EXPLANATORY MEMORANDUM TO

THE REPRESENTATION OF THE PEOPLE (FRANCHISE AMENDMENT AND ELIGABILITY REVIEW) (NORTHERN IRELAND) REGULATIONS 2023

[2023] No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to enable the implementation of the changes to the voting rights of citizens of member States of the European Union ('EU citizens') that are made by section 15, together with schedule 8, of the Elections Act 2022 ('EA 2022').

2.2 It amends existing secondary legislation (see section x below for further details) to enable persons to register to vote under the new eligibility criteria, and to enable the Electoral Registration Officer, which for Northern Ireland is the Chief Electoral Officer (CEO) to effectively maintain their electoral registers, and to administer polls, going forward. It also provides for a one-off process by which the CEO will be obliged to review the eligibility of all already registered EU citizens under the changed eligibility criteria.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument amends the Representation of the People (Northern Ireland) Regulations 2008.

4. Extent and Territorial Application

4.1 The extent of this instrument is limited to Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister of State for Northern Ireland, Steve Baker MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Representation of the People (Franchise Amendment and Eligibility Review) (Northern Ireland) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument is made in consequence of section 15, together with Schedule 8, of the EA 2022. When commenced, these provisions of the 2022 Act will update the franchise rights of EU citizens to reflect our new relationship with the EU (see section

7.1 for details) Note that these changes will not affect the rights of either Cypriots or Maltese citizens who derive their voting and candidacy rights from the status of those countries being Commonwealth countries; nor will they affect the rights of Irish citizens, whose rights are long-standing and are held independently of Ireland's status as a member of the EU.

6.2 The franchise change will apply to all polls in Northern Ireland in which a person's eligibility to vote is determined by the local franchise, i.e. district council elections and Northern Ireland Assembly elections.

6.3 The franchise changes will be implemented in parallel in England and Wales for polls which use the local franchise and for which responsibility is not devolved, in The Representation of the People (Changes to Registration and Voting Rights of European Union Citizens) Regulations 2023.

6.4 They do not impact the local government franchise in either Scotland or Wales, since these are devolved.

6.5 The instrument amends the Representation of the People (Northern Ireland) Regulations 2008 to make the requisite changes to registration processes and to enable the CEO to effectively comply with their duty to maintain their registers going forward, and to administer polls under the changed franchise (see section x for details).

6.6 The CEO has a duty under s.10ZB(1) of the Representation of the People Act 1983 (RPA 1983), to ensure that, 'so far as reasonably practicable, that every person who is entitled to be registered in a register is registered in it, that no person who is not entitled to be registered in a register is registered in it and that that none of the required information relating to any person registered in a register is false.' Part 2 of the instrument provides for review processes in relation to the registration of EU electors in Northern Ireland enabling and requiring the CEO to review the eligibility to remain registered of already-registered EU citizens under the new criteria within the time period between the commencement of the franchise change and 31st January 2025.

6.7 Related to this, Part 3 of the instrument includes provisions to enable the CEO to delay the publication of the revised electoral registers from 1st December 2024 to 31st January 2025, for the purpose of providing them with greater flexibility around delivery of the review process.

6.8 Paragraph 8 of Schedule 8 of the EA 2022 also makes changes to candidacy rights of EU citizens at local elections in Northern Ireland which will be commenced alongside the provisions in this instrument.

7. Policy background

What is being done and why?

7.1 At present, European citizens retain the rights to vote and stand for election that were conferred in consequence of our membership of the EU. Since these were held pursuant to the EU's Freedom of Movement and Voting Rights Directives, no immigration-based eligibility criteria are currently attached to them.

7.2 Schedule 8 of the 2022 Act will, once commenced, remove the automatic right that European citizens have to vote and stand in local and Assembly elections in Northern Ireland. There has never been a general right for European nationals to vote in UK

Parliamentary elections and the 2022 Act and this statutory instrument will not change that.

7.3 Voting rights did not form part of the Withdrawal Agreement, as such matters are a matter for individual sovereign states. Therefore, the UK undertook to update the franchise for European citizens in the EA 2022, in accordance with the principles set out in the paragraph 7.4 below.

7.4 When commenced, the EU citizen voting and candidacy rights (EUVCR) provisions in the EA 2022 will remove the automatic right of individuals to vote and to stand in elections by virtue of being EU citizens. They will, however, ensure continued rights for two groups of EU citizens going forward:

7.4.1 'Qualifying EU citizens': citizens of countries with which the UK has a bilateral voting and candidacy rights ("VCR") treaty – at the time of writing this encompasses citizens of Poland, Spain, Luxembourg and Portugal who are, under the terms of the treaties, 'legally resident' in the UK. The treaties require that the relevant citizens are granted rights to vote and stand for election on 'the same grounds' as British citizens. These treaties also ensure that we are protecting the rights of British citizens in those European countries.

7.4.2 'Citizens with retained rights': citizens of EU member states with which the UK does not have a treaty but who have been legally resident since before the UK left the EU on 31/12/2020. The rationale for the creation of this new category of electors was to enable HMG to uphold the commitment to respect the rights of those citizens who made their home in the UK before EU Exit. The creation of this group of electors necessitated the introduction of a novel 'historical residency' criterion into the franchise and registration framework (i.e. has the person been lawfully resident in the UK since the end of the Implementation Period Completion Date (IPCD) – 31/12/20).

7.5 The franchise change will come into effect five calendar days after the scheduled May polls in 2024, i.e. from 7th May 2024 to mirror the timing in England and Wales where the gap between scheduled polls and the franchise change is intended to support transitional measures relating to candidacy.

7.6 This instrument makes the requisite changes to voter registration and electoral administration processes to implement the franchise change. The changes have been designed to align with existing practices and processes as far as possible. The policy intention is to minimise, where possible, additional burden and confusion for electoral administrators and electors alike and ensure parity of treatment between different groups of electors within the registration and franchise framework.

Explanations

Changes to the voter registration process

7.7 Part 4 of the instrument makes changes to the existing registration application and determination process. These changes will enable eligible persons to apply to register to vote under the new criteria. Correspondingly, they will enable the CEO to determine applicants' eligibility to register to vote under the new criteria. Additionally, the changes will ensure that persons are provided with accurate information about eligibility criteria, and the application process, at the point of application.

7.8 To this end, regulation 18 requires that all persons applying to register to vote in Northern Ireland under the 'retained rights' criteria must indicate, at the point of application, whether they meet the 2022 Act and this new historical residency criteria (e.g. have they been lawfully resident since IPCD?).

7.9 Regulation 18 also makes changes to the prescribed contents of the registration application form to ensure that persons will be made aware, at the point of application, of the changed eligibility criteria. Changes are also made to ensure that the 'retained rights' cohort is made aware the CEO may request additional information and evidence about historical immigration and nationality status, in order to establish the applicant's eligibility (rather than, as now, simply about current immigration and nationality status).

7.10 The 2008 Regulations already provide the CEO with the power to request and accept such additional information and evidence as may be appropriate where they have doubts as to an applicant's eligibility under the new 'historical residency criteria' or any additional documents to support their application under the retained rights criteria.

7.11 To enable the CEO to effectively maintain their registers going forward, and to administer polls under the changed franchise, regulation 19 creates a new franchise marker (a letter prefixed to electors name on register to indicate what elections they are eligible to vote in and why). The letter 'B' is to be used where a person is registered as either a 'qualifying EU citizen' or an 'EU citizen with retained rights'.

Review Process

7.12 Part 2 establishes the process for a one-time review of the eligibility of already registered EU citizens.

7.13 When the franchise change comes into effect, the CEO will be obliged to identify those registered EU citizens who remain eligible under the new criteria, and to confirm their ongoing rights. They will also be obliged to identify those who are no longer eligible, and to remove them from the electoral register.

7.14 Since a review of registered electors based on a reduction of the franchise is without precedent, Regulations 5-14 establishes a bespoke process that mirrors that to be used in England and Wales. The registration review process is intended to be fair and transparent for review subjects, and to minimise burdens on the CEO. As far as possible it has been based on, and benchmarked against, existing practice and processes in relation to electoral registration.

7.15 The end-to-end review processes will take up to three months to complete. Regulation 5 requires the CEO to complete the process, as far is practicably possible, by 31st January 2025; i.e. there will be a nine month 'implementation window' after commencement of the franchise change. The timing, which matches that for England and Wales, is intended to enable Electoral Registration Officers (EROs) to plan and deliver EUVCR changes for non-devolved elections which use the local franchise across the UK, alongside other electoral duties, in the way that is best suited to their local contexts.

7.16 Regulation 16 enables the CEO to delay the publication of the revised register until 31st January 2025. This will enable them to sequence the review and other electoral administration changes.

7.17 The review processes established by this instrument require the CEO to send at least one communication (up to three communications if the elector does not respond), to

every EU elector they review. In order to minimise voter confusion and to perform an educative function going forward, the relevant provisions prescribe each communication's minimum content.

7.18 Regulation 6 enables the CEO to conduct a 'data-based review' of already registered electors using data already available to them as part of their registration duties, for example nationality data (to determine eligibility as a qualifying EU citizen) and registration history (to determine eligibility as a citizen with retained rights)

7.19 Where the CEO is unable to make a determination by way of the data-based review, regulations 7-14 require them to conduct a 'correspondence-based review'

7.20 These provisions establish the minimum requirements for the correspondence-based review contact cycle. In the case of non-response, the CEO must send a minimum three written communications, and make at least one attempt to contact the elector in person before they may make a determination as to a person's eligibility under the new criteria.

7.21 This is comparable to the legal minimum requirements for the 'invitation to register' reminder cycle, which is triggered when the CEO becomes aware of a person who is not registered but who may be entitled to be so.

7.22 The final written communication in the review contact cycle at regulation 8 must inform the review subject that, if they do not respond within fourteen days of the date of the notice, the CEO may determine that they are ineligible under the new criteria and that, in that scenario, the review subject will not be entitled to appeal against the decision.

7.23 Where an elector has responded to one of the review communications and the CEO requires further information and/or evidence to make a determination, regulation 10 provides that if the review subject does not respond by a specified date the CEO may determine that they are ineligible under the new criteria and that, in that scenario, the review subject will not be entitled to appeal against the decision.

Other provisions relating to review process

7.24 There may be instances where review subjects submit fresh applications to register to vote during the review. To minimise the risk of confusion, inconsistent treatment, and additional burden, regulation 6 enables the CEO to consider information in these re-applications as part of the data-based review where the re-application is received before the start of the correspondence review. Correspondingly, where a re-application is received after the start of the correspondence-based review, regulation 15 requires the CEO to treat the information contained therein as a response to the review process and proceed accordingly.

7.25 During the implementation period, the CEO may receive information, either directly from a review subject, or from elsewhere, which is not directly relevant to the questions as to whether the review subject is entitled to remain registered under the new criteria, but which does indicate that the person may no longer be eligible to remain registered on other grounds (e.g. this may include information to indicate that the review subject has moved address, has died, etc.). Therefore, regulation 5(5) enables the CEO to use another review process where this would be appropriate.

7.26 Specific provision is also made for special category electors. Special category electors are persons - such as armed forces voters, crown servants, persons who have no permanent or fixed address, etc - who do not meet the normal residence qualifications

for registration. Such electors are required, by law, to renew their registration declarations annually (five yearly in the case of an armed forces voter) to remain registered. Anonymous electors must make a completely fresh registration application every five years or at the point at which the court order used to support the application expires. As part of the declaration renewal process, a special category elector must declare that they meet the relevant nationality criteria. After the franchise change, EU citizens who are also special category electors will be required to confirm that they are either a 'qualifying EU citizen' or an 'EU citizen with retained rights'. Regulation 7(2) enables, but does not require, the CEO to use the declaration renewal process in lieu of the review process where a special category elector's registration is due to expire before 31/01/25 (i.e. before the end of EUVCR implementation).

7.27 Given the inherent difficulties with making visits to a special category elector's address, where the CEO does review them using the prescribed review process, the requirement to make a personal contact attempt is disapplied in (regulation 9(1)(b) .

8. European Union Withdrawal and Future Relationship

8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union.

8.2 EU Citizens were granted the right to vote and stand in local elections in the UK in 1995. This was done in accordance with the Council of the European Communities directive No.94/80/EC (the voting rights directive), which set out 'arrangements whereby citizens of the Union residing in a member state of which they are not nationals may exercise the right to vote and to stand as a candidate there in municipal elections.' The Local Government Elections (Changes to the Franchise and Qualification of Members) Regulations 1995 enshrined the right of EU citizens to vote in UK local elections. This position is set out in the Representation of the People Act 1983 (as to registration and franchise) as applied by the Elected Authorities (northern Ireland) Act 1989 and in the Local Government (Northern Ireland) Act 1972 (as to candidacy). These rights were reciprocated for British citizens living in EU member states. Voting and candidacy for EU nationals was not covered by the voting rights directive but rather as the result of the adoption of the local franchise in the Northern Ireland Assembly (Elections) Order 2001.

8.3 The UK is no longer covered by the EU voting rights directive. Nor was the matter included in the EU Exit negotiations since voting rights for third country nationals are generally for sovereign states to determine. The UK currently has bilateral treaties with Poland, Spain, Luxembourg and Portugal. These treaties are captured by section 20 of the Constitutional Reform and Governance (CRAG) Act 2010.

9. Consolidation

9.1 This instrument does not consolidate any current legislation.

10. Consultation outcome

10.1 Throughout the development of the policy we have consulted with the Chief Electoral Officer for Northern Ireland and the Electoral Commission. We have also liaised closely with the Department of Levelling Up, Housing and Communities in relation to GB, which has consulted with the Electoral Commission, the Association of Electoral Administrators as well as representatives of the electoral sector and relevant interest groups through structures set up as part the Electoral Integrity Programme.

11. Guidance

11.1 The Electoral Commission provide guidance for electoral returning officers, including the CEO on running electoral registration. We will be working closely with the Commission in providing guidance to the CEO.

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 is being produced and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website when the instrument is laid in Parliament

13. Regulating small business

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

14. Monitoring & review

14.1 Section 62 of the EA 2022 commits the Government to review the operation of that Act within five years of the Act being passed. We envisage that the data produced by the CEO in relation to the review process will be collected and used in that review.

15. Contact

15.1 Katherine Herrick at the Northern Ireland Office Telephone: 07824866744 or email: Katherine.herrick@nio.gov.uk can be contacted with any queries regarding the instrument.

15.2 Máire Caurns, Deputy Director for Elections Policy, at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Steve Baker MP, Minister of State at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.