

# **Written evidence submitted by the Electoral Management Board for Scotland (EMB) to the Devolution (Further Powers) Committee to support their Scrutiny of the Scottish Parliament (Elections etc.) Order 2015**

## **Summary**

1. The Electoral Management Board for Scotland (EMB) is grateful for this opportunity to input to the Committee's consideration of the Order for the 2016 Scottish Parliament Elections.
2. While the scope for detailed review of this final material has been limited as the Order was only laid in Parliament on 4 November, the EMB has been closely engaged with the Scottish Government as the Order has been drafted over recent months. The formulation of the legislation through a process of consultation with interested stakeholders is a valuable and helpful approach that the Board particularly appreciates.
3. In July this year the EMB made substantial comment on the draft Order, endorsing a series of detailed comments made by both the SAA (representing the fifteen Electoral Registration Officers (EROs)), and the Elections Working Group of SOLAR (local government lawyers/administrators).
4. The EMB's prime focus is ensuring that the interests of the voter are kept at the centre of all election planning and administration, promoting consistency and best practice. There are a number of measures within the new Order that demonstrate a real concern for voters and an effort to promote their interests. The Board is particularly supportive of these innovations. There are also measures in the legislation that address and simplify some of the administrative processes associated with the delivery of elections by Returning Officers (ROs) and EROs. Again, these are welcome.
5. The Order has been revised in some areas from the consultation draft to take account of concerns that had been raised by the electoral community, for example with respect to the granting of emergency proxies. The EMB recognises the flexibility of the Scottish Government in considering and reacting to our responses to their consultation.

## **Consultation**

6. The Scottish Government has engaged with a range of electoral stakeholders in the drafting of this Order. The EMB has been involved in consultation directly and through the professional associations that advise the Board.
7. The EMB is grateful for the opportunity to be involved in the drafting of the legislation and appreciates the consultation process undertaken by the Scottish Government. The chance to support the Committee in their scrutiny is also welcomed.
8. An earlier consultation draft of the Order was shared by the Scottish Government and this was closely scrutinised by the Board working primarily through the Electoral Registration Committee of the Scottish Assessors Association (SAA) representing the fifteen Electoral Registration Officers (EROs), and the Elections Working Group of the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR). As a product of this scrutiny the EMB provided the Scottish Government with a series of comments on the Order. Most of these were supportive of the changes in approach that were introduced in the draft Order.

## **General Approach of the Order**

9. The EMB welcomes the policy approach taken by the Order. The body of electoral legislation is notoriously complex developed through a series of different Acts and Orders which can be difficult to navigate. The provisions of this Order are substantially the same as those which governed the Scottish Parliament Elections in 2011. This overall consistency will assist ROs and EROs in planning for and delivering the polls in May 2016.
10. However, helpfully this Order contains a number of changes which reflect developments in the wider electoral field since that last Scottish Parliament general election. For all electoral professionals in Scotland the experience of the Scottish Independence Referendum (SIR) in September 2014 will inform and shape our approach to all future electoral events. The Referendum was the largest electoral event Scotland has ever seen and it is widely viewed as a successful democratic event in which Scotland's largest ever electorate turned out in record numbers to give a result that was accepted as accurate and trustworthy by all campaign groups. Some of the lessons of the Referendum are clearly reflected in the approach of this Order and the EMB welcomes this. However some elements of the SIR provided great challenges, for example with respect to the openness of proxy voting, and the lessons of those challenges have clearly been applied in elements of this Order.

## **Delivering Elections in the Interest of the Voter**

11. The EMB particularly welcomes and supports a number of developments in the in the Order which will promote the interests of the voter, a fundamental aim of the Board. These include for example:

### ***Early dispatch of postal votes***

*Schedule 2, rule 34 and paragraph 7 of schedule 4 provide that postal ballot papers should be issued as soon as practicable, rather than the position in the 2010 Order which was that they could not be issued until after 5 pm on the eleventh working day before the date of poll.*

12. It is in the interests of postal voters to have their papers issued as soon as reasonably possible. Voters can plan participation in the election well in advance of the event and schedule other activities. This assists ROs in managing the receipt of returned postal packs over a longer period, avoiding peaks of workload in the busy polling week. To further support this the EMB works with all ROs and EROs to achieve a consistent date for postal vote issue across Scotland so that it is clear to all voters and campaigners when they can expect to receive their papers.

### ***Replacement of Postal Vote Packs which are lost or not received***

*Schedule 4, paragraph 14 allows for a replacement postal ballot paper to be requested at any time, though the constituency returning officer can ask the voter to allow more time for delivery. The 2010 Order did not permit a person who claimed to have lost or not to have received a postal ballot paper to seek a replacement earlier than the fourth (working) day before a poll. This paragraph takes account of postal ballot papers being issued earlier than previously.*

13. The EMB again supports this development which removes a barrier to postal voters who may not have received papers for reasons beyond their control, such as a failure of the

postal service. This change will avoid them having to wait until close to polling to receive a replacement.

### **Notification to Postal Voters who have submitted incorrect or incomplete Postal Voting Statements**

*Schedule 3, paragraph 25 sets out the procedure that an electoral registration officer must follow to notify a postal voter where their postal voting statement was found not to be properly completed. These procedures will allow voters to make any necessary action to avoid future postal voting statements being rejected. These provisions mirror similar procedures for UK and European parliamentary elections and aim to reduce the risk of rejection of postal votes at future polls.*

14. It is in the interests of the voter to be given an opportunity to avoid a repetition of errors which might lead to their votes being rejected. The practice has been applied at recent major UK polls and while a further administrative task for EROs is important in supporting postal voters.

### **Voters in a queue at close of poll**

*Schedule 2, rule 46(6) allows for voters who may be in a queue at a polling station at the close of poll to be allowed to cast their vote, in line with other elections.*

15. While the EMB encourages ROs to plan for sufficient polling facilities such that all voters can be accommodated without significant queues, these can occasionally develop especially at the close of poll. Allowing queuing voters to cast their vote is clearly in the interest of the voter and has become an accepted approach at recent electoral events across the UK.

### **Issues around Electoral Administration**

16. The EMB welcomes a number of elements in the Order which will address and resolve some challenges in the administration of elections. These include:

#### **Commonly used Names**

*Schedule 2, rules 4(4) and 5(4) allow for a candidate to use a commonly used surname or forename instead of their given name. The 2010 Order required that this name had to be different from the person's other names, which prevented some candidates from using such a name on ballot papers, for example where a person was commonly known by a middle name.*

17. This is an area of the nomination process which can pose challenges to ROs and their teams as they explain the rules on the use of commonly used names to candidates and agents. This amendment deletes the requirement that a commonly used forename requires to be different from any other forename which the candidate had; e.g. it would allow a candidate with the names John Alexander Smith to have on the ballot paper "John Smith", or "Alexander Smith" or "Sandy Smith" if he were commonly known as such. This seems a sensible approach and will avoid a source of some confusion at nominations.

### **Employment of staff by the Returning Officer**

*Schedule 2, rule 54(1) states that the constituency returning officer must not knowingly appoint count staff who have been employed by or on behalf of a candidate or a registered party in connection with the election. This mirrors and extends a restriction in electoral legislation that applies to the appointment of presiding officers and clerks, as set out in rule 36(1), though that has also been qualified by “knowingly” in the draft Order.*

18. This change is welcomed in that it places CROs and RROs under a duty not knowingly to employ any person who has been employed by or on behalf of a candidate or a registered party in or about the election. The perception of the integrity of the election could be severely damaged were it to be seen to be delivered people identified with candidates.

### **Use of Electronic Communications**

*Article 87(3) provides the new option of using electronic means for submitting any application, notice or representation. This will end the need either to send these items by post or to deliver them by hand and will facilitate quicker delivery. It does not apply to nomination papers, only to applications, notices and representations.*

*Article 72(13) - definition of “publish” for election publications: “publish” means make available to the public at large, or any section of the public, in whatever form and by whatever means (including by electronic means).*

19. The acceptance of electronic communications – for example posting material on websites – is a useful recognition of the reliance on electronic communications and publishing, with the internet being the basic repository of information in most situations. It is a helpful signal that elections are “modernising”. The continuing requirement to submit nomination papers by hand however is appropriate and reflects the importance of the integrity of nomination papers in the election process.

### **Other issues raised at consultation**

20. When the draft Order was shared in the summer for consultation the EMB and colleagues in the SAA representing the EROs raised a number of concerns around some of the provisions with respect to proxy voters. In particular the provisions around application to vote by proxy on the grounds of disability or occupation/service/employment reasons prompted some concern.
21. The integrity and security of the electoral register is fundamental to the integrity of the election. While the EMB wishes to remove barriers to a validly registered voter participating in an election, any revisions to the availability of proxy votes need to be considered carefully to protect the security of the register.

*Schedule 3, paragraph 5(6)(b) lists which disability benefits entitle a person to apply for a proxy vote without the need to have their application attested. In line with other electoral legislation, it reflects recent changes to disability benefits.*

22. The criteria for qualifying to appoint an emergency proxy need to be objective to avoid disputes arising around what may be a reasonable expectation to be able to vote in person.

Having a clear list of disability benefits that entitle a person to apply for a proxy without attestation is helpful rather than a blanket offer of a proxy vote for all disabilities.

23. The draft Order as originally shared in the summer gave very broad grounds for obtaining an emergency proxy vote with an approach that followed the extensive grounds available in the rules for the SIR i.e., disability; occupation, employment or service reasons; or unavoidable absence for any reason. This broad scope may have been too wide and could have increased the risk of fraud through what in effect amounted to “proxies on demand”.
24. The SAA (EROs) were of the view then that the more restricted grounds used in the recent UK parliamentary elections should be followed from Day -6 to polling day in Order to protect the integrity of the electoral process and to achieve consistency in approach across polls.

*Schedule 3, paragraphs 7(4) to 7(7) require that where an elector applies for an emergency proxy vote on the grounds of their occupation, service or employment after 5 pm on the sixth working day before a poll, it must be attested. This mirrors the emergency proxy provisions that operated for the 2015 UK parliamentary elections.*

25. In response to the consultation the Order has been revised such that applications for an emergency proxy vote on the grounds of occupation, service or employment after 5 pm on the sixth working day before a poll, must be attested. This reflects the advice of the EROs and is a welcome revision.
26. The EMB recognises and appreciates the flexibility of the Scottish Government in considering and acting on our responses to their consultation

## **Conclusion**

27. The EMB is grateful for the opportunity to support the Committee in their scrutiny of the Scottish Parliament (Elections etc.) Order 2015. The consultative approach that has been taken by the Scottish Government in the development and drafting of this Order has been very welcome. As evidenced by the way in which the Order has been revised in response to areas of concern that were raised, it is clear that this consultation was taken seriously, demonstrating that the Government were open to comments aimed at improving the rules. Again, this is very welcome.
28. The Order as laid provides a sound framework within which electoral professionals will be able to deliver this major event in May 2016. In general the rules are consistent with those that governed the Scottish Parliament elections that were executed successfully in 2011. Experience of recent major polls, including the May 2015 UK Parliamentary Elections and the September 2014 Referendum, has clearly informed the revisions that have been made. The EMB are satisfied that the developments in the legislation will generally promote the interests of the voter and facilitate the effective administration of the polls.
29. These comments are not a thorough examination of every clause of the Order or of every change in the rules. The policy note accompanying the Order helpfully highlights the key changes. The intention is to highlight some fundamental areas where the EMB has a particular interest and to recognise the responsiveness of the Scottish Government in shaping the rules in the context of their consultation and engagement with the electoral professionals.

## **Background - The Electoral Management Board for Scotland MB**

30. The Electoral Management Board for Scotland (EMB) was set up under the Local Electoral Administration (Scotland) Act 2011. This Act gives the Board “the general function of co-ordinating the administration of local government elections in Scotland.”
31. The EMB is independent of both UK and Scottish Governments and political parties, but is accountable to the Scottish Parliament. It consists of Returning Officers, their Deputies and Electoral Registration Officers under the leadership of a Convener who is appointed by Ministers. Specialist advice is supplied by professional associations of election experts, the Scottish and UK Governments and the Electoral Commission.
32. As an expert body of electoral professionals the Board works to promote consistency and best practice in all electoral events. In 2014 it provided extensive support to the Regional Returning Officer (RRO) for the European Parliamentary Elections (EPE) in the Electoral Region of Scotland and to the Chief Counting Officer (CCO) for the Scottish Independence Referendum (SIR), a role taken by Convener of the Board. Its work has continued promoting consistency and providing support through the UK Parliamentary elections in 2015 and in preparation for the Scottish Parliament elections in 2016.

## **The EMB Approach**

33. The EMB’s prime focus is ensuring that the interests of the voter are kept at the centre of all elections planning and administration. Confidence in the result is fundamental to the effective delivery of the democratic process and is predicated on confidence in all stages of the process of planning and delivering an electoral event. As such the work of the EMB is summarised in the objective of the CCO for the SIR “...to deliver a result that will be trusted as accurate”. This objective is built on four key principles which shape the work of the EMB:
  - Accessibility - there should be no barriers to any voter taking part;
  - Consistency - voters should have the same experience wherever they are in Scotland;
  - Efficiency - electoral events will be administered efficiently; and
  - Integrity - electoral events will produce results that are accepted as accurate.
34. It is through this framework that the EMB will view and comment on any developments with respect to the delivery of electoral events. This approach provides the context within which the Board has considered the Scottish Parliament (Elections etc.) Order 2015.

## **Delivering Elections**

35. As professionals in the administration of electoral events the Board has developed views based on significant practical experience. However it is also keenly aware of the limits of its role. The Board is content that while it can comment on and inform the development of policy and legislation around electoral events it is for elected representatives to make the laws and rules. ROs and EROs across Scotland deliver electoral events, the Electoral Commission monitor and report on their conduct and government legislates to create the rules. These three roles are distinct but all are vital to the democratic process.

Submitted on behalf of the Electoral Management Board for Scotland (EMB) by

Chris Highcock  
Secretary to the EMB  
6 November 2015