



Law Society
of Scotland

Consultation Response

Electoral Reform

March 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation on Electoral Reform. The sub-committee has the following comments to put forward for consideration.¹

Who Can Register and Vote

Question 19: Do you have any other comments to make on this issue?

We note that there is an ongoing inquiry of the Scottish Parliament's Equalities and Human Rights Committee on the issue of prisoner voting.

Our Constitutional Law sub-committee responded to that inquiry, and gave oral evidence to that Committee in September 2017.² ECHR case law is clear around a blanket ban breaching Convention rights, though accepting that there is a wide margin of appreciation for Member States in how to determine a policy.

¹ We also provided these comments in response to the UK Government's call for evidence on access to elections – Law Society of Scotland, [Access to Elections](#) (2017)

² Law Society of Scotland, [Memorandum of Comments on Prisoner Voting](#) (2017); [Official Report of the Equalities and Human Rights Committee of the Scottish Parliament](#), 7 September 2017

Accessibility of Voting and Elected Office

Question 23: What other action could the Scottish Government take to widen access to and remove barriers to voting and elected office?

The Electoral Registration and Administration Act 2013 changed the form of electoral registration in Great Britain. The requirements for individual registration have led to regulations requiring a declaration of truth as part of the individual voter registration process.³ This has created a practical requirement that the individual has capacity to make a declaration of truth, which in turn creates a barrier to those who cannot do so. This not only undermines the intention of s 73 of the Electoral Administration Act 2006, it also has the potential to cause distress to individuals and their caregivers. Although it is permitted to assist someone to register, only the individual applying for registration can make the declaration of truth. In situations where the individual does not have the capacity to do so, caregivers face a choice between disenfranchising their relative and being implicated in a potential civil offence of failure to register.⁴ Although the Electoral Registration Officers are encouraged to act sensitively and use their discretion in relation to what action to take when it appears an individual may lack capacity to complete the registration, the guidance itself acknowledges that “In practice, the legislation does not take account of the sensitivities that may arise around issues such as mental capacity.”⁵

This is a problem across the UK. However, there is a particular Scottish issue. The Electoral Commission’s guidance on assisted applications in England and Wales provides that a person holding a lasting power of attorney for the adult may complete the declaration, but the guidance for assisted applications in Scotland states that the grantee under a power of attorney (whether a continuing financial power or welfare power) cannot do so. We are unable to determine the legal basis for this approach. If general powers conferred under a Scottish power of attorney are sufficient to include an act such as making the declaration of truth, then the attorney is authorised to do so. An explicit particular power to do so is not required. The Scottish guidance is not only discriminatory against people who may have cognitive impairments who are Scots: it appears to be incorrect in law.

Even if the guidance were corrected to ensure that those with an appropriate Scottish power of attorney are able complete the declaration of truth, there remains an issue for those who lack both the mental capacity to make the declaration, and an attorney who could do so on their behalf.

³ Representation of the People (Scotland) Regulations 2001, regulation 26(j)

⁴ Representation of the People Act 1983 s 9E

⁵ Electoral Commission, [Guidance on assisted applications in Scotland](#), accessed online 13 November 2017

In addition to the serious consequence of being unable to vote, there are other impacts of not being on the electoral register. The electoral register is commonly used by credit agencies, and not being on the register may affect an individual's ability to get, for example, a mobile phone contract, or a lease.

The impact of these issues is likely to amount not only a breach of Article 3 of Protocol 1 to the European Convention on Human Rights read together with Article 14 of that same Convention, but also a discriminatory denial of the rights under the Convention on the Rights of Persons with Disabilities (specifically Article 29, the right to political participation and Article 12(2), the right to recognition of legal capacity on an equal basis). We note in this latter regard the successful complaint to the UN Committee on the Rights of Persons with Disabilities against discriminatory voting provisions in Hungarian law.⁶

Question 24: As well as the above arrangements, is there anything else that could be done to increase the accessibility of elections?

We do not have direct experience of difficulties encountered by people with mental disabilities in exercising the right to vote. However, in the course of our work, we have received a number of reports of barriers being placed in relation to mental capacity and voting. An example is a complaint that managers of a care home submitted a list of residents whom they deemed to be unable to vote. Both the submission of such a list, and its acceptance by relevant authorities, would be wrongful and would likely warrant a complaint to the UN Committee on the Rights of Persons with Disabilities.

Education is needed to ensure that those supporting adults with incapacities, and those working to ensure the completeness of our electoral roll and the participation of eligible voters in elections, fully understand that mental capacity is not a barrier to voting. Individuals who lack mental capacity retain the right to vote, and can be supported to do so. Such education should cover the presumption of capacity; the obligation of the United Kingdom (undertaken by ratification of the United Nations Convention on the Rights of Persons with Disabilities) to ensure that persons with disabilities receive such support as they may require to enable them to exercise their legal capacity, explaining that (a) voting is an exercise of legal capacity and (b) breach of the Convention may give rise to a complaint under the First Protocol to the Convention; and that to deprive a person of the right and actual possibility to vote may violate the European Convention on Human Rights (ECHR) unless as the proper outcome of a process fully compliant with article 6 of the ECHR.

⁶ See *Zsolt Bujdosó and five others v Hungary*, CRPD/C/10/D/4/2011



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