

**Supplementary Guidance on Determining the Number of
Counting Agents to be allowed at Local Government
By-Elections under COVID1-19 conditions**

ELECTORAL MANAGEMENT BOARD FOR SCOTLAND

Introduction

1. The rules relating to the appointment of Counting Agents are contained in The Scottish Local Government Elections Order 2011. The rules provide that the Returning Officer (RO) may limit the number of counting agents, but the number shall be the same in the case of each candidate.
2. In determining the number of counting agents to be allowed for each candidate, Electoral Commission guidance for ROs on administering the poll (page 34) provides that *“When determining the maximum number of counting agents, each candidate or agent should, as far as possible, be permitted to appoint sufficient numbers of counting agents to enable full and proper scrutiny of the verification and count processes. You [the Returning Officer] should however consider any health and safety implications, including fire regulations for the verification and count venue, when deciding on maximum numbers of counting agents.*

Elections in the Context of COVID-19

3. Due to the COVID-19 pandemic, facilities used as count venues may have limited capacities. A number of Returning Officers (ROs) have asked the EMB for some additional guidance on how to determine the number of counting agents permitted to attend counts under current restrictions regarding physical distancing.
4. In that context the Convener recommends that ROs follow / apply the following principles:-

- The important role of counting agents needs to be recognised. Counting agents play a vital function in scrutinising the verification and count process and holding the RO to account. In this way they promote transparency, support acceptance of the result and add legitimacy to the whole election.
- ROs must give candidates, election agents and counting agents reasonable facilities to oversee the process.
- ROs should review their count venues to confirm that they are fit for purpose in the context of physical distancing, enhanced hygiene and the other considerations set out in the Electoral Commission guidance.
- Where the RO determines to restrict the number of counting agents allowed to attend the count, s/he should engage with candidates and agents to communicate clearly the factors considered in reaching a decision on the number of counting agents permitted. **Ultimately though, the RO’s decision is final.**
- Explaining the verification and count process to candidates and election agents, and the key points for scrutiny, may help alleviate any concerns about the number of counting agents permitted.
- The numbers of counting agents permitted for each candidate must be the same and should be sufficient to enable observation and scrutiny of each of the key stages in the verification and count process. The model of count may dictate appropriate numbers and the key points for scrutiny.
- If the RO intends to allow anyone not entitled by law to attend at the count, then they **must** consult election agents.
- ROs might consider innovative ways of allowing scrutiny to mitigate the impact of limiting the number of counting agents.

ELECTORAL MANAGEMENT BOARD FOR SCOTLAND

5. ROs should read this supplementary guidance in conjunction with the rules and existing Electoral Commission guidance.

Background

6. Rule 26(1)(b) of the election rules contained in The Scottish Local Government Elections Order 2011 provides that each candidate may, before the commencement of the poll, appoint counting agents to attend the counting of the votes.
7. Rule 26(2) provides that the RO may limit the number of counting agents, but the number shall be the same in the case of each candidate.
8. The Electoral Commission's Guidance for ROs on administering the poll (page 34) provides that *"When determining the maximum number of counting agents, each candidate or agent should, as far as possible, be permitted to appoint sufficient numbers of counting agents to enable full and proper scrutiny of the verification and count processes. You [the Returning Officer] should, however, consider any health and safety implications, including fire regulations for the verification and count venue, when deciding on maximum numbers of counting agents."*
9. The Commission's guidance on verifying and counting the votes (page 11) further provides that you *"must give counting agents reasonable facilities for overseeing the verification and counting of the votes, and provide them with relevant information."*

By elections under COVID -19 restrictions

10. A number of local government by elections are taking place throughout October and November 2020 and beyond. In planning and delivering these polls, ROs are required to take account of the ongoing restrictions in place to suppress the Coronavirus.
11. Due to public health advice and social distancing requirements, there may be new occupancy limits on many venues and rooms within them. As a result, in some count/verification venues there may be extremely limited capacity for attendees, including counting agents. This has led to concerns that the number of counting agents that will be authorised by ROs may be smaller than candidates may otherwise expect based on experience at previous polls.
12. This may lead to complaints from some candidates or parties. The EMB has issued this supplementary guidance to assist ROs in making a determination about the number of counting agents allowed to attend counts.

Basic Principles

13. Election rules are clear on those permitted to attend the verification and count. That said, the organisation of the count should recognise the capacity of the venue and the need to preserve a safe operation.
14. The important role of counting agents needs to be recognised. Broadly their role is to support candidates and election agents in scrutinising the verification and count process. In so doing they help preserve the integrity of the count, provide an assurance to all stakeholders that the count has been undertaken according to the rules, and help promote confidence in the result.
15. To support their role, counting agents must be provided with reasonable facilities to oversee the process. Many counting agents will also try to "sample" the ballot papers that they observe being processed, using statistical models to predict the

ELECTORAL MANAGEMENT BOARD FOR SCOTLAND

result. While this is not a fundamental element of “scrutiny”, allowing it does demonstrate transparency as long as the secrecy of the ballot is not compromised.

16. The verification and count process needs to be transparent, while maintaining the secrecy of the ballot. Each candidate is entitled to appoint counting agents, and the maximum number permitted by the RO must be the same for each candidate.

A Formula Approach

17. For some elections, legislation provides a formula to determine the maximum number of counting agents by each candidate or political party. Generally, the number is related to the number of count assistants deployed by the RO. However, the formula is a bit of a red herring. The link to the number of count assistants does not make sense in mini-count set ups, where the need is to observe each table/each mini-count unit. The formula also does not fit well with electronic counts where the points of scrutiny are different from those within a manual count, where a relation to count assistants is more rational.
18. The idea of a formula also gives the impression of an entitlement, despite the importance of health and safety etc., which will be a key concern in the current context, where the need is to maintain physical distance.
19. For council elections there is no formula. The rules provide that *“The returning officer may limit the number of counting agents, but the number shall be the same in the case of each candidate”*. The important thing is an equity of scrutiny of the process.
20. The model of count used may determine appropriate numbers and the key points for scrutiny
 - A “mini-count” may require a formula based on the number of “mini-counts”
 - A traditional count may require a formula based on the number of assistants
 - At an electronic count the papers are primarily visible at the opening of boxes and the scanning of papers. “First stage adjudication” offers little opportunity for scrutiny of papers in context, so such formulas are less valid.

The Proposed Approach

21. The principles set out at the start of this paper are designed to help ROs in making a determination about the number of counting agents that should be allowed at their counts.
22. Any questions should be directed to the Secretary of the EMB or to the Electoral Commission where further guidance is needed.