

**EXPLANATORY MEMORANDUM TO
THE NATIONAL ASSEMBLY FOR WALES (REPRESENTATION OF THE
PEOPLE) ORDER 2007**

2007 No. 236

1. This explanatory memorandum has been prepared by the Wales Office and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Order makes provision for the conduct of elections to the National Assembly for Wales; it provides for the manner in which the election and the election campaign are conducted and for legal challenges to an election. It also includes provisions which reflect the matters in the Election Administration Act concerning, in particular, the collection and retention of personal identifiers for postal and proxy voters and requirements in connection with the application for and dealing with absent votes.

3. Matters of special interest to the Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 The Order is being made to implement changes in the structure of the devolution settlement in Wales under the Government of Wales Act 2006 (GOWA 2006) as they affect elections to the Assembly. That Act will abolish the Assembly constituted by GOWA 1998 and replace it with the Assembly constituted by the GOWA 2006, the National Assembly for Wales Commission (see section 27 GOWA 2006) and the Welsh Assembly Government (including the Welsh Ministers) (see sections 45 and 48 GOWA 2006), thus effecting the separation of legislature and executive in Wales. These changes will take effect following the Assembly elections in May 2007. Although those elections will be elections to the Assembly constituted by GOWA 2006, the actual elections will be conducted under Part 1 of Government of Wales Act 1998 (GOWA 1998). Consequently, this order is made under section 11 GOWA 1998 but paragraph 8 of Schedule 11 to the 2006 Act makes transitional provision as to any order made under section 11 that is in force immediately before section 11 is repealed. It provides that such an order will continue to have effect as if made under section 13 of GOWA 2006; section 13 and section 11 make similar provision as to the conduct of Assembly elections. This will ensure that until any order is made under section 13 this Order can continue to have effect after the May 2007 elections and apply to future elections to the Assembly held under Part 1 of GOWA 2006.

4.2 The Order also gives effect to the change made by section 7 of GOWA 2006 which prevents persons standing both as a candidate at an election to an Assembly

constituency and as a candidate at an election to an Assembly electoral region at the same time. Other provisions relating to Assembly constituency elections and elections to seats in an electoral region are largely based on similar provisions in the 2003 Order: such provisions having been revoked and re-enacted and the opportunity taken to clarify the drafting, such as in article 37 where election agents are appointed by the party submitting a list of candidates for seats in an electoral region rather than the candidates themselves.

4.3 The Order is being made to implement changes in electoral law made by the Electoral Administration Act 2006 (c. 22) (EAA) and the Representation of the People (England and Wales)(Amendment)(No. 2) Regulations 2006 no. 2910 and to modify the Absent Voting (Transitional Provisions)(England and Wales) Regulations 2006 for Wales. Matters relating to registration of voters and the franchise are outside the ambit of section 11 of the Government of Wales Act 1998 (GOWA 1998) as generally, those changes have effect in respect of Parliamentary elections within the United Kingdom and local government elections in England and Wales and not in respect of elections to the National Assembly for Wales (“the Assembly”) This Order will apply those changes to elections to the Assembly both in respect of filling any vacancies that occur in electoral region seats before the next Assembly general election in May 2007 and to that election itself when members for the Assembly as constituted by the Government of Wales Act 2006 (GOWA 2006) will be elected.

4.4 The complexity of the changes effected by both GOWA 2006 and EAA, together with those made by subordinate legislation, meant that the decision was taken to revoke and re-enact where appropriate the 2003 Order to assist those concerned with electoral administration in Wales.

5. Extent

5.1 Although of UK extent, this Order primarily applies to Wales as it provides for the conduct of elections to the Assembly and matters relating thereto.

6. European Convention on Human Rights

6.1 The Secretary of State for Wales has made the following statement regarding Human Rights:

In my view the provisions of the National Assembly for Wales (Representation of the People) Order 2007 are compatible with the Convention rights.

7. Policy background

Changes effected by the Electoral Administration Act 2006

7.1 This Order gives effect, in Wales, to the changes made by The Electoral Administration Bill which was introduced in Parliament on 11 October 2005 and received Royal Assent on 11 July 2006. The Electoral Administration Act 2006 (EAA) aims to make progress on the Government’s four principles found at the core of a healthy democracy:

- (i) Improving Access and Engagement;

- (ii) Improving Confidence;
- (iii) Extending Openness and Transparency in Party Financing;
- (iv) Maintaining Professional Delivery of Elections.

7.2 Regulations have already been made implementing the EAA changes for Parliamentary and local government elections in England and Wales (paragraph 4.1 refers). Those regulations did not apply to the conduct of Assembly elections which have two categories of candidate: for constituency elections' elected on a first past the post basis and for electoral regions, elected under proportional representation from party lists. Electors in Assembly elections have two votes. This Order applies the changes effected by the EAA and the Regulations to this context.

7.3 Detailed provisions in the EAA relating to anonymous registration are not reproduced in this order as Assembly elections use the register of electors for local government elections.

7.4 This Order reflects changes to the structure of the Assembly and Welsh Assembly Government made by The Government of Wales Bill which was introduced into Parliament on 8th December 2005 and received Royal Assent on 25th July 2006. Following the separation of the Assembly into two bodies, some functions of an executive or administrative nature will transfer from the Assembly to the Welsh Ministers who will exercise regulation making powers. GOWA 2006 also prevents candidates on a party list in an electoral region also standing as candidates for a constituency.

PART 2 and Schedule 1: Assembly Franchise and its exercise

7.5 The provisions in this part of the Order relating to the manner of voting at an Assembly election reflect, in substance, those of the 2003 Order but changes to the following provisions give effect to changes made by the Election Administration Act.

Personal identifiers for absent votes

7.6 Following proposals made by noble Lords during the passage of EAA, provisions were inserted to require absent voters to provide personal identifiers to Registration Officers (ROs) (in Wales, Registration officers are the EROs appointed by each county or county borough council). The Act provides for persons voting by post to provide their signature and date of birth on their postal vote application form and on the postal voting statement that accompanies the ballot paper. These measures aim to improve security for postal voting, and protect against the risk of future incidences of fraud. They are also intended to provide greater evidence for a relevant police authority investigating any allegations or possible incidences of electoral fraud.

7.7 The Order (in Part 2 and Schedules 1 and 2) sets out the process by which personal identifiers are to be collected, and how they will be used to check the validity of returned postal votes. The Order sets out the requirement for providing a signature and date of birth on an absent vote application form. It provides for the minimum dimensions of the box for providing signatures and the format in which dates of birth should be provided. It also provides for applications from electors who wish to be exempt from providing personal identifiers due to disability or an inability to read or write. The regulations provide the ROs, when dealing with absent voting applications, with a power to check any signatures or dates of birth previously provided by the

applicant to ROs or Returning Officers, or any previously provided by the applicant to the local authority. They also require the ROs to obtain a fresh signature from absent voters every 5 years to ensure signatures are up to date and take account of changes to a person's signature, and to keep a separate record of absent voters' personal identifiers.

7.8 The Order (in Schedule 1) also set out how the identifiers will be used to check the validity of returned postal votes. They set the minimum level of checking of identifiers and provide that at an Assembly election on each occasion the postal voters' ballot box is opened not less than 20% of covering envelopes will be set aside by the Returning Officer for checking. All returned postal voting statements must have a date of birth and signature to be deemed to be duly completed and valid. Furthermore, for those statements set aside for checking, the Returning Officer must compare the signature and date of birth on the postal voting statement with those provided by the voter and contained on the personal identifier record created under paragraph 2 of Schedule 1. If they both do not match, the statement will be invalid and so the vote will not be counted. Where a Returning Officer deems that a postal voting statement is invalid he shall mark it "rejected" and agents will be entitled to see the identifiers for the voter to whom the statement was addressed and if they object to the Returning Officer's decision the Returning Officer will mark the postal voting statement "rejection objected to".

Absent Voting: Proxy Applications

Attestation of Proxy Votes

7.9 The Act removes the legal incapacity to vote for persons with a mental impairment and allows such persons to apply for a long term proxy vote. The Order expands the list of health professionals who can attest a proxy vote application for a definite or indefinite period to include health professionals that work directly with persons with mental impairments, so that they do not become disenfranchised through any inability to attend a polling station.

Additional Requirements for certain proxy applications

7.10 The Act removes the provision in electoral law that stipulates that mental health patients detained under civil powers must vote at elections by either post or proxy. In future, such persons will not be prevented by electoral law from voting in person in polling stations.

7.11 The change to the manner of voting for detained mental health patients will mean that such persons will have to make a judgement about whether to apply for a postal or proxy vote or to seek leave from the hospital to attend the polling vote in person. As such, there is a risk that if a patient wishes to vote in person but is refused leave on or shortly before polling day, and has not applied for a postal or proxy vote, then they will not be able to vote at all.

7.12 Such patients may apply for an "emergency" proxy vote at any time after the deadline for proxy applications (6 days before polling day) and up until 5pm on polling day. The Order also allow electors who are unable to vote in person due to a disability that has arisen between the deadline for proxy applications and polling day itself, to appoint a proxy up until 5pm on polling day.

Absent voting: Transitional Provisions

7.12 Section 14 of the Electoral Administration Act provides for the collection of personal identifiers of postal and proxy voters in order to deter electoral malpractice. Regulations have already been made in respect of Parliamentary elections in the U.K. and local government elections in England - the Absent Voting (Transitional Provisions)(England and Wales) Regulations 2006. Schedule 2 replicates those new arrangements for Assembly elections requiring existing absent voters to provide personal identifiers which may be the subject of a check at the time of an election and also provides for the collection of a signature and date of birth from those registered for an absent vote on 1st February 2007, the date the Order comes into force. This timetable differs from that at the Absent Voting (Transitional Provisions)(England and Wales) Regulations 2006.

7.13 Without the personal identifiers of all absent voters, the proposed system of checking the authenticity of postal votes would not be workable, as a Returning Officer would be unable to compare the vast majority of identifiers returned on postal voting statements for any given election.

7.14 Schedule 2 sets out a scheme whereby Registration Officers will write to existing postal voters asking for their personal identifiers. The notice will require existing absent voters to provide the information within 42 days. Registration Officers must provide absent voters with information as to how the required personal identifiers will be used, and explain that failure to provide them will mean the voter will lose his entitlement to be an absent voter though loss of entitlement will not prevent the person from making a fresh application for an absent vote.

7.15 Registration Officers must also inform the elector of the date (which will not be less than 49 days from the sending of the initial notice) from which he shall cease to be entitled to vote by post or proxy in the event of his failure to provide the personal identifiers.

7.16 The Government recognizes that there may be a risk that some existing postal or proxy voters will not respond and will lose their entitlement to vote by post or proxy. The Order attempts to minimize this risk by requiring Registration Officers to send a reminder letter after 21 days of the initial notice. Also, Registration Officers will not ask postal voters to re-complete an entire new form, but rather just to provide their signature and date of birth, possibly on a form pre-printed with the existing information already held by the Registration Officer. Failure to respond will mean the Registration Officer will remove the person from the absent voting records and will notify them of this. The Registration Officer must explain the effect of removal from the absent voting record and remind the elector that they may make a fresh application.

Access to election documents

7.17 This Order does not deal with matters in Part 6 of the Representation of the People (England and Wales)(Amendment)(No.2) Regulations 2006 which are made under section 42 of the EAA. A separate set of regulations dealing with access to election documents in an Assembly election will be laid by the Wales Office in spring 2007 and take effect after the May 2007 election.

Postal Voters List

7.18 The Order makes minor changes to reflect that the “list of postal proxies” is to be called “proxy postal voters list” and “absent voters list” is to be called “postal voters list” and amends the procedure of issuing and receipt of postal ballot papers. When a postal voter returns a postal vote or a postal proxy vote, the returning officer will be required to mark the relevant list provided that the postal voting statement has also been received.

7.19 The Electoral Commission in their report on Marked Registers published in February 2005 recommended that an elector should be able to check with the Returning Officer whether their postal vote has been received. The Order clarifies that if an elector asks for confirmation of receipt of his postal vote, and the Returning Officer may give that information, after referring to the relevant lists, provided he is satisfied as to the identity of the elector. amends the procedure of issuing and receipt of postal ballot papers. When a postal voter returns a postal vote or a postal proxy vote, the returning officer will be required to mark the relevant list provided that the postal voting statement has also been received.

Additional requirement for postal vote application

7.20 The Order provides that a reason is required for a postal vote to be sent to an address other than the address at which the postal voter is registered, and that this applies to new postal vote applicants in addition to long term postal and postal proxy voters. This provision was not specified in the EAA but is in line with U.K. Government principles to enhance the security of the postal voting system and it is intended to deter potential fraudulent use of postal votes.

New Offence: provision of false information

7.21 The EAA replaces the offence of providing a false statement in relation to an application for an absent vote with one of providing false information; this includes the provision of a false signature and carrying out a list of acts with the intention of depriving another of the opportunity to vote. By broadening the scope of the offence, it is hoped to provide greater deterrence to those who may misuse the provisions for absent voting.

Returning officers: correction of procedural errors

7.22 The EAA provides that returning officers may correct errors or omissions that arise during the preparation for and conduct of elections. This applies to acts or omissions by the returning officer himself; electoral registration officers and their staff and those supplying goods and services to such officers. Thus, electoral documents printed with incorrect details would be capable of correction under that provision. This article applies that provision to Assembly elections but with the modification that at an Assembly regional election the regional returning officer and a constituency returning officer may also rectify at that election the acts or omissions of the other. This is subject to them first consulting such other returning officer

Powers of arrest

7.23 The EAA maintains the position that the power of arrest inside a polling station, without a warrant, of a person suspected of personation rests with a police constable alone. Amendments made by the Serious Organised Crime and Police Act 2005 to sections 24 and 24A of the Police and Criminal Evidence Act would allow any person who had reasonable grounds for suspecting another person of being guilty of the offence inside a polling station to make an arrest. This Order ensures that this

new provision applies to the separate offence under the order of personation at an Assembly election.

Other provision in Part 2

7.24 The remaining provisions in Part 2 replicate, with appropriate modification, provisions in Parts I and II of Representation of the People Act 1983 (ROPA 1983), e.g. article 18 describes constituency returning officers and regional returning officers and their functions and article 23 confers on the Assembly the power to make orders in connection with returning officers' expenses in Assembly elections.

PART 3 and SCHEDULE 5: The election campaign

Nomination of candidates

7.25 The EAA makes changes to the nomination procedure and by giving returning officers a specified period for determining the validity of those nomination papers and publishing the statement of persons nominated so that returning officers must make any decision on the validity of the nomination papers within 24 hours from the end of the period for delivering nomination papers and by authorising the use of candidates' common names in nomination and ballot papers is applied in Schedule 5 rules 4 to 7. It also introduced new means of paying the deposit required by enabling credit and debit cards and electronic transfer of funds to be used.

Expenses of candidates

7.26 In order to promote transparency and accountability the EAA amends the regime relating to electoral expenses by giving the Electoral Commission power to prescribe the information included on candidates' return of election expenses. The Secretary of State will issue guidance on this issue, which will also apply to Assembly elections. The Act also remedies a previous defect by setting out the activities which a third party can fund, if not authorised by an election agent and this is reflected in the Order.

7.27 In addition, and acting on the recommendation of the Electoral Commission under section 8(2) and (3) of the Political Parties, Elections and Referendums Act 2000, the order sets out new limits for the expenses of candidates at Assembly elections.

7.28 Those new limits apply only to candidates at constituency elections and individual candidates at regional elections. The expenses of registered political parties which submit a list of candidates at a regional election, including the expenses of candidates on that list, continue to be regulated under Part 5 of the Political Parties, Elections and Referendums Act 2000 and not under this Order. However, this Order has taken the opportunity of the revocation of the 2003 Order to clarify this position; it does so by making clear in article 37 that elections agents at a regional election are the agent of the party submitting a list of candidates and not the agent of the candidates on that list (in the 2003 Order referred to as a "group").

Official Poll Cards

7.29 The regulations substitute a revised form of elector's official poll cards and proxy's official poll card and prescribe new forms for official postal poll card to be

sent to electors and their proxies consequential to the changes introduced by the Electoral Administration Act 2006.

Information on election material

7.30 The Order makes new provision as to the information that must appear on election material intended to promote or procure a particular result an Assembly election. This is in line with section 110 Representation of the People Act 1983 that applies to Parliamentary and local government elections (other than local government elections in Scotland) and is substituted by Schedule 18 to the Political Parties, Elections and Referendums Act 2000 which is shortly to be commenced. This will ensure that there is consistency of control as to election material at elections in Wales.

Descriptions of candidates

7.31 The EAA amends Part 2 of the Political Parties, Elections and Referendums Act 2000 to enable a registered political party to register a description that it or its candidates may use at an election. Schedule 5 makes appropriate modifications to the nomination procedure at Assembly elections to enable such descriptions to be used as appropriate at Assembly elections.

Clerical Errors

7.31 The EAA provides for clerical errors in the register to be capable of correction up to and including on the day of the poll. Under previous legislation, the closing date for registering to vote had been around six weeks prior to polling day, with clerical errors only correctable up until five days before the day of poll.

7.32 The Order prescribes the manner in which a person may make a representation that the register contains a clerical error, the time on polling day after which corrections may not be made, and the manner in which notices of correction are to be made and communicated to the relevant polling station.

Replacement of Counterfoils and Corresponding Number List

7.33 The EAA removes the requirement for ballot papers to be attached to a counterfoil. Instead, electoral officers will need to record ballot papers numbers to be used at an Assembly election on the corresponding number list. The Order prescribes the form of corresponding number lists to be used at Assembly elections for both polling station and postal ballot papers and replaces references to counterfoils attached to ballot papers with references to the corresponding number lists.

7.34 The corresponding number list will be in two parts. Returning Officers will be required to record all the ballot paper numbers and the corresponding identifying marks of the ballot papers to be issued to postal voters and to be used at a polling station on Part 1 of the list. Electors will be required to sign for their ballot paper against the ballot paper number and their elector number on Part 2 of the corresponding number list.

PART 4 Legal proceedings

7.35 This Order reproduces the corresponding provisions of ROPA 1983 (as amended) which were contained in the previous Orders made in 1999 and 2003. These set out the procedure for the presentation of an election petition if a person wished to challenge the outcome of an election. The incapacities imposed for corrupt and illegal practices have also been harmonised.

SCHEDULE 3: Issue and receipt of Postal ballot papers

7.36 This Schedule reproduces the provisions of the ROPA Regulations 2001 (SI 2001/341) as amended by the provisions of the EAA and the Representation of the People (England and Wales)(Amendment)(No.2) Regulations 2006 in relation to the following matters:

Cancellation and retrieval of ballot papers

7.37 The Act provides for the cancellation and removal of ballot papers under prescribed circumstances. The Order sets out the process for removal of postal ballot papers from the postal ballot box, in the event that they are cancelled. This provision was piloted at the 2004 European Parliamentary and local elections. The Government believes that the ability to cancel and retrieve a postal ballot paper that has been lost will help to prevent possible abuses of the postal vote system. For example, where a voter does not receive their postal vote, they can report this as lost. If that original vote is then received by the RO, and has possibly been completed by someone other than the elector, the Returning Officer can cancel that ballot paper, retrieve it from the postal ballot box, and issue a replacement to the elector.

7.38 The Order also sets out how the identifiers will be used to check the validity of returned postal votes. They set the minimum level of checking of identifiers and provide that, at an Assembly election, on each occasion the postal voters' ballot box is opened not less than 20% of covering envelopes will be set aside by the Returning Officer for checking. All returned postal voting statements must have a date of birth and signature to be deemed to be duly completed and valid. Furthermore, for those statements set aside for checking, the Returning Officer must compare the signature and date of birth on the postal voting statement with those provided by the voter and contained on the personal identifier record created under paragraph 2 of Schedule 1. If they both do not match, the statement will be invalid and so the vote will not be counted. Where a Returning Officer deems that a postal voting statement is invalid he shall mark it "rejected" and agents will be entitled to see the identifiers for the voter to whom the statement was addressed and if they object to the Returning Officer's decision the Returning Officer will mark the postal voting statement "rejection objected to".

Sorting ballot papers face down

7.39 The Order sets out the procedure for the sorting of returned postal ballot papers once they have been removed from their covering envelopes. Amending the way that postal votes should be sorted at the opening of ballot paper envelopes was a recommendation of the Electoral Commission in response to the Department for Constitutional Affairs' May 2005 Policy Paper. The Commission raised concerns that the current method of sorting could lead to breaches of the secrecy of the ballot, as provided for by Section 66 of the Representation of the People Act 1983. These provisions are intended to ensure that secrecy is maintained by providing that ballot papers are always sorted face down, meaning that election staff and agent of political parties cannot see how an elector has voted.

Changes effected by the Government of Wales Act 2006

7.40 This Act effects the formal separation between the executive and legislative arms of the Assembly as constituted by GOWA 1998; it establishes the Welsh

Assembly Government (made up of the First Minister, other Welsh Ministers and their deputies and the Counsel General) as an entity separate from, but accountable to, the National Assembly. Most of the statutory functions which are currently exercised in the name of the Assembly will become the responsibility of the Welsh Ministers.

7.41 This is reflected in the Order where in the main functions of the Assembly constituted by the 1998 Act in connection with the conduct of an election will, after separation, vest in the Welsh Ministers; for example responsibility for designating returning officers and for setting and meeting the charges of returning officers. However, a few functions will, on separation, vest in the National Assembly for Wales Commission, for example responsibility for sending a shorthand typist to the court hearing an Assembly election petition.

7.42 The dissolution of the Assembly as constituted under GOWA 1998 and the creation of the Assembly as constituted under GOWA 2006 will take place following the election in May 2007 to which this order applies.

7.43 The 2006 Act also prevents dual candidacy, i.e. no candidate may stand for election at the same time in both an Assembly constituency and an electoral region.

7.44 The Act also makes new provision for extraordinary elections within the Assembly's fixed four year term, to apply in exceptional circumstances where the Assembly, though properly constituted, could not perform its functions properly. This has required a change in terminology in the Order, and modifications of provisions to enable an election to take place other than at the end of the four-year term.

Consultation

7.41 The Electoral Commission was consulted on a draft of this order which has taken account of its comments.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

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susan.olley@walesoffice.gsi.gov.uk can answer any queries regarding the instrument.