the end of the count, Counting Officers must prepare a statement showing the number of ballot papers rejected under each of the four headings in paragraph [2.10\(a\)](#) above.<sup>4</sup> This information should be included in your return to the Chief Counting Officer.

## The Counting Officer's decision is final

- 2.41 The decision of the Counting Officer, or authorised depute, on any question arising in respect of a ballot paper is final, subject to any judicial review in accordance with [Section 34](#) of the Scottish Independence Referendum Act 2013.<sup>5</sup>

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<sup>4</sup> SIRA 2013 Schedule 3 Rule 31(6)

<sup>5</sup> SIRA 2013 Schedule 3 Rule 33

# 3 Summary

3.1 The principles to be applied are set out in Section 2 above. In practical terms, the general approach and key elements can be summarised as follows:

- a) consider each ballot paper on its own merits;
- b) always be clear and consistent in the application of the principles to be applied;
- c) take time to ensure that a considered decision with reasons is given in each case;
- d) determine whether the mark or marks on the ballot paper clearly indicate the voter's intention. When doing this, Counting Officers will need to:
  - (i) consider the whole of the face of the ballot paper; and
  - (ii) consider whether the way in which a ballot paper has been marked means that a vote for one of the referendum answers is clearly apparent.

## 4 Examples

- 4.1 Most of the examples provided here are based on previous case law. Ultimately, the decision on any particular ballot paper, including the decision as to whether the voter's intention is clear, rests with the Counting Officer.

### Case Law References

- 4.2 Abbreviated case law references have been used throughout this booklet. The following table lists the full case law references.

<b>Abbreviation</b>	<b>Full reference</b>
Berwick-upon-Tweed case	Berwick-upon-Tweed case [1880] 3 O'M & H 178
Buckrose case	Buckrose case, <i>Sykes v McArthur</i> [1886] 5 O'M & H 110
Cirencester case	<i>Lawson v Chester-Master</i> [1893] 4 O'M & H 194
Cornwell v Marshall	<i>Cornwell v Marshall</i> [1977] 75 LGR 676 DC
Eley v Durant	<i>Eley v Durant</i> [1900] 4 SJ 430
Levers v Morris	<i>Levers v Morris</i> [1971] 3 All ER QBD
Robertson case	<i>Robertson v Adamson</i> [1876] 3R 978
Rowe v Cox	<i>Rowe v Cox</i> [2001] QBD, Case M/294/01
Ruffle v Rogers	<i>Ruffle v Rogers</i> [1982] QB 1220
South Newington case	South Newington case, <i>Lewis v Shepperdson</i> [1948] 2 All ER 503
West Bromwich case	West Bromwich case, <i>Hazel v Viscount Lewisham</i> , [1911] 6 O'M & H 256
Woodward v Sarsons	<i>Woodward v Sarsons</i> [1875] LR10 CP 733

## Allowed votes

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Pages 12-39 contain examples of allowed votes.

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
YES	<input checked="" type="checkbox"/>
NO	<input type="checkbox"/>

Allow for Yes. Berwick-upon-Tweed case and Rule 31(3)(a) – elsewhere than in the proper place.

Although the mark is not fully in the Yes voting box, the mark clearly indicates the voter's intention and is a good vote for Yes in compliance with the test in Rule 31(3).

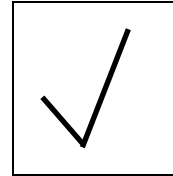
BALLOT PAPER

[Official Mark]

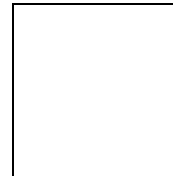
**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**



**NO**



Allow for Yes. Rule 31(3)(b) - marked otherwise than by means of a cross.

Although the mark in the Yes voting box is not a cross, the tick is a positive mark which clearly indicates the voter's intention and is a good vote for Yes in compliance with the test in Rule 31(3).



BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

  
YES

NO

Allow for Yes. Rule 31(3)(a) and (b) – elsewhere than in the proper place and marked otherwise than by means of a cross

Although the paper is not marked by a cross in the Yes voting box, the mark still clearly indicates the voter's intention to choose the Yes option. This is therefore a good vote for Yes in compliance with the test in Rule 31(3).

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**

**NO**

Allow for No. Rule 31(3)(b) - marked otherwise than by means of a cross.

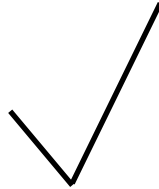
Although the mark in the No voting box is not a cross, the mark still clearly indicates the voter's intention to choose the No option, and so is a good vote for No in compliance with the test in Rule 31(3).

BALLOT PAPER

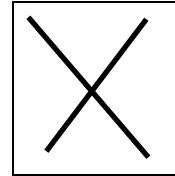
[Official Mark]

**Vote (X) ONLY ONCE**

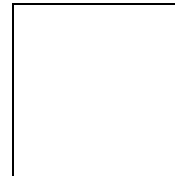
Should Scotland be an independent country?



**YES**



**NO**



Allow for Yes – Rule 31(3)(c) – by more than one mark.

Although the paper is marked by more than one mark, the tick in the Yes area adds to the clear intention of the voter to choose the Yes option, and so, it is a good vote for Yes in compliance with the test in Rule 31(3). The “X” itself is also in the Yes box and as such the main instruction on the paper has been followed.

BALLOT PAPER

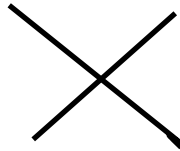
[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**

**NO**



Allow for No – Rule 31(3)(a) – elsewhere than in the proper place.

Although the “X” is not in the No voting box, it clearly indicates the voter’s intention to choose the No option and so is a good vote for No in compliance with the test in Rule 31(3).

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

YES

NO

Allow for Yes. Rule 31(3)(a) and (b) – elsewhere than in the proper place and marked otherwise than by means of a cross

Although the paper is not marked by a cross in the Yes voting box, it clearly indicates the voter’s intention to choose the “Yes” option, and so it is a good vote for Yes in compliance with the test in Rule 31(3).

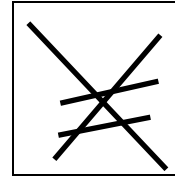
BALLOT PAPER

[Official Mark]

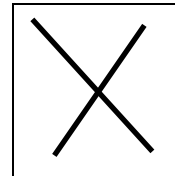
**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**



**NO**



Allow for No – Cirencester case, Eley v Durant and Rule 31(3)(c) – by more than one mark.

Although the paper is marked by more than one mark, the marks in the Yes voting box are taken as an erasure which does not detract from the otherwise clear intention of the voter to choose the No option. Therefore, it is a good vote for No in compliance with the test in Rule 31(3).

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

YES

NO

Allow for No – Woodward v Sarsons and Rule 31(3)(c) – by more than one mark.

Although the paper is marked by more than one mark, the extent of the mark in the Yes voting box is taken as a scoring out or deletion of the Yes option and reinforces the otherwise clear intention of the voter to choose the No option. The voter has also clearly followed the instruction on the ballot paper in the selection of No with an “X” in the No box. This is therefore a good vote for No in compliance with the test in Rule 31(3).

BALLOT PAPER

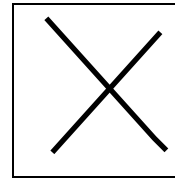
[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

~~YES~~

NO



Allow for No – Woodward v Sarsons and Rule 31(3)(c) – by more than one mark.

Although the paper is marked by more than one mark, the extent of the cross mark in the Yes voting box is taken as scoring out or deleting the Yes option and reinforces the otherwise clear intention of the voter to choose the No option. The voter has also clearly followed the instruction on the ballot paper in the selection of No with an X in the No box. This is therefore a good vote for No in compliance with the test in Rule 31(3).

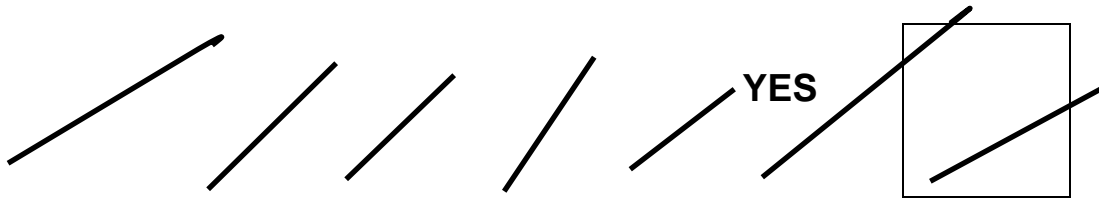


BALLOT PAPER

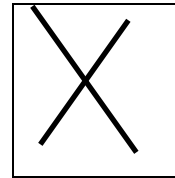
[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?



**NO**



Allow for No – Woodward v Sarsons and Rule 31(3)(c) – by more than one mark.

Although the paper is marked by more than one mark, the marks in the Yes voting box are taken as scoring out or deleting the Yes option and reinforce the otherwise clear intention of the voter to choose the No option. The voter has also clearly followed the instruction on the ballot paper in the selection of No with an “X” in the No box. As such this is a good vote for No in compliance with the test in Rule 31(3).

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

~~YES~~

NO

Allow for No – Levers v Morris and Rule 31(3)(b) - marked otherwise than by means of a cross.

The key proposition which may be taken from Levers v Morris is that, as a matter of principle, a voter may clearly indicate his or her intention by exclusion. There is no reason in principle why that should not apply where there are only two options.

If a mark, such as that shown above, clearly indicates an intention to exclude one option, the Counting Officer could properly conclude that the mark clearly indicates an intention to vote for the other option. On that basis, this example is a good vote for No in compliance with the test in Rule 31(3).

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

no

**YES**

**NO**

Allow for No – Ruffles v Rogers and Rule 31(3)(a) and (b) – elsewhere than in the proper place and marked otherwise than by means of a cross.

Although the paper is marked elsewhere than in the proper place and marked otherwise than by means of a cross, it is appropriate to have regard to the positioning and meaning which properly fall to be attributed to any mark, such as a word. Accordingly, the word “No” in this example can be taken as a clear indication of the voter’s intention to choose the No option. This is therefore a good vote for No in compliance with the test in Rule 31(3).

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	<i>yes</i>
	YES <input type="checkbox"/>
	NO <input type="checkbox"/>

Allow for Yes – Ruffles v Rogers and Rule 31(3)(a) and (b) – elsewhere than in the proper place and marked otherwise than by means of a cross.

Although the paper is marked elsewhere than in the proper place and marked otherwise than by means of a cross, it is appropriate to have regard to the positioning and meaning which properly fall to be attributed to any mark, such as a word. Accordingly, the word “Yes” in this example can be taken as a clear indication of the voter’s intention to choose the Yes option. As such it is a good vote for Yes in compliance with the test in Rule 31(3).

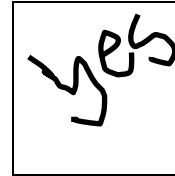
BALLOT PAPER

[Official Mark]

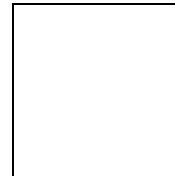
**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

YES



NO



Allow for Yes – Rule 31(3)(b) - marked otherwise than by means of a cross.

Although the paper is marked otherwise than by means of a cross, it is appropriate to have regard to the positioning and meaning which properly fall to be attributed to any mark, such as a word.

As a matter of first impression, the word “Yes” in this example can be taken as affirming the choice of the Yes option and consequently as a clear indication of the voter’s intention to choose the Yes option. As such this is a good vote for Yes in compliance with the test in Rule 31(3).

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**

**NO**

 yes

Allow for no – Rule 31(3)(b) - marked otherwise than by means of a cross.

Although the paper is marked otherwise than by means of a cross, it is appropriate to have regard to the positioning and meaning which properly falls to be attributed to any mark, such as a word. Accordingly, the word “Yes” in this example can be taken as affirming the choice of the No option and so a clear indication of the voter’s intention to choose the No option. This example therefore shows a good vote for No in compliance with the test in Rule 31(3).

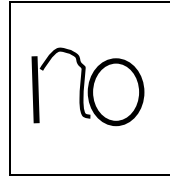
BALLOT PAPER

[Official Mark]

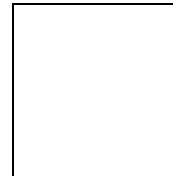
**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**



**NO**



Allow for No – Rule 31(3)(b) - marked otherwise than by means of a cross.

In this example, where the mark is one which carries a meaning – in this case the word “No” – which could infer the voter’s intention, that meaning should be taken into account.

A Counting Officer could, as a matter of first impression, determine that the voter is negating the selection of Yes and thereby voting No by excluding the Yes option. It is not possible to read the written word “No” as emphasising the Yes option. On that basis, it is a good vote for No in compliance with the test in Rule 31(3).

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

YES

yes

NO

no

Allow for Yes –Rule 31(3)(b) and (c) - marked otherwise than by means of a cross and by more than one mark.

As a matter of first impression, the positioning of the words can be taken to clearly indicate that the voter affirms the proposition “Yes” and negates the proposition “No”. On that basis, it is a good vote for Yes in compliance with the test in Rule 31(3).



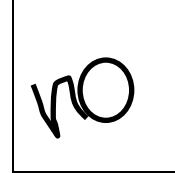
BALLOT PAPER

[Official Mark]

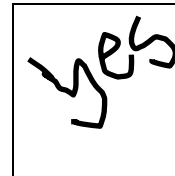
**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

YES



NO



Allow for No. Rule 31(3)(b) and (c) - marked otherwise than by means of a cross and by more than one mark.

As a matter of first impression, the positioning of the words in this example can be taken to clearly indicate that the voter affirms the proposition “No” and negates the proposition “Yes”. On that basis, this is a good vote for No in compliance with the test in Rule 31(3).

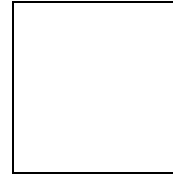
BALLOT PAPER

[Official Mark]

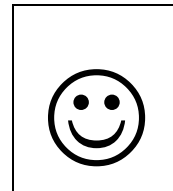
**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**



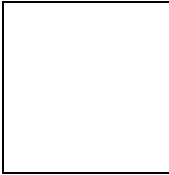
**NO**



Allow for No – Rule 31(3)(b) - marked otherwise than by means of a cross.

The 2013 Act states that Counting Officers should try to discern intention from a mark or marks used by a voter on the ballot paper. In this example, the “emoticon” could reasonably be read as expressing a positive view in relation to the No option.

In other examples where the “emoticon” may be less clear as to its intention, it may be more appropriate for Counting Officers to determine that such a vote is void for uncertainty.

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
YES	
NO	

Allow for Yes – Rule 31(3)(b) - marked otherwise than by means of a cross.

The 2013 Act states that Counting Officers should try to discern intention from a mark or marks used by a voter on the ballot paper. In this example, the “emoticon” could reasonably be read as expressing a positive view in relation to the Yes option.

In other examples where the “emoticon” may be less clear as to its intention, it may be more appropriate for Counting Officers to determine that such a vote is void for uncertainty.

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
YES	<input type="checkbox"/> Bu Choir
NO	<input type="checkbox"/>

Allow for Yes – Rule 31(3)(b) - marked otherwise than by means of a cross.

The 2013 Act states that Counting Officers should try to discern intention from a mark or marks used by a voter on the ballot paper. This shows the version of the Gaelic which would be the grammatically correct “Yes” answer to the Gaelic translation of the referendum question.

As such, this is the Gaelic equivalent of the example on page 26 and this is therefore a good vote for Yes.

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
<b>YES</b>	
<b>NO</b>	

Allow for No – Rule 31(3)(b) - marked otherwise than by means of a cross.

The 2013 Act states that Counting Officers should try to discern intention from a mark or marks used by a voter on the ballot paper. This shows the version of the Gaelic which would be the grammatically correct “No” answer to the Gaelic translation of the referendum question.

As such, this is the Gaelic equivalent of the example on page 28 and this is therefore a good vote for No.

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**

1

**NO**

Allow for Yes – Rule 31(3)(b) - marked otherwise than by means of a cross.

In this example, where the mark is one which carries a meaning – in this case a “1” – which could infer the voter’s intention, that meaning should be taken into account. Here, the figure 1 can be taken as the voter’s first, and only, choice. This vote is therefore a good vote for Yes in compliance with the test in Rule 31(3).

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

YES

1

NO

2

Allow for Yes. Rule 31(3)(b) and (c) - marked otherwise than by means of a cross and by more than one mark.

In this example, where the marks are ones which carry a meaning – i.e. “1” and “2” – which could infer the voter’s intention, that meaning should be taken into account. Here, the figure “1” can be taken as the voter’s first choice and the figure “2” as their second choice. This order of ranking can be taken as a clear intention of the voter to choose the Yes option over the No option. This is therefore a good vote for Yes in compliance with the test in Rule 31(3).

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

~~YES~~

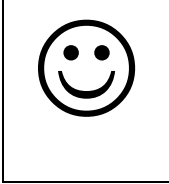
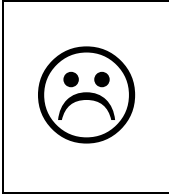
NO

Allow for No – Rule 31(3)(c) – by more than one mark.

In this particular example - allow for No – on the basis that the “X” over the printed word “YES” can be regarded as crossing or scoring out the Yes option when taken together with the clearly marked “X” in the No voting box.

In considering the position and size of the marks such as the cross over the printed word “YES”, Counting Officers will have to be careful to consider what the mark does in terms of obliterating the word or replacing the “X” within the box. If to the Counting Officer it is unclear what the mark does, it may be rejected as void for uncertainty.

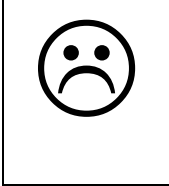
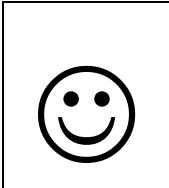


BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
YES	
NO	

Allow for Yes – Rule 31(3)(c) – by more than one mark

In this example, the “emoticons” could reasonably be read as expressing a positive to one option and a negative to another. This in effect ranks the two alternatives in the same manner as a “1” and “2”. Again this would have degrees of acceptability – ranking should only be considered where there is a very clear distinction between the two faces.

In other examples where the distinction between the “emoticons” is less clear, it may be more appropriate for Counting Officers to determine that such a vote is void for uncertainty.

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
YES	
NO	

Allow for No – Rule 31(3)(c) – by more than one mark.

As in the previous example, the emoticons could reasonably be read as expressing a positive to one option and a negative to another. This in effect ranks the two alternatives in the same manner as a “1” and “2”. Again this would have degrees of acceptability – ranking should only be considered where there is a very clear distinction between the two faces.

In other examples where the distinction between the “emoticons” is less clear, it may be more appropriate for Counting Officers to determine that such a vote is void for uncertainty.

## Rejected votes

Pages 40 to 51 contain examples of rejected votes

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
YES	<input type="checkbox"/>
NO	<input type="checkbox"/>

Reject – voting for both answers. Rule 31(2)(b)

This is a clear example of voting for both answers. Both marks are practically identical and no intention on the part of the voter can be determined from either or both marks.

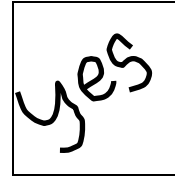
BALLOT PAPER

[Official Mark]

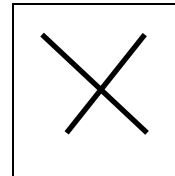
**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

YES



NO



Reject – voting for both answers. Rule 31(2)(b)

Again, this is a clear example of voting for both answers, one following the instruction on the paper and one not. Both marks in the boxes are positive marks in favour of each answer – as such a Counting Officer cannot discern intention from one or both of those marks.

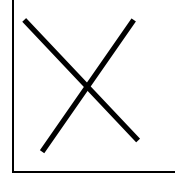
BALLOT PAPER

[Official Mark]

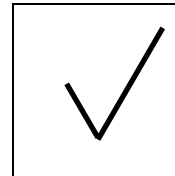
**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

YES



NO



Reject – voting for both answers. Rule 31(2)(b)

Again, this is a clear example of voting for both answers, one following the instruction on the paper and one not. Both marks in the boxes are positive marks in favour of each answer – as such a Counting Officer cannot discern intention from one or both of those marks.

BALLOT PAPER

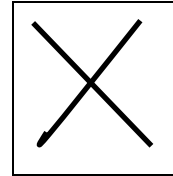
[Official Mark]

**Vote (X) ONLY ONCE**

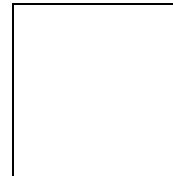
Should Scotland be an independent country?

*L. McEwan, Alder Edge Avenue*

**YES**



**NO**



Reject – voter can be identified. Woodward v Sarsons and Rule 31(2)(c)

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
YES	<input type="checkbox"/>
NO	<input checked="" type="checkbox"/>

Reject - Void for uncertainty - Rule 31(2)(d)

The 2013 Act states that Counting Officers should try to discern intention from a mark or marks used by a voter on the ballot paper. This example appears to be capable of two meanings. The written “No” could be read as a positive vote for No, in effect emphasising the choice of the No option. Alternatively, it could be read as expressing a negative to the No option and thereby be a vote for Yes by exclusion.

If there is real scope for doubt as to which meaning to give to the marks made by the voter, then it is difficult to conclude that those marks clearly indicate the voter’s intention to vote for one of the options.

On that basis, there is no clear intention on the part of the voter and the mark casts doubt as to the voter’s intention. The vote is therefore void for uncertainty.

<b>BALLOT PAPER</b>	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
<b>YES</b>	<input type="checkbox"/>
<b>NO</b>	<input type="checkbox"/>

Reject – void for uncertainty. *Rowe v Cox* and Rule 31(2)(d)

This “X” clearly obliterates the entire paper and no positive intention can be discerned. The fact that the middle of the “X” is in the Yes area of the paper does not provide enough of a notion of intention to allow this vote for Yes. It is clear that the voter intended simply to obliterate the paper.



BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

2

**YES**

**NO**

Reject – Void for uncertainty. Rule 31(2)(d).

In this example, where the mark is one which carries a meaning – in this example, “2” – which could infer the voter’s intention, that meaning should be taken into account. Here, the figure “2” is indicative at most of a second choice. Without a figure “1” against the other option of No, it is not clear which option the voter is selecting as their first choice. On that basis, this example is a rejected vote on the ground of uncertainty as an intention cannot be discerned.

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**

**NO**

Reject – Void for uncertainty. Rule 31(2)(d)

In this example, where the mark is one which carries a meaning – in this example, “3” – which could infer the voter’s intention, that meaning should be taken into account. Here, there is no way to clearly ascertain the intention behind the “3”, given that there are only two choices on the ballot paper. On that basis, this example is a rejected vote on the ground of uncertainty as it does not comply with the test in Rule 31(3).

BALLOT PAPER	<i>[Official Mark]</i>
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
<del>YES</del>	<input type="checkbox"/>
NO	<input type="checkbox"/>

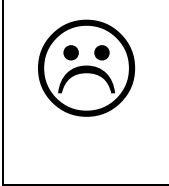

Reject – Void for uncertainty. Rule 31(2)(d)

In ballot papers containing more than two options, as in *Levers v Morris*, a cross through a particular candidate or option would be most likely to be seen by Counting Officers as a misplaced cross.

However, where there are only two options on the ballot paper, the intention of an “X” through “Yes” may be taken to either exclude Yes by crossing or scoring out the Yes option or as a misplaced cross.

Given that the intention either way is not clear, the clearest path is to say that, in terms of Rule 31(2)(d), the paper is void for uncertainty.

In considering the position and size of marks such as the cross over the printed word “YES”, Counting Officers will have to be careful to consider what the mark does in terms of obliterating the word or replacing the “X” within the box. If it is unclear to the Counting Officer what the mark does, it may be rejected as void for uncertainty.

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
YES	
NO	

Reject – Void for uncertainty. Rule 31(2)(d)

The 2013 Act states that Counting Officers should try to discern intention from a mark or marks used by a voter on the ballot paper. The negative “emoticon” or “smiley” in the Yes box can be read two ways:

- (a) as “Yes with regret”; or
- (b) as an alternative to a “No” in the “Yes” box, which would therefore lead to a “No” vote.

On that basis, there is no clear intention on the part of the voter and the mark casts doubt as to the voter’s intention. The vote is therefore void for uncertainty.

BALLOT PAPER	[Official Mark]
<b>Vote (X) ONLY ONCE</b>	
Should Scotland be an independent country?	
YES	<input type="checkbox"/>
NO	<input type="checkbox"/>

Reject – Void for uncertainty. Rule 31(2)(d)

The 2013 Act states that Counting Officers should try to discern intention from a mark or marks used by a voter on the ballot paper. The negative “emoticon” or “smiley” in the No box can be read two ways:

- (a) as “No with regret”; or
- (b) as an alternative to a “No” in the No box, which can be read as both a Yes and a No.

On that basis, there is no clear intention on the part of the voter and the mark casts doubt as to the voter’s intention. The vote is therefore void for uncertainty.

BALLOT PAPER

[Official Mark]

**Vote (X) ONLY ONCE**

Should Scotland be an independent country?

**YES**

**NO**

Reject – ballot paper is unmarked. Rule 31(2)(d)

# Annex 1

## Scottish Independence Referendum Act 2013

### Extracts from Schedule 3 – Conduct Rules

#### Rejected ballot papers

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31 (1) Any ballot paper to which paragraph (2) applies is void and is not to be counted, subject to paragraph (3).

(2) This paragraph applies to a ballot paper –

- (a) which does not bear the official mark,
- (b) which indicates a vote in favour of both answers to the referendum question,
- (c) on which anything is written or marked by which the voter can be identified (other than by the unique identifying number), or
- (d) which is unmarked or void for uncertainty.

(3) A ballot paper on which the vote is marked-

- (a) elsewhere than in the proper place,
- (b) otherwise than by means of a cross, or
- (c) by more than one mark,

Is not for such reason to be considered to be void by reason only of indicating a vote by means of figures or words (or any other mark) instead of a cross, if, in the counting officer's opinion, the mark clearly indicates the voter's intention.

- (4) Paragraph (3) does not apply if –
  - (a) the way in which the ballot paper is marked identifies the voter, or
  - (b) it can be shown that the voter can be identified from it.
  
- (5) The counting officer must –
  - (a) endorse the word “rejected” on any ballot paper which falls not to be counted under this rule, and
  - (b) if any counting agent objects to the counting officer’s decision, add to the endorsement the words “rejection objected to”.
  
- (6) The counting officer must prepare a statement showing the number of ballot papers rejected under each of sub-paragraphs (a) to (d) of paragraph (2).

## Decisions on ballot papers

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- 33. The decision of the counting officer on any question arising in respect of a ballot paper is final, subject to any judicial review in accordance with [Section 34](#).



# Scottish Independence Referendum Act 2013

## Section 34

### Legal challenge to referendum result

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#### **34 Restriction on legal challenge to referendum result**

- (1) No court may entertain any proceedings for questioning the number of ballot papers counted or votes cast as certified by a counting officer or by the Chief Counting Officer under section [7\(2\)\(b\)](#) or (as the case may be) (4) unless-
  - (a) the proceedings are brought by way of a petition for judicial review, and
  - (b) the petition is lodged before the end of the permitted period.
- (2) In subsection (1)(b) “the permitted period” means the period of 6 weeks beginning with-
  - (a) the day on which the officer in question makes the certification as to the number of ballot papers counted and votes cast in the referendum, or
  - (b) if the officer makes more than one such certification, the day on which the last is made.
- (3) In subsection (1), references to a petition for judicial review are references to an application to the supervisory jurisdiction of the Court of Session.

## Annex 2 – Common Gaelic Answers to the Referendum Question

The Gaelic translation of the referendum question is:

**"Am bu chòir Alba a bhith neo-eisimeileach?"**

The grammatically correct answers to this question would be either:

**"Bu chòir"** ("It should" - or Yes); or

**"Cha bu chòir"** ("It should not" – or No).

Other forms of "Yes" or "No" in Gaelic that might be used as answers on the ballot paper are:

**"Tha"** – Yes; or

**"Chan eil"** – No.

These would be the normal and correct response to a question beginning "Is....?" or "Are.....?". If these words appear as responses to the referendum question, a Counting Officer may wish to consider whether these are acceptable as they might have been used by well-meaning learners of Gaelic.

Other possible responses by a Gaelic speaker to the referendum question are:

**"Gu dearbh"** – meaning "certainly"

**"Gu cinnteach"** – also meaning "certainly"

**"Seadh"** – meaning "indeed"

However, the most likely responses in Gaelic to the referendum question are either **"Bu chòir"** or **"Cha bu chòir"**.

# Annex 3 – Adjudication Flowchart

## Adjudication of doubtful ballots

