

**ACTING ATTORNEY GENERAL'S REPORT  
 INTO THE GENERAL ELECTION  
 HELD ON 22 SEPTEMBER 2016  
 IN RESPECT OF THE CONSTITUENCY OF AYRE AND MICHAEL**

**Duty to Inquire**

1. This Report arises as a consequence of an exercise of the functions of the Attorney General set out in Section 71 (1) of the Representation of the People Act 1995, which provides:-

**71 Functions of Attorney General**

- (1) *Where information is given to the Attorney General that any corrupt or illegal practice has occurred in reference to any election, the Attorney General shall make such inquiries and institute such prosecutions as the circumstances of the case appear to the Attorney General to require.*
- (2) *The Attorney General shall, either personally or by a representative, attend the trial of every election petition.*
- (3) *The court may order any party to the petition to pay all or part of the costs of the Attorney General in connection with the petition.*

2. In particular, I have received information by the means set out below that a potentially illegal practice or practice(s) might have occurred in relation to the recent General Election in respect of the constituency of Ayre and Michael. Consequently I have caused enquiries to be made, to which I refer below.

**Background**

3. My inquiries were undertaken as a consequence of concerns expressed by an unsuccessful candidate in that constituency, Louise Whitelegg, when the day after the election she emailed the Returning Officer for the constituency, Mr Simon Cain, an Advocate and partner in the local law firm of Appleby. Ms Whitelegg's email to Mr Cain (copied to Mrs Kirsty Hemsley, a Civil Servant employed within the Cabinet Office) at 11:09 on 23 September 2016 indicated her view '*...there may have been possible errors in the counting of votes in [A]yre & Michael. I would therefore be grateful [sic] if you investigate the issue as a matter of urgency...*'

4. I should add at this point that the Cabinet Office is the Department which has responsibilities for a number of matters pursuant to the Representation of People Act 1995 as a consequence of the Electoral Registration Officer, who has statutory functions under the Act, being head of a Division in the Cabinet Office. Mrs Hemsley reports to the Electoral Registration Officer, Mrs Della Fletcher MBE. ("Mrs Fletcher").
5. Some time after receiving Ms Whitelegg's e-mail but before 1:00pm on Friday 23 September 2016, Mr Cain spoke to Ms Whitelegg. According to an e-mail Mr Cain subsequently sent to Mrs Hemsley of the Cabinet Office at 12:55 on Friday 23 September 2016:

*"I have reassured her that there was absolutely nothing unusual about the count, I have total certainty in the accuracy of the count. I think it is just a couple of supporters who were disappointed in the result and nothing more to this than that. I will send to her and the other candidates a copy of the counting sheet for their information (copy attached, if you are interested)."*

Mr Cain attached to that email a counting sheet, a copy of which is at **page 1** of the Appendices hereto. It will be necessary for me to return to this counting sheet later in this Report.

6. At 16:56 on Friday 23 September 2016, Ms Whitelegg followed up her earlier telephone conversation with Mr Cain by e-mailing him for an update. Mr Cain responded at 18:46 on Friday 23 September 2016 in the following terms:-

*"As I mentioned I have no doubt whatsoever about the accuracy of the count, or about the integrity of the election. There were no discrepancies at all in the verification of the number of ballots. The only comment that I can make is that if certain people were surprised at the outcome, then so be it. I attach the record of the vote, the formal notice of the result and also a copy of the original counting sheet which records the numbers of all of the different combinations of ballot. The turnout was amazing, at 66%, which perhaps had some bearing, I don't know. Also of course the number of voters must not be confused with the number of votes. In this election, as you can see, 7 voters spoiled their papers, 484 voters cast one vote while the rest cast two votes".*

In addition to including the counting sheet, Mr Cain also attached a Counting of Ballot Papers form (Form 37) and Notice of Result (Form 40), which are respectively attached at **page 2 and 3** of the Appendices to this Report.

7. Matters rested over the weekend. However, on the morning of Monday 26 September 2016, probably following a weekend of reflection and looking at the papers Mr Cain had sent her, Ms Whitelegg wrote to Mr Cain in the following terms:-

*"Thank you for the information. I have to confess I can not get the numbers to add up on the first sheet.*

*3,228 voteRs,*

*- 484 plumps (as this is 1 vote per voter)*

*-7 Spoils*

*= 2,737 VoteRs remaining*

*x 2 votes (as each of the remaining voteRs after the plumps / spoiled removed has 2 votes that they used)*

*=5,474 votes available*

*Total no of votes for each candidate 5,680 (minus spoils)*

*206 afloat somewhere"*

8. In her e-mail, Ms Whitelegg refers to numbers on the first sheet not adding up and there being a discrepancy; here she is referring to **page 1** of the Appendices from which it is self-apparent that when adding the total number of votes running horizontally at the foot of the table and comparing it with the known number of voters and plump votes there is an obvious discrepancy.
9. Ms Whitelegg sent a copy of her email to Mr Cain on to Mrs Hemsley of the Cabinet Office later on Monday 26 September 2016 and in a further email sent the three forms she had been sent by Mr Cain on Friday evening.
10. Mrs Hemsley made contact with the Solicitor General later on Monday 26 September 2016 and following that conversation an e-mail was sent to Mr Cain, the Returning Officer at 17:46 on 26 September 2016 in the following terms:-

*"I have spoken with the Solicitor General regarding the issues with the result and paperwork for Ayre and Michael. It is suggested that a meeting is arranged tomorrow for Chambers, Cabinet Office, Louise Whitelegg and yourself to discuss events. Would you be able to bring a brief paper to summarise events please?"*

11. As a consequence of discussions in the Attorney General's Chambers, it was agreed that the Government Advocate, Keiron Murray would attend any meeting with Ms Whitelegg or with Mr Cain, rather than Mr Wannenburg, the Solicitor General or myself. This was to secure that at that stage the Crown Officers were kept at a remove from the fact finding exercise owing to the potential other courses of action which might need to be pursued.
12. Following the invitation to Mr Cain to attend a meeting at midday on 27 September 2016, Mr Cain e-mailed Mrs Hemsley at 10:04 on Tuesday 27 September 2016, that e-mail containing the following comment:-

*Incidentally I called Alf Cannan about this last night. I explained the situation to him. I told him that while this can't come close to affecting the actual result, it is our conjecture that it is his vote and Louise Whitelegg's vote which was undercounted. He said that he was satisfied with my view that while there has clearly been a mistake, that it cannot affect the result in a material way and also that there is not enough reason for me to take the matter further. I said I would speak to him again after our meeting. I also will speak to Carlos Phillips and Tim Baker about this because I want them to be aware of it. I tried to call both earlier today but for now I will wait until our meeting.*

13. The meetings with Ms Whitelegg and separately with Mr Cain were each attended by Mrs Della Fletcher, Mrs Hemsley and Mr Murray. Mrs Hemsley's notes of those meetings are at **pages 4 - 7** of the Appendices.
14. As a consequence of the conclusion of the later meeting with Mr Cain, it was agreed that Mr Murray and Mr Cain would each look at the legal position with regard to the opening of sealed packets of papers relating to the election in Ayre and Michael.

15. Mr Cain called Mr Murray at around 3:30pm on Tuesday 27 September 2016 and indicated that he did not consider there was any impediment to him opening up the sealed ballot papers. Mr Murray indicated in that phone call that it would be a matter for the Returning Officer to consider with his deputies, but it seemed to him [Mr Murray] that the terms of regulations 54 and 56 of the Representation of the People Regulations 2015 (Statutory Document 2015/0379)<sup>1</sup> appear to preclude what Mr Cain was proposing to do.
16. Mr Murray subsequently emailed Mr Cain at 16:42 on Tuesday 27 September 2016, but in the meantime, Mr Cain had called the Cabinet Office at 16:20, a note of which call taken by a colleague of Mrs Hemsley and Mrs Fletcher recorded as follows:-

***Telecon with Simon Cain @16.20 (27 September)***

*SC called to advise that having investigated the legislation it appears that the prohibition of ROs opening sealed packets only extends to certain documents, of which ballot papers are not included. It is only documents that could identify voters i.e. tendered votes, counterfoils.*

*This being the case he has decided to open the ballot papers, and is satisfied he has the discretion to investigate the matter. He believes he could refuse to do this, however he does not want to have any kind of negative impact on the elected candidates going forward.*

*He advised he is not asking the candidates to attend the investigation as he is now against time, and is doing it today along with 2 deputies. He will inform us of the outcome in the morning.*

*SC intends to find out if he can do a revised declaration once he has discovered what has happened – he believes he can. He wants to know if he can amend the numbers.*

*SC advised he has spoken to Kieron<sup>2</sup> in AGs and told him his intentions, although doesn't believe he needs AG clearance.*

*I asked if he wanted us to tell Louise Whitelegg about the recount and he said not to use that expression, it is not a recount, it is an investigation.*

*SC gave his mobile number as 272717 in case we wanted to contact him.*

<sup>1</sup> <http://www.tynwald.org.im/links/tls/SD/2015/2015-SD-0379.pdf>

<sup>2</sup> i.e. Keiron (sic) Murray, a government Law Officer.

17. In his email to Mr Cain, Mr Murray had expressed his views on the legal position as follows:-

*"I refer to our earlier call, which follows the meeting this morning. Given time is pressing in terms of*

- 1) *your deadline to return papers to the Clerk of the Rolls and;*
- 2) *more immediately in terms of your proposed next step (unsealing the packet(s) of counted ballot papers to do an audit\* of votes cast to ascertain why the original count was wrong), I have to draw your attention to the following provisions of the 2015 Regs.*

<http://www.tynwald.org.im/links/tls/SD/2015/2015-SD-0379.pdf>

**54 Sealing up of ballot papers**

- (1) *On the completion of the counting of the votes the returning officer must seal up in separate packets the counted and rejected ballot papers.*
- (2) *The returning officer must not open the sealed packets of tendered ballot papers or of counterfoils, or of the marked copies of the register of electors.*

...

**56 Orders for production of documents**

- (1) *An order —*
  - (b) *for ... the inspection of any counted ballot papers in the custody of the Clerk of the Rolls, may be made by the Keys or, if satisfied by evidence on oath that the order is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers or for the purpose of an election petition, by a Deemster.*
- (7) *No person may —*
  - (a) *inspect any rejected or counted ballot papers in the possession of the Clerk of the Rolls; or*
  - (b) *open any sealed packets of counterfoils,*

*except as provided in accordance with this regulation.*

*Whilst I note your view that what you propose to do is not expressly prohibited (and that the prohibition seems to be focused on opening documents that could enable identification of voters and the way they cast their votes), I have to say that my reading of Reg 56 (7) is at odds with your approach as no express provision is made for re-opening the sealed ballot boxes of counted boxes within Regulation 56.*

*Aside from the apparent express prohibition, I have to express the view that not maintaining the integrity of documents sealed after the count and the declaration of the result without having an order in place from Keys or Court risks further corrupting the process, given that:-*

- a) after the count and the declaration occurs the obligations on the ROs are very much to get the documents to Clerk of the Rolls as soon as possible; and*
- b) in determining whether to grant an order for inspection, specific regard has to be had by Keys and the Court as to the circumstances of the inspection, per Regulation 56 (2) and (3), whereas what you propose, with the greatest respect to you and your Deputy ROs, is in no way subject to any such consideration”.*

18. Mr Cain was aware of the views of Mr Murray as set out in his email before he took his next action.
19. That action was that Mr Cain arranged for himself, Mr Simon Harding (one of the two Deputy Returning Officers for the constituency) and Ms Robyn Wood (the Presiding Officer in Sulby) to open and review the sealed packets of ballots, not for the purposes of a recount but to locate the 103 ballots unaccounted for. I should add that Mr Harding and Ms Wood are each advocates and who are respectively a director and employee of Appleby, the firm in which Mr Cain is a director.
20. Mr Cain subsequently e-mailed each of the candidates in the following terms (which terms warrant recital in full).

*"Dear Candidates,*

*On Friday, Louise Whitelegg wrote to me by email querying the totals of the votes which I had declared the night before and asking me to investigate. I was unaware of any problem with the count and so I assured her that there were no issues with the count. Of course no recount was requested on the night as you all know. To reassure her, I sent to her the counting sheet from Thursday evening. On Monday morning yesterday at about 11am, Louise wrote to me again by email, specifically questioning whether or not the number of ballots recorded on the sheet as having been counted did in fact match the number ballots cast by the voters. Having reviewed the figures with my deputy returning officer, it became apparent that Louise was entirely correct and that, and this shocked me, 103 ballots appeared to be unaccounted for on the counting sheet.*

*I knew that this discrepancy could not affect the result which I had certified, but nevertheless it is essential that our MHKs can go about their business with no suggestion that there was anything untoward about their election. Now I am not able to undertake a recount, as this can only take place if one is requested at the count, and in fact I do not have the legal standing to seek the court's assistance. I am prohibited from opening the sealed packets containing the tendered ballot papers, the marked register of electors or the counterfoils of used ballots. But I am not aware of anything to stop me reopening the package of ballots if I consider it absolutely necessary for some reason. In this case I decided to do just that in order to carry out the investigation asked of me by Louise.*

*I did consider asking all of you and your counting agents to attend during my investigation but I have only a very limited amount of time before I am legally required to deliver up all the relevant documents to the Clerk of The Rolls, in respect of which the absolute deadline is Thursday evening. Time is of the essence if I could get to the bottom of what had occurred. Therefore this afternoon at 4.40pm I, Simon Harding (one of the two deputy returning officers) and Robyn Wood (the presiding officer in Sulby), opened the sealed packet of ballots and reviewed the packets of votes. This was not a recount: the purpose was to locate 103 ballots unaccounted for. I am pleased to report that we discovered the following:*

- 1 In the pile of the Cannan/Phillips ballots, we discovered two piles of eleven which should have been piles of ten (that's 2 found);*



- 2 *In the pile of the Cannan/Phillips ballots, we discovered two piles of ten which appear not to have been counted; (that's twenty found)*
- 3 *We located five additional Cannan/Phillips ballots which had escaped from any bundle within the sealed package but had not been accounted for on the counting sheet. (that's five found)*
- 4 *In the pile of the Baker/Cannan ballots, we discovered one pile of eleven which should have been a pile of ten; (that's one found)*
- 5 *We discovered that the pile of the Cannan/Whitelegg ballots had been miscounted, and the actual number of ballots in that pile was 196, whereas the counting sheet showed 121. (that's 75 found).*

*This, then accounts for the 103 ballots which had been unaccounted for.*

*The revised number of votes can be seen on the revised sheet which I attach.*

*I want to repeat that we undertook this exercise not as a recount but to investigate the matter raised by Louise.*

*Unfortunately I also realised on Monday (yesterday) that I had made an unrelated clerical error following the declaration which also confused matters. You will recall that the first thing that was done at the count was to count and to account for every single ballot paper from all of the ballot boxes and also the advance votes. This tallied perfectly. The total number of ballots cast was 3,192 which happened to include 748 from Kirk Michael. Later when I tallied the numbers together I wrote down 784 instead of 748, meaning that the total then appeared to be 3,228 instead of 3,192.*

*I am now minded to amend the declaration of result so that the actual numbers revealed by our investigation today correspond to the result on record for the future. I do not have to this but I would like to do so. Of course this does not affect in any way whatsoever the outcome of the election of our two MHKs who were sworn in today. I consider that I am able to do this but I intend to confirm with HM Attorney General's Chambers that they do not have an objection to this. I will also discuss with the Cabinet Office the best way of communicating this with the media.*

*It is essential that this process is transparent. If any of you or your counting agents wish to inspect the ballots again, I will be very happy for you or them to do so tomorrow, but after that I must file all the documents with the Clerk of the Rolls after which I will have no access to the papers. Unless I hear any objection I intend to file*

*the amended declaration of result with the Cabinet Office at 2pm tomorrow. If any of you want to speak with me tonight please feel free to do so on 272717.*

*Finally I want to thank Louise for notifying me of the counting error, which, even though it had no material effect on the result, nevertheless would have left a unresolved question had it not been investigated, and that would have been potentially unfortunate for all concerned”.*

21. Mr Cain sent each of the candidates a revised Counting Sheet dated 27 September 2016, a copy of which is produced at **page 8** of the Appendices hereto.
22. Having notified the candidates of the steps taken, the following day at 10:20 on Wednesday 28 September 2016, Mr Cain sent an email to Mrs Hemsley in the following terms:-

*Following my email last night, we have had a long look at the powers of the returning officer, and conclude that we are stretching the powers of the RO too far to suggest I can actually make a new declaration of the results, even though I have said that I would like to be able to do that. So I intend to explain this to Louise and suggest instead that I prepare a brief report for the benefit of the Cabinet Office and the candidates summarising what happened, my investigation, what I discovered (essentially two counting errors) and setting out my own views on what went wrong and lessons to be learned, and maybe suggestions on how the regulations could be altered to avoid the issues I had arising again. If anyone ever asks the candidates about it they will have a copy of that report. It will enclose a copy of both the original and the revised counting sheet. I could also send that to the Clerk of the Rolls to be kept with the election papers. I don't think I can do anything else. Last night Louise sent me an email thanking me for my email and saying she would call me today. I am very glad we reviewed the ballots yesterday (not as a recount but to investigate as requested) and removed all of the mystery from this. I will also email all candidates later today for one final time summarising this. Let me know if you have any comments on this suggested course of action.*

23. Later that morning Mrs Hemsley and Mrs Fletcher returned a call to Ms Whitelegg, in which Ms Whitelegg expressed her concerns as to transparency and the need for a public statement. Mrs Hemsley subsequently emailed Mr Cain at 11:45 on 28 September 2016 relaying the contents of the call to Ms Whitelegg, namely that the Cabinet Office had requested Ms Whitelegg to make contact with Mr Cain to discuss

her concerns. The Cabinet Office left matters with Mr Cain to discuss with Ms Whitelegg and advise the Cabinet Office as to his position as to what could be advised publically. Mrs Hemsley followed up her email with a further email to Mr Cain at 12:28 which flagged with Mr Cain the fact that Isle of Man Newspapers were aware of the discrepancy in the votes counted and had asked Government for a response. Mrs Hemsley indicated to Mr Cain that no comment has been given in the first instance.

24. At 12:49 on Wednesday 28 September 2016 Mr Cain emailed the Cabinet Office to indicate that he had spoken to Ms Whitelegg who seemed very satisfied with his response and proposed course of action.
25. Following this apparent resolution of matters having been effected, matters were brought to my attention in relation to the steps that have been taken by the Returning Officer on Tuesday 27 September 2016.
26. I subsequently wrote to Mr Cain on the afternoon of Wednesday 28 September 2016 requesting that Mr Cain attend a meeting at the Attorney General's Chambers due to take place at 10:00 am on Friday 30 September 2016.

*Your recent exchanges with Keiron Murray in Chambers concerning the above have been brought to my attention.*

*I have considered carefully the information contained in these exchanges and whilst noting your acknowledgement of the errors in conducting the count at this election I am concerned that your subsequent action in opening the sealed papers relating to the election, recounting them and then communicating the 'corrected' vote to candidates may constitute an illegal process.*

*I have noted the advice which Keiron provided to you in advance of you taking the action above which you chose not to follow.*

*In the circumstances I have decided that it is in the public interest to conduct my own inquiry with reference to the matter pursuant to section 71 of the Representation of the People Act 1995.*

*Whilst noting from your correspondence with Keiron as to what you acknowledge you did and by inference your own reasoning I would like to afford you the opportunity of offering me in my inquiry a fully reasoned justification. Accordingly, I invite you to call and see me at 10am this Friday morning.*

*I need conclude my inquiry as quickly as possible hopefully before Tynwald sits on the 4<sup>th</sup> October 2016.*

27. Mr Cain subsequent to agreeing to attend this meeting with me sent a further (and final) email to the candidates in the election in the following terms:-

*"You will be glad, and I hope, that this may be the last email from me on this subject.*

*Towards the end of my email yesterday I said that I would have liked to amend the notification of the result. However, yesterday evening I considered this further and this morning considered it with colleagues and the opinion we came to is that there is in fact no power in law for such a thing to be done by a returning officer. Accordingly I will not do that. A suggestion that ballot papers have gone missing during a count is an extremely serious thing, so it was a relief that we were able to show very quickly that no such thing happened but that there had been human error in the counting. The results as declared on Thursday must stand although I note that the details of the counting mistake are now in the public domain.*

*Of course there will be lessons to be learned to ensure such mistakes are not allowed to happen in the future.*

*All original documents are now filed the Clerk of the Rolls".*

28. I subsequently met with Mr Cain and Mr Harding on the morning of Friday 30 September 2016, having been provided in advance of that meeting with copies of material correspondence in relation to the above.
29. My attendance note of the meeting is attached at **pages 9 – 12** of the Appendices hereto.

30. Having set out the matters which inform my Inquiry, I turn now to report on the two questions of
- (1) whether there has been an illegal practice; and
  - (2) whether there is any public interest in my pursuing matters further

### **CONCLUSIONS**

- 31 Regulation 54 of the Representation of the People Regulations 2015 provides:
- “(1) On the completion of the counting of the votes the Returning Officer must seal up in separate packages the counted and rejected ballot papers.
  - (2) The Returning Officer must not open the sealed packets of tendered ballot papers or counterfoils, or of the marked copies of the register of electors.”.
- 32 Regulation 55 requires the Returning Officer as soon as practicable and in any event within 7 days of declaring the result of the poll to deliver the Clerk of the Rolls the packets of documents set out and described in Regulation 55(2)) which include:
- “(a) documents present or generated at the count –
    - (i) the ballot papers (including the advance ballot papers which have been mixed with the other ballot papers accepted at the polling station).
- 33 As noted above, the counted and rejected ballot papers had to have been sealed up in separate packets at the completion of the count and the Returning Officer was not, in my opinion, entitled to reopen those sealed up packets of counted and rejected ballot papers which had to be delivered to the Clerk of the Rolls.
- 34 I need not concern myself with any other packages other than the sealed up packets of counted and rejected ballot papers which the Returning Officer has acknowledged he opened.

- 35 Mr Cain has offered to me his view that, notwithstanding regulation 54(1), whilst the packages in question remain in his possession and until they are actually delivered to the Clerk of the Rolls, they remained in his custody and control and that he was therefore able to reopen them as he did and reseal them before delivering them to the Clerk of the Rolls as he was required to do. He considers that the prohibition against non-opening sealed packets of ballot papers only relates to 'sealed packets of tendered ballot papers or counterfoils, or of the marked copies of the Register of Electors', as specified in Regulation 54(2).
- 36 I do not accept Mr Cain's views in this respect as regulation 54(1) is in my opinion clear in its terms and intent that the counted and rejected ballot papers had to be sealed at the close of the actual count. The requirement for the Returning Officer to so act under Regulation 54(1) is mandatory.
- 37 I consider that the advice given by Mr Murray to Mr Cain in Mr Murray's email of the 27<sup>th</sup> September 2016 (as set out in full in paragraph 17 above) to be correct.
- 38 I consider that, if the position were otherwise and a Returning Officer was able to open the sealed packets of counted and rejected ballot papers after the count and before their actual delivery to the Clerk of the Rolls, this would result in an obvious risk of corruption of the electoral process with which the public would be understandably concerned. The public have the comfort that it is only an order from the Keys or from the Court that could authorise the breaking of the seal of the packets of the counted and rejected ballot papers that had been sealed by the Returning Officer at the conclusion of the count.
- 39 I have therefore concluded that the Returning officer was wrong and on the face of he acted unlawfully when opening the packages of counted and rejected ballot papers.
- 40 I am satisfied from the facts of this matter, however, that the Returning Officer in so acting in opening the sealed packages of counted and rejected ballot papers, did so with good intentions and not in any way to seek to corrupt the process. I am also satisfied that the legislation could make it clearer that these packages must not be

been sealed by the Returning officer at the conclusion of the count without an order from the Keys or from the Court.

- 41 From the information the Returning Officer obtained by his checking the counted and rejected ballot papers he was then able to reconcile the discrepancies which his Counting of Ballot Papers Form identified. He was, as a result, able to account for the discrepancy of the missing 103 ballot papers and he set out the detail of his findings in his email to the candidates of the 28<sup>th</sup> September 2016.
- 42 I am satisfied with the Returning Officer's explanation to me that the missing 103 ballot papers from the counting process arose as a result of human errors when counting and as a result of the Returning Officer not having in place a robust means of ensuring a reconciliation of the ballot papers counted and rejected as compared with the total number of ballot papers presented to him for counting by his Presiding Officers. Although mistakes can be made when counting votes, a robust reconciliation process would in my view have captured these errors.
- 43 In my formal interview of the Returning Officer and one of his deputies, Mr Simon Harding, both acknowledge that their reconciliation process during the final stages of the counting of votes was clearly inadequate and they were concerned to apologise profusely for their error and for their apology to be noted by me to both the electorate in Ayre and Michael and to each of the candidates.
- 44 As the facts of this case show, despite the 103 ballot papers not having been counted the result would not have been any different from that declared by the Returning Officer at the conclusion of the count and as notified on this writ of election issued immediately following the count. However the outcome could in other circumstances have been different, necessitating the need for an Election Petition to invite the Court to consider rectifying the position.
- 45 From my own point of view, having considered and concluded my own investigation of the matter of the missing 103 ballot papers, I do not consider it necessary to present an Election Petition.

- 46 Having reached the conclusion that the Returning Officer committed an unlawful act by opening the sealed packets of counted and rejected ballot papers, I need consider whether it is in the public interest to consider prosecuting him for such breach. I have concluded not.
- 47 The public must have confidence in the election process and clearly the accounting of the votes cast is essential. There will be instances of human error and it is for the Returning Officers to therefore ensure that they have in place a robust and reconcilable counting process in which both the candidates and the public can have confidence.
- 48 There are clearly lessons to be learned from this matter which has led me to conclude that this Report and Conclusions following my own investigation should be published.

J. L. M. Quinn  
H.M. Acting Attorney General  
3<sup>rd</sup> October 2016



Appendices 1 of 8

	TOTAL	AYRES	BAKER	CANNAN	KERMODE	PHILLIPS	WHITELEGG
AYRES	—	—					
BAKER	105		105				
CANNAN	210			210			
KERMODE	57				57		
PHILLIPS	76					76	
WHITELEGG	36						36
AYRES/BAKER	10	10	10				
AYRES/CANNAN	12	12		12			
AYRES/KERMODE	3	3			3		
AYRES/PHILLIPS	8	8				8	
AYRES/WHITELEGG	6	6					6
BAKER/CANNAN	<del>668</del>		<del>668</del>	<del>668</del>			
BAKER/KERMODE	81		81		81		
BAKER/PHILLIPS	501		501			501	
BAKER/WHITELEGG	206		206				206
CANNAN/KERMODE	190			190	190		
CANNAN/PHILLIPS	535			535		535	
CANNAN/WHITELEGG	121			121			121
KERMODE/PHILLIPS	63				63	63	
KERMODE/WHITELEGG	46				46		46
PHILLIPS/WHITELEGG	148					148	148
TOTALS		39	1571	1726	440	1331	563
		6	2	1	5	3	4



**Counting of Ballot Papers for General Election to the House of Keys 2016**

Under regulation 46 of the Representation of the People Regulations 2015

To be completed by the Returning Officer on Polling Day, 22 September 2016

Constituency Ayres Michael

**NUMBER ORDINARY BALLOT PAPERS**

Polling Station No. 1	784
Polling Station No. 2	547
Polling Station No. 3	274
Polling Station No. 4	664
Polling Station No. 5	204
Polling Station No. 6	219
Polling Station No. 7	381
<b>ABSENT VOTERS' BALLOT ENVELOPES</b>	155
<b>TOTAL</b>	3,228

**VOTES**

Rejected	7
Counted for Ayres	39
Counted for Baker	1571
Counted for Cannon	1736
Counted for Kermode	440
Counted for Phillips	1331
Counted for Whiteley	563
Counted for	
Counted for	
<b>TOTAL</b>	5,687

Signature [Handwritten Signature] Date 22/9/16



**Notice of Result for General Election to  
the House of Keys 2016**

Under regulation 51 of the Representation of the People Regulations 2015

To be completed by the Returning Officer on Polling Day, 22 September 2016

Constituency Ayres + Michael

I hereby give notice that the candidates elected at the above election are:

TIMOTHY SIMON BAKER  
of BALLAMEANAGH, GLEN AVLDYN, LEZAYRE IM7 2AG  
and ALFRED LOUIS CANNAN  
of SHEN CARDEE, SUMMERHILL ROAD, JURBY

The total number of votes given for each candidate is as follows:

Name of Candidate	No. of Votes
Patrick Stephen AYRES	39
Timothy Simon BAKER	1,571
Alfred Louis CANNAN	1,736
Alan KERMODE	440
Carlos PHILLIPS	1,331
Louise Elizabeth WHITELEGG	563

Total number of voters voting at the election (other than voters whose ballot papers have been rejected is):

3,228

The number of rejected ballot papers under each head is:

- Want of official mark;
- Want for more candidates than vacancies to be filled;
- Writing or mark by which voter could be identified;
- Unmarked or void for certainty:

2
2
-
3

Signature [Signature] Date 22/9/16  
(Returning Officer)

**Note of Meeting**

**27 September 2016, 11.30 am Committee Room, Cabinet Office, Third Floor,  
Government Office**

Louise Whitelegg	Candidate, Ayre and Michael
Kirsty Hemsley	Cabinet Office
Della Fletcher	Registration Office
Keiron Murray	Government Advocate

1. KH began by welcoming Louise, thanking her for attending. She advised that she had herself examined the Ayre & Michael counting sheet, transferring it into a spreadsheet. She advised that she can reconcile the difference to be 103 ballot papers uncounted, which is the same as Simon Cain's reconciliation. KH asked LW to explain her larger figure, as she advised yesterday by telephone. LW confirmed that she was mistaken as she had incorrectly dealt with plump votes (by subtracting them twice from votes cast) and that she agreed with the difference of 103 papers, up to 206 double votes.
2. LW feels strongly that something needs to be done regarding the errors in the elections results for Ayre & Michael, and that it would be incorrect for the results to stand uncorrected.
3. LW advised that she had reviewed the Representation of the People Act and felt that S45 could place the duty on the AG to conduct a recount.
4. LW advised that SC (Simon Cain, Returning Officer for Ayre and Michael) had omitted two errors to her (103 uncounted ballot papers and incorrect statement of voters voting at election [due to transposition of numbers of papers in polling district 1]). LW's concern is that may be any other errors; she believes she possesses sufficient evidence to warrant a recount.
5. Meeting discussed SC's assumption that missing 103 papers were double votes for Whitelegg and Cannan. LW is concerned that this is supposition and is deeply concerned with the process. She is also concerned that 103 voters have been disenfranchised by their votes not being counted for in the result./
6. She advised that the result was not advised to candidates prior to declaration therefore they were not able to request a recount. She advised that the only way she could view the numbers was by 'peering over the shoulder' of the returning officer.

7. LW feels that Cabinet Office should organise recount. In her view this matter could jeopardise Alf Cannan's potential tenure as Chief Minister if it was to become public at a later date.
8. LW notes that the cost of petitioning the court for an election petition could cost may £'000. However she would be happy to be used as an avenue to conduct an election petition is required.
9. Whilst SC may have assumption on what occurred, they are in LW's opinion assumptions and this makes the matter toxic for LW and that the result should not, in her opinion stand. A recount is LW's ideal outcome, when questioned by KH. She feels that it is necessary to resolve the reputation issue and to assure the integrity of IOM elections.
10. LW view is that a recount should be conducted quickly, quietly and swiftly and then would be followed by a press release advising the correct results.
11. LW advised that Cabinet Office and AG's need to take time now to examine the legislation to examine the next steps and that KH would keep in touch as the matter progresses. LW advised that she had been discussing the issue with Pat Ayres (fellow candidate) who was assisting her with advice.

Meeting closed 12 noon.

**Note of Meeting**

**27 September 2016, 12 noon Committee Room, Cabinet Office, Third Floor,  
Government Office**

Simon Cain	Returning Office, Ayre and Michael
Kirsty Hemsley	Cabinet Office
Della Fletcher	Registration Office
Keiron Murray	Government Advocate

1. SC advised that he made an error on form 43 (check reference) when recording ballots for polling district 1 Kirk Michael. It should have been 748 not 784 which has meant that the number of ballots (or voters voting) has been incorrectly completed in paperwork and stated incorrectly in the result declaration.
2. SC felt the count ran smoothly; all ballots and advance votes were accounted for. Votes were then separated into plumps and combinations and separated out into appropriate piles. SC moved round the room and was advised the number of votes by clerks counting the various combinations.
3. Candidates were able to see the summary sheet as the results were being compiled. Candidates also watched the table being transposed onto another sheet.
4. Once Louise Whitelegg had raised queries regarding the result, Simon Harding, one of Simon Cain's deputies examined counting table and identified that there were 103 ballot papers unaccounted for.
5. SC believes 3 ballot papers 'missed' and 100 unaccounted for due to error of either i) number advised to him by counting clerk or ii) transcription error on counting table.
6. SC was happy that during the count all ballot papers issued were accounted for.
7. SC feels anomaly exists in Cannan/Whitelegg vote combination and this would be the like home for the uncounted ballots.
8. SC confirmed that 3,192 is the number of valid ballot papers, not the number recorded on the Declaration of result. This number corresponds with the counterfoils.
9. Margin between all candidates >103 and the maximum number of votes any candidate could possibly gain is 103 therefore the order of candidates in the result is unaffected by this error. 103 votes would be too large a number to permit a recount.
10. SC has spoken to Alf Cannan to explain the issue, intends to speak to all candidates.

11. Advised SC that Louise Whitelegg is keen to see vote 'recounted' but SC does not believe this to be a possible action by the RO. Discussed with SC the need to ensure that the transparency concerns of LW are addressed.
12. SC is unsure whether he can reopen sealed ballot papers and whether all candidates would agree to this action. Would this be legal and whose decision would it be? Need to ensure actions do not jeopardise good governance for Isle of Man electoral process.

### **Next Steps**

13. SC and KM to review Representation of the People Act and Regulations and consider next course of action.

Appendices 8 of 8

Revised 27. Sept. 2016.

	TOTAL	AYRES	BAKER	CANNAN	KERMODE	PHILLIPS	WHITELEGG
AYRES	-	-					
BAKER	105		105				
CANNAN	210		7	210			
KERMODE	57				57		
PHILLIPS	76					76	
WHITELEGG	36						36
AYRES/BAKER	10	10	10				
AYRES/CANNAN	12	12		12			
AYRES/KERMODE	3	3			3		
AYRES/PHILLIPS	8	8				8	
AYRES/WHITELEGG	6	6					6
BAKER/CANNAN	669		669	669			
BAKER/KERMODE	81		81		81		
BAKER/PHILLIPS	501		501			501	
BAKER/WHITELEGG	206		206				206
CANNAN/KERMODE	190			190	190		
CANNAN/PHILLIPS	562			562		562	
CANNAN/WHITELEGG	196			196			196
KERMODE/PHILLIPS	63				63	63	
KERMODE/WHITELEGG	46				46		46
PHILLIPS/WHITELEGG	148					148	148
Rejected (Spoiled)	7						
TOTALS		39	1572	1839	440	1,358	638

3,192.



**Attendance Note**

**John Quinn's meeting with Simon Cain and Simon Harding, one of his Deputy Returning Officers (Caren Pegg, the other Deputy, was not in attendance)**

**Held on the 29<sup>th</sup> September 2016**

- JQ referred to the advice which Keiron gave you – SC said he had not sought Keiron's advice, but had considered it. He continued that he had considered the law and formed his own view that he could do as he did.
  
- If you were to conclude that he considered it a duty to conduct a fair selection he believed what he did necessary.
  
- The first he heard of the matter was on Friday (23<sup>rd</sup> September 2016) just after 11.00am – this was a surprise as there was no issue at the count and no call for recounts. He received an email from Louise Whitelegg just after 11.00am.
  
- He spoke to her on the Friday when she 'phoned and asked why there had not been a recount. You explained and sent her and other candidates a copy of the counting sheet you prepared at the time.
  
- She then told him on the Monday (26<sup>th</sup> September 2016) there was an error on the counting sheet. You looked at it and noted the error she referred to which identified 103 missing ballots.

- As Returning Officer you asked yourself to question what do you do about it? Do you have a duty to do anything at all?
  
- You felt you had a duty to investigate and you considered what you did.
  
- You didn't know whether she would be satisfied with you acknowledging there was a discrepancy. At about 9.00pm on the day of the count you had every ballot paper accounted for – reconciled with the 7 reports from Presiding Officers and Advance Votes you received. We had a total of 10 boxes to count. After recounting the actual numbers of ballot papers we then considered the count of the votes.
  
- We had 6 candidates. A voter could vote for 1 or any combination of the 6.
  
- You planned to divide the papers into piles of the 21 combinations. There were 7 rejected ballot papers.
  
- We then considered each pile, the numbers of each was entered onto a sheet and we then entered the votes cast for candidates on a separate sheet. The Candidates and their Counting Agents were walking around and supervising and you gave explanations to any questions posed as to what was going on. You did not carry out a further reconciliation. Now looking at the Counting Sheet, he acknowledged there was a big mistake, there seemed to have been 103 missing. This was clear from the sheet itself when later considered.
  
- So a mistake was made.

- I asked why he then opened the sealed papers. He said he considered he had a duty of care to the candidates and so carried out his own investigation and if he had not done so would have been in breach of that duty.
- He had established that regardless there could not be different result – worst case scenario was that Tim Baker could have had 103 plump votes which would have put him within 60 votes of Mr Cannon.
- As he knew he had 103 ballots which had disappeared from the count, he was concerned about them being missing as it could have affected the reputation of the candidate, the counters etc. and it could have been suggested as foul play.
- He believed it was important to identify what had happened and wanted to say that they didn't go missing; it was simply an error of counting. You wanted to answer this issue.
- The step was not taken lightly to open the sealed envelopes; when he opened the sealed packages they were opened in the presence of the Deputies and Robyn Wood Advocate at Appleby who was the Presiding Officer in the Polling Station in Subly.
- You considered we are legally entitled to conduct an investigative process. I asked on what basis you were able to carry out an investigation. He believed his duty went beyond declaring the result. You were only able to investigate as you felt able to open the sealed packages.
- Do not feel you have taken the law into your own hands and I put to him that the legislation already provides for the means of review. He said the packages were still

in his own hands when you opened them; you had not delivered them to the Registry.

- He noted the clear defined prohibition from opening certain sealed packages under the Act – and considered he did not.
  
- There seems in his view to be a clear rationale of what you cannot open under the Act.
  
- You spoke to the candidates and explained what you discovered – you acknowledge all counting errors which would have been addressed by a reconciliation step which you acknowledge was missing.
  
- You made a mistake and are very sorry and apology offered through me to the people of the Ayre and Michael and the candidates.
  
- What would have happened if it had changed the result is an issue he had not had to consider.