EXPLANATORY MEMORANDUM TO

THE SCOTTISH PARLIAMENT (ELECTIONS ETC.) ORDER 2010

2010 No. 2999 (S. 9)

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. Purpose of the instrument

2.1 The Order provides for the conduct of elections for membership of the Scottish Parliament. It updates and consolidates the existing provisions on conduct of such elections contained in the Scottish Parliament (Elections Etc.) Order 2007 (as amended) ("the 2007 Order"). It applies, with modifications, provisions relating to parliamentary elections including changes made by the Electoral Administration Act 2006 and the Political parties and Elections Act 2009.

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

3.1 Other than the point in paragraph 6, none.

4. Legislative Context

4.1 This Order replaces the 2007 Order. It makes provision equivalent to that which applies to the conduct of Westminster parliamentary elections, but adapted to fit the electoral system for the Scottish Parliament. Provisions in the Order are therefore similar to those of the Representation of the People Act 1983 and the Representation of the People (Scotland) Regulations 2001 which are applied by the order with the necessary modifications.

4.2 In terms of the Scotland Act, the next ordinary general election to the Scottish Parliament is to take place on 5 May 2011. This Order is to be made so that the election is run under substantially consolidated legislation, updated (where relevant) to reflect the changes that have been made to the provisions which govern the conduct of Westminster parliamentary elections. It takes into account changes made by the Electoral Administration Act 2006, the Political Parties and Elections Act 2009 and the Representation of the People (Scotland)(Amendment) Regulations 2010. In his statement to the House of Commons welcoming the publication of the Gould report into the conduct of the May 2007 elections, Secretary of State for Scotland, Des Browne, indicated that he was minded to accept the recommendation it the report that the relevant legislation governing the elections should be consolidated (Hansard House of Commons Debates 23 October 2007: column 165). The decision to consolidate the legislation was confirmed in the Secretary of State's statement on 24 June 2008 (Hansard Written Ministerial Statements 24 June 2008: column 12ws).

4.3 When the draft of what became the Scottish Parliament (Elections etc.) Order 2009 was debated, Parliamentary Under Secretary of State for Scotland, Ann McKechin, indicated that a consolidating instrument would be introduced nearer the 2011 election date. (Hansard Delegated Legislation Committee 13 July 2009: column 9).

4.4 When Parliament was considering the terms of what became section 25 of the Political Parties and Elections Act 2009 (which transfers, for Westminster parliamentary elections, the function of post election storage of election documents from sheriff clerks to returning officers), HM Government indicated that equivalent provision for Scottish parliamentary elections would be made in this Order. This undertaking was repeated in the debate on the draft Representation of the People (Scotland) (Amendment) Regulations 2010 (Hansard Public Bill Committee 18 November 2008: column 285 and Hansard General Committee Debates 23 February 2010: column 3)

5. Territorial Extent and Application

5.1 This instrument applies to the all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Secretary of State for Scotland, Michael Moore MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Scottish Parliament (Elections etc.) Order 2010 are compatible with the Convention rights."

6.2 This statement differs from the statement made by the then Parliamentary Under Secretary of State for Scotland, David Cairns MP, in relation to the 2007 Order. That statement was qualified in relation to the equivalents of what are now articles 21(2) and 26(1) as they were to apply to the legal incapacities of convicted prisoners. The qualification was based on the government's understanding at that time that the Scottish Parliament was to be considered part of the "legislature" as that term is to be understood in the context of Article 3 of Protocol No. 1 (A3P1) to the Convention. On that basis it was the government's position when the 2007 Order was laid and debated that A3P1 applied to elections to the Scottish Parliament and those provisions of the Order would be incompatible with convention rights where they were applied to convicted prisoners excluded from the franchise by section 3 of the Representation of the People Act 1983. That understanding also underpinned the Secretary of State's concession before the Registration Appeal Court in *Smith v Scott* 2007 S.C. 345 that the Scottish Parliament was a "legislature" for the purposes of A3P1, a point which was not argued before the court in that case. The Registration Appeal Court accepted the position without comment. In *XY v Scottish Ministers* 2007 S.C. 631, the Inner House of the Court of Session proceeded on the basis that the Registration Appeal Court in *Smith v Scott* had held that the Scottish Parliament was a legislature. Once again, the point was not argued.

6.3 The scope of A3P1 is a live issue before the European Court of Human Rights (ECtHR) in the case of *Toner v United Kingdom* (application no. 8195/08), in which a decision is currently awaited. In that case the application of A3P1 to the Northern Ireland Assembly is under consideration, the government having been invited by the

ECtHR to make submissions on whether the Assembly is a legislature for the purposes of A3P1.

6.4 Therefore, having reviewed the matter and applied the ECtHR case of *Molka v Poland* (application no. 56550/00) to this issue, the government is of the view that, for the purposes of A3P1, the Scottish Parliament is not part of the "legislature" (as the term is to be understood in that context) and accordingly it is the government's position that A3P1 does not apply to Scottish parliamentary elections.

6.5 If the ECtHR's decision affects the government's position on the applicability of A3P1 to Scottish parliamentary elections, the Secretary of State will advise the Joint Committee as soon as possible after the decision is issued.

7. Policy background

7.1 This Order consolidates the amendments contained in the Scottish Parliament (Elections etc.) (Amendment) Order 2008 and the Scottish Parliament (Elections etc.) (Amendment) Order 2009.

7.2 Following consultation with the Electoral Commission, it has been decided not to consolidate the provisions contained in the Scottish Parliament (Elections etc.) (Amendment) Order 2007 which allowed the Electoral Commission to access the sealed ballot papers and other documents and records in connection with any review it has been asked to undertake by the Secretary of State. These provisions were required to allow Ron Gould to carry out his investigation on the problems with the Scottish Parliament elections in May 2007 and are no longer necessary. This Order revokes but does not consolidate those provisions.

7.3 The Scottish Parliament (Elections etc.) Order 2007 implemented some of the provisions contained in the Electoral Administration Act 2006, which received Royal Assent on 11 July 2006. This order implements the remaining provisions of that Act and also takes account of provisions contained in the Political Parties and Elections Act 2009 which affect the running of elections.

7.4 Apart from the consolidation of the 2008 and 2009 amendments to the 2007 Order, the main changes that have been made are:

- Article 5(2) (formerly article 6(2)) has been amended to reflect the provisions of sections 18A and 18B of the Representation of the People Act 1983 (introduced by section 16 of the Electoral Administration Act 2006) which set out the requirements for the review of polling districts and places.

- Article 36 applies to candidates at Scottish parliamentary elections (other than party list candidates) the regime for control of donations to candidates which applies to parliamentary elections by virtue of section 71A of the Representation of the People Act 1983 (introduced by section 130 of the Political Parties, Elections and Referendums Act 2000).

- Article 43 limits the expenses that may be incurred by or on behalf of candidates (other than party list candidates) in the pre-candidacy or "long campaign" period before a Scottish parliamentary general election. This reflects the position that applies to parliamentary general elections by virtue of section 76ZA of the

Representation of the People Act 1983 (as introduced by section 21 of the Political parties and Elections Act 2009).

- Article 47 (formerly article 46) incorporates the revised requirements for candidates' returns as to election expenses contained in section 81 of the Representation of the People Act 1983 (introduced by section 26 of the Electoral Administration Act 2006).

- Article 74 (formerly article 73) now reflects the requirements of section 110 of the Representation of the People Act 1983 (as amended by section 66 of the Electoral Administration Act 2006) in relation to the information which has to appear on election publications.

- Article 88 (formerly article 87) increases the "minimum period" between the dissolution of the Scottish Parliament and the day of poll from 21 to 28 days. This reflects the increase in the overall timetable for Scottish Parliament elections recommended in the Gould report.

- Paragraphs 1(3) and 2(5) of Schedule 1 have been amended to allow electoral registration officers to supply returning officers and other persons or organisations with a consolidated version of the register which takes account of any alterations as opposed to having to provide a copy of the original register and individual copies of the notices of alteration.

- Rule 1 of Schedule 2 provides the timetable for elections. There is no longer to be a separate timetable for by-elections.

- Rule 20 of Schedule 2 allows for minor errors on nomination forms to be corrected by either the constituency or regional returning officer. This reflects parliamentary election rule 14A (inserted by section 19 of the Electoral Administration Act 2006).

- Rule 48(3)(b) of Schedule 2 has been amended to also allow grandparents or grandchildren to assist a person with disabilities to vote at a polling station.

- Rule 49(7) of Schedule 2 now requires the voter to sign the tendered votes list. This is in line with rule 40(3) of the Parliamentary election rules (as amended by paragraph 81(3) of schedule 1 to the Electoral Administration Act 2006).

- Rules 69 to 71 of Schedule 2 and paragraph 30 of Schedule 4 have been amended to reflect the transfer of responsibility for the storage of election documents from sheriff clerks to constituency returning officers. Similar changes were made in respect of the UK parliament election documents by section 25 of the Political Parties and Elections Act 2009.

- Rules 72 to 78 of Schedule 2 have been updated to reflect the revised provisions around the death of a candidate during the election period which were introduced by section 24 of the Electoral Administration Act 2006.

- Rule 79 of Schedule 2 has been amended to specify what information on members should be entered in the Scottish Parliament's returns book and to restrict the

availability of the returns book for public inspection to the life of the Parliament or to such later as the Presiding Officer of the Scottish Parliament may direct.

- Paragraph 10 of Schedule 3 has been amended to include a requirement for the electoral registration officer to inform a proxy that they have been appointed and the length of their appointment.

- Paragraphs 16 to 21 of Schedule 3 provide for limited access to, and supply of copies of, absent voting records (such as the postal voters list), for candidates and political parties, elected representatives as well as public inspection of those records under supervision. These reflect the position for UK parliamentary elections under the Representation of the People (Scotland) Regulations 2001.

- Paragraph 5(5) of Schedule 4 has been amended to allow the returning officer to determine which of a candidate's proposed agents are to be appointed for the purpose of attending the postal voting proceedings if the list submitted by the candidate contains more names than authorised by the returning officer.

7.5 In addition the opportunity has been taken to make the order more 'readable' by including additional descriptions in parenthesis where references are made to other statutory provisions and also to modernise the language used in the order.

8. Consultation outcome

8.1 Representatives from the Society of Local Authority Lawyers and Administrators in Scotland, Society of Local Authority Chief Executives and Senior Managers, Association of Electoral Administrators, Scottish Assessors Association and the Electoral Commission were fully involved in the consideration of amendments to the 2007 order.

8.2 The Presiding Officer of the Scottish Parliament was consulted on the changes to the returns book and the increase in the "minimum period" for the dissolution of Parliament.

8.3 In accordance with section 7(1) and (2)(g) of the Political Parties, Elections and Referendums Act 2000, the Electoral Commission have been consulted on the Order. The Commission have made a number of observations which were considered when finalising the Order.

9. Guidance

9.1 The Electoral Commission has the responsibility for providing guidance to returning officers and others on the conduct of elections. The Commission will be updating its guidance as part of its normal preparations for the 2011 Scottish Parliament general election.

9.2 The Scotland Office meets regularly with electoral administrators and will provide any advice that is required.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is limited to changes to the rules that Returning Officers and Electoral Registration Officers must apply when dealing with Scottish Parliament elections.

10.3 An Impact Assessment has not been prepared for this instrument as these changes will have no impact on the private or voluntary sector.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Scottish Parliament election rules are monitored by the Scotland Office and the Electoral Commission. Any recommendations for changes to the rules will form part of the Commission's report on the conduct of Scottish parliamentary general and by-elections.

13. Contact

Roddy Angus at the Scotland Office can answer any queries regarding the instrument.

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