

Scottish General Election (Coronavirus) 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 General Election (Coronavirus) 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 are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill Provisions

3. The Bill addresses a number of issues relating to the possibility of the 2021 Scottish Parliament General Election having to be conducted differently or deferred for reasons relating to coronavirus, specifically:

- it gives a power to the Scottish Ministers to make regulations to provide for the poll to be conducted as an all-postal ballot;
- it gives a power to the Scottish Ministers to make regulations for polling to take place over more than one day;
- it gives a contingency power to the Presiding Officer to postpone the 2021 election by up to 6 months, in certain circumstances, and allows for either of the above measures to apply if the election is postponed.

4. The Bill also makes several changes to the arrangements for the poll scheduled to take place on 6 May 2021, or any deferred poll:

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- it brings forward the deadline for postal vote applications, with a power for the Scottish Ministers to amend the deadline to closer to the date of the poll;
- it makes the pre-election period of dissolution last only one day, to give Parliament additional time in case it needs to meet to pass emergency legislation to delay the election;
- it gives the Presiding Officer greater flexibility in timings when making arrangements for the first meeting of the new Parliament and provides greater flexibility regarding the timing of the election of a new Presiding Officer.

Rationale for Subordinate Legislation

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

- the need for any legislative provision to be in place in adequate time for the Scottish Parliament election scheduled for 6 May 2021. Of necessity the Bill makes provisions that would depart from the usual practice that electoral reform legislation should not come into force in the period of 6 months prior to the scheduled date of the election. However, to give as much notice as possible, the Bill itself provides for two matters, rather than leaving them to subordinate legislation. These are sections 3 and 7, the application deadline for postal voting and consequential modifications relating to the date of dissolution of the Parliament;
- the need to provide flexibility to respond rapidly to changing circumstances without requiring primary legislation, within the parameters approved by the Parliament. In particular, regard has been had to the possibility that the Parliament may be in recess ahead of the poll.

6. As a general point, the Scottish Government would highlight that, except as described in paragraph 4 above, it is planning for the 6 May 2021 poll to be conducted as currently provided for by other legislation. The powers in the Bill are envisaged as powers that would only be used to make alternative provision should that prove necessary. If the May poll needs to be delayed for reasons related to coronavirus, the Bill envisages (at section 11(2) and (3)) that emergency primary legislation is likely to be brought forward. The

Scottish Government expects that, in proposing such legislation, it would explain its intentions as regards the matters described in paragraph 3 above. Emergency primary legislation would give the Parliament the opportunity to consider further what provision it considers appropriate at that time.

Delegated Powers

7. The Bill contains the following delegated powers provisions:

Section 3 – Closing Date for Application to Vote by Post or Amend Existing Absent Vote Arrangements

Power Conferred On: The Scottish Ministers
Power Exercisable By: Regulations Made by Scottish Statutory Instrument
Parliamentary Procedure: None

Provision

8. Section 3(2) and (3) modifies existing provision in the Scottish Parliament (Elections etc.) Order 2015 (S.S.I. 2015/425) which sets the deadline at such elections for applications for a postal vote or to change an existing absent voting arrangement between proxy and postal voting. Under the 2015 Order the deadline is the eleventh day before the polling day. This is altered for the scheduled 6 May 2021 poll to the twenty-first day before the polling day. Section 3(5) allows the Scottish Ministers to change the deadline either generally or in relation to a particular type of application, though section 3(6) restricts such changes so that they can only provide a deadline to be later than the twenty-first day before polling day, not earlier.

Reason for Taking Power

9. The purpose of the provision at section 3(2) and (3) is to allow for more time to process what is expected will be a much higher number of applications for postal votes than usual, due to the effects of the coronavirus pandemic. It is possible that prior to May 2021 it will become apparent that a shorter application deadline can be managed, and a shorter deadline may be possible should the May poll be delayed. The power at section 3(5) will give flexibility to allow later applications, either generally or of particular types.

Choice of Procedure

10. No procedure is proposed for regulations under section 3(5). Parliament would have approved the principle of a deadline that could be relaxed if circumstances permit. If such provision is to be made, it may require to come into force at comparatively short notice, at a time when Parliament may be in recess or unable to meet for reasons relating to coronavirus. The modification has no lasting effects (it is for the specific 2021 poll only) and would be uncontentious. No voter would be disadvantaged by the change; it would simply allow additional time for some voters to choose how they arrange to vote. Regulations would be subject to the default laying requirement, under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 5 – Power to Provide for All-Postal Vote

Power Conferred On: The Scottish Ministers
Power Exercisable By: Regulations Made by Scottish
Statutory Instrument
Parliamentary Procedure: None

Provision

11. Section 5(1) allows the Scottish Ministers to provide that the May 2021 poll is to be conducted solely by means of postal votes and to make such provision as to polling arrangements for that purpose as Ministers see fit. This includes modification of enactments, though not of the Bill as enacted other than section 3(2) and (3). Before making regulations, Ministers must consult the Presiding Officer, the Electoral Commission, and the convener of the Electoral Management Board for Scotland.

Reason for Taking Power

12. The Scottish Ministers do not anticipate that it is likely to be practicable, even should it transpire to be desirable, to conduct the scheduled poll on 6 May 2021 as an all-postal ballot. However, it may be possible to conduct a delayed poll on that basis, and the circumstances of the coronavirus pandemic might make it preferable to do so, rather than delay until a poll with in-person voting can be conducted.

13. Any such poll would need to amend electoral legislation and set out the details of how an all-postal ballot was to be conducted. The power may

also be used modify section 3(2) and (3) of the Bill, because those subsections provide the application deadline for postal voting and it would be necessary to make different arrangements (to remove the ability of postal voters to opt for an in-person or proxy vote).

Choice of Procedure

14. No Parliamentary procedure is proposed for regulations under section 5(1). Parliament would have approved the principle of the poll being conducted on an all-postal basis. If such provision is to be made, it may require to come into force at comparatively short notice, at a time when Parliament may be in recess or unable to meet for reasons relating to coronavirus. The modification has no lasting effects (it is for the 2021 poll only) and the requirement to consult with electoral professionals gives reassurance that the practicability of any provision to be made will be taken into consideration. The requirement to consult with the Presiding Officer allows him to consider if Parliament should play any role in relation to the proposal, for example through considering an emergency Bill or a motion that a poll on a particular day be conducted on an all-postal basis. The uncertainties as to the circumstances that might be involved, and the timescales that might be possible, require that the power be flexible. Regulations would be subject to the default laying requirement, under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 8(1) – Power to Provide for Polling on Additional Days

Power Conferred On: The Scottish Ministers
Power Exercisable By: Regulations Made by Scottish Statutory Instrument
Parliamentary Procedure: None

Provision

15. Section 8(1) allows the Scottish Ministers to provide that the poll at the 6 May 2021 election is to continue on one or more of the 8 calendar days immediately following the first day of the poll. If the poll is postponed, the power would apply identically in the 8 day period following the postponed poll date, by virtue of section 8(3). Provision can be made to specify that particular categories of voters may vote on particular days (or times on particular days). Before making regulations, Ministers must consult the Presiding Officer, the Electoral Commission, the convener of

the Electoral Management Board for Scotland and the Chief Medical Officer of the Scottish Administration.

Reason for Taking Power

16. The purpose of the provision at section 8(1) is to allow for the possibility that in-person voting will take longer than normal at the 2021 poll, due to the potential imposition of physical distancing measures to protect against the transmission of coronavirus. It is also possible that there will be a wish to spread voting over two or more days, with arrangements for particular voters to attend on particular days (for example based on address or alphabetical factors). It is possible that polling days might have to be non-consecutive, for example to ensure suitable polling station provision or for other administrative reasons.

Choice of Procedure

17. No Parliamentary procedure is proposed for regulations under section 8(1). Parliament would have approved the principle that there could be circumstances which justify a departure from the usual rule that polling is started and concluded in a single day. If such provision is to be made, it may require to come into force at comparatively short notice, at a time when Parliament may be in recess or unable to meet for reasons relating to coronavirus. The modification has no lasting effects (it is for the 2021 poll only). The requirement to consult with electoral professionals gives reassurance that the practicability of any provision to be made will be taken into consideration, as will consultation with the Chief Medical Officer in relation to pandemic influences. The requirement to consult with the Presiding Officer allows him to consider if Parliament should play any role in relation to the proposal, for example through a motion that a poll be conducted on multiple days. The uncertainties as to the circumstances that might be involved, and the timescales that might be possible, require that the power be flexible. Regulations would be subject to the default laying requirement, under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 8(7) – Polling on Additional Days: Power to Modify the Meaning of “Relevant References”

Power Conferred On: The Scottish Ministers
Power Exercisable By: Regulations Made by Scottish
Statutory Instrument
Parliamentary Procedure: None

Provision

18. Section 8(9) defines as a “relevant reference” any reference in the Scottish Parliament (Elections etc.) Order 2015 (S.S.I. 2015/425) or any other enactment or document (however expressed) to the day or date of the poll at an election for membership of the Scottish Parliament. If the power at section 8(1) is exercised to provide for polling at the 2021 election to take place over more than one day, section 8(3) and (8) provide that, unless varied, references to the day of the poll will mean 6 May 2021, or the day set for any postponed poll. That fixes to that day, for example, the day on which a person has to attain the age of 16 to be able to vote, and in relation to incapacity to vote. Section 8(7) allows the Scottish Ministers to vary that interpretation for particular references.

Reason for Taking Power

19. There are a few references within the 2015 Order to things happening on the day of the poll which would not operate as intended if fixed as referring exclusively to the first day of a poll being conducted over two or more days. Chiefly, these relate to employment “on the day of the poll”. This power is intended as a safeguard, so that if the power is exercised to provide for polling over two or more days, such references can be altered to read to different days on which polling is taking place.

Choice of Procedure

20. No Parliamentary procedure is proposed for regulations under section 8(7). If provision is made under section 8(1) (which is the only circumstance in which this power can be used), regulations under section 8(7) may require to come into force at comparatively short notice, at a time when Parliament may be in recess or unable to meet for reasons relating to coronavirus. The modification has no lasting effects (it is for the specific situation in relation to the 2021 poll only) and is essentially administrative detail. No formal consultation with electoral professionals seems needed in relation to this power; they would already have been consulted in relation to the regulations under section 8(1). Regulations would be subject to the default laying requirement, under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 14 – Ancillary Provision

Power Conferred On:	The Scottish Ministers
Power Exercisable By:	Regulations Made by Scottish
Statutory Instrument	

Parliamentary Procedure: None

Provision

21. Section 14(1) confers on the Scottish Ministers a power to make incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill as enacted, or any provision made under it. This includes the power to modify enactments, including the Act itself.

Reason for Taking Power

22. This power provides the flexibility to make any necessary adjustments that may arise as a result of the other provision in the Bill as enacted. Without the power, there would be difficulties if a situation arose where it was not possible to return to Parliament with primary legislation to deal with technical, operational or implementation matters needed as a result of the Act. The ancillary power is tied to the scope and policy intention of the Bill. Whilst potentially wide, it is limited to the extent that it can only be used if Scottish Ministers consider it appropriate to do so, for purposes that are linked to those of the Bill as enacted.

23. Depending how the provisions in the Bill are used, after enactment, ancillary provision may need to be made quickly. It is anticipated that use of the provisions would require some ancillary provision. For example, use of the power to provide for polling to take place on more than one day would require some provision to be made for safe storage of ballot boxes between polling days, and for how their seals are to be inspected at the start of the further day or days. Provision for an all-postal ballot would require adaptation of the current rule for mixing before counting of postal ballot papers with ballot papers from polling stations (Scottish Parliament election rule 55(5)(a)). However, as it is the use of provisions that informs what ancillary provision is appropriate, it would not be practicable to set out the detail of such provision in the Bill.

Choice of Procedure

24. The other powers in the Bill itself adopt no Parliamentary procedure, for the reasons described above. The reasons for that procedural choice apply equally to this power, in particular that provision may need to come into force at comparatively short notice, at a time when Parliament may be in recess or unable to meet for reasons relating to

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coronavirus. Regulations would be subject to the default laying requirement, under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 15 – Commencement

Power Conferred On: The Scottish Ministers

Power Exercisable By: Regulations Made by Scottish Statutory Instrument

Parliamentary Procedure: None

Provision

25. Section 15(2) provides that the Scottish Ministers may by regulations make transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill as enacted.

Reason for Taking Power

26. Section 15(1) provides for the Act to come into force on the day after it receives Royal Assent. The Scottish Ministers have not identified any need to have power to provide in this manner for the commencement of the legislation, as introduced. However, it is prudent (and commonplace) to have such a power in case there is a need to make provision for effective transitional arrangements, either as an oversight or as a result of an amendment made to the Bill during its Parliamentary consideration.

Choice of Procedure

27. As is usual for regulations relating to the commencement of legislation, the power is not subject to Parliamentary procedure. Regulations would be subject to the default laying requirement, under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

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