

SCOTTISH ELECTIONS (FRANCHISE AND REPRESENTATION) ACT 2020

EXPLANATORY NOTES

THE STRUCTURE AND SUMMARY OF THE ACT

5. The Act consists of 13 sections and a schedule which are largely modifications of existing electoral law, in particular the Local Government (Scotland) Act 1973 (“the 1973 Act”), the Representation of the People Act 1983 (“the 1983 Act”), the Scotland Act 1998 (“the 1998 Act”) and the Representation of the People Act 2000 (“the 2000 Act”).
6. Changes to secondary legislation required to enable proxy and postal voting by prisoners enfranchised under the Act are set out in the schedule introduced by section 10.
7. Other changes to statutory instruments required to facilitate proxy and postal voting by foreign nationals enfranchised by the Act will be made through secondary legislation under powers set out in existing legislation.

Part 1 – Foreign Nationals

Section 1 - Voting by qualifying foreign nationals

8. Section 1 of the Act makes a number of amendments to the 1983 Act in respect of the franchise for local government elections in Scotland. The overall effect is to extend the category of those able to register to vote in local government elections in Scotland to citizens of all countries who are resident in Scotland and have leave to remain in the UK (section 11 of the 1998 Act provides that the franchise for local government elections in Scotland also applies at Scottish Parliament elections). Subsections (2) to (8) insert the new category of voter of “qualifying foreign national” into various provisions of the 1983 Act dealing with registration of electors for local government elections. This category is defined by subsection (9), which makes an addition to subsection (1) of section 202 (the interpretation section) of the 1983 Act.
9. The insertion of “qualifying foreign national” into these provisions of the 1983 Act expands the franchise beyond those foreign nationals currently entitled to vote as an elector at local government elections in Scotland (and Scottish Parliament elections) (by virtue of section 2(1)(c) of the 1983 Act). As a result, paragraph (a) of the definition of “qualifying foreign national,” inserted into section 202 of the 1983 Act excludes Commonwealth citizens and citizens of the Republic of Ireland from the definition of “qualifying foreign national”, since these categories are already eligible to register to vote at those elections. Citizens of other European Union countries will potentially fall within the definition of “qualifying foreign national” and the category of “relevant citizen of the Union” is removed as regards Scottish local government electors. These EU Citizens will in require on the commencement of this section to fall within the definition of “qualifying foreign national” in order to vote as a Scottish local government elector. Paragraph (b)(i) and (ii) of the definition of “qualifying foreign

national” in subsection (9) provides that the new, additional category of “qualifying foreign national” means someone who does not require leave to enter or remain in the United Kingdom under the Immigration Act 1971 or who has, or is to be treated as having, any such leave. The extent of the period of leave to remain under paragraph (b) (ii) is not relevant: any period of leave will suffice to permit registration.

Section 2 - Scottish parliamentary elections: nomination, election and holding office

10. Section 2 of the Act amends section 16 of the 1998 Act to remove the disqualification applied to certain foreign nationals in relation to membership of the Scottish Parliament by virtue of the Act of Settlement 1700 (which allows UK, Irish and Commonwealth citizens to stand in UK Parliamentary elections (and, by virtue of section 16, Scottish Parliament elections)). Subsection (2) of section 16 currently enables citizens of the European Union resident in the United Kingdom to become members of the Scottish Parliament (subject to any other disqualification such as age). This separate provision in respect of EU nationals is repealed by section 2(a).
11. New subsection (2A), inserted into section 16 of the 1998 Act by this section, will effectively allow, subject to certain conditions, all foreign nationals to stand as candidates, to be nominated for election and to hold office in the Scottish Parliament. Sub-paragraph (a) requires the person to be resident in the United Kingdom. Sub-paragraph (b) requires the person to have indefinite leave to remain in the UK or pre-settled status. This new category of candidate will be subject to the existing restrictions on candidature which already apply to the existing categories of candidates.

Section 3 - Local government elections: nomination, election and holding office

12. Section 3 of the Act makes a number of amendments to section 29 of the 1973 Act in regard to allowing a “qualifying foreign national” (as defined in the definition inserted by subsection (4)), to be nominated for election and holding office as a member of a local authority in Scotland. The definition of “qualifying foreign national” for these purposes means a person who does not require leave under the Immigration Act 1971 to enter or remain in the United Kingdom, is to be treated as having indefinite leave to remain in the UK or has pre-settled status. The existing qualifications for nomination, election and holding office as a member of a local authority will apply to such foreign nationals as they currently apply to qualifying Commonwealth citizens and citizens of the Republic of Ireland.

Part 2 – Persons Who Have Received a Severance Payment Within the Meaning of Section 12 of the Local Governance (Scotland) Act 2004

Section 4 – Repeal of disqualification for nomination, election and holding office as member of a local authority

13. Section 4 of the Act repeals section 29(1A) of the 1973 Act, which was inserted by section 12(4) of the Local Governance (Scotland) Act 2004 (“the 2004 Act”). This removes the disqualification for nomination, election and holding office as a member of a local authority in Scotland for persons who received a severance payment within the meaning of section 12 of the 2004 Act.

Part 3 - Prisoners Etc.

14. Part 3 of the Act extends the franchise in Scottish Parliament and local government elections to some convicted persons. It applies to convicted persons in penal institutions, including those in young offender institutions.

Section 5 – Voting by convicted persons sentenced to terms of 12 months or less

15. Section 5 amends section 3 of the 1983 Act to provide an exception to the existing universal prohibition on “convicted persons” detained within a “penal institution” voting at any election in the UK. Section 3(2) of the 1983 Act defines a “convicted person” and a “penal institution” for the purposes of that prohibition.
16. Section 5(2) of the Act adds a reference to subsection (1) of section 3 of the 1983 Act to introduce the exception inserted by section 5(3) of the Act.
17. Section 5(3) of the Act inserts two new subsections into the 1983 Act. New subsection (1A) permits prisoners who have been sentenced to a term of imprisonment not exceeding 12 months to vote in Scottish local government elections. New subsection (1B) makes provision for prisoners serving consecutive or concurrent sentences which in total do not exceed 12 months. This applies where a person receives more than one sentence on the same occasion; or where a person is sentenced on separate occasions but is not released (other than on temporary release) for any period between the first occasion of sentencing and the last. For example, a person sentenced (at the same time) to a six month sentence and a seven month sentence, to be served concurrently, would be regarded for the purposes of this section as serving a total term of seven months and would therefore be covered by new subsection (1A). A prisoner sentenced to two sentences of seven months that are to run consecutively would not be able to vote whilst in prison, as for the purposes of the section they would be considered to be serving a single term of 14 months.
18. Section 11 of the 1998 Act provides that the franchise for local government elections in Scotland also applies at Scottish Parliament elections. Additionally, it is used for national park elections (Schedule 1 of the National Parks (Scotland) Act 2000). As a result of the changes to section 3 of the 1983 Act, prisoners who have been sentenced to a term of imprisonment not exceeding 12 months will also be able to vote in Scottish Parliament and national park elections.

Section 6 – Review of operation of section 5

19. Section 6 places a duty on the Scottish Ministers to undertake a review of the operation of section 5 of the Act, with a view to considering whether the sentence threshold for prisoner voting expressed in section 3(1A) of the 1983 Act is appropriate. In carrying out the review, the Scottish Ministers must consult such persons as they consider appropriate. The Scottish Ministers must publish a report on that review and lay a copy before the Scottish Parliament no later than 4 May 2023.

Section 7 - Residence of convicted persons in prison etc.: uninterrupted residence

20. Section 7 adds a new section to the 1983 Act - section 7AA. Subsection (2) of section 7AA defines circumstances in which, for the purposes of electoral registration, a convicted person’s residence is deemed not to have been interrupted by their detention in a penal institution. The convicted person is considered still to be a resident, and therefore able to register to vote with reference to an address, if they intend to return to that address on release from prison and will not be prevented from doing so by an order of any court. Alternatively, a convicted person is considered still to be resident, and therefore able to register to vote with reference to an address, where the address serves as a permanent place of residence (for the convicted person alone or with other persons) and the convicted person would be in actual residence there if it were not for their detention. The practical effect is that a prisoner is effectively granted an absent vote at the home address at which they were resident before being detained.

Section 8 - Residence of convicted persons in prison etc.: notional residence

21. Section 8 amends several sections of the 1983 Act that deal with the situation of a prisoner who is eligible to register to vote but who is not entitled to be registered by

virtue of residence (including by virtue of new section 7AA) at any place other than the penal institution at which they are detained.

22. Subsection (2) makes a number of amendments to section 7B of the 1983 Act. New subsection (2D) allows convicted persons enfranchised by the Act to register to vote via a declaration of local connection. A declaration of local connection must state, amongst other things, a “required address” (as defined in section 7B(4)). Prisoners may need to register via declaration of local connection if they do not have a fixed abode or are prohibited from returning to their previous registered address.
23. New paragraph (d) of subsection (4) is added to section 7B of the 1983 Act to define the required address which a convicted person must specify in making a declaration of local connection. It is intended that the prisoner will not be listed on the electoral register as being registered at a particular address but will be listed as registered within the relevant ward or constituency. In the first instance, prisoners should register with reference to an address where they would be residing but for their detention. If that is not possible, they can register with reference to an address at which they were resident immediately before being detained (this includes the address of, or which is nearest to, a place in Scotland where the person commonly spent a substantial part of their time if they had been homeless immediately before being detained) but it cannot be the address of a penal institution. If neither of these are possible, or the prisoner could only give an address from which they are prevented from residing at because of an order of any court, a prisoner can register to vote by a declaration of local connection with reference to the prison as the “required address.” However, a person cannot specify the prison as the “required” address if they have a home outwith Scotland or would otherwise not be resident in Scotland but for their detention. This is to ensure that only a prisoner with a connection to Scotland can specify the prison as the “required address” for the purpose of making a declaration of local connection.

Section 9 - Method of voting by convicted persons at local government elections

24. Section 9 sets out the manner by which a prisoner may cast their vote by making a number of amendments to schedule 4 of the 2000 Act. A prisoner may apply to vote by post or they may appoint a proxy to cast their vote on their behalf. Applications to vote by post or proxy will be subject to the same restrictions which apply to other voters. No provision is being made to allow for prisoners to cast their votes in person at polling stations within prison premises (or elsewhere) due to the security and practical difficulties of making such arrangements. Section 9(4) makes an amendment to paragraph 6 of schedule 4 of the 2000 Act to provide that a prisoner to whom new subsection 3(1A) of the 1983 Act applies will not be capable of acting as a proxy for another elector.
25. The provisions in schedule 4 of the 2000 Act refer only to local government elections. Equivalent provision for Scottish Parliament elections is made in Part 2 of the [Scottish Parliament \(Elections etc.\) Order 2015](#) (the “2015 Order”). An equivalent change is made to the 2015 Order in paragraph 2 of the schedule of the Act added by section 10 referred to in paragraph 26 below.

Section 10 – Consequential modifications

26. Section 10 introduces the schedule of modifications to secondary legislation in relation to prisoner voting (see paragraphs 30 to 32 below).

Part 4 – Final Provisions

Section 11 - Ancillary provision

27. Section 11 enables the Scottish Ministers by regulations to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Act

or any provision made under it. Subsection (2) provides that regulations under this section may make different provision for different purposes or modify any enactment (including the Act). Subsection (3) provides that regulations under subsection (1) which contain provision adding to, replacing or omitting any part of the text of an Act are subject to the affirmative procedure. Subsection (4) provides that otherwise, regulations under subsection (1) are subject to the negative procedure.

Section 12 – Commencement

28. Subsection (1) of section 12 provides that Parts 3 and 4 of the Act come into force on the day after Royal Assent. Subsection (2) provides that the rest of the Act comes into force on such day as the Scottish Ministers may by regulations appoint. Subsection (3) provides that regulations under this section may include transitional, transitory or saving provision and may make different provision for different purposes and that regulations under this section may appoint different days for different purposes.

Section 13 - Short title

29. Section 13 sets out the short title of this Act: the Scottish Elections (Franchise and Representation) Act 2020.

Schedule—Modifications of Enactments in Consequence of Part 3

30. Paragraph 1 of the schedule inserts a new regulation into the [Representation of the People \(Absent Voting at Local Government Elections\) \(Scotland\) Regulations 2007](#) (“the 2007 regulations”), which places additional requirements for applications for a proxy vote for a particular or indefinite period based on detention in a penal institution. New regulation 9A requires such an application to state that the applicant is eligible to vote by proxy on grounds relating to their detention in a penal institution and the name of the penal institution in which they are detained. Regulation 10 of the 2007 regulations is amended to create a requirement for an application by a prisoner to vote by proxy at a particular election to state that the applicant is eligible to vote by proxy on grounds relating to their detention in a penal institution and the name of the penal institution in which they are detained.
31. Paragraph 2 of the schedule amends article 7(6) of the 2015 Order to exclude a prisoner as a person who can vote at a polling station at a Scottish Parliamentary election. Article 8(3) is amended by paragraph 2(3) of the schedule to include a prisoner as a person eligible to vote by proxy at a Scottish Parliamentary election. A new paragraph (4A) is inserted into article 10 by paragraph 2(4) of the schedule to clarify that a prisoner cannot act as a proxy at a Scottish Parliamentary election.
32. Paragraph 2(5) of the schedule inserts a new paragraph (6A) into schedule 3 of the 2015 Order to create a requirement for applications for a proxy vote for a particular period or indefinite period based on detention in a penal institution to state that the applicant is eligible to vote by proxy on grounds relating to their detention in a penal institution and the name of the penal institution in which they are detained. A new sub-paragraph (7A) is added to paragraph 7 of schedule 3 of the 2015 Order to create a requirement for an application by a prisoner to vote by proxy at a particular Scottish Parliament election to state that the applicant is eligible to vote by proxy on grounds relating to their detention in a penal institution and the name of the penal institution in which they are detained.