

Roddy Angus
Elections and Boundaries Team
The Scotland Office
1 Melville Crescent
Edinburgh
EH3 7HW

20 May 2010

Dear Roddy,

Draft Scottish Parliament (Elections etc.) Order 2010 consultation

Further to your letter of 6 April 2010, please find attached the Electoral Commission's response to your consultation on the draft Scottish Parliament (Elections etc.) Order 2010. The Commission hopes the Scotland Office finds our comments of assistance and we would be happy to engage in further discussions relating to any matter raised in this response if you so wish.

Yours sincerely,



Andy O'Neill
Head of Office Scotland
0131 225 0201
aoneill@electoralcommission.org.uk

The Electoral Commission response to the Scotland Office's consultation on the draft Scottish Parliament (Elections etc.) Order 2010

1 Introduction

- 1.1 The Electoral Commission welcomes the opportunity to respond to the Scotland Office's consultation on the draft Scottish Parliament (Elections etc.) Order 2010 (hereafter referred to as 'the draft Order'), an initial draft of which we received on 6 April 2010, followed on 15 April 2010 by the Appendix of Forms and consequential amendments to the draft Order.
- 1.2 The Commission would welcome a formal response from the Scotland Office on the content of this paper. In the meantime, Commission staff would be happy to discuss any of the comments and issues outlined below.

2 General points on the draft Order

- 2.1 We note that the draft Order consolidates the Scottish Parliament (Elections etc.) Order 2007 and subsequent amendment Orders.¹ It also applies some outstanding changes arising out of the Electoral Administration Act 2006 which were not included in the 2007 Order, and also the Political Parties and Elections Act 2009.
- 2.2 We are pleased that the Scotland Office is continuing the precedent of creating a new, comprehensive Order ahead of the next scheduled general election rather than making further amendments. This makes it easier for electors, candidates and administrators to find and read the current legislation.
- 2.3 We are, however, concerned that the Scotland Office has fallen behind its own timetable for supplying the draft Order to the Commission by two months. The Scotland Office had already identified that a UK Parliamentary general election in the spring of 2010 and a normal summer recess for the Houses of Parliament meant that it would be a challenge to have the draft Order in force by the six month deadline recommended by the Independent review of the Scottish Parliamentary and local government elections 3 May 2007 (also known as the Gould report). We have endeavoured to respond as quickly as possible in order to avoid any further delay. We urge the Scotland Office to ensure that this legislation has been made by the UK Parliament at least six months before the day of the poll. As we have

¹ These are the Scottish Parliament (Elections etc.) (Amendment) Order 2008 and the Scottish Parliament (Elections etc.) (Amendment) Order 2009.

previously advised, the Commission cannot finalise its guidance until the legislation has completed its parliamentary process.

- 2.4 Our intention in drafting this response has been to identify substantive issues that might lead to unworkable or undesirable arrangements. We do not believe that it is our responsibility to identify all minor drafting errors in the draft Order but have nevertheless highlighted a small number of minor drafting errors which we have identified in the course of developing our response.
- 2.5 The Commission will be reporting on the administration of the 2010 UK Parliamentary general election and English local government elections in July. We will also produce in the next few days an interim report examining the problems of those people who were unable to vote after having queued at polling stations up to 10pm on polling day. Depending on the findings of these reports, we may wish to make further comment on the draft Order if there are any recommendations which would be applicable for the 2011 Scottish Parliamentary elections.

3 Detailed comments on the draft Order

Main body of the Order

Articles 8 and 9 – Absent votes at Scottish Parliamentary elections

- 3.1 The draft Order consolidates the changes introduced by the Scottish Parliamentary (Elections etc.) (Amendment) Order 2008 which requires postal voters to supply their signature and date of birth (the personal identifiers) on applications to vote by post, and also on the postal voting statements that are returned with postal ballot papers.
- 3.2 The Commission made a series of recommendations in 2007 on improving the personal identifier system which seeks to make it easier for the voter and ensure that as many postal votes as possible can be carried forward to the count. The Scotland Office should implement those recommendations in the draft Order. The Commission continues to support these recommendations. These include:²
 - re-examining the waiver provisions
 - establishing a mandatory specification for the storage and exchange of personal identifier records
 - making provision to allow Returning Officers to check personal identifiers against more than one control sample where it is available

² *The introduction of absent voting identifiers in England and Wales*, the Electoral Commission, 2007.

- allowing Electoral Registration Officers to renew or refresh the personal identifier record at any time

Article 10 – Proxies at Scottish Parliamentary elections

- 3.3 Article 10(10) introduces a new procedure requiring Electoral Registration Officers to confirm to an elector and their proxy that the proxy's appointment has ended. The new procedure requires the Electoral Registration Officer to provide such confirmation where the elector has cancelled the appointment in writing, superseded the appointment by naming a new proxy or, if the appointment was for a particular period, at the point at which that period ends. We would welcome clarification of what would happen if the proxy's appointment comes to an end because the elector is removed from the electoral register at a particular address.
- 3.4 To the best of our knowledge, this provision is not in force for any other statutory election in Great Britain. We support providing electors and their proxies with information they may need but we also wish to see a consistent approach taken in legislation unless there is a specific reason to act differently.

Article 45 – Return as to election expenses

- 3.5 Article 45(5) deals with payments made by election agents in respect of two or more candidates. We are not clear under what circumstances these provisions would apply because election agents have to make separate expenses returns for each candidate. We would therefore ask for some clarity as to the purpose of these provisions.

Article 72 – Details to appear on election publications

- 3.6 We support the change to the details that must now appear on Scottish Parliamentary election campaign materials so that it mirrors those in place for other elections. It also means that election campaign material that promotes constituency and individual regional candidates will be subject to the same framework that applies to material promoting a political party's regional list.

Article 80 – Interpretation of 'candidate'

- 3.7 The regulated period for candidate spending (for candidates in constituency contests and individual candidates on regional lists) is still defined by Article 80 of the Order as starting either on the date of dissolution of the Scottish Parliament, or the date on which the person is declared to be a candidate or nominated as a candidate (whichever is earlier), and ending on election day.

- 3.8 In its White Paper *Party finance and expenditure in the United Kingdom* (2008), the Ministry of Justice expressed sympathy with our position (which we have held since 2003) that for devolved legislatures with fixed term elections, the regulated period for candidates should be extended to four months. This would then match the regulated period for parties contesting the elections on the regional lists. We therefore make this recommendation in relation to the draft Order. This would ensure a more comprehensive period of regulation of candidate expenses and bring into line the regulated periods for individual candidates and parties on regional lists. It would also provide greater transparency of candidates' election expenses.
- 3.9 It is also worth noting that in the recent UK Parliamentary general election, following changes brought in by the Political Parties and Elections Act 2009 (PPE Act), the total regulated period for candidate spending lasted just over four months. In recognition of this extended regulated period, candidate spending limits were varied accordingly. Therefore should the regulated period be extended for candidates at the Scottish Parliament elections, consideration should be given to increasing the spending limits along the lines set out in the PPE Act.

Schedule 2 – Scottish Parliamentary Election Rules

Rule 2 – Timetable for an election to fill a constituency vacancy

- 3.10 The Commission supported the extension of the electoral timetable for a Scottish Parliamentary general election when it was included in the Scottish Parliament (Elections etc.)(Amendment) Order 2009 (hereafter referred to as 'the 2009 Amendment Order').
- 3.11 In our response, we also stated that we were disappointed that the Scotland Office was not also extending the timetable for constituency by-elections by a week at the least, particularly as the minimum 14 working day timetable would mean there was very little time for electors to either register to vote or apply to vote by post if they wanted to do so by the deadline of 11 working days before polling day.
- 3.12 We note that there is not a separate timetable for constituency by-elections to the National Assembly for Wales or the Greater London Assembly. We do not believe that it is either necessary or desirable to maintain a separate timetable for Scottish Parliamentary constituency by-elections, and this rule should be deleted.
- 3.13 We continue to call on the UK Government to undertake a holistic review of all electoral timetables in order to align the legislative and administrative timetables in the interests of electors. This would also better facilitate combined elections and accommodate recent changes to electoral law. Scotland Office ministers and officials should work with their counterparts in

the Ministry of Justice, other relevant UK Government departments and the Scottish Government with a view to developing a common timetable for all elections in the UK.

Rules 5, 6 and 7 – Nomination of candidates

- 3.14 The draft Order introduces provision to allow all candidates to choose to withhold their home address from publication as was implemented for UK Parliamentary elections by the PPE Act. The effect at a Scottish Parliamentary election would, however, be different as the candidates' home addresses were not published on ballot papers in the 2007 elections and there have been no alterations to the form of ballot papers in the draft Order to change this. Also, the draft Order does not require each candidate's home address to be published on the Statement of Persons Nominated. Therefore, the only place that a candidate's home address will be available in any event is on the home address form and this can only be viewed by those who are already entitled to view the nomination papers.
- 3.15 The Commission would welcome clarification of why this has been included and what the policy intention is.

Rules 5 – Nomination of candidates for return as a constituency member

- 3.16 The draft Order states that candidates standing on behalf of parties in constituency elections may only use the registered party name on the ballot paper. However, provision is also made for the word 'Scottish' to be inserted as a prefix into the registered party name. Whilst we understand that some registered political parties contesting a Scottish Parliamentary election will want to use a geographic description, it does mean that parties can use descriptions on the ballot paper that have not been registered with us. The descriptions will not have been subject to the checks that are performed prior to registration. This therefore removes one of the safeguards set out in Section 28(4) of PPERA to avoid voter confusion.
- 3.17 The provision requiring that a registered party name (with the optional prefix) be used prevents candidates standing on behalf of two or more parties on the constituency ballot paper. We recommend that provision is made in the Order to allow candidates who wish to stand on behalf of two or more parties to do so. This should also include provision for such candidates to be able to use an emblem when standing on behalf of two or more parties from the registered emblems of any of those parties.

Rules 6 and 7 – Nomination of candidates for return as regional members

- 3.18 The draft Order states that parties contesting regional elections may use the registered party name (with the prefix 'Scottish' if desired) followed by any of their registered descriptions.

- 3.19 Whilst re-iterating our position above about the use of party names that have not been registered with us, the principle of putting the party name first is in line with the recommendations of the Gould report and '*Making your mark – guidance for government policy makers*'³ in ensuring that voters are fully aware of the party for which they are voting. In addition, we recommend that independent candidates standing on regional lists be listed on the ballot paper in alphabetical order of their surname amongst the political parties rather than being listed at the bottom of the regional ballot paper after the political parties.
- 3.20 We note that the type of descriptions that can be used to describe either parties or candidates (standing on behalf of parties) varies across the two ballot papers. Therefore the Scotland Office may wish to consider standardising the way in which they are described across both ballot papers to ensure consistency of approach and thereby assisting voters.

Rule 49 – Tendered ballot papers

- 3.21 In Rule 49(7), a voter who is being issued with a tendered ballot paper will have to sign the tendered votes list. It is our understanding that this provision was originally drafted as part of the UK Government's intention that all voters would sign when they applied for a ballot paper at a polling station. Although signing for tendered ballot papers is in force at UK Parliamentary elections, there is not an equivalent signature requirement for voters receiving an ordinary ballot paper. If a voter refused to sign for a tendered ballot paper, there are no provisions that allow the Presiding Officer to refuse to issue the ballot paper. We therefore believe that the reference to signing for a tendered ballot paper should be deleted from the draft Order.

Rules 72-78 – Death of candidates

- 3.22 On a point of drafting, we believe that the paragraphs in Rule 77 need to be renumbered as there are presently two paragraph 4's, and in the second paragraph 4, the reference to Rule 67(6) should be changed to Rule 67(7) which relates to the return or forfeiture of deposits for individuals and parties contesting a regional election.

Schedule 4 – Issue and receipt of postal ballot papers

- 3.23 In our report, '*The introduction of absent voting identifiers in England and Wales*', we recommended that the UK Government take steps to mandate that Returning Officers verify the personal identifiers on all returned postal

³ A copy of this guidance is available on our website at www.dopolitics.org.uk/making-your-mark/government-policy-makers.

voting statements. In Scotland, the Local Returning Officers for the 2009 European Parliamentary elections successfully verified all personal identifiers and did so again at the 2010 UK Parliamentary general election. We therefore recommend that 100% verification is introduced by the draft Order.

Schedule 5 – Combination of polls

3.24 We note that there are alterations to the Scottish Parliamentary and Scottish local government election rules when such elections are combined. We would ask for an assurance that the Scotland Office has discussed these changes with the Scottish Government (who are responsible for the Scottish local government election rules) and are satisfied that the combination rules as drafted are compatible.

Appendix of forms

3.25 The appendix of forms contains various forms to be used in connection with Scottish Parliamentary elections including forms that will be widely seen by voters. These include poll cards, postal voting statements, information notices and the ballot papers. We are disappointed that the forms in the draft Order have not been designed using the principles and good practice advice we provided in '*Making your mark – guidance for government policy makers*'.

3.26 The Commission's priority for all elections is to put the voter first. We have attached some suggested alterations to the forms that will be used by the public based on the principles contained in *Making you mark*. We recommend that the Scotland Office redesigns the forms and undertakes user testing to be assured that the forms can be easily understood by the electorate.

Forms J and K – Ballot papers

3.27 We are disappointed that the Scotland Office has not taken on board the recommendations made in *Making your mark*. Chapter 4A gives the detail of what we expect a ballot paper to look like so that voters can navigate the ballot paper easily. We ask the Scotland Office to redraft the forms along these lines.

Forms L, U, V and Y – Postal voting statements

3.28 The forms of postal voting statements also do not reflect the guidance on designing postal voting statements given in Chapter 4B of *Making your mark*. The Scotland Office should redraft the postal voting statements and accompanying instructions along those lines.

- 3.29 The postal voting statement should be clearly identified, state what it is for and what the voter is supposed to do. Information about where to find the instructions should also come at the start of the statement and not at the end.
- 3.30 The instructions should be clearer and more concise. They should be on a separate document so the postal voter can refer to them as they complete their ballot papers, postal voting statement and seal up the envelopes. The instructions should also be in a logical order. We also recommend that graphical illustrations are used on the instructions to the voter to clearly show what they are expected to do.
- 3.31 Anonymous electors who are voting by post are required to provide their signature on the postal voting statement unless they have applied to the Electoral Registration Office for a waiver. In Forms L, U and V, the Scotland Office should remove the instruction that says the signature box should be removed for all anonymous postal voters.
- 3.32 On Form Y, there is no instruction to the Returning Officer to omit the name of an anonymous elector from the postal voting statement. This should be included.

Forms M, M1, N and N1 – Poll cards

- 3.33 The various forms of poll cards would also benefit from being redrafted into plain English and also from making provision for the Constituency Returning Officer to include the colours of the ballot papers that will be used so that voters know what to expect when they receive their ballot papers. The Scotland Office should work with the Interim Electoral Management Board for Scotland to ensure that the same colour of ballot papers will be used across Scotland. This will then allow a clear and consistent national public awareness campaign to be undertaken in the run up to the poll.
- 3.34 Some electors apply for a postal vote for an election and expect it to arrive before they go away from their home address on holiday or on business. They do not always appreciate the timeframe for the delivery of postal votes to them and this means that in some instances, electors have found themselves unable to cast their postal vote because they lacked information at the time they decided to apply for a postal vote. We believe that Forms M (the poll card) and N (the poll card for proxy voters) should set out the expected date of delivery of postal votes so that electors have all the information they need in order to decide how best to cast their vote.

Forms O, O3, P and X – Information for voters

- 3.35 We would direct the Scotland Office to Chapters 4B and 4C of *Making your mark* which specify how polling station notices (those on display inside and

outside of the polling station) and polling booth notices (those in the booth where the voter marks their ballot papers) respectively.

- 3.36 Notices should contain all the information that the voter needs at the point of use. Polling station notices should clearly explain the whole voting process and the polling booth notice should focus on how to mark the ballot paper and how the voter can get help if they need it. There should not be any additional notices (such as Form P – further information for voters at a Scottish Parliamentary general election) that repeat some of the information already provided.
- 3.37 Consequently, the notice that is to be provided by Rule 38(13) should be included in a single notice in the polling booth along with instructions on how to mark the ballot paper(s) rather than as a separate notice.
- 3.38 Form O3 is incorrectly titled as it does not make any reference to the local government election which would also be taking place. We also consider that this form should be relabelled as Form O1 as there is no Form O1 or O2 appended to the draft Order.

Provisions not contained in the draft Order

Control of donations to candidates in constituency contests and individual candidates on regional lists

- 3.39 We are concerned that there are still no provisions in the draft Order that introduce controls on donations received by candidates in constituency contests and individual candidates on the regional lists. This is integral to the integrity of candidate election finance and is vital in ensuring public confidence in the democratic process. Indeed, the Commission have repeatedly raised this issue with the Scotland Office since 2006.
- 3.40 Therefore we recommend that the Scotland Office replicates Section 71A (which gives effect to Schedule 2A – which should also be included) of the RPA 1983 which provides for controls on donations to candidates. We recommend that this applies to both candidates standing in constituency contests and individual candidates standing on regional lists