

SCOTTISH LOCAL GOVERNMENT ELECTIONS (CANDIDACY RIGHTS OF FOREIGN NATIONALS) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Scottish Local Government Elections (Candidacy Rights of Foreign Nationals) 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 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.

4. 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

¹ [Agreement between the United Kingdom of Great Britain and Northern Ireland and the Grand Duchy of Luxembourg on the Participation in Certain Elections of Nationals of Each Country Resident in the Territory of the Other \(publishing.service.gov.uk\)](#).

² [Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Poland on the Participation in Certain Elections of Nationals of Each Country Resident in the Territory of the Other \(publishing.service.gov.uk\)](#).

³ [Agreement between the United Kingdom of Great Britain and Northern Ireland and the Portuguese Republic Regarding the Participation in Local Elections of Nationals of Each State Resident in the Other's Territory \(publishing.service.gov.uk\)](#).

⁴ [Agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain on the Participation in Certain Elections of Nationals of Each Country Resident in the Territory of the Other \(publishing.service.gov.uk\)](#).

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.

5. To comply with the United Kingdom’s obligations under those agreements, the Bill makes limited amendments to section 29 of the Local Government (Scotland) Act 1973⁶ (“the 1973 Act”). That section sets out the eligibility requirements for nomination, election and holding office as a member of a local authority in Scotland.

6. Section 1(2)(a) of the Bill amends section 29(1) of the 1973 Act to allow a fourth category of person – referred to as a “schedule 6A national” – to stand for election, be elected and hold office as a member of a local authority in Scotland. To fall within the category of a “schedule 6A national”, a person must meet two eligibility requirements. The first requirement is based on nationality: the person must be a national of a country for the time being listed in new schedule 6A (added by section 1(3) of the Bill). The countries which are listed in new schedule 6A are the countries who are the parties to the agreements with the United Kingdom (being Luxembourg, Poland, Portugal and Spain). The second requirement is based on holding lawful immigration status: the person must be someone who either (a) does not require leave under the Immigration Act 1971 to enter or remain in the United Kingdom, or (b) does require, and for the time being has, such leave.

RATIONALE FOR SUBORDINATE LEGISLATION

7. The Bill contains three delegated powers, which are explained in more detail below.

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

- the need to provide flexibility to respond promptly to any changes to the United Kingdom’s international treaty obligations, without the need for primary legislation;
- the need to make proper and efficient use of valuable parliamentary time; and
- the potential for unexpected issues to arise, which might otherwise frustrate the purpose of the Bill’s provisions as approved by the Parliament.

9. For each provision, this memorandum sets out:

- The person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- Why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and

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 [The Local Government \(Scotland\) Act 1973 \(legislation.gov.uk\)](https://www.legislation.gov.uk).

- The parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

10. Subordinate legislation is required to implement the Scottish Government’s policy and some form of parliamentary procedure is appropriate. For the decision on whether to apply the negative procedure or the affirmative procedure, the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

DELEGATED POWERS

Section 1(3) – Duty to add a country to the list of countries referred to in the definition of “schedule 6A national”

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: negative

Provision

11. As explained in paragraph 6, section 1(2)(a) of the Bill adds a new category of eligible persons to section 29(1) of the 1973 Act, known as “schedule 6A nationals”. This term is defined by section 29(8) of the 1973 Act, which is inserted by section 1(2)(c) of the Bill. It is defined by reference to the list of countries in the new schedule 6A, which is added to the 1973 Act by section 1(3) of the Bill. Paragraph 2 of schedule 6A enables further countries to be added to the list of countries in order to implement any new treaties entered into by the United Kingdom relating to eligibility to stand at local government elections.

12. Paragraph 2 of schedule 6A imposes a duty on the Scottish Ministers to make regulations to add a country to the list of countries in paragraph 1 of schedule 6A in the circumstances set out in paragraph 2(a) and (b). Those circumstances are where the United Kingdom and the country intend to become parties to a relevant treaty, and the pre-conditions for ratifying the treaty have been met in accordance with section 20 of the Constitutional Reform and Governance Act 2010⁷. A relevant treaty is one which contains provision relating to eligibility to stand as a candidate at local government elections.

13. By virtue of paragraph 4(a) of new schedule 6A, regulations made under paragraph 2 may include incidental, supplementary, consequential, transitional, transitory or saving provision.

Reason for taking power

14. The purpose of the provision in paragraph 2 of new schedule 6A is to enable the Scottish Ministers to respond promptly to, and ensure compliance with, any changes in the United Kingdom’s treaty obligations in relation to candidacy rights in local government elections. It will ensure that candidacy rights are duly extended to the nationals of any other country or countries

⁷ [The Constitutional Reform and Governance Act 2010 \(legislation.gov.uk\)](http://legislation.gov.uk).

with which the United Kingdom enters into a candidacy eligibility agreement. Delegation of this regulation-making function to the Scottish Ministers will ensure that, once this Bill is in force, the list of countries in schedule 6A of the 1973 Act can be amended to properly reflect and implement the United Kingdom's international obligations without the need for further primary legislation.

15. The reason for including the provision in paragraph 4(a) of new schedule 6A is to allow for ancillary provision to be made, as required, to deal with the legal and practical consequences of extending the list of countries in paragraph 1 of schedule 6A. For instance, this may involve prescribing or updating forms or adjusting procedures to ensure the smooth administration of elections.

Choice of procedure

16. The negative procedure is considered appropriate for regulations made under paragraph 2 of new schedule 6A. This is because the Scottish Ministers have no discretion in adding countries to the list under paragraph 2, as the addition would be necessary in order to comply with the United Kingdom's international treaty obligations on local election candidacy rights. Applying the negative procedure will ensure that the list of countries in new schedule 6A is updated as timeously as possible in accordance with international law, while providing an appropriate level of parliamentary scrutiny.

Section 1(3) – Power to remove a country from the list of countries referred to in the definition of “schedule 6A national”

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: negative

Provision

17. Similar to paragraph 2 of new schedule 6A of the 1973 Act (explained above), paragraph 3 of schedule 6A confers power on the Scottish Ministers to amend the list of countries in paragraph 1. It enables the Scottish Ministers, by regulations, to remove a country from the list of countries in line with the United Kingdom's international treaty obligations on local election candidacy rights. Accordingly, the Scottish Ministers may only exercise the power in paragraph 3 where the country and the United Kingdom cease to be party to a treaty containing provision relating to eligibility to stand as a candidate at local government elections.

18. By virtue of paragraph 4(a) of new schedule 6A, regulations made under paragraph 3 may also include incidental, supplementary, consequential, transitional, transitory or saving provision.

Reason for taking power

19. The purpose of the provision in paragraph 3 of new schedule 6A is to enable the Scottish Ministers to respond to changes in the United Kingdom's treaty obligations in relation to candidacy rights in local government elections. Accordingly, this power will allow the Scottish Ministers to remove candidacy rights from the nationals of any country that ceases to be a party to a candidacy eligibility agreement with the United Kingdom. Whereas paragraph 2 of new schedule 6A imposes a duty on the Scottish Ministers to amend the list of countries in the circumstances set out,

paragraph 3 simply confers a power to do so. The Scottish Ministers are afforded discretion in removing a country from the list on account of the fact that, in some cases, only a 30-day notice period is required to terminate a treaty agreement. This discretion is intended to avoid any significant disruption or unfairness that may result from removing candidacy rights, for example in the event of a treaty agreement ceasing to be in force during a local government election period. The power will ensure that, once this Bill is in force, the list of countries in schedule 6A of the 1973 Act can be amended to properly reflect the United Kingdom's international obligations without the need for further primary legislation.

20. The provision in paragraph 4(a) of new schedule 6A is included to allow for ancillary provision to be made, as required, to deal with the legal and practical consequences of removing a country from the list of countries in paragraph 1 of schedule 6A. For instance, this may involve making specific saving or transitional provision in relation to any existing office-holders who are affected by the removal of a country from the list. It may also involve prescribing or updating forms or adjusting procedures to ensure the smooth administration of elections.

Choice of procedure

21. As with regulations under paragraph 2, the negative procedure is considered appropriate for regulations made under paragraph 3 of new schedule 6A. This is because the power will only be exercisable in response to a country and the United Kingdom ceasing to be party to a treaty providing for candidacy rights in local government elections. Given that an international treaty agreement may be terminated at relatively short notice, the negative procedure will enable the list of countries in paragraph 1 of schedule 6A to be updated as timeously as possible to reflect any change to the United Kingdom's obligations under international law. However, it will also ensure that any such amending regulations are subject to an appropriate level of parliamentary scrutiny.

Section 2 – Ancillary Provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative if amending an Act, otherwise negative

Provision

22. Section 2 of the Bill confers on the Scottish Ministers a power to make any 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. This includes the power to make different provision for different purposes. It also includes the power to modify any enactment, whether primary or secondary legislation (although not the Bill itself, as the Bill does not contain any substantive provisions that are free-standing).

Reason for taking power

23. The need for this Bill arises out of changes to the United Kingdom's international obligations. The power to make a range of ancillary provision is needed to ensure that the policy intention of the Bill is fully achieved. Whilst there are no specific proposals to use this power, it provides a flexible and efficient way to make ancillary provision should the need arise. For instance, consequential provision may be required to make necessary changes to related legislation, or

incidental or supplementary provision may be required to prescribe some additional procedure to fully implement the changes proposed by the Bill. Accordingly, the power may require to be used to prescribe or update forms, to specify new or additional documents that may be used as proof of identity and eligibility to stand, or to reflect any change to the name of a country for the time being listed in new schedule 6A of the 1973 Act. Although the Scottish Government has carefully considered the implications of the Bill in the wider scheme of electoral law, the power would enable them to address any unforeseen or unexpected issues that would otherwise reduce the Bill's effectiveness.

24. Without the power to make any such ancillary provision, it might be necessary to return to Parliament with another Bill, to deal with technical, operational or implementation matters clearly within the scope and policy intention of this Bill. That would not be an efficient use of resources.

25. The Scottish Government recognises the potentially broad application of this power, which includes the power to modify primary legislation. However, it is limited to the extent that it may 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, which concerns the conferral of certain candidacy rights in accordance with international treaty agreements entered into by the United Kingdom. The power, therefore, could not be used to bring forward substantive policy change relating to the persons entitled to stand as candidates at Scottish local government elections (for instance, by further altering the eligibility of persons to stand).

Choice of procedure

26. Section 2(3)(a) of the Bill provides that any regulations under section 2 will be subject to the affirmative procedure if they contain provisions which make textual changes to an Act. Section 2(3)(b) provides that, in any other case, regulations under section 2 will be subject to the negative procedure. This approach is typical for delegated powers to make ancillary provision. It is considered to provide the appropriate level of parliamentary scrutiny for regulations which textually amend primary legislation, while allowing efficient use of parliamentary time for regulations that do not require the same level of scrutiny because they make changes to the administrative details set out in electoral subordinate legislation.

This document relates to the Scottish Local Government Elections (Candidacy Rights of Foreign Nationals) Bill (SP Bill 11) as introduced in the Scottish Parliament on 7 February 2022

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