

The Scottish Elections (Representation and Reform) Bill

Written submission from Professor Alistair Clark

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Introduction

1. My expertise is in electoral integrity and administration, with numerous published research articles and reports on these themes. I write in a personal capacity (<http://www.ncl.ac.uk/gps/staff/profile/alistairclark.html#background>).

Candidacy Rights for Foreign Nationals with Limited Leave to Remain

2. It is not entirely clear what problem extending candidacy rights to foreign nationals with limited leave to remain is a solution to. The Scottish government's Policy Memorandum itself suggests that there is limited support for such a power. It also sets out a range of potential difficulties with such a scheme. It does not seem to set out, however, a compelling case for this to be legislated for. I focus on four issues here, which are not covered sufficiently in the Policy Memorandum, but suggest the utility of such a power might be limited.

3. The normal route to candidate selection and eventual nomination is through adoption by political parties. Potential candidates typically have been engaged with a political party for some time, through membership, activism and finally standing to become a candidate. Selection in intra-party selection processes normally necessitates building support within local party branches and the organisation more generally. This takes time, and I would expect that local branches and party organisations would be much more likely to select a long-standing member than someone who has limited leave to remain with weak local roots. Parties can still, of course, represent those with limited leave to remain without offering candidates who might meet that description.

4. A second route to nomination would be for a candidate with limited leave to remain to stand as an Independent on a regional list or for a council ward. There is an organisational barrier, common to all Independents, with the need for an agent familiar with electoral law to be responsible for the candidate's campaign. There are also potential financial barriers to nomination, with the requirement for a deposit of £500 to stand for a regional list for the Scottish parliament. While this can certainly be paid by someone on behalf of the candidate, this is not returned unless the candidate achieves more than 5% of the vote. While some notable Independents have had success via such a route, those doing so have typically been very well-known figures to begin with.¹ Independents more typically achieve a low share of the vote, insufficient to be elected. While Independents certainly have more success in local elections, if contesting a council election the candidate would need to attract transfers and in most wards achieve upwards of 20% of the ward vote to be elected (more in a by-election).² It is difficult to see such an Independent candidate with limited leave to remain achieving either of those levels of success, unless a party or some other organisation somehow promotes their campaign.

5. Paragraph 27 of the Policy Memorandum notes that any successful candidate would still have to meet any other conditions of their leave to remain, such as a job or course of study. While many councillors do hold jobs, it is difficult to see how this is compatible with being elected as an MSP which most observers would, I strongly suspect, view as a full-time post.

6. There is a broader debate going on in electoral integrity circles about protecting democracy from the influence of foreign powers. For example, the Joint Committee on National Security Strategy at Westminster currently has an open inquiry into Defending Democracy which is looking at such matters.³

7. Although a concern in this area is recognised in the Policy Memorandum's discussion of lower donation limits in third party campaign finance,⁴ it does not seem to be recognised or considered as a risk in discussion of candidacy rights to foreign nationals with limited leave to remain. Candidacy, whether eventually successful or not, is conceivably one form where someone with allegiance to a foreign state might become influential.

8. Recommendation 1 – The Committee should assure itself of the Scottish government's risk assessment in this area, and what, if any, mitigating measures it has considered.

9. Taken together with the various objections and difficulties listed in the Policy Memorandum, these issues suggest that there may be limited utility of having such a power in legislation and it being used. Electoral law is already complex enough. The justification for such a power seems not entirely compelling, and not all risks seem to have been considered fully.

10. Recommendation 2 – The Committee should probe the justification for extending candidacy rights to those with limited leave to remain with the responsible minister. In the absence of some more compelling justification which overcomes the various issues, whether or not this particular part of the Bill should be dropped should be considered.

Campaign Finance

11. As the Scottish government recognise in the Policy Memorandum, transparency in campaign finance is a crucial aspect of maintaining trust in the electoral process.

12. The main emphasis in this section of the Bill is bringing Scottish provisions for campaign financing into line with those introduced in the Elections Act 2022. The driver in the Bill seems to be a desire to simplify matters for political parties, candidates and campaigners by maintaining consistency between rules for UK and Scottish parliamentary elections.⁵

13. I have argued elsewhere that there is a very important missed opportunity here which could a) increase transparency in Scottish parliamentary electoral politics and b) simplify the process of campaign finance reporting for political parties by

bringing UK and Scottish parliamentary campaign finance reporting laws into synch with each other.⁶

14. In a UK general election, during the short campaign political parties must report donations, loans and spending to the Electoral Commission *weekly* under the provisions of the Political Parties, Elections and Referendums Act (PPERA) 2000. This is not the case for contests to the Scottish parliament. Donations, loans and campaign spending remain on the normal three-monthly reporting pattern that also applies outside election periods.

15. This is likely to have been an oversight, given that the Scottish Parliament had only just been set up when PPERA was being legislated for. Yet, even if campaign spending is restricted to around £1.5m per party for Scottish Parliament elections, the Scottish parliament now has considerably more powers than it did in 2000. It was set up intentionally to be more accessible and transparent to the public.

16. This difference between campaign finance reporting for the two institutions seems an increasingly unsustainable anomaly. There is no obvious reason why Scottish parliament elections should be less transparent. In the interests of transparency, the Scottish government should act to bring regulation around Scottish Parliament election funding and spending into line with practice for UK parliament elections with weekly reporting during the election period. Unfortunately, this was not considered in the Scottish Government's recent electoral reform consultation.

17. Scottish political parties may not like this suggestion. In general terms however, the current Bill has accepted the principle that simplicity and consistency for campaigners should drive reforms in campaign finance, with rules for the UK parliament being predominant. And given that Scottish parties already comply with weekly reporting requirements for UK general elections, there is no obvious reason for them not being able to also comply with such requirements for Scottish parliament contests. The Scottish government has also accepted the principle in this Bill that because some reforms were largely technical, there was no need for them to be put out to consultation.⁷

18. Given the importance of achieving increased transparency in advance of the 2026 Scottish parliament election, this is not something that should be put off to separate legislation given the length of time that would take and the uncertainty of it becoming law in sufficient time in advance of 2026. It should be part of this Bill.

19. Recommendation 3 - The Committee should investigate with the responsible minister bringing broader Scottish parliament three-monthly campaign finance reporting schedules into line with weekly UK parliament schedules to provide consistency, simplify the process and increase transparency. Amendments can be proposed to achieve this aim at Stage 2.

Election Postponement

20. The Coronavirus pandemic saw elections postponed throughout the world. Parliaments and electoral authorities in many countries were however often caught in a legal black hole without the necessary powers readily available to postpone

elections (and by-elections) legally. This resulted in numerous countries adopting retrospective legislation to permit postponement.⁸ To avoid such a situation again, the Scottish government is right to be thinking about the legal powers and institutional processes that might be utilised in just such an emergency. Nonetheless, the issues raised are not easily resolved.

21. The Bill envisages a power for the Presiding Officer to postpone a Scottish parliamentary election by up to eight weeks, with the possibility of a further eight week extension for a prolonged emergency. The Policy Memorandum suggests that such powers would only be used in exceptional circumstances and sets out a range of principles which have been used to guide the power in the Bill.⁹ These principles seem sensible and emphasise the role of parliament in developing consensus around this.

22. There are four potential circumstances set out which might require a postponement: a clashing UK general election; a public health emergency; a major security incident; and the death of the sovereign.¹⁰ The guiding principle is to have 'the *maximum period* of delay at the shortest duration *considered necessary*' (my italics).¹¹

23. This raises several issues. Firstly, while I understand that this is planning for an unknown circumstance and there cannot consequently be a definitive list, some of the examples given are either somewhat vague or fail to convince. They do not seem at the level which might necessitate election postponement. For example, a major security incident has already happened during an election campaign in the Manchester concert bombing during the 2017 general election. This led to parties pausing their campaigns for a few days, but there was no talk of postponing the election. The London Bridge stabbings in 2019 were also in advance of the December general election that year, with parties barely pausing their campaigns on that occasion and the poll being held as scheduled. Similarly, with a public health emergency, there is a clear question of the scale and seriousness of whatever pathogen or contagion is causing an issue. Localised interventions are probably more likely than nation-wide postponements.

24. There is a danger here of relatively uncommon yet essentially routine events, although certainly serious, being declared emergencies and leading to postponement. This should be resisted. There needs to be a legal test, included in the Bill, which prevents such events being declared nationwide emergencies. This test needs to be set at a high level for a postponement to be agreed to. One approach might be to examine either the Civil Contingencies Act or Human Rights Act regimes for a legal test of emergency and /or necessity which might be included in the Bill to demonstrate the need for postponement.

25. Recommendation 4 – The Committee should explore with the responsible minister how such a legal test might be developed and operationalised for inclusion in the Bill.

26. The second related issue is the question of who is considering postponement necessary. While seeking to place responsibility on the Presiding Officer, as a neutral and respected figure, was a reasonable thing to do in 2021, this nevertheless

places a considerable responsibility on one person in the future. To ensure that the perceived necessity is an actual emergency with necessity impelling postponement, the Presiding Officer needs to formally consult with and be advised by an advisory cross-party group of senior politicians, the Electoral Commission and also the Convenor of the Electoral Management Board. This group could be nominated in advance of dissolution. What I have in mind here is stronger than just the consultation with the EMB and Electoral Commission the Bill currently provides for.

27. Formalising this might be a partial way around the conundrum between dissolution, and the need for parliamentary approval for postponement. Having applied a test of necessity, there should be a set level of support within the political advisory group for postponement (to be defined by parliament, perhaps either unanimity or a supermajority, however defined). There should also be a presumption of transparency here with, at minimum, minutes of this discussion made public. This advisory group should be required to also approve any extension, if thought necessary.

28. Recommendation 5 – The Committee should explore with the Minister responsible how such an advisory group might work to clearly establish necessity, and the level of support the Presiding Officer should need to declare a postponement.

29. The maximum period of delay is eight weeks plus a further eight weeks should there be a need to postpone further after the first period. This means a delay of effectively four months. This is quite a long time given that many administrative lessons have already been learned about holding elections under emergency circumstances. This is not to downplay the potential for something serious to happen to compel postponement. However, the average delay to elections internationally during the COVID-19 pandemic was only around three to four months. That reduced over time, as knowledge of the virus and its mitigations became available.¹²

30. To avoid the democratic uncertainty and lack of accountability that occurred in England's local elections between 2020-2021, there has to be an expiry date to any postponement. This was rightly recognised in the Scottish General Election (Coronavirus) Act 2021, and the Committee should satisfy itself that the Bill provides for such an expiry date of any postponement beyond which an election must be conducted.

Electoral Pilots and Democratic Engagement Funding

31. Scotland has been at the forefront, with Wales, of pioneering reforms in electoral policy and administration within the UK. Increased powers to conduct electoral pilots are therefore welcome. This will enable potential innovations to be tested. A non-exclusive list of potential issues where pilots may be conducted is included in the Policy Memorandum.¹³ The desire to increase democratic participation and to provide funding to allow schemes to try and enable this is also welcome.

32. In practical terms, it is necessary that evaluation of any pilots or funding on democratic engagement be seen as independent. With this in mind, the Committee

might therefore wish to explore with the Scottish government the desirability of including the facility of tendering for or enabling independent academic evaluations, alongside those conducted by the Electoral Commission, of any pilots or effects of funding that are conducted under this legislation.

33. There are two general points that flow from these parts of the Bill. They are part of a broader debate and therefore beyond action in this Bill. They relate directly to the Scottish government's desire to strengthen participation and to improve voter registration among under-represented groups. I mention them to inform the Committee's deliberations, since a desire to increase turnout and participation in all Scottish elections, local or parliamentary, is something to be desired and within the Committee's remit. Both might help with this, and they beg the question of why the reforms proposed in this Bill provide only for relatively small and incremental initiatives. Aspects of this discussion may inform future reforms.

34. The first is reform to the electoral registration system. There are still many potential electors unregistered under the individual registration system used in Scotland and the UK more generally. The most recent estimate of this by the Electoral Commission found that in Scotland local government registers were only 81% complete and 88% accurate, while the numbers for parliamentary registers were 83% complete and 90% accurate.¹⁴ The Scottish government is undoubtedly aware of this issue and has been considering future approaches to electoral registration.

35. One example is currently being set by the Welsh government. The Welsh parliament is legislating for automatic electoral registration in the Elections and Elected Bodies (Wales) Bill 2023. This is currently at Stage 2 in the Senedd. While accuracy would still remain an ongoing challenge under this, automatic registration would essentially resolve the completeness of registers problem. An alternative approach would be to adopt some form of assisted or automated registration, where public bodies remind potential voters about registering for example. Aspects of assisted registration may also go some way to helping improve registration rates, even if automatic registration were currently thought a step too far.

36. The second is more radical but seldom seems to be considered in discussions about increasing turnout. This is to consider compulsory voting as an option. This has been shown to both increase turnout considerably, and, importantly, to reduce inequalities in voting behaviour between socio-demographic groups.¹⁵ While there would inevitably be numerous aspects to consider in doing so, this would address the Scottish government's priorities as set out in their Shared Policy Programme. This can be argued out in various ways, but, wherever one stands on it, that this is not seriously considered when improving participation is being discussed as an objective seems an omission in the consideration of potential ways forward.