

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO.2)

ELECTIONS BILL

1. This supplementary 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>
3. On 16 September 2021 the UK Government tabled amendments which were agreed at House of Commons Committee Stage which corrected the unintended consequences for devolved Welsh elections (set out in paragraph 31). On 11 January 2022 the UK Government tabled further amendments which were agreed at House of Commons Report Stage and some of these amendments make provision falling within the legislative competence of the Senedd. On 28 February 2022 the UK Government tabled amendments ahead of House of Lords Committee Stage and again some of these amendments make provision falling within the legislative competence of the Senedd. The laying of this memorandum has been delayed due to negotiations and discussions with the UK Government in respect of a number of the Bill’s provisions.
4. Consideration of the Bill by the House of Lords commenced on 18 January 2022. The version of the Bill, agreed by the House of Commons and as it entered the House of Lords for consideration, can be found at: [Elections Bill \(parliament.uk\)](https://www.parliament.uk/bills/2021-22/elections-bill).

Policy Objective(s)

5. The UK Government’s stated policy objectives are to make new provision for and to amend existing electoral law.
6. The UK Government’s stated policy objectives of the Bill are set out in the Policy Statement which can be found at: [Elections Bill 2021: Summary factsheet - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/policy-statements/elections-bill-2021)

Summary of the Bill

7. The Bill is sponsored by the Cabinet Office.
8. The Bill contains the following provisions:

- 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;
- Introduction of an online service for applying for an absent vote;
- 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 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; and
- A requirement for digital campaigning material to display a digital imprint.

Update on position since the publication of the first Legislative Consent Memorandum (LCM)

9. We laid an LCM on 9 September 2021, based on the Bill as introduced into Parliament (House of Commons) on 5 July 2021. The LCM set out details of our significant concerns with the Bill as introduced, and confirmed we would not be in a position to recommend the Senedd gives its consent to the Bill as introduced unless the Bill was substantially amended to address those concerns.
10. The UK Government has tabled a number of amendments since the Bill's introduction, in both the House of Commons and the House of Lords. These amendments substantially alter the original Bill as introduced and which the original LCM was based on. Therefore, both the LCM and this supplementary memorandum must be considered together when deciding on consent for these provisions.
11. The UK Government tabled a number of amendments on 11 January 2022 in advance of Report Stage in the House of Commons which now form part of the Bill. These amendments can be found here: [elections_rm_rep_0111.fm \(parliament.uk\)](https://www.parliament.uk/elections_rm_rep_0111_fm). The specific amendments tabled on 11 January to which this supplementary memorandum refers, are those relating to the digital imprint provisions as outlined in paragraphs 34-43 below.

12. Although the usual two week window for laying has passed since the 11 January amendments were tabled, this supplementary memorandum is being laid at this time in order that it may reflect the outcome of our negotiations and discussions with the UK Government in respect of a number of the Bill's provisions including those amendments tabled on 11 January and agreed to the Bill on 17 January.
13. As a result of positive engagement with the UK Government, we have been successful in securing amendments which carve out devolved elections from a number of the Bill's provisions. As a result, our previous concerns, set out in the original LCM, regarding undue influence, the Electoral Commission, notional expenditure and other political finance measures have been adequately addressed by the UK Government amendments tabled on 28 February 2022 for consideration at House of Lords Committee stage. An outline of the relevant amendments can be found in paragraphs 17-29.
14. On 28 February, further amendments were tabled by the UK Government to the Digital Imprints provisions in Part 6 of the Bill at House of Lords Committee stage. These amendments also have implications for the previous amendments which were tabled on 11 January. These are covered in paragraphs 44-53.
15. The areas where the Welsh Government and the UK Government continue to have a difference of opinion in terms of competence are considered below in paragraphs 33-57.

Changes to the Bill since the publication of the first Legislative Consent Memorandum on 9 September 2021, which achieve the effect of carving out devolved elections in Wales from the scope of the provisions

16. Following constructive engagement with the UK Government in recent months, the UK Government tabled amendments in advance of House of Lords Committee Stage on 28 February 2022 which carve out devolved elections in Wales from the scope of many of the provisions set out in the original LCM. The amendments are available in full here: [1501 \(parliament.uk\)](https://www.parliament.uk). My position on the relevant carve out amendments is set out below. It is important to acknowledge here the positive engagement between the Welsh Government and the UK Government in achieving these carve outs for Wales and the Welsh Government's successful influence on the Bill in these areas.

Undue Influence - Clause 8 and Schedule 5

17. The amendments tabled to clause 8 insert a new section 114A in the Representation of the People Act 1983 (the 1983 Act) which provides that the new offence of undue influence as inserted by that provision only applies to UK Parliamentary elections and local government elections in England. The existing offence of undue influence in section 115 of the

1983 Act is therefore preserved for Senedd elections and local government elections in Wales.

18. Although we have been successful in securing these amendments, there remains a situation where the new offence in section 114A of the 1983 Act could still be relevant to Senedd elections due to the effect of paragraph 5 of Schedule 1A to the Government of Wales Act 2006 (GOWA). This provision disqualifies a person from being a Senedd Member or a candidate in an election to be a Senedd Member in circumstances where they are incapable of being elected to the House of Commons as a result of being reported personally guilty or convicted of any type of corrupt or illegal practice under the 1983 Act. As the two different offences in section 114A and 115 of the 1983 Act will meet the definition of a 'corrupt practice', paragraph 5 of Schedule 1A to GOWA will automatically capture the widened definition of 'corrupt practice' as it applies to UK parliamentary elections. This means that a person who is prevented from being a Member of the UK Parliament as a result of committing the new offence under section 114A of the 1983 Act will also be prevented from being a Senedd Member.
19. In our view it is appropriate the Bill does not amend Schedule 1A to GOWA. This Schedule was inserted into GOWA by the Senedd and Elections (Wales) Act 2020 (the 2020 Act). Changing the criteria by which individuals are disqualified from being either a Senedd Member or a candidate in an election to being a Senedd Member would represent a significant change to the current regime set out in Schedule 1A to GOWA, which was scrutinised by the Senedd prior to the passage of the 2020 Act. It should be a matter for the Welsh Government, rather than the UK Government to determine whether any amendments are required to the approach taken by the 2020 Act in advance of the next Senedd elections in 2026 and for the Senedd to scrutinise any proposals for legislative change which may be contained in any future Senedd Bill.

Clause 14 - Strategy and Policy Statement

20. The amendments amend the new section 4(3A) which is to be inserted in the Political Parties, Elections and Referendums Act 2000 (PPERA) by carving out Welsh devolved functions from the scope of any Strategy and Policy Statement which is to be published by the Secretary of State under that provision. These tabled amendments address the concerns raised by the Welsh Government on devolved elections.

Clause 15 - Examination of duty to have regard to strategy and policy statement

21. Our previous concerns about clause 15 no longer apply as a result of the approach taken by the UK Government in their amendments. The Speaker Committee's scrutiny power under section 13ZA of PERA will not capture an examination of the Electoral Commission's Welsh

devolved functions due to these being carved out from the content of the Strategy and Policy Statement by clause 14.

Clause 18 - Notional expenditure: use of property etc on behalf of candidates and others

22. The tabled amendment addresses the concerns previously raised by the Welsh Government in respect of clause 18(1). Section 90C of the 1983 Act is amended so that it no longer makes provision in relation to the application of the rules on campaign expenditure for candidates at local government elections in Wales.
23. Paragraph 17 of the original LCM also identified clause 18(5) which amended section 112 of PPERA in respect of notional expenditure as a provision which required Senedd consent. This provision has not been amended. However, as our primary concerns were with clause 18(1) which has now been addressed, we are content to support this provision. The circumstances in which the provision being made by clause 18(5) would have effect are limited to referendums that are either held throughout the UK, or one or more of England, Scotland, Wales and Northern Ireland. In addition, the relevant referendum must be one which is held by or under an Act of Parliament. The provision does not capture a referendum held by or under an Act or Measure of the Senedd or a poll held under section 64 of GOWA.

Clause 19 - Codes of practice on expenses

24. This provision originally modified the functions of the Welsh Ministers in relation to devolved elections by amending the power of the Welsh Ministers to issue a code of practice by the Electoral Commission under paragraph 14A of Schedule 4A to the 1983 Act, as well as the Welsh Ministers power to designate the date on which a code of practice under paragraph 14A comes into force. The amendments address the Welsh Government's concerns by inserting a provision which provides that the amendments to paragraph 14A of Schedule 4A to the 1983 Act do not apply to an order made by the Welsh Ministers.

Clause 20 - Authorised persons not required to pay expenses through election agent

25. Clause 20 amended section 73 of the 1983 Act to clarify that expenses incurred under section 75 in relation to local government elections must have been authorised. The tabled amendment addresses our concerns by carving out expenses incurred in relation to local government elections in Wales from the scope of the provision.

Clause 24 - Restriction on which third parties may incur controlled expenditure

26. The original provisions inserted a new section 89A into PPERA which had the effect of restricting which third parties may incur controlled expenditure. Those provisions also captured expenditure incurred in relation to Senedd elections. The amendments address our concerns by carving out Senedd elections from the scope of the provisions. The amendments achieve this effect by providing that the clause only applies to UK parliamentary general elections or general elections to the Northern Ireland Assembly.

Clause 25 - Third parties capable of giving notification for purposes of Part 6 of PPERA

27. The original provisions conferred a regulation making power on 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. The tabled amendment addresses our concerns by limiting the exercise of the Secretary of State's regulation making power for the purposes of periods involving parliamentary general elections or general elections to the Northern Ireland Assembly.

Clause 26 - Recognised third parties: changes to existing limits etc

28. This provision amended 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. The tabled amendments address our concerns by ensuring that the clause does not have any application to devolved elections. The amendments achieve this effect by providing that the clause only applies in relation to periods involving parliamentary general elections or general elections to the Northern Ireland Assembly.

Clause 27 - Joint campaigning by registered parties and third parties

29. This clause amended 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 tabled amendments address our concerns by ensuring that the clause does not have any application to devolved elections. The amendments achieve this effect by providing that the clause only applies in relation to periods involving parliamentary general elections or general elections to the Northern Ireland Assembly.

Summary

30. The Welsh Government is supportive of the amendments outlined in paragraphs 17-29.

European Citizens voting and Candidacy Eligibility (Clause 13 and Schedule 8)

31. It is also necessary to acknowledge the progress made in relation to European Citizens voting and Candidacy Eligibility provisions, amendments to which were on tabled on 16 September 2021 to correct the unintended consequences for devolved Welsh elections that sought to limit the application of the changes to reserved elections as was the original intention. The position is set out in full in the following letter to the Chairs of the Legislation, Justice and Constitution Committee and the Local Government and Housing Committee: [Eich cyf \(senedd.wales\)](#).

Changes to the Bill since the publication of the first Legislative Consent Memorandum on 9 September 2021, for which consent is required

32. Notwithstanding the positive progress made to carve out Wales from some vital aspects of the Bill, it is evident that there remains a difference of opinion between the Welsh Government and the UK Government on aspects relating to digital imprints and intimidation. Paragraphs 34-53 below set out the relevant changes made to the Digital Imprints provisions in Part 6 of the Bill at House of Commons Report Stage and the amendments tabled at House of Lords Committee Stage which require the consent of the Senedd.

Part 6 of the Bill - Digital Imprints provisions

33. The original LCM was laid for all of the Digital Imprints provisions in the Bill (as contained in clauses 35-56 in the Bill as introduced) on the basis that the provisions were 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. The Welsh Government's position towards these provisions was set out in paragraphs 34-38 in the original LCM. I set out my position regarding amendments laid since the original LCM below.

Amendments made to Part 6 of the Bill during the House of Commons Report Stage

34. The full amendments made during House of Commons Report stage, can be found here: [elections_rm_rep_0111.fm \(parliament.uk\)](#). An overview of the relevant amendments and related provisions is provided below:

Clause 40 (Electronic material to which section 39 applies: paid-for material):

35. Amendments are made to the clause to refer to the new purposes referred to in clause 41, as set out in the following amendment below.

Clause 41 (Purposes referred to in section 40):

36. This provision replaces the purposes previously set out in clause 39(3) of the Bill as the purposes intended to be achieved by paid-for electronic material in order for Part 6 to apply to the material. This new clause makes it clear that this covers material in support of categories of parties, candidates and elected office-holders and applies whether or not the material expressly names the party.

Clause 42 (Electronic material to which section 39 applies: other electronic material)

37. The provision has been amended to clarify that in order for electronic material to meet the condition in sub-paragraph (2)(b) in relation to a referendum, the material must be published during the referendum period for that referendum.

Clause 43 (Purposes referred to in section 42)

38. A number of amendments have been made to this provision to bring it into line with the approach taken in clause 41. The amendments make it clear that electronic material need not expressly mention a particular name and that electronic material may relate to more than one particular election.

Clause 44 (Electronic material relating to more than one candidate or future candidate)

39. Consequential amendments are made to this provision to cross refer to the purposes in clause 39.

Clause 48 (Enforcement by Commission)

40. Amends the scope of the Electoral Commission's Enforcement powers under that provision to make it clear that it captures an offence under section 46(1) which relates to the publication of electronic material which can reasonably be regarded as intended to achieve a purpose within—

- (i) Section 41(2) (registered parties etc.),
- (ii) Section 41(7) (categories of elected office-holders), or
- (iii) Section 41(9) (referendums).

Schedule 11 (Illegal Practices)

41. An amendment is being made to paragraph 3 (Candidates etc. at elections at Senedd Cymru) to refer to the "Purposes" set out in section 41(4).
42. It is the view of the Welsh Government that these amendments taken together in respect of devolved elections are within the legislative competence of the Senedd. The amendments amend provisions which

apply to devolved elections and taken as a whole can be viewed as relating to a non-reserved matter, namely intending to regulate transparency of electoral material published online and to ensure that readers and recipients of that electoral material understand who has published material online. This is a purpose that is within the Senedd's legislative competence.

43. The Welsh Government's view remains that whilst there is no disagreement with the policy intent, these amendments concern electoral transparency which, so far as devolved elections are concerned, falls within devolved competence and requires Senedd consent.

Amendments made to Part 6 of the Bill during House of Lords Report Stage

44. The UK Government also tabled a number of amendments to the digital imprint provisions on 28 February 2022. Those amendments can be found here: [1501 \(parliament.uk\)](https://www.parliament.uk/legislation/amendments/1501). An overview of the relevant amendments and related provisions is provided below:

Clause 40 (Electronic material to which section 39 applies: paid-for material)

45. Clause 40(2) which sets out when the first condition for determining whether electronic material falls within the scope of clause 39 is omitted. The new provision to replace it provides that the condition in clause 40(2) is met only when the "sole or primary purpose" that the electronic material can reasonably be regarded to achieve is a purpose within clause 41.
46. Clause 40(3) is amended to make it clear that the second condition will be met only where the promoter of the relevant material, or the person on behalf of whom the relevant material is published, has paid for the material to be published as an advertisement.
47. A new subsection (5) and (6) is inserted to make it clear that in cases where electronic material is published on a website or mobile application, the reference in clause 40(3) to a person paying for material to be published does not include making payments related to setting up, operating or maintaining the website or mobile application.

Clause 41 (Purposes referred to in section 40)

48. The amendments to clause 41 make it clear that the references in the purposes to influencing the public to give support to or withhold support for such individuals only applies in their capacity as such a candidate/future candidate or elected office-holder etc. Clause 41(11) is also omitted which will mean that references to a referendum in that provision will now capture a poll held under section 64 of GOWA.

Clause 42 (Electronic material to which section 39 applies: other electronic material)

49. This amendment inserts a new third condition which provides that clause 42 does not apply in relation to electronic material where the promoter of the material or the person on behalf of whom the material is published has paid for the material to be published as an advertisement.

Clause 45 (Exceptions to section 39)

50. A number of amendments are made to this provision to clarify that the republication exception in clause 45 can apply where both the original publication and the later republication are carried out by the same person.

Clause 46: (Offence of breaching section 39)

51. The amendment inserts an additional defence into clause 46 in relation to the republication of electronic material. The defence applies where material has previously been published and the person charged with the offence reasonably believed that it complied with clause 39 at the time of publication in circumstances where that material was not materially altered when it was republished.

Clause 48 (Enforcement by the Commission)

52. This amendment provides that the Electoral Commission is able to enforce the offence in clause 46(1) in relation to the publication of electronic material which can reasonably be regarded as intended to achieve a purpose within clause 41(9)(referendums) only in relation to a referendum to which Part 7 of PPERA applies and where the material is published during the relevant referendum period.
53. As with the position taken in respect of the amendments passed at House of Commons Report Stage, it is our view that the amendments tabled on 28 February 2022 taken together in respect of devolved elections are within the legislative competence of the Senedd. The amendments amend provisions which apply to devolved elections and taken as a whole can be viewed as relating to a non-reserved matter, namely intending to regulate transparency of electoral material published online and to ensure that readers and recipients of that electoral material understand who has published material online.

Outstanding issues from original LCM

Intimidation (disqualification)

54. An area that the UK Government has not looked to carve out Wales is in respect of Part 5 of the Bill 'Disqualification of Offenders for Holding Elective Office, etc.' This Part introduces a new electoral sanction in the form of a disqualification order 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 against them.

55. The Welsh Government has stated we are not opposed in principle to the provisions on intimidation, as it is important to protect participants in the democratic process.
56. It is the UK Government's view that the intimidation disqualification order relates to the reserved matter of criminal proceedings (which includes sentencing) and so the legislative consent process has not been engaged. As such, the UK Government has stated it would not be considering an amendment to remove the application of the disqualification order to devolved elections and elected offices in Wales.
57. The Welsh Government maintains the position that these provisions are making provision with regard to devolved matters due to the impact that the provisions have on the qualification of membership of the Senedd and local authorities in Wales. We also maintain that every legislature should have the freedom to determine its own disqualification regime and that for the elections for which it is responsible. The position is set out in full in paragraphs 29-33 of the original LCM.

General (clauses 60 and 61)

58. The consent of the Senedd is also considered necessary for clauses 60 and 61 as set out in paragraphs 39-41 of the original LCM. Clause 60 could be used to amend any of the provisions that impact on devolved elections. Clause 61 could have potential implications for the Welsh Consolidated Fund and the funding of devolved elections and are therefore consequential on devolved provision.
59. These are standard provisions and we support their inclusion. Although the regulation making power in clause 60 could be exercised to amend legislation that is within the Senedd's legislative competence, it is a narrowly defined provision which only allows consequential amendments to be made by the Bill, or to provisions amended by the Bill, as a consequence of the amendment or revocation of any secondary legislation referenced in the Bill. Such an approach is required in order to ensure that the effect of the Bill's provisions still operate appropriately following the amendment or revocation of any secondary legislation that is referenced in the Bill. As devolved elections have now been carved out from the majority of the Bill provisions, the potential implications that this provision has on legislation within the Senedd's competence is significantly reduced.

Financial implications

60. There are not considered to be any additional financial implications for Wales as a result of the amendments to Part 6 of the Bill. The financial

impact of the Bill (as introduced) as affecting Wales is summarised in the LCM laid on 9 September 2021. Whilst the amendments which carve out devolved elections from a number of the Bill's provisions address the financial issues to the areas they relate, the general concerns set out in the original LCM are still applicable.

Conclusion

61. I welcome the positive engagement of the UK Government in carving Wales out of key provisions in the Bill. However, I disagree with the UK Government that the provisions related to digital imprints and intimidation outlined in paragraph 33-57 above do not require the Senedd's legislative consent. The digital imprints provisions are within the legislative competence of the Senedd, insofar as they contain provision which relates to devolved elections. The intimidation provisions have a direct impact on the eligibility criteria for membership of the Senedd and local authorities in Wales. These provisions therefore require the Senedd's legislative consent.
62. I do not disagree with the UK Government's policy intent for the provisions related to digital imprints and intimidation but I maintain we are able to decide, following engagement with stakeholders, the options for bringing forward legislation to the Senedd in due course on these matters.
63. While the Welsh Government's opposition to large parts of the Bill are well known, with the exception of the two areas of disagreement above we are otherwise content that the substantive elements of the Bill do not impact on matters that are within the Senedd's competence. I therefore recommend that the Senedd gives consent for the provisions falling either within the legislative consent of the Senedd or making provision with regard to devolved matters.

Mick Antoniw MS
Counsel General and Minister for the Constitution
22 March 2022