

SCOTTISH ELECTIONS (REPRESENTATION AND REFORM) BILL

[AS AMENDED AT STAGE 2]

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.7.9 of the Parliament’s Standing Orders in relation to the Scottish Elections (Representation and Reform) Bill (“the Bill”). This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

2. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

DELEGATED POWERS

Section 2B – power to amend section 31(3C) and (3D) of the Local Government (Scotland) Act 1973 relating to amendment, repeal or re-enactment of Channel Islands or Isle of Man legislation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative
Revised or new power: new power

Provision

4. Section 2B of the Bill amends section 31 of the Local Government (Scotland) Act 1973 (the “1973 Act”), which outlines the circumstances in which individuals are automatically disqualified for nomination, election and holding office as member of local authority. Section 31

is amended so that a person who is subject to “relevant notification requirements” or “a relevant sexual harm or risk order” is disqualified from nomination, election and holding office as member of a local authority.

5. Section 2B(3) contains a regulation making power inserted in section 31(3E) of the 1973 Act, enabling Scottish Ministers to update references to the Channel Islands and Isle of Man legislation listed in the definitions. These references cover “relevant notification requirements” and “relevant sexual harm or risk order” under Channel Islands and Isle of Man legislation.

Reason for taking power

6. This power is necessary because the references to UK legislation could be updated in consequential amendments when the UK primary legislation is changed but that would not be possible if the Channel Islands and Isle of Man legislation was changed.

Choice of procedure

7. The affirmative procedure is considered appropriate for regulations made under new section 31(3E). This is in order to afford a greater level of parliamentary scrutiny of changes to the list of disqualification criteria.

Section 15 – modification to power to make regulations to add description of third parties who can incur controlled expenditure

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative
Revised or new power: revised power

Provision

8. Section 15 amends the Political Parties, Elections and Referendums Act 2000 (“PPERA”) to allow the Scottish Ministers to amend by regulations the list (contained in section 88(2) of that Act) of third parties who can incur controlled expenditure during a Scottish devolved regulated period. The Scottish devolved regulated period is 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 PERA¹. The amended section 88 of PERA allows Ministers to add, change, or remove categories of third party able to campaign during Scottish Parliament regulated periods.

9. Section 15 was amended at Stage 2 so that in order to make a change to the list of categories, a recommendation by the Electoral Commission must first have been made in all cases. Prior to the amendment, a recommendation from the Electoral Commission was only required in order to remove or change an existing category. This change reflects a recommendation from the Standards, Procedures and Public Appointments Committee Stage 1 Report on the Bill (see paragraph 174).²

¹ [Political Parties, Elections and Referendums Act 2000 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

² [Stage 1 Report on the Scottish Elections \(Representation and Reform\) Bill | Scottish Parliament \(https://digitalpublications.parliament.scot/Committees/Report/SPPAC/2024/6/18/cd992e36-6dce-411e-bb9c-21ebd4880798-1#89e0f1ff-6053-4432-80b2-d760a7950a26.dita\)](https://digitalpublications.parliament.scot/Committees/Report/SPPAC/2024/6/18/cd992e36-6dce-411e-bb9c-21ebd4880798-1#89e0f1ff-6053-4432-80b2-d760a7950a26.dita)

Reason for taking power

10. The purpose of the provision is to ensure the Scottish Ministers are able to respond to changes made by the UK Secretary of State to the list of third party campaigners at reserved elections, as set out in section 88(9) of PPERA.

Choice of procedure

11. The affirmative procedure is considered appropriate for regulations made under section 15. This is in order to afford greater parliamentary scrutiny of any amendments to the list of third party campaigners. A recommendation from the Electoral Commission would be required in advance of an affirmative instrument being laid in Parliament.

Section 28 – modification to existing order-making power in relation to pilot schemes for local elections

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: No procedure to initiate pilot, affirmative procedure to make any change resulting from a pilot permanent
Revised or new power: revised power

Provision

12. Section 28 outlines the powers and process by which Scottish Ministers can pilot electoral changes at local government elections. This section of the Bill was amended at Stage 2 to variously add the Electoral Commission as a required consultee for electoral innovation pilots, proposed under section 5 of the Scottish Local Government (Elections) Act 2002 (the “2002 Act”), which was amended by section 28 of the Bill as introduced to allow Scottish Ministers, Electoral Registration Officer and the Electoral Management Board for Scotland (EMB) as well as local authorities to propose pilots. This means that persons proposing an electoral pilot must consult the Electoral Commission before making such a proposal. The amendments also mean that the Scottish Ministers will be obliged to consult with the Electoral Commission and the EMB before making any modifications to a pilot scheme proposed by a local authority or registration officer under section 5 of the 2002 Act.

Reason for taking power

13. This is a minor change to the existing power, and no new power is conferred on Ministers by these changes. The Electoral Commission plays a key role in ensuring the integrity of elections, and it is considered appropriate that they are consulted before any changes to elections are made as part of a statutory pilot.

Choice of procedure

14. No change to procedure has been made by these provisions. The existing procedure is no procedure to initiate a pilot, and affirmative procedure to make permanent any change resulting from a pilot.

Section 28A – power to make regulations with temporary provision about the registration of electors

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative
Revised or new power: new power

Provision

15. Section 28A enables the Scottish Ministers to make regulations to make temporary provision about the registration of electors (“registration of electors pilot provision”). A definition of a “registration of electors pilot provision” provides that the pilots are in relation to the registration of persons in the Scottish local government registers only (i.e. the registers used for both local government and Scottish Parliament elections).

16. A non-exhaustive list of the matters pilot provision may cover is provided. This includes provision about the processing of information for and in connection with any matter as regards registration. The registration pilots are expected to run by public bodies only or bodies with public functions by agreement with the relevant body. The provision therefore does not contain a regime to require enforcement of information sharing for the purposes of a pilot. It does not in particular enable the creation of offences. The provision clarifies that the regulations cannot however affect someone’s right to be registered (i.e. matters relating to franchise). As pilots are temporary, regulations made under this power must include a date by which they expire.

17. The Scottish Ministers will only be able to make regulations under this section where a proposal for a pilot has been made and approved in accordance with section 28B. That section requires that where the Scottish Ministers, a local authority or an electoral registration officer propose a pilot, they must consult the EMB and the Electoral Commission before making a proposal. Where the EMB makes a proposal, they must consult the Electoral Commission. The Scottish Ministers may either accept the proposal, accept the proposal subject to modifications or reject a proposal. Where Ministers are minded to modify a proposal, they must consult the EMB and the original proposer before doing so. Ministers may only accept a proposal where (in their view) it will facilitate registration or encourage more people to register.

Reason for taking power

18. Existing powers for holding statutory pilots at local government elections did not allow for pilots of registration measures. The powers are broadly equivalent to the existing powers in the 2002 Act, but expressly allow for pilots of changes to registration of voters.

Choice of procedure

19. The choice of procedure is negative procedure. This level of scrutiny may be considered appropriate as a registration pilot has the potential to be a substantial undertaking requiring significant levels of funding.

Section 28D – power to make regulations with permanent provision about the registration of electors

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative
Revised or new power: new power

Provision

20. Section 28D of the Bill provides Scottish Ministers with the power to permanently modify electoral law if, following the Electoral Commission’s report on a pilot conducted under section 28A, they decide that the piloted provisions or similar provisions should apply generally and on a permanent basis. The power is contingent on the Electoral Commission report (issued under section 28C) recommending that the change should be made generally and permanently. Before laying a draft of the SSI containing the regulations, the Scottish Ministers must consult the EMB and such other persons they consider appropriate. The Scottish Ministers must lay a copy of the report prepared by the Electoral Commission into the operation of the pilot at the same time as laying a draft of the SSI.

Reason for taking power

21. This power is linked to the power in section 28A of the Bill. In the same way that the 2002 Act did not expressly allow pilots of registration measures, section 28A does not make provision for permanent changes to the law following such pilots. This power will allow for any registration pilots to be made permanent following a recommendation by the Electoral Commission.

Choice of procedure

22. The affirmative procedure is considered appropriate for regulations made under section 28D. This mirrors the existing powers under section 6 of the 2002 Act for making permanent changes as a result of electoral pilots held in accordance with section 5 of the 2002 Act.

Section 29A – sub-delegation of statutory guidance at local government elections

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: affirmative
Revised or new power: revised power

Provision

23. Section 29A changes the Scottish Ministers’ powers to make legislation for the smooth running of local government elections to allow that legislation to refer to documents (such as guidance or forms) prepared by other organisations and provide that those documents form part of the rules in relation to local government elections.

24. It modifies the general power in section 3 of the Local Governance (Scotland) Act 2004 for Ministers to make provision in secondary legislation in relation to the conduct of local

government elections. This power is typically used ahead of every local government election to update the rules for the forthcoming election.

25. Unlike the equivalent power in relation to Scottish Parliament elections (section 12 of the Scotland Act 1998) the local government power for secondary legislation does not allow Ministers to sub-delegate tasks to other bodies. Sub-delegation is when a piece of secondary legislation (or delegated legislation) contains a further delegation of authority to another person, typically a public body. This provision will permit sub-delegation, and that will allow bodies such as the EMB or Electoral Commission to be asked to provide guidance on elections, for example on asking the Electoral Commission to provide guidance on accessibility measures in polling places, as they already do for UK Parliamentary elections in Scotland.

26. Paragraph (a) of new subsection (3A) provides that references are ambulatory. This means that the most recently published version of a document referred to will automatically become the authoritative one. For example, Ministers will not need to make a new Order every time that the Electoral Commission updates its accessibility guidance. However, paragraph (b) of this subsection helps Ministers retain control by giving them the power to specify other requirements in an Order which a document must meet before a document is considered authoritative.

Reason for taking power

27. This power allows Scottish Ministers to sub-delegate the responsibility to provide documents such as guidance on electoral matters to bodies such as the Electoral Commission and the EMB for local government elections. This power already exists in the context of Scottish Parliament elections, and this change will allow for more consistent sub-delegation where appropriate.

Choice of procedure

28. This change is a modification of the general power in section 3 of the Local Governance (Scotland) Act 2004 for Ministers to make provision in secondary legislation in relation to the conduct of local government elections. As a result changes made following this modification will be made using the affirmative procedure which applies to measures under section 3.

*This document relates to the Scottish Elections (Representation and Reform) Bill (SP Bill 42A)
as amended at Stage 2*

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