

# Report on the Welsh Elections (Coronavirus) Bill

February 2021

## Background

**1.** The Fifth Senedd is nearing its conclusion, and the next Senedd general election (the “2021 Election”) is scheduled for 6 May 2021. However, in recent months, consideration has been given as to how the running of the 2021 Election could be affected by the coronavirus pandemic.

### The Elections Planning Group

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**2.** As such, in June 2020, the Welsh Government established an Elections Planning Group (the “EP Group”) to consider the potential impact of coronavirus restrictions on the administration of the 2021 Election and whether adjustments were needed to the relevant existing legislation to ensure a safe election.

**3.** The EP Group consisted of political parties, Welsh and UK government officials, and stakeholders involved in running the 2021 Election, such as the Electoral Commission and Returning Officers.

**4.** On 29 September 2020, and before the report of the EP Group was published, the First Minister, Mark Drakeford MS, said that it was “not right that this Senedd should be extended beyond its current term”.<sup>1</sup> The First Minister also said he felt strongly that “the Senedd needs a democratic refresh”.<sup>2</sup>

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<sup>1</sup> Plenary, 29 September 2020, Record of Proceedings

<sup>2</sup> Plenary, 29 September 2020, Record of Proceedings



**5.** The EP Group's report was published on 6 November 2020.<sup>3 4</sup> In it, the EP Group agreed a set of principles and conclusions to support more detailed planning and preparations for the 2021 Election, including that the continuing aim should be for the 2021 Election to be held on 6 May as planned. To achieve this, the EP Group recommended:

- considering ways of instilling flexibility into the election planning process which reflects public health advice;
- that there should be an early drive to encourage postal vote applications, especially for voters who have previously been shielding or those considered vulnerable;
- that there should be some degree of greater flexibilities in respect of postal and proxy votes while maintaining appropriate checks to protect against the risk of voting fraud;
- that voting should be considered a 'reasonable excuse' for leaving the house if any coronavirus regulations are in place at the time of the 2021 Election; and
- that the 2021 Election count could be conducted over an extended timeframe if this would greater protect the health and safety of those involved.

**6.** In a statement on 6 November 2020, the First Minister confirmed that the Welsh Government would implement the areas of consensus reached by the EP Group.<sup>5</sup>

**7.** The EP Group did not agree on all matters, and did not reach an overall consensus on the need for contingency arrangements to postpone the 2021 Election.

**8.** The EP Group's report was debated in Plenary on 17 November 2020.<sup>6</sup> In that debate, the First Minister said it would be irresponsible of the Welsh Government

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<sup>3</sup> [Report of the work of the Elections Planning Group: September 2020](#)

<sup>4</sup> The Committee considered the report of the Elections Planning Group on 9 November 2020 and subsequently [wrote](#) to the First Minister on 12 November. The First Minister [responded](#) on 17 November.

<sup>5</sup> [Welsh Government Written Statement: Report of the Elections Planning Group](#), 6 November 2020

<sup>6</sup> [Plenary, 17 November 2020, Record of Proceedings](#)

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“not to make plans in case the pandemic is so serious in May of next year where it wouldn’t be safe to hold an election.”<sup>7</sup>

### Existing law on a Senedd general election

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**9.** The date of an ordinary Senedd general election is set by section 3 of the *Government of Wales Act 2006* (the “2006 Act”). It provides that each ordinary Senedd general election is to be held on the first Thursday in May in the fifth calendar year following the previous ordinary general election. The previous election took place in 2016.

**10.** Using existing powers under section 4 of the 2006 Act, the Llywydd has discretion to vary the date of the 2021 Election by bringing it forward by one month, or postponing it until 6 June 2021. Primary legislation is needed to postpone the 2021 Election beyond this date.

**11.** The EP Group’s report stated that most political parties were willing to consider “a possible extension to the Llywydd’s [existing] power to vary the date of the 2021 Election by more than a month” as a “contingency measure in extremis”, but there was no consensus across the whole Group.<sup>8</sup>

**12.** During the Plenary debate in November 2020, the First Minister acknowledged that increasing the Llywydd’s powers to vary the 2021 Election would be a “major constitutional step”.<sup>9</sup> He nonetheless confirmed that the Welsh Government was preparing to draft a Bill to make provision for postponing the Election by up to six months if necessary. The First Minister said:

“This will allow us to bring forward legislation to the Senedd if the situation after Christmas suggests that we will need to do this as a final resort.”<sup>10</sup>

**13.** During the same debate, the First Minister suggested that extending the Llywydd’s powers to postpone the election may require safeguards, such as a two thirds ‘supermajority’ confirmatory vote in the Senedd before the Llywydd could exercise any extended postponement powers.<sup>11</sup> The First Minister also suggested that conditions could be attached to such powers that would compel the

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<sup>7</sup> Plenary, 17 November 2020, Record of Proceedings

<sup>8</sup> Report of the work of the Elections Planning Group: September 2020

<sup>9</sup> Plenary, 17 November 2020, Record of Proceedings

<sup>10</sup> Plenary, 17 November 2020, Record of Proceedings

<sup>11</sup> Plenary, 17 November 2020, Record of Proceedings

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Llywydd to consult the most recent advice and information on public health issues at the time.<sup>12</sup>

## The Emergency Bill procedure and introduction of the Bill

**14.** Standing Order 26.95 makes provision for the passing of emergency legislation if approved by a motion in the Senedd. An Emergency Bill is a Government Bill that needs to be enacted more quickly than would be facilitated by the Senedd's usual legislative scrutiny process.

**15.** On 26 January 2021, the Minister for Housing and Local Government, Julie James MS ("the Minister"), told the Senedd:

"I'm sure that we're all tired of both saying and hearing the word 'unprecedented', but it is nevertheless true that the coronavirus pandemic continues to confront us with choices and decisions that, in other circumstances, we would certainly not have considered [...]".<sup>13</sup>

**16.** The Minister made these comments during the Senedd's consideration of a motion allowing the Welsh Elections (Coronavirus) Bill ("the Bill") to be treated as a Government Emergency Bill. This motion was agreed, along with a motion under Standing Order 26.98(ii) confirming the timetable for scrutiny of the Bill.<sup>14</sup>

**17.** On 27 January 2021, the Minister introduced the Bill.<sup>15</sup>

**18.** On introduction, the Llywydd issued a statement that, in her view, the provisions of the Bill would be within the legislative competence of the Senedd.<sup>16</sup>

**19.** The Bill, as introduced, proposes to introduce contingency electoral arrangements for the purposes of the 2021 Election and for Senedd and local authority by-elections.

**20.** The Explanatory Memorandum (EM) accompanying the Bill states:

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<sup>12</sup> Plenary, 17 November 2020, Record of Proceedings

<sup>13</sup> [Plenary, 26 January 2021, Record of Proceedings](#)

<sup>14</sup> Plenary, [Motion under Standing Order 26.95 that a Bill to be known as the Welsh Elections \(Coronavirus\) Bill be treated as a Government Emergency Bill and Motion under Standing Order 26.98\(ii\) to agree a timetable for the Bill to be known as the Welsh Elections \(Coronavirus\) Bill](#), 26 January 2021

<sup>15</sup> [Welsh Elections \(Coronavirus\) Bill](#)

<sup>16</sup> [Presiding Officer's Statement on Legislative Competence, Welsh Elections \(Coronavirus\) Bill](#), January 2021

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“The [Welsh] Government’s firm intention is that the election will proceed on 6 May 2021. But it is prudent to ensure that contingency arrangements are in place in the event that the pandemic presents a serious threat to public health and the conduct of the election.”<sup>17</sup>

## Committee consideration

**21.** We took evidence from the Minister on 1 February 2021.<sup>18</sup>

**22.** The Bill concerns matters fundamental to the operation of democracy and democratic accountability in Wales. One of the consequences of dealing with the Bill as an Emergency Bill is that there is limited time in which to fully understand the implications of its provisions, or to hear the views of stakeholders. As a result, there is a concern that the Bill could be subject to less-informed scrutiny at Stages 2 and 3.

**23.** Should the general principles of the Bill be agreed to, our report aims to provide Members of the Senedd with further information that may inform scrutiny and debates during the subsequent stages in the Senedd.

### Need for the Bill and the Welsh Government’s approach to legislating

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**24.** The Minister told the Senedd that the Welsh Government was:

“... working closely with stakeholders to ensure that... measures are being taken to make elections safer. These include introducing social distancing and hygiene methods at polling stations, as well as encouraging registration for absent voting so that voters do not need to attend in person if they do not wish to do so. But as the rules for our elections are set out in primary legislation, we have concluded that we need to put in place legislation that will enable the election to be postponed if—and only if—the Senedd agrees that the public health situation makes it impossible to proceed.”<sup>19</sup>

**25.** On the use of the Emergency Bill procedure, the Minister also told the Senedd:

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<sup>17</sup> Welsh Elections (Coronavirus) Bill, [Explanatory Memorandum](#), January 2021, paragraph 8

<sup>18</sup> All comments in this report attributed to the Minister and Welsh Government officials, in the context of them giving evidence to us, derive from the Record of Proceedings for the [1 February 2021 meeting of the Legislation, Justice and Constitution Committee](#)

<sup>19</sup> Plenary, 26 January 2021, Record of Proceedings

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“With the election fast approaching, it's preferable to have any changes to electoral law put in place well ahead of polling day. This is important in aiding electoral administrators to make their preparations for the election and to provide them with clarity to carry out their vital role. Although we are working closely with stakeholders, we must allow them as much time as we can to carry out any legislative changes. The time left between now and the polling day in May is simply not sufficient to allow for the full scrutiny process and for administrators to make preparations.”<sup>20</sup>

**26.** We asked the Minister if the Welsh Government should have dealt with the need for primary legislation such as the Bill a lot earlier than it has done. The Minister told us that, towards the end of 2020, the Welsh Government’s resources were taken up by matters relating to the UK’s exit from the EU and the coronavirus pandemic, and that the Welsh Government was only able to do what was possible at the time.

**27.** Given that it is the Welsh Government’s firm intention that the 2021 Election proceeds on 6 May 2021, and given the fact that the EP Group did not reach an overall consensus on the need for contingency arrangements to postpone the 2021 Election, we asked the Minister to explain the reasons for introducing the Bill.

**28.** The Minister reiterated comments that she made to the Senedd on 26 January 2021, stating that we continue to live through extraordinary times. The Minister also repeated that it is the Welsh Government’s firm intention that the 2021 Election should proceed as planned on 6 May.

**29.** This ambition notwithstanding, the Minister told us that it was prudent to have all the necessary contingency arrangements in place to respond to the risk to the 2021 Election due to the pandemic and that primary legislation was therefore needed.

**Conclusion 1.** We acknowledge the arguments in respect of the need for the Bill, and recognise that making legislative provision that will enable the 2021 Election (and Senedd and local government by-elections) to be postponed for a short period represents a pragmatic solution given the ongoing coronavirus public health emergency.

**Conclusion 2.** It would have been preferable to follow the example of the Scottish Government and introduce a Bill much earlier to enable fuller scrutiny

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<sup>20</sup> Plenary, 26 January 2021, Record of Proceedings

of the important constitutional matters contained in the Bill and an in-depth understanding of its practical implications.

### Legislative competence and human rights

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**30.** The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.

**31.** To be within the legislative competence of the Senedd, section 108A(2)(e) of the 2006 Act requires all provisions of a Bill to comply with the European Convention on Human Rights.

**32.** The Minister told us that she has given consideration to human rights issues and is satisfied that the Bill complies with Convention rights. However, the EM makes no reference to human rights.

**33.** We are aware that Article 3 of the First Protocol to the Convention requires the holding of free elections at reasonable intervals. As human rights issues must always be considered by the Welsh Government in the preparation of Bills, such considerations should be set out in detail in the accompanying EM. The fact that this is an Emergency Bill introduced as a result of a public health emergency does not lessen the need for the inclusion of such information. It is not appropriate simply to indicate that an assessment has been undertaken and then not to identify the outcome of that assessment in the EM.

**34.** On this occasion, the EM should have contained an analysis of whether the Bill engages Article 3 of the First Protocol and, if so, how any interference with the right is justified. Details of the consideration given as to whether any other Convention rights are engaged by the provisions in the Bill should also have been set out in the EM.

**35.** Given that such an assessment has been undertaken and is a requirement in the context of determining legislative competence, publishing it should not be onerous.

**Recommendation 1.** The Minister should publish the Welsh Government's assessment of the impact of the Bill's provisions on human rights as soon as possible and no later than 5 February 2021.

### The 2021 Election (section 1)

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**36.** In relation to section 1 of the Bill, the Explanatory Notes state "Section 1 of the Bill defines the term "the 2021 election". Nowhere in the Bill (including the long

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title) does it state that the Bill solely relates to the 2021 Election and to Senedd and local authority by-elections in 2021.

**37.** The Minister told the Senedd:

“The objective of this Bill is to introduce temporary changes in response to the immediate challenges presented by the pandemic, and it is not intended to make permanent changes to our electoral laws. The provisions in the Bill will only apply for the elections in 2021 and will have no effect on future elections. Electoral law is a complex subject matter, and permanent changes in this area should be subject to full scrutiny.”<sup>21</sup>

**38.** We asked the Minister why the Bill does not include a sunset provision such that the provisions of the Bill which relate to the 2021 Election cease to have effect on the day after the new Senedd meets for the first time, and the remainder of the Bill ceases to have effect on 5 November 2021.

**39.** The Minister told us that there was no need for a sunset provision in the Bill as the Bill can only relate to the 2021 Election. The Minister also said that the Bill is effectively spent after 5 November 2021.

**40.** We do not agree with this assessment. For example, if the 2021 Election is postponed to 5 November, section 4 would continue after 5 November to determine the date of the first meeting of the new Senedd. Furthermore, and more significantly, the power provided by section 12 of the Bill could allow the Welsh Ministers to amend the date of 5 November 2021 set out in section 5(3)(b) of the Bill by regulations.

**41.** Given the Welsh Government’s view (supported by the Minister’s comments in our meeting) that the Bill is only for the purpose of the 2021 Election, we do not consider that there should be any objection to the inclusion of a sunset provision in the Bill.

**Recommendation 2.** The Bill should be amended to expressly time limit the contingency measures set out in the Bill, in particular, to provide that the provisions which relate to the 2021 Election cease to apply on the day following the first meeting of the new Senedd.

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<sup>21</sup> Plenary, 26 January 2021, Record of Proceedings



### Dissolution of the current Senedd (section 3)

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**42.** Section 3 prescribes that the Senedd will be dissolved on 29 April 2021, seven days before the scheduled 2021 Election.<sup>22</sup> Alternatively, if the election is postponed, the section provides that dissolution will take place seven days in advance of any subsequent election date.

**43.** The Explanatory Memorandum states that:

“The purpose of the [shortened dissolution period] is to provide a mechanism to enable the current Senedd to respond, if required to do so, to the unfolding public health issues leading up to the election. It also means that the Senedd is sitting and able to resolve to fix a date for the poll for the ordinary general election if there is a need to postpone”.<sup>23</sup>

**44.** We asked the Minister to explain why a dissolution date of 29 April 2021 has been chosen.

**45.** The Minister told us that a shorter dissolution period would enable the current Senedd additional time to consider urgent subordinate legislation that may be needed to address the ongoing coronavirus pandemic. The Minister also said that the additional time was necessary in order to provide the current Senedd with the opportunity to utilise the powers in section 5 of the Bill to postpone the 2021 Election, should that power be needed.

### Power to postpone the 2021 Election for up to six months (section 5)

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**46.** Section 5 of the Bill provides that the First Minister may propose to the Llywydd that the 2021 Election is postponed for a reason relating to coronavirus, if the First Minister considers it “necessary or appropriate” to do so.

**47.** We asked the Minister to explain why the power of the First Minister to propose a postponement to the election arises when he considers it “appropriate or necessary” rather than just when “necessary”.

**48.** The Minister told us that this wording followed the approach adopted in the Scottish General Election (Coronavirus) Bill (now Act of 2021).

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<sup>22</sup> Section 2 of the Bill disapplies provisions under the 2006 Act which determine the usual Senedd dissolution period and the date of the first Senedd meeting after an election.

<sup>23</sup> Explanatory Memorandum, paragraph 23

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**49.** The Minister also said that ‘necessary’ reasons would be strictly linked to public health evidence, whereas ‘appropriate’ reasons, while related to the pandemic, may be such things as not having the required numbers of staff to run an election.

**50.** In our view, not having the necessary staff resource in order to sufficiently support the running of the 2021 Election would be classed as a reason why it would be necessary to postpone the election. We are not convinced that the word “appropriate” is required in section 5(1).

**Recommendation 3.** The Bill should be amended to remove “or appropriate” from section 5(1).

**51.** We asked the Minister if the First Minister will consult others, such as the Electoral Commission and the Chief Medical Officer, prior to proposing a postponement and, if so, why a duty to consult was not included on the face of the Bill.

**52.** The Minister told us that she did not see a need for such a duty because the Welsh Government has already adopted a partnership approach to addressing issues around the 2021 Election and has been closely working with the Electoral Commission, Returning Officers and the Chief Medical Officer.

**53.** While this proactive close working is to be welcomed, we see no reason why this should mean that the Welsh Government should not be legally required to consult such persons that could helpfully assist the First Minister before he proposes a postponement under section 5(1). In our view, it is important that the public are aware of who is being consulted about potential changes to the date of a democratic election.

**Recommendation 4.** The Bill should be amended so that the First Minister must consult the Electoral Commission, the Chief Medical Officer, and such other persons considered to be appropriate, before exercising the power in section 5(1) of the Bill.

**54.** Providing the Senedd has not been dissolved, the Llywydd may postpone the 2021 Election to the earliest date considered to be reasonably practicable.<sup>24</sup>

**55.** The Minister told the Senedd:

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<sup>24</sup> Section 2 of the Bill makes the statutory election date in the 2006 Act (6 May 2021) subject to the power under section 5 of the Bill to delay the election for up to 6 months.

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“It will be for the Llywydd to propose a date for the poll in the event of a proposal from the First Minister for postponement. The new date fixed for the election must be within six months of 6 May and requires the approval of the Senedd by a majority of two thirds of the total number of Senedd seats.”<sup>25</sup>

**56.** We asked the Minister to set out how sections 5(1), 5(2) and 5(3) of the Bill will work in practice.

**57.** The Minister confirmed to us that the Llywydd’s decision to bring forward a motion that seeks the Senedd’s approval to fix a new day for the 2021 Election was entirely at the discretion of the Llywydd. The Minister also confirmed that, while a two-thirds majority vote in favour of a new date was a deliberate high hurdle to pass, there could be a deadlock position between the Llywydd and the Senedd should 40 Senedd Members not agree with the date proposed. The Minister said that she did not want the 2021 Election to be moved to a date when there wasn’t a large majority in favour of that date.

**58.** In the event that a postponed election date cannot be agreed, the 2021 Election would proceed on 6 May.

**59.** As soon as possible after a new date is fixed, in accordance with section 5(4)(b), the Llywydd must lay a statement before the Senedd confirming the new date and the reason for exercising the postponement power.

**60.** We asked the Minister why the First Minister is not similarly required to issue a statement that provides reasons for proposing the postponement of the election in the first instance, to aid transparency and to enable the Llywydd and Members to make informed decisions.

**61.** The Minister told us that the requirement has been placed on the decision-maker, i.e. the Llywydd, but suggested that the First Minister would almost certainly issue a statement which told people that he had made a proposal to the Llywydd.

**62.** Section 5(6) of the Bill provides that the First Minister’s power to propose a postponement of the election under section 5(1) of the Bill, and the Llywydd’s power to fix a new date under section 5(2), may be exercised more than once. On each occasion, any newly fixed date must not be after 5 November 2021. We

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<sup>25</sup> Plenary, 26 January 2021, Record of Proceedings

asked the Minister to explain why the Bill includes provision allowing the election to be postponed multiple times.

**63.** The Minister told us that the best possible outcome is that there is no postponement at all, but that the contingency powers were needed because of the uncertainties surrounding the ongoing pandemic. The Minister also accepted that multiple postponements would be difficult to manage.

**64.** Overall, we do not consider the wording of sections 5(2), 5(3) or 5(4) to be clear because the precise sequence of events involved in the postponement of an election is not easily discernible from the reading of these provisions, particularly because of the use of “may” in section 5(2).

**65.** Our understanding is that under section 5 of the Bill, the Llywydd essentially has a discretion to propose a date for a postponed poll, but that such date only becomes ‘fixed’ once a supermajority of the Senedd votes in favour of it under section 5(2)(a).

**66.** Predicated on that basis:

- To what extent, if any, is a motion by the Llywydd proposing a specified postponed election date amendable by Members of the Senedd?
- If a supermajority of the Senedd does not vote in favour of a date proposed by the Llywydd, can the Llywydd introduce a subsequent motion proposing an alternative date and seek the approval of the Senedd on the new date?
- If so, would this need to be triggered by a fresh proposal by the First Minister under section 5(1) of the Bill, or, in theory, could the Llywydd put forward multiple dates until a supermajority of the Senedd approves one?
- Under section 5 of the Bill, can the Llywydd fix a date for a postponed election, other than one expressly approved by a supermajority of the Senedd?

**67.** Our preference would be that the date of the 2021 Election, that is to be postponed as a consequence of the pandemic, should be approved by the Senedd, with the role of the Llywydd to give effect to that decision.

**Recommendation 5.** The Minister should clarify during the Stage 1 debate the implications of the drafting of sections 5(2), 5(3), 5(4) and 5(6) of the Bill by

confirming our understanding as set out in paragraph 65 and addressing each of the questions in paragraph 66.

**68.** While we accept the pragmatic reasoning for the powers in section 5, we believe that any such decision to postpone the 2021 Election needs to be taken as early as possible.

#### Further power to vary the date of the 2021 Election (section 6)

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**69.** Section 6 provides that the Llywydd may vary the date of an election postponed under section 5 by one month before or after the newly fixed date, provided it is no later than 5 November 2021. This mirrors the Llywydd's existing power to move an election by one month from 6 May 2021 under section 4 of the 2006 Act, but in the context of a postponed election.

**70.** A variation under section 6 does not have to relate to coronavirus, and the Llywydd will not have to seek approval for any such variation through a vote in the Senedd.

**71.** We asked the Minister to explain why it is considered appropriate to include the section 6 power to further vary the date of the 2021 Election, in light of the fact that it could enable the Llywydd to override the decision of two thirds of the Members of the Senedd to fix a specific date for a postponed election.

**72.** The Minister told us that this power preserved the existing power in section 4 of the 2006 Act and was intended to allow for 'concurrent disasters'. As such, a further short postponement of the 2021 Election may be needed for a reason not directly linked to coronavirus.

**73.** We also asked the Minister if she considered it possible in practical terms to bring forward or delay an election by a month.

**74.** The Minister acknowledged that only the most extraordinary of circumstances would lead to the use of this power. The Minister also said that the power would have to be exercised in consultation with Returning Officers.

**75.** Given that this power could be used in circumstances that are not related to the pandemic and such use would override the date of the poll as agreed by at least 40 Members, we believe the Llywydd should be required to issue a statement explaining the reasons for her decision.

**Recommendation 6.** Section 6 of the Bill should be amended to include a requirement that the Llywydd make a statement confirming the day fixed for

the holding of the poll and explaining why it was necessary to vary the date previously fixed under section 5.

**76.** If the Llywydd proposes to further vary the election date under section 6(2) of the Bill, section 6(4) of the Bill provides for Her Majesty to, by royal proclamation, dissolve the Senedd and require the poll to be held on the day proposed by the Llywydd.<sup>26</sup> The Bill does not set out any further detail as to how the making of the proclamation would work in practice.

**77.** We asked the Minister to provide further detail on the form and manner of preparation, and the publication of, the royal proclamation. We also asked her whether further legislation is required to deal with these matters in order to ensure that section 6 of the Bill is effective.

**78.** The Minister explained that an Order in Council is due to be made under section 116 of the 2006 Act on 10 February 2021.<sup>27</sup> The Minister said that the Order will include a form of wording and process for proclamations to be made under sections 4 and 5 of the 2006 Act and the proposal is that this form of wording and process would be used as a precedent or template for a proclamation made under section 6 of the Bill.

**79.** We note that the new Order in Council will not actually apply to the power of the Llywydd to seek the postponement of an election by way of royal proclamation under section 6 of the Bill. It is therefore feasible that, in the absence of a form of wording and formal process being provided specifically for a royal proclamation under section 6 of the Bill, the Llywydd would not be able to use the power under section 6.

**Recommendation 7.** The Minister should explain to Members during the course of the Stage 1 debate what measures are to be put in place to specifically provide for the form, manner of preparation and publication of the royal proclamation under section 6 of the Bill, to ensure that the Llywydd is able to fully exercise the power under section 6.

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<sup>26</sup> Section 2 of the Bill disapplies the statutory time limit for the Senedd's first meeting if the election date is varied by Royal Proclamation.

<sup>27</sup> Referenced in the meeting by the Minister as The Senedd Cymru (Letters Patent and Proclamations) Order 2021

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#### Date of the first meeting after the 2021 Election (section 4)

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**80.** Section 4 provides that the Senedd must meet within 21 calendar days after the 2021 Election is held. This applies whether the 2021 Election is held as scheduled or if it is postponed. Under current arrangements, the Senedd must meet within fourteen days of the 2021 Election (excluding Saturdays, Sundays and bank holidays).

**81.** Without the Bill, if the Election was held as scheduled on 6 May 2021, the Senedd would have to meet by 26 May 2021. Under section 4 of the Bill, if the 2021 Election was held as scheduled on 6 May 2021, the Senedd would have to meet by 27 May 2021.

**82.** Therefore, in most circumstances, the Bill provides an additional day before the Senedd must meet under current arrangements. The EM states:

"The purpose of this extension is to provide some flexibility to cater for a potential delay in counting ballots, confirming results and returning Members ..."<sup>28</sup>

**83.** We asked the Minister why an extension of 24 hours is considered necessary and upon what evidence this decision was based. In doing so, we noted the reference in paragraph 26 of the Explanatory Memorandum to the consultation undertaken with Returning Officers.

**84.** The Minister told us that the Welsh Government was in consultation with Returning Officers about a number of practical issues which may result because of less staff flexibility or social distancing measures in counting halls, for example. The Minister also suggested that the counting for constituency seats would not take place until the morning following the election polling day, and that, in counting halls for multiple constituencies, counts are likely to take place consecutively rather than simultaneously. As such, 24 hours was a best estimate of the additional time that may be necessary.

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#### Powers to postpone Senedd and local authority by-elections (sections 7 and 8)

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**85.** Section 7 enables by-elections for Senedd constituency seats that arise after 6 May 2021 to be postponed. The section confers a power on the Llywydd to postpone such by-elections to the earliest day considered to be reasonably

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<sup>28</sup> Explanatory Memorandum, paragraph 26

practicable, after consultation with Welsh Ministers.<sup>29</sup> The power can be exercised more than once, but it cannot be used to fix a date after 5 November 2021.

**86.** A postponement under section 7 of the Bill does not have to relate to coronavirus, although the EM suggests that the power would be used to respond to the public health pandemic.<sup>30</sup>

**87.** Section 8 of the Bill contains a regulation-making power enabling the Welsh Ministers to postpone local government by-elections that fall between 6 May 2021 and 5 November 2021.

**88.** A local government by-election is defined as an election to fill a casual vacancy in the office of councillor in a county council, county borough council or community council in Wales which is due to take place between 6 May 2021 and 5 November 2021.

**89.** While the EM states the power in section 8 is designed to be used where the public health situation would not allow for the safe delivery of local government by-elections<sup>31</sup>, a postponement under section 8 also does not have to relate to the coronavirus pandemic.

**90.** We asked the Minister why these powers were not directly linked to coronavirus. The Minister said that the precedent had been established by the *Coronavirus Act 2020* and that, while not a requirement, the expectation is that any such postponement would be connected to coronavirus. The Minister also indicated that the Welsh Government wanted some flexibility, particularly to manage issues in relation to the administration of elections.

**91.** The power to make regulations under section 8 may be exercised more than once in respect of any local authority by-election. Such Regulations may amend, modify, repeal or revoke any enactment and are subject to the negative scrutiny procedure in the Senedd. This regulation-making power is therefore a Henry VIII power in that it permits the amendment of primary legislation.

**92.** The EM notes that:

“This power could not be used to set a date for a poll in a by-election that is after 5 November 2021. The power enables retrospective

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<sup>29</sup> Section 2 of the Bill makes the provisions on vacant Senedd constituency seats in the 2006 Act subject to section 7 of the Bill, which empowers the Llywydd to postpone by-elections.

<sup>30</sup> Explanatory Memorandum, paragraph 38

<sup>31</sup> Explanatory Memorandum, paragraph 39



provision to be made in relation to local government byelections, an approach consistent with that taken in section 68 of the Coronavirus Act 2020.”<sup>32</sup>

**93.** The use of negative procedure is justified in the EM as follows:

“To respond to the unfolding pandemic to enable the date of a poll in a by-election to be postponed if to do so is necessary for public health reasons to allow for the safe delivery of the poll.”<sup>33</sup>

**94.** We asked the Minister why the negative procedure was appropriate for such regulations and she indicated that the power needed to be exercised quickly.

**95.** These powers could potentially be exercised following the 2021 Senedd Election and are very broadly drawn, such that they could be used to include the power to amend, modify, repeal or revoke any Act.

**96.** As a general principle, we do not consider it appropriate to amend primary legislation by means of the negative procedure. We were not persuaded by the Minister’s reasoning for departing from this principle, particularly when the powers could be used to amend this Bill should it become an Act.

**Recommendation 8.** The Bill should be amended so that where the regulation-making power in section 8 is used to amend primary legislation, the made affirmative procedure should apply.

Modification of the National Assembly for Wales (Representation of the People) Order 2007 (section 10)

**97.** Section 10 makes a number of adjustments to the National Assembly for Wales (Representation of the People) Order 2007, as amended (the “Conduct Order”) for the purposes of the 2021 Election only. These include adjustments to determine when a person becomes a “candidate” in light of the shorter dissolution period proposed by the Bill, and to make provision regarding proxy voting and nomination paper arrangements, as recommended by the EP Group.

**98.** With regard to the Welsh Government’s approach to legislating, the Committee notes that whilst modifications for the purpose of the 2021 Election are made to subordinate legislation made by section 10 of the Bill, amendments relating to local authority by-elections are being made to other subordinate

<sup>32</sup> Explanatory Memorandum, page 20, Table 5

<sup>33</sup> Explanatory Memorandum, page 19, Table 5

legislation via regulations such as the Local Government (Coronavirus) (Postponement of Elections) (Miscellaneous Amendments) (Wales) Regulations 2021.

**99.** Section 10(3) of the Bill modifies the Conduct Order to the effect that all those seeking election to the Senedd will become candidates on 7 April 2021. This will be the case regardless of whether the 2021 Election takes place on 6 May or whether it is postponed to a later date (under sections 5 or 6 of the Bill). We asked the Minister to explain how this is intended to work in practice, particularly from the perspective of election expenditure and whether, in the event that the election is postponed, further legislation is envisaged to deal with a prolonged candidacy period.

**100.** The Minister told us that discussions with the Senedd Commission about matters including the Members' Code of Conduct and election expenditure are ongoing, and that there are no changes provided for on the face of the Bill as those changes will depend on the date of the election.

**101.** The Minister said that, if there is a postponement, the Welsh Government will have to bring forward legislation to sort out the difficulties with election expenditure. With regard to the nature of that legislation, the Minister told us (by way of an example) that a postponement of a month would require different changes than may be necessary if there is a postponement to the last possible date.

**102.** Section 13 of the 2006 Act already enables the Welsh Ministers to make provision for elections by way of an Order. We asked the Minister why these powers were not being used to make all the necessary changes to the Conduct Order.

**103.** The Minister said that the permanent changes to the Conduct Order had been made by the Senedd Cymru (Representation of the People) (Amendment) Order 2020, which the Senedd agreed before Christmas, whereas the temporary changes for the purpose of the 2021 Election are included on the face of the Bill to aid accessibility.

#### Power to make consequential and transitional provision (section 12)

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**104.** Section 12 of the Bill confers a wide regulation-making power on the Welsh Ministers to make supplementary, incidental, consequential or transitional provisions. This regulation-making power is therefore a Henry VIII power in that it permits the amendment of primary legislation.

**105.** We asked the Minister why this power is needed in addition to the power in section 13 of the 2006 Act, which already enables Welsh Minister to make provision for elections by way of Order subject to the affirmative procedure.

**106.** The Minister told us that the existing power in section 13 of the 2006 Act is limited and that the power under section 12 of the Bill was required to deal with all eventualities that may arise.

**107.** Welsh Ministers may use the regulation-making power in section 12 if they consider it necessary or appropriate for the purposes of, or in consequence of, or for giving full effect to any provision of the Bill.

**108.** Regulations under section 12 may:

- make retrospective provision in relation to a local authority by-election (within the meaning given by section 8(2));
- amend, modify, repeal or revoke any enactment;

and are subject to the negative scrutiny procedure in the Senedd.

**109.** The EM states that:

“Although the Bill seeks to address issues relating to the general election that may arise as a result of the pandemic, the fast moving nature of the situation may lead to issues which could not have been foreseen but require legislation to resolve. The postponement of the poll may lead to practical consequences, such as candidates' deposits and destruction of postal votes, which would be best addressed via secondary legislation.”<sup>34</sup>

**110.** The negative procedure is justified in the EM on the grounds that:

“The powers would relate only to the purpose of or to give full effect to the Bill.

The subject matter of the Bill will require swift action.”<sup>35</sup>

**111.** We explored with the Minister why section 12 of the Bill provides a Henry VIII power subject to the negative procedure, particularly as such a power can be used to make retrospective provision, to revoke primary legislation and to amend

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<sup>34</sup> Explanatory Memorandum, page 20, Table 5

<sup>35</sup> Explanatory Memorandum, page 20, Table 5

or modify this legislation (should it be passed). In response the Minister acknowledged that normally she would agree with the affirmative procedure when exercising Henry VIII powers but said that these were extraordinary times and the need for speed is paramount.

**112.** We recognise that it may be necessary to act quickly. However, regulations made in response to the coronavirus pandemic have also been made quickly but that has not necessitated the use of the negative procedure. We also note that these regulations could amend this Bill should it become an Act. Furthermore, such regulations could potentially be made during any pre-dissolution recess; in such circumstances, the tabling of a motion to annul may not be possible until after the 2021 Election has taken place. While such a scenario may be unlikely, nevertheless checks and balances on executive power should be in place. We believe it would be appropriate to use a made affirmative procedure where regulations under section 12 make amendments to primary legislation (including this Bill if enacted).

**Recommendation 9.** The Bill should be amended so that regulations made under section 12 that amend primary legislation are subject to the made affirmative procedure.

## Postal voting

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**113.** The EM states that “there will be promotional activities to encourage voters to make use of... postal voting” and that “These measures are being put in place through non-legislative methods”.<sup>36</sup>

**114.** We asked the Minister to explain why the Welsh Government has decided that contingency legislative provisions for postal voting are not required in the Bill.

**115.** The Minister stated that an all-postal vote 2021 Election was deemed impractical by the Welsh Government as, following consultation, the UK Government refused to contemplate the measure for the Police and Crime Commissioner elections scheduled to be held on the same day.

**116.** The Minister confirmed that a number of matters concerning arrangements for postal voting were still under discussion with Returning Officers. In particular, the Minister stated that electoral administrators were concerned about the

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<sup>36</sup> Explanatory Memorandum, paragraph 65

practicalities of administering a large number of postal vote applications on the last permissible day for such applications.

**117.** The Minister stated she did not rule out making minor amendments to the Bill at Stage 2 if necessary regarding the administration of the postal vote.

**Recommendation 10.** The Minister should confirm to Members during the course of the Stage 1 debate what type of amendments the Welsh Government may introduce at Stage 2 in respect of contingency arrangements for postal voting.

### Early voting

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**118.** The Minister told the Senedd that she and her fellow Ministers “would've liked to introduce provisions for early voting in order to give people more choice as to when to vote in person, but we have accepted the advice of the electoral community that, at this notice, [...] this cannot be achieved for 6 May”, but that it was being kept “under review in the event that the election is postponed” and that the Welsh Government “may, therefore, return to this at Stage 2”.<sup>37</sup>

**119.** We asked the Minister to explain why the Bill as introduced does not include provision for early voting.

**120.** The Minister confirmed that the UK Government refused to consider early voting for the concurrent Police and Crime Commissioner elections and that the complexity of early voting for one election and not the other was “beyond contemplation”. However, the Minister stated that if it was necessary to postpone the 2021 Election from 6 May and it was possible to hold the Senedd and Police and Crime Commissioner elections on separate days, then the Welsh Government would explore the possibility of early voting.

**121.** Under such circumstances, we asked the Minister to explain how provision for early voting would likely be structured in practice.

**122.** The Minister stated the exact nature of early voting was still under discussion with Returning Officers. However, the Minister confirmed that voting over multiple days was being discussed, taking into account equality impact assessments, disability access and the staffing capacity of Returning Offices.

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<sup>37</sup> Plenary, 26 January 2021, Record of Proceedings

**Recommendation 11.** The Minister should confirm to Members during the course of the Stage 1 debate how and when the Welsh Government may introduce contingency arrangements for early voting.