

Scottish Elections (Representation and Reform) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Scottish Elections (Representation and Reform) Bill, introduced in the Scottish Parliament on 23 January 2024.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 42–FM);
 - a Policy Memorandum (SP Bill 42–PM);
 - a Delegated Powers Memorandum (SP Bill 42–DPM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 42–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill

5. The Bill covers a wide range of issues associated with reform of Scottish Parliament and local government elections in Scotland. This follows the Scottish Government's consultation¹ published in 2022.

¹ <https://www.gov.scot/publications/electoral-reform-consultation/>

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6. The Bill contains 50 sections under 10 Parts, and a schedule. Commentary on the effect of individual sections, and the schedule, follows below. In summary, the Bill—

- extends candidacy rights at Scottish Parliament and local government elections to foreign nationals with limited leave to remain (Candidacy rights etc. of foreign nationals (Part 1));
- extends the disqualification criteria for MSPs and councillors so that a person subject to a disqualification order under the Elections Act 2022 or a Scottish disqualification order under the Act for this Bill (each of which are to be imposed by a court where it is satisfied that the offence is aggravated by hostility toward certain persons including, for example, politicians or election staff) are disqualified from holding such elective office; and severs the link which provides that disqualification from membership of the House of Commons automatically means that the person is disqualified from being an MSP (Disqualification (Part 2));
- holds candidates and agents accountable for notional expenditure only where they direct it and restricts those who can operate as a third-party campaigner in devolved elections. To support these campaign finance changes, the Bill also proposes enabling the Electoral Commission to prepare a code of practice in relation to the operation of the provisions as they concern devolved Scottish elections (Campaign finance (Part 3));
- revises the existing power of the Presiding Officer of the Scottish Parliament (“PO”) to postpone an ordinary election so that it is possible to postpone it by a further 8 weeks and makes provision for the first meeting of the new Parliament to occur as soon as reasonably practicable thereafter; removes the requirement for the PO to set a date for an extraordinary general election where an ordinary general election is due to take place within 8 weeks; makes provision about the election of a new PO and the appointment of a new First Minister in such exceptional circumstances; gives a power to the convener of the Electoral Management Board for Scotland (EMB) to postpone an ordinary local election by 2 weeks; gives a power to returning officers to postpone the poll for an ordinary election for their area; and gives powers to returning officers to postpone or cancel by-elections (Rescheduling of elections etc. (Part 4));
- adjusts existing powers to pilot electoral processes by adding the Scottish Ministers, the EMB and electoral registration officers as persons who may propose pilots (in addition to the existing power for local authorities) and making other procedural changes; and provides the Scottish Ministers with financial assistance powers for the purpose of increasing democratic engagement (Election Pilots and Democratic Engagement (Part 5));
- requires certain unpaid-for digital campaigning material for Scottish elections published by relevant third-party campaigners to display a digital imprint with the name and address of that third party promoter (and any other publisher) where the electronic material meets the conditions set out in the provisions (Information to be included with certain electronic material at Scottish elections (Part 6));

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- revises the deadline for Boundaries Scotland to submit its first report on the electoral arrangements for a local government area to April 2031 (Boundaries (Part 7));
- requires the Electoral Commission to prepare a separate 5-year plan, to be scrutinised by the Scottish Parliament Corporate Body, in respect of its Scottish devolved functions (Electoral Commission (Part 8));
- adjusts the constitution of the EMB, most significantly giving it a separate legal personality as a body corporate and providing for the post of deputy convener (Electoral Management Board for Scotland (Part 9));
- Part 10 contains general provision.

Note on interpretation

7. The Bill's freestanding text (that is, any provision which is not a textual amendment of another piece of legislation) is to be interpreted in accordance with the Interpretation and Legislative Reform (Scotland) Act 2010.²

8. Text that the Bill inserts into other enactments is to be interpreted in accordance with the interpretation legislation that applies to that enactment. For example—

- text inserted into the Local Government (Scotland) Act 1973, the Representation of the People Act 1983, the Political Parties, Elections and Referendums Act 2000 or the Scotland Act 1998 is to be interpreted in accordance with the Interpretation Act 1978;³
- text inserted into the Scottish Local Government (Elections) Act 2002 is to be interpreted in accordance with the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999;⁴
- text inserted into the Local Electoral Administration (Scotland) Act 2011 is to be interpreted in accordance with the Interpretation and Legislative Reform (Scotland) Act 2010.⁵

Crown application

9. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. As such, this Bill applies to the Crown in the same way as it applies to everyone else. However, the Bill amends a number of existing enactments – some of which do, and some of which do not, apply to the Crown. The Bill makes no change to the application of those enactments to the Crown.

² <https://www.legislation.gov.uk/asp/2010/10/contents>

³ <https://www.legislation.gov.uk/ukpga/1978/30/contents>

⁴ <https://www.legislation.gov.uk/uksi/1999/1379/contents/made>

⁵ <https://www.legislation.gov.uk/asp/2010/10/contents>

Commentary on provisions

Part 1: Candidacy rights etc. of foreign nationals

10. Part 1 contains provision which would give foreign nationals, with any form of leave to remain in the United Kingdom, the right to stand as candidates at Scottish local government elections and Scottish Parliament elections.

11. The Scotland Act 1998 (the “1998 Act”) sets out who may be a member of the Scottish Parliament. Section 5 provides for candidacy but does not set out the criteria. Instead, that is left to sections 15 and 16 which provide for disqualification from membership of the Parliament and exemptions. Section 17 provides that if a disqualified person is returned as a member of the Parliament “his return shall be void and his seat vacant”. So while there is no specific rule that an ineligible person may not be a candidate in a Scottish Parliament election, there is a de facto prohibition as they would be unable to take their seat if successful.

12. Section 15 provides the grounds by which a person is disqualified from being a member of the Parliament. Provision about nationality is made by subsection 15(1)(b) of the 1998 Act. That provision transposes the House of Commons’ nationality requirements into the Scotland Act. The specific disqualification stems from the Act of Settlement 1700, but the UK Parliament’s website sets out the position in plain English:-

“To stand as a candidate in a UK Parliamentary General Election you need to be at least 18 years old and:

a British citizen

a citizen of the Republic of Ireland

a citizen of a commonwealth country who does not require leave to enter or remain in the UK, or has indefinite leave to remain in the UK”.⁶

13. Section 2 of the Scottish Elections (Franchise and Representation) Act 2020 (the “2020 Act”) created an exception to that, extending the categories of persons who may be members of the Scottish Parliament. This enabled foreign nationals with indefinite (or ‘unlimited’) leave to remain to stand as candidates in Scottish parliamentary elections.

14. Equivalent provision is made for local government (also known as local authorities or councils) by section 29 of the Local Government (Scotland) Act 1973 (the “1973 Act”). This section has been expanded over a number of years. As enacted, it enabled British subjects and Irish citizens to stand. The terminology of British subject was updated to the current label of “qualifying Commonwealth citizen”.⁷ Between the

⁶ <https://www.parliament.uk/about/mps-and-lords/members/electing/mps/candidates/>

⁷ See Schedule 1 of Electoral Administration Act 2006.

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entry into force of the Treaty of the European Union and the UK's withdrawal from the EU, section 29 included provision enabling EU citizens to stand and hold office.⁸

15. Section 3 of the 2020 Act inserted a new category of eligible persons labelled "qualifying foreign nationals". This definition mirrors the text which was inserted into section 16 of the Scotland Act at the same time.

16. Finally, section 29 of the 1973 Act was amended by the Scottish Local Government Elections (Candidacy Rights of Foreign Nationals) Act 2022 (the "2022 Act"). This added an additional category of persons labelled "schedule 6A nationals". These are nationals of countries with whom the UK has a bi-lateral treaty relating to candidacy in municipal elections (currently Luxembourg, Spain, Portugal and Poland). Nationals of these countries may stand for election in local government elections in Scotland if they have any form of leave to remain.

17. "Leave to remain" is a term of art founded in the Immigration Act 1971 (the "1971 Act"). Section 3(1)(a) of that Act provides that a person who is not a British citizen shall not enter the UK unless given leave to do so. Section 3(1)(b) provides that such leave may be granted either for a limited or for an indefinite period of time. British citizenship is determined by reference to the British Nationality Act 1981. Section 3(2) provides that the Secretary of State for the Home Department (often referred to as the Home Secretary) shall make rules as to the practice followed in administration of the 1971 Act. These are the immigration rules.⁹ They include rules as to periods of leave to remain and how conditions to leave to remain are attached in different circumstances.

18. Examples of people who may be lawfully present in the UK with limited leave to remain include those with student visas, work and business visas and certain visas given to the family members and dependents of persons who themselves have leave to remain in the UK. It excludes persons who have applied for refugee status in the UK and are awaiting a decision (these persons are also known as asylum seekers) or persons whose application has been refused. It also excludes people who are unlawfully present in the UK or who are lawfully in the UK without leave to remain. This final category may include diplomatic missions, armed service personnel and stateless persons.

19. The EU settlement scheme was established to provide for EU, EEA and Swiss citizens living in the UK at the end of the transition period in accordance with the UK's obligations under the Withdrawal Agreement.¹⁰ In almost all cases, the deadline for applying for the EU settlement scheme has now passed. The scheme has two tiers. Settled status is a form of indefinite leave to remain open to eligible persons who had

⁸ Also known as the Maastricht Treaty. For details of the basis for this change in EU law see Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.

⁹ <https://www.gov.uk/guidance/immigration-rules/immigration-rules-index>

¹⁰ The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community is available here: [New Withdrawal Agreement and Political Declaration - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/654972/Withdrawal_Agreement_and_Political_Declaration.pdf)

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lived continuously in the UK for 5 years prior to their application. Persons who had less than 5 years continuous residence in the UK were able to apply for pre-settled status. This is a form of limited leave to remain which may be subject to extension and which is designed to lead to settled status.

20. Part 1 of the Bill contains provision which would extend candidacy rights to all foreign nationals with any form of leave to remain. This Part confers candidacy rights only. That is because voting rights have already been conferred by virtue of section 1 of the 2020 Act. That section amended the Representation of the People Act 1983 to extend the franchise for Scottish elections to all foreign nationals who have any description of leave to enter or remain in the United Kingdom

Section 1 – Scottish Parliament elections

21. This section amends section 16 of the Scotland Act 1998 (exceptions and relief from disqualification) to allow all foreign nationals who are at least 18 years old and resident in the UK and with any form of leave to remain, to stand as candidates, to be nominated for election and to hold office in the Scottish Parliament.

22. Since giving candidacy rights to all foreign nationals with limited leave to remain would also include foreign nationals with indefinite leave to remain or EU nationals with pre-settled status, there is no need to create such a distinction. Therefore, the references to indefinite leave and pre-settled status in subsections (2B)(b)(ii) and (2C) of section 16 of the 1998 Act are removed by this section.

Section 2 – Local government elections

23. This section amends section 29 of the 1973 Act (Qualifications for nomination, election and holding office as member of local authority) to allow all foreign nationals who are at least 18 years old and resident in the UK and with any form of leave to remain, to stand as candidates, to be nominated for election and be a member of a local authority.

24. Since giving candidacy rights to all foreign nationals with limited leave to remain would also include foreign nationals with indefinite leave to remain, EU nationals with pre-settled status and “schedule 6A nationals” there is no need to create such a distinction. Therefore, the references to indefinite leave, pre-settled status and “schedule 6A nationals” are removed by this section. The 2022 Act is also repealed.

Part 2: Disqualification

25. This Part contains provision making changes to the disqualification criteria for membership of the Scottish Parliament and local authorities, part of which mirrors the changes made by Part 5 of the Elections Act 2022 in respect of elective offices across the rest of the United Kingdom.

Scottish disqualification orders

Section 3 – Scottish disqualification orders

26. This section applies where an offender is convicted by a criminal court in Scotland of an offence listed in the schedule of the Bill which was committed when the offender was aged 18 or over; and the court is satisfied beyond reasonable doubt that the offence is aggravated by hostility related to a returning officer or their staff (as defined in section 4), a registration officer or their staff (as defined in section 5) or a counting officer or their staff (as defined in section 6) (described here collectively as “election workers”).

27. In those circumstances the court must, when dealing with the offender for the offence, also make a Scottish disqualification order. The disqualification order is to have effect for 5 years and, by virtue of the changes made by sections 7 and 8 to the Scotland Act 1998 (the “1998 Act”) and the Local Government (Scotland) Act 1973 (the “1973 Act”), respectively, means that the offender is disqualified from being a member of the Scottish Parliament or local authority.

28. However, the court does have some discretion as it does not have to make the disqualification order if they consider it would be unjust due to particular circumstances about the offence or the offender. Where the court determines not to make the order, the court must give its reasons for not doing so in open court.

29. An offence is aggravated by hostility if the offender demonstrated hostility towards the victim of the offence because the victim is, or the offender presumes the victim to be, an election worker. The hostility must be demonstrated by the offender at the time of committing the offence, or immediately before or after the commission of the offence.

30. In terms of section 3(4), the ‘victim’ of the offence doesn’t necessarily need to be an election worker in order for the offence to be aggravated by the necessary hostility. This means that an offence could be aggravated by hostility where (for example) an offender commits a relevant offence against person A (e.g., an election worker’s parent) and that offence is motivated by the offender’s hostility towards person B because B is an election worker.

31. It is immaterial whether or not an offender’s hostility is also based (to any extent) on any other factor not listed in that subsection, i.e., a factor other than the victim being or being presumed by the offender to be an election worker, or a factor other than hostility towards persons in their capacity as an election worker.

32. In terms of section 3(6) and (7), the court may consider evidence presented by the prosecution or defence in deciding whether or not to make a disqualification order under this section, even if that evidence would not have been admissible in the proceedings in which the offender was convicted.

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33. For the purposes of determining whether an offender was aged 18 or over when the offence was committed, where an offender is found to be committed over more than a single day it is taken to have been committed on the last of those days.

Schedule

34. The schedule lists the offences of an intimidatory nature in respect of which a Scottish disqualification order can be made by a court under section 3. It includes—

- any offence which is tried under indictment (solemn procedure), which may for example include offences such as murder and rape,
- certain common law and statutory offences tried on petition (summary procedure), which are listed in Chapter 1 (common law) and Chapter 2 (statutory offences) of the schedule.

35. Part 3 of the schedule also makes provision to include inchoate (that is, incomplete) versions of the offences listed, as well as superseded versions of those offences.

Section 4 – Returning officers

36. This section defines the first category of persons referred to in section 3.

Section 5 – Registration officers

37. This section defines the second category of persons referred to in section 3.

Section 6 – Counting officers

38. This section defines the third category of persons referred to in section 3.

Section 7 – Effect of order: Scottish Parliament

39. Section 15 of the 1998 Act provides the grounds by which a person is disqualified from being a member of the Parliament. This section amends section 15 of the 1998 Act to provide that a person who is subject to a Scottish disqualification order is disqualified from membership of the Parliament (but see commentary on effect of section 12). Section 17 of the 1998 Act provides that if a disqualified person is returned as a member of the Parliament “his return shall be void and his seat vacant”. So while there is no specific rule that an ineligible person may not be a candidate in a Scottish Parliament election, there is a de facto prohibition as they would be unable to take their seat if successful.

Section 8 – Effect of order: local government

40. Section 31 of the 1973 Act provides the grounds by which a person is disqualified for nomination, election and holding office as a member of a local authority. This section amends section 31 of the 1973 Act to provide that a person who is subject to a Scottish

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disqualification order is disqualified from being a member of a local authority (but see commentary on effect of section 12).

Section 9 – Power to amend schedule

41. This section allows the Scottish Ministers by subsequent regulations to add or omit offences from the list of criminal offences in the schedule in respect of which a disqualification order can be made in accordance with section 3. Such regulations are subject to the affirmative procedure.

Disqualification orders under Elections Act 2022

42. Part 5 of the Elections Act 2022 (the “2022 Act”) made provision for a disqualification order, similar to the Scottish disqualification order provided under section 3 of this Bill, but in relation to offences aggravated by hostility related to candidates (as defined in section 32 of that Act), holders of relevant elective offices (as defined in section 33 of that Act) or campaigners (as defined in section 34 of that Act). A person subject to an order is disqualified from being nominated for election to, being elected to or holding certain elective offices. Section 37 of the 2022 Act lists the relevant elective offices to which the disqualification applies.

43. Part 5 of the 2022 Act is part of the law of Scotland. Therefore, a court in Scotland must make an order if an offender is convicted of an offence listed in schedule 9 of that Act aggravated by hostility in relation to MSPs, Scottish councillors etc. However, the Scottish Parliament and local authorities in Scotland are not included in the list of “relevant elective offices” from which a person subject to a disqualification order is disqualified.

Section 10 – Disqualification from membership

44. Section 15 of the 1998 Act provides the grounds by which a person is disqualified from being a member of the Parliament. Section 10 therefore provides that a person who is subject to a disqualification order under section 30 of the 2022 Act is disqualified from membership of the Parliament (but see commentary on effect of section 12). Section 17 of the 1998 Act provides that if a disqualified person is returned as a member of the Parliament “his return shall be void and his seat vacant”. So while there is no specific rule that an ineligible person may not be a candidate in a Scottish Parliament election, there is a de facto prohibition as they would be unable to take their seat if successful.

Section 11 – Local authorities: disqualifications for nomination, election and holding office

45. Section 31 of the 1973 Act provides the grounds by which a person is disqualified for nomination, election and holding office as a member of a local authority. Section 11 therefore provides that a person who is subject to a Scottish disqualification order is also disqualified from being a member of a local authority (but see commentary on effect of section 12).

Temporary relief from disqualification

Section 12 – Persons holding office: temporary relief from effect of disqualification

46. This section sets out the process by which a member of the Scottish Parliament, or member of a local authority, who is disqualified from holding that office as a result of a Scottish Disqualification Order under section 3 or a disqualification order under section 30 of the 2022 Act should lose their seat or vacate their office. It mirrors section 31 of the 2022 Act and has the effect of providing temporary relief to an office-holder who becomes subject to an order to allow them, for a limited period only, to appeal the conviction or order.

47. Section 16 of the 1998 Act provides exceptions to the grounds by which a person is disqualified from being a member of the Parliament. Section 12 of the Bill therefore amends section 16 of the 1998 Act to provide that a disqualification order does not disqualify a member until the appropriate time. The appropriate time being the end of the 3-month period after the court made the disqualification order or, if earlier, the end of the period during which an appeal against the criminal conviction or sentence is allowed. When the member makes an appeal against their conviction or the making of a disqualification order the office is vacated at the end of the 3-month period unless the appeal is dismissed or abandoned before the 3-month period expires, in which case the person is disqualified at that earlier time; or the appeal is upheld before the 3-month period expires, in which case the member is not disqualified.

48. Section 17 of the 1998 Act deals with the effect of disqualification and subsection (2) of that section provides that if a member of the Scottish Parliament becomes disqualified from being a member of the Parliament or from being a member for the particular constituency or region for which he is sitting, the person shall cease to be a member of the Parliament (so that their seat is vacant). This section amends section 17(4) to make it clear that subsection (2) is subject to new provision inserted into section 16 of the 1998 Act (as made by this section of the Bill) providing the (up to 3 month) temporary relief for the person subject to the order(s). This section also provides that where such relief applies, although the disqualified member's seat will not be vacated immediately (and therefore, the person does not cease to be a member of the Parliament until the seat is vacant) in the meantime, the member may not participate in any proceedings of the Parliament and other rights and privileges may be withdrawn on a resolution of the Parliament.

49. Section 31 of the 1973 Act provides the grounds by which a person is disqualified for nomination, election and holding office as a member of a local authority. Therefore, for local government, section 12(5) of the Bill amends section 31 of the 1973 Act to create an exception, so that the disqualification order does not disqualify a member until the appropriate time. Again, the appropriate time is the end of the 3-month period after the court made the disqualification order or, if earlier, the end of the period during which an appeal against the criminal conviction or sentence is allowed. When the member makes an appeal against their conviction or the making of a disqualification order the office is vacated at the end of the 3-month period unless the appeal is dismissed or

abandoned before the 3-month period expires, in which case the person is disqualified at that earlier time; or the appeal is upheld before the 3-month period expires, in which case the member is not disqualified.

Section 15 of the Scotland Act 1998

Section 13 –Ending Ambulatory effect of section 15 of the Scotland Act 1998

50. Section 15 of the 1998 Act provides the grounds by which a person is disqualified from being a member of the Scottish Parliament. The general approach is that, subject to any exceptions described in section 16, the grounds for disqualification governing membership of the House of Commons are imported in relation to membership of the Scottish Parliament.

51. Subsection (1) of that section sets out the main grounds of disqualification from membership of the Scottish Parliament but it is subject to the exceptions provided for in section 16.

52. Subsection (1)(a) provides that a person who is disqualified from membership of the House of Commons under section 1(1)(a) to (e) of the House of Commons Disqualification Act 1975 is also disqualified from membership of the Scottish Parliament. Section 1(1)(a) to (e) disqualifies judges, civil servants (which would include staff of the Scottish Administration), members of the armed forces, members of police forces and members of foreign legislatures.

53. Subsection (1)(b) of the 1998 Act provides that a person, who is disqualified from membership of the House of Commons, otherwise than under the House of Commons Disqualification Act 1975, is also disqualified from membership of the Scottish Parliament. This covers common law and other statutory disqualifications and, at the time of the passing of the 1998 Act, was said to have the effect of excluding from membership:

- persons under the age of 21 who are disqualified by section 7 of the Parliamentary Elections Act 1695;¹¹
- aliens who are disqualified at common law and by virtue section 3 of the Act of Settlement 1700, as amended by the British Nationality Act 1981 (c.61),¹² Schedule 7. Irish or Commonwealth citizens are not regarded as aliens for this purpose. Section 16(2) also excepts EU citizens who are resident in the UK;
- persons who are mentally ill and who are disqualified at common law. The procedure for the vacation of their seats is specified in section 141 of

¹¹ <https://www.legislation.gov.uk/aep/Will3/7-8/25>

¹² <https://www.legislation.gov.uk/ukpga/1981/61>

the Mental Health Act 1983 (c.20),¹³ as amended by paragraph 19 of Schedule 8 of the Scotland Act 1998;

- undischarged bankrupts who are disqualified by section 427 of the Insolvency Act 1986 (c.45),¹⁴ as amended by paragraph 23(6) of Schedule 8 of the Scotland Act 1998;
- persons guilty of corrupt or illegal practices are disqualified under the Representation of the People Act 1983;¹⁵
- convicted prisoners serving a sentence of more than one year's detention (or an indefinite sentence) in the UK or Ireland are disqualified by the Representation of the People Act 1981 (c.34);¹⁶
- peers are disqualified because, as members of the House of Lords, they are already members of the UK Parliament but not Irish peers by virtue of the Peerage Act 1963. Section 16(1)(a) lifts this disqualification.

54. Sections 15(1)(a) and (b) have “ambulatory” effect, which means that they are to be interpreted as modified from time to time. This means that any new rules which would prevent a person being a member of the House of Commons (i.e. following an Act of Parliament passed by the UK Parliament) would automatically have the effect of being imported by section 15 of the 1998 Act, and so disqualify the person from membership of the Scottish Parliament.

55. This section changes that by providing that whether or not a person is disqualified depends on how the law, which includes statutory rules and common law, would be interpreted at a point in time, namely 27 April 2022, which is the day before the Elections Act 2022 received Royal Assent. This means that if a person would be disqualified under the grounds for disqualification governing membership of the House of Commons (whether under the House of Commons Disqualification Act 1975 or otherwise) as the law applied on 27 April 2022, or by any additional grounds specified in section 15(1) of the 1998 Act (which will now include, for example, a person subject to a Scottish Disqualification Order under section 3 or a disqualification order under section 30 of the 2022 Act) the person is disqualified from membership. The main purpose of this provision is to sever the link with House of Commons rules and so prevent any new rules which are made in respect of membership of the House of Commons automatically applying in relation to membership of the Scottish Parliament.

56. The changes made by this section do not affect the power of the Parliament of the United Kingdom to make laws for Scotland. In other words, the UK Parliament could still make provision disqualifying persons from being members of the Scottish Parliament if it consciously decided to do so.

¹³ <https://www.legislation.gov.uk/ukpga/1983/20>

¹⁴ <https://www.legislation.gov.uk/ukpga/1986/45>

¹⁵ <https://www.legislation.gov.uk/ukpga/1983/2>

¹⁶ <https://www.legislation.gov.uk/ukpga/1981/34>

Part 3: Campaign finance

57. The existing regulatory framework governing the spending and funding (political or campaign finance) of candidates, political parties and third-party campaigners and other campaigners is contained within the Representation of the People Act 1983 (the “1983 Act”) and the Political Parties, Elections and Referendums Act 2000 (“PPERA”).

58. Part 4 of the Elections Act 2022 (the “2022 Act”) made some changes to campaign finance rules for UK elections which are reserved to Westminster (in terms of the Scotland Act 1998). This Part contains provisions which would provide for consistency with some of the changes to the rules made by 2022 Act, as they concern devolved Scottish elections.

59. The 2022 Act made amendments to the 1983 Act and PERA in relation to reserved elections, to clarify the law in relation to notional expenditure, to ensure that benefits in kind, such as property, goods, services or facilities that are supplied to a candidate, party or campaign for free or at a discount, should only qualify as an election expense for the relevant campaign where it is authorised or directed by the campaign. This clarification came as a result of a Supreme Court judgment (*R v Mackinlay and others* [2018])¹⁷ that held such notional expenditure was an election expense without the need for authorisation.

60. The 2022 Act also introduced some restrictions on the ability of third parties, meaning individuals or organisations that are not registered political parties, to incur controlled expenditure in regulated periods in advance of elections to the House of Commons or to the Northern Ireland Assembly. Broadly speaking, controlled expenditure relates to reportable expense to support specified activity that meets the purpose of influencing voters to vote in a particular way.

Expenditure in respect of Scottish Parliament elections

Section 14 – Notional and third party expenditure: Scottish Parliament elections

61. This section amends sections 73(1A), 86(1A), and 94(8A) of PERA so that the amended provisions in relation to notional spending by political parties and third parties also now apply to campaign periods for Scottish Parliament general elections.

Section 15 – Third parties capable of giving notification

62. This section inserts section 88(11) and (12) into PERA, to allow the Scottish Ministers to amend the list of third parties who can incur controlled expenditure during a Scottish devolved regulated period, defined as the period (normally 4 months) before a Scottish Parliament election for which campaign limits are applied in terms of paragraph 5 of schedule 10 of PERA. Third parties can be added to or removed from the list, or the list can be varied, but removals or variations can only be effected on the

¹⁷ <https://www.supremecourt.uk/cases/uksc-2018-0091.html>

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recommendation of the Electoral Commission. Any regulations made by the Scottish Ministers under section 88(11) of PPERA will be the subject the affirmative procedure.

Section 16 – Restriction on which third parties may incur controlled expenditure

63. This section introduces a further restriction on third parties that may incur controlled expenditure (including notional controlled expenditure) in connection with a Scottish election campaign. It does this by inserting a new section 89B into PPERA, providing that only those third parties that would fall within the categories of third party listed in section 88(2) of PPERA are able to incur controlled expenditure expenses above a de minimis threshold of £700 during a Scottish devolved regulated period. Inserted section 89B also includes an either way offence of authorising expenses in breach of the section, which is punishable by fine.

Section 17 – Transitional provision: offences relating to third party expenditure

64. This section sets out a transitional provision to provide that the changes made by section 16 have effect only in relation to a Scottish devolved regulated period beginning on or after the day on which section 16 comes into force. It is an offence for a non-eligible third party (see section 88(2) of PPERA) to incur controlled expenditure (or for someone to do so on their behalf).

Section 18 – Code of practice on controls relating to third parties

65. This section inserts new sections 100AA and 100BA into PPERA, which broadly mirrors sections 100A and 100B of that Act, which were inserted into PPERA by the 2022 Act. These new sections place a duty on the Electoral Commission to produce a statutory code of practice on the application of expenditure controls for third party campaigners contained within that Act as it relates to Scottish devolved elections and Scottish devolved regulated periods.

66. The Electoral Commission must, when preparing the code, follow the process set out in these sections which includes a requirement to consult with the Scottish Parliament, and any other persons the Electoral Commission considers appropriate. Section 100BA also sets out the process to be followed for the Code to be approved. The Scottish Ministers may approve a draft code with or without modifications and must then lay it before the Parliament. Parliament then has 40 days to resolve not to approve the Code.

67. The provision contained in this section also provides that compliance with any code issued under this section is a potential defence where the offence relates to expenditure incurred or treated as incurred by a third party during a Scottish devolved regulated period. This means where a person, for example, is charged with an offence in relation to controlled expenditure (or where expenditure is treated as controlled expenditure) and they determine what is or is not controlled expenditure (or is to be

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treated as such) in accordance with an issued code then there is a defence open to them.

Expenditure in respect of local government elections

Section 19 – Notional expenditure: local government elections

68. This section amends section 90C(1A) of the 1983 Act to clarify that expenditure on behalf of a candidate in a Scottish local election should only be considered incurred by the candidate where it has been directed, encouraged or authorised by them.

Part 4: Rescheduling of elections etc.

69. This Part contains provision to make arrangements to postpone elections and, in the case of certain by-elections, cancel elections and for connected purposes (including, in relation to the election of new Presiding Officer and choice of new First Minister, as it relates to postponed Scottish Parliament general elections).

Scottish Parliament elections

Section 20 – Power of Presiding Officer to postpone ordinary election

70. The existing power in section 2 of the Scotland Act 1998 (ordinary general elections) (the “1998 Act”) gives the Presiding Officer of the Parliament a power to propose an alternative date for an election a month either side of when it would otherwise be due to occur. His Majesty may then, by proclamation under the Scottish Seal, dissolve the Parliament, require the poll to be held on the proposed day, and require the Parliament to meet within seven days of the election.

71. This section changes that by amending section 2 of the 1998 Act so that the Presiding Officer may propose a date that is up to 4 weeks earlier, or 8 weeks later from when an ordinary general election would otherwise be scheduled. The Presiding Officer may also, after proposing a new date under the exercise of that power, propose a further (new) date which is 8 weeks later than the date previously fixed (which may result in a delay totalling 16 weeks). This section also provides that, where the date of the poll has been fixed in this way, the Parliament must meet “as soon as reasonably practicable” after the poll, rather than within 7 days, where a date for the poll has been fixed by the Presiding Officer in this way. This section also provides that, before proposing a day for the holding of a poll under the exercise of either power, the Presiding Officer must consult the Electoral Commission and the convener of the Electoral Management Board for Scotland.

72. The procedure involving the proclamation by His Majesty is otherwise unchanged and applies in relation to the second use of the power by the Presiding Officer, as it applies to the first, the only difference being that the second proclamation would not have the effect of dissolving Parliament (as it would already have been dissolved). Section 19 of the 1998 Act provides that the Presiding Officer will not cease to hold office merely because of the dissolution of the Parliament before a general election and

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will continue to hold office until such time as the new Parliament elects a Presiding Officer (and the deputies) under subsection (1) of that section. In other words, the Presiding Officer is able to propose a new date even after Parliament has been dissolved.

Section 21 – Power of Presiding Officer to schedule extraordinary general elections

73. Section 3 of the 1998 Act (extraordinary general elections) provides for the Presiding Officer to propose a date for the holding of a poll for a general election, in two circumstances—

- where the Parliament resolves that it should be dissolved. If the resolution is passed on a division, it requires two-thirds of the total membership of the Parliament to vote in favour (i.e. $2/3$ of $129 = 86$); or
- where the Parliament fails to nominate one of its members for appointment as First Minister within the time allowed under section 46.

74. This section creates an exception to that. It amends section 3 to provide that the Presiding Officer may not propose a day for the holding of a poll if either of the events mentioned above occurs within the period of 8 weeks ending with the day on which the poll at the next ordinary general election would be held. In other words, where an ordinary general election is scheduled to take place within 8 weeks, no extraordinary general election may be held.

Section 22 – Election of new Presiding Officer: extension of period

75. Section 19 of the 1998 Act provides that Parliament must, following a general election, elect from its members a Presiding Officer and two deputies before it conducts any other proceedings (except the taking by its members of the oath of allegiance) and in any event, within the period of 14 days beginning immediately after the day of the poll at an election.

76. This section changes that by amending section 19 of the 1998 Act so that, in cases where a general election was held on a day proposed by the Presiding Officer in accordance with a proclamation made by His Majesty under section 2(5) or new section 2(5E), the requirement for Parliament to elect a Presiding Officer and two deputies is to be done as soon as reasonably practicable after the day of the poll at the election.

Section 23 – Choice of new First Minister after changed election date

77. Section 46 of the 1998 Act requires the Parliament, within the period allowed in subsection (3), to nominate a First Minister if one of the events mentioned in subsection (2) of that section occurs.¹⁸ The period allowed for nomination is normally 28 days after

¹⁸ (a) the holding of a poll at a general election, (b) the First Minister tendering his resignation to Her Majesty, (c) the office of First Minister becoming vacant (otherwise than in consequence of tendering their resignation) or (d) the First Minister ceasing to be a member of the Parliament otherwise than by virtue of a dissolution.

the occurrence of the event in question. If the Parliament fails to make a nomination within that period, then the Presiding Officer is required by section 3(1)(b) to propose a day for the holding of an extraordinary general election.

78. This section creates a small exception by amending section 46 so that if Parliament does not meet within the period of 7 days immediately after the day of the poll at a general election which was held on a day proposed by the Presiding Officer in accordance with a proclamation made by His Majesty under section 2(5) or new section 2(5E), any delay beyond the normal 7 day deadline for the first meeting is not counted as part of the 28 day period under section 46.

Section 24 – Rescheduling of by-elections

79. Section 9 of the 1998 Act provides for a by-election to be held within three months of a constituency seat becoming vacant. It also provides however that the by-election should not be held if the last day on which it could be held is within 3 months of the due date of the poll in the next ordinary general election. Subsection (2) of that section states that the date of the poll in that by-election is to be fixed by the Presiding Officer.

80. This section amends section 9 of the 1998 Act to give the Presiding Officer a power to fix another date for the poll for the by-election which is within 3 months of the date originally fixed. However that power is only exercisable if the date fixed does not fall within the period 6 months before the date of the next ordinary general election. This section also amends section 9 of the 1998 Act to provide that, in such cases (i.e. where the date fixed falls within the 3-6 month period before the date of the next ordinary general election, since it is not possible to fix a date within 3 months of the poll), the Presiding Officer is given a power to determine that the by-election is not held.

81. Before fixing another date or determining an election is not to be held, the Presiding Officer must consult the Electoral Commission, the convener of the Electoral Management Board for Scotland and the returning officer for the constituency.

Local government elections

Section 25 – Power of convener of Electoral Management Board to postpone ordinary local election

82. Section 43 of the Representation of the People Act 1983 (the “1983 Act”) sets out that Scottish local government elections are to occur on the first Thursday in May in every year in which ordinary elections are to be held (see section 5 of the Local Government etc. (Scotland) Act 1994) unless specified by order under subsections (1)(b), (1AB) or (1B) of that section.

83. This section amends the 1983 Act to give the convener of the Electoral Management Board for Scotland (“EMB”) a power to postpone the ordinary election by

up to 2 weeks. Before fixing a new date the convener must consult the Electoral Commission and the Scottish Ministers.

Section 26 – Power of returning officers to postpone election for their area

84. This section amends the 1983 Act to give returning officers a power, in relation to their local government area only, to postpone the poll at the ordinary election for that area by up to 2 weeks. Before fixing another date the returning officer must consult the Electoral Commission, the convener of the EMB and the Scottish Ministers. This means that if the poll for the ordinary election was postponed by the convener of the EMB, then again by the returning officer, this could result in the poll for that area being postponed by a period totalling 4 weeks.

Section 27 – Power of returning officers to postpone or cancel by-election

85. Section 37 of the Local Government (Scotland) Act 1973 Act (“the 1973 Act”) provides for a by-election to be held within three months of a casual vacancy in the office of councillor occurring (a casual vacancy may occur where a councillor dies, resigns or is disqualified). It also provides however that where a vacancy in the office of councillor occurs within 6 months before the date of the next ordinary local government election, a by-election should not be held but rather the vacancy filled at the next ordinary local government election. The exception to this is where, on the occurrence of the vacancy (or in the case of a number of simultaneous vacancies, the occurrence of the vacancies), the total number of unfilled vacancies in the membership of the council exceeds one third of the whole number of members, in which case the by-election must still be held.

86. This section amends the 1973 Act to give returning officers a power to fix another date for the poll that is within 3 months of the date fixed. The returning officer may also then delay the poll by a further 3 months. However, in both cases, the power is only exercisable if the date fixed does not fall within the period of 6 months before the date of the next ordinary local election. The exception to this is where, on the occurrence of the vacancy (or in the case of a number of simultaneous vacancies, the occurrence of the vacancies), the total number of unfilled vacancies in the membership of the council exceeds one third of the whole number of members, in which case the election may be delayed even if the date of the poll is fixed for a date falling within the 3-6 months period before an ordinary election.

87. This section also amends the 1973 Act so that, where the date fixed falls within the 6 month period before the date of the next ordinary local election, the returning officer is given a power to determine that the by-election is not held and so the casual vacancy is filled at the next ordinary local election. In such cases the date fixed for the holding of the poll remains and the returning officer has no power to cancel the by-election.

88. Before fixing another date or determining an election is not to be held, the returning officer must consult the Electoral Commission and the convener of the EMB.

Part 5: Election pilots and democratic engagement

89. Part 5 contains an amending section 28 adjusting existing powers in sections 5 and 6 of the Local Government (Elections) Act 2002 (the “2002 Act”) to pilot electoral processes and a new section 29 to provide the Scottish Ministers with new financial assistance powers for the purpose of increasing democratic engagement. Currently, the Scottish Ministers have a range of grant making powers that may be used to facilitate participation in elections, although these tend to be framed in relation to specific groups rather than the whole electorate.

90. The existing pilot powers in section 5 of the 2002 Act allow a local authority to propose to the Scottish Ministers a pilot scheme for a local government election held in their area. The Scottish Ministers can modify a proposed scheme and implement it by order. A scheme can introduce different provisions regarding voting methods, locations, and counting of votes, as well as candidate election communications. After the relevant elections, the Electoral Commission must prepare a report assessing the scheme's impact on voting, informed decision-making, and ease of use. The report may also address voter turnout, electoral offences, and malpractice. Under section 6 of the 2002 Act, the Scottish Ministers may make permanent changes to election procedures based on the success of pilot schemes. The changes can apply to all local government elections in Scotland or specific types of elections. Such a section 6 Order, if approved by the Scottish Parliament under affirmative procedure, may modify or disapply existing laws.

Section 28 – Pilot schemes under the 2002 Act

91. This section amends section 5 and 6 of the 2002 Act to expand who can propose a pilot scheme, to add a reference to other enactments which may be modified by a pilot scheme, to add consultation requirements and to make consequential amendments.

92. Subsection (2)(a) and (b) of section 28 allow, in addition to local authorities, the Scottish Ministers, the Electoral Management Board for Scotland or electoral registration officers to initiate a pilot proposal. The requirement in section 5(3) of the 2002 Act for a pilot to be likely to facilitate voting or encourage more voting remains (as provided for by the amendments in subsection (3)(d)).

93. Subsection (2)(c) removes the limitation that a scheme may only make provision differing from Representation of the People Acts. This is too restrictive in terms of local government elections in Scotland, given that the Representation of the People Acts are not the only source of electoral law in Scotland. For example, provisions about the conduct of local government elections in section 3 of the Local Government Scotland Act 2004 and the Scottish Local Government Elections Order 2011 which has the rules for those elections, including actions to be taken before the poll and voting procedure. Subsection (2)(f) makes amendments consequential on that.

94. Further consequential adjustments are made: by subsection (2)(e), to update the consultation requirements for pilot Orders for the possible different sources of a

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proposal; by subsection (2)(g) to adjust the recipients of an Electoral Commission report on a pilot scheme; and by subsection (2)(h) to provide a definition of “electoral registration officer”.

95. Subsection (3) adds a mandatory consultation requirement with the Electoral Management Board for Scotland to the Scottish Ministers’ existing powers in section 6 of the 2002 Act to make an order making permanent changes to election procedures following the success of pilot schemes.

Section 29 – Funding to increase democratic engagement

96. This section sets out a new specific financial assistance power to enable the Scottish Ministers to make or give grants, loans, guarantees and indemnities for the purposes of, or in connection with, increasing democratic engagement. This may be in relation to local government elections or Scottish Parliament elections. The purpose for which a grant or financial assistance may be given includes activities which, in the opinion of the Scottish Ministers, are undertaken with a view to increasing or improving registration and participation by voters, candidates, campaigners and others.

97. For example, funding may be given to third parties to run engagement campaigns, or the Scottish Ministers may fund initiatives of its own. Some examples of projects which have been tried in other jurisdictions and which may be considered for funding are things such as digital surgeries connecting councillors and MPs with people, chatbots answering common questions on registering and voting in different languages and videos tailored to different groups giving a “walk through” or other information about a polling station.

Part 6: Information to be included with certain electronic material at Scottish elections

98. Part 6 contains provisions promoting further transparency at Scottish elections. It requires certain unpaid-for electronic campaigning material for Scottish elections which is promoted by or published on behalf of “relevant third party” organisations to display an imprint with the name and address of the promoter and of any other person on behalf of whom the material is being published.

99. While the term “digital imprint” is not used in the Bill or in the corresponding provisions in Part 6 of the Elections Act 2022 (see below), it is often used to mean required identification information added to digital campaigning material. Therefore, wherever that term is used in these Explanatory Notes or in other Accompanying Documents, it is an intended shorthand for the information required to be included with any electronic campaigning material to which legislative provisions apply.

100. Part 6 regulates any “relevant third party”, which means a body (not a candidate or another individual) involved in campaigning or influencing the election while not being a direct participant, such as a political party (hence “third party”). The “relevant” qualification recognises that there are other third parties involved in campaigning which

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are not covered by this Part. For example, “recognised third parties” (campaigning groups which have registered with the Electoral Commission) fall to be regulated under the regime in Part 6 of the Elections Act 2022.

101. This Part supplements that regime in Part 6 of the Elections Act 2022, which requires digital imprints to be included in a broad range of electronic material. Generally, the transparency requirements there require contact information to be included with paid-for electronic material which relates to registered political parties and candidates and also with other unpaid-for electronic material connected with elections. The 2022 Act’s application as regards unpaid-for material is limited to material which is promoted by or published on behalf of certain groups listed in section 44(3) of the Act, such as registered parties, candidates, office holders and recognised third parties.

102. Therefore the 2022 Act does not extend to unpaid-for digital campaigning material for Scottish elections which is promoted by or published on behalf of third party campaign groups which are not recognised third parties. The supplementary provisions in this Part are intended to extend requirements to that group.

103. Digital imprint rules for Scottish elections are currently found in the Scottish Elections (Details to appear on Election Material) Regulations (S.S.I. 2020/297) and the Scottish Elections (Details to appear on Election Publications) Regulations (S.S.I. 2020/298). Following the enactment of this Part it is intended that the coverage and requirements for Scottish elections will be in this Part and in Part 6 of the Elections Act 2022. The regulations are therefore revoked by section 44.

104. More generally, there remain requirements to include contact details in campaign material for Scottish elections for printed material which is not in an electronic or digital format. Section 143 of the Political Parties, Elections and Referendums Act 2000 (“PPERA”) sets out what details are to appear on printed election material at Scottish Parliament (and other) elections and section 110A of the Representation of the People Act 1983 provides for the details to appear on election publications for Scottish local government elections.

Introduction

Section 30 – Application of this Part

105. This section notes the coverage of this Part as applying to electronic material published in connection with a relevant Scottish election (defined in section 32 as Scottish Parliament and local government elections). It also notes the other legislation in relation to electronic material published in connection with these elections.

106. As noted, this Part supplements Part 6 of the Elections Act 2022, which requires the display of a digital imprint for other types of digital campaigning material published in connection with Scottish elections. Therefore subsection (2) is a signpost towards those provisions. The reference in that subsection to requirements in “any other enactment”

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recognises that there may also be legislative requirements set out elsewhere in the future.

Interpretation

Section 31 – Key definitions

107. This section defines key terms for the coverage of the Part: "electronic material", "promoter", "published" and "relevant third party". "Electronic material" can be text, pictures, videos, audio or music. However, phone calls and text messages are explicitly excluded from this definition. In order to be published by the promoter, the electronic material needs to be transmitted to the public or any section of the public. This may be done via the internet or by other electronic means.

108. The definitions of "electronic material", "promoter" and "published" are broadly consistent with those in section 39 of the 2022 Act, which defines those terms for the coverage of the complimentary Part 6 of the 2022 Act. A "promoter" is the person causing the material to be published, but is not a person who does such publishing in the ordinary course of their business, (for example, internet providers or social media companies).

109. Section 39 of the 2022 Act contains a power for the Secretary of State to modify the definitions of "electronic material", "the promoter" or "publish". Similarly, subsection (3) allows the Scottish Ministers to modify these key definitions by regulations.

110. The definition of "relevant third party" is also key in terms of the coverage of the Part. This defines the third party campaign groups to which, as noted above, digital imprint requirements in the 2022 Act do not apply. The contact details of the promoter and of any other person on whose behalf the material is published are to be included when certain electronic material is promoted by a relevant third party or published on behalf of a relevant third party. The definition of relevant third party covers persons who undertake activities in relation to a Scottish election but with the explicit exclusion of individuals, recognised third parties and registered parties. This definition may also be modified by regulations made by the Scottish Ministers in terms of their power in this section.

Section 32 – Further definitions relating to candidates etc.

111. This section defines other terms used in the Part to outline the boundaries of the transparency requirements in this Part: "candidate", "future candidate", "registered party", "recognised third party", "registered party", "relevant Scottish election" and "relevant Scottish elective office". As with its inclusion in Part 6 of the 2022 Act, "future candidate" is a person who is a future candidate at an election for a relevant Scottish elective office. This category is intended to avoid any potential ambiguity in relation to when imprints are required because candidates are only being legally recognised for a limited pre-election period, despite the fact they may have been campaigning before then.

Electronic material: conditions for application

Section 33 – Electronic material: conditions for application of section 35

112. This section sets out 3 conditions for when the digital imprint requirements will apply. These conditions are that:

- The material can reasonably be regarded to achieve either of the 2 purposes within the subsequent section (i.e. (i) procuring electoral success at a relevant Scottish election for registered parties or more than one candidate or future candidate or (ii) the election of a particular candidate or future candidate).
- The promoter of the material is a relevant third party or the person on whose behalf it is published is a relevant third party.
- Neither the promoter of the material nor the person on whose behalf the material is published has paid for the material to be published as an advertisement.

113. The first condition is further elaborated on in section 34. The second condition provides that material can be promoted by the relevant third party or published on their behalf. Where it is published on their behalf, section 35(2) will require their contact details to be included despite relevant third party not being the actual promoter. The third condition restricts the coverage of this to unpaid-for material, with paid-for material and some other unpaid-for material published by persons other than relevant third parties already regulated by the regime in Part 6 of the Elections Act 2022.

Section 34 – Purpose of the electronic material

114. This section sets out the 2 purposes mentioned in the first condition in section 33. The first purpose is promoting or procuring electoral success at one or more particular Scottish elections in relation to a registered party, registered parties who advocate for or against particular policies or otherwise fall within a particular category of parties and candidates or future candidates with particular opinions or otherwise come within a particular category.

115. The references here to parties who promote policies and to candidates in categories is consistent with the tests in Part 6 of the Elections Act 2022 for its regulation of paid-for and certain unpaid-for electronic material. The intention is to capture more general material, for example material promoted by a relevant third party persuading the public to vote for candidates with a particular position on the constitution, climate, taxes, etc. The material might prejudice rather than promote the electoral prospects of other parties, candidates or future candidates. It need not expressly mention the name of any party, candidate or future candidate to achieve this purpose.

116. The second purpose is in subsection (4): promoting or procuring the election of a particular candidate or future candidate at one or more Scottish elections. It need not

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expressly mention the name of any candidate or future candidate, to be in scope of the regime.

117. Subsections (5)(b) and (6) clarify that where electronic material may be reasonably regarded as promoting or procuring the electoral success of two or more candidates standing in the name of a party or included in a list of candidates submitted by the party then it may be regarded as being published on behalf of the registered party (rather than on behalf of a candidate).

118. The split of the 2 purposes between success of parties or groups on the one hand and individual candidates on the other facilitates continuation of the existing enforcement regime. Material in the former category is generally enforced by the Electoral Commission and material about an individual candidate is generally enforced by the police in the first instance. The existing split of responsibilities between the enforcement authorities is found in the print regime, Part 6 of the Elections Act 2022 and the to-be-revoked the Scottish Elections (Details to appear on Election Material) Regulations (S.S.I. 2020/297) and the Scottish Elections (Details to appear on Election Publications) Regulations (S.S.I. 2020/298). Where there is overlap, it would be for the authorities to establish, based on the particular facts, where the enforcement responsibility lies.

Requirements when publishing electronic material

Section 35 – Requirement to include information

119. This section has the principal (digital imprint) requirement for information about any relevant third party promoters and any person on behalf of whom the material is being published (who is not the promoter) to be included as part of the electronic material. It is to be legible or audible and directly accessible (where not included in the material itself) imprint on electronic material within the scope of the regime. It is a similar requirement to that in section 41 of the Elections Act 2022 in relation to the material covered there.

120. Subsection (1) requires these imprints to be displayed as part of the material or in a location that is directly accessible from the material only where that is not reasonably practicable. Subsection (2) provides that the imprint information required to be embedded within electronic material is the name and address of the promoter of the material and any person on behalf of whom the material is being published (and who is not the promoter).

121. As with the corresponding provisions in the Elections Act 2022, subsection (3) has regulation-making powers to modify the details to be included in the imprint, if required. This is to accommodate technological advances and any required changes as a result of the implementation of this or the corresponding regime under the 2022 Act.

122. Subsections (4) to (6) set out further imprint requirements, for example that the imprint is legible or audible and retained as part of the material when republished.

Section 36 – Exceptions to requirement in section 35

123. This section sets out a number of exceptions to the regime. Subsection (1) provides that generally, the re-publishing or ‘re-sharing’ of electronic material will not require a new imprint, where the original (section 35 compliant) imprint is retained in the material, and the material (the content or the imprint) has not been materially altered since it was previously published (for example, sharing, forwarding or re-posting an existing message on social media). The exception applies regardless of whether the material is re-published by the original promoter, or by another person.

124. Subsection (3) outlines exceptions for material published for journalistic purposes which is the publication of electronic material on a website or mobile application whose primary purpose is the publication of journalism. For example, campaigning material written as an article in a blog or an online newspaper would not require a digital imprint.

125. Subsection (5) makes provision to amend the section, by way of regulations, to add, modify or remove cases to which an imprint is not required.

Offences

Section 37 – Offence of breaching section 35

126. Section 37 sets out the offence, defences and penalties applicable to the regime. Subsection (1) provides that where electronic material is published without an imprint (in contravention of the requirements in section 35), the relevant third party who is the promoter of the material and any person on behalf of whom the material is being published (if not the promoter) becomes liable for a criminal offence. The penalties are set out in subsection (2) and defences in subsections (3), (4) and (5).

127. Under subsection (7) a court must notify the Electoral Commission when a person is convicted of an offence under subsection (1) and the sentence imposed, as soon as is practicable.

Section 38 – Individual culpability where organisation commits an offence

128. Despite the general exclusion of liability for individuals acting as such there is still potential for an individual to commit an offence, where they are the controlling mind of an organisation. Section 38 makes provision for certain persons associated with different types of organisations to be held criminally liable for committing an offence under section 37, in addition to the organisation.

129. For that to happen, any person referred to in this section as a “responsible individual” must have consented to, or connived in, the organisation’s commission of the offence. Subsection (4) sets out a table explaining which type of person is a “responsible individual” in relation to different types of organisation listed in the table. For example, the director or secretary of a company, and a partner in a firm, are responsible individuals, so potentially have criminal liability for offences under section 36 committed by the company or partnership, respectively.

Enforcement and investigation

Section 39 – Enforcement by the Electoral Commission

130. Section 39 and 40 enable enforcement by the Electoral Commission using investigatory powers and civil sanctions. As noted above, certain types of material are investigated by the Electoral Commission, although this does not prevent appropriate cases being referred to or investigated by the police.

131. Section 39 applies Parts 1 to 4 and 6 of Schedule 19C of PPERA and the Political Parties, Elections and Referendums (Civil Sanctions) Order 2010 (S.I. 2010/2860) in respect of offences described in subsection (2). The Commission's enforcement powers are limited to material the purpose of which is procuring electoral success for registered parties and categories of registered parties, candidates or future candidates. The police and the courts are responsible for the enforcement of offences relating to electronic material promoting particular candidates or particular future candidates.

Section 40 – Supply of information

132. To supplement enforcement of the Act, this section provides investigatory powers to gather information. The powers are those set out in Schedule 12 of the 2022 Act in relation to the requirements of Part 6 of that Act.

133. Schedule 12 requires any person to comply with a notice for the supply of information to enable the Electoral Commission or a police constable to determine whether electronic material has been published in contravention of the electronic imprint regime. The information required will be identified by the Electoral Commission or police in the notice and must be information that is reasonably required to determine whether electronic material has been published in contravention of the regime or to make contact with the promoter of the material or the person on behalf of whom the material has been published (and who is not the promoter). It ensures compliance with an order through the courts. The schedule also applies restrictions on the disclosure of information. A person is not required to provide legally professionally privileged information or disclose information which would contravene data protection legislation.

Guidance and Electoral Commission Report

Section 41 – Guidance

134. This section requires the Electoral Commission to issue statutory guidance. Under subsection (1) it must contain details on the operation and enforcement of the regime. In enforcing the regime the Electoral Commission and the police are to have regard to the guidance.

135. The section also provides the procedure for creating the guidance. The Electoral Commission must draft the guidance for approval by the Scottish Ministers who are able to modify the draft before laying it before the Scottish Parliament. Any modified

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guidance must be accompanied by a statement outlining the reason for the amendments. Subsections (7) to (9) outline the process for laying the guidance, which includes a 40 day period in which the Parliament can resolve not to approve the guidance. Given this parliamentary procedure, the subsequent regulations bringing the guidance into force are not subject to any Parliamentary procedure.

Section 42 – Electoral Commission’s Annual Report

136. This section adds to the Scottish reporting requirements of the Electoral Commission in paragraph 20A of schedule 1 of PPERA. Under subsections (1) and (2) the Electoral Commission’s annual report must include information about convictions (for offences relevant to this Part) reported to the Electoral Commission and the Electoral Commission’s use of its powers to request information under Schedule 12. The Commission is not required to provide any information which may be unlawful or adversely impact upon ongoing investigations or proceedings (subsection (3)).

Final provisions

Section 43 – Scottish Ministers regulation making powers

137. Under this section, the Scottish Ministers are only able to make regulations under the powers in this Part of the Act following a recommendation from the Electoral Commission or consultation with the Electoral Commission, except for regulations under section 41(9)(b) (which bring guidance into force).

Section 44 – Consequential revocations

138. As digital imprint rules for Scottish elections will be in this Part and in Part 6 of the Elections Act 2022, this section revokes the regulations containing the earlier Scottish regime.

Part 7: Boundaries

139. Part 7 contains provisions adjusting the date of the new review of local government wards and numbers of councillors.

Section 45 – Boundaries Scotland: changing date of next review of local government wards and number of councillors

140. The first report of Boundaries Scotland on the electoral arrangements for a local government area under section 16(2A) of the Local Government (Scotland) Act 1973 is to be submitted by no later than 31 December 2028. This section changes that so that the report must be submitted by no later than 20 April 2031.

Part 8: Electoral Commission

141. This Part contains provisions adjusting the requirements on the Electoral Commission to provide 5-year plans setting out its aims and objectives and

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requirements for resources in respect of its Scottish devolved functions. Currently, the Commission submits its 5-year plan to the Speaker's Committee (which covers its functions for other UK elections) at the start of the first sitting of the UK Parliament following a general election. The SPCB is sent a copy and can make recommendations. This Part changes that in that it would require the Commission to prepare a separate plan for Scottish elections and for the timing of these plans to correlate with Scottish Parliament general election cycles, giving the SPCB better oversight in terms of the Commission's strategic and financial priorities.

Section 46 – Five-year plan: devolved Scottish elections and referendums

142. This section amends schedule 1 of the Political Parties, Elections and Referendums Act 2000 ("PPERA").

143. It provides that for each financial year, the Commission must prepare an estimate of the Commission's income and expenditure for the year in relation to the Commission's devolved Scottish functions and, by no later than 6 months before the start of each financial year (or such later date as the Commission and the SPCB may agree), send the estimate to the SPCB for approval.

144. When the Commission send to the SPCB such an estimate in respect of the first financial year following a Scottish Parliament general election, it must also submit to the SPCB a plan setting out its aims and objectives for the exercise of the Commission's devolved Scottish functions during the next 5 years and estimated requirements for resources for the exercise of those functions during that period.

145. The SPCB must examine each plan submitted to it and decide whether it is satisfied that the plan is consistent with the economical, efficient and effective discharge by the Commission of their functions. If it is not so satisfied it may recommend such modifications to the plan as it considers appropriate for the purpose of achieving such consistency. As part of its examination, the SPCB may consult a committee of the Scottish Parliament (for example, the Standards, Procedures and Public Appointments Committee) and any other persons as it consider appropriate.

146. After the SPCB has reported to the Commission on its findings and recommendations (if any) the Commission must make whatever modifications to the draft code it considers necessary and lay the plan before the Parliament. If the Commission did not follow any recommendations it must explain in a document laid before Parliament why it did not.

147. The Commission may, of its own accord or as required by the SPCB, submit a new (or revised) plan at any other time during the 5 year period, under the same process.

148. Scottish devolved functions cover any functions under Part 1 of PERA in relation to Scottish Parliamentary general elections and by-elections, any local

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government elections and under the Referendums (Scotland) Act 2020 in relation to any referendum held throughout Scotland.

Part 9: Electoral Management Board for Scotland

149. Part 9 contains provisions adjusting the constitution of the Electoral Management Board for Scotland (the “EMB”), most significantly giving it a separate legal personality as a body corporate. The EMB was established on a non-statutory basis in 2008, before the Local Electoral Administration (Scotland) Act 2011 (“the 2011 Act”) provided it with its current statutory basis. It consists of a convener appointed by Scottish Ministers and other board members appointed by the convener. Section 47 of the Bill amends the EMB constitution as set out in the 2011 Act.

150. Under section 1 of the 2011 Act, the EMB was given the general function of “co-ordinating the administration of local government elections in Scotland.” Its role was extended by the Scottish Elections (Reform) Act 2020 to include Scottish Parliamentary elections. The functions in relation to those elections include assisting returning officers, local authorities and other persons and promoting best practice. The 2011 Act gives the convener the power to issue directions to returning officers on the running of the local government elections and, as a result of the changes made by the Scottish Elections (Reform) Act 2020, also on the running of Scottish Parliament elections.

151. The convener of the EMB took on the role of chief counting officer in the 2014 referendum and section 7 of the Referendums (Scotland) Act 2020 provides for the convener to be the chief counting officer in any future referendums held under the rules in that Act.

Section 47 – Constitution of the Electoral Management Board for Scotland

152. Subsection (2) provides that the EMB continues to exist and becomes a body corporate with the same name. The continuation means that the current convener and members of the board will continue to serve in their roles in accordance with their current terms of office. As a body corporate, the EMB will have a separate legal personality and will be able to take actions in its own name, for example entering into contracts.

153. As noted, the general functions of the EMB are in the 2011 Act and are not being adjusted by this section. However, as the EMB will have legal personality and will be taking its own actions, subsection (3) clarifies these functions by adding supplementary text around the powers of the EMB and the validity of the actions it takes (supplementary in the sense that it adds to the common law position). Specifically, it clarifies that the EMB can do anything which appears to it to be necessary or expedient for the purposes or in connection with its functions or otherwise conducive to them and that the validity of its actions are not affected by certain procedural defects.

154. Subsection (4) adds the statutory post of deputy convener to the EMB. A deputy convener may be appointed by the convener and assumes the powers of the convener

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if the convener's office is vacant or if the convener is incapacitated or otherwise unable to act. For example, a deputy convener would be able to issue directions under the 2011 Act. In the ordinary course of business, the deputy convener would be able to deputise to the extent determined by the convener.

155. The appointment powers (to determine the terms and conditions of appointment and to remove, reappoint and reinstate) in section 5 of the Interpretation and Legislative Reform (Scotland) Act 2010 will apply to the appointment of a deputy convener, subject to the specific provision made here allowing one 4 year term for a deputy convener, which may be renewed once.

156. The remaining change in subsection (5) recognises the statutory basis on which the EMB is now constituted. As a statutory body with separate personality, it will be required to prepare its own accounts.

Part 10: General provision

Section 48 – Ancillary provision

157. This section empowers the Scottish Ministers, by regulations, to make various types of ancillary provision for the purposes of, in connection with, or to give full effect to the Act or any provision made under it.

158. Regulations under this section may modify any enactment (including the Bill itself once enacted). The word “enactment” is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010¹⁹ and includes Acts of the Scottish or UK Parliaments as well as secondary legislation.

159. If regulations under this section textually amend an Act then they are subject to the affirmative procedure, but otherwise they are subject to the negative procedure (see sections 28 and 29 of the Interpretation and Legislative Reform (Scotland) Act 2010²⁰).

Section 49 – Commencement

160. This section sets out when the provisions of the Bill, once enacted, will come into force (i.e., take effect).

161. Some of the final sections, including this section, will come into force automatically on the day after the Bill receives Royal Assent. The substantive provisions will be commenced in accordance with regulations made by the Scottish Ministers under this section. Such regulations may include transitional, transitory or saving provision related to commencement and may make different provision for different purposes. In particular, this allows different provisions to be commenced on different days.

¹⁹ <https://www.legislation.gov.uk/asp/2010/10/schedule/1>

²⁰ <https://www.legislation.gov.uk/asp/2010/10/part/2/crossheading/parliamentary-scrutiny>

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162. Regulations under this section will, unless exercised in conjunction with powers under other sections, be laid before the Scottish Parliament but will not be subject to any parliamentary procedure (see section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010²¹).

Section 50 – Short title

163. This section provides for resulting Act (if the Bill is passed and given Royal Assent) to be known as the Scottish Elections (Representation and Reform) Act 2024.

²¹ <https://www.legislation.gov.uk/asp/2010/10/section/30>

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Scottish Elections (Representation and Reform) Bill

Explanatory Notes

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