

# Scottish General Election (Coronavirus) Bill

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## Explanatory Notes

### Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Scottish General Election (Coronavirus) Bill ("the Bill"), introduced in the Scottish Parliament on 16 November 2020.
2. The following other accompanying documents are published separately:
  - a Financial Memorandum (SP Bill 86–FM);
  - a Policy Memorandum (SP Bill 86–PM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 86–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

### Overview of the Bill

5. The Bill's purpose is to make arrangements for the Scottish Parliament election scheduled for 6 May 2021 which are considered necessary to mitigate the public health effects of the coronavirus pandemic.
6. The main measures of the Bill will:
  - bring forward the deadline for postal vote applications;

- give a power to the Scottish Ministers to make regulations to provide for an all-postal election to be held;
- make the pre-election period of dissolution last only one day, in case the Parliament needs to meet to pass emergency legislation to delay the election;
- allow the Scottish Ministers to make regulations to hold polling over multiple days;
- make arrangements for the first meeting of the new Parliament and the election of a new Presiding Officer;
- give a reserve power to the current Presiding Officer to postpone the 2021 election by up to 6 months in certain circumstances; and allow for the same measures as above to apply if the election is postponed.

7. The Bill is comprised of 16 sections under 8 italic headings. Commentary on the effect of individual sections follows below.

## Commentary on sections

### Application of Act

#### **Section 1: Application of Act to 2021 election**

8. This introductory section makes clear that the Bill applies only to the general election for membership of the Scottish Parliament which is due to be held on 6 May 2021 (by operation of section 2(2) of the Scotland Act 1998). It does not apply to any other national or local election.

### Disapplication of existing law

#### **Section 2: Disapplication of Section 2 of Scotland Act 1998**

9. This section nullifies the effect of certain provisions in the Scotland Act 1998 that would otherwise apply to the 2021 election. Specifically, section 2(3) and (4), which relate to the dissolution of the Scottish Parliament before an election and the first meeting of the Parliament following an election; section 2(5), which gives the Presiding Officer of the Scottish Parliament a power to propose an alternative date for an election a month either side of when it would otherwise be due to occur; and section 2(5ZZA) and (5ZA), which are consequential to section 2(5). These provisions are replaced, for the purpose of the 2021 election, by sections 6 to 11 of the Bill.

## Postal voting arrangements

### **Section 3: Closing date for application to vote by post or amend existing absent vote arrangements**

10. The effect of section 3 is to bring forward the deadline for applications for a postal vote for the 2021 election to the twenty-first day before the polling day (for 6 May, this would mean the deadline is expected to be 6 April). Under paragraph 9 of schedule 3 to Scottish Parliament (Elections etc.) Order 2015 (S.S.I. 2015/425) (“the 2015 Order”) the deadline is normally the eleventh day before the polling day. The purpose of this provision is to allow for more time to process what is expected will be a much higher number of applications than usual due to the effects of the coronavirus pandemic.

11. Subsection (5) allows the Scottish Ministers to change the deadline by regulations – but under subsection (6) this can only be used to move the deadline closer to the polling day.

### **Section 4: Report on uptake of postal voting at closing date**

12. This section requires the Scottish Ministers to report to the Parliament on the uptake of postal voting for the 2021 election as at 7 April 2021 (i.e. the day after the deadline which will apply under section 3 if the election proceeds on 6 May).

13. The report must contain information on the percentage of the electorate that has been granted a postal vote for the election and the number of pending applications as at 7 April 2021. Subsection (2) provides that the report must be published and laid before the Parliament by Ministers as soon as reasonably practicable after that date.

### **Section 5: Power to provide for all-postal vote**

14. This section confers a regulation-making power for the Scottish Ministers to make provision for an all-postal vote at the 2021 election.

15. Subsection (3) would allow regulations made under subsection (1) to modify any enactment: including section 3(2) and (3) of the Bill, which make provision relevant to postal voting as described above, but not including the rest of the Bill.

16. Subsection (4) requires the Scottish Ministers to consult those persons listed before making regulations under this section.

17. No Parliamentary procedure attaches to regulations under section 5(1). Regulations would be subject to the default laying requirement, under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

## Other arrangements for 2021 election

### **Section 6: Dissolution of current Parliament**

18. The effect of section 13 of the Scotland Act 1998 is that when the Scottish Parliament dissolves before a general election, MSPs cease to hold office, and therefore the Parliament cannot be convened during the period of dissolution to debate or pass legislation. For previous general elections, the period of dissolution has usually lasted 28 days.

19. However, at the time of the introduction of this Bill, the possibility exists that, once the Parliament dissolves, there is a spike or surge of coronavirus infections that could potentially endanger the general election being safely held on 6 May.

20. The purpose of this section is to provide a kind of insurance policy against that situation occurring by making the dissolution period last only one day. It is anticipated that the Parliament will instead go into recess for the campaign 28 days prior to the election (although it is ultimately for the Parliamentary Bureau to decide on this after discussions with the business managers of the different political parties). This means that MSPs will still retain office until 5 May, and therefore up to that point the Parliament would be able to be recalled from recess in order to debate and pass emergency primary legislation to postpone the election, if a surge of coronavirus infections were to threaten the election occurring as normal.

### **Section 7: Dissolution of current Parliament: consequential modifications**

21. This section makes adjustments to certain provisions of the 2015 Order in consequence of the change to the dissolution period made by section 6.

22. Article 80(1) of the 2015 Order provides that a person becomes a “candidate”, in relation to a Scottish Parliamentary election, on the dissolution of the Parliament. Subsection (2) of section 8 modifies this to 28 working days before 6 May 2021 – this is expected to be 25 March, which is also anticipated to be the point at which the Parliament enters recess for the election campaign. A person would then remain a candidate from then

on (barring deselection or resignation) even if the election were to be postponed – in other words, they would not become a candidate in legal terms for a second time.

23. Another effect of this provision of the 2015 Order, in combination with section 7 of the Bill, is that many individuals will have dual status as both serving MSPs and election candidates from 25 March until 4 May (if the election is not postponed, in which case section 11(8) of the Bill would also postpone dissolution). However, MSPs will remain subject to the MSP Code of Conduct in terms of their use of Parliamentary privileges and resources during this period, meaning that it will be possible for the new Parliament to consider any complaints against a successful candidate who was alleged to have abused their position as a sitting MSP in this period.

24. This provision also has implications for the “regulated period” for campaign expenditure for an election under the Political Parties, Elections and Referendums Act 2000, which covers expenditure by political parties and others in the run up to a poll date. The regulated period is split into the “long” and “short” campaigns, each having different rules for the recording of expenditure for the purposes of returns that require to be submitted to the Electoral Commission. The long campaign will commence on 6 January 2021. The short campaign commences the day after a person becomes a candidate – by the operation of subsection (2) of section 7 of the Bill, the short campaign is expected to commence on 26 March 2021.

25. Paragraph 1(2) of schedule 1 of the 2015 Order links the supply of electoral registers, by electoral registration officers to local authority returning officers, to the date of dissolution. Subsection (3) of section 7 of the Bill changes this to 28 working days before the election takes place. If the election were to be postponed, the duty on electoral registration officers to supply the register as soon as practicable after that date would be reactivated.

26. For the purpose of calculating the dates mentioned in this section, the Scottish Parliamentary Rules are set out in schedule 2 of the 2015 Order, with paragraph 2 the relevant provision on the computation of time.

## **Section 8: Power to provide for polling on additional days**

27. This section gives the Scottish Ministers the power to specify in regulations one or more additional days over which the poll for the 2021 election is to take place. The purpose of this provision is to allow for the

possibility that in-person voting will take longer than normal due to the potential imposition of physical distancing measures to protect against the transmission of coronavirus. The power may be exercised whether or not the day of the poll for the 2021 election is postponed by the Presiding Officer under section 11.

28. If the power to make regulations is exercised, the regulations must provide that the additional polling days are to take place within a period of 8 days falling immediately after the day of the poll (but the days specified need not be consecutive to the day of the poll or to each other).

29. Subsection (4) provides that the regulations may specify particular days or times when certain descriptions or categories of persons eligible to vote in person may do so. This would, for example, allow provision to be made requiring voters of a particular age, or in a particular area, who do intend to exercise their right vote, to do so only on specified days or at specified times.

30. Before making regulations under this section, Scottish Ministers must consult the Presiding Officer of the Scottish Parliament, the Electoral Commission, the convenor of the Electoral Management Board for Scotland and the Chief Medical Officer of the Scottish Administration.

31. Subsection (7) allows the Scottish Ministers to make regulations modifying the meaning of references to the day or date of the poll in any enactment or document (e.g. the 2015 Order) as regards the 2021 election, if regulations under subsection (1) are in force. But otherwise such references are unaffected and are still to be read as references to 6 May 2021 (or the date fixed by the Presiding Officer under section 11 of the Bill in the event that the 6 May poll date is postponed).

32. This confirms, for example, that despite the poll taking place over a number of days, 6 May (or the day fixed by the Presiding Officer under section 11) is the relevant date for determining eligibility to vote on the basis of a person's age. By virtue of section 2 of the Representation of the People Act 1983 and section 11 of the Scotland Act 1998, a person must be at least 16 years of age on the day of the poll to be eligible to vote at an election for membership of the Scottish Parliament.

33. No Parliamentary procedure is proposed for regulations under section 8(1) or (7). Regulations would be subject to the default laying requirement,

under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

## Arrangements for new Parliament

### **Section 9: First meeting of new Parliament**

34. This section allows the Presiding Officer discretion to fix a day for the first meeting of the new Parliament after the 2021 election takes place, in consultation with the Electoral Commission and the convener of the Electoral Management Board for Scotland. The usual rule, disapplyed by section 2 of the Bill, is that the first meeting of a new Parliament must take place within 7 days of a general election. It is anticipated that a longer interval might be needed to allow for the possibility of extended polling and counting taking place due to the impact of coronavirus measures. However, subsection (2) still requires that the first meeting is fixed as soon as reasonably practicable after the election.

### **Section 10: Election of new Presiding Officer**

35. This section modifies section 19(1A)(b) of the Scotland Act 1998 so that, rather than having to take place within 14 days of the election, as would normally be the case, the selection of a new Presiding Officer (and two deputies) by MSPs must occur as soon as reasonably practicable after the 2021 election. Under section 19 of the 1998 Act this would also have to take place before any other business is conducted by the new Parliament except MSPs taking their oaths of office.

## Reserve power of Presiding Officer to postpone 2021 election

### **Section 11: Power of Presiding Officer to postpone election**

36. This section gives the current Presiding Officer the power to postpone the 2021 election by up to 6 months in certain circumstances.

37. The Presiding Officer may only postpone the election if satisfied that it is necessary or appropriate to do so; and, additionally, if the power is to be exercised for a reason relating to coronavirus, if satisfied that the Parliament could not safely meet in plenary in order to pass a Bill to delay the election (the presumption being that it is Parliament first and foremost that should take the decision to delay).

38. Under subsection (4), the new date for the election must be as soon as reasonably practicable after the old date.

39. Where the power is exercised, subsection (5) requires the Presiding Officer to publish the new date for the election along with a statement of reasons for exercising the power – this information must be published on the Parliament’s website as soon as reasonably practicable.

40. Subsection (6)(a) allows for the power to be exercised multiple times (so long as the relevant conditions are met on each occasion). However the effect of subsection (6)(b) is that the power could not be used to postpone the election beyond 5 November 2021.

41. Subsection (7) also requires the Presiding Officer to consult those persons listed before exercising the power.

42. By the operation of subsection (8), the Parliament will automatically be dissolved on the day immediately before the new date fixed for the election – including after any re-exercise of the power to postpone – for the same reasons as those behind section 6 of the Bill.

## Supplementary

### **Section 12: Effect of Act on existing power to make provision about elections**

43. The purpose of this section is to clarify that the Scottish Ministers’ existing power to make provision about the conduct of elections in section 12 of the Scotland Act 1998 is unaffected by this Act (as sections 3 and 5 provide for things that provision made under section 12 of the 1998 Act could already do, but without the requirement for affirmative Parliamentary procedure, in order to allow for greater urgency in responding to pandemic conditions).

## Final provisions

### **Section 13: Interpretation**

44. This section provides definitions for all the defined terms used throughout the Bill.

### **Section 14: Ancillary provision**

45. Subsection (1) of this section gives the Scottish Ministers a freestanding regulation-making power to make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, or in connection with,

giving full effect to the Bill. Subsection (2) allows such regulations to modify any enactment, including the Bill itself.

## **Section 15: Commencement**

46. This section provides that the Bill, once enacted, will come into force on the day after Royal Assent. Subsection (2) provides that the Scottish Ministers may make regulations in connection with the coming into force of the Act that include transitional, transitory or saving provision. It should be noted that these aspects are not substantive powers but are dependent on commencement.

## **Section 16: Short title**

47. This section provides that the Bill, once enacted, will be referred to as the Scottish General Election (Coronavirus) Act 2021.

This document relates to the Scottish General Election (Coronavirus) Bill (SP Bill 86) as introduced in the Scottish Parliament on 16 November 2020

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