



The Scottish Parliament
Pàrlamaid na h-Alba

Published 14 November 2019
SP Paper 623
15th Report 2019 (Session 5)

Standards, Procedures and Public Appointments Committee

Comataidh Inbhean, Dòighean-obrach is Cur-an-dreuchd Poblach

The Representation of the People Act 1983 Remedial (Scotland) Order 2019



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Standards, Procedures and Public Appointments Committee

The remit of the Standards, Procedures and Public Appointments Committee is to consider and report on—

- (a) the practice and procedures of the Parliament in relation to its business;
- (ab) a proposal for a Bill relating to the arrangements for financial assistance to non-Government political parties represented in the Parliament;
- (b) whether a member's conduct is in accordance with these Rules and any Code of Conduct for members, matters relating to members interests, and any other matters relating to the conduct of members in carrying out their Parliamentary duties;
- (c) the adoption, amendment and application of any Code of Conduct for members; and
- (d) matters relating to public appointments in Scotland;
- (e) matters relating to the regulation of lobbying; and
- (f) matters relating to Scottish general elections falling within the responsibility of the Cabinet Secretary for Government Business and Constitutional Relations.



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Introduction

1. [The Representation of the People Act 1983 Remedial \(Scotland\) Order 2019](#) (the Order) allowed prisoners serving sentences of 12 months or less, and who met the other franchise criteria, to register to vote in the Shetland by-election held on 29 August 2019. The Order made changes to the effect of the law as provided for in section 3 of the Representation of the People Act 1983.

Franchise for the Shetland by-election

2. The Scotland Act 2016 (“the 2016 Act”) devolved increased autonomy to the Scottish Parliament and the Scottish Ministers in relation to the operation of Scottish Parliament and local government elections in Scotland.
3. Following commencement of the provisions in the 2016 Act relating to elections, the Scottish Government held consultations on electoral reform (December 2017 – March 2018) and prisoner voting (December 2019 – March 2019) with a view to developing legislation to improve the administration of devolved elections and to comply with Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR).
4. The Scottish Elections (Franchise and Representation) Bill (the Bill) was introduced on 20 June 2019 and include a provision to enfranchise prisoners sentenced to 12 months or less.
5. In 2005, in the case of [Hirst v United Kingdom \(No 2\)](#), the European Court of Human Rights found that the UK’s blanket ban on prisoner voting was in breach of [Article 3 of Protocol 1 of the European Convention on Human Rights \(ECHR\)](#) which requires states to “hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.
6. As Michael Clancy of the Law Society of Scotland told the Committee in evidence, “Having the capacity to legislate on elections means that the crunch point of compliance with the ECHR comes into sharp relief.”¹ This “crunch point” came in the summer, shortly after the Bill was introduced, when the decision to hold the Shetland by-election on 29 August 2019 required the Scottish Government to consider whether and how to comply with Convention requirements in relation to that electoral event. In the by-election for Ettrick, Roxburgh and Berwickshire held on 8 June 2017, the Scottish Government made no provision in relation to enfranchising prisoners and risked contravening the ECHR.
7. Section 12 of the Convention Rights (Compliance) (Scotland) Act 2001 allows Scottish Ministers to make a remedial order where necessary or expedient to ensure compatibility with the European Convention on Human Rights (ECHR). On 1 August 2019, the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, announced that the Scottish Government would make an Order to extend the franchise for the Shetland by-election.
8. The Scottish Government stated that the provision made by the Order was “necessary or expedient in consequence of section 3 of the Representation of the People Act 1983 being incompatible with a Convention right”². It further stated:

” “The courts have been crystal clear – the blanket ban on prisoner voting is not compliant with the ECHR. Whether people agree with that or oppose it, one thing everyone should agree on is that elections must be compliant with the law. And, unlike the UK Government, who did not rectify this issue for more than a decade, the Scottish Government is legally obliged under the Scotland Act to comply with the ECHR. The timing of the by-election means action must be taken now, on a temporary basis, to ensure Scotland does not breach the ECHR.”³

9. The provisions in the Remedial Order reflected the prisoner voting provisions contained in the Scottish Elections (Franchise and Representation) Bill, which the Committee has considered at Stage 1.

Committee consideration of the Order

10. The Committee noted that, in his letter to the Delegated Powers and Law Reform Committee, the Cabinet Secretary for Government Business and Constitutional Relations (the Cabinet Secretary) addressed the reason why it was not considered sufficient to leave the law unchanged until after the passage of the Bill:
 - ” ...my key concern was in ensuring the compatibility of Scots law with the ECHR. Whilst the possibility of challenge was a factor to be considered, this does not change the overarching requirement to ensure that devolved elections are conducted in a manner compatible with the ECHR.”⁴
11. The Cabinet Secretary also addressed the approach taken in introducing the Remedial Order:
 - ”The power under section 14 of the Convention Rights (Compliance) (Scotland) Act 2001 can only be employed when it appears to the Scottish Ministers that, for reasons of urgency, it is necessary to make a remedial Order without following the procedure set out in sections 13(2) to (4) of that Act. Notice for the by-election was given on 15 July and, as you will appreciate, the timing of the by-election was not set by the Scottish Government. With the deadline for registration as an elector set at midnight on Tuesday 13 August, it was imperative for the Order to be made as quickly as possible in order to allow any qualifying prisoners time to register.”⁵
12. The Committee considered the policy provisions contained in the Remedial Order in the context of its Stage 1 scrutiny of the Scottish Elections (Franchise and Representation) Bill.
13. The Committee heard oral evidence and received a number of written submissions on the provisions contained in the Bill. These are all included in the Committee’s Stage 1 Report on the Scottish Elections (Franchise and Representation) Bill.

Conclusion

14. The Committee recognises the Scottish Government’s concern about the compatibility of Scots law with ECHR in relation to the Shetland by-election. Nevertheless, the Committee notes that in the by-election for Ettrick, Roxburgh and Berwickshire held on 8 June 2017, the Scottish Government made no provision in relation to enfranchising prisoners and risked contravening the ECHR.
15. The Committee notes the time constraints that the Scottish Government was under in relation to the by-election, but regrets that the provisions in relation to prisoner voting were first used when the Bill was still at Stage 1. However, the Committee also acknowledges that the Cabinet Secretary has indicated the Scottish Government’s intention to revoke the Order:
 - ” It is my view that it would be desirable for the Order to be revoked as soon as possible to ensure that Parliament, in its consideration of the Bill, can consider the Scotland-wide approach that the Scottish Government has proposed to ensure that devolved elections are compatible with the ECHR in relation to prisoner voting.”⁶
16. The Committee’s key conclusions and recommendations in relation to prisoner voting are set out in its [Stage 1 report on the Scottish Elections \(Franchise and Representation\) Bill](#).

- 1 Standards, Procedures and Public Appointments Committee. *Official Report*, 19 September 2019, Col 4.
- 2 [The Representation of the People Act 1983 Remedial \(Scotland\) Order 2019.](#)
- 3 Cabinet Secretary for Government Business and Constitutional Relations , [Scottish Government press release](#), 1 August 2019
- 4 [Letter from the Cabinet Secretary for Government Business and Constitutional Relations to the Delegated Powers and Law Reform Committee.](#)
- 5 [Letter from the Cabinet Secretary for Government Business and Constitutional Relations to the Delegated Powers and Law Reform Committee.](#)
- 6 [Letter from the Cabinet Secretary for Government Business and Constitutional Relations to the Delegated Powers and Law Reform Committee.](#)

