

# Scottish Elections (Representation and Reform) Bill

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Scottish Elections (Representation and Reform) Bill introduced in the Scottish Parliament on 23 January 2024.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 42–EN);
  - a Financial Memorandum (SP Bill 42–FM);
  - a Delegated Powers Memorandum (SP Bill 42–DPM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 42–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

## Policy objectives of the Bill

### General overview

4. The Scotland Act 2016<sup>1</sup> amended the Scotland Act 1998 (the "Scotland Act")<sup>2</sup> to devolve further powers to the Scottish Parliament. The changes were based on recommendations made in the Report of the Smith Commission: Proposals for further Devolution to Scotland<sup>3</sup> published on 27 November 2014 for further devolution of powers to the Scottish Parliament. Of relevance to this Bill are additional powers to amend certain sections of the Scotland Act and for the Scottish Parliament and the

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2016/11/contents/enacted>

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/1998/46/contents>

<sup>3</sup> [The Smith Commission Report \(nationalarchives.gov.uk\)](http://www.nationalarchives.gov.uk)

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Scottish Ministers to have increased autonomy in relation to the operation of Scottish Parliament and local government elections in Scotland.

5. Since 2016, the Scottish Parliament has made a number of significant changes in relation to Scottish Parliament and Scottish local government elections. In particular, the Scottish Elections (Reform) Act 2020 (the “Reform Act”) made changes in relation to the roles of the Electoral Commission, the Electoral Management Board (EMB), and Boundaries Scotland.<sup>4</sup> The Scottish Elections (Franchise and Representation) Act 2020 (“the Franchise Act”) allowed all resident foreign nationals with any form of leave to remain to vote in Scottish Parliament and Scottish local government elections.<sup>5</sup> In relation to candidacy rights, it allowed those with indefinite leave to remain (which includes EU nationals with settled status) to stand as candidates in Scottish Parliament and Scottish local government elections. EU nationals with pre-settled status were also granted these candidacy rights. A further limited expansion of candidacy rights in local government elections in relation to foreign nationals with limited leave to remain occurred in 2022.<sup>6</sup>

6. The Bill follows a Scottish Government consultation on improvements to electoral law which ran from 14 December 2022 to 15 March 2023<sup>7</sup>. The consultation paper discussed whether there should be any change for those currently able to vote but not permitted to stand for election, such as 16- and 17-year-olds and foreign nationals with limited leave to remain in the UK. It discussed issues arising from the UK Elections Act 2022 (the “Elections Act”), in particular in relation to campaigning in elections. It highlighted a number of possible changes to assist candidates in local government elections and issues that had been identified in relation to the emergency re-scheduling of elections. It also posed questions on how to increase voter registration and how to improve accessibility in elections, to ensure all people can vote independently and in secret.

7. The consultation consisted of 30 closed and 16 open questions, with 21 of the 30 closed questions being straightforward ‘yes/no’ type questions. 517 valid responses were received. 488 (94%) of responses came from individuals and 29 (6%) from organisations. Throughout this memorandum, reference is made to the percentages of all responses to certain consultation questions, as well as some references to the percentages of individual or organisational responses to a question. The responses to the consultation and the resulting analysis should be considered as an indication of some opinions on the topics discussed, but due to the self-selecting nature of public consultation, does not represent an accurate sample of the Scottish population. Non-confidential consultation responses, an analysis of the responses and a Scottish Government response to the consultation have all been published on the Scottish Government website.<sup>8</sup>

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<sup>4</sup> <https://www.legislation.gov.uk/asp/2020/12/contents>

<sup>5</sup> <https://www.legislation.gov.uk/asp/2020/6/enacted>

<sup>6</sup> <https://www.legislation.gov.uk/asp/2022/4/contents/enacted>

<sup>7</sup> <https://www.gov.scot/publications/electoral-reform-consultation/>

<sup>8</sup> <https://www.gov.scot/publications/scottish-government-response-results-electoral-reform-consultation-2022-23/>

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8. The purpose of this Bill is to make a number of improvements to the law affecting Scottish Parliament and Scottish local government elections. It will amend Scottish electoral law to confer candidacy rights, set out new rules governing candidates, make improvements for voters, provide for emergency re-scheduling of elections and reform arrangements for several electoral organisations. It builds upon the electoral reform consultation, although includes some issues that were not featured in that consultation.

9. The Bill makes provision on the following:

- Extending candidacy rights at Scottish Parliament and local government elections to foreign nationals with limited leave to remain;
- Extending the Elections Act disqualification order to bar those found guilty of offences involving intimidation of campaigners, candidates and elected representatives from being Members of the Scottish Parliament (MSPs) and councillors and create a new Scottish disqualification order which will apply to those guilty of offences involving intimidation of electoral workers;
- Updating the definition of notional expenditure at Scottish Parliament and local government elections in line with the Elections Act;
- Reducing the amount campaigners ineligible to register with the Electoral Commission can spend to £700 in Scottish Parliament elections, aligning with the Elections Act;
- On rules for third party campaigning in Scottish Parliament elections, responding to the Elections Act by allowing Scottish Ministers to amend the categories of third-party campaigners by order and requiring the Electoral Commission to provide a code of practice on third-party campaigning;
- Taking forward a range of measures based on experience with Covid-19 to ensure emergency re-scheduling of elections can be more easily facilitated. These include:
  - Extending the period by which the Presiding Officer can postpone national Scottish Parliament elections to 8 weeks with the possibility of a further 8 week extension (and providing a power to rearrange by-elections by up to 3 months);
  - Removing the risk of an Extraordinary General Election being required in the run up to a scheduled Scottish Parliament election;
  - Allowing emergency postponement of local government elections by up to two weeks, with the Convener of the EMB able to postpone the entire national election and each Returning Officer able to postpone in their area;
  - Allowing Returning Officers to rearrange local government by-elections in their area by up to 3 months;
- Amendments to allow electoral pilot schemes to be proposed by Scottish Ministers, the EMB and Electoral Registration Officers (EROs) in addition to local authorities (and requiring the EMB to be consulted on pilot proposals);

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- Creating a power to permit funding by the Scottish Ministers to increase democratic engagement;
- Revoking the existing Scottish regulations on digital imprints, but reworking one aspect (requiring an imprint on unpaid for material posted by an organisation other than a regulated campaigner) to apply to material relating to Scottish devolved elections, in addition to the new Elections Act rules;
- Changing the deadline by which Boundaries Scotland is required to review local government electoral wards from 2028 to 2031, to match 5 year election cycles;
- Facilitating improved scrutiny by the Scottish Parliament of the activities of the Electoral Commission in relation to Scottish Parliament and local government elections;
- Amending the legal status of the EMB so that it will have a legal personality in its own right;
- Creating a Deputy Convener post for the EMB.

10. The Bill does not affect the electoral franchise.

11. Ongoing consultation has taken place with electoral organisations, including the Electoral Commission, the EMB and the Electoral Registration Committee of the Scottish Assessors Association during the consultation period and the development of the draft legislation. This engagement is discussed in further detail in the relevant sections.

12. The Bill's provisions are mainly drawn from the consultation exercise. The following provisions were not included in the consultation exercise because they were technical in nature and as such likely to be of limited interest to the wider public:

- Changing the deadline by which Boundaries Scotland is required to review local government electoral areas;
- Ending the automatic application of any new change to House of Commons eligibility rules to MSPs.

13. All of the proposed provisions in the Bill are intended to improve the administration of Scottish Parliament and local government elections in Scotland and to benefit voters.

14. The following descriptions of the provisions in the Bill include detail on consultation responses where relevant.

## Provisions of the Bill

### Candidacy rights for foreign nationals with limited leave to remain (Part 1 of the Bill)

15. Franchise and candidacy rights in relation to Scottish Parliament and local government elections are devolved to the Scottish Parliament. Since 3 August 2020, the Franchise Act has allowed all resident foreign nationals with any form of leave to remain to vote in Scottish Parliament and Scottish local government elections. 'Leave to remain' means permission granted to non-UK nationals to stay in the UK for a limited or unlimited period of time, but does not include those seeking asylum. In relation to candidacy rights, the Franchise Act allowed those with indefinite leave to remain to stand as candidates in Scottish Parliament and Scottish local government elections (this included EU nationals with settled status). It also extended these candidacy rights to EU nationals with pre-settled status. Those who have settled status (who will usually have lived in the United Kingdom for a continuous 5-year period) may stay in the United Kingdom for as long as they like, whereas those who have pre-settled status may only stay in the United Kingdom for a period of 5 years from the date they receive that status (unless they apply for, and are granted, settled status before the expiry of that period). The deadline for most people to apply for settled status or pre-settled status under the EU Settlement Scheme was 30 June 2021. The principal grounds of eligibility included for an applicant to be from the European Union, Switzerland, Norway, Iceland or Liechtenstein and to have started living in the United Kingdom by 31 December 2020 or to be the family member of someone from the European Union, Switzerland, Norway, Iceland or Liechtenstein who started living in the United Kingdom by 31 December 2020.<sup>9</sup>

16. A further change was made in 2022 to allow nationals of Luxembourg, Poland, Portugal and Spain with limited leave to remain to stand in Scottish local government elections, provided that they meet the normal requirements that apply to all British nationals seeking to stand in local elections.<sup>10</sup> This change was made to give effect to treaties that the UK Government has agreed with Luxembourg, Poland, Portugal and Spain to extend local government candidacy rights to all nationals of those countries on the same basis as enjoyed by United Kingdom nationals.

17. In addition to being 18 or more years old, and not subject to any legal incapacity, candidates for local government elections in Scotland must, under section 29 of the Local Government (Scotland) Act 1973:<sup>11</sup>

- be registered as a local government elector for the local authority area in which they wish to stand on the day of nomination;

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<sup>9</sup> <https://www.gov.uk/settled-status-eu-citizens-families/what-settled-and-presettled-status-means>

<sup>10</sup> <https://www.legislation.gov.uk/asp/2022/4/contents/enacted>

<sup>11</sup> <https://www.legislation.gov.uk/ukpga/1973/65/section/29>

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- have occupied as owner or tenant any land or other premises in the local authority area during the whole of the 12 months before the day of the nomination;
- have as a main or only place of work in the local authority area during the 12 months prior to the day of their nomination; or
- have lived in the local authority area during the whole of the 12 months before the day of their nomination.

18. Section 31 of the 1973 Act<sup>12</sup> provides a list of certain disqualifications for nomination, election and holding office as a member of a local authority including sequestration, bankruptcy and certain criminal convictions. Also, under section 31A of the 1973 Act,<sup>13</sup> a paid office-holder or employee of a local authority is disqualified from holding office as a member of a local authority.

19. In relation to Scottish Parliament elections, under section 15 of the Scotland Act, a person is disqualified from being a member of the Scottish Parliament (subject to section 16) if the person is:

- (a) disqualified from being a member of the House of Commons under paragraphs (a) to (e) of section 1(1) of the House of Commons Disqualification Act 1975<sup>14</sup> (judges, civil servants, members of the armed forces, members of police forces and members of foreign legislatures);
- (b) disqualified otherwise than under that Act (either generally or in relation to a particular Parliamentary constituency) from being a member of the House of Commons or from sitting and voting in it, or
- (c) an office-holder of a description specified in an Order in Council made by His Majesty.

## Consultation (candidacy rights)

20. The consultation paper outlined the Scottish Government's intention to encourage active participation in Scotland's democracy. It noted that since 3 August 2020 virtually all persons aged 16 or over living in Scotland who either have leave to remain in the UK or who do not require such leave have the right to register to vote in Scottish Local Government and Scottish Parliament elections. The paper reflected that as a result there are two main groups of people who can vote but who are not able to stand as candidates. These are people aged 16 or 17 and foreign nationals with limited leave to remain. The paper also provided a more detailed summary of those excluded from voting and/or candidacy rights for Scottish Parliament and/or local government elections. The paper set out the following position:

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<sup>12</sup> <https://www.legislation.gov.uk/ukpga/1973/65/contents>

<sup>13</sup> [Section 31A of the Local Government \(Scotland\) Act 1973 \(legislation.gov.uk\)](#) (added by section 7(2) of the Local Governance (Scotland) Act 2004).

<sup>14</sup> <http://www.legislation.gov.uk/ukpga/1975/24/contents>

“As a result of these past changes, Scotland has one of the world's most generous and inclusive arrangements for voting and candidacy rights. Many democracies extend voting and candidacy rights on an equivalent basis, set out in an international treaty with two or more countries agreeing to grant voting and candidacy rights to each other's nationals. The Scottish Parliament has instead chosen to extend voting and candidacy rights in devolved elections on a unilateral basis. This is intended to allow anyone who has chosen to make their life in Scotland the right to participate in our democracy. It means that the provision of voting and candidacy rights to those living in Scotland is not dependent upon their place of birth. A person need not be the citizen of a democracy that has agreed an electoral rights treaty with the United Kingdom to participate in devolved Scottish elections. Voting rights are extended to all those with any form of leave to remain in the UK who live in Scotland for long enough to be able to register to vote. This supports the Scottish Government's view that anyone who is living in Scotland should have a say on how Scotland is run.”

21. The consultation paper also highlighted that the Scottish Government has previously made clear that it would like to extend candidacy rights and the Scottish Government and Scottish Green Party - Shared Policy Programme (2021) includes an undertaking to extend candidacy rights in devolved elections, and a commitment to the fullest possible democratic participation in Scotland.<sup>15</sup>

22. Questions 1 to 3 of the consultation paper sought views on whether to extend candidacy rights for Scottish Parliament and local government elections to 16- and 17-year olds, and to foreign nationals with limited leave to remain. 77% of respondents were opposed to extending candidacy rights to both 16- and 17-year olds and foreign nationals with limited leave to remain, however responding organisations were 67% in favour of extending candidacy to young people, and 88% in favour of extending candidacy to foreign nationals with limited leave to remain. As part of the consultation process, a round-table discussion with young people was held, attended by high school students, representatives of the Scottish Youth Parliament, and representatives of stakeholder groups focussed on young people. Support for the proposed extension of candidacy rights to young people was voiced by some individuals, however some of the practical concerns raised in the consultation paper were also voiced, including the need to ensure appropriate safeguarding and support was in place for young people.

### Scottish Government position as adopted in the Bill

23. In principle, the Scottish Government considers that all those able to vote in Scottish Parliament and local government elections should also be able to stand as candidates. It therefore considers that voters with limited leave to remain in the UK should be empowered to hold elected office, although it is acknowledged that this was not a favoured course of action amongst consultees. As a result, Part 1 of the

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<sup>15</sup> <https://www.gov.scot/publications/scottish-government-and-scottish-green-party-shared-policy-programme/pages/a-democratic-outward-looking-scotland/>

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Bill will provide candidacy rights in Scottish Parliament and local government elections for all resident foreign nationals aged 18 or older with limited leave to remain.

24. However, the Government has reflected on the concerns raised during the consultation in relation to extending candidacy rights to 16- and 17-year-olds. Concerns were raised around the potential exposure of young people to intimidation, both as candidates and as representatives and also practical issues concerning travel to the Scottish Parliament or council headquarters and working hours. The Government recognises these concerns and has concluded that the time is not right for an extension of candidacy rights to 16- and 17-year olds in this Bill.

25. In reaching its position as set out in the Bill the Government acknowledges that if elected a person's leave to remain may expire during their term of office. But that is not necessarily the case. People can and do have their leave renewed or replaced by another form of leave. Refugee Leave, for example, is set at 5 years, but many refugees successfully move to another form of leave such as Indefinite leave to remain (permission to stay as a refugee, humanitarian protection or Discretionary Leave).<sup>16</sup>

26. When the Bill for the Franchise Act was considered by the Scottish Parliament, concerns were aired that a person subject to limited leave to remain might not be able to serve as an elected representative. However, in October 2022, the Home Office amended immigration legislation to ensure that being an elected representative will not be considered as incompatible with any immigration/leave conditions restricting employment.<sup>17</sup> As a result, "Standing for or filling an elected post in local or devolved government is not considered to be employment for the purposes of the immigration rules, and conditions restricting employment do not affect the ability to undertake such activities." See Statement of changes to the immigration rules: HC719, 18 October 2022<sup>18</sup>). The accompanying Explanatory Memorandum provided further guidance:

"7.46. Individuals in various routes under these Rules have conditions attached to their permission which restrict their ability to work. A change is being made so such conditions will not prevent migrants standing for or filling an elected post in local or devolved government. Many of those subject to immigration control would not meet the eligibility criteria to stand for election, regardless of these Rules, but this change ensures the UK meets its commitments to countries with which we do have reciprocal agreements around candidacy. Before this change, any such cases would have to be handled on a discretionary basis.

7.47. The change allows those with existing leave to remain who are eligible to stand for and fill elected posts (including any associated work around running for election) where they are eligible to do so. It does not, however, alter the candidacy rules, which are subject to separate regulation. It also does not create any provision for someone to remain in the UK on the basis they are standing for

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<sup>16</sup> <https://www.gov.uk/settlement-refugee-or-humanitarian-protection>

<sup>17</sup> <https://www.gov.uk/entering-staying-uk/immigration-rules>

<sup>18</sup> [https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc719-18-october-2022?utm\\_medium=email&utm\\_campaign=govuk-notifications-topic&utm\\_source=f58b2042-6e32-4909-9091-dd4519d09997&utm\\_content=immediately](https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc719-18-october-2022?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=f58b2042-6e32-4909-9091-dd4519d09997&utm_content=immediately)

or filling an elected post. Candidates who are subject to immigration control must have a separate basis for stay. For example, a Skilled Worker or Student would need to continue doing the job or course they had been sponsored to do, to maintain their existing status, or they would have to switch to any other immigration route for which they are eligible".<sup>19</sup>

27. Any successful candidate would still have to meet any other conditions of their leave to remain, such as participation in a job or course tied to their leave to remain. For example, a student with leave to remain linked to a particular course would still have to follow that study programme, even if they became a councillor or MSP.

28. The Bill's Financial Memorandum contains discussion of available data relevant for assessing the number of people aged 18 or over in Scotland with limited leave to remain

29. The same eligibility requirements and disqualifications which currently apply to candidates in devolved elections will also apply to any new potential candidates permitted to stand following this Bill (e.g. in relation to age, being a registered elector or resident in a local authority area and disqualification). Returning Officers are responsible for administering the nomination process for candidates in local government elections. This includes ensuring that information on the election process and spending is easily available for candidates and agents, including through providing briefing sessions and ensuring they are issued with written guidance. Returning Officers must also ensure that candidates have the opportunity to have their nomination papers informally checked prior to their formal submission. Further information is available on the Electoral Commission website.<sup>20</sup>

## Alternative approaches considered

30. As candidacy rights for Scottish Parliament and local government elections are set out in primary legislation, there is no alternative to primary legislation which would allow for change in this area. Candidacy rights are not being extended to 16- and 17-year-olds as a result of the concerns identified during the consultation.

## Disqualification from elected office (Part 2 of the Bill)

### Disqualification order for those found guilty of intimidation

31. Following concerns being expressed about an increase in intimidatory behaviour by some individuals during election and referendum campaigns, the independent Committee on Standards in Public Life undertook a review of electoral events. On 13 December 2017, the Committee published its 17th report: Intimidation in public life: A

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<sup>19</sup> [Explanatory memorandum to HC 719 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

<sup>20</sup> <https://www.electoralcommission.org.uk/sites/default/files/2021-11/SLG%20Part%20A-Returning%20Officer%20role%20and%20responsibilities.pdf>

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Review by the Committee on Standards in Public Life.<sup>21</sup> The review highlighted that candidates and campaigners throughout the UK faced increased intimidation and suggested that “specific electoral sanctions would reflect the seriousness of this threat.”

32. The Committee made a number of recommendations to government, social media companies, political parties, the police, broadcast and print media, and representatives and candidates. One of the recommendations was that the UK Government should consult on a new crime in electoral law of intimidating candidates during an election period. However, the UK Government ultimately decided to adopt a new sanction that would prohibit offenders from standing for elective office for five years rather than a separate offence.

33. Part 5 of the Elections Act introduced a new penalty for anyone found guilty of certain crimes aggravated by hostility towards candidates, campaigners or elected representatives<sup>22</sup>. Under these measures, a court must make a disqualification order which prevents the offender from being elected to a “relevant elective office” for a period of 5 years (unless it is unjust to do so). These offices are Members of Parliament, the Welsh Senedd and the Northern Irish Assembly as well as a number of local and regional elected offices in England, Wales and Northern Ireland.

### Consultation (disqualification order)

34. In the electoral reform consultation, the Government explained that it intended to adopt this measure. The paper set out the view that those harassing or intimidating elected representatives, candidates or campaigners should be subject to additional sanctions which reflect the impact of an offence on the democratic process. The question was asked as to whether a similar measure should be introduced in Scotland, which would disqualify those found guilty of intimidation from standing for election for Scottish Parliament and local government elections. In the consultation, 77% of responses noted support for such a policy change. The consultation analysis noted concerns that the power could be abused to either prevent freedom of speech or suppress opposition and that some respondents “questioned how intimidation and harassment can be defined, and expressed a concern that legitimate questioning of candidates could be labelled as harassment to silence criticism”.<sup>23</sup>

### Scottish Government position as adopted in the Bill

35. The Government continues to hold the position set out in the consultation paper that removing the right of someone convicted of harassing or intimidating those involved in the electoral process to stand or hold an elective office for a period is a reasonable response to their actions and links the punishment directly to the offence.

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<sup>21</sup> <https://www.gov.uk/government/publications/intimidation-in-public-life-a-review-by-the-committee-on-standards-in-public-life>

<sup>22</sup> <https://www.legislation.gov.uk/ukpga/2022/37/contents/enacted>

<sup>23</sup> [Electoral Reform Consultation Analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/Electoral-Reform-Consultation-Analysis)

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36. The Bill will extend the effect of disqualification orders under the Elections Act to bar offenders from being MSPs or councillors in Scotland. This is intended to provide additional protection to those who participate in elections and contribute to the political debate and to deter individuals from carrying out acts of intimidation.

37. The Bill will also introduce a new “Scottish disqualification order”, which will disqualify from running as candidates in Scottish Parliament and local elections those found guilty, in Scotland, of intimidating electoral workers such as polling staff in the context of an election. This change reflects calls from electoral administrators, and it was raised as a proposal in some responses to the electoral reform consultation.

38. As with the Elections Act scheme, the Scottish disqualification order will be applied by a judge passing sentence following a conviction for a relevant criminal offence in Scotland. Crimes that this Scottish disqualification order can be applied alongside include any case tried under solemn procedure (where a jury is required) and selected crimes tried under summary procedure (cases heard by a judge without a jury). This list of crimes mirrors that set out in schedule 9 of the Elections Act.

### Alternative approaches considered

39. The Scottish Government agrees with the conclusion of the UK Government against creating a new specific criminal offence to cover crimes committed in the context of elections. Additional approaches were considered, such as extending the coverage of a Scottish disqualification order to apply to bar convicted persons from being the agents of candidates or to those attending an election count, but in discussion with the Electoral Commission and the EMB it was concluded that such measures were not required. It is also considered that a five-year duration for disqualification matches Scottish electoral cycles, but it is acknowledged that arguments can be made for different disqualification periods.

### The ambulatory effect of section 15 of the Scotland Act: disqualification from the Scottish Parliament

40. Section 15(1)(a) and (b) of the Scotland Act operates so that anyone disqualified from being a Member of Parliament is also disqualified from being a Member of the Scottish Parliament. The Scottish Government considers that regulation of membership of the Scottish Parliament should principally be a matter for the Parliament.

41. The Bill therefore seeks to change section 15 of the Scotland Act to end the automatic application of new House of Commons eligibility rules to the Scottish Parliament disqualification. The change will retain the current eligibility criteria for MSPs as of 27 April 2022 (the day before the Elections Act attained Royal Assent).

42. This policy did not feature in the electoral reform consultation, as it was identified as a change that seemed desirable after the consultation was published.

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43. The Government notes that the Welsh Senedd has fully restated its law on disqualification.<sup>24</sup>

## Campaign finance (Part 3 of the Bill)

44. Part 4 of the Elections Act made a number of changes to law around campaigning at elections and in particular spending by campaigners. These changes did not apply to Scottish and Welsh Parliament elections, unless the regulated spending period for one of those elections overlaps with that for a UK Parliament election (outlined further below). Amongst other things, the Elections Act:

- Clarified the legal test for what constitutes notional campaign expenditure;
- Restricted spending by ineligible foreign third-party campaigners, unless spending less than £700;
- Created an order-making power to allow Scottish Ministers to add or remove categories of eligible third-party campaigners;
- Provided for an Electoral Commission code of practice for third-party campaigning; and
- Required groups to register with the Electoral Commission if spending more than £10,000 across the constituent parts of the UK, but less than the limits in each individual country (see Alternative Approaches section).

45. Although both the Scottish and Welsh Governments recommended refusal of legislative consent to the Elections Act provisions, both Governments indicated some sympathy for the changes in principle<sup>25</sup>. While acknowledging that adopting these changes might provide consistency and clarity for voters, campaigners, and electoral administrators, both Governments considered that they should undertake their own consultation on the impact of the campaigning and electoral finance provisions. The Welsh Government has now brought forward a Bill adopting core aspects of the Elections Act regime, making similar provision on campaign finance to those in this Bill.<sup>26</sup>

46. The Scottish Government consultation explored the impacts of extending the Elections Act changes on campaigning to devolved Scottish elections. It acknowledged that the changes proposed, particularly those affecting third-party campaigners, were intended to help ensure that elections are free from foreign interference and ensure that voters can transparently see who funds election campaigns. It also highlighted the important role that legitimate third-party campaigners play in democracies, particularly in sharing a range of information with voters.

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<sup>24</sup> <https://www.legislation.gov.uk/anaw/2020/1/section/29>

<sup>25</sup> Scottish Government Legislative Consent Memorandum on the Elections Bill: <https://www.parliament.scot/-/media/files/legislation/bills/lcms/elections-bill/splcms068.pdf>

<sup>26</sup> <https://business.senedd.wales/mgIssueHistoryHome.aspx?IId=41986>

## Notional expenditure

47. Notional expenditure is a form of campaign expenditure, where a party, candidate, or campaigner receives goods or services for free or at a discounted price. The full price of the goods or services must be declared as campaign expenditure. For example, if a candidate received a 50% discount on printing campaign material from a printing shop, the full price of the printing (as if the discount had not been applied) must be declared as campaign expenditure.

48. The Elections Act made amendments to a number of rules related to campaign spending in reserved elections, including updating the definition of notional expenditure. Following the Supreme Court ruling in the case of *R v Mackinlay and others*,<sup>27</sup> the Elections Act changes mean that candidates only needed to report notional expenditure when they had actually used it, or they or their agent had directed or encouraged someone else to use it on their behalf during a regulated campaigning period. This meant that candidates and their agents were no longer responsible for expenditure which they had no knowledge about.

## Consultation (notional expenditure)

49. The consultation paper explained that the Government was considering updating the legal definition of notional expenditure for devolved Scottish elections in line with the Elections Act. 84% of respondents agreed with the proposal to apply these rules.

## Scottish Government position as adopted in the Bill

50. The change in the Bill (and related changes planned in secondary legislation) will mean that when candidates are given goods or services for free or at a discount, the full value must appear in the candidate's financial returns if specifically agreed by the candidate or their agent. This will mean that candidates and their agents will not need to declare spending they had no knowledge about (e.g. political party posting flyers without the candidate's consent or knowledge), even when the spending may have been to their benefit. Introducing the Elections Act wording to apply to devolved Scottish elections will help ensure the rules are clear and consistent for campaigners and candidates.

51. This change is intended to provide clarity to parties, candidates, and campaigners, as they will follow consistent rules whether they campaign for a UK Parliamentary election or a Scottish devolved election.

52. The Bill's change will apply to all forms of campaigning at local government elections. The Bill does not apply this change to candidate expenditure at Scottish Parliament elections as the existing rules are set out in the Scottish Parliament (Elections etc.) Order 2015, and the necessary adjustment will therefore be made by existing secondary legislation powers.

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<sup>27</sup> The ruling in *R v Mackinlay and others* found that election expenses had to be declared by candidates even if they or their agent had not authorised the spending.

### Third party campaigning

53. Third party campaigners (also called non-party campaigners) are individuals or organisations that campaign in elections, but are not standing as political parties or candidates. In the Elections Act, a number of changes to third-party campaigning were introduced for elections reserved to the UK Parliament. This Bill aims to replicate a number of these measures to apply, where relevant, to Scottish Parliament and local government elections.

54. Section 27 of the Elections Act provides that the Secretary of State may, by order, amend the list of categories of organisation that are able to register as a third party campaigner for reserved elections, as listed in section 88 (2) of the Political Parties, Elections and Referendums Act 2000. In order to amend or remove a category, a recommendation first has to have been made by the Electoral Commission. This recommendation is not required in order to add a new category.

### Consultation (third party campaigning)

55. The Scottish Government's electoral reform consultation asked whether a similar provision to that introduced in the Elections Act should be created for Scottish Ministers to amend the list of categories of third-party campaigner. 42% of respondents agreed with this policy proposal.

### Scottish Government position as adopted in the Bill

56. The Bill will allow Scottish Ministers to amend the list of categories of third party campaigner at Scottish Parliament elections by regulation, in similar terms to the order-making power created in the Elections Act. In order to amend or remove a category, a recommendation first has to have been made by the Electoral Commission.

57. The purpose of the regulation-making power is to ensure that Ministers can effectively respond to future changes in the ways groups campaign in Scottish Parliament elections. It also ensures that if changes in this area are made by the UK Parliament for reserved elections, the Scottish Parliament is able to respond to this and, if necessary, replicate any changes in order to maintain consistent rules for campaigners across the UK.

### Spending by overseas-based third party campaigners

58. The UK Elections Act also reduced the amount that overseas-based third party campaigners could spend in reserved elections before they were committing an offence, setting the limit at £700. This represented a significant decrease from the former limit of £10,000.

### Consultation (Spending by overseas-based third party campaigners)

59. Question 35 of the consultation asked if consultees thought that the spending limit should be reduced to £700 for overseas based third parties that are ineligible to

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register with the Electoral Commission, stay at existing limits (£10,000) or another change be made.

60. Both organisations that answered this question agreed that the spending limit should be reduced. Furthermore, the Electoral Commission noted that reducing the limits on unregistered campaigning “would make it clear that foreign interference in UK elections is not permitted.” There was also broad support among individuals with 66% in agreement.

### Scottish Government position as adopted in the Bill

61. The Bill adopts the Elections Act restriction on overseas-based third party campaigners, applying a £700 limit for spending in Scottish Parliament and local elections. The provision involves an offence of authorising expenses in breach of the restriction, punishable by a fine. Adoption of this measure will avoid confusion for campaigners between Scottish Parliament and local elections and other UK elections (as the limit will be the same) and seeks to limit overseas influence in elections. This provision differs from the Elections Act in one way, as it does not exempt UK-registered unincorporated associations from the £700 limit, as doing so could allow some non-resident UK citizens (who are able to vote in reserved elections) to campaign more extensively in devolved Scottish elections, despite not being eligible to vote in such elections. This mirrors the rules for overseas campaigning in devolved Welsh elections, where UK citizens resident overseas also are not included in the voting franchise.

### Electoral Commission code of practice on third party campaigning

62. One of the key functions of the Electoral Commission is in providing guidance to candidates, political parties, third party campaigners, Returning Officers, EROs and others on their respective responsibilities in relation to elections including electoral expenses. The Commission has powers to take enforcement action where breaches of the rules have been identified. The Commission is also required to provide access to the electoral process for electoral observers, as individuals or on behalf of third-party organisations and representatives of the Commission.

63. The Electoral Commission provides a code of practice on the rules and regulations of third-party campaigning. This code relates to reserved UK elections, and the Scottish Government considers that the Electoral Commission should be able to provide a similar code explaining the rules around third party campaigning in Scottish Parliament and local elections.

### Consultation (Electoral Commission code of practice on third party campaigning)

64. There was widespread support for this proposal, with 85% of individuals and all four organisations who answered giving their backing.

## Scottish Government position as adopted in the Bill

65. The Bill places a duty on the Electoral Commission to produce a statutory code of practice on the application of expenditure controls for third party campaigners contained within that Act as it relates to a Scottish devolved elections and regulated period. This includes a requirement to consult with the Scottish Parliament, and any other persons the Electoral Commission considers appropriate. This provision mirrors a similar duty on the Electoral Commission relating to third-party campaigning at reserved elections under the Elections Act.

## Alternative approaches considered

66. Following the changes made in the Elections Act to reserved elections, primary legislation is required in order to adopt similar provisions for Scottish Parliament and local government elections. The consultation questions for these elements of campaigning were presented as closed questions and alternative models were not generally discussed. In terms of spending by overseas-based third parties, a number of consultation responses noted that the limit should be zero, and that any such spending should constitute an offence. The Scottish Government has considered that the £700 limit provides the appropriate balance between reducing foreign influence on devolved elections, while not criminalising very low amounts of spending.

67. One Elections Act change on campaign finance raised by the consultation has not been adopted in the Bill. This was whether third-party campaigners should be required to register with the Electoral Commission if, during the period before an election, they spend more than £10,000 across the constituent parts of the UK, but less than the individual thresholds in each nation. This would impact, for example, campaign groups wishing to campaign in both Scottish Parliament and Welsh Senedd election periods taking place simultaneously. It would, for example, have meant that third-party campaigners spending more than £10,000 across multiple countries within the UK (e.g. £9,000 in Scotland and £5,000 in Wales) would be obliged to register with the Electoral Commission.

68. Following further discussion with the Electoral Commission, the Government has decided not to pursue this change. Through these discussions, it was established that there would be very limited benefit for campaigners, or increasing transparency for voters, in making this change. It does not seem especially appropriate as there will typically be little overlap between, for example, a Scottish Parliament and a Welsh Parliament election. The Welsh Government has not included provision on this issue in its Elections and Elected Bodies (Wales) Bill.

## Emergency re-scheduling of elections (Part 4 of the Bill)

### Revised power for Presiding Officer to delay Scottish Parliament General Election

69. The Scottish Parliament is dissolved in the run up to a Scottish Parliament election. Following dissolution, Members of the Scottish Parliament cease to hold office,

and the Parliament cannot be re-convened to debate or pass legislation until new members have been elected. Government Ministers and the Presiding Officer remain in office. The date of dissolution is 28 working days prior before the day of the election, which is normally held on the first Thursday in May. For the election held on 6 May 2021, the Scottish Parliament would, in normal circumstances, have been expected to have dissolved on 25 March 2021.

70. There is only one emergency re-scheduling power available after the Scottish Parliament has dissolved. Under section 2(5) of the Scotland Act, the Presiding Officer has the power to propose a new date for the poll at a Scottish Parliament election which is not more than one month before or after the first Thursday in May. This power was originally intended to deal with an unexpected clash of polls (e.g. with a 'snap' UK Parliament election) by allowing the Presiding Officer to change the date of the Scottish Parliament poll but can be used in other situations. In making any decision the Presiding Officer is obliged to consult the Electoral Commission.

71. Any other emergency change to the date of Scottish Parliament and local government elections would almost certainly require an Act of the Scottish Parliament, which is not possible once Parliament has dissolved prior to an election.

72. In the run up to the May 2021 Scottish Parliament election concerns were expressed about what would happen if, once the Parliament had dissolved, an event connected with the coronavirus pandemic (such as a spike or surge of coronavirus infections) potentially endangered the election being safely held on 6 May 2021. The maximum delay of a month at the recommendation of the Presiding Officer was not considered to provide sufficient scope to move polling day in response to a significant deterioration in virus conditions. Temporary legislative changes were made to allow elections to be rearranged due to pandemic conditions. The Scottish General Election (Coronavirus) Act 2021 provided that dissolution should take place on 5 May, instead of 25 March, as would normally have occurred.<sup>28</sup> The change to dissolution meant that MSPs stayed in office until the day before the election, and Parliament would have been able to debate and pass an emergency Bill to postpone or alter arrangements for the election if that had been required.

73. There are a number of other possible situations in which it might prove necessary for the date of a scheduled Scottish Parliament election to change. One possibility is that a UK Parliament General election is called on or near the date of a scheduled Scottish Parliament election. Under the Scotland Act, this would automatically require a new date to be arranged for the Scottish Parliament election. The Dissolution and Calling of Parliament Act 2022 means that a UK Parliamentary election can be announced at short notice on the decision of the Prime Minister (25 working days following the proclamation dissolving the existing Parliament).<sup>29</sup>

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<sup>28</sup> <https://www.legislation.gov.uk/asp/2021/5/contents/enacted>

<sup>29</sup> [The Dissolution and Calling of Parliament Act 2022](https://www.legislation.gov.uk/ukpga/2022/11/contents/enacted)

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74. The Scottish Government is of the view that if a UK Parliament election was called on, or close to, the date of a Scottish Parliament election, then it would be preferable for the Scottish Parliament to be able to meet to discuss the options around any possible postponement of the Scottish Parliament election. This would allow the Parliament to consider the effect of the clash on the Scottish election.

75. Other possible examples that might require a change in date include a public health emergency, major security incident or the demise of the Crown.

76. While there was ultimately no need to postpone the May 2021 Scottish Parliament election, the experience of the potential risk to disruption of that poll has highlighted that the existing arrangements for postponing a Scottish Parliament election could, and in the view of the Scottish Government should, be strengthened.

77. For reference, the formal election period for Scottish Parliament and local government elections commences seven weeks before the day of the poll.

### Consultation (Revised power for Presiding Officer to delay Scottish Parliament General Election)

78. The electoral reform consultation explained that experience in recent years, in particular planning the 2021 Scottish Parliament election during the Covid-19 pandemic, had identified a number of concerns with current arrangements for changing the date of scheduled elections.

79. The consultation paper noted that since the Scottish Parliament and local government elections held on the same day in 2007 there has been general agreement on the desirability of avoiding different types of election being held at the same time. It considered that the changes in the Elections Act had underscored this, in particular as voters in UK Parliament elections are now required to provide proof of identity when voting (as this will not be required in devolved Scottish elections it risks significant confusion at polling stations if a UK Parliament election were held at the same time as a Scottish Parliament or local government election).

80. The consultation discussed two main options in this area: (a) a change to dissolution arrangements (as adopted for the 2021 election) so that the Scottish Parliament was not formally dissolved until close to the election and MSPs could be recalled if needed (e.g. to pass a Bill setting a new election) and (b) a change to the Presiding Officer's power to recommend a new date.

81. Consultation responses were mixed and highlighted concern that powers to rearrange elections might be abused. While only one in five individuals (21%) agreed with the proposal, two thirds of the six organisations who answered the question were in favour. There were clear concerns noted in consultation responses that any re-scheduling powers should only be used in emergency situations and that elections should not be able to be rescheduled for political benefit.

## Scottish Government position as adopted in the Bill

82. The Scottish Government has reflected upon the concerns aired by consultees that emergency powers in this area might be abused. But it also considers that experience since early 2020 has highlighted several ways in which the law in this area needs to be improved. Its consideration of provisions for the Bill in this area has been informed by the following guiding principles:

- to set any maximum period of delay at the shortest duration considered necessary in light of the distinct features of each election;
- to ensure the Scottish Parliament has the opportunity wherever possible to make decisions on re-scheduling elections for a substantial period;
- to place any power to delay on an impartial, respected, officeholder and to require consultation with relevant persons or organisations prior to any decision;
- to present these measures as proposals for Parliament to consider during the course of the Bill with the goal of gaining consensus; and
- that provisions on moving polling day to be earlier are largely impractical, as the impact on the electoral timetable would cause significant challenges for administrators and confusion for voters (e.g. it would be expected to cause considerable confusion on deadlines for registering or for obtaining proxy votes).

83. The Bill therefore sets out a number of changes in relation to Scottish Parliament and local government elections.

84. It modifies the current power for the Presiding Officer to recommend to the Sovereign a change in the Scottish Parliament election date by a month. The one month period is thought to be insufficient to satisfactorily arrange a new polling date. Such a short period would place a great deal of pressure on electoral administrators in finding suitable accommodation and staffing cover and would be likely to increase costs. A postponement of a month or less would also mean that the campaign periods for both elections would significantly overlap, potentially confusing voters and risking one election overshadowing the other. It is also considered that it is more helpful to consider the period of any delay in weeks rather than months. This is because the most likely scenario would be for the election to move from one Thursday to another: so it is considered likely that any postponement under current arrangements would in fact be likely to be for four weeks.

85. The Bill changes the Presiding Officer's power to one allowing them to recommend postponing the election by eight weeks or to bring it forward by four weeks. In light of experience in planning for the 2021 Scottish Parliament election, eight weeks is considered to be a more realistic period in which to arrange a postponed election. It would, in particular, permit a greater separation in time between polls if a UK Parliament general election were called for a date on or near a scheduled Scottish Parliament election. This is intended to reduce the impact of one election campaign affecting the other campaign. Eight weeks would also mean that the election would be likely to occur before July, a month which is generally avoided for electoral events due to the impact of

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summer holidays. The Bill does not prevent an election being postponed by a shorter time, if that was considered more appropriate in the circumstances.

86. As introduced, the Bill sets out a requirement for the Presiding Officer to consult the Electoral Commission and the Convener of the EMB for any use of the power. The Convener of the EMB will have access to the best information on administrative readiness for holding the election and will be able to advise on the optimum date.

87. It is not considered likely that polling day would ever be brought forward as a result of an emergency as to do so within weeks of polling day would be likely to cause substantial confusion around the deadlines for registration and absent vote applications. In theory, there could in some circumstances be a case for a power to make an election earlier to be used some time ahead of the election in order to avoid a specific event anticipated on the scheduled polling day. But this is not considered likely or desirable, not least because section 2(5)(a) of the Scotland Act means that use of the section 2 power to move a Scottish Parliament election also has the effect of dissolving the Scottish Parliament. Some consideration was given to whether a change was warranted to that process (e.g. to ensure that a decision in October to move the polling day to April would not dissolve the Parliament in October) but no change is proposed as the Government wished to restrict the Bill's changes on introduction to those considered essential to cover emergency circumstances.

88. A significant concern with extending the period by which the Presiding Officer can postpone an election is that it will in most cases increase the amount of time during which the Parliament is dissolved and there is no representation for the public. For example, if Parliament were dissolved in March and an election scheduled for May was postponed to September, it would mean there would be no MSPs or meetings of the Parliament for a period of almost 6 months. This would clearly be entirely unsatisfactory and undemocratic, which is why the Bill's provisions are limited to an eight-week postponement, with the possibility of a second eight week postponement (both of which would only be expected to be used in exceptional circumstances).

89. This second postponement by eight weeks is considered necessary to cover a prolonged emergency such as a pandemic. It is acknowledged that this second potential postponement could ultimately result in the Parliament being dissolved for a substantial period of time, but it is difficult to identify other satisfactory options in the event of pandemic-style conditions applying once Parliament has dissolved. One possible additional option in this area would be the approach adopted in section 11 of the Scottish General Election (Coronavirus) Act 2021, which provided that if that Act's expanded six month postponement power for the Presiding Officer was to be exercised for a reason relating to coronavirus, then the Presiding Officer would have to be satisfied that the Scottish Parliament could not safely meet for the purpose of passing a Bill for an Act to change the day for the holding of the poll; that the reason for the exercise of the power would have to be published and that Scottish Ministers, the

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Convener of the EMB, the Electoral Commission and the Chief Medical Officer of the Scottish Administration would have to be consulted.<sup>30</sup>

90. It might also be considered that there should also be a duty on the Presiding Officer to consult within Parliament in some way, but this again runs into practical difficulties if a decision is to be made after Parliament has dissolved.

## Implications of a rearranged Scottish Parliament Election

91. Under section 2(3) of the Scotland Act, the first meeting of a new Parliament must take place within 7 days of a general election. However, a rearranged poll creates significant challenges for electoral administrators in terms of ensuring sufficient staff and in arranging venues, especially for the count in large cities. In planning the 2021 Act, consideration was given to the legislative implications of any delay to the election count. While it was not considered that any changes to the law were required in order for counting to be held over the Friday and Saturday (which occurred for social distancing purposes), it was identified that the prospect of a longer count meant that changes were needed to the deadlines for the first meeting of the new Parliament and the choice of a new First Minister. Section 9 of the 2021 Act therefore provided for the Presiding Officer to fix a day for the first meeting of the new Parliament in consultation with the Electoral Commission and the convener of the EMB. The legislation also required that the first meeting be fixed as soon as reasonably practicable after the election. In addition, section 46 of the Scotland Act requires the Parliament to nominate a First Minister within 28 days of an election. Section 9(3) and (4) of the 2021 Act therefore made provision to ensure that any delay beyond the normal 7-day deadline for the first meeting was not counted as part of the 28-day period under section 46.

92. On the basis that these changes would improve resilience around re-scheduled elections the Bill makes similar provision to the 2021 Act to take account of the potential need for a prolonged count at a rearranged poll. They will not apply to a poll held on the scheduled election date as planned as it is assumed no special measures will be needed for an election held in 'normal' circumstances.

93. The Scotland Act provides that Parliament must, following a general election, elect from its members a Presiding Officer and two deputies before it conducts any other proceedings (except the taking by its members of the oath of allegiance) and in any event, within the period of 14 days beginning immediately after the day of the poll at an election. The Bill changes that for cases where a general election was held on a day proposed by the Presiding Officer the requirement for Parliament to elect a Presiding Officer and two deputies is to be done as soon as reasonably practicable after the day of the poll at the election.

94. Section 46 of the Scotland Act provides that the period for nomination of a First Minister is normally 28 days after the general election. The Bill creates a small exception by amending section 46 so that if Parliament does not meet within the period of 7 days immediately after the day of the poll at a general election which was held on a

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<sup>30</sup> <https://www.legislation.gov.uk/asp/2021/5/section/11/enacted>

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day proposed by the Presiding Officer, any delay beyond the normal 7-day deadline for the first meeting is not counted as part of the 28-day period under section 46.

95. Postponement of an election for a relatively short period raises the question of avoiding reprinting (e.g. of ballot papers printed with the original date) and to preserve one-off absent vote arrangements made for the original date. These changes can be made by existing secondary legislation powers (see Article 15 of the Scottish Parliament (Elections etc.) (Miscellaneous Amendments) Order 2020<sup>31</sup>).

## Dissolution

96. The consultation paper discussed changes to the date of the dissolution, but this is a change that can be made by existing secondary legislation powers. Consultees were broadly split on the issue (48% in favour, 52% against), with organisations other than the Scottish Parliament Corporate Body (the “SPCB”) approving.<sup>32</sup> Discussions with Scottish Parliament officials have made clear that changing dissolution permanently to the day before polling day (as in 2021) would have a significant impact on arrangements for MSPs and Scottish Parliament staff. It could also be argued that allowing MSPs to retain that status during the election campaign could provide an unfair advantage (e.g. as they could seek to make use of ‘MSP’ in communications).

97. The Scottish Government wishes to ensure that there is consensus on any changes to the process for postponing Scottish Parliament general elections (SPGE) and to any change to dissolution. A central aim is to ensure that the Scottish Parliament would be able to meet and pass emergency legislation in relation to the election date in response to a conflicting UK Parliament General Election (UKGE) which was called at the last possible moment. The Scottish Parliament dissolves 28 working days prior to polling day for a SPGE. After then there are no MSPs and the Parliament cannot meet again (although the Presiding Officer remains able to exercise functions of that office). When the Prime Minister calls a UKGE, the House of Commons will dissolve 25 working days after the royal proclamation (and there have been calls by MPs for this period to be reduced<sup>33</sup>). This creates a situation where a snap UKGE could be called for a date on or close to a SPGE after the Scottish Parliament has been dissolved and is unable to react. No response other than the (current) one month postponement power of the Presiding Officer would be available (there is a further provision in section 2(2B) for

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<sup>31</sup> <https://www.legislation.gov.uk/ssi/2020/426/article/15/made>

<sup>32</sup> [https://consult.gov.scot/constitution-and-cabinet/electoral-reform/consultation/view\\_respondent?show\\_all\\_questions=0&sort=submitted&order=ascending&q\\_text=corporate&uuld=368463318](https://consult.gov.scot/constitution-and-cabinet/electoral-reform/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&q_text=corporate&uuld=368463318)

<sup>33</sup> The Report of the Joint Committee on the Fixed Term Parliament Act had the following recommendation at Chapter 4 (para 215):

“A cross-party working party should be established by Government to examine how the General Election campaign period can be shortened from 25 days without compromising voter participation, including through the increased use of technology and increased focus on year-round voter registration. The working party should report its recommendations to Government as soon as possible and in time to ensure any legislative requirements can be put forward in legislation for consideration before the expected date of the next General Election”.

<https://committees.parliament.uk/publications/5190/documents/52402/default/>

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Scottish Ministers to set a new date when a UKGE clashes with a SPGE, but this requires affirmative procedure primary legislation, which would not be possible after dissolution).

98. In order to allow the Parliament to pass emergency legislation, the Government is considering if the 28 working day period could be reduced to 20 working days. As this is a matter for secondary legislation (an amendment to the Scottish Parliament Conduct Order) it is not, strictly speaking, part of the Bill process but given its relevance to the changes in the Bill, the Government would like to engage further on this question as the Bill progresses. A pre-dissolution recess could be used to avoid shortening the campaign period, but that would be a matter for the Parliament to decide.

### Guidance on scheduling elections

99. While there are statutory prohibitions on national local elections or UKGEs being held on the same day as a SPGE, there is no bar on different by-elections being held at the same time or on national council elections being held on the same day as a UKGE. It is therefore intended to discuss guidance to try and discourage different types of election being held on the same day with the Electoral Commission and EMB.

### New power for the Presiding Officer to delay a Scottish Parliament by-election

100. If a constituency seat in the Scottish Parliament becomes vacant, for any reason, an election must be held to fill that vacancy, normally referred to as a by-election. The date of the poll at the by-election is set by the Presiding Officer of the Scottish Parliament and the poll must be held within 3 months of the Presiding Officer being informed of the vacancy. There is no by-election process in respect of Scottish Parliament regional list seats.

101. While the Presiding Officer of the Scottish Parliament has the power to move the date of a scheduled Scottish Parliament general election by up to one month either side of a scheduled date of poll, no such power exists to change the date of a by-election, once it has been set by the Presiding Officer. Under the existing rules, it would require an Act of the Scottish Parliament to cancel a by-election date once set.

102. The Presiding Officer was temporarily granted a power to rearrange constituency by-elections as an emergency measure in response to the pandemic in 2020 (section 69 of the Coronavirus Act 2020, with exercise of the power requiring consultation with Scottish Ministers and the Convener of the EMB.<sup>34</sup> The power could have been used more than once and was time-limited to prevent a date being set after 6 May 2021). No vacancies arose in the period in question.

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<sup>34</sup> <https://www.legislation.gov.uk/ukpga/2020/7/section/69/enacted>

## Consultation (Scottish Parliament by-elections)

103. The consultation paper set out that the Scottish Government was of the view that there would be merit in allowing the Presiding Officer to change the date set for a Scottish Parliament by-election, should circumstances in the constituency make the running of the by-election on the planned date challenging due to public health concerns or security issues. It proposed that the Presiding Officer should be given the power to postpone the date of a by-election by up to 3 months, should circumstances mean that the originally selected date is no longer tenable. A statutory obligation to consult the Electoral Commission, the EMB Convener and the relevant Returning Officer was envisaged. This would avoid the need for legislation to rearrange a by-election in the face of a health or security emergency.

104. A small majority of both individuals and organisations were in favour of this proposal. Of those answering, 52% of individuals and 57% of organisations agreed. Concerns were raised that by-elections could be delayed for political reasons, and that voter confusion, particularly relating to postal ballots, could be an issue. Some respondents suggested that consultation be required with other stakeholders before a postponement can be made.

## Scottish Government position as adopted in the Bill

105. The Bill sets out a new power for the Presiding Officer to delay a Scottish Parliament by-election by 3 months (one use only). There would be a requirement to consult the Electoral Commission, the Convener of the EMB and the relevant Returning Officer.

106. The Bill also states that the power to re-arrange is only exercisable if the date fixed does not fall within the period of 6 months before the date of the next ordinary general election. Where the date fixed falls within the period 6 months before the date of the next ordinary general election), the Presiding Officer is given a power to determine that the by-election not be held.

## Alternative approach considered (Presiding Officer power to move poll)

107. The Bill provides the Presiding Officer with only one opportunity to rearrange the poll, but the Government accepts that an argument could be made for a second use of the power to be permitted in certain circumstances (as with its proposals for local government by-elections below). With the power limited to one use, emergency legislation would be required should it prove undesirable to proceed with the by-election on the preferred date.

## Extraordinary General Elections

108. The Bill modifies section 3 of the Scotland Act which says when an Extraordinary General Election (EGE) must be held. This change is being made to address a potential risk that has been identified where the existing law could impact on a scheduled SPGE (potentially with the overall effect of meaning the general election would occur a week or

two later than planned). The Bill seeks to ensure that if an EGE were required to be called in close proximity to a scheduled SPGE, there would be no EGE and instead the SPGE would be held as normal. This is a highly technical change and so was not highlighted in the consultation.

## Postponement of local government elections (national)

109. Under the provisions set out in sections 5 and 6 of the Local Government etc. (Scotland) Act 1994, Local Government elections must be held on the first Thursday in May every fifth year. The most recent Local Government elections were held on 5 May 2022 and the next scheduled date is 6 May 2027. Under this legislation, the date of a Local Government election can only be changed if an order is made by statutory instrument not later than 1<sup>st</sup> February in the year preceding the year in which the election is to be held, in other words, a minimum of 15 months before the date of poll.

110. Outwith this situation, the only way to change the date of the Local Government elections is by an Act of the Scottish Parliament.

111. While the Scottish Parliament can use primary legislation to change local government election dates in response to emergency situations such as a public health emergency or major security incident, this is not a comprehensive solution. If the need for a postponement arose a few days before the election, then it may not be possible for emergency legislation to come into force in time. In addition, if there is a clear and undisputed reason for a postponement, e.g. a national lockdown in response to a pandemic, then requiring primary legislation would be an arguably avoidable drain on Parliament time during an emergency.

112. Section 37ZA of the Representation of the People Act 1983 (following an amendment made in 2021) allows Welsh Ministers to re-arrange a scheduled local government election by order for one or more counties or county boroughs in Wales. This power is not subject to a minimum period for a postponement.<sup>35</sup>

## Consultation (local government elections (national))

113. The consultation paper explained that experience during the coronavirus pandemic had demonstrated that there may be a need to postpone or cancel Local Government elections at shorter notice than currently allowed for under the existing legislation. It suggested a postponement could be due to a public health emergency such as a pandemic or security issues. It highlighted that local government elections in England were postponed in 2001 due to travel restrictions connected to an outbreak of foot and mouth disease.<sup>36</sup> The paper also explained that since each Local Government election is a separate contest for that council area, it would be possible to postpone some polls in some areas but not others if local issues arose.

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<sup>35</sup> <https://www.legislation.gov.uk/ukpga/1983/2/section/37ZA#commentary-key-984814807e8327eceeec9bd41c4bde86>

<sup>36</sup> <https://researchbriefings.files.parliament.uk/documents/RP01-71/RP01-71.pdf>

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114. The paper invited views on whether the Convener of the EMB should be given the power to change the date of scheduled Local Government elections, either Scotland-wide or in an individual local authority area.

115. Most consultees (68%) opposed allowing the convener of the EMB to postpone nationwide council elections for up to one month. Few alternative approaches were suggested other than to make no change.

### Scottish Government position as adopted in the Bill

116. For the reasons set out above and notwithstanding the consultation responses, the Government remains of the view that change is needed in this area in order to provide an adequate response to emergency situations arising near to the date of a scheduled election. Continuing to rely on emergency legislation is viewed as creating risk, especially where an event arises in the week of an election. As a result the Bill sets out a new power for the EMB Convener to postpone a nationwide general local government election in its entirety by up to 2 weeks, with a requirement to consult the Electoral Commission and Scottish Ministers. It also gives Returning Officers a power, in relation to their local government area only, to postpone the poll at the ordinary election for that area by up to 2 weeks. Before fixing another date the Returning Officer must consult the Electoral Commission, the convener of the EMB and the Scottish Ministers. This measure was developed in discussion with electoral stakeholders following the consultation. The COSLA response to the consultation concluded:

“We can see the benefit of have greater flexibility to enable Local Government elections to be postponed in the event of an urgent situation, such as a pressing public health or security issue. We believe that there should be provision for these decisions to be taken locally, in order to best enable local circumstances to be taken into account.”<sup>37</sup>

117. In considering issues around local government elections, an additional factor is the use of the Single Transferable Vote system. Since its introduction in 2007, votes cast at local government elections have been counted using an electronic counting (eCounting) system. The nature of the planning, set-up and provision of specialist resource and capacity to deliver eCounting in each of the 32 local authority areas means that it would be very challenging to pause and re-deploy the system and that supporting resource for an ordinary local government election that was postponed by a short period (e.g. one month or even six weeks). Switching to the arduous process of counting results by hand would be very challenging logistically and capacity-wise, given the scale of the elections. It would also risk results being subject to a significant delay and a high degree of human error (given how complex a voting system it is to count by hand) and would require a legislative change since electronic counting is required by law.

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<sup>37</sup> [Response 1065764727 to Electoral reform consultation - Scottish Government consultations - Citizen Space](#)

118. While the Bill contains power for the EMB Convener to postpone scheduled council elections nationwide by up to two weeks, this has been prepared with two scenarios in mind. The first is a specific event such as the demise of the Crown or a terrorist attack that means polling day cannot occur as planned. The limited postponement power will allow polling day to be adjusted by a very short period if the Convener thinks this is possible in all the circumstances (including the ability to count votes). A two-week period is considered to be sufficient to potentially allow for this limited adjustment of polling day in response to the demise of the Crown or a security emergency. However, it is considered that postponing a local government election on a national basis for an intermediate period (e.g. a month) would not be feasible because of the complexities, mentioned above, involved in eCounting local government elections.

119. It is considered that if a nationwide local government election cannot be safely held within days of the original polling date the most likely scenario is expected to be a medium to long term postponement of four to six months. Rather than grant such an extensive power of delay to the EMB Convener, the Bill has deliberately limited the power of extension to a maximum of two weeks so that the power could be used to create time for the Scottish Parliament to legislate for a new election date several months ahead (should it consider this to be appropriate).

120. The Bill also provides a new power for each Returning Officer to be able to postpone the general local government election in their council area by up to 2 weeks, with a requirement to consult the EMB Convener and the Electoral Commission.

121. The default starting point for calculating a postponement from is the first Thursday in May, but that start-date shifts if a postponement is set by the convener of the EMB. This could mean that, in theory, an election in some local authorities could be extended by 4 weeks from the original date (i.e. 2 weeks by the EMB Convener, then a further two weeks by the Returning Officer).

122. The Government accepts that a case could be made for a longer period, in particular in relation to the power of Returning Officers to postpone the election for their council area. In particular, the eCounting concerns identified around a nationwide local election may be less challenging in some council areas compared to others (the greatest challenges are thought to lie in city council areas where a large commercial venue such as the Emirates Arena in Glasgow has to be hired for the count).

## Postponement of local government by-elections

123. In 2020 Returning Officers were temporarily provided with power to postpone council by-elections as an emergency measure in response to the pandemic. This power worked well and avoided the need for Scottish Parliament emergency legislation to avoid by-elections being held at unsafe times.

## Consultation (Local Government by-elections)

124. The paper invited views on whether a change to a by-election date should be a decision for the Convener of the EMB or for the individual Returning Officer in the relevant local authority area. 43% of respondents agreed that local government by-elections should be able to be postponed, however respondents were split as to whether the local Returning Officer (17%) or the Convener of the EMB (22%) should make this decision. This equates to 51% and 39% of those who supported a change, respectively.

## Scottish Government position as adopted in the Bill

125. The Bill creates a new power for each Returning Officer to rearrange local government by-elections in their council area by up to 3 months, with a requirement to consult the EMB Convener and the Electoral Commission. This power can be exercised a second time.

126. It is considered that the eCounting concerns identified around a nationwide local election are not as pressing for a by-election. Because fewer ballot papers need to be counted for a by-election smaller premises can be used (even in city areas).

## Election Pilots (Part 5 of the Bill)

### Extension of piloting powers

127. Under section 5 of the Scottish Local Government (Elections) Act 2002 local authorities can propose to Scottish Ministers that they conduct pilots in relation to the holding of elections, for example to “facilitate voting by any persons or any class of person”.<sup>38</sup> The power has been little used and no pilot has occurred since 2004 (when a pilot in relation to holding a by-election entirely by postal voting took place).

128. Section 5 sets out a need for secondary legislation (‘no procedure’) where a pilot is proposed. Any orders making piloted schemes permanent require Parliamentary approval (affirmative procedure) under section 6 of the 2002 legislation. This issue was not consulted on directly. The consultation asked (at question 16) what more could be done to improve the voting experience for individuals with particular accessibility needs or requirements. The consultation analysis reported that “Over a third of respondents answered Q16. Aside from those who felt current arrangements were satisfactory, themes emerged around the accessibility of polling stations, consideration of alternative voting options such as remote methods, better promotion of accessibility features and the need for greater consultation.”<sup>39</sup> Several of these suggestions, such as accessibility features, could potentially be the subject of an electoral innovation pilot.

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<sup>38</sup> <https://www.legislation.gov.uk/asp/2002/1/section/5>

<sup>39</sup> [Electoral Reform Consultation Analysis - gov.scot \(www.gov.scot\)](http://www.gov.scot)

## Scottish Government position as adopted in the Bill

129. The Bill will extend the power to propose electoral pilots to Scottish Ministers, the EMB and EROs. It is hoped that this will increase the prospect of pilots on electoral innovations being undertaken. The Bill could mean that certain pilots that would have been initiated by a council at the suggestion of the Scottish Ministers, EMB or EROs will be initiated directly. The Bill also introduces a requirement for the EMB to be consulted on all proposals for pilots (other than those which it initiates itself).

130. Examples of possible future pilots in this area include the use of digital poll cards (transmitted to voters by email or App), either in addition to or in place of paper poll cards this would be aimed at making these accessible for people with sight loss. Other possibilities include a pilot of a new tactile or audio voting aid. No pilots under this legislation are currently planned. It is not anticipated that these changes will result in a substantial number of pilots, for example there could be two pilots in one year and then no pilots for the rest of the five-year electoral cycle. For reference, a pilot of advance voting occurred in Wales in 2021 but this is not being considered in Scotland.<sup>40</sup>

131. By making it possible for pilots to be proposed by the EMB and EROs (this is in addition to the existing power for local government areas to propose pilots), the Government hopes to encourage innovation.

## Funding powers to increase democratic engagement

132. The Scottish Government and Scottish Green Party - Shared Policy Programme (2021) includes a commitment to the fullest possible democratic participation in Scotland.<sup>41</sup> It included undertakings to:

- to improve the accessibility of elections, with a particular focus on people with sight loss
- strengthen participation, by all sections of our society, in Scotland's democratic processes. We will use strategies and initiatives that promote a dialogue with people in Scotland, including forums such as citizens assemblies to help explore complex policy issues
- work to increase voter registration and active participation in elections by under-represented groups, including non-UK citizens and young people

133. The Electoral Commission produce a report on the accuracy and completeness of the electoral registers of Great Britain every four years. The most recent report was

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<sup>40</sup> <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/advance-voting-pilots-evaluation>

<sup>41</sup> <https://www.gov.scot/publications/scottish-government-and-scottish-green-party-shared-policy-programme/pages/a-democratic-outward-looking-scotland/>

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published in 2023 and considered the registers for December 2022.<sup>42</sup> The results show that in Scotland in December 2022:

- Local government registers were 81% complete and 88% accurate; and
- Parliamentary registers were 83% complete and 90% accurate.

134. The Welsh Government launched a Democratic Engagement Grant scheme in January 2023 to fund third sector organisations and local authorities to support citizens to engage with democracy, with an emphasis on hard-to-reach groups. Under the Welsh scheme £300,000 is being made available, per year, to improve democratic engagement.<sup>43</sup>

## Consultation

135. The Scottish Government's electoral reform consultation (at Question 12) sought views on what could be done nationally or locally to increase registration levels, especially among under-represented groups such as younger people and foreign nationals. Many consultees suggested more promotion to encourage voter registration, mainly calling for either campaigns or media promotion, with social media most frequently mentioned. Some called for targeted marketing, for instance, with foreign nationals or in specific areas.

## Scottish Government position as adopted in the Bill

136. The Bill creates a new power to enable the Scottish Government to make grants and other financial assistance to organisations for activities that are designed to increase democratic engagement. One possible example would be a grant to promote work on improving accessibility information in polling places (for example, for those with sight loss). Where a grant or assistance scheme is put in place, this is expected to be focussed on local organisations which work with harder to reach groups and which have clear objectives to improve democratic participation, such as through encouraging registration.

137. The Scottish Government undertakes to write to the lead Scottish Parliament subject committee on elections matters (currently the Standards, Procedures and Public Appointments Committee) on each occasion that a democratic engagement grant or funding (or a scheme of such grants) is to be made.

## Digital imprints on electronic material (Part 6 of the Bill)

138. An imprint contains details on election campaign material (leaflets, campaign messages etc.) that show the name and address of who has produced, promoted and, in certain circumstances, paid for the material. Requiring an imprint helps to ensure

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<sup>42</sup> <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/accuracy-and-completeness-electoral-registers/2023-report-electoral-registers-uk>

<sup>43</sup> <https://www.gov.wales/democratic-engagement-grant>

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ownership in relation to campaign material by making campaigners responsible for their communications and improves voter confidence, by allowing them to consider who has produced the material and factor that into their consideration of the contents. The imprint regime also helps the Electoral Commission to enforce spending rules by making it easy to identify those who are responsible for material.

139. Prior to 2014, the requirement for an imprint on campaign material to identify campaigners at elections only applied to printed material, such as leaflets and posters. However, in 2014, Scotland became the first part of the UK to require imprints on digital campaign material, with rules applied to the 2014 Independence Referendum. In 2020, digital imprint rules were applied to all Scottish Parliament and Local Government elections.<sup>44</sup>

140. At the 2021 Scottish Parliament election and the 2022 Scottish Local Government elections an imprint was required on all online campaign material which promoted one or more candidates or registered political parties, one or more parties who supported (or who did not support) particular policies or candidates who held (or who did not hold) particular opinions or supported particular policies. The controls on digital material mirrored those for printed election material which fell within these categories.

141. In order to encourage free participation in the democratic process, an exemption to the requirement for an imprint was included for material which only expressed an individual's personal opinion and was published on their own behalf and on a non-commercial basis. This personal opinion exemption does not extend to direct participants in elections such as the candidates and other political entities. The feedback on the operation of the rules in the Electoral Commission's reports on the elections was positive for both elections,<sup>45</sup> with the Commission noting that in the 2022 local government elections 88% of campaigners understood the new requirement to include imprints on digital campaign material.

142. Part 6 of the Elections Act contains digital campaigning measures which apply to all elections and referendums in the UK, including Scottish Parliament and Scottish Local Government elections. The Act introduced a new digital imprints regime requiring anyone paying for digital political material to be advertised to explicitly show who they are and on whose behalf they are promoting the material. Paid-for material is where a payment is made for the material to be published as an advertisement. The content must also meet one of the purposes set out in section 43 of the Elections Act. These purposes include influencing members of the public to support or withhold support from a political party, parties who advocate particular policies, candidates, future candidates, elected officeholders and the holding or outcome of a referendum in any area of the

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<sup>44</sup><https://www.legislation.gov.uk/ssi/2020/297/contents/made#:~:text=The%20Scottish%20Elections%20%28Deta%20ils%20to%20appear%20on%20Election,information%20about%20its%20policy%20objective%20and%20policy%20implications.> and <https://www.legislation.gov.uk/ssi/2020/298/contents/made>

<sup>45</sup> E.g. <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/scotland-local-council-elections/report-may-2022-scottish-council-elections>

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United Kingdom. Unlike the Scottish provisions, which are only relevant during the campaign at a Scottish Parliament or local government election, the Elections Act regime applies at all times.

143. Under the new UK regime certain campaigners (registered political parties, candidates, future candidates, recognised third-party campaigners, referendum campaigners, holders of elected office and recall petition campaigners) are also required to include an imprint on their other unpaid-for electronic material if it constitutes digital election, referendum or recall petition material.

144. The Scottish secondary legislation and the UK legislation are similar, with both sets of rules requiring an imprint on material produced by certain specified persons such as candidates. However, there are some differences. For example, as already stated, some of the provisions in the Elections Act apply at all times, not just in the run up to an election. Also, the Scottish legislation's requirement for an imprint applies to anyone who is promoting the success of a candidate(s) or political party (parties), not just those listed in the Elections Act, unless it is published on the individual's own behalf on a non-commercial basis and only expresses their own opinion.

145. The UK-wide regime only applies to someone that pays for material to be published as an advertisement and certain political entities who must include an imprint on their other electronic material. Anyone who does not pay to advertise material within the scope of the regime or who is not one of the specified political entities requiring an imprint on their other electronic material, is not required to include an imprint under the UK-wide regime.

### Consultation (digital imprints)

146. The consultation paper accepted that the operation of two separate imprint regimes covering Scottish Parliament and local government elections would be likely to lead to confusion. The paper noted that options were limited in this area as a result of the scheme set out in the Elections Act applying to all elections and campaign activity in the UK. This was despite the Scottish Government's argument, rejected by the UK Government, that legislative consent in this area was required (see the Legislative Consent Memorandum referenced in paragraph 45).

147. The consultation paper accepted that it would be too confusing for all aspects of the existing Scottish digital imprints scheme to continue to apply alongside the Elections Act measures. It therefore set out two options: (i) Option A, a complete revocation of the Scottish provisions and (ii) Option B, a partial revocation, with some aspects of the Scottish regime preserved where it is considered that they could operate alongside the Elections Act provisions.

148. All organisations and two thirds (64%) of individuals agreed with the proposal to revoke the existing Scottish provisions. However, the Electoral Commission commented:

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“Digital campaigning accounts for an increasingly large proportion of spending reported by campaigners after elections. Requiring campaigners to include imprints on digital campaign material delivers greater transparency for voters and helps improve public confidence in digital campaigning at elections and referendums”.<sup>46</sup>

## Scottish Government position as adopted in the Bill (digital imprints)

149. Part 6 of the Bill seeks to revoke the current Scottish legislation in this area. It is considered that this will make it easier for the Electoral Commission to prepare relevant guidance and for campaigners to familiarise themselves with the changes. However the Bill also seeks to recreate one aspect of the previous Scottish regime. Although most consultees favoured outright revocation, the measure in the Bill is intended to effectively apply as a ‘bolt on’ addition to the UK-wide scheme. It has been developed in consultation with the Electoral Commission and is considered to promote further transparency at Scottish Parliament and local elections.

150. The additional provision is restricted to unpaid campaign activities by organisations other than registered third parties (i.e. those engaged in third party campaigning but intending to spend less than £10,000 during the regulated election period in relation to a Scottish Parliament election). This means that for Scottish Parliament and local elections there will be one additional circumstance in which an imprint will be required (as the UK legislation does not cover unpaid posting by organisations other than recognised third parties (campaigning groups which have registered with the Electoral Commission)).

151. The Bill also seeks to apply an enforcement regime to this additional provision that closely mirrors the Election Act scheme. It follows the penalties and defences set out in section 48 of the Elections Act in relation to the new requirement (e.g. the person who is guilty of the offence is the promoter of the material and any person on behalf of whom the material is being published and that the penalty should be a fine not exceeding level 5 on the standard scale). As with the Elections Act a court must notify the Electoral Commission when a person is convicted of an offence and the sentence imposed.

152. The Bill also enables enforcement by the Electoral Commission using investigatory powers and civil sanctions. The Electoral Commission will be required to issue statutory guidance and to include details of information about relevant convictions reported to the Electoral Commission and the Electoral Commission’s use of its powers to request information.

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<sup>46</sup> [Response 655451304 to Electoral reform consultation - Scottish Government consultations - Citizen Space](#)

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## Boundaries Scotland (Part 7 of the Bill)

153. Boundaries Scotland (formally named the Local Government Boundary Commission for Scotland) is responsible for:

- carrying out reviews of constituencies and regions for the Scottish Parliament;
- carrying out reviews of electoral arrangements for local authorities;
- carrying out reviews of the boundaries of local authority areas; and
- responding to requests for reviews of electoral wards or local authority areas.

### Scottish Government position as adopted in the Bill

154. The Scottish Elections (Reform) Act 2020 changed local government election term lengths to five-year instead of four-year periods. Boundaries Scotland are required to conduct reviews of local government electoral arrangements (i.e. the number of councillors and ward boundaries within each local authority) every 15 years. In the 2020 Act, the deadline by which Boundaries Scotland was required to have completed the next reviews of local government electoral arrangements was set at 31 December 2028.

155. The Bill will amend this deadline date, from 31 December 2028 to 30 April 2031. This will better align with the 5-year period between local government elections, and better reflect the 15-year period between reviews. This deadline will also allow for a 12-month period before the following scheduled local government elections, in May 2032.

### Consultation (Boundaries Scotland)

156. The issue noted above was not included within the electoral reform consultation due to its technical nature and limited interest to the public. It has been developed in discussion with Boundaries Scotland, which noted in its consultation response that:

“The current deadline of 31 December 2028 no longer fits with the dates of local government elections given the move to 5-year terms and reviews every 15 years. A move to May 2031 would set the deadline 12 months before the elections expected in May 2032.”<sup>47</sup>

The electoral reform consultation asked whether the process by which Boundaries Scotland’s recommendations for changes to local government electoral arrangements and Scottish Parliament boundaries are approved should be amended. The consultation paper noted that international best practice, including at a UK-level, is that the recommendations made by independent boundary commissions should be approved automatically (in a process often referred to as “automaticity”). The Scottish Government is sympathetic to this view, and presented automaticity as one of the potential models in the consultation, noting that the political independence of

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<sup>47</sup> [Response 686340754 to Electoral reform consultation - Scottish Government consultations - Citizen Space](#)

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Boundaries Scotland should be preserved. However, the scale of such a change, and the knock-on effect on other aspects of how Boundaries Scotland operate and conduct reviews, means that further consideration on the best way to approach such a reform is required.

## Electoral Commission (Part 8 of the Bill)

157. The Electoral Commission is the independent body which oversees elections and regulates political finance in the UK. It was set up in 2000, by the Political Parties, Elections and Referendums Act 2000 (“PPERA”)<sup>48</sup>. The Commission works to promote public confidence in the democratic process and ensure its integrity by:

- enabling the delivery of free and fair elections and referendums, focusing on the needs of electors and addressing the changing environment to ensure every vote remains secure and accessible;
- regulating political finance – taking proactive steps to increase transparency, ensure compliance and pursue breaches; and
- using its expertise to make and advocate for changes to our democracy, aiming to improve fairness, transparency and efficiency.

158. The Electoral Commission operates UK-wide but is also accountable to the Scottish Parliament for its work on Scottish Parliament and Scottish Local Government elections (referred to as "devolved Scottish elections" in this Chapter). This includes providing guidance to EROs and Returning Officers, setting performance standards and measuring performance against those standards. The UK Parliament's Speaker's Committee on the Electoral Commission<sup>49</sup> has an oversight role in relation to the Electoral Commission's activities on a UK-wide level. The Electoral Commission is required by PERA<sup>50</sup> to submit to the Speaker's Committee an annual estimate of income and expenditure and every five years a plan setting out its aims and objectives. Both the five-year plan and the estimate of income and expenditure are subject to the approval of the Speaker's Committee.

159. The Commission undertakes a number of roles in relation to providing guidance to candidates, political parties, third party campaigners, Returning Officers, EROs and others on their respective responsibilities with regard to elections. It also undertakes the provision of public awareness information for the public and for electors, including public awareness campaigns in the run up to elections and the provision of household leaflets on the election and voting process before a poll. The Commission may prepare codes of practice giving guidance on candidates' and parties' expenditure at elections under RoPA and for those observing at elections in addition to guidance as to the kinds of expenses which count towards, respectively, political parties, third party campaigners and referendum expenditure limits under PERA.

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<sup>48</sup> <http://www.legislation.gov.uk/ukpga/2000/41/contents>

<sup>49</sup> <https://committees.parliament.uk/committee/144/speakers-committee-on-the-electoral-commission/>

<sup>50</sup> <https://www.legislation.gov.uk/ukpga/2000/41/schedule/1>

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160. The Commission also undertakes regulatory functions, including assessing ROs and EROs against performance standards; regulating donations and spending of political parties, candidates and campaigners; and taking enforcement action where breaches of rules have been identified. The Commission can levy civil sanctions for some offences, or, where breaches of electoral rules are severe, refer matters for criminal prosecution.

161. In its statutory role, the Electoral Commission reports on the conduct of elections and identifies potential areas for improvement.

162. The Reform Act made a number of changes in relation to the funding and accountability of the Electoral Commission and the Codes of Practice through which the Commission can provide guidance to candidates, political parties, campaigners and those involved in electoral administration. A key change in the Reform Act was for the Scottish Parliament to fund the Commission for its work related to Scottish Parliament elections and Local Government elections in Scotland. The Act retained the role of the Speaker's Committee in Electoral Commission oversight and created a structure for the Scottish Parliamentary Corporate Body (the "SPCB") to report to the Speaker's Committee on the Commission's five-year plan. The Commission must also submit an annual estimate to the SPCB by end September each year requesting funding for its devolved functions.

163. The Reform Act requires the Commission to submit a plan related to the Commission's devolved Scottish functions to the SPCB. It:

- must examine each plan submitted to it in so far as the plan relates to the Commission's devolved Scottish functions
- must decide whether it is satisfied that the plan is consistent with the economical, efficient and effective discharge by the Commission of their devolved Scottish functions, and
- if it is not so satisfied, may recommend such modifications to the plan as it considers appropriate for the purpose of achieving such consistency.

164. The SPCB must, after concluding its examination and making any recommendations report to the Speaker's Committee on its findings and its recommendations (if any) and lay the plan before the Scottish Parliament.

165. The Commission was also required, as soon after the end of each financial year as may be practicable to prepare and lay before the Scottish Parliament a report about the performance of the Commission's devolved Scottish functions during that financial year.

166. The Electoral Commission is obliged by PPERA to submit plans to the Speaker's Committee setting out its aims and objectives for the period of five years beginning with the financial year to which an estimate of the Commission's income and expenditure relates.

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167. The Reform Act required the Commission to submit the five-year plan to the SPCB as well as to the Speaker's Committee and for the plan to be laid before the Scottish Parliament as well as the UK Parliament. The Commission and the SPCB have agreed that the 5-year plan should be tabled once in the term of each legislature.<sup>51</sup>

### Consultation (Electoral Commission)

168. The Consultation Paper explained that Senedd Cymru had legislated in 2020 to set out arrangements for funding and oversight of Commission's functions in relation to devolved Welsh elections.<sup>52</sup> Those changes created a similar structure to that adopted in Scotland in relation to the Commission's five-year plan for devolved Welsh elections and devolved Welsh referendums but went further than the Reform Act by requiring the Commission to prepare a report about the performance of the Commission's functions in relation to devolved Welsh elections and devolved Welsh referendums during that financial year and lay it before Senedd Cymru. It also made more detailed provision requiring the Llywydd's Committee<sup>53</sup> (which scrutinises the Electoral Commission's financial estimates and five-year plans as they relate to the exercise of the Commission's functions in relation to devolved Welsh elections and referendums) to report to Senedd on its oversight of the Commission and its scrutiny of financial estimates submitted by the Commission on its spending.

169. The consultation sought views on the role of the Scottish Parliament in overseeing the Electoral Commission's activities in relation to devolved Scottish elections and referendums. The consultation discussed reforms to the scrutiny of the Electoral Commission, and asked whether the Commission's activities in relation to Scottish Parliament and Local Government elections should be overseen by the Scottish Parliament, rather than the current arrangement, which relies upon the Speaker's Committee at Westminster.

170. Respondents were broadly opposed to the proposal for the Scottish Parliament to have greater oversight of the Electoral Commission's devolved activities. Three fifths (60%) disagreed with the proposal, with four of the five organisations who answered the question disagreeing. The consultation analysis reported that the majority of responses "focussed on the importance of the Electoral Commission's impartiality; many stressed the need for the Electoral Commission to remain free from political influence. As such, some expressed disapproval of the proposal to give the Scottish Parliament a greater role in the oversight of Electoral Commission activity."

171. The Electoral Commission's consultation response highlighted the importance of its independence and suggested that a subject committee of the Parliament could undertake scrutiny work at the request of the SPCB. Such an arrangement is

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<sup>51</sup> Para 15(1) of schedule 1 of PPERA provides that the five-year plan shall be tabled in the UK Parliament in the first financial year following a UK general election

<sup>52</sup> <https://www.legislation.gov.uk/anaw/2020/1/section/28>

<sup>53</sup> <https://senedd.wales/committees/llywydd-s-committee/>

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anticipated following the Bill, although the exact arrangements will be a matter for the Scottish Parliament.

### Scottish Government position as adopted in the Bill (Electoral Commission)

172. The Government is committed to ensuring that the Electoral Commission is not subject to political interference. It agrees with the view held by many consultees that the Electoral Commission must remain free from political influence. But the current arrangements mean that the principal scrutiny role in relation to Commission's activities in relation to Scottish Parliament and local government elections is a matter for the Speaker's Committee at Westminster. One feature of this arrangement is that the Commission includes its projected work on Scottish Parliament and local government elections in the 5-year plan it prepares for UK Parliament and English local elections after a UK Parliament General Election. A new 5-year plan is required after every UK Parliament general election, even though a feature of the UK Parliament system is that elections can be held after substantially less than five years. As outlined above, this is not the position in Wales: the Welsh Senedd has a clear and leading role in relation to scrutiny of the Commission's activities on Welsh Senedd and council elections. There is in particular a separate 5-year plan for the commissions' devolved Welsh activities and it is tied to the fixed cycle of Senedd elections.

173. The Government has concluded that the Commission should prepare a separate 5-year plan in respect of Scottish Parliament and local elections and for this to be tied to the Scottish Parliament election cycle, rather than UK Parliament elections.

174. As a result, the Bill seeks to improve the role of the Scottish Parliament in parliamentary scrutiny of the Commission in relation to its activities for Scottish Parliament and local government elections. The changes will also align with the equivalent arrangements in Wales (although does not see the establishment of an equivalent to the Llywydd's Committee).

175. It provides that for each financial year, the Commission must prepare an estimate of the Commission's income and expenditure for the year in relation to the Commission's devolved Scottish functions (which includes functions in relation to Scottish Parliamentary general elections and by-elections, any local government elections and under the Referendums (Scotland) Act 2020 in relation to any referendum held throughout Scotland) and, by no later than 6 months before the start of each financial year (or such later date as the Commission and the SPCB may agree), send the estimate to the SPCB for approval.

176. It also provides that when the Commission send to the SPCB such an estimate in respect of the first financial year following a Scottish Parliament general election, it must also submit to the SPCB a plan setting out its aims and objectives for the exercise of the Commission's devolved Scottish functions during the next 5 years and estimated requirements for resources for the exercise of those functions during that period.

177. The SPCB must examine each plan submitted to it and decide whether it is satisfied that the plan is consistent with the economical, efficient and effective discharge by the Commission of their functions. If it is not so satisfied it may recommend such modifications to the plan as it considers appropriate for the purpose of achieving such consistency. As part of its examination, the SPCB may consult a committee of the Scottish Parliament (for example, the Standards, Procedures and Public Appointments Committee) and any other persons as it considers appropriate.

178. After the SPCB has reported to the Commission on its findings and recommendations (if any) the Commission must make whatever modifications to the draft plan it considers necessary and lay the plan before the Parliament. If the Commission did not follow any recommendations it must explain in a document laid before Parliament why it did not. The Commission may, of its own accord or as required by the SPCB, submit a new (or revised) plan at any other time during the 5-year period, under the same process.

179. These funding and financial accountability arrangements for the Electoral Commission are intended to balance the need to ensure the Commission's independence from the government with appropriate safeguards for ensuring proper financial control. The Bill's change effectively gives the Scottish Parliament an equivalent oversight role for relevant Commission activity to that of the Speakers Committee at Westminster and the Llywydd's Committee in Wales.

180. The Government has considered adopting the approach of the Welsh Senedd and establishing a dedicated subject Committee to consider the Commission's work. In discussion with Scottish Parliament officials and the Electoral Commission, it has been concluded that it should be possible (if the Scottish Parliament so decides) to create a structure under which substantial policy consideration of the Commission's activities in relation to Scottish Parliament and local elections is considered by a nominated Committee of the Parliament (most likely the Standards, Procedures and Public Appointments Committee), reporting to the SPCB.

181. In preparing the Bill's provisions in this area in consultation with the Electoral Commission and Scottish Parliament officials, there was one aspect where final agreement was not reached. This concerned whether the final say on the content of the Commission's 5-year plan for its activities in relation to Scottish Parliament and local elections should rest with the Commission or with the Scottish Parliament. The Government considers that placing the final decision with the Commission sends a strong message of support for the Commission's independence and that is the approach reflected in the Bill. It does however appreciate that both the UK and Welsh Parliaments have adopted the opposite approach, of the relevant parliamentary committee having the final say. There is merit in both approaches and this is an issue that the Government would like to specifically highlight for consideration during the course of the Bill.

## Electoral Management Board for Scotland (Part 9 of the Bill)

182. The EMB was set up on an interim basis in 2008 and became a statutory body as a result of the Local Electoral Administration (Scotland) Act 2011<sup>54</sup> which gave the EMB “the general function of co-ordinating the administration of local government elections in Scotland.” The functions, membership and role of the Board are set out in sections 1-9 of the 2011 Act.

183. The EMB has two specific roles:

- assisting local authorities and other persons in carrying out their functions in relation to local government elections; and
- promoting best practice in local government elections by providing information, advice or training (or otherwise).

184. The EMB's primary focus is in ensuring that the interests of each voter are kept at the centre of all election planning and administration and in providing advice to stakeholders on the running of electoral events. It supports the electoral community in Scotland to deliver elections safely, securely and successfully.

185. The Convener of the EMB has the power to issue directions to Returning Officers and EROs and this role was widely considered to be highly successful in the running of elections under coronavirus pandemic conditions.<sup>55</sup> Currently the EMB lacks a legal personality which means that it cannot enter into contracts. This limits the extent to which it can support local authorities and others to run elections. A key example would be the contract for electronically counting votes cast at local government elections, where the Scottish Government tenders the contract and officials take on the accountable officer roles. This is an exercise that the EMB with a legal personality could manage in future. There are other national contracts which the EMB could enter with the agreement of the local authorities. These could lead to savings to local authorities for services such as economies of scale in printing, promoting best practice and efficiencies and in managing common contracts covering multiple councils.

186. The EMB currently receives Scottish Government funding of £200K per annum and is hosted by City of Edinburgh Council. The current Convener is the Chief Executive of Comhairle nan Eilean Siar and does not receive any payment for the Convener role apart from expenses. The current Secretary to the EMB is a Deputy Returning Officer for City of Edinburgh Council. Work is undertaken by contractors, and additional staff have been employed for specific projects, such as the current strand of work focused on improving accessibility to voting. This may have been an appropriate model when the EMB was established but the evolution of its place, and expectations of

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<sup>54</sup> <https://www.legislation.gov.uk/asp/2011/10/contents>

<sup>55</sup> <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/our-reports-and-data-past-elections-and-referendums/report-scottish-parliament-election-6-may-2021>, see Recommendation 7

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its function, in the delivery of successful elections across Scotland suggests that a change is needed.

187. The Welsh Senedd is currently considering a Bill seeking to place a duty on the Welsh Democracy and Boundary Commission to create an EMB for Wales. As part of this process the Welsh Senedd's Local Government and Housing Committee requested that the EMB Convener provide evidence to the Committee. During their evidence the Convener stated (at paragraph 174): "I'm keen personally that the EMB have a legal status. I think that is important, and that shows a maturing of the position of the EMB within the electoral structure in Scotland"; and (at paragraph 195): "I think the feedback from the electoral community in Scotland over the years has consistently been to the effect that electoral management without the EMB would be very, very difficult indeed. And it was set up for a purpose. It was set up to co-ordinate and support, and its esteem, if I can put it that way, has grown across the political spectrum and within the communities it serves."<sup>56</sup>

### Consultation (EMB)

188. The Scottish Government's consultation on electoral reform included questions about the structure of the EMB and the creation of the post of Deputy Convener. The consultation analysis noted that the most common theme was recognition of the importance of impartiality and transparency in the EMB's operations. All organisations who answered, including the EMB, agreed that a Deputy Convener post should be established. Individuals were evenly split on the proposal with 51% in favour and 49% opposed.

### Scottish Government position as adopted in the Bill (EMB)

189. The Bill provides for a change of status of the EMB from a statutory committee to a body corporate so that it can enter into contracts and play a fuller role in assisting local authorities. The Government is consulting with the EMB on any need for further adjustments required as a consequence of this change.

190. The Bill proposes the creation of the post of Deputy Convener of the EMB. While a deputy would have been possible under current arrangements, the Bill will allow any Deputy Convener to assume the powers of the Convener to issue directions if the Convener became incapacitated as well as being able to deputise generally for the Convener.

191. Provision of paid post-holders for the EMB has been identified by the Government as a desirable step. It is however dependent on funding being agreed. Providing for a paid Convener and Deputy Convener (a new post envisaged by the Bill) and other staff is estimated to involve expenditure which would at most double the current budget allocation from £200K per year to £400K per year. A source for additional funds beyond the current £200K has not currently been identified. The change will therefore not occur until a business case is completed and financial

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<sup>56</sup> <https://record.senedd.wales/Committee/13822>

provision made. No obligation is created in the Bill for paid office holders to be established. There is an argument that enhancing the EMB should lead to efficiency savings (e.g. in the form of promotion of good practice and negotiating common contracts) for local government in running elections and this could be a factor in any future funding arrangement. The Government intends to consult further with COSLA and others on possible sources of additional funding for the EMB, but at present the changes made by the Bill will not directly result in the additional cost identified below. This is because they are enabling changes: the Bill does not require paid postholders or other expenditure to be incurred, but it will make this possible if and when funding can be secured.

## Alternative approaches (Where not covered above)

### Choice of legislation

192. The Government has sought to follow the convention that changes which can be made using existing secondary legislation powers should not be made by primary legislation. That is why some changes that featured in the consultation are not included in the Bill: because existing secondary legislation powers allow such changes to be pursued separately. This includes issues discussed in the consultation such as a contact address for a council election candidate acting as their own agent, free campaign mailings for candidates and improvements to the requirement for a tactile ballot paper to be provided in polling places to support voters with sight loss.

193. Some aspects of the digital imprints changes in Part 6 of the Bill could have been achieved through secondary legislation (in particular revocation of the existing Scottish imprints regime), but the Government considered, given the complexity of the provisions, setting out the full change in the Bill would be clearer for campaigners to understand and apply.

### Boundaries Scotland: boundary review process

194. Boundaries Scotland is an independent Commission which reviews and makes recommendations on the boundaries of constituencies and regions for the Scottish Parliament, and local government electoral arrangements. Chapter 6 of the consultation paper explained that the Scottish Government was considering additional ways of preventing political influence on the boundary-setting process. Several options were proposed:

- Option 1 – Remove the requirement for Boundaries Scotland to review proposals if they are rejected by the Scottish Parliament. This would remove the potential for a back-and-forth between Boundaries Scotland and the Parliament if they could not agree, but risks boundaries becoming increasingly out of date if the Parliament rejects proposals.
- Option 2 – Change how Parliament scrutinises Boundaries Scotland proposals, so they could only reject or change the proposals if there were concerns that Boundaries Scotland had not followed their duties as set out in law. This limits the ways that Parliament can scrutinise the proposals but

would help to ensure objections were linked directly to Boundaries Scotland's methodology, limiting opportunities for political interference.

- Option 3 – Move to a process called 'automaticity', where legislation implementing the proposals made by Boundaries Scotland comes into effect automatically; without Parliament or Ministers having the final say over being able to reject or modify the reports. Versions of automaticity are used in the boundaries-setting process for the UK Parliament and in countries including Australia, Canada, and New Zealand. This approach would give Boundaries Scotland more independence from political issues, and there are options available to allow Parliament to retain some elements of scrutiny over the process.

195. Currently, recommendations for changes to the boundaries of Scottish Parliament boundaries and local government electoral arrangements are scrutinised by a parliamentary committee before being voted on by the Parliament. MSPs therefore have the option of voting against the recommendations made by Boundaries Scotland. Two fifths (39%) of those who answered this question felt there should be no change to the process for approving boundary changes. The third option was the most popular of the three options presented in the paper, backed by 34% of respondents overall and by three quarters (75%) of organisations. Of those who supported one of the three options presented in the paper, 58% of respondents supported Option 3, with 86% of organisations in favour of this option. The Scottish Government is of the view that automaticity represents the direction of travel that should be pursued in any change to the process by which reviews by Boundaries Scotland are approved. However, the Scottish Government is considering the most appropriate way to move forward with any legislative change in this area.

## Disqualification of local councillors and Members of the Scottish Parliament appearing on the sex offenders register

196. The following paragraphs describe an issue that does not feature in the Bill but which is being actively considered ahead of Stage 2 of the Bill.

197. Section 31 of the Local Government (Scotland) Act 1973 prevents individuals standing, or holding office, as a local authority member if they have, within five years prior to the day of the election, or since their election, been convicted in the UK, Channel Islands or Isle of Man of any offence and have received a custodial sentence, suspended or not, for a period of not less than three months without the option of a fine.

198. For elections to the Scottish Parliament, people are disqualified from standing or continuing to serve as an MSP if they have been convicted of an offence and have been sentenced to be imprisoned or detained for more than a year and are detained anywhere in the UK, the Republic of Ireland, the Channel Islands or the Isle of Man, or are unlawfully at large (section 1 of the Representation of the People Act 1981, as it applies to Scottish Parliament elections by virtue of section 15 of the Scotland Act). The justification for this difference in approach in relation to convictions is unclear.

## 2023 Scottish Consultation on Disqualification of Councillors

199. The Scottish Government's Disqualification criteria for councillors consultation paper was launched in May 2023 and closed on 9 August. The impetus for the consultation was a high profile case involving a councillor who was sentenced to a community payback order upon being convicted of a sexual offence. Because they were not given a custodial sentence of 3 months or more, the statutory provisions excluding certain offenders from being local authority councillors were not engaged. It was suggested there was a potential issue arising from long term sentencing trends and the Scottish Government's continuing commitment to reduce the use of short custodial sentences and encourage wider use of community sentences.

200. The consultation set out the objective of protecting the electorate from exposure to councillors during the period when they are subject to the Sex Offender Notification Requirements in Part 2 of the Sexual Offences Act 2003 ("SONR"). One factor noted was that consultations with councillors may generally be held on a one-to-one basis and in often isolated locations. There was also the potential for an imbalance of power, if a member of the electorate is vulnerable and/or seeking assistance from a councillor. It was also highlighted that councillors have a leading role to play in building and preserving a society where the rights and freedoms of individuals are respected and that it was vital that they have the trust of the communities they serve. The results of the consultation are available on the Scottish Government website.<sup>57</sup>

## Application to MSPs

201. The features identified in the consultation in relation to councillors are clearly relevant to MSPs, in particular, protecting constituents in their interactions with MSPs, especially where alone or if the MSP has a power dynamic advantage in relation to a constituent. It is also clear that MSPs are high profile public figures, with responsibilities including law making – the Government considers that the arguments set out in its summer 2023 consultation paper in favour of building and preserving a society where the rights and freedoms of individuals are respected and communities can trust their representative clearly carry over to MSPs. Any distinction in treatment between MSPs and councillors in this area without a clear rationale seems likely to reduce public trust.

## UK Parliament and Welsh Senedd changes

202. Section 20 of the Local Government and Elections (Wales) Act 2021 amended the law to prevent persons subject to the notification requirements or orders under Part 2 of the Sexual Offences Act 2003 from being councillors in Wales.<sup>58</sup> The Local Government (Disqualification) Act 2022 made similar provision in relation to councillors and mayors in England.<sup>59</sup>

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<sup>57</sup> <http://www.gov.scot/ISBN/9781835218617>

<sup>58</sup> <https://www.legislation.gov.uk/asc/2021/1/section/20>

<sup>59</sup> <https://www.legislation.gov.uk/ukpga/2022/17/section/1>

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203. There have been some recent calls for a change in relation to sex offender notification and MP disqualification.<sup>60</sup>

204. The Welsh Senedd also legislated in the Senedd and Elections (Wales) Act 2020 to restate disqualification criteria from the Senedd, but this was in the context of disqualification in relation to holding certain offices.<sup>61</sup>

### Scottish Government position

205. The Government considers that the Bill presents an opportunity to bar those subject to sexual offender notification requirements and other restrictions arising from orders involving sexual risk from serving as councillors.

206. The consultation focused only on disqualification on the basis of being subject to the sex offender notification requirements in Part 2 of the Sexual Offences Act 2003, but some consultation responses were in favour of adopting a broader approach, as elsewhere in the UK, of also disqualifying persons subject to certain orders related to the posing of sexual risk.

207. The roots of this move are grounded in both protecting the public in personal encounters with elected representatives and also a more general reputational concern based on trust and confidence.

208. In considering disqualification for MSPs it seems logical that the same sexual offender restrictions barring a person from being a councillor should also bar a person from being an MSP, unless there is a compelling rationale for a distinction. No such rationale has so far been identified. While it could be argued that some councillors may be more likely to have face-to-face meetings on their own with vulnerable people as part of their duties, that situation could still arise for an MSP (particularly in relation to party or parliamentary staff). In any event, it is considered that the general point around public confidence in elected representatives argues against different treatment. The case for an additional restriction in relation to MSPs is arguably stronger, as the sentence threshold for a criminal conviction to bar a person from serving as an MSP is 12 months, while it is only 3 months for a councillor. Adopting the same approach for MSPs is considered to be consistent with one of the key principles of the Verity House Agreement – mutual trust and respect for the democratic mandates of both spheres of government.

209. Disqualification would not apply until any appeal right had been exhausted and any change would not disqualify serving MSPs and councillors from office at the point at which the law changed (so that a person currently serving as an MSP or councillor and subject to notification requirements or a relevant order would not be disqualified when the law changes but, they would be disqualified from standing for re-election at the next local government election, should they still be subject to the relevant order or the SONR

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<sup>60</sup> [https://twitter.com/FDA\\_union/status/1718018660311118067](https://twitter.com/FDA_union/status/1718018660311118067)

<sup>61</sup> <https://www.legislation.gov.uk/anaw/2020/1/section/29>

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at that time). This is considered an essential transitional provision. It is to be noted, too, that any imposition of a relevant order/SONR after the provision comes into force would lead to immediate disqualification; it would not be a question of waiting until the next round of local government elections took place.

210. The Government wishes to highlight this issue now to promote debate ahead of the Bill's Stage 2 (when the issue could be adopted as an amendment). One specific issue on which views are sought is the question of how the list of restrictions which will attract the disqualification will be maintained (e.g. if new types of restriction are created). Where disqualification is tied to holding a particular office, normal practice is for changes to be made by secondary legislation. But neither the UK nor Welsh Parliaments have applied their disqualification regimes for sexual conduct restrictions to parliamentarians: their provisions affect councillors only. While Scottish Parliament legislation changing Scottish provisions on orders and notification requirements could likely update our list as a consequential amendment to those, this would not be possible for changes to orders from elsewhere in the UK, the Channel Islands and the Isle of Man. The logical way for such updates to be achieved would be through an express power for Scottish Ministers to amend the list of restrictions by regulations.

211. The Government therefore welcomes and invites debate on whether - if the restriction outlined above is adopted into the Bill - it would be appropriate for Ministers to take a power to amend the list of sexual conduct restrictions for MSPs.

## Changes to the electoral franchise

212. The electoral reform consultation explained that Scotland has one of the most generous voting franchises in the world. Since 2020 and excluding short term visitors such as tourists, asylum seekers are now the main group of foreign nationals aged 16 or over living in Scotland without voting rights in Scottish Parliament and local government elections.

213. The consultation therefore asked whether the franchise should be extended further in relation to two groups of people. These were asylum seekers, and to those detained on certain mental health grounds related to criminal justice. Neither proposition was supported by many respondents to the consultation, with 78% against extending voting rights to asylum seekers, and 80% opposed to those detained on mental health grounds related to criminal justice.

214. The Government accepts that there are significant challenges in extending voting rights to asylum seekers, and concerns have been raised by EROs in relation to whether they would know when an asylum claim had been conclusively rejected so as to remove the person from the electoral register. No change to the franchise is proposed in the Bill.

## Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

### Equal opportunities and Child's Rights and Wellbeing Impact Assessment

215. The proposed provisions within the Bill in regard to extending candidacy rights will allow additional foreign nationals resident in Scotland, and who are 18 years of age or over, to stand in Scottish local government elections. This is in line with the Scottish Government's position in relation to immigration and its desire to demonstrate that Scotland is a welcoming place for all.

216. By expanding democratic engagement and accountability in extending candidacy rights, the Bill will contribute to the achievement of the Scottish Government's National Performance Framework Outcomes of inclusive, empowered, resilient and safe communities.

217. The Bill is not considered to have a negative impact on any of the protected equality groups. It promotes equality by ensuring that any eligible person who wishes to stand as a candidate at a Scottish Parliament local government election is able to do so. The Bill will affect everyone in Scotland who will become entitled to stand for election as a result of its provisions. It has the potential to impact positively on those who share the following protected characteristics:

Race – the protected characteristic of race includes nationality.<sup>62</sup> Extending candidacy rights to additional foreign nationals is likely to positively impact upon those resident in Scotland as empowered and valued members of the community.

218. An Equality Impact Assessment is considered necessary and will be published at: <https://www.gov.scot/publications/>. In relation to the disqualification sanction focused on intimidation in Part 2 of the Bill it highlights evidence indicating that harassment and intimidation of politicians is often particularly focused on women and can be a significant factor in them deciding not to stand for re-election.

219. A Children's rights and wellbeing impact assessment (CWRIA) screening process has been completed and concluded that a CRWIA was not required. The Scottish Government notes that had changes to candidacy rights for 16- and 17- year olds featured in this Bill, a full CRWIA would have been required.

### Human rights

220. The Bill has no disproportionate effect on human rights. The Scottish Parliament is a legislature in terms of the right to free elections in Article 3 of Protocol 1 of the European Convention on Human Rights. Part 1 of the Bill allows foreign nationals with

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<sup>62</sup> Section 9 of the Equality Act 2010 <http://www.legislation.gov.uk/ukpga/2010/15/section/9>

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limited leave to remain to stand for election which will have a positive effect by enabling more people to become representatives in the Scottish Parliament. Part 2 of the Bill disqualifies persons who are guilty of an offence which is aggravated by intimidation towards candidates, campaigners, elected representatives and election workers from being MSPs. These provisions will deter intimidatory behaviour towards persons involved in democratic life and electoral processes.

221. The controls in Part 6 of the Bill on digital imprints mirror existing controls. To the extent that they interfere with freedom of expression under Article 10, they represent a restriction which will be prescribed by law and necessary in a democratic society for the protection of the rights of others. They do not impede or curtail political expression or debate. The aim as with the original measures is to strengthen the integrity of the democratic electoral process by ensuring citizens are better informed as to the source of campaign material, and they do not apply to individuals' views. The investigatory powers of the Electoral Commission, and the civil sanctions available to them, in relation to digital imprints, contain safeguards to ensure compatibility with the Convention, principally Articles 6, 8 and 10.

222. A human rights impact assessment was considered not to be required because there were no negative impacts for individuals or bodies affected identified during the Bill's formulation.

## Island communities

223. The Bill has no disproportionate effect on island communities. The Bill will apply to all communities across Scotland, including island communities. The Bill has no disproportionate or negative effect on island communities. The Bill's other reforms will apply to island communities in the same way as to other communities in Scotland.

## Local government

224. Electoral law provides that local authorities must place at the disposal of the Returning Officer the services of their staff for the purpose of assisting the Returning Officer in the discharge of any functions in relation to holding elections in that constituency. In addition authorities must appoint electoral registration officers and assign such staff to assist them as may be required.<sup>63</sup> As a result, all aspects of elections have an impact on local government and the impact has been factored into the assessment of each issue above. The Scottish Government has worked in partnership with COSLA during the consultation and in subsequent policy formulation. The principles of the Verity House Agreement have also guided policy formulation, in particular the "commitment to the principle of regular and meaningful engagement, and respect for each other's democratic mandate, in order that we can work together more effectively to improve the lives of the people of Scotland."<sup>64</sup> The Government has also worked closely with the EMB on many of the Bill's proposals. The EMB is able to

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<sup>63</sup> See the Representation of the People Act 1983, in particular sections 8, 25 and 52.

<sup>64</sup> [New Deal with Local Government – Verity House Agreement - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2023/01/23/2023-01-23-NDLGA-VerityHouseAgreement.pdf)

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provide a perspective from the point of view of Returning Officers and EROs on possible changes and the impact on local government. In particular:

- The provisions extending candidacy rights to foreign nationals with limited leave to remain will have limited impact on Returning Officers, because responsibility for making a valid nomination to stand for election rests with candidates. The nomination form for persons seeking to be elected as councillors will require to be changed as a result of changes to those entitled to stand in local government elections.
- The provisions in the Bill on Scottish Disqualification Orders respond to concerns raised by electoral workers in relation to intimidatory conduct directed towards staff at elections.
- The provisions on emergency rescheduling of elections, and in particular local elections, will empower the Returning Officer in each council area to make an assessment about the safe holding of an election.
- The provisions to allow electoral pilot schemes to be proposed by EROs and the EMB aim to encourage local innovation in elections.
- The provisions in relation to restructuring the EMB reflect comments from the EMB about its role.

## Sustainable development

225. The Bill will have limited impact on sustainable development and is unlikely to have any effect on the environment. Affording a small number of additional foreign nationals living in Scotland the ability to stand in local government elections is likely to positively impact upon all those resident in Scotland as allowing empowered and valued members of the community to directly engage in local democracy. But it is not expected to have any impact on the environment and is considered unlikely to impact on inequalities of outcome caused by socioeconomic disadvantage.

226. The Bill's provisions permitting democratic engagement funding and electoral pilots may ultimately lead to initiatives to support involvement in elections by certain groups where it is considered there are challenges to participation.

227. The expansion of the EMB should assist in the promotion of best practice in Scottish Parliament and local elections through the provision of information, advice and training. The EMB for Scotland's focus on ensuring that the interests of each voter are kept at the centre of all election planning and administration should assist in promoting the accessibility of voting for all persons in society.

## Fairer Scotland Duty

228. The Bill will allow Ministers to issue Democratic Engagement Grants under the new funding power, which could include projects seeking to encourage engagement in the political process. It will also increase the range of organisations able to propose pilots on electoral innovations. No specific grant project or pilot has so far been

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identified and funding and a business case would need to be established for each grant or pilot. However, assessing the Fairer Scotland Duty is expected to be a key part in many grant and pilot decisions.

## Strategic Environmental Assessment

229. A Strategic Environmental Assessment was not considered necessary as the Bill has no direct impact on the environment. It is potentially possible that electoral innovation pilots permitted under the Bill could result in a move away from paper-based processes (e.g. through use of digital rather than hardcopy polling cards). However, this would be a matter for consideration at the time of any relevant pilot.



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# Scottish Elections (Representation and Reform) Bill

## Policy Memorandum

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