POLICY NOTE

THE REPRESENTATION OF THE PEOPLE ACT 1983 REMEDIAL (SCOTLAND) ORDER 2025

SSI 2025/353

The Scottish Ministers make the following Order in exercise of the powers conferred by sections 12(1) and (3) of the Convention Rights (Compliance) (Scotland) Act 2001 ("the 2001 Act") and all other powers enabling them to do so.

Purpose of the instrument.

This Order allows some persons detained in hospital under orders and directions relating to criminal justice to vote in Scottish parliamentary elections and local government elections in Scotland.

The Order will come into force on 19 November. The changes will apply to Scottish Parliament and local government elections which take place on or after 7 May 2026. The Order and its effects will expire on 28 February 2030.

Remedial Order procedure

1. Section 12 of the 2001 Act allows the Scottish Ministers to make a remedial order where necessary or expedient to ensure compatibility with the European Convention on Human Rights (the "ECHR").

2. This Order is subject to the urgent procedure set out in section 14 of the 2001 Act. Section 14(1) confers a power on the Scottish Ministers, for reasons of urgency, to make a remedial order without following the 2 procedures specified in section 13 of the 2001 Act. Section 14(2)(b) requires the Scottish Ministers to lay a statement of reasons for having made this Order – this statement is included as and Annex to this Note.

3. While this Order will come into force on 19 November 2025, section 14(2)(a) of the 2001 Act provides that the Scottish Ministers must, after making such an order, give appropriate public notice of its contents, and invite written comments to be made within 60 days of this Order being made. In accordance with section 14(3) and (4) of the 2001 Act, the Scottish Ministers must consider all written observations made; and lay a statement before the Scottish Parliament summarising these comments and specifying the modifications (if any) they consider it appropriate to make to this Order.

4. Section 14(5) of the 2001 Act provides that if modifications are so specified, the Scottish Ministers must make and lay before the Scottish Parliament a further remedial order incorporating the relevant changes. In accordance with section 14(6), either the initial version of the remedial order or the revised version of the remedial order must be approved within 120 sitting days (commencing on 18 November 2025), otherwise the remedial order will cease to have effect.

5. The Scottish Ministers are of the opinion that there are compelling reasons (as set out in the Annex) to require the making of this Order.

Policy Objectives

Background

6. In the case of *Hirst v. United Kingdom* (No. 2), Application no. 74025/01, 6 October 2005, the European Court of Human Rights concluded there had been a violation of Article 3 of Protocol 1 to the ECHR by the United Kingdom insofar as section 3 of Representation of the People Act 1983 ("1983 Act") imposed a blanket restriction on convicted prisoners detained in prison from voting. The Scottish Government considers it appears that a similar restriction in section 3A of the 1983 Act which applies to offenders detained in mental hospitals under specified orders and directions is in Scotland incompatible with Article 3 of Protocol 1 and Article 14 ECHR.

7. On 7 May 2026 a general election to the Scottish Parliament will be held. The Parliament is a legislature to which the ECHR applies. The Scottish Government and Scottish Parliament require to ensure that the franchise for elections to the Scottish Parliament are compatible with the ECHR

Policy

8. This Order modifies the law relating to Scottish Parliamentary elections and local government elections in Scotland to remove this ECHR incompatibility.

9. It does so by enabling some persons subject to section 3A(1) of the 1983 Act to vote in local government elections in Scotland while they are detained in pursuance of a relevant order or direction, provided any conditions specified are met. Section 11 of the Scotland Act 1998 provides that those entitled to vote in Scottish Parliament elections are those entitled to vote, and registered, as local government electors. Therefore, the modifications made by this Order in respect of the local government franchise will also affect Scottish Parliament elections.

10. The Order comes into force on 19 November. The changes will apply to Scottish Parliament and local government elections which take place on or after 7 May 2026. The Order is subject to a sunset provision and its effects will expire on 28 February 2030. The intention is that this Order is replaced by primary legislation before it expires with a Bill introduced in the next Parliament.

11. The overall number of people to be enfranchised is estimated to be around 20 individuals.

12. The overall objective is to extend voting rights in a way consistent with the provision for prisoner voting set out in the Scottish Elections (Franchise and Representation) Act 2020. The approach in that Act will also inform practical arrangements for newly enfranchised voters to exercise their rights.

Detail of the remedial Order (until its expiry)

13. Article 3 of this Order will allow individuals disqualified under section 3A of the 1983 Act to vote, provided they are subject to an order or direction listed in new subsection (3A), and meet any specified conditions.

14. All individuals subject to a temporary compulsion order under section 54 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) or a guardianship order under section 58 of that Act will be able to vote.

15. Individuals subject to an interim compulsion order under section 53 of the 1995 Act, or a compulsion order under section 57(2)(a) or 57A(2) will also be able to vote, provided the offence for which they have been convicted or charged was not punishable by imprisonment exceeding 12 months. As they have not been sentenced, their deemed liability for the offence will determine how they are treated, e.g. a person convicted of an offence carrying a maximum sentence of 2 years would remain ineligible to vote while so detained.

16. The Order specifies how liability is to be calculated where an individual has been convicted or charged with multiple offences - by aggregating the maximum terms of imprisonment for each offence, as if the sentences were consecutive. For example, a person convicted of offences carrying maximum penalties of 3 months, 6 months and 6 months respectively would be treated as liable to be sentenced to 15 months' imprisonment (and so not able to vote).

17. The disenfranchisement is removed for individuals subject to a hospital direction under section 59A of the 1995 Act or a transfer for treatment direction under section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003.[1]

18. The disenfranchisement will remain for all individuals subject to a compulsion order and a restriction order under section 57(2)(a) and (b) or section 57A and section 59 of the 1995 Act.

19. Articles 4 and 5 and the schedule make provision regarding where a detained person is treated as residing for the purposes of these rules. The individual's usual home address can still count as their residence for voter registration. Their detention does not break their residence if they intend to return there after release and nothing legally prevents them from doing so, or if the address is their permanent home and they would be living there if they were not detained. The individual may make a declaration of local connection to an address they are connected to, such as where they would live if not detained, where they lived before detention - evidence is needed that they would not have been entitled to register by virtue of residence at any place other than where they are detained.

20. The Order makes provision about the method of voting by detained individuals enfranchised under this Order, who will only be able to vote by post or by proxy and will not be able to vote as proxy.

21. The normal obligation on Electoral Registration Officers to make a personal visit to a detained individual enfranchised under this Order, who has not responded to three successive invitations to register, is disapplied. As eligible persons will be detained in secure accommodation, obliging an ERO to arrange a personal visit would not be practical (for example, the person may have been or may be about to be released). Provision is also made so that the newly enfranchised voters will be recorded on the register of electors using the marker "M", which is also used for qualifying foreign nationals and eligible prisoners.

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1 Rules are set out for how an individual is treated if they have received multiple sentences at the same time, or on separate occasions without any release (other than temporary release) between first and last sentencing. For example, a person sentenced concurrently to terms of 6 months and 7 months would be treated as serving a total of 7 months and therefore would be able to vote. Conversely, a person sentenced to two consecutive terms of 7 months would be treated as serving a single term of 14 months and would remain ineligible to vote while detained.

22. Any individual registered (as a local government elector) by this Order is entitled to remain registered until it expires. After the Order expires, the registration officer must remove those individuals from the register unless they are otherwise entitled to be registered.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

23. The Scottish Ministers have made the following statement regarding children's rights.

> In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (the Act), the Scottish Ministers certify that, in their view, the Representation of the People Act 1983 Remedial (Scotland) Order 2025 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

24. This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

25. The Scottish Government's Electoral Reform Consultation ran between 14 December 2022 and 15 March 2023. 517 responses to the consultation were received, 94% from individuals, and 6% from organisations. The Scottish Government published an independent analysis of the consultation on 31 July 2023. Copies of the consultation, responses and the analysis are available on the Scottish Government's website.

26. The consultation paper explained that since 21 February 2020, prisoners serving sentences of 12 months or less have been eligible to vote in Scottish Parliament and Local Government elections. This change was made following a decision of the European Court of Human Rights (ECtHR) that the UK was in breach of Article 3 of Protocol No 1 of the ECHR in relation to prisoner voting rights.

27. The consultation sought views on whether certain persons detained in hospital in connection with offending behaviour should continue not to have voting rights in Scottish Parliament and local government elections. It noted challenges in identifying a comparable threshold for persons detained on mental health grounds in connection with criminal justice, in particular as persons can be detained subject to periodic review rather than for a set term.

28. The inclusion of this matter in the consultation followed discussion of the matter in 2022 in the Scottish Mental Health Law Review, which concluded in its Final Report (p. 479) that voting rights should be extended to people detained under mental health legislation and the apparent blanket disenfranchisement ended for individuals detained under forensic orders.

29. No formal consultation has been undertaken on this Order. Section 14(2) of the 2001 Act provides that Scottish Ministers must, upon making the Order, give notice of the publication of the remedial order to appropriate organisations and invite observations in writing within 60 days of the Order being made. Once the 60 day period has expired, the Scottish Government will lay a statement before Parliament summarising all the observations

received and what, if any, modifications they consider appropriate to make to the order. It will be for the Scottish Parliament to approve this Order (or any second remedial order made its place) within 120 days of it being made or it will fall.

30. The public notice of the contents of this Order will be published on the Scottish Government's website. Written observations are requested by 1 February 2025. The Government will proactively highlight the publication of the remedial order to relevant organisations, including the Electoral Commission, Electoral Management Board for Scotland, the Scottish Assessors Association Electoral Registration Committee and the Law Society of Scotland.

Impact Assessments

31. The Scottish Government has prepared a Child Rights and Wellbeing Impact Assessment (CRWIA). The CRWIA notes that the provision could allow some 16 and 17 year olds to register to vote in Scottish Parliament and local government elections.

32. An Equalities Impact Assessment (EQIA) has been prepared, outlining the impacts on groups with protected characteristics. There is minimal differential impact on these groups, and where there are differences, the EQIA finds that there is a positive impact.

33. The Scottish Government view is that this Order has no significant impact on data protection, the environment, fairness; island communities and therefore no impact assessments are required for those areas.

Business and Regulatory Impact Assessment (BRIA)

34. The Minister for Parliamentary Business and Veterans confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Financial Implications

35. There are no specific significant costs associated with the changes made in this order.

Scottish Government
Directorate for Constitution

November 2025

ANNEX

Representation of the People Act 1983 Remedial (Scotland) Order 2025

Statement of Reasons (as published separately)

This Statement of Reasons is provided by the Scottish Ministers in accordance with section 14(2)(b) of the Convention Rights (Compliance) (Scotland) Act 2001 ("the 2001 Act").

The Scottish Ministers have made *the Representation of the People Act 1983 Remedial (Scotland) Order 2025* for the following reasons:

On 7 May 2026 a general election to the Scottish Parliament will be held. The Parliament is a legislature to which Article 3 of Protocol 1 ("A3P1") of the European Convention on Human Rights ("ECHR") applies. The Scottish Government and Scottish Parliament require to ensure that the franchise for elections to the Scottish Parliament are compatible with A3P1, and the ECHR, as interpreted by the European Court of Human Rights ("ECtHR"). Furthermore, Article 14 ensures the rights enshrined by the ECHR must be enjoyed free from any unjustified discrimination[2]. This requires that they address the ban on voting in Scottish Parliament elections by "forensic" mental health patients who are detained in hospital or other settings in the complex range of circumstances of the orders and directions listed in section 3A(3) of the Representation of the People Act 1983 ("the 1983 Act").

The disfranchisement of detained forensic mental health patients originally mirrored that of all those convicted and sentenced to imprisonment for any length of time. In 2005 the ECtHR found in *Hirst v United Kingdom (No 2)* that the UK blanket ban on prisoner voting was in breach of A3P1, which provides that signatory states: "undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." This has been interpreted to give individuals the right to vote and to stand for election. The breach of A3P1 in respect of prisoner voting was remedied by Part 3 of the Scottish Elections (Franchise and Representation) Act 2020 which enables convicted persons detained in prison on a sentence of 12 months or less to vote in Scottish Parliament and local government elections.

The current voting ban in section 3A(3) of the 1983 Act is a general automatic disenfranchisement of detained forensic mental health patients. A discernible and sufficient link is required between the sanction and the conduct and circumstances of the individual concerned. The current ban prevents forensic mental health patients from voting where mental health patients detained under civil orders and prisoners would be able to vote in analogous circumstances, as provided for following the Scottish Elections (Franchise and Representation) Act 2020. As such, the Scottish Government considers it appears section 3A(3) of the 1983 Act is in breach of A3P1 and Article 14 of the ECHR.

2 See for instance *X v Mental Health Tribunal for Scotland* [2022] CSOH 78

Legislative change is required to deal with this incompatibility of the franchise. Following the necessary policy and legal analysis of the detailed circumstances provided for, a Compliance Order under section 12 of the Convention Rights (Compliance) (Scotland) Act 2001 which is made under the urgent procedure is the most appropriate mechanism to deliver a solution which is workable to allow for election administration in time for the general election to the Scottish Parliament on 7 May 2026. The modifications to the existing law made by the Order are temporary as the Order is time-limited and will expire on 28 February 2030. The Scottish Government would also plan to bring forward a Bill in the next Session of Parliament to give the Parliament the opportunity to consider the issues more fully and in light of further consultation.

Under the urgent procedure the Order will come into force on the day on which it is made. This is considered necessary in order to allow preparations to be made to permit newly enfranchised persons to exercise the right vote in the election on 7 May 2026. Once the change is in force, the Electoral Commission will commence work on guidance and changes to forms in order to facilitate the new voting rights. Electoral Registration Officers will also begin the process of ensuring that the newly enfranchised persons can register to vote. The deadline to register to vote ahead of the 7 May 2026 election is 20 April 2026. In addition, detained persons cannot vote in person and the standard deadlines for arranging a postal or proxy vote occur on 21 April and 28 April respectively, with applications for a proxy vote at the particular election remaining opening until 5pm on the date of the poll. Commencement as soon as possible will allow communications to voters to assist them with registering to vote and arranging a postal or proxy vote. As the Order will not apply to council by-elections prior to 7 May and Scottish Parliament by-elections cannot be called in the six months prior to a general election to the Scottish Parliament, commencement of the Order at the point it is laid is not expected to have any negative impact.

Therefore, the Scottish Ministers consider that there are compelling reasons for making an Order under section 12 of the 2001 Act as distinct from taking any other action.