

The Welsh Government's Legislative Consent Memorandum on the Elections Bill

December 2021



1. Background

The UK Government's Elections Bill

1. The Elections Bill¹ (the Bill) was introduced into the House of Commons and had its first reading on 5 July 2021. It is sponsored by the Department for Levelling Up, Housing & Communities.

2. The explanatory notes to the Bill state:

*"The Bill makes new provision for and amends existing electoral law to ensure that UK elections remain secure, fair, modern, inclusive and transparent."*²

3. At the time this report was agreed, the date for the Report stage in the House of Commons was yet to be confirmed.

4. The majority of the Bill's provisions would not apply to devolved elections, but would apply to reserved elections held in Wales.

The Welsh Government's Legislative Consent Memorandum

5. Standing Orders 29.1 and 29.2 provide that a Legislative Consent Memorandum is required when a relevant UK Bill modifies or falls within the Senedd's legislative competence.

6. In particular, Standing Order 29.1 provides that the Welsh Ministers must lay a Legislative Consent Memorandum where a Bill in the UK Parliament makes provision in relation to Wales:

- for any purpose within the legislative competence of the Senedd (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Senedd); or
- which modifies the legislative competence of the Senedd.

7. When considering whether a particular clause requires consent, we have applied the "purpose test" set out in the first bullet point (Standing Order 29.1(i)) i.e. does the provision have a devolved purpose.

¹ Elections Bill, as introduced [Bill 138 2021-22]

² Elections Bill, Explanatory Notes, July 2021, paragraph 1

8. On 9 September 2021, Mick Antoniw MS, Counsel General and Minister for the Constitution (the Counsel General), laid before the Senedd a Legislative Consent Memorandum³ (the Memorandum) in respect of the Bill.

9. The Business Committee agreed that the Legislation, Justice and Constitution Committee, and the Local Government and Housing Committee, should report on the Memorandum by 4 November 2021.⁴ The date was subsequently extended to 16 December 2021.⁵

Provision for which the Senedd's consent is required

10. Paragraphs 6 to 41 of the Memorandum highlight the clauses that the Welsh Government considers require consent. However, there is disagreement between the Welsh Government and UK Government⁶ about the provisions which require consent.

11. There is agreement that consent is required for the following clauses⁷:

- Clause 7 and Schedule 4 (concerning undue influence);
- Clause 12 (concerning the Electoral Commission);⁸
- Clauses 16, 17 and 18 (concerning notional expenditure for candidates and others);⁹
- Clauses 22 to 25 (concerning political finance).¹⁰

12. However, disagreement on consent relates to the following clauses, which the Welsh Government considers do require consent in contrast to the view of the UK Government.

³ Welsh Government, [Legislative Consent Memorandum, Elections Bill](#), September 2021

⁴ Business Committee, [Timetable for consideration of the Legislative Consent Memorandum on the Elections Bill](#), September 2021

⁵ Business Committee, [Revised Timetable for consideration of the Legislative Consent Memorandum on the Elections Bill](#), November 2021

⁶ Elections Bill, Explanatory Notes, July 2021, Annex 1

⁷ Some of the clause numbers have changed following amendment of the Bill at Committee Stage ([Bill 178 2021-22, as amended in Committee](#)).

⁸ Currently clause 13, following an amendment to the Bill at Committee Stage

⁹ Currently clauses 17-19, following an amendment to the Bill at Committee Stage

¹⁰ Currently clauses 23 -26, following an amendment to the Bill at Committee Stage

- Clause 13 (concerning the Electoral Commission)¹¹
- Clauses 26 to 30 and 32 to 34 (concerning intimidation)¹²
- Clauses 35 to 56 (concerning digital imprints)¹³
- Clauses 57 and 58 (concerning general matters).¹⁴

13. After initially disagreeing with the UK Government, following an amendment to the Bill, the Welsh Government is now in agreement that Clause 11 and Schedule 7 (European Citizens Voting and Candidacy Eligibility) does not require the consent of the Senedd (see paragraphs 20 and 21 of this report).

The Welsh Government's position

14. Paragraphs 43 to 47 of the Memorandum discuss the reasons why the Welsh Government does not think that it is appropriate for the Bill to make certain devolved provision.

15. Paragraph 43 of the Memorandum 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".

16. Paragraph 44 of the Memorandum notes that some proposals in the Bill "may have merit" for devolved elections but states:

"...rather than making provision via this Bill, we would prefer to consult our stakeholders and bring forward legislation to the Senedd in due course."

17. In addition, the Memorandum includes the Counsel General's view that it was not "one of those occasions where it would be helpful to take advantage of a UK Bill to make urgent provision."¹⁵ The Memorandum also states:

¹¹ Currently clause 14, following an amendment to the Bill at Committee Stage

¹² Currently clauses 27-31 and 33-35, following an amendment to the Bill at Committee Stage

¹³ Currently clauses 36-57, following an amendment to the Bill at Committee Stage

¹⁴ Currently clauses 58-59, following an amendment to the Bill at Committee Stage

¹⁵ Welsh Government, Memorandum, paragraph 45

"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.

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."¹⁶

18. Paragraph 52 of the Memorandum states:

"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."

2. Committee consideration

19. We considered the Memorandum at our meeting on 18 October 2021,¹⁷ together with a written briefing from the Electoral Commission¹⁸ and correspondence from the Counsel General.¹⁹ We also considered correspondence from the Llywydd's Committee sent to Kemi Badenoch MP, Minister of State for Levelling Up & Equalities, regarding provisions in the Bill relating to the accountability of the Electoral Commission.²⁰

¹⁶ Welsh Government, Memorandum, paragraphs 46-47

¹⁷ [Legislation, Justice and Constitution Committee, 18 October 2021](#)

¹⁸ The Electoral Commission, [Briefing: UK Government Elections Bill – impact on elections in Wales](#), September 2021

¹⁹ [Letter from the Counsel General](#), 12 October 2021

²⁰ [Letter from the Chair of the Llywydd's Committee to Kemi Badenoch MP, Minister of State for Levelling Up & Equalities](#), 18 October 2021

20. We agreed our report on 15 November 2021.

Our view²¹

Provisions for which consent is sought

21. We agree with the Welsh Government's assessment of the clauses in the Bill that require consent (see paragraphs 11 and 12). However, in reaching this view we note, as the Counsel General's letter of 12 October 2021 explains, that the Welsh Government's position regarding clause 11 and Schedule 7 has changed following an amendment to the Bill, such that it no longer considers that consent is required. The Counsel General's letter explains that these provisions have been amended in the UK Parliament to correct the unintended consequences for devolved elections and to limit their application to reserved elections, as was the original intention.

22. We also note the Counsel General's view that a Supplementary Legislative Consent Memorandum was not needed to cover the relevant amendments because they made provision consequential to matters outside the legislative competence of the Senedd, and as a result do not require Senedd consent by virtue of the exception in Standing Order 29.1(i).

Indirect impact of the Bill on devolved elections

23. We note that the Welsh Government does not support the Bill's proposals to introduce voter ID (clause 1), place constraints on postal and proxy voting (clauses 2, 3 and 5) or extend the overseas franchise (clause 10)²², despite acknowledging that the Bill does not apply them to devolved elections in Wales, because of concerns "about potential unintended consequences such as voter and candidate confusion and complexity for administrators."²³ We also note the Welsh Government's view that additional financial burdens could be placed on local authorities in Wales, particularly around the administration of the electoral identity document.²⁴

24. The Senedd general election in 2021 was a combined poll with the Police and Crime Commissioner (PCC) elections (responsibility for these elections is reserved to the UK Parliament). If there is a future combined poll, an indirect impact of the Bill may be a

²¹ References to clauses in the Our view section are references to clauses in the Bill as introduced and in the Memorandum. Details of changes to clause numbers following amendment of the Bill at Committee Stage are provided in the footnotes to paragraphs 11-12 of this report.

²² Currently clause 11, following an amendment to the Bill at Committee Stage

²³ Welsh Government, Memorandum, paragraph 42

²⁴ Welsh Government, Memorandum, paragraph 48

requirement to show photographic vote ID as a condition of voting in the PCC elections, but not in the Senedd elections.

25. We note that the Electoral Reform Society Cymru, in speaking about the Bill, has expressed concerns about poll clerks becoming “bouncers at the ballot box” and being required to turn away “potentially thousands of would-be voters each election.”²⁵

26. We also note the warning of the Electoral Commission that there is potential for voter confusion, “particularly if UK and Welsh elections (including by-elections) are held in close proximity, or indeed on the same day”.²⁶

27. When the polls are not combined, it may mean that the voting requirements will vary year-to-year depending upon whether the poll was a reserved or devolved election.

28. Other provisions in the Bill, if passed, may also have an indirect impact on devolved elections. For example, currently, electors in Wales may remain registered for postal votes indefinitely, but must refresh their signature every five years. If the Bill is passed, it means that two absent voting regimes will run simultaneously requiring a person to re-register for a postal vote every three years for reserved elections (as proposed in the Bill) and also refresh their signature for devolved elections every five years. The staggered renewal intervals necessarily mean that in time, a person may be required to renew their reserved postal vote and update their signature for devolved elections in close succession, such as in consecutive years.

29. The proposed ban on handling postal votes may also indirectly impact devolved elections. For example, if there is a future combined poll, it may mean that campaigners could handle Senedd ballots, but not reserved ballots. This may be a factor if ballot papers for future combined polls are included in a single voting pack, as they were for the 2021 Senedd and PCC elections.

Conclusion 1. We agree with the Welsh Government, the Electoral Reform Society Cymru and the Electoral Commission that clauses 1, 2, 3, 5 and 10 of the Bill may have a significant indirect impact on devolved elections, such as voter and candidate confusion and complexity for electoral administrators. We are therefore concerned at the impact the Bill may have on the engagement of citizens in Wales with the democratic process.

²⁵ Nation Cymru, [Welsh Government refuses consent for Elections Bill which would ban those without ID from voting](#), 10 September 2021

²⁶ The Electoral Commission, Briefing: UK Government Elections Bill – impact on elections in Wales, September 2021

Recommendation 1. Following the completion of the Bill's passage through the UK Parliament, the Counsel General should issue a statement on the implications of the legislation for devolved elections in Wales.

Clauses 12 and 13 regarding the Electoral Commission

30. The Electoral Commission is independent of the UK Government and reports to the UK Parliament through the Speaker's Committee on the Electoral Commission. Since the *Senedd and Elections (Wales) Act 2020* (the 2020 Act), the Electoral Commission is now accountable to the Senedd via the Llywydd's Committee in relation to devolved Welsh elections and referendums. The 2020 Act also provides for the Electoral Commission to be funded directly from the Welsh Consolidated Fund. The Electoral Commission reports to the Llywydd's Committee on its yearly estimates and five-year plan where these relate to the Commission's devolved Welsh functions.

31. Clause 12 amends Part 1 of the *Political Parties, Elections and Referendums Act 2000* (the 2000 Act) by inserting new sections which make provision for the Secretary of State to publish a 'Strategy and Policy Statement' which will provide guidance to which the Electoral Commission must have regard when carrying out their functions. If a Statement is published under clause 12 of the Bill, the Electoral Commission must prepare a report for the Speaker's Committee to demonstrate what it has done in response.

32. There is also a requirement in clause 12 that the Welsh Ministers be consulted on the draft statement, so far as the draft relates to the Commission's devolved Welsh functions. After consultation with the Welsh Ministers, the Secretary of State must make such changes to a Statement as they consider necessary.

33. 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*) which relate to:

- Senedd general elections;
- by-elections for Senedd constituency vacancies;
- local government elections in Wales; and
- 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).

34. Clause 13 inserts a new section 13ZA into the 2000 Act expanding the role of the Speaker's Committee to include a power to examine the performance by the Electoral Commission of their duty to have regard to the strategy and policy statement.

35. We have noted above our agreement with the Welsh Government that consent is required for clause 13, although this view is not shared by the UK Government.

36. We also note the views of the Electoral Commission that:

"Strong accountability to, and effective scrutiny by the UK's parliaments are essential for the Electoral Commission to secure confidence in its work across the political spectrum. The role of the Senedd, as well as UK and Scottish Parliaments, is important in achieving this. The Commission must also be able to decide on its priorities and work independent of government influence or controls. It is vital that there should be no actual or perceived involvement from government in our operational functions or decision-making.

The proposed Strategy and Policy Statement would give current and future UK Government Ministers a new and broad scope to align the Commission's activities with the UK Government's strategic objectives, and to shape the exercise of the Commission's functions in relation to future elections and referendums. The proposals, as currently worded, go beyond accountability and scrutiny of the Commission and its decision making by enabling the UK Government to issue statutory guidance for the Commission, therefore, directing and guiding how those decisions are made."²⁷

37. In a similar vein, the Welsh Government raises concerns about the provisions on the accountability of the Electoral Commission. In particular:

- they do not consider that they are compatible with the Commission's accountability to the Llywydd's Committee in the Senedd established under the 2020 Act;²⁸
- 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. By way of an example, the Welsh Government considers that the issuance of a Statement without Senedd involvement "could result in additional costs

²⁷ The Electoral Commission, Briefing: UK Government Elections Bill – impact on elections in Wales, September 2021

²⁸ Welsh Government, Memorandum, paragraph 43

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".²⁹

38. As drafted, the Bill does not provide for any consultation requirements or input by the Llywydd's Committee on a proposed Statement. The Electoral Commission has said it is important for its "accountability and independence to have parity for consultation with all three legislatures".³⁰

39. We note that the Llywydd's Committee has stated in correspondence with the UK Government that:

*"Notwithstanding this decision on consent, the view of the Llywydd's Committee is that the Elections Bill should be amended to require that the Llywydd's Committee to be consulted if the UK Government intends to issue Strategy and Policy Statements which relate to the exercise of the Electoral Commission's devolved Welsh functions. This would provide for parity with the UK Government's required consultation and engagement with the Speaker's Committee."*³¹

40. Until a Statement is published, it is unclear to us the extent to which a Statement may seek to direct the Electoral Commission's work in devolved areas or in ways which may be incompatible with its five-year plan submitted to, and scrutinised by, the Llywydd's Committee.

41. Apart from the content of a Statement, its impact in practice is also likely to depend on the way in which the Electoral Commission chooses to 'have regard' to the statement in the exercise of its functions. We note that the Commission has said that while it appears it will be able to depart from a Statement "if it reasonably considers that other considerations justify doing so", amendments in the drafting of the Bill are required to make this "practical, realistic and be upheld in the Courts".³²

42. The Electoral Commission's website contains a section providing its views on each of the Bill's main proposals. Acknowledging that the Commission reports to and is part-funded by the Senedd, it states:

²⁹ Welsh Government, Memorandum, paragraphs 50-51

³⁰ The Electoral Commission, Briefing: UK Government Elections Bill – impact on elections in Wales, September 2021

³¹ Letter from the Chair of the Llywydd's Committee to Kemi Badenoch MP, Minister of State for Levelling Up & Equalities, 18 October 2021

³² The Electoral Commission, Briefing: UK Government Elections Bill – impact on elections in Wales, September 2021

"We therefore expect that the [Strategy and Policy] statement, and the related processes, will reflect and not undermine this important shared accountability".³³

Conclusion 2. We are extremely concerned with the provisions set out in clauses 12 and 13 as they impact on devolved areas and recent accountability arrangements set out in legislation made by the Senedd in 2020. The failure of the Bill to acknowledge, let alone take account of the *Senedd and Elections (Wales) Act 2020*, is regrettable.

Conclusion 3. Of equal concern is the apparent lack of engagement between the UK Government and the Welsh Government on a significant area of public policy, and one of fundamental importance to the rights of citizens and their engagement in the democratic process to decide who governs them.

Overall

43. We note the Welsh Government's view that consent should not be provided to the Bill and the reasons for this view as set out in the Memorandum.

44. We welcome the view expressed in the Memorandum that the Welsh Government would prefer to consult stakeholders in Wales and bring forward its own electoral legislation for scrutiny in the Senedd in due course. We were therefore pleased to hear the Counsel General re-iterate this view in an evidence session with the Committee on 20 September 2021, when he highlighted how "local government and Senedd elections are within our ... devolved responsibilities", and how electoral law is "ripe for consolidation" and "ripe for reform", noting also that Senedd legislation would be bilingual.³⁴

45. We also note the suggested intention that new legislation could be brought forward in time for the next Senedd election in 2026.³⁵

46. We do note, however, that the Memorandum refers to the Counsel General wanting to assure himself "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" (see paragraph 16 above).

³³ The Electoral Commission, [A strategy and policy statement for the Electoral Commission](#), 5 July 2021

³⁴ Legislation, Justice and Constitution Committee, [RoP](#) [65], 20 September 2021

³⁵ Welsh Government, Memorandum, paragraph 45

Recommendation 2. The Counsel General should confirm at the earliest opportunity his intention to bring forward a Welsh Bill on electoral law in time for the next Senedd general election in 2026.

47. We also note the Counsel General is working with the UK Government with a view to seeking amendments to the Bill to reflect the Welsh Government's policy position (see paragraph 17 above).

Recommendation 3. The Counsel General should at the earliest opportunity:

- confirm the outcome of his discussions with the UK Government about amending the Bill including in relation to clauses 12 and 13 relating to the Electoral Commission;
- explain the nature of the amendments being sought, including the extent to which they relate to a devolved purpose;
- advise when, if appropriate, he intends to bring forward a Supplementary Legislative Consent Memorandum related to the tabling of amendments in accordance with Standing Orders 29.2.

48. Finally, we wish to highlight one aspect of the Memorandum where we believe more information would have been helpful. As a Committee, we are interested in inter-governmental relations, particularly in the context of discussions on Bills where Senedd consent may be required. As we allude to in the discussion on clauses 12 and 13, it is not clear to us how the position set out in the Memorandum has been arrived at and, when and to what extent, the UK Government engaged with the Welsh Government. We would have found such information useful, not only in terms of understanding how the Bill has been developed but also in the context of our wider interest in, and scrutiny of, inter-governmental relations.

Recommendation 4. The Welsh Government should include a commentary on the extent of co-operation and engagement with the UK Government in all Legislative Consent Memoranda that are required by virtue of Standing Order 29.