SCOTTISH STATUTORY INSTRUMENTS

2020 No. 297

REPRESENTATION OF THE PEOPLE

The Scottish Elections (Details to appear on Election Material) Regulations 2020

Made - - - -	*24th September 2020*
Laid before the Scottish Parliament	*28th September 2020*
Coming into force - -	*7th December 2020*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 143(6) and section 156(5) of the Political Parties, Elections and Referendums Act 2000(**a**) ("the 2000 Act"), section 2(2) of the European Communities Act 1972(**b**) and all other powers enabling them to do so.

In accordance with section 143(6) of the 2000 Act, the Scottish Ministers have consulted the Electoral Commission.

Citation and commencement

1. These Regulations may be cited as the Scottish Elections (Details to appear on Election Material) Regulations 2020 and come into force on 7 December 2020.

Application

2.—(1) These Regulations apply to election material within the meaning of section 143 of the 2000 Act(**c**).

(2) These Regulations do not apply in relation to an election where the date of the poll is before 6 May 2021.

(**a**) 2000 c.41. The functions of the Secretary of State are, insofar as within devolved competence, transferred to the Scottish Ministers by section 9 of the Scotland Act 2016 (c.11) and section 53 of the Scotland Act 1998 (c.46) ("the 1998 Act").

(**b**) 1972 c.68 ("the 1972 Act"). The 1972 Act was repealed by section 1 of the European Union (Withdrawal) Act 2018 (c.16) ("the 2018 Act") with effect from exit day (see section 20 of the 2018 Act), but saved, subject to modifications, until IP completion day by section 1A of that Act. Section 1A of the 2018 Act was inserted by the European Union (Withdrawal Agreement) Act 2020 (c.1) ("the 2020 Act"), and defines "IP completion day" by reference to section 39(1) to (5) of the 2020 Act. Section 2(2) was amended by the 1998 Act, schedule 8, paragraph 15(3) (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c.51) ("the 2006 Act")). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act and by the European Union (Amendment) Act 2008 (c.7) ("the 2008 Act"), section 3(3) and schedule 1, Part 1. Paragraph 1A of schedule 2 was inserted by section 28 of the 2006 Act and amended by Part 1 of the schedule of the 2008 Act and S.I. 2007/1388. The functions conferred upon the Minister of the Crown under section 2(2), insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act. Section 2(2) is relevant to regulations 9 to 12.

(**c**) Section 143(11) provides that "election material" has the meaning given by section 143A. The definition of election material in section 143(11) was substituted by section 26(11)(b) of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (c.4) ("the 2014 Act"). Section 143A was added by section 26(12) of the 2014 Act.

Interpretation

3. In these Regulations—

"address" means postal address,

"the 1983 Act" means the Representation of the People Act 1983(**a**),

"the 2000 Act" means the Political Parties, Elections and Referendums Act 2000,

"the 2015 Order" means the Scottish Parliament (Elections etc.) Order 2015(**b**),

"EEA state" means a state which for the time being is a member State of the European Union or a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992(**c**), together with the Protocol adjusting that Agreement signed at Brussels on 17 March 1993(**d**), as modified or supplemented from time to time,

"information society service" has the meaning given in Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market(**e**),

"information society service provider" means a person providing an information society service,

"recipient" means a person who (whether for professional purposes or not) uses an information society service, in particular for seeking information or making it accessible,

"relevant offence" means an offence under section 143(9) of the 2000 Act (details to appear on election material).

Circumstances in which election material is to be taken as published

4. For the purposes of these Regulations, election material is published where it is transmitted to the public at large, or any section of the public via the internet and is presented in text format or in another format which contains text.

Details to appear on election material

5. Material to which section 143(1)(b) of the 2000 Act (details to appear on election material) applies is not to be published, in relation to an election mentioned in regulation 6, unless it includes the following details—

(a) the name and address of the promoter(**f**) of the material, and

(b) the name and address of any person on behalf of whom the material is being published (and who is not the promoter).

Elections to which regulation 5 applies

6. The elections are—

(a) Scottish Parliamentary general elections,

(b) elections held under section 9 of the Scotland Act 1998 (constituency vacancies),

(c) local government elections in Scotland.

(**a**) 1983 c.2.
(**b**) S.S.I. 2015/425.
(**c**) Command Paper 2073 and OJ L 1, 3.1.1994, p.3.
(**d**) Command Paper 2183 and OJ L 1, 3.1.1994, p.572.
(**e**) OJ L 178, 17.7.2000, p.1. The Directive has been incorporated into the EEA agreement by Decision 91/2000 of the EEA Joint Committee (OJ L 7, 11.1.2001, p.13). Article 2(a) defines "information society services" to mean "services" within the meaning of Article 1(2) of Directive 98/34/EC (OJ L 204, 21.7.1998, p.37) as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p.18) which provides that it is any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.
(**f**) "the promoter" has the same meaning as in section 143(11) of the Political Parties. Elections and Referendums Act 2000 (c.41).

Circumstances in which regulation 5 does not have to be complied with

7.—(1) Regulation 5 does not apply to the publication of election material if the material—

(a) is published by an individual other than a relevant person,

(b) expresses the individual's personal opinion, and

(c) is published on the individual's own behalf on a non-commercial basis.

(2) In regulation 7(1)(a), a "relevant person" means—

(a) a person who is a candidate at the election,

(b) a person who holds a relevant elective office (within the meaning of paragraph 1(8) of schedule 7 of the 2000 Act(**a**) (operation and interpretation of schedule)),

(c) a person who is an officer of any registered party, namely—

(i) the registered leader under section 24(1) of the 2000 Act (office-holders to be registered),

(ii) the registered nominating officer under section 24(1) of the 2000 Act (office-holders to be registered),

(iii) the registered treasurer under section 24(1) of the 2000 Act (office-holders to be registered),

(iv) where a registered party is a party with accounting units—

(aa) the registered treasurer of any accounting unit under section 27(2)(a) of the 2000 Act(**b**) (financial structure of registered party: accounting units), or

(bb) another person who is an officer of the unit registered for the purposes of section 27(3) of the 2000 Act (financial structure of registered party: accounting units),

(v) a registered campaigns officer under section 25(1) of the 2000 Act(**c**) (parties with campaigns officers),

(vi) a deputy campaigns officer appointed under section 25(4) of the 2000 Act (parties with campaigns officers),

(vii) a deputy treasurer appointed under section 74(1) of the 2000 Act (officers of registered party with responsibility for campaign expenditure),

(d) a person who is an election agent appointed—

(i) under article 32 of the 2015 Order (appointment of election agent), or

(ii) under section 67(1) of the 1983 Act (appointment of election agent),

(e) a person who is a deputy election agent appointed—

(i) under article 33 of the 2015 Order (appointment of sub-agent), or

(ii) under section 68(1) of the 1983 Act(**d**) (nomination of sub-agent at parliamentary or authority elections),

(f) a responsible person in relation to a recognised third party within the meaning of section 85(7) of the 2000 Act(**e**) (controlled expenditure by third parties).

(**a**) Paragraph 1(8) of schedule 7 was amended by S.I. 2004/366 and S.I. 2012/1917.
(**b**) Section 27(2)(a) was amended by paragraph 141 of part 7 of schedule 1 of the Electoral Administration Act 2006 (c.22).
(**c**) Section 25 was amended by paragraphs 4(3)(a) and (b) of schedule 6 of the Recall of MPs Act 2015 (c.25).
(**d**) Section 68(1) was amended by paragraph 13(2) of schedule 3 of the Greater London Authority Act 1999 (c.29).
(**e**) Section 85(7) was amended by section 32(7) of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (c.4). Section 88(1) of the Political Parties, Elections and Referendums Act 2000 (c.41) specifies when a third party is recognised for the purposes of Part 6 of the Act.

Consideration of election material regarded as promoting or procuring the electoral success of two or more candidates in a party

8.—(1) For the purposes of regulation 5(b), election material to which paragraph (2) applies—

(a) is not to be taken as being published on behalf of a candidate merely because it can be regarded as promoting or procuring their electoral success, but

(b) may be regarded as being published on behalf of the party mentioned in paragraph (2).

(2) This paragraph applies to election material which can be reasonably regarded as promoting or procuring the electoral success of two or more candidates standing in the name of a party or included in a list of candidates submitted by the party in connection with the election.

Information society services: restriction on institution of proceedings against a non-UK service provider

9.—(1) Proceedings for a relevant offence are not to be instituted against an information society service provider who is established in an EEA state other than the United Kingdom unless the derogation condition is satisfied.

(2) The derogation condition is satisfied where the institution of proceedings—

(a) is necessary for the purposes of the public interest objective,

(b) relates to an information society service that prejudices that objective or presents a serious and grave risk of prejudice to it, and

(c) is proportionate to that objective.

(3) In paragraph (2) the "public interest objective" means public policy, in particular the prevention, investigation, detection and prosecution of a relevant offence.

Information society services: exception for mere conduit

10.—(1) Where an information society service provider provides so much of an information society service as consists in—

(a) the provision of access to a communication network, or

(b) the transmission in a communication network of information provided by the recipient of the service,

anything done by the provider in providing that part of the service is not to result in the commission of the relevant offence.

(2) Paragraph (1) applies only if the provider does not—

(a) initiate the transmission,

(b) select the recipient of the transmission, or

(c) select or modify the information contained in the transmission.

(3) For the purposes of paragraph (1), the provision of access to a communication network, and the transmission of information in a communication network, includes the automatic, intermediate and transient storage of the information transmitted so far as the storage is solely for the purpose of carrying out the transmission in the network.

(4) Paragraph (3) does not apply if the information is stored for longer than is reasonably necessary for the transmission.

Information society services: exception for caching

11.—(1) Where an information society service provider provides so much of an information society service as consists in the transmission in a communication network of information provided by a recipient of the service, anything done by the provider in connection with the automatic, intermediate and temporary storage of information so provided is not to result in the commission of the relevant offence if—

(a) the storage of the information is solely for the purpose of making more efficient the onward transmission of the information to other recipients of the service at their request, and

(b) the condition in paragraph (2) is satisfied.

(2) The condition is that the provider—

(a) does not modify the information,

(b) complies with such conditions as are attached to having access to the information, and

where paragraph (3) applies, expeditiously removes the information or disables access to it.

(3) This paragraph applies if the provider obtains actual knowledge that—

(a) the information at the initial source of the transmission has been removed from the network,

(b) access to it has been disabled, or

(c) a court or administrative authority has required the removal from the network of, or the disablement of access to, such information.

Information society services: exception for hosting

12.—(1) Where an information society service provider provides so much of an information society service as consists in the storage of information provided by a recipient of the service, anything done by the provider in providing that part of the service is not to result in the commission of the relevant offence if—

(a) the information society service provider had no actual knowledge when the information was provided that its provision amounted to commission of the relevant offence, or

(b) on obtaining actual knowledge that the provision of the information amounted to commission of the relevant offence, the information society service provider expeditiously removed the information or disabled access to it.

(2) Paragraph (1) does not apply if the recipient of the service is acting under the authority or control of the information society service provider.

GRAEME DEY
Authorised to sign by the Scottish Ministers

St Andrew's House,
Edinburgh
24th September 2020

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision in relation to details which must appear on election material in terms of section 143(1)(b) of the Political Parties, Elections and Referendums Act 2000 ("the 2000 Act")."Election material" has the meaning given by section 143A of the 2000 Act. Section 143(1)(a) of the 2000 Act already makes provision in this regard in relation to certain types of printed documents. These Regulations make provision, which applies to Scottish local government and Scottish Parliament elections, in relation to "other material".

Regulation 4 defines the circumstances in which election material is published for the purposes of these Regulations. Regulation 5 provides that material to which section 143(1)(b) of the 2000 Act applies is not to be published, in relation to those elections listed in regulation 6 , unless it includes the name and address of the promoter (the person who causes the material to be published) and any other person on behalf of whom the material is being published.

Regulation 7(1) provides that regulation 5 does not apply to the publication of election material which is published by an individual other than a "relevant person", expresses the individual's personal opinion and is published on the individual's own behalf and on a non-commercial basis. Regulation 7(2) defines "relevant person".

Regulation 8 provides that material which can reasonably be regarded as promoting or procuring the electoral success of two or more candidates of the same party is not to be taken as being published on behalf of a particular candidate (for the purposes of regulation 5(b)) merely by reason of that fact but may be regarded as being published on behalf of the party.

By virtue of section 143(9) of the 2000 Act, an offence is committed where material to which these Regulations apply is published in contravention of the requirements set out in these Regulations. Either the promoter of the material or any other person by whom the material is published, within the meaning of these Regulations, can be found guilty of the offence ("the relevant offence").

Regulations 9 to 12 make provision in relation to the circumstances in which making facilities available in connection with electronic communication or the storage of data is, or is not, to result in the commission of the relevant offence. They also ensure compliance with Directive 2000/31/EC on certain legal aspects of information society services in the Internal Market (OJ L 178, 17.7.2000, p.1) ("the Directive").

Regulation 9 provides that proceedings for the relevant offence cannot be taken against an information society service provider based in another EEA state, in respect of anything done by the provider in providing that service, unless the derogation condition is met. This ensures that the relevant offence, as applied to material falling within these Regulations, complies with Article 3(2) and (4) of the Directive.

Regulations 10 to 12 specify circumstances involving mere conduit, caching and hosting of information society services which are not to result in the commission of the relevant offence. These ensure that the relevant offence, as applied to material falling within these Regulations, complies with Articles 12 to 14 of the Directive.

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