

Scottish Local Government Elections (Candidacy Rights of Foreign Nationals) Bill

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 Local Government Elections (Candidacy Rights of Foreign Nationals) Bill introduced in the Scottish Parliament on 7 February 2022.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 11-EN);
 - a Financial Memorandum (SP Bill 11-FM);
 - a Delegated Powers Memorandum (SP Bill 11-DPM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 11-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 purpose of the Bill is to ensure compliance with treaty obligations in relation to candidacy for Scottish local government elections. It will amend Scottish electoral law to implement treaties which the UK Government has agreed that confer reciprocal voting and candidacy rights in relation to local elections. It will also oblige the Scottish Ministers to extend local government candidacy rights by secondary legislation where the United Kingdom enters into a similar treaty with any other country and enable them to remove local government candidacy rights if a treaty arrangement comes to an end

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(for further information in relation to these secondary legislation powers, see the Delegated Powers Memorandum that accompanies the Bill).

5. The United Kingdom has entered into bilateral agreements with Luxembourg¹, Poland², Portugal³ and Spain⁴ on local election participation. In the agreements, the United Kingdom undertakes to grant the nationals of those countries who are legally resident in the United Kingdom the right to stand as candidates at local elections in the United Kingdom subject to the same conditions and disqualifications as apply to nationals of the United Kingdom⁵. The treaties with Luxembourg and Portugal have been ratified, whilst ratification of the treaties with Poland and Spain will take place as soon as possible following passage of this Bill.

6. The Bill confers candidacy rights only, even though the agreements with Luxembourg, Poland, Portugal and Spain also include undertakings regarding voting rights at local elections. That is because those voting rights are conferred by the Scottish Elections (Franchise and Representation) Act 2020 (the “Franchise Act”).⁶ Section 1 of the Franchise Act amended the Representation of the People Act 1983 to extend the franchise for Scottish local government elections to all foreign nationals who have any description of leave to enter or remain in the United Kingdom.⁷

7. The Bill does not apply to elections to the Scottish Parliament.

Background

8. The Scottish Government is committed to increasing participation in elections both in terms of voter turnout and encouraging a wide range of people to stand for election. Democratic participation challenges the inequalities of power and influence that exist in society.

9. Prior to the United Kingdom’s departure from the European Union on 31 January 2020, all EU nationals resident in the United Kingdom could stand as candidates in United Kingdom local elections. Free movement between the United Kingdom and the European Union ended on 31 December 2020 and on 1 January 2021, the United Kingdom implemented a points-based immigration system. From that date, EU nationals

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/81439/2/CS_Luxembourg_1.2019_Voting_Rights.pdf.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/89056/7/CS_Poland_1.2020_UK_Poland_Agreement_Participation_Certain_Elections.pdf.

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/81439/6/CS_Portugal_1.2019_Voting_Rights.pdf.

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78632/1/CS_Spain_2.2019_Elections.pdf.

⁵ In accordance with the agreements, nationals of the United Kingdom who are legally resident in Luxembourg, Poland, Portugal and Spain are to be granted reciprocal candidacy rights in each of those countries.

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

⁷ <https://www.legislation.gov.uk/ukpga/1983/2/contents>

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(other than those from Ireland) who were not eligible under the EU Settlement Scheme had to meet specific requirements in order to work or study in the United Kingdom⁸. However, domestic electoral law was not immediately changed to modify local government voting and candidacy rights, with the UK Government confirming that resident EU citizens elected in the May 2021 local elections in England would be able to serve their full term, and that this would also apply to those elected before 2021.⁹ The UK Government's future policy intention for EU national candidacy and voting rights in English local elections is set out in section 13 and schedule 8 of the Elections Bill, currently before the UK Parliament.¹⁰ This makes provision about voting and candidacy rights of EU citizens in relation to local elections in England and certain other elections and seeks to ensure compliance with the voting and candidacy rights treaties outlined in paragraph 5. As introduced, the Bill sought to remove the existing automatic grant of voting and candidacy rights to all EU citizens, and to grant rights to two groups:

- a) The first group, 'EU citizens with retained rights', comprises persons who have been living in the United Kingdom or Crown Dependencies since before the end of the Implementation Period Completion Day (IPCD) - 31 December 2020 - and hold lawful immigration status.
- b) The second group, 'qualifying EU citizens', comprises citizens of those countries with which the United Kingdom has a voting and candidacy eligibility agreement. Such persons must also hold lawful immigration status.¹¹

10. Franchise and candidacy rights in relation to Scottish Parliament and local government elections are devolved to the Scottish Parliament and the Franchise Act passed in 2020 sought - as part of a wider expansion of voting and candidacy rights - to anticipate the effect of the United Kingdom's departure from the EU. 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. In relation to candidacy rights, it 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

⁸ <https://www.gov.uk/guidance/the-uks-points-based-immigration-system-information-for-eu-citizens#working-in-the-uk>

⁹ House of Commons, 17 June 2021 <https://hansard.parliament.uk/commons/2021-06-17/debates/21061757000010/LocalElectionsEUCitizensLivingInTheUK>

¹⁰ <https://bills.parliament.uk/publications/44762/documents/1267> as brought from the House of Commons to the House of Lords

¹¹ As set out on pages 11 and 12 of the Explanatory Notes to the UK Elections Bill at introduction: <https://publications.parliament.uk/pa/bills/cbill/58-02/0138/en/210138en.pdf>

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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 2020.¹²

11. As a result, nationals of Luxembourg, Poland, Portugal and Spain who have indefinite leave to remain (including settled status) or pre-settled status are currently able 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. 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 1973:¹³

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

12. Section 31 of the 1973 Act¹⁴ 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 Act¹⁵, a paid office-holder or employee of a local authority is disqualified from holding office as a member of a local authority. These disqualifications will continue to apply to all candidates.

13. Under the provisions of section 29 of the 1973 Act, a newly arrived person in Scotland would have to register to be an elector in a particular local government area before being able to stand as a candidate at local government elections (because they would not be able to demonstrate previous residence in the area).

14. The treaties that the UK Government has agreed with Portugal, Luxembourg, Spain and Poland seek to extend local government candidacy rights to all nationals of those countries on the same basis as enjoyed by United Kingdom nationals. This means that legislation is required to extend candidacy rights to nationals of those

¹² <https://www.gov.uk/settled-status-eu-citizens-families/what-settled-and-presettled-status-means>

¹³ <https://www.legislation.gov.uk/ukpga/1973/65/section/29>

¹⁴ <https://www.legislation.gov.uk/ukpga/1973/65/contents>

¹⁵ [Section 31A of the Local Government \(Scotland\) Act 1973 \(legislation.gov.uk\)](#) (added by section 7(2) of the Local Governance (Scotland) Act 2004).

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countries who are legally resident in the United Kingdom, but who do not have indefinite leave to remain or pre-settled status.

15. The UK Government has indicated that the voting and candidacy rights treaties with Spain and Poland cannot be ratified until local government voting and candidacy rights for all Polish and Spanish nationals are enshrined in law in England and Wales, Scotland and Northern Ireland. The treaty with Spain is already provisionally applied, so UK nationals living there can participate in local elections. However the treaty with Poland is not provisionally applied, so passage of this Bill is a key step in ensuring that UK nationals living there can participate in local elections.

16. Changes to the law on candidacy rights for Scottish local elections require primary legislation. This Bill will ensure candidacy rights for Scottish local government elections comply with treaty obligations.

17. The Office for National Statistics estimates that over the period July 2020 to June 2021, there were approximately 62,000 Polish, 14,000 Portuguese and 11,000 Spanish people resident in Scotland. Nationality data for Luxembourg is not available, but it is estimated that there were approximately 3,000 people born in Luxembourg resident in Scotland.¹⁶ These figures are estimates derived from a survey and confidence intervals are indicated in the data. Data collection was also affected by the coronavirus pandemic, which meant that a different method was used to calculate figures from January 2020 compared to previous years. More information on the impact of COVID-19 on these statistics is provided on the Office for National Statistics website¹⁷.

18. The Home Office publishes statistics on the number of settled and pre-settled status applications received in Scotland. This does not necessarily mean that the applicants now reside in Scotland as the applicants may have subsequently moved. The latest data available covers the period 28 August 2018 to 30 September 2021 and is summarised in the following table¹⁸.

¹⁶<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationalityunderlyingdatasheets> See Table D, Row 402 (Scotland) and columns R (Luxembourg), BT (Poland), BV (Portugal) and CZ (Spain). Table B Row 402 (Scotland) and columns T (Luxembourg), CD (Poland), CF (Portugal) and DR (Spain) provides data by country of birth.

¹⁷<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/yearendingjune2021#impact-of-coronavirus-on-these-estimates>

¹⁸ <https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-september-2021>

EU Settlement Scheme: Concluded Applications by Outcome Type and Nationality, 28 August 2018 to 30 September 2021 - Scotland

Country of Nationality	Total (including refused, void, withdrawn and invalid)	Settled	Pre-settled
Luxembourg	190	60	130
Poland	97,340	75,540	18,550
Portugal	9,680	4,590	4,650
Spain	19,100	7,460	10,930

19. It should be noted that this data covers applications rather than applicants and people may submit multiple applications, i.e. to move from pre-settled to settled status. The population estimates by country of birth and nationality referred to in paragraph 15 cannot be directly compared with EU settlement scheme figures because of differences in what the statistics measure and how they are compiled. However, the data available does at the very least suggest that a substantial proportion of the nationals of Portugal, Luxembourg, Spain and Poland currently resident in Scotland enjoy local government candidacy rights by virtue of having settled or pre-settled status. The implication is that the Bill will, at least initially, result in only a relatively small number of people obtaining candidacy rights.

Consultation

20. Because this Bill is focused entirely on compliance with treaty obligations, a formal consultation was not considered necessary. In advance of the Franchise Act, the Scottish Government held a public consultation exercise on Electoral Reform between December 2017 and March 2018, which sought views on a number of issues, including access to voting and elected office.¹⁹ Although there was not a specific question in relation to extending candidacy rights to foreign nationals, the consultation revealed that there was general support amongst organisations and individuals for extending the electoral franchise for devolved elections to everyone who is legally resident in Scotland, with 78% of those who responded agreeing to that proposition.²⁰

21. The Scottish Government has discussed the need for this Bill with the Electoral Commission and the Electoral Management Board for Scotland (the “EMB”). Neither organisation has raised any concerns in relation to the Bill. The Convener of the EMB has responsibility to oversee elections in Scotland with specific powers to co-ordinate Scottish local government and Scottish Parliament elections, making directions to

¹⁹ <https://www.gov.scot/publications/consultation-electoral-reform/>

²⁰ <https://www.gov.scot/publications/electoral-reform-consultation-analysis/pages/10/>

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Returning Officers and Electoral Registration Officers. The Electoral Commission is the independent body which oversees elections and regulates political finance in the United Kingdom. It issues guidance for people seeking to become candidates in Scottish local government elections.²¹ Consultation with these bodies will continue during the implementation period in order to ensure a smooth introduction of the proposed changes, including updated forms and guidance.

Administration of elections

22. It is intended that the extension of candidacy rights under the Bill will result in as little practical change as possible in terms of electoral administration. Foreign nationals will be able to be nominated as candidates in the same way as those already afforded candidacy rights.

23. 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.²²

24. 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. See paragraphs 11 to 13 above).

Provisions of the Bill

25. The Bill makes limited amendments to section 29 of the Local Government (Scotland) Act 1973 (“the 1973 Act”).²³ That section sets out the eligibility requirements for nomination, election and holding office as a member of a local authority in Scotland.

26. One of the categories of persons who are currently eligible to stand as candidates at Scottish local government elections under section 29 of the 1973 Act is “qualifying foreign nationals”. That category covers foreign nationals (other than Commonwealth citizens or citizens of the Republic of Ireland), who either (a) do not require leave under the Immigration Act 1971²⁴ to enter or remain in the United Kingdom, or (b) if they do require such leave, have indefinite leave to remain or pre-

²¹ <https://www.electoralcommission.org.uk/i-am-a/candidate-or-agent/council-elections-scotland>

²² <https://www.electoralcommission.org.uk/sites/default/files/2021-11/SLG%20Part%20A-Returning%20Officer%20role%20and%20responsibilities.pdf>

²³ <https://www.legislation.gov.uk/ukpga/1973/65/section/29>

²⁴ <https://www.legislation.gov.uk/ukpga/1971/77/contents>

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settled status²⁵. It therefore includes any nationals of Luxembourg, Poland, Portugal and Spain (and any other EU country) who have settled or pre-settled status. The Bill extends section 29 of the 1973 Act to confer candidacy rights on all nationals of Luxembourg, Poland, Portugal and Spain who hold lawful immigration status in the United Kingdom (in that they have any description of leave to enter or remain in the United Kingdom).

Alternative Approaches

Choice of legislation

27. Primary legislation is required for substantive changes to candidacy rights. The subject matter of Scottish local government elections is devolved and so it is appropriate that the changes are made by the Scottish Parliament. The Bill is limited to conferring candidacy rights on the nationals of those countries with which the UK Government has agreed treaties on reciprocal voting and candidacy rights in relation to local elections.

28. It would be possible for this Bill to go further, for example to extend candidacy rights to all foreign nationals with limited leave to remain or to extend candidacy rights in Scottish Parliament elections. However, the Scottish Government intends to consult during the course of 2022 on the issues surrounding a wider extension of candidacy rights. This consultation will contribute towards the development of “legislation on electoral reform that enables more people to stand as candidates at Scottish Parliament and local government elections” as set out in the Scottish Government and Scottish Green Party - Shared Policy Programme.²⁶

29. This consultation will include further consideration of some of the issues identified with a wider extension of candidacy rights during the passage of the Franchise Act (see paragraphs 72 and 73 of the Policy Memorandum to the Scottish Elections (Franchise and Representation) Bill).²⁷

²⁵ The expressions “qualifying foreign national” and “pre-settled status” are defined in section 29(5) to (7) of the 1973 Act (as inserted by section 3(4) of the Scottish Elections (Franchise and Representation) Act 2020 <https://www.legislation.gov.uk/asp/2020/6/section/3>).

²⁶ <https://www.gov.scot/publications/scottish-government-scottish-green-party-shared-policy-programme/pages/2/>

²⁷ <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/scottish-elections-franchise-and-representation-scotland-bill/introduced/policy-memorandum-scottish-elections-franchise-and-representation-scotland-bill.pdf>

Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

Equal opportunities

30. The proposed provisions within the Bill in regard to extending candidacy rights would allow a small number of people legally 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.
31. 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.
32. 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 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 nationality²⁸. 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.
33. An Equality Impact Assessment is not considered necessary given the limited nature of the change being made by the Bill, which is effectively a small extension of the substantial expansion of foreign national voting and candidacy rights set out in the Franchise Act. For reference, the Equality Impact Assessment for the Bill that led to the Franchise Act is available online.²⁹

Human rights

34. The Bill has no disproportionate effect on human rights. 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.

²⁸ Section 9 of the Equality Act 2010 <http://www.legislation.gov.uk/ukpga/2010/15/section/9>

²⁹ <https://www.gov.scot/publications/scottish-elections-franchise-representation-bill-eqia/>

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Island communities

35. The Bill has no disproportionate effect on island communities. The rules for standing for election in an island community are no different from elsewhere.

Local government

36. The nomination form for the election of councillors will require to be changed (as they currently refer to qualifying Commonwealth citizens, citizens of the Republic of Ireland or qualifying foreign nationals) to insert the new category of “schedule 6A national” in the list of those entitled to stand in local government elections.

Sustainable development

37. The Bill will have no impact on sustainable development. 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.

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