

**INDEPENDENT INVESTIGATION INTO
THE ROYAL COLLEGE OF NURSING'S
2020 PRESIDENTIAL ELECTION**

Simon Cheetham QC

Introduction and Terms

1. I have been instructed to carry out a review of the 2020 Presidential election.

2. The Terms of Reference are: to consider the circumstances surrounding the 2020 Presidential election and whether the actions taken and decisions made were in accordance with the Trade Union & Labour Relations (Consolidation) Act 1992, the existing RCN Charter, Rules, Standing Orders, Regulations and the RCN Elections – policy & procedure document and campaigning guidelines.

3. Specifically, for the purposes of this part of the review, I have been asked to do three things:
 - (i) review the management of all the complaints received about the Presidential election between the call for nominations and the date when the final candidate withdrew;

 - (ii) review the judgments made about what constitutes an RCN resource (including posts on Twitter and Facebook, speaking at RCN events and inclusion in RCN publications) and whether posts on Facebook and Twitter contravened the legislation and/or the RCN's internal rules and regulations; and

- (iii) determine what decisions were made and by whom and whether these decisions were correctly made within the context of legislation and/or the RCN's internal rules and regulations.
4. The next part of this review, which will follow later in the year, is to suggest recommendations about the elections process for the future.

Conduct of investigation and structure of this report

5. In preparing this report, I was given access to:
- (i) the RCN's Charter, Standing Orders and relevant policies and guidance;
 - (ii) the complaints made by members and the responses to those complaints;
 - (iii) correspondence between the RCN and the candidates;
 - (iv) communications with the independent scrutineer;
 - (v) other relevant documents (including, for example, Twitter feeds).¹
6. I interviewed 16 people, mostly via Teams, and was satisfied that I was able to gain a range of views, as well as speak to those most directly involved in the election.² One of the candidates was unwilling to participate, but otherwise, all of those approached were willing to be interviewed. The interviews were recorded and the recordings transcribed, which was to assist me in preparing this report, but the transcripts will remain confidential.

¹ These are listed at Appendix A

² Their names and roles are listed at Appendix B; I spoke to one person via Zoom and one by telephone rather than via Teams.

7. In this report, I have provided a summary of the relevant law and RCN rules, policies and guidance. I have then set out a chronology of the election, before addressing each of the three specific issues.
8. The findings and conclusions are mine alone and I have not been influenced by anyone to reach a particular outcome.

The statutory framework

9. The election of officers of trade unions is a statutory process under Part I Chapter IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the Act”). The election process as prescribed in the Act is therefore not open to variation or qualification, as its requirements are mandatory. S.46(6) of the Act states: “*The provisions of this Chapter apply notwithstanding anything in the rules or practice of the union*”.
10. Under s.49, an independent scrutineer is appointed, whose role is:

to carry out –

(a) the functions in relation to the election which are required under this section to be contained in his appointment; and

(b) such additional functions in relation to the election as may be specified in his appointment.

11. There is a closed list of independent scrutineers who can be appointed by trade unions and UK Engage was appointed for this election.³ I understand that this was the first time they had been instructed.
12. The scrutineer’s role includes the supervision of the production of voting papers, inspection of the register of names and addresses of the members of the union, and

³ The Trade Union Ballots and Elections (Independent Scrutineer Qualifications) (Amendment) Order 1993 SI 1993/1909, as subsequently amended, most recently in 2017.

the preparation of a report at the end of the election process, the contents of which are defined at s.52, and that report is available to all members. As well as dealing with more technical matters, such as the voting process, the report must state whether the scrutineer is satisfied that there are no reasonable grounds for believing there were any contraventions of the statutory requirements. The report must also state whether the scrutineer is satisfied that the arrangements made with respect to voting papers and the counting of votes included all such security arrangements as were reasonably practicable for the purpose of minimising any unfairness or malpractice that might occur.

13. Under s.54(1): *“The remedy for a failure on the part of a trade union to comply with the requirements of this Chapter is by way of application under section 55 (to the Certification Officer) or section 56 (to the court)”*. Importantly, therefore, the remedy for such a failure lies outside the trade union and not within its own procedures. An application is open to anyone who is a member of the trade union at the time of the election and, in practice, an application will generally be made to the Certification Officer (“the CO”). The CO – whose decisions are publicly available – has extensive powers to investigate and remedy any failures.

14. I shall deal with the Returning Officer below, but it is worth mentioning at this stage that it is not a statutory appointment. In fact, there is no reference to a Returning Officer in the Act.

The RCN’s Charter and Standing Orders

15. Under Article 4 of the Charter, the RCN is *“a special register trade union body under Trade Union and Labour Relations (Consolidation) Act 1992”*. This therefore brings the RCN within the statutory provisions of the 1992 Act.

16. Under Article 9, *“There shall be a President who shall be a Member nominated and elected to serve for a period as prescribed in Standing Orders”*.

17. Under Standing Order 12.5 (President and Deputy President):

Not less than six months before the 1 January in any given calendar year in which the new or re-elected President and Deputy President shall take up office the Council shall appoint a Returning Officer to be responsible for and to make such regulations as are necessary for the proper conduct of the elections to these offices. The elections to the office of President and Deputy President shall be separate but concurrent;

18. Under 12.6, *“The Council shall determine the dates by which nomination and voting papers are to be received”*.

19. Under 12.7:

The Council shall procure that there be sent to every Member before the date at which the new or re-elected President and Deputy President shall take up office, voting papers in such form as the Council shall determine setting out the names of the candidates. Every Member shall be entitled to cast one vote in each election.

20. The Council has no further role in the conduct of the elections for the President and Deputy President under the Standing Orders.

21. Under Standing Order 1.15, *““Returning Officer” means a person appointed by the Council to serve as Returning Officer in the event of any election conducted in accordance with Standing Orders and who is not a Member of the College;”*. Under Standing Order 12.5, The Returning Officer is appointed, *“to be responsible for and to make such regulations as are necessary for the proper conduct of the elections to these offices”*.

Election procedures

22. The “RCN Elections – policy and processes” (“the Policy”) is a 30 page document. On its first page, it is dated “June 2016”, which would suggest it is the latest version, but the table of contents records under “12. Publication of nominations

and objectives”: *“Note – this section is subject to revision following RCN Council’s decision on 10 April 2019 to remove the objection period for all elections”*. That Note is inserted again above section 12 in the Policy, without further reference.

23. While the entire Policy is relevant to this review:

- (i) Section 2 sets out the “Core principles for RCN elections”. These include that, *“The election process is objective. Procedures will be applied consistently and impartially. The administration of the election and counting of votes will be conducted by someone who is not a member of the RCN.”*
- (ii) Under Section 3, *“When should this policy and process document be used?”*, it states: *“This document is designed to supplement the provisions for elections in the Royal Charter, Standing Orders, and Regulations by providing greater detail on how elections are run and managed in the RCN. It applies to all RCN elections and describes the overarching principles and rules which should be applied.”*
- (iii) Section 4 deals with *“trade union law and when it applies”*, noting that: *“where the election procedures give options, only those that comply with trade union law can be used”*.
- (iv) Section 6 is headed: *“Responsibility for elections – Returning Officer and Independent Scrutineer”*. The first paragraph states: *“The RCN has a Returning Officer, who is appointed by RCN Council. The Returning Officer is responsible for the conduct of elections. It is the job of the Returning Officer to apply and interpret these procedures, and all other applicable procedures; ensure that the count is carried out in accordance with requirements; and to announce the results.”* It states that role of the independent scrutineer is as described in s.49 of the Act.

- (v) Section 17 concerns “*Campaign guidance and rules*”. It states: “*For the purposes of an election campaign candidates and their supporters will not have access to RCN resources. Using RCN resources may lead to disqualification from the election.*”

24. Appendix A is headed “*Role of the Returning Officer*” and reads: “*The UK Returning Officer is the person who has the overall responsibility for the conduct of elections. The UK Returning Officer is an officer of the Royal College of Nursing who is appointed by RCN Council. RCN Council has agreed this responsibility should be held by the Head of Governance.*”

25. It lists the Returning Officer’s specific responsibilities, including:

- *Appointing an Independent Scrutineer to oversee and distribute the ballot papers and to receive and count the ballot papers and declare the results.*
- *Working with the RCN’s Governance Support Committee to ensure the election process is as efficient and effective as possible and complies with the RCN’s statutory obligations and its charter, standing orders and regulations.*
- *Logging all complaints received and ensuring that they are managed in a clear, transparent and timely way.*

26. Of particular relevance to this review is Appendix C – *Campaigning guidance and rules*. This supports s.17 of the Policy and states, “*For the purposes of an election campaign candidates and their supporters will not have access to RCN resources. Using RCN resources may lead to disqualification from the election*”.

27. Under the heading “*What can you do?*” it encourages candidates to promote their campaigns through a wide variety of channels so that as many members as possible engage in the elections. It recommends “*face to face communication*” as “*the most effective way to get your message across*”. It then states:

Online channels – *today’s online media and social networking offer instant access to spread the word and extend your reach. Unlike traditional forms of communication,*

you can open up a world of instant and direct communication with people. Use sites like LinkedIn, Facebook, Twitter and YouTube as well as viral email campaigns, or even set up your own website.

28. There is another heading: “What you cannot do” and it is helpful to set this out in full.

4. What you cannot do

4.1 You cannot use the RCN’s resources yourself to promote your campaign, even if you wish to disseminate information not directly linked to standing for election. Putting across your views on a particular issue in an RCN publication, for example, could be interpreted as electioneering and be open to challenge.

4.2 Below is a guide to what are considered RCN resources – however, the list is not exhaustive and if you are unsure please seek advice from the Returning Officer.

- *The RCN membership and staff database.*
- *RCN external and internal circulation lists.*
- *The RCN website including any interactive facility (such as a discussion zone, private message facility, online community or comment field) unless areas are specifically designated as being available for candidates during an election period.*
- *RCN publications – electronic or printed.*
- *RCN branding, crest or logo.*
- *RCN official social networking sites such as the RCN Facebook/Twitter accounts or YouTube channel, unless candidates have been specifically informed that they can do this.*
- *Funding from branches, national forums or other official RCN groups.*
- *RCN events. By all means network at events and tell people you are standing for election but you cannot set up “a stall” or speak from the platform about your campaign.*
- *RCN staff – you must not ask RCN staff to help you with your campaign for example, asking them to forward on emails or help write your statement.*

4.3 *In addition, you may not claim expenses from the RCN for any part of your campaign.*

4.4 *There are a few things to be aware of if you already hold a role within the RCN:*

- *If you are attending an event for which you would normally claim expenses then you can still do that but you must be able to demonstrate that your presence is linked to your current role.*
- *If appropriate the RCN will continue to publicise activities you undertake in your current role – for example, if you are the President and you are standing for re-election as President for a further term of office – but will not refer to the fact that you are standing for election.*
- *If you have an RCN email address you should not use it to access RCN internal email distribution addresses as this gives you an unfair advantage over other candidates. However, you can email individuals at the RCN using the standard email format `firstname.surname@rcn.org.uk` as described in the RCN members' handbook.*

29. Finally, there is this section: ***“Disqualification*** *Any candidate not observing the rules in this policy and process document will be disqualified”*. As almost every interviewee pointed out, that means that the Policy states twice that use of RCN resources “*may*” lead to disqualification and once that it “*will*” lead to disqualification.

30. What this Policy does not contain is any process for dealing (a) with members who have raised complaints and (b) candidates against whom complaints are made. As noted above, it simply leaves to the Returning Officer the responsibility for managing those complaints. The following matters are therefore not defined within the Policy:

- (i) the process and timescale for addressing members' complaints, although the Returning Officer is responsible for ensuring they are dealt with in “*a clear, transparent and timely way*”;
- (ii) the process for notifying candidates about complaints;

- (iii) whether or not candidates' responses to complaints should be heard and considered before any decisions are made affecting their candidacy;
- (iv) how candidates should be informed of any decisions and by whom.

31. Several interviewees criticised the Policy for not allowing candidates an internal right of appeal against disqualification, for example, by involving the Council. However, that is something the Policy could not lawfully do, because that would run counter to the independence required by the Act. Any member has the right to complain about a decision to the CO, so any discussion needs to be around how decisions leading to disqualification are reached.

32. In addition to the Policy, there is also the "*Procedure for the election of RCN President and Deputy President*", which sets out who can stand in this election, the nominations process and election timetable.

33. Candidates were also sent: the "*RCN President and Deputy President Election 2020 – campaign pack*". This repeats the message regarding the effectiveness of "*face to face communication*" and, under the heading "*Online channels*", states:

Social media platforms offer instant access to a broad range of people and can help you to extend your reach beyond your immediate pool of contacts.

Using sites like Facebook, Twitter, Instagram, LinkedIn, YouTube and TikTok can really help to get yourself noticed. If you do not already have these social media accounts you may wish to consider setting one up in order to campaign. But remember – you will need to be active on social media to grow your following and to reach new audiences.

34. It also has a section entitled "*What you can't do*", which essentially mirrors Appendix C of the Policy, but adds after the list of RCN resources: "*NB this list is not exhaustive so if you are unsure please seek advice immediately by emailing elections@rcn.org.uk*". It repeats: "*If you are unsure whether you can or can't do*

something please contact one of the Governance team below who will be more than happy to advise” and then lists four contact names, including the Returning Officer.

Other relevant documents

35. The RCN provides guidance for RCN Facebook group moderators on managing their groups. It is made clear to moderators that Facebook groups should not be used for “non-RCN” events or services. It states that RCN regional/country communications teams will support moderators and recommends that local communications leads are moderators of such groups. There is also guidance for regional and country communications teams to help them create closed Facebook groups for RCN branches, which again encourages the appointment of regional/country communications leads as moderators. It acknowledges that there have been instances when members have set up a Facebook group for their branch without appointing RCN communications staff as moderators.
36. These guidance documents do not expressly refer to candidates seeking election. They set out questions designed to help moderators identify if a new joiner is an RCN member, but do not otherwise prescribe limits on group membership.

Chronology of relevant events

37. Nominations opened for the 2020 Presidential election on 19 June and closed on 20 July. Following a verification period, the details of 4 candidates were published on 3 August:
- Yvonne Coghill CBE FRCN
 - Professor Julie Green
 - Stuart McKenzie
 - Professor Anne Marie Rafferty CBE FRCN
38. On 28 July, before the names of the candidates were published, Professor Green had sought clarification about the use of social media, asking: *“I just wondered*

whether you use social media via the main RCN FB page, etc.” The response from the Assistant Member Engagement and Projects Officer directed her to the campaign guidance and said that candidates’ use of social media would be monitored to ensure compliance and she was encouraged to report anything that went “*against the parameters set out in the campaign pack*”.

39. One RCN publication – Primary Health Care - containing an article that referenced one of the candidates was current at that date.⁴ It was entitled “What will the “new normal” look like for nursing?” and referred to Professor Green (amongst others). It described her as “RCN district nursing forum chair” and provided her photograph and set out her views, but did not refer to the fact that she was standing as a Presidential candidate. In due course, this was the subject of complaints about this candidate.
40. On 3 August, Mr McKenzie tweeted from his personal Twitter account that, “*I’m standing in the Presidential Election @theRCN as announced on the website this morning*”. On 3 August, in response to a supportive comment on his tweet from a member, Mr McKenzie wrote: “*If there’s a Branch or work meeting you think I could Zoom into or MS Teams just let me know. I’d be happy to engage.*” On 5 August, he received this message from @RCNGovernance: “*Just a reminder this is an individual vote and candidates cannot secure the backing of whole RCN entities*”.
41. On 10 August, another RCN publication – Nursing Standard – published an article that referenced a candidate. It was entitled “How you can tackle casual racism and microaggression in the NHS” and referred to Yvonne Coghill, described as “RCN deputy president”. It quoted her at length, but did not mention her candidacy. In due course, this was also the subject of complaints about this candidate.
42. On or by 10 August, it had been drawn to the Returning Officer’s attention by one of the other candidates and various forum moderators that Mr McKenzie had been

⁴ I believe a version of this article also appeared subsequently in Nursing Standard.

seeking access to various closed Facebook groups and also that he had allegedly been using Twitter inappropriately. By the same date, the Returning Officer had also received similar allegations regarding Professor Rafferty in respect of closed Facebook groups. Among the complainants was one of the other candidates.

43. Before taking any decision in respect of those two candidates, the Returning Officer – quite properly – sought advice and guidance from the independent scrutineer, providing that person with the relevant RCN documents. The response on 11 August, following a virtual meeting on 10 August, recited many of the provisions set out above. It stated that there were two options: to deal with alleged breaches of the election process through the complaints procedure or to use the provisions for disqualification as a candidate. I would point out that the Policy does not contain a complaints procedure.
44. The independent scrutineer also noted the discrepancy between “may disqualify” and “will disqualify” but did not express an opinion, saying that, ultimately, this was a matter for RCN management to resolve. He drew attention to section of the Policy and the need for the election process to be objective and for procedures to be applied consistently and impartially. Although the reference to “RCN management” is not completely clear, in the context of the election, I understand him to be referring to the Returning Officer.
45. On 13 August, Mr McKenzie was told by the Returning Officer that he was being disqualified and, on the same date, Professor Rafferty was told she was being disqualified by the former Chair of Council and the Chief Executive. These were both telephone conversations and the candidates received letters the next day from the Returning Officer detailing the alleged breaches. The disqualifications were announced by Twitter on 14 August via the RCN Governance account, without naming the individuals.
46. Immediately after their expulsion, concerns were raised about the references in the two publications mentioned above to Professor Green and Ms Coghill. Complaints

had also been raised regarding Ms Coghill's planned appearance at an RCN Scotland event on 13 August (which, in the event, did not take place), including by another candidate, and also her use on 3 August of "@theRCN" on Twitter. The tenor of the complaints was that these were also breaches of the Policy and a consistent approach needed to be taken. They were not disqualified, although subsequently both candidates withdrew their candidacy on 2 September.

47. It is fair to say that there was something of an explosion on social media after the expulsion of the two candidates, particularly on Twitter, some of which I have seen. It is not within the remit of this review to consider it further, but I note that it created a difficult and unhelpful atmosphere for all involved and included some unpleasant attacks on individuals, including the Returning Officer.

The management of complaints

48. This section contains a review of the management of the complaints received about the Presidential election between the call for nominations and the date when the final candidate withdrew.

49. I have gone through each of the complaints and responses. In summary:

- (i) In total, 76 complaints were made by 47 members.⁵ 8 of those complainants made 2 or more complaints, the most being 10 complaints. The great majority of the complaints were received in the period between 13 and 20 August 2020, with a very few coming after the date when the remaining candidates withdrew.
- (ii) The complaints were submitted to a range of individuals, as well as to the RCN's complaints mailbox. Numerous complaints were copied to more

⁵ By "complaint", I am referring to the entire thread of correspondence following an initial complaint, even where fresh complaints were raised and additional names added (which I have not included in the total).

than one individual. There were 13 named recipients, including the Returning Officer, the former Chair of Council and the Chief Executive.

- (iii) The complaints can broadly be divided into 3 categories
 - (a) the conduct of candidates;
 - (b) the disqualification of candidates, together with the treatment of the remaining candidates; and
 - (c) more general concerns about the election process, including individuals' eligibility to vote.
- (iv) In fact, the generic term "complaints" is inaccurate. Some of these were little more than members asking questions about what was happening, for example, along the lines of "What is the RCN going to do next?".
- (v) Complaints were acknowledged fairly promptly, but responses were generally made in September and they came from a number of individuals, including the Returning Officer, the former Chair of Council and the Chief Executive.

50. I would make the following findings regarding the complaints. First, it is clear that many members did not appreciate that a complaint about the election should have been directed towards the person with responsibility for the conduct of the election, namely the Returning Officer. At the same time, it is also clear that some complainants intended a particular recipient to receive and respond to their complaint, because (for example) that person was their Council member.

51. Secondly, since the complaints were being received at multiple points across the RCN, they had to be collated and this was done by the members of staff who normally handled complaints. The sheer volume was obviously both overwhelming and unexpected. My understanding is that, in previous elections, the Returning Officer has been able to deal with the few complaints herself, but the

number of complaints this time meant that was not feasible. It also meant that the staff who handled members' "day-to-day" complaints were not prepared for these election complaints and had not dealt with such complaints before.

52. Thirdly, because so many people were involved, both as recipients and respondents, there were delays in responding, but there was also a lack of clarity over who was actually responsible for dealing with these matters. That also has to be placed in a context of uncertainty over the days following the disqualification of two candidates as to what would happen next, as well as the impact of the former Chair of Council standing down, given that she was actively involved in corresponding with some of the complainants.

53. Fourthly, the situation was further complicated by the fact that some of the complaints were directed at the Returning Officer herself, including some personal attacks on her integrity. Where those complaints were also about the conduct of the election, strictly speaking the Returning Officer should have been responsible for responding to them, but plainly that placed her in a very difficult position.

54. Finally and perhaps inevitably from the previous findings, there was no clear strategy for dealing with members' complaints during this election. However, the responses were broadly consistent, albeit delayed and from more than one respondent.

55. My conclusions on this first issue are as follows.

(a) Going into this election, there was nothing that would have suggested to the Returning Officer that the existing procedure, whereby she handled the small volume of complaints herself, would not be adequate.⁶ What happened this year was unforeseeable and that is an important qualification to these conclusions.

⁶ The Returning Officer is responsible for all elections (i.e. not just those for President and Deputy President).

(b) Nevertheless, it is clear that, wherever there was a genuine complaint about the conduct of the election process, that should have been directed to and managed by the Returning Officer, but that did not always happen, because of the volume of complaints within a short space of time. The position may have been improved if there had been a filtering process, whereby those “complaints” that were no more than queries could have been separated out and dealt with separately.

(c) However, the requirement in the Policy is that complaints, “*are managed in a clear, transparent and timely way*”. Applying that measure, I do not think that requirement was met, which was for the reasons set out above, namely – in summary – the volume and spread of the complaints.

56. It would therefore make sense to have a defined elections complaints procedure, with a suggested timetable and clear lines of response, which would be a recommendation that I would suggest developing further in the next stage of this review.

RCN resources

57. In this section, I shall review the judgments made about what constitutes an RCN resource and whether posts on Facebook and Twitter contravened existing legislation and/or the RCN’s internal rules and regulations.

58. I am going to start by considering what is meant by the term “the RCN’s resources” and what constitutes use of them to promote a campaign. Without being too legalistic in approaching this issue, the word “official” in this context suggests to me an “authorised” site, so that an “*RCN official social networking site*” would be one authorised and approved by the RCN and used to communicate on its behalf. The site would be a “resource” in the sense that it is something that can be used and drawn upon by the RCN in order to function effectively.

59. There is no statutory guidance, but I have looked at relevant case law to see if it provides assistance. The cases tend to be very fact specific, but in *Burgess and others v UNISON* D/5-20/17-18, the CO found that where a trade union branch promoted a candidate on its branch website, that was use of the union's resources (and impermissible on the facts of that case). The decision also notes that it does not follow that a reference to a branch in a candidate's email necessarily meant that union resources were being used.
60. Twitter. Starting with social media, as noted above, the Policy provides this definition: "RCN official social networking sites such as the RCN Facebook/Twitter accounts". The RCN's account has the username "@theRCN" and has a large following. It is recognisably "official", as it is the RCN's account on that platform.
61. A tweet that appeared on that account which said "vote for this candidate" would obviously not be allowed, whereas a neutral reference to the fact that (for example) "the following candidates are standing for office" would not be using the account to promote a campaign. Those are the two extremes, but the clear intent of the Policy is that the RCN's Twitter account should not be used as a platform. So if there was a tweet on @theRCN which was about an individual candidate, even if it did not mention their candidacy, that could be seen as a tacit endorsement of that person and thus promoting their campaign.
62. There are also Twitter accounts for other groups of RCN members, such as @RCNStudents and @RCNSouthWest. If I take the latter, it describes itself as "The Royal College of Nursing South West region official account". I think that would therefore qualify as an RCN resource within the Policy definition, but there may well be some Twitter accounts that have a much less "official" connection, although I have not carried out any significant research.
63. Candidates can use their own private Twitter accounts and are encouraged to do so. It does not seem to me that mentioning "@theRCN" in a tweet from an

individual candidate's Twitter account would amount to using the RCN's resources to promote a campaign. It means that the followers of that person's Twitter account will see the mention, but it is not use of the RCN's twitter account, so much as a reference to it.

64. Facebook. When I enter "Royal College of Nursing" as a search term on Facebook, it takes me to the Facebook account: "@royalcollegeofnursing". That is clearly an official RCN Facebook site, which is authorised and approved to communicate on the RCN's behalf. The RCN can control what it chooses to post on its pages.
65. The same search also takes me to Facebook accounts for particular specialisms (e.g. "Royal College of Nursing Students") and regional or local groups (e.g. "RCN West Midlands", "Milton Keynes Branch Royal College of Nursing"). They all have the RCN logo; as one person described it to me, they are "RCN branded". If I take the RCN West Midlands account as an example, under "About", it states: "*The West Midlands region of the Royal College of Nursing. We support and represent more than 40,000 members in the West Midlands*". These other accounts are closed, in other words, a Facebook user needs to join that group to have access to the information on its site. I have carried out only limited research, but clearly some groups are very small indeed and (probably) very informal. Obviously, individual candidates might also have their Facebook pages.
66. Some interviewees considered that only the Facebook account - "@royalcollegeofnursing" - could be described as "official", because they saw that as the only account referable to the organisation as a whole and/or controlled by the organisation. Others saw it differently, given the RCN branding and "identity" and the centralised guidance on creating and managing RCN Facebook groups. They would argue that all RCN Facebook groups are communicating on behalf of the RCN as an organisation, by carrying messages from the RCN to members of that group. They are "official" in the sense that they are approved, with a measure of control provided through the guidance.

67. The purpose of the restrictions on use of RCN resources – however defined - is to prevent unfair promotion of campaigning during an election. If one candidate joins a closed RCN Facebook group and campaigns to its members, that is creating an unfair advantage, if other candidates are then denied that opportunity or unaware it is being done. For example, I note that the RCN Student Facebook account has 35,000 followers. A candidate is unlikely to qualify for membership by being a student, but could nevertheless apply to join the group and, if accepted, would then have access to a significant portion of the electorate. Perhaps more in theory than in practice, another candidate’s application to join might not be accepted, but there is no guidance on the issue for Facebook group moderators and organisers.⁷
68. A restrictive definition that only sees @royalcollegeofnursing as the official RCN Facebook resource would therefore allow any candidate to use any other RCN Facebook group to promote their campaign. Inevitably, that would allow candidates different levels of exposure, depending upon how many Facebook groups that could access and would have the clear potential to create an uneven playing field. A broader definition that precluded use of any RCN Facebook account would be even-handed, as it would treat all candidates equally, but would include small and informal Facebook groups that anyone would strain to describe as “official”.
69. That broader definition also raises another important issue, which runs parallel to these considerations. This election occurred during the Covid-19 pandemic. Although the guidance to candidates encouraged face-to-face communication as the best method of campaigning, that was the one thing none of them could do. It is clear that no thought was given prior to the election as to how Covid-19 had affected the way candidates should campaign. Irrespective of Covid-19, there is also the fact that social media has very quickly become the main way that many

⁷ That said, I noticed that a thread running through some of the complaints and queries was that a closed Facebook group could only be joined by someone who was (for example) from that region or involved in that specialty.

individuals communicate. I am not saying that these factors alter the definitions in the Policy, but they are relevant to its application and certainly relevant to future recommendations.

70. My own view is that the Policy is not sufficiently clear in its definition with regard to Facebook groups. However, influenced by *Burgess*, I tend towards the view that the reference to RCN Facebook account(s) in the Policy extends beyond @royalcollegeofnursing, because – for example – the West Midlands Facebook group has been set up under the guidance of the RCN for members in that region, both to promote their interests, but also to communicate with them. The Facebook page carries the RCN logo and a fair-minded observer would be more likely to see it as an RCN resource than independent of the RCN. I accept, though, that there may be Facebook groups where the link is far less strong.

71. What this therefore calls for is a clear definition, such as: *“by official RCN Facebook, we mean only @royal college of nursing”* or, alternatively, *“we mean any Facebook group displaying the RCN logo and which is aimed at RCN members by speciality and/or location”* or something similar. If the former definition were adopted, much thought would have to be given to the consequent limitation on the use of social media in a society where that has become a prime method of communication. If the latter definition were adopted, there would then need to be clear guidance for moderators to ensure that candidates had the opportunity for equal exposure. This leads into what will be another recommendation in due course, which is discussion with candidates before an election on the various definitions and what that means in practice.

72. In the meantime, the consequence of that lack of clarity is that it left the responsibility for defining exactly what the Policy meant to the person appointed by the Council to be responsible for managing the election process, namely the Returning Officer.

73. Publications. The Policy refers to “*RCN publications – electronic or printed*”. According to the RCNi website, it publishes 11 journals, so these are what I would understand to be RCN publications and thus RCN resources. Nursing Standard and Primary Health Care are two of those RCN publications.
74. An article that appeared in an RCN publication and expressly promoted a candidate would be contrary to the Policy, but a neutral announcement of the full list of candidates would not be. However, where that candidate receives a prominent mention in an article, that is giving them an exposure that other candidates are not getting from that publication, irrespective of whether their candidacy is mentioned. Visibility is an important part of campaigning and I would note that a candidate who holds a prominent position within the RCN is also more likely to be mentioned in an RCN publication than one who does not.
75. It has to be a question of degree. A passing reference to a candidate’s name, perhaps among a list of names and without further information, would be unlikely to promote that candidate’s campaign. On the other hand, an article that features that candidate and quotes them extensively would be assist their campaign, albeit indirectly. To me, that becomes a matter of discretion and whether the breach is of such a nature that it cannot be said to promote a candidate’s campaign, so as to justify no further action (and see below).
76. Some interviewees took the view that it did not matter, so long as the candidate was identified by their RCN role, rather than their candidacy, but I disagree. To take this away from the RCN, suppose that I decided to stand for elected office in my professional body. Let us say that, during the course of the election, I am featured in an article in an official legal publication, which does not mention my candidacy, but which a reader and potential voter might think shows that I have good judgment, similar views and so on. The reader/voter might even think that the nature of the publication suggests that I have the implicit approval of the professional body. That is bound to be to my advantage as a candidate.

77. This view is also consistent with Appendix C of the Policy, where it states: *“Putting across your views on a particular issue in an RCN publication, for example, could be interpreted as electioneering and be open to challenge”*.
78. There is a practical difficulty here. One of the candidates, who is an academic, told me that the article that referenced her was written well before she decided to stand as a candidate and she had no control over its publication date. It is neither fair nor practicable to prevent anyone who might feature in a publication that happens to be published during the election period from standing as a candidate. The answer to that difficulty lies in the necessary discretion in applying the Policy. Relevant to the exercise of that discretion would be the nature and contents of the article or feature and how and where it came to be published.
79. Speaking events. The Policy refers to “RCN events” and allows networking at events, but does not allow setting up a “stall” or speaking from the platform about the campaign. However, I would suggest that the same issues arise as set out above in respect of publications. An event gives visibility to a candidate, even though they are undertaking that activity in their current role, so this has to be approached with caution.

The decisions taken

80. This third section concerns the decisions that were made, by whom and whether these decisions were made correctly within the context of legislation and/or the RCN’s internal rules and regulations.
81. First, it is clear to me that the decision to disqualify the candidates was taken by the Returning Officer herself. It was suggested by some interviewees that it was not her decision, or that she took the decision with others and/or that it was politically motivated and intended to prevent one or both of the candidates from winning. That was conjecture on their part and I can only look at the evidence,

which overwhelmingly suggests that the decision to disqualify was taken by the Returning Officer alone, after speaking with the independent scrutineer.

82. I can see, however, that the fact that the decisions were communicated in different ways fed into those conjectures. I was told – and I accept – that it was felt that, owing to the very prominent status of one of those candidates, it would be better if she were informed of her disqualification by the former Chair of Council and the Chief Executive, whereas the other candidate was informed by the Returning Officer. Even though the intentions were honourable, I think that was a misjudgement, because it gave the perception of different treatment. The decision was taken by the Returning Officer and it was for her to communicate that decision.

83. Secondly, it is important to keep in mind that the management of the election process was delegated by the Council to the Returning Officer. It was her role – and hers only – to deal with complaints about candidates and to apply the Policy as she both understood and interpreted it. Any deficiencies or uncertainties in the Policy and any concerns about her role needed to be recognised and addressed before the election by the Council. Equally, any question over whether the role of the Returning Officer was better performed by someone inside or outside the RCN should have been addressed before.

84. Thirdly, I believe that the Policy allowed the Returning Officer a discretion before disqualifying a candidate, even though that was the only sanction. That is not just because of the confusing inclusion of both “may” and “will” in the Policy in respect of disqualification, but because, as some of the examples above suggest, there may well be breaches that are minimal, harmless, unintended and so on and/or which do not in fact promote a candidate’s campaign. The purpose of the Policy is to prevent unfairness in an election campaign, which means that a breach that does not create any unfairness should not lead to disqualification.

85. Fourthly, it is surprising that the Policy does not spell out what should happen if a complaint is made about the candidate in terms of process. However, it seems to me that any process should allow the candidate to know what complaints have been brought against them and should provide them with an opportunity to explain themselves before any decision is taken. Of course, it may well be that an explanation will not make any difference, but anyone facing allegations that could lead to their disqualification in an election should have that opportunity.
86. That would also have gone some way to address a valid criticism from both disqualified candidates that, because the decision was completely unexpected, they were unprepared for it. That made it much harder to deal with and left them feeling isolated.
87. A significant number of interviewees said there should be a right of appeal from the Returning Officer's decision. I have touched on this earlier, but, to be clear, there could not be an internal right of appeal, because that would not be independent. The statutory mechanism allows for a complaint to the CO or court only. However, the lack of an internal appeal emphasises the importance of a fair and transparent process, in which candidates and complainants have confidence.
88. Fifthly, it was the view of many interviewees that any member of staff appointed as Returning Officer for such an important election was being given a huge and perhaps unfair responsibility and placed under a significant amount of pressure. Some interviewees saw a potential tension between that person's role as a member of staff within a line of management and their necessary independence as Returning Officer. My own view is that, within a trade union, there is much to be said for taking the role of the Returning Officer away from an appointed member staff to an external, independent body, but that is a recommendation I can return to at the next stage of this review.
89. Turning to the decisions taken:

- (i) I believe it was open to the Returning Officer to conclude that both Professor Rafferty and Mr McKenzie had breached the Policy in respect of their use of RCN Facebook groups, as both had sought access to closed Facebook groups. It was not disputed that they had done so and both candidates were open about their use of social media or, in Professor Rafferty's case, how others had used social media on her behalf.
- (ii) As I have noted earlier, there is an argument that there is only one official RCN Facebook account, namely @royalcollegeofnursing, but the Returning Officer was entitled to take a broader interpretation, particularly as it is difficult to see how there could be fair campaigning without each candidate having the opportunity for the same access. Further, as I have said already, if there was any uncertainty over the scope of the definition, then it was for the Returning Officer to resolve that uncertainty herself, if necessary with the advice of the independent scrutineer.
- (iii) I disagree with the Returning Officer, however, over her interpretation of the use of Twitter by Mr McKenzie. I do not think that sending messages from his private Twitter account fell within the definition of using RCN Resources to promote his campaign, whoever was the recipient.
- (iv) I think there should have been a procedure whereby the Returning Officer explained the complaints to the candidates and gave them the opportunity to explain the alleged Policy breaches, alternatively, why any breaches were of such a nature that they did not justify disqualification. This should have happened before any decision was taken. As there was no such procedure, it would be unfair to criticise the Returning Officer for failing to do something that she was not required to do. However, I agree with the view expressed by some interviewees that the lack of process also fed into a suspicion about how decisions were reached, although my conclusion is that the Returning Officer reached her decisions in good faith.

- (v) The only sanction under the Policy is disqualification, but in my view, the Returning Officer had a discretion not to impose that sanction if she considered the breach could be described as a technical or minimal breach of the Policy and/or did not in fact promote a candidate's campaign. However, it was open to the Returning Officer to find that these were significant breaches, so that the only sanction open to the Returning Officer under the Policy was disqualification.
- (vi) That raises a number of questions. Some interviewees felt strongly that there should have been "a tap on the shoulder" first, in other words, an initial warning that the Policy was being breached. It was felt by some that this had been done in previous elections. Another view expressed by some interviewees was that action (such as a warning) should have been taken as soon as a breach had been notified.
- (vii) I cannot make any clear findings about what happened in previous elections, but the Policy does not allow for a system of warnings. I cannot therefore criticise the Returning Officer for not giving warnings when she became aware of breaches and, indeed, I am sure she would have been criticised by some if she had done so, given that is not set out in the Policy. She also felt, correctly, that the damage had been done. Nevertheless, it seems to me that this should be a consideration for the future, so that disqualification is the ultimate sanction, but warnings can be given where appropriate. Were a candidate given a warning, but then continued regardless, it would also make the case for disqualification much clearer.
- (viii) In practical terms, I think an opportunity was lost when Professor Green raised a valid query over use of RCN resources before the election started. This may be the benefit of hindsight, but it might have indicated that the guidance was not completely clear and would therefore have been an opportunity to clarify the position, for example through FAQs. It is

noteworthy that, having raised this issue, Professor Green was the one candidate who steered away from social media.

- (ix) There is also an important question over how the decisions were communicated and the consequence of disqualification in such a high-profile election. Quite obviously, these decisions were very upsetting for those two candidates and they also caused huge reputational damage, both individually and institutionally. I am not minimising the distress and frustration felt by Mr McKenzie when I say that Professor Rafferty, as President, also had to deal with the more public embarrassment of being disqualified from running for the office she was currently holding. That does not mean the decisions were wrong, nor does it mean the decision maker acted improperly, but it does suggest that the consequences of disqualification as the only sanction (both on terms of its communication and its impact) had not been thought through properly when Council approved the Policy. That is something that requires further consideration for the future.
- (x) It seems to me that a consistent approach could arguably have led to the disqualification of Yvonne Coghill as well, which was a view expressed by a number of interviewees (not all of whom were in possession of the full facts). However, I am mindful of the fact that I never had the opportunity of speaking with Ms Coghill to understand her version of events, whereas my conclusions regarding the decisions made in respect of the other three candidates are coloured by their interviews.
- (xi) First, she had referred to @theRCN on Twitter, although I do not think that actually amounted to use of an RCN resource, as I have explained above. Secondly and more significantly, Ms Coghill had featured in an article in Nursing Standard and, although there was no mention of her candidacy and no blame can attach to her personally for appearing in that article, it was plainly use of an RCN resource and the exposure – at least potentially

- gave her an unfair advantage. Thirdly, there was also the appearance at an RCN Scotland event, although that did not take place in the end.

- (xii) The issue is not one of culpability, but of whether a consistent approach to the Policy should have led to the conclusion that Ms Coghill was also in breach and, if that was the case, whether the same sanction should have been applied. The Policy does not require any “guilty” intention on the part of the candidate and I am sure Ms Coghill did not intend to obtain an unfair advantage (and I would say the same of Professor Rafferty and Mr McKenzie).
- (xiii) Professor Green is in a similar position. She was the candidate who sought clarification of social media use, so she was clearly trying to establish what she could and could not do. As a matter of common sense, it seems harsh to penalise an academic for appearing in article that happened to be published during the election, when she had no control over that publication, although the same might be said of Ms Coghill.⁸ The views she expressed in the article were fairly narrowly defined and I doubt this could reasonably have given her any advantage.
- (xiv) Overall, I could not say that the Returning Officer was “wrong” with regard to Ms Coghill and Professor Green, because it is a matter of interpretation and – as I have said repeatedly – how the Policy was interpreted and applied was the responsibility she was given.

Conclusion

90. In conclusion, the Returning Officer did not breach the Act in any way, nor did she breach the RCN’s Charter, Standing Orders or the Policy. She interpreted and applied the Policy strictly, but she was given the responsibility of managing the

⁸ Ms Coghill was the candidate I did not speak to, so I am not sure of the circumstances around this publication.

election. The collective responsibility for the Policy itself lay with the Council and not the Returning Officer.

91. Nevertheless, the outcomes suggest that the Policy needs to be significantly revised in the light of this election to take into account: (i) changing times and ways of communicating, (ii) proper processes for complaints resolution, (ii) clarification of the parameters of campaigning and (iv) to ensure that, if difficult decisions have to be made, they can be made in ways that cause the least damage to individuals and to the organisation itself. Any elections policy should be pragmatic and purposive, with the aim of achieving equal access and exposure for all candidates across all forums to ensure fair elections. The experience of this election suggests the current Policy does not achieve that.