

Scottish Elections (Franchise and Representation) Bill

Delegated Powers Memorandum Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Scottish Elections (Franchise and Representation) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum do not form part of the Bill, are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill makes changes to the franchise for, and candidacy rights in, Scottish Parliament and Scottish local government elections. This follows the devolution of additional powers in relation to Scottish Parliament and local government elections to the Scottish Parliament in the Scotland Act 2016. The Bill:

- extends the right to vote in Scottish Parliament and local government elections to all foreign nationals who are legally resident in Scotland;
- extends the right to stand for election and hold office as elected members following Scottish Parliament and local government elections to certain foreign nationals; and
- extends to certain convicted persons rights to vote at Scottish Parliament and local government elections.

This document relates to Scottish Elections (Franchise and Representation) Bill (SP Bill 51) as introduced in the Scottish Parliament on 20 June 2019

Rationale for delegated powers

4. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

- the need for any legislative provisions to be in place in adequate time for the next scheduled Scottish Parliament election (currently scheduled for May 2021). The Electoral Commission recommended in 2007¹ that electoral reform legislation should not come into force in the period of 6 months prior to the notice of election being made;
- the need to provide flexibility to respond to changing circumstances without the need for primary legislation; and
- the potential for unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

Delegated Powers

5. The Bill contains the following delegated powers provisions:

Section 8 – Ancillary Provision

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure if adding to, replacing or omitting text in an Act, otherwise negative procedure

¹ The Independent Review of the Scottish Parliament and local government elections 3 May 2007, The Electoral Commission
https://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0011/13223/Scottish-Election-Report-A-Final-For-Web.pdf

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Provision

6. Section 8 confers on the Scottish Ministers a power to make incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with or for giving full effect to this Act or any provision made under it. Subsection (2) allows regulations to make different provision for different purposes and to modify any enactment, including the Bill as enacted.

7. The Bill makes changes to a protected subject-matter specified under section 31(5)(a) of the Scotland Act 1998 (persons entitled to vote as electors at an election for membership of the Parliament). As such, the Bill is expected to be subject to the two thirds super-majority requirement for passage of the Bill set out in section 31A of the Scotland Act 1998. As section 8 allows for modification of any enactment (including the Bill as enacted), provision under section 8 may relate to this protected subject-matter. For the reasons outlined below, the Government considers that such a power is justified in the circumstances.

Reasons for taking this power

8. As with any change to the law, the Bill may give rise to a need for a range of ancillary provisions. The power is needed to ensure that the policy intentions of the Bill are achieved if further changes are found to be necessary as a result of provisions in the Bill. Whilst there are no specific proposals to use this power, as existing powers enable foreseen changes to secondary legislation in this area to be made, the ancillary power provides the flexibility to make any unforeseen but necessary adjustments that may arise as timeously as possible. The Bill makes amendments to what is a complex and technical electoral law statutory framework. Without the power to make incidental, supplementary or consequential provision, it might be necessary to return to Parliament with primary legislation, to deal with technical, operational or implementation matters clearly within the scope and policy intention of the Bill. That would not be an efficient use of resources. Such a power could be potentially wide, but is restricted here, to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, in connection with or for giving full effect to the Bill as enacted or any provision made under it.

9. The necessity of a flexible power of this nature is particularly important in this Bill because the Bill is necessary, in relation to prisoner voting, to ensure that the Scottish Government is in compliance with its obligations

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under the European Convention of Human Rights. It is therefore essential in this case to ensure that necessary changes can be made to related legislation to ensure that the law can be brought into a Convention-compliant state as soon as possible. Furthermore, whilst the Bill, in addition to relating to a protected subject-matter, also confers power to potentially modify a protected subject-matter, the Scotland Act 1998 envisages such a possibility. Section 31(4) states a Bill “relates to a protected subject-matter if it would modify, or confer power to modify” any of the listed subject matters.

10. The power could not be used to bring substantive policy change relating to the persons entitled to vote as electors at Scottish Parliament elections (for instance, by further altering the eligibility of prisoners to vote). Whilst provision may be made which is “supplemental” this must be linked back to the purposes of or for giving full effect to the Act and insofar as the power includes a power to amend primary legislation, it will be construed and applied narrowly and strictly.

Choice of procedure

11. Section 8(3)(a) of the Bill provides that any Regulations will be subject to affirmative procedure if they contain provisions which make textual changes to an Act (including the Bill as enacted). Section 8(3)(b) provides that in other cases regulations will be subject to negative procedure. This provides the appropriate level of parliamentary scrutiny for the textual amendment of primary legislation, where affirmative procedure is normally set out, while ensuring that other ancillary provision is still subject to an appropriate level of scrutiny by Parliament. Negative procedure is considered appropriate in terms of expedition and convenience for provision that does not amend primary legislation, such as any use of the power that amends electoral regulations. The sort of administrative detail which is likely to be covered by amendments to regulations is unlikely to be such as would necessitate the use of affirmative procedure. Where provision was being made that went beyond administrative detail, it is likely that it would require to amend both primary and secondary legislation, and in that eventuality it is probable that a single, affirmative procedure, instrument would be the vehicle by which the Scottish Government would progress the making of ancillary provision.

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Section 9 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: laid, no procedure

Provision

12. Section 9 provides that sections 8, 9 and 10 of the Bill, once enacted, will come into force on the day after Royal Assent. Otherwise, provisions will commence on such day or days as the Scottish Ministers may by regulations appoint. Subsection (3) provides that commencement regulations may include transitional, transitory or saving provision and make different provision for different purposes.

Reason for taking power

13. It is standard for the Scottish Ministers to have power to provide in this manner for the commencement of Bills, once enacted. It is appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable, where they are not to come into effect immediately (noting the need for any legislative provisions to be in place in adequate time for the next scheduled election referred to above). It is necessary to provide that commencement regulations can also make provision for effective transitional arrangements when provisions are being brought into force and can provide for them to be commenced for different purposes. For example, it may be appropriate initially only to commence a provision for the purpose of making regulations.

Choice of procedure

14. As is usual for commencement regulations, the power is subject to the default laying requirement, under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

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