EXPLANATORY MEMORANDUM TO

THE POLICE AND CRIME COMMISSIONER ELECTIONS (AMENDMENT) ORDER 2022

2022 No.

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Levelling Up, Housing and Communities and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 This order has two purposes. It amends the spending rules for Police and Crime Commissioner elections for England and Wales within the Police and Crime Commissioner Elections Order 2012. This makes the provisions consistent with the amendments to equivalent notional expenditure provisions for reserved elections made by sections 20 to 22 of the Elections Act 2022.

2.2 The order also inserts two additional welfare benefits into the list of qualifying benefits for certain proxy voting applications for those receiving such benefits for these elections.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State, Andrew Stephenson has made the following statement regarding Human Rights:

"In my view the provisions of the Police and Crime Commissioner Elections (Amendment) Order 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 Sections 20 to 22 of the Elections Act 2022 ("the Act") amended the 'notional expenditure' provisions which specify how particular types of spending during an election campaign must be accounted for at reserved elections (I.e., UK Parliamentary General and Northern Ireland Assembly elections and local elections in England and Northern Ireland). This required the amending of the Political Parties Elections and Referendums Act 2000, the Representation of the People Act 1983, the Recall of MPs Act 2015 and the Electoral Law (Northern Ireland) Act 1962 by the Act.

6.2 The equivalent provisions for Police and Crime Commissioner elections are contained with the Police and Crime Commissioner Elections Order 2012 and were not amended by the Act. This order makes those amendments (articles 2 (2), (3) & (5)) for Police and Crime Commissioner elections in England and Wales to ensure consistency across reserved elections. Policing and the election of Police and Crime Commissioners is a reserved matter for Wales.

6.3 Article 2 (4) updates the list of qualifying welfare benefits for proxy vote applications for Police and Crime Commissioner elections to include two disability assistance related benefits introduced by regulations made under section 31 of the Social Security (Scotland) Act 2018. This allows those in receipt of these benefits to not to have to include an attestation as to their disability as part of their application for a proxy vote in Police and Crime Commissioner elections in England and Wales.

6.4 This replicates a change that has previously been made for UK parliamentary and local elections by the Social Security (Scotland) Act 2018 (Information-Sharing and Disability Assistance) (Consequential Provision and Modifications) Order 2021 and the Social Security (Scotland) Act 2018 (Disability Assistance and Information-Sharing) (Consequential Provision and Modifications) Order 2022. The same amendment needed to be made for Police and Crime Commissioner elections and included within the next suitable legislation.

7. Policy background

What is being done and why?

7.1 The 2012 order sets out the rules of conduct at Police and Crime Commissioner (PCC) elections. This includes provisions on the regulation of candidates' spending and the payment of election expenses. Benefits in kind (property, goods, services, or facilities) with a value of £50 or greater, which are supplied free of charge or at a discount of more than 10% of the commercial rate for their use must be accounted for as election expenses in a candidate's spending return. In other areas of legislation, such benefits in kind are sometimes referred to as "notional expenditure."

7.2 In July 2018, the Supreme Court ruled in the case of R v Mackinlay and others [2018] UKSC 42 that there is no requirement that the provision of these benefits must be authorised by the candidate or his election agent. This led to concerns that candidates and their election agents could be liable for spending they were either unaware of or not involved in but were seen to have benefited from. As a result, the Elections Act amended existing primary legislation, to clarify the notional expenditure rules. Therefore, this order is required to ensure that this clarification of the law is replicated for PCC elections in the relevant secondary legislation.

Explanations

7.3 Article 2 (3) of this order ensures that PCC candidates only need to report benefits in kind which they have used, or directed, authorised, or encouraged someone else to use. This change to the law replicates the clarification made by section 20 of the Elections Act 2022 in respect of other reserved elections. This order ensures that the application of these rules is consistent for different types of candidates across reserved elections in the UK.

7.4 Article 2 (2) amends article 31 of the 2012 order as currently the law requires that expenses incurred by a third party (under article 34 of the 2012 order) must be paid by the election agent. This unnecessarily complicates the transaction. This amendment

replicates section 22 of the Elections Act 2022 and ensures that third parties can both incur and pay for authorised expenses themselves, rather than expenses being paid through the election agent of the candidate they are promoting.

7.5 Article 2 (5) amends the provisions in the 2012 order providing that the Electoral Commission may prepare guidance on election expenses for PCC candidates. The amendments clarify that the guidance can cover the application of the rules in relation to expenses incurred. This is to ensure that the codes of practice are sufficiently broad to include an explanation of the rules on all forms of expenditure. To also ensure the parliamentary procedure bringing into force this code of practice is consistent with other provisions contained in the Representation of the People Act 1983 and the Political Parties, Elections and Referendums Act 2000, the order is amended so that the code is brought into force by a statutory instrument. This provision replicates the effect of section 21 of the Elections Act 2022.

7.6 Article 2 (4) amends the 2012 order to entitle those receiving two new Scottish social security disability benefits to apply for an emergency proxy vote at a PCC election without the need for the application to include an attestation as to their disability. The changes will ensure that disabled persons in receipt of the new Scottish benefits may make an emergency proxy vote application at a PCC election in the same circumstances as a person who is entitled to the corresponding reserved social security benefit. As the new benefits are payable for 13 weeks from the date of a move from Scotland, this will ensure that disabled people in receipt of the benefits who have recently moved from Scotland would be able to make a proxy vote application at a PCC election, without the need for an attestation as to their disability, whilst a decision is pending on a social security benefit in the new jurisdiction where they now reside.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not consolidate any current legislation.

10. Consultation outcome

10.1 The Department for Levelling Up, Housing and Communities consulted on this instrument with the Electoral Commission.

10.2 The Electoral Commission was consulted for over four weeks from July to August 2022. The Electoral Commission recommended a technical change to article 2 (5) of the order to ensure that the Commission could produce a code of practice covering Part 3 of the 2012 order. This replicates the amendment made to the Representation of the People Act 1983 in section 21 of the Elections Act 2022. The Department for Levelling Up, Housing and Communities updated the order accordingly.

10.3 The Electoral Commission's consultation response highlighted the potential for the order to come into force during a regulated period for a non-ordinary election and had proposed the department consider whether the rules should be applied only to elections with a polling date after a specified date. The department considered this proposal. However, the department noted that the proposal would be disadvantageous

because it would delay the provision of certainty to candidates and agents about their legal responsibilities. The department considered that the provision of this benefit outweighed the likelihood of a non-ordinary election i.e., an election due to the occurrence of a vacancy. Furthermore, in the event of the amended rules coming into force during a 'regulated period' leading up to a non-ordinary election, the department considers that this change would be unproblematic for candidates and agents, as the clarification the order makes will make it easier for candidates and their agents to understand how to manage their spending and expenses returns. The process of submitting and completing a return remains the same. In addition, the savings provisions in this order provide a clear understanding of how the rules are to be applied in such a scenario.

11. Guidance

11.1 The Electoral Commission provides regular guidance on what constitutes an electoral expense for candidates. The Commission plans to include information on this instrument in guidance for Police and Crime Commissioner elections.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because no, or no significant, impact on the business, charities, voluntary bodies, or public sectors is foreseen.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 There are no plans to monitor or review the instrument.

14.2 Section 62 of the Elections Act 2022 commits the Government to review the operation of that Act within five years of the Act being passed. Any findings from the review of the provisions in that Act, which are reflected in this order, may be considered at that time.

15. Contact

15.1 Imogen Harris at the Department for Levelling Up, Housing and Communities Telephone: 07749713595 or email: imogen.harris@levellingup.gov.uk can be contacted with any queries regarding the instrument.

15.2 Becca Crosier, Deputy Director for Elections Division, at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.

15.3 Andrew Stephenson, Parliamentary Under Secretary of State at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.