POLICY NOTE

THE SCOTTISH ELECTIONS (DETAILS TO APPEAR ON ELECTION PUBLICATIONS) REGULATIONS 2020

SSI 2020/298

1. The above instrument was made in exercise of the powers conferred by section 110A(7) and section 201(3) of the Representation of the People Act 1983 ("the 1983 Act"), article 72(7) of the Scottish Parliament (Elections etc.) Order 2015 ("the 2015 Order"), section 2(2) of the European Communities Act 1972 ("the 1972 Act") and all other powers enabling them to do so.

2. The instrument is subject to negative procedure. This procedure applies in accordance with section 110A(10) of the 1983 Act and article 72(15) of the 2015 Order and in terms of section 2(2) and paragraph 2(2) of schedule 2 of the 1972 Act because the regulations do not amend primary legislation or create a new criminal offence.[1]

Summary Box

These Regulations will introduce controls around online campaigning at Scottish Parliament and Scottish local government elections by requiring an imprint to be included on all online campaign publications which promote or procure the election of a candidate at either of these elections. These controls mirror those already in place for printed election material which fall within these categories.

In order to encourage free participation in the electoral debate, an exemption to the requirement for an imprint has been include for material which only expresses an individual's personal opinion and is published on their own behalf and on a non-commercial basis. This personal opinion exemption does not extend to direct participants in elections such as the candidates and their agents.

3. This instrument and policy note should be read in conjunction with the Scottish Elections (Details to appear on Election Material) Regulations 2020, and their associated policy note, which introduce similar requirements for material which is intended to promote one or more particular parties, one or more parties who advocate (or who do not advocate) particular policies or candidates who hold (or who do not hold) particular opinions or support particular policies at either a Scottish Parliament or local government election.

Policy Objectives

4. Article 72 of the 2015 Order and section 110A of the 1983 Act make provision that requires certain types of printed election material to include an imprint (i.e. the name and address of the printer of the document, the name and address of the "promoter" of the material and the name and address of any person on behalf of whom the material is being

1 References to annulment in pursuance of either House of Parliament in terms of the 1972 Act are to be read as a reference to the Scottish Parliament by virtue of section 118(2) of the Scotland Act 1998.

published). However, this requirement does not extend to other material, including online material, which is not specified in either article 72 or section 110A.

5. Online campaigning is increasingly becoming the main method of campaigning at electoral events, particularly for political parties. The Electoral Commission has pressed for restrictions to be introduced to ensure that voters are made aware of the person on whose behalf online material is being published, so that they can make an informed judgement on the content. The Electoral Commission has also recommended that the requirement to provide digital imprint details should not extend to material which only expresses an individual's personal opinion and which is published on their own behalf on a non-commercial basis. The Commission also recommended that the personal opinion exemption should not extend to direct participants in an election such as the candidates or their agents.

6. These regulations provide that election material which is transmitted via the internet, which includes social networking services such as Twitter, and is presented in text form or in another form which contains text should not be published unless it includes the names and postal addresses, which can include a PO Box, of the persons who are causing the material to be published and on whose behalf the material is being published. Election material is defined in article 72 of the conduct order and section 110A of ROPA as being material which can reasonably be regarded as intended to promote or procure the election of a candidate at a Scottish Parliament or Scottish local government election respectively

7. There are exceptions to the requirement to include an imprint for material which is published by an individual, expresses their own personal opinion and is published on their own behalf with no payment involved or where the material cannot reasonably be regarded as campaign material promoting or procuring a particular outcome at the election. These exceptions from the online imprint requirement are designed to reflect that individuals are more likely to participate in online debate rather than through printed material, due to the time and cost associated with producing printed materials.

8. Including an exemption on personal opinion will ensure that individuals who wish to take part in the election debate (e.g. by commenting on matters on their own social media accounts) on a non-commercial basis would not be required to give their name and address on such communications.

9. However, it is recognised that some people, whilst being "individuals" also have a vested interest in the outcome of an election. Therefore any individual who is also a registered campaigner, or who spent money to create campaign materials, would be required to include an imprint, in the same way as though it were printed material. This will promote voter awareness and involvement at elections and ensure that campaigning at elections is properly regulated. Those who will not be able to claim exemption from the imprint requirement are:

- A candidate at the election;
- A person who holds a relevant elective office, which includes the following individuals:

    - member of the House of Commons;
    - member of the Scottish Parliament;
    - member of the National Assembly for Wales;
    - member of the Northern Ireland Assembly;
    - police and crime commissioner;
    - member of any local authority in any part of the United Kingdom, including the Common Council of the City of London but excluding a parish or community council;
    - member of the Greater London Assembly;
    - Mayor of London or elected mayor within the meaning of Part II of the Local Government Act 2000;
- An officer of any registered political party;
- An election agent or deputy election agent;
- A responsible person in relation to a recognised third party for the election.

10. Candidates, MPs and local councillors etc. will not be exempted from the imprint requirement as they are political entities and any online activity by them is likely to be in support of their party's candidates' or their party's political objectives and therefore the possibility of bias should be made clear to the reader. Similarly, political party office holders' online activity is likely to support their party's candidates and therefore this should be made clear in their online postings.

11. If any material covered by these regulations fails to meet the requirements contained in these regulations, then the promoter of the material and any other person by whom the material is published may be guilty of an offence. The regulations also 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 an offence. This limits the potential liability of intermediaries such as internet service providers and ensures compliance with Directive 2000/31/EC on certain legal aspects of information society services in the Internal Market (known as "the E-Commerce Directive"). The offences and penalties associated with online campaigning are the same as those which already apply to the publishing of printed materials at an election.

Consultation

12. In accordance with the requirements of article 72(7) of the conduct order, these measures have been prepared in discussion with the Electoral Commission.

13. Wider consultation did not occur, due to the restricted effect of the changes and because the overall policy (the inclusion of imprints on online publications) has already been subject to parliamentary scrutiny and agreement during the parliamentary process for Referendums (Scotland) Act 2020.

Impact Assessments

14. No equality, business and regulatory or child rights issues arise to require an Equality Impact Assessment, Business and Regulatory Impact Assessment or Child Rights and Wellbeing Impact Assessment.

15. The Order has the effect of requiring those who participate in political campaigning to add the name and address of the persons who cause the material to be published and on

behalf of whom the material is being published. The changes do not directly affect anyone other than those who choose to participate in political campaigning.

Financial Effects

16. 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.

Scottish Government
Directorate for Constitution and Cabinet

September 2020