

LEGISLATIVE CONSENT MEMORANDUM

ELECTIONS BILL

1. This legislative consent memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The Elections Bill (“the Bill”) was introduced in the House of Commons on 5 July 2021. The Bill as introduced can be found at:
<https://publications.parliament.uk/pa/bills/cbill/58-02/0138/210138.pdf>

Policy Objective(s)

3. The UK Government’s stated policy objectives are to make new provision for and to amend existing electoral law.

Summary of the Bill

4. The Bill is sponsored by the Cabinet Office.
5. The Bill makes provision for:
 - A requirement for Voter ID at UK parliamentary elections, at local elections in England and at Police and Crime Commissioner (PCC) elections in England and Wales;
 - Safeguards for postal and proxy voting;
 - Clarifying and updating the law on the undue influence of electors;
 - Clarifying and updating the law on assistance available to voters with a disability;
 - Removing the 15 year limit on the exercise of voting rights in UK Parliamentary elections currently placed on British electors living overseas, and makes amendments to the registration process;
 - Introducing rules for voting and candidacy eligibility of EU citizens voting and standing in local elections in Northern Ireland, England, and PCC elections in England and Wales;
 - Amending the current provisions for the UK Parliamentary accountability of the Electoral Commission;
 - Amending the current provisions around political finance and expenditure in elections;
 - Introducing a new disqualification order if a person is convicted of an intimidatory criminal offence;
 - A requirement for digital campaigning material to display a digital imprint.

Provisions in the Bill for which consent is required

Undue influence (clause 7 and schedule 4)

6. The Bill clarifies the activities which constitute undue influence by amending Section 115 of the Representation of the People Act 1983. Undue influence will also continue to be a corrupt practice, meaning that if a person is guilty of undue influence in relation to any electoral event in the UK, they will be incapable of being elected to or holding all relevant UK elective offices for five years.
7. 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.

European Citizens Voting and Candidacy Eligibility (clause 11 and Schedule 7)

8. The UK Government has sought agreements with EU Member States that will enable UK nationals living in those countries to vote and stand in their local elections in return for local voting and candidacy rights for citizens of these countries living in the UK. Voting agreements with Spain, Portugal, Luxembourg and Poland have already been agreed. EU citizens who have been living in the UK since before the end of the Implementation Period will retain their local voting and candidacy rights in England and Northern Ireland, provided they hold lawful immigration status, regardless of whether they are citizens of Member States with which the UK has voting and candidacy rights agreements. For EU citizens who arrived in the UK after this point, voting and candidacy rights will rest on the principle of a mutual grant of rights, through agreements with the respective EU Member States. The Bill will remove the existing automatic grant of voting and candidacy rights.
9. 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.

The Electoral Commission (clause 12 and clause 13)

10. Clause 12 of the Bill amends Part 1 of the Political Parties Elections and Referendums Act 2000 (PPERA) to make provisions for a power to designate a Strategy and Policy Statement, which will be drafted by the UK Government and subject to Parliamentary approval. Before the statement can be designated by the Secretary of State, the Welsh Ministers must be consulted on the draft, so far as the draft relates to the Commission's devolved Welsh functions. However, it is for the Secretary of State to make any changes the Secretary of State considers necessary in light of the responses to the consultation.

11. The Commission must have regard to the statement when carrying out their functions and are required to publish an annual report on what steps it has taken in respect of the statement. The Secretary of State must review the statement on a 5 yearly cycle and may revise the statement without consulting the Welsh Ministers.
 12. 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.
 13. Clause 13 of the Bill inserts a new section into 13ZA of PPERA to amend the functions of the Speaker's Committee in order to further enhance the Electoral Commission's accountability to Parliament. This general scrutiny power will include, but not be limited to, examining the Electoral Commission's compliance with its duty to have regard to the Strategy and Policy Statement as introduced by this Bill.
 14. 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.
- Notional expenditure** (clauses 16(1), 16(5), 17(2) and 18)
15. This Bill clarifies the law so that candidates only need to report benefits in kind which they have actually used, or directed someone else to use, and therefore doesn't include the responsibility for benefits in kind of which they had no knowledge. This clarification will also be extended to other campaigners who are subject to notional expenditure controls. Expenditure which promotes an individual candidature would continue to count towards a candidate's own spending limit.
 16. Clause 16(1) of these provisions which amends section 90C of the Representation of the People 1983 Act 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.
 17. Clause 16(5) amends section 112 PPERA in respect of notional referendum expenses.
 18. Clause 17(2)(a) of the Bill amends the power of the Welsh Ministers to issue a code of practice by the EC under paragraph 14A of Schedule 4A to the Representation of the People Act 1983. The amendments made by this clause are to make it clear that the code of practice can cover the application of the rules in relation to expenses incurred for the purposes of a candidate's election.

19. Clause 17(2)(b) of the Bill also amends the power of the Welsh Ministers in paragraph 14A(7)(b) of Schedule 4A RPA 1983 to designate the date on which a code of practice under paragraph 14A comes into force. This provision amends sub-paragraph 14A(7)(b) of Schedule 4A to the RPA1983 to specify that the order that brings the code of practice into force is a statutory instrument.
20. Consent is required for clause 17(2) as these provisions modify the functions of the Welsh Ministers.
21. 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.
22. These amendments relating to notional expenditure do not extend to candidates at Senedd elections. In the case of a candidate at a Senedd Election, there will be no requirement to authorise the use of property, goods, services or facilities on behalf of that candidate whereas in respect of political parties, the authorisation requirements will apply.
23. Section 64 of the National Assembly for Wales (Representation of the People) Order 2007 makes similar provision for candidates at Senedd Elections to that in section 90C of the Representation of the People 1983 Act for candidates at Local Government elections in Wales (amended by Cause 16(1) of the Bill). Without an amendment to the National Assembly for Wales (Representation of the People) Order 2007 there is a possibility of the development of a two tier approach in Wales with respect to campaign expenditure and the need to authorise.

Political finance (clauses 22 – 25)

24. 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. Clause 22 of this Bill inserts a new section 89A into PPERA to remove the scope for any legal spending by foreign third-party campaigners underneath the registration threshold but above a £700 'de minimis'. Inclusion of such a provision will balance the desire to prohibit spending by foreign entities without criminalising low level, potentially inadvertent, breaches which are unlikely to adversely impact an election.
25. Clause 23 creates a regulation making power for the Secretary of State alone to amend section 88(2) PPERA to the effect of amending by way of adding, removing or varying the descriptions of third parties. There is no duty to gain the consent of the Welsh Ministers, despite the implications for devolved elections.

26. Clause 24 amends various sections of PPERA 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. This new 'lower' tier will apply when a third-party campaigner intends to spend in excess of £10,000 on controlled expenditure during a regulated period across, or in any constituent part/s of, the UK, but below the existing country specific thresholds for registration, which acts as their upper limit. All of these measures only apply to qualifying expenditure, not wider, non-electoral, campaigning that groups may undertake. Therefore, the lower tier third-party campaigners will be subject to the minimum of regulation necessary to ensure that they are a UK-based or an eligible overseas entity.
27. Clause 25 amends section 94(6) of PPERA 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. The stated aim of this is to ensure that campaigners are not able to bypass their spending limits using coordinated spending.
28. The Senedd could legislate in this area in relation to campaign expenditure for standalone devolved elections.

Intimidation (clauses 26 – 30 and clauses 32 – 34)

29. 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. The disqualification order can be imposed on a person convicted of a criminal offence (as set out in Schedule 8 of the Bill) motivated by hostility towards a candidate, future candidate, substitute or nominee (in Northern Ireland), campaigner or the holder of a relevant elective office. The effect of the new disqualification order is a five-year disqualification from standing for, being elected to or holding certain elective offices.
30. Clause 32 provides for UK Government Ministers alone to amend the list of intimidatory criminal offences to which the disqualification order applies via statutory instrument and as set out in Schedule 8. There is no duty to gain the consent of the Welsh Ministers, despite the implications for devolved elections.
31. Clause 33 provides a definition of the relevant elective office to which the disqualification order would apply and which include implications for Members of the Senedd, Members of a local authority in Wales and mayors.
32. Clause 34 gives effect to Schedule 9, which directly amends section 18 (effect of disqualification) of the Government of Wales Act 2006 to the effect that if a Senedd Member becomes disqualified by virtue of a

disqualification order under section 27 of the Bill, then the person ceases to be a member of the Senedd and the person's seat is vacant.

33. These provisions 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.

Digital Imprints (clauses 35 – 56)

34. The Bill introduces a new digital imprints regime requiring anyone paying for digital political material to be advertised to explicitly show who they are, and on whose behalf they are promoting the material. Paid material is paid-for advertising, in which costs have been incurred for the promotion or distribution of the material. Conversely, unpaid material is organic material for which no costs were involved in its promotion or distribution. Certain campaigners (registered political parties, candidates, future candidates, recognised third-party campaigners, referendum campaigners, holders of elected office and recall petition campaigners) will also be required to include an imprint on their organic (unpaid) material if it constitutes digital election, referendum or recall petition material.
35. Clause 35 which sets out a definition of “electronic material”, “promoter” and “publisher” which engage the obligation to endorse the electronic material also provides that these definitions may be modified by the Secretary of State alone via subordinate Legislation. There is no duty to gain the consent of the Welsh Ministers, despite the implications for devolved elections.
36. Clause 40 provides a definition of a relevant election for the purpose of the unpaid material which includes an election to Senedd Cymru, local government elections in Wales and mayoral elections.
37. Clause 49 places the Electoral Commission under a duty to issue guidance on the operation and enforcement of the digital imprint regime. The guidance is approved by UK Government Ministers only. This is despite its implications for devolved elections.
38. 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.

General (clauses 57 and 58)

39. Clause 57 provides only for a UK Minister to amend any provision of the Bill by statutory instrument, or any provision amended by this Bill in other Acts, as a consequence of the amendment or revocation of any secondary legislation referenced in the Bill, which could extend to a Measure or Act of the Senedd.

40. Clause 58 provides that Parliament will pay for any costs that a UK Government Minister incurs as result of the Bill and for any increased costs under existing Act of Parliament if they arise as a result of this 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 this Bill and are incurred under an existing Act of Parliament.
41. 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 Elections Bill

42. The Welsh Government does not support the introduction of voter ID, the placing of unnecessary constraints on postal and proxy voting, or the extension of the overseas franchise. We are content that the Bill does not apply these to Wales, but we are concerned about potential unintended consequences such as voter and candidate confusion and complexity for administrators.
43. 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.
44. Other proposals in the Bill may have merit and the case for implementing them for devolved elections, if they align with Welsh Government policies, may be strengthened if doing so would maximise clarity for voters, candidates and administrators. However, rather than making provision via this Bill, we would prefer to consult our stakeholders and bring forward legislation to the Senedd in due course.
45. Although inclusion of the issues raised in the Bill within our own legislation would mean working to different timescales, the impact of this is likely to be small. The Bill's provisions will not be in force in time to apply for Welsh Local Government elections in May 2022, and there is time to bring forward our own legislation ahead of the next Senedd election in 2026. This is not, therefore, one of those occasions where it would be helpful to take advantage of a UK Bill to make urgent provision.
46. As there is no timing advantage in making devolved provision within this Bill, we are able to prioritise other principles within our general approach to legislating. We are 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.

47. I have, however, agreed with the UK Government that I will consider further the proposals in the Bill which may have merit. In particular, I will want to assure myself and the Senedd that there are no significant and immediate disbenefits to voters and stakeholders in Wales arising from pursuing these proposals in future Welsh legislation rather than in this Bill.

Financial implications

48. We are concerned that changes outlined in the Bill will have an impact on devolved elections, including additional burdens placed on local authorities in Wales. This in particular relates to the administration of the electoral identity document, where the Bill also introduces a local voter card which will be a form of identification that can be obtained from a local authority and used for identification purposes at a polling station. We expect the UK Government to meet this cost in full in accordance with the Statement of Funding Policy.

49. The expenditure of the Electoral Commission in respect of devolved Welsh elections is, so far as it cannot be met out of income received by the Commission, paid out of the Welsh Consolidated Fund, pursuant to section 28 of the Senedd and Elections (Wales) Act 2020. The Bill places further obligation on the Electoral Commission in respect of devolved elections which has not as yet, formed part of our budgetary requirements. Future budgetary obligations should arise as a direct result of legislation pursued by the Senedd in respect of devolved elections.

50. We consider that the duty to consult the Welsh Ministers on the proposed Strategy and Policy Statement as far as the draft relates to the Commission's devolved Welsh functions is insufficient.

51. For example, the Strategy and Policy Statement, issued without Senedd involvement, could result in additional costs to the Electoral Commission which, in devolved areas, would need to be met out of the Welsh Consolidated Fund, subject to agreement by the Senedd.

Conclusion

52. It is my view that it is not appropriate to deal with the provisions described above in this UK Bill. Although I do see the benefits of addressing for devolved elections some of the issues covered by this Bill, subject to the further consideration I referred to above, my preference is to do this via Senedd legislation in due course. I cannot, therefore, currently recommend consent to the Bill. We are working with the UK Government with a view to seeking amendments to the Bill to reflect our policy position.

Mick Antoniw MS
Counsel General and Minister for the Constitution
9 September 2021