

## POLICY NOTE

### THE SCOTTISH PARLIAMENT (ELECTIONS ETC.) (MISCELLANEOUS AMENDMENTS) ORDER 2020

#### SSI 2020/XXX

1. The above instrument was made in exercise of the powers conferred by sections 12(1) and 113(2), (4) and (5) of the Scotland Act 1998 (“the 1998 Act”) and sections 72A(1)(c), 85A(1)(c), 156(5), paragraph 4 of schedule 8 and paragraph 4 of schedule 8A of the Political Parties, Elections and Referendums Act 2000 (“the 2000 Act”) and all other powers enabling them to do so. The instrument is subject to affirmative procedure.

#### Summary Box

This Order makes a number of changes to the rules which set out how Scottish Parliament elections should be run.

As well as technical changes, which reflect the transfer of responsibilities relating to electoral registration to the Scottish Parliament, which were set out in the Scotland Act 2016, changes are made in the following areas:

- Exclusion of certain items from expenditure limits;
- Increase of candidates’ expenditure limits if a poll is postponed;
- Advertising that candidates’ expenditure returns are available for inspection;
- Legibility of imprints on printed campaign materials;
- Procedures to be followed if a poll is postponed by the Presiding Officer;
- Address to be used by some prisoners for dispatch of poll cards and when applying for an absent vote;
- Minimum number of counting agents which can be appointed;
- Emergency proxies;
- Standardisation of the deadlines for replacement of spoilt or lost postal ballot papers; and
- Printing instructions for party names on the regional ballot paper.

#### Policy Objectives

2. The purpose of this instrument is to amend the Scottish Parliament (Elections etc.) Order 2015 (“the 2015 Order”, SSI 2015/425) which provides the rules governing the conduct of elections of members of the Scottish Parliament. The instrument also makes changes to the 2000 Act as regards certain exemptions from qualifying expenses at Scottish Parliament elections.
3. Section 3 to 10 of the Scotland Act 2016 (“the 2016 Act”) transferred, from the Secretary of State for Scotland to the Scottish Ministers, the power to make provisions about electoral registration and the conduct of elections for, and the return of members to, the Scottish Parliament (insofar as they had not already been transferred by sections 1 and 3

of the Scotland Act 2012). Sections 3 to 10 of the 2016 Act were commenced by the Scotland Act 2016 (Commencement No. 6) Regulations 2017 (SI 2017/608) and came into force on 18 May 2017. This instrument exercises the powers of Scottish Ministers in these areas.

4. In terms of section 2(2) of the 1998 Act (as amended by the Scottish Elections (Reform) Act 2020, the next ordinary general election to the Scottish Parliament is scheduled to take place on 6 May 2021.
5. Most of the rules which governed the running of the Scottish Parliament general election held in May 2016 will remain the same. However, this instrument does include a number of changes which reflect developments since the last election. The instrument also contains a number of technical changes which reflect the transfer of responsibility for making provisions relating to electoral registration from the Secretary of State to the Scottish Ministers.
6. The changes set out in these regulations are as follows:

**Revocations and savings in the 2015 conduct order** (*Articles 3, 4, 6, 7, 12, 13, 15(6), 18 and the schedule*)

7. When the 2015 conduct order was drafted and made, the Scottish Parliament only had certain responsibilities in relation to administration of the Scottish Parliament elections and these powers did not extend to the franchise or electoral registration. Because of this, responsibility for the conduct of the 2016 Scottish Parliament election was effectively a joint issue for the Scottish and UK governments.
8. In practice, this was dealt with by replacing all non-registration provisions in the Scottish Parliament (Elections etc.) Order 2010 (“the 2010 order”) with a new Scottish Parliament order made by the Scottish Minister (the 2015 Order). The registration specific provisions were retained in the 2010 Order (made by the Secretary of State). This was achieved by retaining the relevant provisions when the rest of the 2010 conduct order was revoked by the 2015 order. These retentions are detailed in paragraph 3 of schedule 9 to the 2015 order. The Secretary of State did not make any changes in relation to the electoral registration provisions in the 2010 order.
9. The 2016 Act subsequently devolved the power to make provision for the registration of local government electors to the Scottish Parliament. In terms of section 11 of the 1998 Act, those who are eligible to vote as local government electors are eligible to vote in Scottish Parliament elections. Following the 2016 Act, there is now no policy reason for separately retaining the registration provisions for Scottish Parliament elections in the 2010 order. The opportunity has therefore been taken to use this order to incorporate most of the retained provisions of the 2010 Order into the 2015 Order. These changes are made by Articles 3, 4, 6, 7, 12, 13 and 15(6).
10. Whilst several provisions of the 2010 Order have been incorporated into the 2015 order, there are a number of provisions of the 2010 Order which were retained by paragraph 3 of

schedule 9 of the 2015 Order for specific purposes and it is not necessary to incorporate these into the 2015 Order where the existing drafting in that Order is sufficient.

11. Accordingly, These provisions of the 2010 Order are revoked by this Order:

- article 15(2) (officers of councils to be placed at the disposal of a RRO), so far as relating to the functions of a RRO under the 2010 Order,
- article 16 (returning officers: discharge of functions), so far as relating to—
  - the power of a RRO to appoint persons to discharge the RRO's functions under the 2010 Order, and
  - the duty of RROs and CROs to co-operate in relation to the functions of a RRO under the 2010 Order,
- article 24 (payment of registration expenses),
- article 28 (breach of official duty),
- article 91 (sending of applications, notices etc.),
- article 92 (interference with notices), so far as relating to notices published in connection with the duties of an ERO under the 2010 Order, and
- article 94 (correction of procedural errors, so far as relating to the taking of steps by a RRO to correct the acts or omissions of a RRO in relation to the functions of a RRO under the 1998 Act or the 2010 Order

12. Two of the provisions in the 2010 Order which were retained by paragraph 3 of schedule 9 of the 2015 Order continue to be retained by this Order and are not revoked:

- article 87 (modification of section 10 of the 1998 Act), and
- schedule 2, rule 65 (equality of votes at poll for return of regional members)

This is because these provisions amend sections 10 and 8(7) of the Scotland Act 1998 which deal with the filling of a regional vacancy and the equality of votes at a regional election respectively.

### **Record of anonymous entries (Article 5)**

13. Article 21 of the 2015 Order sets out that a person on the list of proxies should not be excluded from voting due to certain grounds, for example not being of voting age (although that does not prevent the rejection of such a vote on a scrutiny). Article 21 of the 2010 Order (retained by paragraph 3(f) of schedule 9 of the 2015 Order) applied equivalent provision to other voters on the local government register. Article 5 of this Order consolidates these provisions in the 2015 Order.
14. The equivalent provision for UK parliamentary elections can be found in section 49 of the Representation of the People Act 1983. Paragraph 7 of schedule 1 of the Electoral Administration Act 2006 inserted a new sub-paragraph (4A) into section 49 which extended the provisions in the section to those with an entry on the record of anonymous entries at relevant elections.
15. We are therefore extending the prohibition against being excluded from voting so that it specifically applies to electors with an entry in the record of anonymous entries, in the same way as it applies to an entry in the register of local government electors or an entry

in the list of proxies. This change brings the position in relation to Scottish Parliament elections into line with that at other elections in Scotland.

**Exemptions from expenditure limits and increase of expenditure limits where the poll is postponed by the Presiding Officer** (Articles 8, 9, 21 and 22)

16. Articles 8 and 9 make amendments to article 42 and 43 of the 2015 Order as regards candidate election expenses and pre-candidacy election expenses at Scottish Parliament election, in line with the position agreed by the Parliament for referendums in the Referendums (Scotland) Act 2020. Accordingly, reasonable additional costs incurred in connection with adapting campaign materials for those with disabilities, providing security at election events and translating election materials into other languages will not count against expenditure limits. However, the costs of providing these services will still have to be funded by campaigners and parties.
17. Disability related expenses include, but are not limited to, the cost of providing transport support for mobility impaired candidates or support workers, British Sign Language (BSL) interpretation for hearing impaired candidates during election campaigns and the transcription of campaign material into braille for visually impaired candidates. Matters of expenditure that would be common to both disabled and non-disabled candidates, such as the normal printing of campaign leaflets for distribution to the public, would not fall within the scope of this exemption.
18. The translation provision is intended to cover the reasonable additional costs of translating campaign material from English into other languages. It is not intended to cover the cost of adapting materials to take account of local dialects or regional variations.
19. The equivalent provisions for expenditure incurred by parties and by qualifying third parties can be found in paragraph 2 of schedule 8 of the 2000 Act and paragraph 2 of schedule 8A of the 2000 Act, respectively. Articles 21 and 22 of this Order makes amendments to those paragraphs to include similar exemptions from qualifying expenses, incurred at Scottish Parliament elections.
20. Provision has also been made in articles 8(2) and 9(2) of this Order for constituency and individual regional candidates' expenditure limits at Scottish Parliament election to be increased by 50% if a poll is postponed by the Presiding Officer under the powers set out in sections 2(5) and 3(2B) of the 1998 Act. This is in line with the similar arrangements for postponement of UK parliamentary elections in the event of the demise of the Crown, as set out in section 20(5) of the Representation of the people Act 1985.

**Publication of time and place for inspection of expenditure returns** (Article 10)

21. Articles 56(1) and (2) of the 2015 Order both include a requirement to “publish in not less than (X) newspapers” a notice of the time and place at which candidates' returns and declarations can be inspected.
22. Concerns have been expressed that publication of notices in newspapers is expensive and, in the digital age, not the best way to publicise the opportunity to inspect expenditure

returns. It is also not in line with the long term aim of encouraging returning officers to make expenditure returns available online, rather than just for physical inspection.

23. The Government's view is that newspaper publication is no longer the most cost effective way of giving notice of the opportunity to inspect expense returns. All councils have alternative ways of publicising notices and similar documents, normally including online publicity and the placing of notices in libraries and other public buildings.
24. The requirement to publish in newspapers set out in article 56 is therefore replaced with a requirement for the returning officer to publicise the opportunity to inspect expenditure returns in such manner as they think fit.

### **Legibility of imprints (Article 11)**

25. Article 72 of the 2015 Order sets out that any election publication must have an imprint setting out details of the printer, promoter and publisher of the publication. This is required so that the reader knows the source of the information and views expressed in the publication and can make a reasoned judgement as to its content.
26. It has been suggested that, either unthinkingly or deliberately, the imprint on some publications has been included in such a way as to make it difficult to read, either due to its size or poor contrast between the font colour and the background. It has been suggested that a requirement to ensure that an imprint is legible should be added to the 2015 Order.
27. The Government is of the view that any imprint should fulfil the purpose it is designed to achieve and that an illegible imprint, although present, is not complying with the spirit of the legislation.
28. Our initial proposal was to add a requirement to article 72 that "the relevant details" required by sub-paragraphs (4) to (6) must be included in such a way that they are legible.
29. However, following discussions with the Electoral Commission about how legislation around legibility would work in practice, we have agreed that a minimum type size, which depends of the size of the printed material or advertisement, should be specified in the legislation.

### **Supply of electoral register (Article 14)**

30. The change made by article 14 is a technical change to reflect the amendment of section 2(5)(a) of the 1998 Act, by section 3(2)(a) of the Scottish Elections (Reform) Act 2020 which sets out that the Presiding Officer's power to postpone a Scottish Parliament election applies even where the Parliament had already been dissolved in advance of an ordinary general election.

### **Procedures to be followed if an election is postponed (Article 15(2))**

31. Sections 2(5) and 3(2B) of the 1998 Act (as amended by section 3 of the Scottish Elections (Reform) Act 2020) make clear that the Presiding Officer's power to change the

date of a Scottish Parliament poll can be exercised even if the Parliament has already been dissolved in the run up to an election (either ordinary or extraordinary).

32. Article 15(2) inserts a new rule 1A into the Scottish Parliamentary elections rules set out in schedule 2 of the 2015 Order which sets out the principles which should be followed where the date of the poll is postponed under section 2(5) or 3(2B) and the steps prior to the poll have already commenced as Parliament has been dissolved. The policy intention is to reduce the disruption and expense of any postponement of the poll whilst still allowing it to be run as closely to the normal procedure as possible. The new rule 1B makes provision which allows for materials produced or used in connection with the original poll date to be used for the revised poll date.

#### **Issue of official poll cards to prisoners (Article 15(3))**

33. Part 3 of the Scottish Elections (Franchise and Representation) Act 2020 extended the franchise at devolved elections to convicted persons detained in a penal institution in Scotland for a term of 12 months or less. This change allows for a prisoner's official poll card to be sent to their prison address as opposed to their registered address.

#### **Number of counting agents (Articles 15(4) and (5))**

34. Rule 39(2) and (3) of the Scottish Parliamentary elections rules currently set out that the returning officer may limit the number of counting agents as long as each candidate and party are entitled to the same number of counting agents. However there is no minimum level set for the number of counting agents which have to be appointed.
35. These amendments will bring practice at Scottish Parliament elections into line with that at other elections by still allow returning officers to limit the number of counting agents but setting out that the minimum number of counting agents per individual candidate and party must be:
- the same in the case of each candidate and party; and
  - the number allowed to a candidate or party shall not (except in special circumstances) be less than the number obtained by dividing the number of clerks employed on the counting by the number of candidates.

#### **Registered address for detained prisoners who are applying for an absent vote (Article 16(3))**

36. Paragraph 1(4) of schedule 3 to the 2015 Order sets out, in relation to specific categories of elector, what address the applicant can be registered at, or be treated as having applied to be registered at, when applying for an absent vote.
37. The amendment made by article 16(3) specifies that, in the case of a detained prisoner who is eligible to vote, the address specified in their application for an absent vote can be the address shown on their declaration of local connection.

#### **Emergency proxies (Articles 16(4) – (6))**

38. Paragraph 7(2) of schedule 3 of the 2015 Order sets out additional requirements for applications for a proxy vote in respect of a particular election. Paragraph 9 of schedule 3 of the 2015 order makes provision as regards the closing date for proxy applications at Scottish Parliament elections.
39. Concerns have been expressed that if something were to occur to a potential voter, which would prevent them voting in person, shortly before the deadline for a normal proxy but, for good reasons, they were not able to apply for a proxy until after the proxy deadline, then they would not qualify for an emergency proxy (i.e. a proxy vote which is sought after 5 pm on the sixth day before the date of the poll). Such a situation might occur where an individual is involved in an incident, is hospitalised and is physically unable, perhaps due to being unconscious, to apply for a proxy vote before the deadline for a normal proxy.
40. Articles 16(4) and (5) introduce a new category of eligibility for an emergency proxy in these circumstances. This change will mean that in such a situation the individual can now apply for an emergency proxy but they must provide an explanation of why they were unable to apply before the normal deadline. As currently, the final decision on whether to grant an emergency proxy would lie with the Electoral Registration Officer.
41. Article 16(6) extends the categories of people that can apply for an emergency proxy to include individuals who cannot vote in person because they are following Scottish Government or medical advice by shielding or self-isolating due to coronavirus, and only become aware of the need to shield or self-isolate less than 6 days before polling day. This change is intended to be temporary. The provision will cease to have effect two years after coming into force and there is a duty on Scottish Ministers to review the need for the requirements after one year.
42. This provision mirrors the similar change for local government elections made in the Representation of the People (Absent Voting at Local Government Elections) (Amendment) (Coronavirus) (Scotland) Regulations 2020.

**Standardising the deadline for replacement of spoilt or lost ballot papers (Articles 17 and 19(3) to (7))**

43. Paragraph 13(3) of schedule 4 to the 2015 Order sets out that the deadline for replacing spoilt postal ballot papers is “5pm on the day of poll”. Paragraph 14 of the same schedule sets out the procedure for replacing lost postal ballot papers but does not specify a deadline on the day of poll for applications. It has therefore been generally accepted that, in the absence of anything to the contrary, the deadline is the close of poll at 10pm.
44. There is no obvious reason why there are different deadlines for the replacement of postal ballot papers in these two circumstances and therefore the proposal is that the deadline for the replacement of spoilt ballot papers, currently 5pm, should be changed to 10pm on the day of poll. In order to clarify the position around replacement of lost/not received ballot papers, a specific deadline of 10pm is added for replacement to paragraph 14(6) of schedule 4.

45. Changes have also been made to the guidance provided on this issue on the postal voter's poll cards and postal voting statements (forms K, L2, M2, T and U) as set out in article 19(3) to (7).

### **Printing of party name on regional ballot paper (Article 19(2))**

46. The instructions for printing regional ballot papers set out in form J of the appendix of forms to the 2015 Order, specify that certain kinds of type should be used for different entries. For example political parties' and individuals candidates' names must be in bold print. However whilst the printing instructions indicate that individual candidates' surnames must be in capitals (direction 12 to form J), they are silent on whether capital or lower case should be used for political parties' names. The example of the ballot paper set out in form J shows the political parties' names as being in capitals.

47. Concerns have been expressed that it is not clear whether or not the party name should be all in capitals or if it can be in lower case with only initial capitals. In order to clarify the position, the directions to the printing of the regional ballot paper are amended so that it is clear that the names of the political parties must appear in capitals. This would ensure that they match the surnames of individual candidates which must also appear in capitals, as set out in direction 12.

### **Consultation**

48. In addition to the statutory requirement to consult with the Electoral Commission, the following bodies and stakeholders were consulted during the preparation of the draft Order:

- Electoral Management Board for Scotland
- Association of Electoral Administrators
- Electoral Registration Committee of the Scottish Assessors Association
- Society of Local Authority Lawyers & Administrators in Scotland
- Society of Local Authority Chief Executives and Senior Managers
- COSLA
- Scottish Parliament Political Parties Panel
- Political Parties represented in the Scottish Parliament

Responses were received from:

- Electoral Commission
- Electoral Management Board for Scotland
- Electoral Registration Committee of the Scottish Assessors Association
- Scottish National Party
- Scottish Liberal Democrats

The responses to the consultation have helped informed the content of the draft Order.



## **Impact Assessments**

49. The Scottish Government view is that this Order has no significant impact on child rights and wellbeing; equality, data protection, the environment, fairness; island communities and therefore no impact assessments are required for those areas.

## **Business and Regulatory Impact Assessment (BRIA)**

50. The Scottish Government do not consider that that a BRIA is necessary as the policy changes will not lead to any new costs or savings for business, third or public sector organisations, regulators or consumers. There is no new additional cost on the public sector as the Scottish Government will meet any costs of associated activity and there is no transfer of costs or benefits from one group to another.

## **Financial Implications**

51. It is estimated that the cost of running the Scottish Parliament general election in May 2021 will be about £20.6 million. This amount is made up of two main elements: £12.5 million in respect of returning officers' charges for services rendered and expenses incurred; and £8.1 million in respect of payments to Royal Mail for the delivery of candidates' election material. These estimated costs are based on comparisons with the cost of delivering previous elections and referendums across the UK. It should be noted that these costs are based on a "normal" general election and do not take account of any additional costs which may be necessary due to any restrictions or changes which are required to take account of public health measures which may be necessary due to the coronavirus pandemic.
52. Under article 18 of the 2015 Order, returning officers will be entitled to recover their costs and fees in respect of the election from the Scottish Government. The total amount that returning officers will be entitled to recover for delivery of the poll and the count will be set out in a separate fees and charges order. These costs will initially be borne by local authorities but will be reimbursed by the Scottish Government. Following normal practice at other elections, advance payments of up to 75% of returning officers' expenses may be made prior to the poll, with the remaining balance being paid once individual returning officers' accounts have been submitted and verified.
53. At the May 2016 Scottish Parliament general election, returning officers charges amounted to £11.9 million. Since then there has been an increase in registration levels and political engagement which, together with increases in the number of electors voting by post, will result in increased costs. For comparison purposes, at the December 2019 UK general election, £11.3 million was allocated to returning officers in Scotland, however this is for use of a single ballot paper and does not reflect that, at a Scottish Parliament election, each voter marks two ballot papers (for constituency and regional candidates) which then requires two separate counts.

Scottish Government  
Directorate for Constitution and Cabinet

21 October 2020