EXPLANATORY MEMORANDUM TO

THE SCOTTISH PARLIAMENT (ELECTIONS ETC.) ORDER 2007

2007 No. [XXXX]

1. This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 The Order provides for the conduct of elections for membership of the Scottish Parliament. It updates the 2002 Order to apply provisions from the Electoral Administration Act 2006. The Order also allows for the use of an electronic count of ballot papers and the use of a combined ballot paper for constituency and regional polls.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Other than the point in paragraph 6.1 et seq., none.

4. Legislative Background

4.1 This Order implements the provisions in the Electoral Administration Act 2006 for Scottish Parliament elections and applies to such elections certain amendments, mainly to the Representation of the People Acts 1983 and 2000, made by the 2006 Act. The regulations are made under sections 12 (1) and 113 of the Scotland Act 1998.

5. Territorial Extent and Application

5.1 This instrument has UK extent.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Scotland, David Cairns MP, has made the following statement regarding Human Rights:

"I am unable (but only because of the application of certain provisions of the order to convicted prisoners) to make a statement that in my view the provisions of the draft Scottish Parliament (Elections etc.) Order 2007 are compatible with the Convention rights. However, the government nevertheless wishes the House to resolve to approve the draft order."

6.2 This statement has been made only because a few provisions of the Order, in so far as they apply to the legal incapacity of convicted prisoners, give effect to and enforce provisions of the Representation of the People Act 1983 which have been

found by the European Court of Human Rights, in *Hirst v United Kingdom*, to be incompatible with the Convention Rights. However, the government considers that, by virtue of section 6(2)(b) of the Human Rights Act 1998, the making of this provision would not be unlawful. This is on the basis that the provision is giving effect to or enforcing provisions of primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights.

6.3 Specifically, article 27(1) of the draft Order provides that a person shall be guilty of an offence if he votes, applies for an absent vote or applies for the appointment of a proxy knowing that the voter is subject to a legal incapacity to vote at a Scottish Parliament election. This provision replicates section 61(1) of the Representation of the People Act 1983. These provisions are not compatible, following the decision in *Hirst*, in so far as they apply in a blanket manner to all convicted prisoners. Article 22(2) also replicates a provision in the primary legislation, being section 49(5) of the 1983 Act, which applies in such a manner.

6.4 The government is at present consulting on how the primary legislation should be altered following the decision of the European Court of Human Rights. It would be inappropriate to anticipate what Parliament may decide following that consultation. The provision being made in the Order is accordingly required to give effect to the provisions of the primary legislation at forthcoming Scottish Parliamentary elections.

7. Policy background

7.1 The Electoral Administration Act 2006 received Royal Assent on 11 July 2006 and aims to make progress on the government's four principles found at the core of a healthy democracy:

(i) improving access and engagement
(ii) improving confidence in electoral security
(iii) extending openness and transparency in party financing
(iv) maintaining professional delivery of elections.

7.2 The government announced that alongside the Act, it would introduce secondary legislation, in line with the above principles, to improve public confidence in the electoral system.

7.3 This Order implements some of the provisions in the Act to ensure they are in place for the next elections to the Scottish Parliament to be held in May 2007.

7.4 The new provisions made in this Order as a result of the Electoral Administration Act include the replacement of counterfoils with the corresponding number list; translations of certain electoral documents into Braille and languages other than English; and attendance of accredited observers at electoral proceedings. Returning Officers will now be able to correct procedural errors which means that simple procedural errors can be changed on polling day to ensure votes are not discounted due to an error made by polling staff.

7.5 Anti-fraud measures have been introduced including replacement of the Declaration of Identity with the postal voting statement which requires a postal voter to sign a statement confirming they are the correct recipient of the ballot papers. The list of postal ballot papers requires to be marked to show when the paper was issued and when it was received. A new provision is made to allow postal voters to confirm

that their returned postal vote and voting statement have been received. A new requirement is introduced for an application made for a ballot paper to be sent to a different address from that shown on the record of absent voters to indicate why circumstances require it to be sent there. Work is underway to develop further procedures to introduce additional provisions made in the Electoral Administration Act to commence personal identifiers for postal votes. Secondary legislation will be proposed to implement these provisions when systems have been developed in liaison with Returning Officers. These provisions will require postal voters to provide their signature and date of birth on the postal voting statement and the Returning Officers will then check these against details held elsewhere to try to further reduce electoral fraud.

7.6 A new provision is brought in to allow candidates' nominations to state their commonly used surname or forename in addition to their other name. This will allow candidates' names to appear on the ballot paper as the name they are commonly known by. Two or more political parties are now able to register a description for use by a candidate standing in the name of both or all of the parties jointly. This means candidates can appear on ballot papers with joint descriptions of both/all parties they represent.

7.7 The Order also anticipates the introduction of anonymous registration which will come fully into force in May 2007. Voters will be able to apply to be placed on the register anonymously if their safety or that of a person in their household would be at risk if the register of electors contained their name or address. These applications require to be verified to ensure that such voters do not register fraudulently.

7.8 In addition to the above measures, all of which have their origins in the Electoral Administration Act 2006, this Order also accommodates the use of electronic counting of ballot papers. The government is enabling electronic counting of ballot papers for the Scottish Parliament elections as part of the wider elections modernisation agenda. Ballot papers will be able to be counted electronically using scanners and PCs. The Order provides for either an electronic or manual count.

7.9 The Order enables a combined ballot paper for the constituency and regional polls to be used. This will involve printing on the same sheet of paper, with the regional ballot paper on the left and the constituency paper on the right-hand side. The two parts of the sheet will be printed in different colours, to help electors distinguish them. Re-designing the ballot paper so that it better reflects the mixed member voting system fulfils one of the recommendations made in the Arbuthnott Commission Report "Putting Citizens First: Boundaries, Voting and Representation of Scotland".

7.10 Provisions are made to allow for the combination of polls where a Scottish Parliamentary election and a Scottish local government election are held on the same day (as is proposed in May 2007).

7.11 In accordance with section 7(1) and (2)(g) of the Political Parties, Elections and Referendums Act 2000, the Electoral Commission was formally consulted on the draft Order. The Elections 2007 legislation sub-group was involved throughout the drafting of the Order. The sub-group members included representatives from SOLAR (Society of Local Authority Lawyers and Administrators in Scotland), SOLACE (Society of Local Authority Chief Executives and Senior Managers), AEA

(Association of Electoral Administrators), SAA (Scottish Assessors Association), COSLA (Convention of Scottish Local Authorities), Electoral Commission, Scotland Office and Scottish Executive.

7.12 A public consultation was held between June and August 2006 on the design of the ballot paper. The main options on which opinions were sought were combining the constituency and regional polls onto a single ballot sheet and grouping candidates on the ballot paper by political party. 29 responses were received before the closing date and included comments from local authorities, political parties, election organisations and disability/campaigning groups. Following analysis of the responses received, the move to a single ballot sheet was adopted with candidates listed alphabetically by surname.

7.13 Guidance on the conduct of Scottish Parliamentary elections is produced by the Electoral Commission.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The impact on the public sector will be in relation to the new duties and responsibilities which this Order places on Electoral Registration Officers and Returning Officers. They are now required to undertake new duties in relation to anti-fraud measures and the conduct of elections.

9. Contact

Karen McNeill at the Scotland Office Tel: 0131 244 9005 or email: karen.mcneill2@scotland.gsi.gov.uk can answer any queries regarding the instrument.