

SL(5)541 – The Local Government (Coronavirus) (Postponement of Elections) (Wales) Regulations 2020

Background and Purpose

These Regulations were made by the Welsh Ministers under sections 67 and 68 of the Coronavirus Act 2020, and came into force on 5 May 2020. The Regulations postpone certain by-elections which were due to be held during the period from 16 March 2020 to 31 January 2021.

Regulation 3 postpones by-elections which would be held to fill vacancies in the office of councillor in any county council or county borough council in Wales to a day falling within the period commencing on 1 February 2021 and ending on 16 April 2021.

Regulation 4 postpones by-elections which would be held to fill vacancies in the office of community councillor in any community council in Wales to a day falling within the period commencing on 1 February 2021 and ending on 16 April 2021.

Regulation 5 makes provision to relieve returning officers and others of liability under certain provisions of the Representation of the People Act 1983 in relation to polls which were required to be held but were not held in the period after 24 April 2020.

Procedure

Negative.

Technical Scrutiny

One point is identified for reporting under Standing Order 21.2 in respect of this instrument.

Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

1. Regulations 3(1) and 4(1) together provide for the postponement of a relevant election (defined in Regulation 2 as an election to fill a casual vacancy in the office of councillor in a county council, county borough council or community council in Wales).

Pursuant to these provisions, relevant elections which “would otherwise be held...on a day during the relevant period” (being the period from 16 March 2020 to 31 January 2021) are instead to be held within the period commencing 1 February 2021 and ending on 16 April 2021.

However, the Regulations do not specify whether a relevant election would be subject to the postponement provisions in Regulations 3(1) and 4(1), and the associated disapplication of criminal liability for breach of official duty for returning officers and others under Regulation 5, in the circumstances where the ordinary statutory time frame for holding such an election were to fall partly within the relevant period and partly after it.

Merits Scrutiny

The following 3 points are identified for reporting under Standing Order 21.3 in respect of this instrument.



Standing Order 21.3(ii) - that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

1. We note the breach of the 21-day rule (i.e. the rule under section 11A(4) of the Statutory Instruments Act 1946 that a negative procedure statutory instrument should be laid before the Senedd at least 21 days before that instrument comes into force), and the explanation for the breach provided by the Minister for Finance and Trefnydd in a letter dated 29 April 2020 to the Llywydd. The letter explains that the breach allows these Regulations to come into force on 5 May 2020. The letter confirms that this is necessary because The Coronavirus Act 2020 only indemnifies returning officers and others against breaching their official duty by dis-applying sections 39 and 63 of the Representation of the People Act 1983 for the period 15 March to 24 April 2020. The letter further notes that a “long gap between the end of that indemnity cover and this order [sic] being put in place would leave Returning Officers vulnerable to prosecution.”

2. It is noted in the Explanatory Memorandum (“EM”) that due to the immediacy of the Regulations, a consultation has not been undertaken by the Welsh Government, nor has a Regulatory Impact Assessment been completed. However the EM notes that views have been sought from stakeholders (such as the Electoral Commission, the Wales Electoral Coordination Board and the Association of Electoral Administrators) and that further views of stakeholders will be sought retrospectively as part of a future consultation on “supplementary provisions which will be required”. The EM does not confirm the nature of those supplementary provisions.

3. We note the following issues in relation to the EM:

- a. A number of erroneous references throughout to the instrument being an Order instead of Regulations;
- b. In section 3.2, incorrect dates when referring to the effect of section 65 of the Coronavirus Act 2020 (the period referred to commences on 16 March 2020 as opposed to 15 March 2020) and to the relevant period for the purpose of section 67 of that Act (which should be 16 March 2020 and 5 May 2021 instead of “16 March and 5th May 2021”);
- c. In section 3.2, a reference to section 65 of the Coronavirus Act being a provision which provides Welsh Ministers with powers (the regulation-making powers for these purposes are in sections 67 and 68 of that Act only);
- d. In section 4.2, a statement that the provisions of the Coronavirus Act 2020 are time limited for two years. There are a number of exceptions to this expiry provision, including, pursuant to section 89(2)(i) of that Act, the enabling powers relied upon for these Regulations;
- e. Section 4.3 refers to the UK Government announcing its intention to postpone all scheduled elections to be held in May 2020 and notes that the “Welsh Government gave its full support to returning officers who made the decision to suspend their polls before the date of Royal Assent which would not be covered by these provisions”. It is not clear what provisions are being referred to in this context, given the reference to the date of Royal Assent; and
- f. Section 4.7 refers to section 63 of the Representation of the People Act 1983 as providing for “an offence of official duty”, which should make reference to breach of official duty.

Implications arising from exiting the European Union

No implications are identified for reporting under Standing Order 21.3 in respect of this instrument.



Government Response

Response to Technical Scrutiny point

1. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

Government response:

The Regulations do not specify whether a relevant election would be subject to postponement and the disapplication of liability provisions in the circumstances where the ordinary time frame for holding such an election were to fall partly within the relevant period and partly after it for the following reason. Pursuant to section 89 of the Local Government Act 1972 an election to fill a casual vacancy must be held within 35 days of that vacancy. It is recognised that the 35 day period may “straddle” the relevant period. However, it is for the returning officer to fix the date of such an election (see section 89(2) of the Local Government Act 1972). The Regulation making power in section 67 of the Coronavirus Act 2020 does not provide the power to direct returning officers to fix a particular date. If the date fixed by the returning officer for such a poll falls within the relevant period then the poll will be postponed and the disapplication provisions will apply. If the date fixed by the returning officer falls outside the relevant period then such a poll will not be postponed and the disapplication of liability provisions will not apply. It is currently being considered whether any further supplementary provision is required to be made pursuant to the power in section 68 of the Coronavirus Act 2020 in connection with the regulations made under section 67 of the 2020 Act.

Response to Merit Scrutiny

Standing Order 21.3(ii) - that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Government response:

- In relation to merit point 2, section 68 of the Coronavirus Act 2020 provides the power to make supplementary provision and sets out a non-exhaustive list of matters about which provision may be made. Any supplementary provision that is considered necessary (which is currently being considered) will be made pursuant to that power.
- In relation to merit point 3, we note and accept the issues that have been identified. The Explanatory Memorandum will be amended and re-laid as a matter of urgency.

Committee Consideration

The Committee considered the instrument and Government response at its meeting on 18 May 2020 and reports to the Senedd in line with the reporting points above.

