

Report on the Legislative Consent Memorandum for the Elections Bill

December 2021

1. Background

1. On 9 September 2021, the Counsel General and Minister for the Constitution laid a Legislative Consent Memorandum (“the LCM”) for the Elections Bill currently before the UK Parliament.
2. On 14 September 2021, the Business Committee referred the LCM to the Local Government and Housing Committee (“the Committee”) and the Legislation, Justice and Constitution Committee for consideration. The Business Committee set a reporting deadline of 4 November 2021, the date was subsequently extended to 16 December 2021. We considered the LCM at our meeting on 6 October.
3. The Counsel General and Minister for the Constitution wrote to both committees on 12 October with information relating to amendments laid by the UK Government on 16 September.

2. The Welsh Government’s Legislative Consent Memorandum

4. Paragraph 5 of the LCM summarises the Bill and its policy objectives. Paragraphs 6 to 28 set out the provisions in the Bill for which consent is being sought by the UK Government. Paragraphs 29 to 41 set out further provisions which the Welsh Government considers the Senedd’s consent is required.



Paragraphs 42 to 47 set out the Welsh Government's views on the provisions being made in a UK Bill, rather than via Senedd legislation.

5. Paragraph 52 sets out the Welsh Government's conclusion that it is not appropriate to deal with these provisions in a UK Bill. The Counsel General and Minister for the Constitution notes that, despite seeing the benefits of addressing for devolved elections some of the issues covered by this Bill, his preference would be to do this via Senedd legislation in due course.

Provisions for which consent is sought

6. The Senedd's consent is being sought by the UK Government for clauses 7, 12, 16, 17, 18, 22, 23, 24, 25 and Schedule 4 because they relate to, and in some cases have a direct effect on, devolved Welsh elections.

7. "Devolved Welsh elections" is the collective term for the following:

- a. Senedd elections,
- b. Senedd by-elections,
- c. local government elections in Wales, and
- d. referendums held under the Local Government Act 2000 or those relating to local authority executive arrangements.

Clause 7 and Schedule 4: Undue influence

8. Section 115 of the Representation of the People Act 1983 ("RPA 1983") sets out the corrupt practice of undue influence. Clause 7 clarifies the activities which constitute undue influence by amending that section of the RPA 1983.

9. Paragraph 7 of the LCM states:

"These provisions are within the legislative competence of the Senedd as they relate to the conduct of local government elections in Wales, and incapacities relating to being elected to or holding the office of a member of the Senedd or Local Government elective offices in Wales."

Clause 12: The Electoral Commission

10. Clause 12 amends Part 1 of the Political Parties, Elections and Referendums Act 2000 ("PPERA 2000") by inserting new sections which make provision for the introduction of a 'Strategy and Policy Statement' which will provide guidance to

which the Electoral Commission must have regard when carrying out their functions. There is a requirement that the Welsh Ministers be consulted on the draft statement, so far as the draft relates to the Commission's devolved Welsh functions.

11. The Electoral Commission's "devolved Welsh functions" are defined in the Bill as the functions (in so far as those functions do not relate to reserved matters within the meaning of the Government of Wales Act 2006 ("GoWA 2006")) which relate to:

- i. general elections of members of the Senedd;
- ii. by-elections for Senedd constituency vacancies;
- iii. local government elections in Wales; and
- iv. referendums held under Part 2 of the Local Government Act 2000 or Part 4 of the Local Government (Wales) Measure 2011 (referendums relating to local authority executive arrangements).

12. Paragraph 12 of the LCM states:

"These provisions are within the legislative competence of the Senedd as the Electoral Commission will need to have regard to the Strategic and Policy Statement in the discharge of the Commission's devolved Welsh functions."

Clauses 16, 17 and 18: Notional expenditure

13. Clause 16 amends section 90C of the RPA 1983 by clarifying that candidates only need to report benefits in kind which they have actually used, or directed someone else to use, and does not include a responsibility for benefits in kind of which the candidate had no knowledge.

14. Clause 17 amends the provisions in electoral law providing that the Electoral Commission may prepare guidance on election expenses for candidates. The amendments make it clear that the guidance can cover the application of the rules in relation to expenses incurred for the purposes of a candidate's election (whether or not they are "election expenses").

15. Clause 18 amends section 73 of the RPA 1983 (and equivalent provisions throughout electoral law) so that expenses incurred by an authorised third party do not have to be paid by the election agent, they can be paid for by the third party.

16. In relation to clauses 16, 17 and 18, the LCM states:

“Clause 16(1)... are within the legislative competence of the Senedd insofar as they relate to the application of the rules on campaign expenditure for candidates at devolved local government elections in Wales” [LCM paragraph 16]

“Consent is required for clause 17(2) as these provisions modify the functions of the Welsh Ministers” [LCM paragraph 20]

“Clause 18 of the Bill makes amendments to Section 73 of PPERA to clarify that the expenses must have been authorised. Such amendments relating to standalone devolved elections would be within the competence of the Senedd.” [LCM paragraph 21].

Clauses 22 to 25: Political finance

17. Paragraph 24 of the LCM states:

“Currently foreign third-party campaigners can legitimately spend on UK elections under the recognised third-party campaigner registration thresholds, and this activity only becomes illegal once the thresholds are passed. Only UK-based groups/individuals or registered overseas electors are permitted to register with the Electoral Commission as third-party campaigners.”

18. Clause 22 inserts a new section 89A into the PPERA 2000 to remove the scope for any legal spending by foreign third party campaigners underneath the registration threshold but above the £700 ‘de minimis’.

19. Clause 23 grants the Secretary of State a regulation making power to amend section 88(2) of the PPERA 2000 by adding, removing or varying descriptions of “third parties”.

20. Clause 24 amends various sections of the PPERA 2000 to require third-party campaigners to give a notification to the Electoral Commission at a lower level of spending than is currently required, effectively creating a two tier system for registration.

21. Clause 25 amends section 94(6) of the PPERA 2000 to make provision so that third-party campaigners and political parties who are working together on a

joint campaign will both report any associated spending and identify the parties involved in the arrangement.

22. Paragraph 28 of the LCM states:

“The Senedd could legislate in this area in relation to campaign expenditure for standalone devolved elections.”

Provisions which the Welsh Government consider require consent

23. In addition to the clauses where consent is being sought by the UK Government, the Welsh Government has set out the further clauses for which it considers consent is also required.

Clause 11 and Schedule 7: European Citizens Voting and Candidacy Eligibility

24. Clause 11 gives effect to Schedule 7, which amends voting and candidacy rights of EU citizens. The Annex to the UK Government’s Explanatory Notes for the Bill provides that consent has not been sought for clause 11 and Schedule 7. However, paragraph 9 of the LCM states:

“While these provisions are intended to apply only to reserved elections Schedule 7 of the Bill, as introduced, amends existing provision in the Representation of the People Act 1983 in such a way that those provisions applying to the devolved franchise are repealed, therefore changing those entitled to register for and vote at local government and Senedd elections. Changes to the provisions to correct the unintended consequences for devolved Welsh elections are being discussed with the UK Government.”

25. Schedule 7 sets about amending the franchise for local government elections, but paragraph 359 of the Explanatory Notes to the Bill states:

“This change will flow through to all elections that use the local government franchise and are reserved to the UK Government.”

26. In his letter of 12 October, the Counsel General and Minister for the Constitution explained that amendments to Schedule 7 had been laid by the UK Government on 16 September:

“Amendment 8 makes technical amendments to Schedule 7, which amends various provisions of the Representation of the People Act 1983, to clarify that changes affecting the rights of EU citizens to vote in local government elections in England do

not affect the position in relation to local government elections in Wales. Amendment 7 is consequential on amendment 8. Amendment 9 clarifies that section 49(5)(b)(iii a) of the Representation of the People Act 1983 (as would be inserted by paragraph 1(8)(a) of Schedule 7) will apply to England only. Amendment 10 clarifies that section 49(5)(b)(iv) of the Representation of the People Act 1983 will continue to apply, but to Wales only.”

27. The letter also sets out the Welsh Government’s support for the amendments, providing that its concerns around the provisions in Clause 11 and Schedule 7 requiring consent have been addressed. Consequently, it no longer considers that consent is required for those provisions:

“The Welsh Government is supportive of these amendments to correct the unintended consequences of provisions included in the Bill as introduced.

In my view, as the effect of the amendments is that only the franchise for reserved elections would now be changed, they make provision which is consequential to matters outwith the legislative competence of the Senedd, and does not require Senedd consent by virtue of the exception in Standing Order 29.1(i). I have therefore not laid a supplementary LCM in relation to them.”

Clause 13: The Electoral Commission

28. Clause 13 inserts a new section 13ZA into the PPERA 2000, expanding the role of the Speaker’s Committee to include a power to examine the performance by the Electoral Commission of its duty to have regard to the strategy and policy statement.

29. The Annex to the [Explanatory Notes for the Bill](#) provides that consent has not been sought for clause 13. However, the Welsh Government states in the LCM that it considers consent to be required. Paragraph 14 of the LCM states:

“The Electoral Commission reports to the Senedd through the Llywydd’s Committee on its yearly estimates and accounts and Five Year Plan where these relate to the Commission’s devolved Welsh functions. As this general power of oversight over the Electoral Commission’s functions by the Speaker’s Committee

could have regard to devolved elections the Senedd's consent is considered necessary."

Clauses 26 to 30 and 32 to 34: Intimidation

30. Paragraph 29 of the LCM states:

"This Bill introduces a new electoral sanction in the form of a disqualification order imposed by the Courts, which is intended to provide additional protection to those who participate in elections and contribute to the political debate, and deter individuals from carrying out acts of Intimidation."

31. Clause 32 provides that a UK Minister may, via statutory instrument, add to, vary or omit offences from the list of criminal offences set out in Schedule 8 of the Bill in respect of which a disqualification order can be made.

32. Clause 33 sets out the relevant elective offices to which the disqualification order would apply, which includes Members of the Senedd, Members of a local authority in Wales and mayors.

33. Clause 34 gives effect to Schedule 9, which directly amends section 18 (effect of disqualification) of the GoWA 2006 to the effect that if a Senedd Member becomes disqualified by virtue of an order made under clause 27 of the Bill, then the person ceases to be a member of the Senedd and the person's seat becomes vacant.

34. The Annex to the Explanatory Notes for the Bill provides that consent has not been sought for clauses 32 to 34. However, the Welsh Government states in the LCM that it considers consent to be required. Paragraph 33 of the LCM states:

"These provision[s] have direct implications for Members of the Senedd, Members of a local authority in Wales and mayors. Therefore consent from the Senedd is considered necessary."

Clauses 35 to 56: Digital imprints

35. Clause 35 sets out definitions (in relation to digital imprints) of "electronic material", "promoter" and "publisher" which engage the obligation to endorse the material. The clause provides that the definitions may be modified by the Secretary of State.

36. Clause 40 provides a definition of a "relevant election" for the purposes of identifying relevant electronic material, and the definition includes elections to Senedd Cymru, local government elections in Wales and mayoral elections.

37. Clause 49 places a duty on the Electoral Commission to issue guidance on the operation and enforcement of the digital imprint regime, which must be approved by the UK Government.

38. The Annex to the Explanatory Notes for the Bill provides that consent has not been sought for the clauses relating to digital imprints. However, the Welsh Government sets out in the LCM that it considers consent to be required. Paragraph 38 of the LCM states:

“It is our view that these provisions taken together in respect of devolved elections are within the legislative competence of the Senedd as they are intended to regulate transparency of electoral material published online and ensure that readers and recipients of that electoral material understand who has published material online.”

Clauses 57 and 58: General

39. Clause 57 provides a UK Minister with the power to amend any provision of the Bill by statutory instrument, or any provision amended by the Bill in other Acts, as a consequence of the amendment or revocation of any secondary legislation referenced in the Bill.

40. Clause 58 provides that the UK Parliament will pay for any costs that a UK Minister incurs as a result of the Bill, and for any increased costs incurred under existing Acts of Parliament if they arise as a result of the Bill. It also provides that any increase in payments made from the UK Consolidated Fund will be met, if they arise as a result of the Bill and are incurred under an existing Act of Parliament.

41. The Annex to the Explanatory Notes for the Bill provides that consent has not been sought for clauses 57 and 58. However, paragraph 41 of the LCM states that the Welsh Government considers consent to be required:

“Clause 57 could be used to amend any of the provisions that impact on devolved elections and clause 58 could have potential implications for the Welsh Consolidated Fund and the funding of devolved elections and are therefore consequential on devolved provision. Therefore Senedd consent is considered necessary.”

Reasons for making these provisions for Wales in the Bill

42. Paragraphs 43 to 47 of the LCM set out the reasons why the Welsh Government does not consider it appropriate for the Bill to contain devolved provisions. Paragraph 43 of the LCM states:

“We are concerned that the provisions in the Bill regarding the accountability of the Electoral Commission, as currently drafted, are not compatible with the accountability arrangements, established by the Senedd and Elections (Wales) Act 2020, between the Electoral Commission and the Llywydd’s Committee in the Senedd.”

43. Paragraph 44 of the LCM states that the Welsh Government would prefer to consult its stakeholders and “bring forward legislation to the Senedd in due course”, instead of making provision via a UK Bill. According to the LCM, the Welsh Government is:

“...committed to improving the accessibility of Welsh law in line with the Legislation (Wales) Act 2019, and this is particularly important in the context of complex electoral law. We would prefer to consolidate the law as far as possible, and importantly make it bilingually, within Senedd legislation – rather than allowing the further fragmentation which this Bill would produce.” [LCM paragraph 46]

3. Committee consideration and conclusion

44. We note the Welsh Government’s position that it is not appropriate to grant consent to the UK Government to legislate on the devolved matters included in this Elections Bill. Most Members of the Committee agree with the Welsh Government that consent should not be granted. The majority of the Committee believe any proposals to legislate on these devolved matters should be brought forward by the Welsh Government and subject to full scrutiny by the Senedd.

45. Two Members of the Committee, Joel James MS and Sam Rowlands MS, disagree with the majority view and believe that consent should be granted.
