



Law Society
of Scotland

Law Society of Scotland

Scottish General Election (Coronavirus) Bill Stage 1 Briefing

December 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law Sub-committee welcomes the opportunity to offer comments on the Scottish General Election (Coronavirus) Bill Stage 1. The Sub-committee has the following comments to put forward for consideration.

General Comments

Application of Act

1. Application of this Act to 2021 election

Section 1 provides that the Bill is to apply to the general election for the Scottish Parliament due to be held on 6 May 2021. We agree with this provision.

2. Disapplication of section 2 of the Scotland Act 1998

This section disapplies the Scotland Act 1998 section 2 subsections (3) to (5ZA).

Subsections (3) to (5ZA) provide:

(3) If the poll is to be held on the first Thursday in May or on the day specified by an order under subsection (2B), the Parliament—

(a) is dissolved by virtue of this section at the beginning of the minimum period which ends with that day, and

(b) shall meet within the period of seven days beginning immediately after the day of the poll.

(4) In subsection (3), "the minimum period" means the period determined in accordance with an order under section 12(1).

(5) [Subject to subsection (2A),] if the Presiding Officer proposes a day for the holding of the poll which is

not more than one month earlier, nor more than one month later, than the first Thursday in May, Her Majesty may by proclamation under the Scottish Seal—

- (a) dissolve the Parliament [(unless the Parliament is already dissolved)],*
- (b) require the poll at the election to be held on the day proposed, and*
- (c) require the Parliament to meet within the period of seven days beginning immediately after the day of the poll.*

[(5ZZA) Before proposing a day for the holding of the poll under subsection (5), the Presiding Officer must consult the Electoral Commission.]

(5ZA) Where a day is specified by order under subsection (2B), subsection (5) applies as if the reference to the first Thursday in May were a reference to that day.]

It is clear that section 2(3) to (5ZA) of the Scotland Act requires to be disapplied in order to make the changes in this bill.

Postal voting arrangements for 2021 election.

3. Closing date for application to vote by post or amend existing absent vote arrangements

The issues covered in section 3 are matters which are in the province of those who have knowledge and expertise of the voting system. We have no comment to make.

4. Report on uptake of postal voting at closing date

Section 4 provides:

The Scottish Ministers must prepare a report setting out, as at 7 April 2021 –

- (a) the percentage of the total number of persons entitled to vote at the 2021 election who have been granted a postal vote for the election, and*
- (b) the number of pending applications for a postal vote for the election.*

We take the view that it will be important for the report to indicate the number of potential electors who have not applied for a postal vote at 7 April.

5. Power to provide for all-postal vote

We agree that it is sensible for Scottish Ministers to take a power to provide for an all postal vote. We agree with the view of the Standards, Procedures and Public Appointments Committee which believes “that Parliamentary scrutiny and approval of such a move is necessary and ask the Government to bring forward measures to ensure this” (Stage 1 Report page 14).

It will be important for there to be enough time between making regulations and the actual date of the vote accordingly the timeframe for this process should be made clear by the Government. We note that a period of 6 months was referred to in evidence to the Standards, Procedures and Public Appointments Committee (Stage1 Report, paragraph 40) which is the same as the period referred to in the Policy Memorandum (Para 48). This contrasts with the earlier statement in the Policy Memorandum (Para 21):

"The power is not subject to Parliamentary procedure as a result of the potential need to respond very swiftly to the impact of the coronavirus pandemic on the election, at a time when the Parliament may be in recess."

Other arrangements for 2021 election

6. Dissolution of current Parliament

Section 6 changes the date of the Parliament's dissolution to 5 May 2021, the day before the scheduled date for the general election. This anticipates the contingency that Parliament will need to deal with legislation to delay the election if holding it on 6 May 2021 would be unsafe because of the virus. The SPICE paper on the bill explains the need for section 6 by explaining "at dissolution Members of the Scottish Parliament cease to be MSPs. Section 13 of the Scotland Act 1998 provides that an MSP's term of office ends with dissolution of the Parliament. The result is that after dissolution the Parliament cannot be re-called. Rather, a new Parliament must be elected". Therefore, it is important to make sure that the Parliament can operate in these exceptional circumstances. We agree with this proposed approach.

7. Dissolution of current Parliament: consequential modifications

We note the additional provisions which make consequential amendments to the 2015 regulation.

8. Power to provide for polling on additional days

This is a novel arrangement for elections to the Scottish Parliament, but it is not novel in a few other countries and other legislatures such as the European Parliament, the Indian Parliament and the Czech Republic and Slovakian legislatures.

This proposal does have consequences, eg for rules about publication of polls on election day, about regulated periods for election expenditure. Section 8(7) provides for amendment of relevant references in any enactment or other document, but will this encompass broadcasters' election codes of practice?

9. First meeting of new Parliament

We agree with the terms of section 9.

10. Election of new Presiding Officer

We agree with the terms of section 10.

11. Power of Presiding Officer to postpone election

Section 11 provides: –

(1) If the Presiding Officer considers it necessary or appropriate for any reason to do so, the Presiding Officer may fix a day that is after 6 May 2021 for the holding of the poll for the 2021 election.

(2) Subsection (3) applies if the power conferred by subsection (1) is to be exercised for a reason relating to coronavirus.

(3) Before exercising the power, the Presiding Officer must be satisfied that the Scottish Parliament could not safely meet for the purpose of passing a Bill for an Act to change the day for the holding of the poll.

This is a contingency measure should the election need to be delayed when the Parliament cannot safely meet.

We note that the Presiding Officer can exercise this power if he “considers it necessary or appropriate for any reason to do so”. It is important to note the breadth of this power. It would be clear when there is a *necessity* to postpone – that is an objective basis upon which to exercise the power. It is less clear when it is *appropriate* for the power to be exercised. That is a more subjective basis. Furthermore, the delay does not have to be because of coronavirus but can be “for any reason”. We note that the “Committee recognises that the provision at Section 11 for the Presiding Officer to postpone 2021 election is a measure of last resort. If the Presiding Officer wishes to postpone for a reason related to Coronavirus, he must be satisfied that the Parliament could not meet safely to legislate to change the date of the Poll. As such we recognise that the provision is unlikely to be invoked given the ability for the Parliament to meet virtually. (Stage 1 Report page 22-23). We agree that this is expected to be a provision of last resort and that the ability for the Parliament to meet virtually may mean this section will never be applied. However, these aspects reinforce questions about the need for the power. Accordingly, the Government should explain fully the need for such a wide-ranging power.

If the delay is due to coronavirus, the Presiding Officer must be satisfied that the Parliament could not safely meet to pass primary legislation to change the date of the poll.

We note that under subsection (6) the power:

(a) may be exercised more than once, but

(b) may not be exercised so as to fix a day that is after 5 November 2021.

We agree with this limitation on the exercise of the power.

12. Effect of Act on existing power to make provision about elections

We have no comments to make.

13. Interpretation

We have no comments to make.

14. Ancillary provision

We have no comments to make.

15. Commencement

We have no comments to make.

16. Short title

We have no comments to make.



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