

*These notes relate to the Health Boards (Membership and Elections)
(Scotland) Act 2009 (asp 5) which received Royal Assent on 22 April 2009*

HEALTH BOARDS (MEMBERSHIP AND ELECTIONS) (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1 – Constitution of Health Boards

9. This section amends Schedule 1 to the 1978 Act. That Schedule currently contains provision about the constitution of Health Boards. In particular, it contains provisions about the appointment of Health Board members (who are currently all appointed by the Scottish Ministers in accordance with this Schedule).
10. Subsection (2) substitutes a new paragraph for the existing paragraph 2 of Schedule 1 to the 1978 Act. New paragraph 2(1) specifies the three different types of member that will comprise a Health Board. These are—
 - “appointed members” (a chairman and other members appointed by the Scottish Ministers);
 - “councillor members” (councillors appointed by the Scottish Ministers following nomination by local authorities in the area of the Health Board); and
 - “elected members” (individuals elected as members of the Health Board at an election).
11. New paragraph 2(2) provides that regulations must specify, in respect of each Health Board in Scotland, the total number of members of the Board and the number of that total which is to be represented by each type of member. Those numbers may differ from Board to Board.
12. New paragraph 2(3) provides that (a) the total number of councillor members and elected members of a Health Board must amount to more than half the total number of members and (b) a Board must contain at least one councillor member from each local authority whose area is wholly or partly within the area of the Health Board. The regulations cannot specify numbers which would not be in accordance with those two conditions.
13. New paragraph 2(4) provides that these conditions do not apply during any period when an elected member or councillor member vacates office and the vacancy has not been filled. This ensures that in the event of a vacancy arising the Health Board will still be able to carry out its functions.
14. Subsection (3) amends paragraph 2A of Schedule 1 to the 1978 Act to ensure that it continues to be a requirement in the case of a prescribed Health Board that at least one of the appointed members must hold a post in a university with a medical or dental school. A “prescribed Health Board” is one which is prescribed in regulations as requiring a member holding one of these posts. Currently these are the Health Boards which have at least one university in their area with a medical or dental school.

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15. Subsection (4) amends paragraph 3 of Schedule 1 to the 1978 Act to ensure that it continues to be a requirement that appointed members may be appointed only after consultation with universities and other relevant organisations. It also removes the existing sub-paragraph (a) of paragraph 3 to remove the requirement to consult each local authority in the area of the Health Board concerned. This is because local authorities will have their own councillor members. Under the current arrangements, the Scottish Ministers would normally appoint at least one councillor to each Health Board. Existing paragraph 3(a) ensured that such an appointment could not be made without the local authority being consulted. New paragraph 2 of Schedule 1 now provides for local authorities to nominate the councillor member to be appointed.
16. Subsection (5) inserts new paragraph 3A into Schedule 1 to the 1978 Act. New paragraph 3A stipulates that a person appointed as chairman of a Health Board may not be an employee of that Health Board.
17. Subsection (6) inserts new paragraph 10A into Schedule 1 to the 1978 Act. New paragraph 10A(1) sets out the usual period that an elected member holds office for. Paragraph 10A(2) provides that an elected member vacates office if they become the holder of one of the public offices specified in the paragraph. Paragraph 10A(3) provides that regulations may specify further circumstances in which an elected member must vacate office before the end of the period that they normally hold office for and, in particular, may specify that an elected member must vacate office on becoming the holder of a post set out in a list of restricted posts maintained by the Health Board concerned for that purpose.
18. Subsection (7) amends paragraph 11(a) of Schedule 1 to the 1978 Act to ensure that it continues to be the case that regulations may make provision about the appointment, tenure and vacation of office of appointed members. This will also apply to councillor members.
19. Subsection (8) amends paragraph 12 of Schedule 1 to the 1978 Act to ensure that it continues to be the case that the proceedings of a Health Board are not invalidated by any vacancy in membership or by any defect in the appointment of any member. This will also apply to councillor members and elected members.

Section 2 – Health Board elections

20. Subsection (1) inserts new subsection (10A) into section 2 of the 1978 Act. New subsection (10A) provides that Schedule 1A will make provision for the elections of individuals to be members of Health Boards.
21. Subsection (2) inserts new section 105(2A) into the 1978 Act. It provides that election regulations made under new paragraph 12(1) of Schedule 1A will be subject to affirmative resolution procedure.
22. Subsection (3) inserts new Schedule 1A into the 1978 Act, which makes provision for Health Board elections.
23. Paragraph 1 provides that an election held under Schedule 1A is known as a “Health Board election”.
24. Paragraph 2 provides for the timing of Health Board elections. It provides that election regulations will specify the day on which a Health Board must hold the first election in the Health Board area. This day could be different for different Health Board areas. Health Board elections will be held on a fixed 4 year cycle. However, a Health Board election may be held in a Health Board area before the day specified if the Scottish Ministers make an order under section 77 of the 1978 Act to declare that a Health Board is in default.
25. Paragraph 3 provides for electoral wards. It provides that each Health Board area is to be comprised of a single electoral ward unless election regulations specify that a

Health Board area is to be divided into more than one ward. If regulations specify such a division then they must also specify the number of wards, the boundaries of those wards and the number of elected members to be elected in each ward. Also, before regulations specifying such a division are made, the Scottish Ministers must consult the Local Government Boundary Commission for Scotland and the Commission must give them advice about the boundaries of the wards.

26. Paragraphs 4 to 8 deal with the conduct of elections. Paragraph 4 provides that election regulations must appoint a returning officer for a Health Board election and sets out that election regulations will make provision about the tenure and vacation of office of a returning officer, the functions of a returning officer, the payment of a returning officer's fees and expenses, and any other matters relating to the returning officers as the Scottish Ministers consider appropriate.
27. Paragraph 5 provides that the nomination of a candidate must be made within the period specified in election regulations and in accordance with any other requirements made in those regulations. It also provides that a candidate may withdraw from a Health Board election at any time before the end of the nomination period set out in regulations.
28. Paragraph 6 makes provision for uncontested elections. If, at the end of the nomination period, the number of nominated candidates in an electoral ward is equal to or less than the number to be elected for that ward then—
 - (a) the Health Board election is not to be held in the ward, and
 - (b) on the day on which the election was supposed to be held, the returning officer must—
 - (i) declare the nominated candidates (if there are any) to be deemed to have been elected as elected members for the ward (so they are all effectively elected without a vote being held), and
 - (ii) if the number of nominated candidates is less than the number that is to be elected for that ward, declare the number of vacancies in the ward.
29. Paragraph 7 makes provision for contested elections. The number of members that are to be elected for a ward are to be elected at a poll. Sub-paragraph (2) provides that at the poll, each individual entitled to vote may do so by marking on the ballot paper the voter's first preference from the nominated candidates. The voter can then express a second preference for another candidate and, if the voter wishes, subsequent preferences from amongst the candidates. This is the basic structure of a single transferable vote (STV) system. Sub-paragraph (3) states that election regulations must, in particular, make provision about the manner in which and period during which votes may be cast (for example, postal voting, electronic voting, or traditional ballots at polling stations), the form and content of ballot papers, the manner in which the number of votes which will secure the return of a candidate as an elected member is to be calculated (that is to say, the mathematical formula to be used in the STV system), the procedure for counting votes, and the declaration of the result of the poll.
30. Paragraph 8 makes provision about the eligibility of individuals to be candidates. Sub-paragraph (1) provides that an individual is disqualified from being a candidate in a Health Board election if they hold one of the public offices specified in the sub-paragraph. Sub-paragraph (2) provides that election regulations may make further provision about who is qualified to be a candidate in a Health Board election, and the circumstances in which an individual may be disqualified from being a candidate and may, in particular, disqualify individuals holding a post set out in a list of restricted posts maintained by the Health Board concerned for that purpose.
31. Paragraph 9 makes provision about entitlement to vote (in other words, the franchise of Health Board elections). Sub-paragraph (1) provides that an individual is entitled to vote at a Health Board election if the individual is aged 16 or over and meets any further

criteria specified in election regulations. Sub-paragraph (2) sets out that the further criteria may, in particular, provide that an individual is eligible to vote only if they are registered in the register of local government electors at an address in the Health Board area, and would be entitled to vote at a local government election in an electoral area falling wholly or partly in the Health Board area, or would be if they were 18 or over. Sub-paragraph (3) provides that election regulations may determine, or set out the criteria for determining, the electoral ward in which an individual is entitled to vote. It also provides that an individual cannot vote more than once in the same Health Board area, nor in more than one Health Board area.

32. Paragraph 10 makes provision about election expenses. It provides that election regulations may make provision about the expenses which may be incurred by any person in connection with the Health Board election.
33. Paragraph 11 deals with what happens when there is a vacancy amongst the elected members of a Health Board. It applies if a returning officer declares a vacancy in an electoral ward due to an insufficient number of candidates and also if an elected member vacates office before the end of the usual period. It provides that the Scottish Ministers may direct the Health Board with the vacancy to invite an unelected candidate to fill the vacancy (election regulations can set out criteria for determining which unelected candidate is to be invited) or alternatively the Scottish Ministers can appoint an individual to fill the vacancy. Clearly the first of these options would not be available if the vacancy arose due to an insufficient number of candidates in the first place.
34. If a vacancy arises in a Health Board area less than 6 months before the date of the next scheduled Health Board election, the Scottish Ministers may, instead of taking action to direct the Health Board to invite an unelected candidate or appoint an individual to fill the vacancy, direct the Health Board to leave the vacancy unfilled until the next Health Board election in the Health Board area (paragraph 11(3)). Paragraph 11 also provides that an individual who fills a vacancy is to be treated as if that individual was an elected member of the Health Board (sub-paragraph (4)).
35. Paragraph 12 confers power on the Scottish Ministers to make election regulations. It provides that the Scottish Ministers may make election regulations in relation to any matter specified in new Schedule 1A as something in relation to which provision may be made by election regulations. It also provides that the election regulations may make further provision about Health Board elections (if it is something not already provided for in new Schedule 1A).
36. It also provides that election regulations may apply an enactment (with or without modifications specified in the regulations) or disapply an enactment to Health Board elections.

Section 3 – Scottish Ministers’ powers in relation to elected members

37. Section 3 amends section 77(2) of the 1978 Act to ensure that when an order is made to declare a Health Board to be in default the order must not only provide for the appointment of new members, but also must make provision for an election and may make provision about what is to happen in the period until the election is held.

Section 4 – Pilot scheme

38. Subsection (1) provides that the Scottish Ministers may, by order, appoint a day on which sections 1 to 3 are to come into force in respect of the Health Board areas specified in the order. An order under this provision is known as a pilot order.
39. Subsection (2) provides that the Scottish Ministers may make one pilot order only, although this does not affect their power to modify or revoke the order.
40. Subsection (3) provides that the pilot order may bring sections 1 to 3 into force with such modifications as the Scottish Ministers consider appropriate.

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41. Subsection (4) sets out that affirmative resolution procedure will apply to a pilot order (or order amending a pilot order) which adds to, replaces or omits any part of the text of sections 1 to 3 of the Act and to an order revoking the pilot order. Otherwise it will not be subject to any parliamentary procedure.

Section 5 – Report on pilot scheme

42. Subsection (1) provides that at least 2 but no later than 5 years after the first election held in a Health Board area specified in the pilot order, the Scottish Ministers must publish a report. The report must contain the following things—
- (a) a description of the changes made to the 1978 Act by sections 1 to 3 and how the constitution of Health Boards was changed by those sections coming into force in the Health Board areas specified in the pilot order,
 - (b) a description of the Health Board elections held in the Health Board areas, and
 - (c) an evaluation (carried out by an independent person) of—
 - (i) the level of public participation in the Health Board elections,
 - (ii) whether having elected members on Health Boards led to increased engagement with patients and other members of the public or improved local accountability of the Health Board in the specified Health Board areas, and
 - (iii) the cost of holding the Health Board elections and the estimated cost of holding future Health Board elections in all Health Board areas.
43. Subsection (2) provides that the report may contain such other information, and an evaluation of such other matters, as the Scottish Ministers consider appropriate.
44. Subsection (3) provides that Ministers must appoint a person to carry out the evaluation of the pilot Health Board elections at least 3 months before the first Health Board election is held.
45. Subsection (4) provides that the Scottish Ministers must lay a copy of the published report before the Scottish Parliament.
46. Subsection (5) sets out persons who would not be considered independent for the purpose of undertaking the evaluation.

Section 6 – Termination of pilot scheme

47. Subsection (1) provides that the pilot order can only stay in force for 7 years after the day the first election is held in a Health Board area specified in the pilot order. But the Scottish Ministers could revoke the pilot order on an earlier date.
48. If the pilot order is revoked before a roll-out order is made under section 7 of the Act, or a question of whether to resolve to approve a draft roll-out order is not agreed by the Scottish Parliament, then, on the day the pilot order is revoked, or on the day after the question is put, subsections (3) and (4) come into force (subsection (2)). This means that in order for the main provisions of the Act to continue to have effect in the areas specified in the pilot order, a roll-out order has to be made before the pilot order is revoked (note that the pilot order is automatically revoked under subsection (1) at the end of the 7 year time-limit). Another effect of the self-repealing provision of subsection (2) is that it would no longer be possible to bring the main provisions of the Act into force in areas not specified in the pilot order.
49. Subsections (3) and (4) only come into force in the circumstances set out in subsection (2). In such circumstances, subsections (3) and (4) repeal the main provisions of the Act that provide for elections to Health Boards to be held but retain the statutory basis for the appointment of local councillors as Health Board members.

Section 7 – Roll-out

50. Subsection (1) provides that the Scottish Ministers may by order appoint a day on which sections 1 to 3 are to come into force in respect of Health Board areas not specified in the pilot order. Such an order is known as a “roll-out order”. When a roll-out order is made it has the effect of repealing section 6 of the Act (see subsection (2) of section 7). Repealing section 6 prevents the pilot order from being revoked after the expiry of the time limit in section 6(1) and therefore also stops the consequential repeal of the main provisions of the Act.
51. Subsection (3) provides that a statutory instrument containing a roll-out order may not be made unless the evaluation report has been published, and a draft of the roll-out order has been laid before, and approved by a resolution of, the Scottish Parliament.
52. Subsection (4) provides that before laying a draft of a roll-out order before the Scottish Parliament, Ministers must:
- lay a copy of the proposed draft roll-out order and a statement of their reasons for proposing to make it before the Scottish Parliament;
 - publicise the proposed draft roll-out order; and
 - have regard to any representations, resolutions or committee reports of the Scottish Parliament about the proposed draft roll-out order made during such period as Ministers may specify when laying the copy proposed draft roll-out order.
53. Subsection (5) provides that the period to be specified by Scottish Ministers under subsection (4) must be at least 60 days in total and include at least 30 days during which the Scottish Parliament is not dissolved or in recess.
54. Subsection (6) provides that when laying a draft of a roll-out order before the Scottish Parliament, Scottish Ministers must lay a statement detailing any representations, resolutions or reports made along with their response and set out any material changes to the proposed draft roll-out order along with their reasons for these changes.
55. Subsection (7) provides that a roll-out order may make such provision adding to, replacing or omitting any part of the text of, or otherwise modifying, any enactment as the Scottish Ministers consider appropriate. One of the things that could be done under this power is amendment of new Schedule 1A to the 1978 Act in response to the evaluation of the pilot schemes. For example, where elements of the process have been seen to work less well in the pilot areas, changes could be made to the way the process works by amending Schedule 1A for the Health Boards which did not participate in the pilot scheme (where elections would be held for the first time) and for the pilot scheme Boards (in relation to the subsequent elections for those Boards).

Section 8 – Minor and consequential amendments

56. Section 8 introduces the schedule which contains minor and consequential amendments.

Section 9 – Key terms

57. Section 9 defines the key terms used in the Act.

Section 10 – Orders

58. Subsection 10(1) provides that an order under the Act is to be made by statutory instrument.
59. Subsection (2) provides that such an order may make different provision for different purposes and contain any supplementary, incidental, consequential, transitional, transitory or saving provision which the Scottish Ministers consider appropriate.

Section 11 – Commencement

60. Subsection (1) provides that sections 1 to 3 come into force in accordance with sections 4 and 7 (that is, the provisions relating to the pilot scheme and roll-out respectively).
61. Subsection (2) provides that sections 4, 5, 6(1) and (2), 7, 9, 10, 12 and this section come into force on Royal Assent.
62. Subsection (3) provides that section 6(2) provides for the commencement of section 6(3) and (4) in particular circumstances.
63. Subsection (4) provides that section 8 and the schedule come into force on such day as Scottish Ministers may by order appoint.

Schedule – Minor and consequential amendments

National Health Service (Scotland) Act 1978 (c.29)

64. Paragraph 1 amends paragraph 4 of Schedule 1 to the 1978 Act to extend the power in that paragraph which permits the Scottish Ministers to pay to the chairman of a Health Board and such other members of a Health Board as may be set out in regulations such remuneration as they may from time to time determine. The power is extended to include such members of committees and sub-committees of a Health Board as regulations may specify.

Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)

65. Paragraph 2 amends schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 to exclude from the remit of the Commissioner for Public Appointments in Scotland the appointment to any Health Board of—
 - (a) councillor members, and
 - (b) appointed members who are appointed by virtue of the member either—
 - (i) holding a post in a university with a medical or dental school,
 - (ii) being employed as an officer of the Health Board (for example, the chief executive of the Health Board), or
 - (iii) being a member of a body set up by a Health Board which represents healthcare professionals working in the Health Board area. This covers representative forums set up by Health Boards to allow them to consult with doctors, dentists, opticians, pharmacists and other professionals in the area. These bodies are currently known as Area Clinical Forums.