

# DELEGATED POWERS AND LAW REFORM COMMITTEE

## 6th Meeting, 2021 (Session 6)

**Tuesday 28 September 2021**

### Instrument Responses

#### Instruments subject to Negative procedure

#### **Representation of the People (Absent Voting at Local Government Elections) (Scotland) Amendment Regulations 2021 (SSI 2021/317)**

**On 16 September 2021, the Scottish Government was asked:**

The instrument amends the Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations 2007 (“the principal Regulations”) which set out the procedure for an elector to make an application to appoint a proxy to vote at Local Government elections on their behalf. Regulation 4 of the instrument substitutes regulation 7 of the principal Regulations and specifies additional requirements when an elector makes an application in an emergency for a replacement proxy to be appointed if the existing proxy is unable to attend the polling station on election day. The new regulation states at paragraph 7(d) that “in the case of an application to which regulation 11(4B) applies” the application must give reasons why the circumstances of the proxy on the date of the poll will, or are likely to be such that they cannot reasonably be expected to vote in person at the polling station allotted, or likely to be allotted to the election. Regulation 11(4B) is introduced by regulation 5 of this instrument. Regulation 11(4B) simply states that “An application to which this paragraph applies must be refused where the application is received after 5pm on the day of the poll at the election for which it is made” thereby introducing a deadline by which any application for a replacement proxy must be received.

Regulation 5 also introduces regulation 11(4A) which sets out the circumstances in which the deadline set by regulation 11(4B) applies, namely where the proxy currently appointed for the elector is not entitled to vote by post at the election and the circumstances of the proxy on the date of the poll will, or are likely to be such that they cannot reasonably be expected to vote in person at the polling station allotted, or likely to be allotted to the election. These are the circumstances in which an application for appointment for a proxy must give reasons under the terms of regulation 7(d). If the application falls within the criteria specified in regulation 11 (4A)(a) and (b) and the application doesn’t fall foul of the rule in 11(4B) a replacement proxy may be appointed.

1. Should the reference in regulation 7(d) properly be to regulation 11(4A) which prescribes the criteria which must be met to enable an elector to make an application for a replacement proxy and applies the deadline specified in regulation 11(4B) by which the application must be received?

2. If so, what corrective action is proposed and by when?

**On 21 September 2021, the Scottish Government responds as follows:**

Regulation 4 of the Representation of the People (Absent Voting at Local Government Elections) (Scotland) Amendment Regulations 2021 (“the Amendment Regulations”) replaces regulation 7 of the Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations 2007 (“the 2007 Regulations”). The purpose of this is to clarify the effect of regulation 7 and to add a further paragraph (paragraph (d)) which provides for emergency applications to appoint a proxy. Those applications must provide reasons as to why the appointed proxy cannot vote in person on the date of the poll. Instead of narrating the circumstances in which an emergency application to appoint a proxy can be made, regulation 7(d) refers to emergency applications as “an application to which regulation 11(4B) applies”.

The Scottish Government consider that there is no error in regulation 7(d) and the reference to regulation 11(4B) is correct. Regulation 11(4B) is applied to certain applications by regulation 11(4A) and regulation 7(d) cross-refers to regulation 11(4B) in order to catch those applications. If regulation 7(d) referred instead to regulations to which regulation 11(4A) applied it would have no effect as regulation 11(4A) doesn’t apply to any applications, it only states the types of application to which regulation 11(4B) applies.

One option in regulation 7(d) would have been to reiterate the circumstances set out in regulation 11(4A) in order to describe the applications caught by the requirements in regulation 7(d). It was considered that a reference to applications to which regulation 11(4B) applies was shorter but still restricted the requirements in regulation 7(d) to emergency applications to appoint a proxy.

**Instruments not subject to any parliamentary procedure**

**Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No. 6 and Transitional Provision) Order 2021 (SSI 2021/314 (C. 21))**

**On 16 September 2021, the Scottish Government was asked:**

The Order commences section 17 and schedule 1 of the Local Electoral Administration and Registration Services (Scotland) Act 2006 on 28 September 2021. This instrument is part of a package of elections SSIs laid this week, including SSI 2021/311, which commences various sections of the Scottish Elections (Reform) Act 2020 the following day.

The Scotland Act 2016 conferred additional powers on the Scottish Parliament and Scottish Ministers in relation to the operation of local government elections in Scotland. In the absence of any explanation in the accompanying documents, please explain why section 17 and schedule 1 of the 2006 Act, which replace and insert provisions in the Representation of the People Act 1983 defining (Scottish local government) election expenses, are only being commenced now, 15 years later.

**On 21 September 2021, the Scottish Government responds as follows:**

Section 17 of the Local Electoral Administration and Registration Services (Scotland) Act 2006 (“the 2006 Act”) introduced new section 90ZB to the Representation of the

People Act 1983 (“the 1983 Act”) and gives effect to schedule 1 of the 2006 Act which in turn inserts new schedule 4B into the 1983 Act. Section 90ZB provides a definition of election expenses for the purposes of Scottish local government elections. Similar provisions were made for English and Welsh local government elections in section 27 of the Electoral Administration Act 2006 (“EEA 2006”).

A late change was made to section 27 of EEA 2006 prior to the Bill being passed by the UK Parliament. During the passage of the Bill, section 27 had previously provided that accounting period for election expenses would start four months before the election. This received criticism in the UK Parliament as it could have required candidates to retrospectively account for their expenses. The four month period was replicated in the 2006 Act in order to maintain consistent of practice in elections across the UK.

The four month period was removed from EEA 2006, before the Bill was passed, in response to the criticism it received and the accounting period for election expenses was instead commenced when an individual became a candidate. While the removal of the four month period was replicated in the 2006 Act prior to the Bill being passed by the Scottish Parliament, there was no corresponding amendment to commence the accounting period when an individual became a candidate. This apparent omission meant that section 17 could have been interpreted so widely as to include any expenditure incurred at any time (before or after a person becomes a candidate) which was used for the candidates election.

The amendments made by Article 3(4) of the Scottish Local Government Elections Amendment Order 2021 (laid before the Scottish Parliament on 14th September 2021) correct this error by ensuring that the accounting period for election expenses commences when the individual becomes a candidate at the election. It is this amendment which enables section 17 of the 2006 Act to be brought into force.

The 2006 Act obtained Royal Assent on 1st August 2006 making it difficult to bring in the necessary changes in time for the 2007 local government elections. There have only been two further ordinary local government elections in 2012 and 2016 in relation to which the definition of election expenses could have been changed but on those two occasions, section 17 and schedule 1 of the 2006 Act were not brought into force.

The need to amend section 90ZB of the 1983 Act either before or immediately after it was brought into force accounts in part for the delay. Competing priorities in 2012 and in 2016 meant that the legislative steps being taken now were pushed back. As the system of election expenses has operated effectively there were no widespread calls for these provisions to be brought into force and, as they serve to clarify the meaning of election expenses, they were not given priority. The Scottish Government acknowledges the delay but is now content that the necessary amendment to section 90ZB is being made which enables the commencement of section 17 and schedule 1 of the 2006 Act.