

Explanatory Memorandum to the Senedd Cymru (Representation of the People) (Amendment) Order 2020

This Explanatory Memorandum has been prepared by the Office of the First Minister and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister/Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Senedd Cymru (Representation of the People) (Amendment) Order 2020

Mark Drakeford MS
First Minister of Wales
8 December 2020

PART 1

Description

1. Ahead of each Senedd election the National Assembly for Wales (Representation of the People) Order 2007,¹ which sets out the manner in which the election and election campaign is conducted and includes provision for legal challenge, is reviewed and amended to take account of any policy or legislative changes since the last election.
2. The draft Senedd Cymru (Representation of the People) (Amendment) Order 2020 outlines amendments to the 2007 Order in readiness for the 2021 Senedd general election.

Matters of special interest to the Legislation, Justice and Constitution Committee

3. The National Assembly for Wales (Representation of the People) Order 2007 has previously been amended by the National Assembly for Wales (Representation of the People) (Amendment) Order 2010, the National Assembly for Wales (Representation of the People) (Fresh Signatures for Absent Voters) Order 2013 and most recently twice in 2016 by the National Assembly for Wales (Representation of the People) (Amendment) Order 2016 and the National Assembly for Wales (Representation of the People) (Amendment) (No 2) Order 2016. As such this will be the fifth set of amendments to the 2007 Order.
4. The Welsh Government is committed to making the law in Wales accessible, transparent and easy to navigate. We recognise that electoral law is in need of updating and consolidation. The 2007 Order is also not currently bilingual (although some of the forms in the Schedules to it are). We plan to review the 2007 Order further after the elections with a view to consolidating it in time for the 2026 elections.
5. The draft Statutory Instrument (SI) was originally laid before Senedd Cymru on 24 November 2020 in advance of a plenary debate scheduled for 15 December 2020.
6. On 2 December 2020 the Legislation, Justice and Constitution Committee produced a draft report highlighting three technical scrutiny points under Standing Order 21.2(vi), one technical scrutiny point under Standing Order 21.2(vii) and two merits scrutiny point under Standing Order 21.3(ii).
7. Whilst most of the points raised were technical in nature, the third point raised under Standing Order 21.2(vi) was substantive enough that the SI would be defective were it made in the form it had been laid and meant it was not possible to rectify via the publishing process.

¹ The National Assembly for Wales (Representation of the People) Order 2007
<http://www.legislation.gov.uk/ukxi/2007/236/contents/made>

8. The Welsh Government, accepting and grateful for the points raised by the Legislation, Justice and Constitution Committee draft report, wish to ensure that legislation is clear and certain in its effect and so have withdrawn the original draft instrument and replaced it with this corrected version.

Legislative background

9. The proposed amendments to the 2007 Order will be made under section 13 of the Government of Wales Act 2006 (GoWA 2006).²
10. Previous Orders and amendments have been made by the Secretary of State for Wales. Following the enactment of the Wales Act 2017 the power to make provision for the conduct of Senedd elections has largely transferred to the Welsh Ministers.
11. The Conduct Order was originally made under section 11 of the Government of Wales Act 1998 (the predecessor to section 13 of GoWA 2006) but as a result of paragraph 8 to Schedule 11 to GoWA 2006 is treated as if having been made under section 13 of that Act.

Section 13

12. Section 13 now currently provides that “*the Welsh Ministers may by order make provision that would be within the legislative competence of the Senedd, if included in an Act of the Senedd, as to:*
 - (a) *the conduct of elections of Members of the Senedd,*
 - (b) *the questioning of an election of Members of the Senedd and the consequences of irregularities, and*
 - (c) *the return of a Member of the Senedd otherwise than at an election.*
13. The Senedd Cymru (Representation of the People) (Amendment) Order 2020 will be made under the draft affirmative procedure.

Purpose and intended effect of the legislation

14. The National Assembly for Wales (Representation of the People) Order 2007 sets out the detailed rules for the conduct of elections to Senedd Cymru. It sets out the way in which the election and the election campaign are conducted, and includes provisions for legal challenge to an election. It also includes provisions concerning the collection and retention of personal identifiers for postal and proxy voters and requirements in connection with the application for and dealing with absent votes.
15. The 2007 Order is reviewed and has generally been amended before each Senedd general election. Amendments to the Order are typically made to

² Section 13 of the Government of Wales Act 2006
<https://www.legislation.gov.uk/ukpga/2006/32/section/13/2018-04-01>

reflect any relevant policy or legislative changes which have taken place since the previous election. They also make any relevant technical and/or minor updates such as amendments to certain limits to candidates' expenditure.

16. Many of the amendments to the 2007 Order outlined in the Senedd Cymru (Representation of the People) (Amendment) Order 2020 are technical in nature and are required to reflect policy decisions and legislative changes which have already been subject to substantive consideration. In particular most arise as a result of changes to the franchise and disqualification arrangements made by the Senedd and Elections (Wales) Act 2020,³ specifically the extension to voters aged 16 and 17 and to qualifying foreign citizens, and some consequential amendments arising from the disqualification and naming provisions.
17. Other amendments are more significant and reflect changes made elsewhere in the United Kingdom to allow candidates the option of not publishing their home address at an election, along with the issue of payment to returning officers fees for services rendered, as well as other general updates reflecting changes since the last amending Order was made.
18. The purpose and intended effect of the Senedd Cymru (Representation of the People) (Amendment) Order 2020 is, therefore, to amend the National Assembly for Wales (Representation of the People) Order 2007 to reflect the relevant policy or legislative changes which have taken place since the 2016 Senedd general election in preparation for the 2021 Senedd general election.

Consultation

19. On 15 June 2020, the Welsh Government issued a 12 week consultation on the draft Senedd Cymru (Representation of the People) (Amendment) Order 2020. The consultation sought views on whether there were any additional aspects of the 2007 Order which required updating or amending as well as comments on the proposed amendments themselves. The purpose of the consultation was to ensure the relevant issues had been identified and the resulting amendments were clear and workable.
20. View of stakeholders were sought on the provisions in the draft Order relating to the following matters:
 - Senedd change of name (to reflect Part 2 of the Senedd and Elections (Wales) Act 2020)
 - Extension of Senedd franchise to 16 and 17 year olds and associated provisions (to reflect Part 3 of the Senedd and Elections (Wales) Act 2020)

³ Senedd and Elections (Wales) Act 2020 <http://www.legislation.gov.uk/anaw/2020/1/contents/enacted>

- Extension of Senedd franchise to qualifying foreign citizens (to reflect Part 3 of the Senedd and Elections (Wales) Act 2020).
- Disqualification (to reflect Part 4 of the Senedd and Elections (Wales) Act 2020)
- Publication of Candidates' addresses
- Payments by and to Returning Officers
- Provision for codes made by the Welsh Ministers to apply to Senedd elections, rather than UK codes made by the Secretary of State

The legislative changes relating to the Senedd change of name, franchise and disqualification arrangements took effect in the Senedd and Elections (Wales) Act 2020. The Senedd Cymru (Representation of the People) (Amendment) Order 2020 is embedding these required amendments as a result of the 2020 Act into the National Assembly for Wales (Representation of the People) Order 2007. The consultation sought views on the need to change the provisions in the 2007 Order, as brought about by the 2020 Act. The consultation did not include consulting on the merits of policies which had already been subject to consultation and debate.

21. The consultation document also highlighted issues that were being considered:
 - Provision to ensure that the rules in the Order for absent voters' records and the rules for the protection of information about 14 and 15 year old attainers in the Senedd and Elections (Wales) Act 2020 operate effectively together.
 - Provision for political parties to use the term "Welsh" or "Cymru" on registration and ballot papers to ensure that the distinction can be made between devolved branches of UK-wide political parties and avoid confusion for voters.
22. The consultation document also set out proposals to lay a separate combined Order for the Local Government and Senedd elections in respect of exempting disability and translation expenses to ensure that there is a consistent approach across devolved Welsh elections. The Representation of the People (Election Expenses Exclusion) (Wales) (Amendment) Order 2020 was duly laid on 19 October 2020.
23. The consultation closed on 8 September 2020. As well as being publicly available on the Welsh Government website, a targeted number of stakeholders with a direct interest in the proposals were contacted directly via email on the day the consultation was published to raise awareness of the consultation and allow for the maximum amount of time to respond.
24. The Electoral Commission have been consulted throughout the process of producing the draft 2020 Order. This is in line with Section 7 of the Political Parties, Elections and Referendums Act 2000 which requires consultation

with the Electoral Commission before an Order under section 13 of the Government of Wales Act 2006 can be made.

25. The Information Commissioner's Office was also consulted in line with Article 36 (4) of the General Data Protection Regulation which imposes a requirement to consult with the Information Commissioner's Office (ICO) when developing policy proposals relating to the processing of personal data.

26. A total of 14 substantive responses were received to the consultation.

27. The following changes were made to the Order post consultation:

Presentation of Political Parties on Nomination and Ballot Papers

28. Provision has been added for political parties to use the term "Welsh" or "Cymru" on nomination and ballot papers to ensure that the distinction can be made between devolved branches of UK-wide political parties and avoid confusion for voters. The option is discretionary and it is up to the candidate whether the prefix / suffix is adopted. Where the party name is neither Welsh or English, the name can be preceded by "Welsh" or followed by "Cymru"

Payments to Returning Officers

29. Provision has been made to remove the personal fees previously paid to Returning Officers for services rendered and instead allow an amount to be paid via Returning Officers for services rendered for electoral administration by electoral administration teams.

30. The payment is intended to recognise the independent status of all electoral administrators and the additional burden placed on teams during the Senedd elections and preceding months and responsibilities undertaken by them which exceed their contracted principal council functions.

31. The payment will be paid directly to the Returning Officer to be distributed amongst the electoral administrators at their discretion, having regard to guidance which will be provided by the Welsh Ministers.

Data Protection

32. Provision has been added to require Electoral Registration Officers to include, when considering absent voters records, provisions in section 24 of the Senedd and Elections (Wales) Act 2020 and articles 8(9) and 12(13) in the National Assembly for Wales (Representation of the People) Order 2007.

33. An analysis of the consultation responses is available as part of the Welsh Government's response to the consultation, published on the Welsh Government website:

<https://gov.wales/sites/default/files/consultations/2020-11/draft-senedd-cymru-representation-of-the-people-responses.pdf>

6. Regulatory Impact Assessment (RIA)

34. The draft Senedd Cymru (Representation of the People) (Amendment) Order 2020 makes amendments to the National Assembly for Wales (Representation of the People) Order 2007.
35. These amendments are mainly based on policies which have already been subject to substantive consultation and debate. Where policies were considered in the Regulatory Impact Assessments for the Senedd and Elections (Wales) Act 2020 and the Local Government and Elections (Wales) Bill, in the absence of any additional or alternative evidence, we did not consider it to be necessary to carry out those assessments again.
36. The Explanatory Memorandum including the Regulatory Impact Assessment for the Senedd and Elections (Wales) Act 2020 can be found at the following link:

<https://senedd.wales/laid%20documents/pri-ld12142-em-r/pri-ld12142-em-r-e.pdf>
37. The Explanatory Memorandum including the Regulatory Impact Assessment for the Local Government and Elections (Wales) Bill can be found at the following link:

<https://senedd.wales/laid%20documents/pri-ld12877-em/pri-ld12877-em-e.pdf>
38. The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to the post consultation amendments to the Order. As a result, it was not considered necessary to carry out a regulatory impact assessment as to the likely costs and benefits of complying with these amendments.
39. The amendment relating to the payments to Returning Officers and Data Protection are policies which were considered in the Regulatory Impact Assessments for the Local Government and Elections (Wales) Bill and the Senedd and Elections (Wales) Act 2020 respectively.
40. The amendment relating to the presentation of political parties on nomination and ballot papers falls within the exemption contained within the Code where routine technical amendments or factual amendments are required to update regulations.