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# Scottish Elections (Franchise and Representation) Bill

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The Scottish Elections (Franchise and Representation) Bill seeks to change the franchise (who has the right to vote) and candidacy for Scottish elections.



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# Background to the Bill

In December 2017, the Scottish Government indicated its decision to take forward reform of devolved aspects of electoral law by launching [a consultation on electoral reforms](#) for Scottish Local Government and Scottish Parliament elections. The consultation sought views on a number of issues, including:

- term lengths;
- extending the franchise to all foreign nationals legally resident;
- extending the role of the Electoral Management Board for Scotland;
- access to voting and elected office;
- electronic voting;
- the role and remuneration of Returning Officers; and
- boundary reviews.

The [Scottish Government's 2018/19 Programme for Government](#) included a commitment to introduce an Electoral Franchise Bill and an Electoral Reform Bill, with the former to “include provisions to extend the franchise for Scottish Parliament and Local Government elections to protect the franchise for EU citizens.”

In December 2018, the Scottish Government launched [a consultation on prisoner voting](#). This followed an [inquiry on prisoner voting](#) by the Equalities and Human Rights Committee of the Scottish Parliament. Further detail on the inquiry and consultation is available in the [Prisoner voting section of this briefing](#).

[The Scottish Elections \(Franchise and Representation\) Bill](#) was introduced in Parliament on 20 June 2019 by Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP.

[Section 11](#) of the [Scotland Act 2016](#) provides that a super majority (two-thirds of the total number of MSPs) is required for legislation on certain matters. Those matters include “the persons entitled to vote as electors at an election for membership of the Parliament”. As such, it is expected that the Scottish Elections (Franchise and Representation) Bill will be subject to super majority requirements <sup>1</sup>.

It is likely that the Scottish Government will introduce further legislation to address some of the issues around electoral law which have been consulted on, but which are not included in this Bill <sup>2</sup>.

# Bill overview

The Bill falls into three main subject areas:

- extending the franchise to citizens of all countries who are legally resident in Scotland;
- extending candidacy rights, and
- allowing some prisoners the right to vote.

The Bill is made up of ten sections which modify existing electoral law. Its intention is "to ensure that citizens of all countries who are legally resident [in Scotland] are able to vote and stand in elections which affect them.<sup>3</sup>"

The Bill proposes changes which would apply only at Scottish elections. That is elections to the Scottish Parliament and Scottish local government. The Bill does not affect, for example, the franchise for Westminster general elections. [An overview of the franchise for every type of election held in the UK is available on the UK Government website.](#)

Whilst the Bill does not change the franchise for referendums directly, the [Referendums \(Scotland\) Bill](#) proposes at Section 4 that the local government elections franchise be used for Scottish referendums. As such, the franchise as amended by this Bill could apply to future Scottish referendums.

## Franchise

As the law stands, to vote in Scottish elections (both local government and Scottish Parliament) an individual must:

- be [registered to vote](#);
- be 16 or over on the day of the election;
- be a British, qualifying Commonwealth or EU citizen;
- be resident at an address in Scotland, and
- not be legally excluded from voting.

[Section 4\(6\) of the Representation of the People Act 1983](#) provides that a Commonwealth citizen is 'qualifying' if they do not require leave, under the [Immigration Act 1971](#), to enter or remain in the UK, or that if they do require leave to enter or remain in the UK they have been granted such leave or are treated as having been granted such leave. Any type of leave to enter or remain is acceptable, whether indefinite, time limited or conditional.

The rules around Commonwealth citizens mean, for example, that an individual from Canada can vote in Scottish elections so long as they meet the other requirements set out above.

Individuals who are not EU or Commonwealth citizens, but who may be resident in Scotland, are excluded from the franchise. This means, for example, that an individual from the USA (who does not hold British citizenship) cannot vote.

In December 2017, the Scottish Government launched a [consultation on electoral reform](#). The consultation explored the possibility of extending the voting franchise to “everyone legally resident in Scotland”, including to all those granted asylum or living on a visa, such as non-EU or non-Commonwealth citizens.

The [Scottish Government's analysis of the consultation](#) found that 79% of respondents supported an extension to the franchise.

At [Portfolio Questions on 23 May 2018](#), Ross Greer MSP asked whether the Scottish Government's proposal to extend the franchise would see refugees and asylum seekers resident in Scotland given the right to vote in Scottish Parliament elections. In response, the Minister for Parliamentary Business, Joe FitzPatrick MSP said:

“ Yes. In my view, people who have been welcomed here as refugees and people who are going through the process of seeking asylum should be included. Scotland is a welcoming country and our intention to extend the opportunity to vote to all those who are legally resident in Scotland, whatever their place of birth, should include refugees and asylum seekers. ”

Section 1 of the Bill extends the franchise for Scottish elections to include all those with a legal right to live in Scotland. It does so by creating a new category of voter – “qualifying foreign national”.

A qualifying foreign national is someone who does not require leave to enter or remain in the UK under the [Immigration Act 1971](#). Any period of leave to remain entitles a person to register to vote.

This means that people who have been granted refugee status and those who have been granted asylum will be able to vote, so long as they satisfy the condition of living in Scotland, as well as the conditions which apply to all electors (for example being over 16 years of age). People who are in the UK illegally, or who are seeking asylum but whose claim is still undetermined, will not be able to vote.

The Scottish Government has said that, should the voting and candidacy rights of EU citizens change as a result of the UK leaving the UK, the Bill "provides an opportunity for these rights to be reaffirmed" <sup>4</sup> .

The Government hopes that the extension of franchise and candidacy rights will ensure that Scotland has an "electoral system that supports and empowers the engagement in elections of all those who have chosen to make Scotland their home." <sup>5</sup> "

The Bill also proposes giving prisoners on short sentences the right to vote. This is discussed in more detail in the [Prisoner voting section](#) of this briefing.

## Candidacy for Scottish elections

Those who are able to vote in Scottish elections are generally able to stand as candidates to hold office.

In line with the Bill's proposal to extend the franchise to all foreign nationals living in Scotland legally, the Bill therefore seeks to allow people from all countries to stand for election to both the Scottish Parliament and to local government.

Sections 2 and 3 of the Bill (Section 2 relates to candidacy for Scottish Parliament elections, and Section 3 to local government elections) propose extending candidacy rights to all foreign nationals who are resident in Scotland and who have an indefinite right to live in Scotland.

The requirement for a person to have indefinite leave to remain in the UK in order to be able to stand as a candidate ensures that, if elected, an individual's term of office does not extend beyond the period in which they are legally allowed to live in the UK<sup>6</sup>.

If candidacy rights were to mirror the franchise provisions exactly then all foreign nationals with a right to remain in the UK, no matter the length of that right, would be able to stand for election.

At present, to be able to stand as a constituency or regional candidate at the Scottish Parliamentary election an individual must, on the day they are nominated and on polling day, be:

- at least 18 years old; and
- a British citizen; or
- an Irish citizen; or
- an eligible Commonwealth citizen (one who either does not need leave to enter or remain in the UK, or has indefinite leave to remain in the UK), or
- a citizen of any other member state of the European Union.

There is no legal requirement for a person wishing to stand as a candidate in Scottish Parliament elections to be a registered elector (be registered to vote).

In addition to the above criteria, those standing for election to local government must also meet one of the following criteria:

- be registered to vote in the local authority area;
- have lived in the local authority area during the whole of the last 12 months;
- had main or only place of work in the local authority area during the whole of the last 12 months; or
- occupied any land or premises in the local authority area as either owner or tenant during the whole of the last 12 months.

The Bill does not seek to change the candidacy criteria beyond the citizenship requirements. This means that, for example, individuals aged 16 or 17 who are currently unable to stand as candidates will still be unable to stand for election.

## Scottish Parliament disqualifications

A number of people are disqualified from standing for election to the Scottish Parliament because of an office they hold. This includes full-time members of the judiciary, civil servants, members of a police force, members of the regular armed forces, members of a legislature of any country or territory outside the Commonwealth (other than the Republic of Ireland), and those who hold an office that is listed in [The Scottish Parliament \(Disqualification\) Order 2015](#).

Bankruptcy is not itself a ground for disqualification. A person cannot, however, stand if they have had their estate sequestrated by a court in Scotland and they have not been discharged, nor if they are currently subject to a bankruptcy restrictions order or debt relief restrictions order made by a court in England, Wales or Northern Ireland.

[The Representation of the People Act 1981](#) disqualifies individuals from standing for election if they have been convicted of an offence, have been sentenced to be imprisoned or detained for more than a year and are detained anywhere in the UK, the Republic of Ireland, the Channel Islands or the Isle of Man, or are unlawfully at large.

A person is also disqualified under the [Representation of the People Act 1983](#), if they have been convicted or have been reported guilty of a corrupt or illegal electoral practice or of an offence relating to donations. The disqualification for an illegal practice begins from the date a person has been reported guilty by an election court or convicted and lasts for three years. The disqualification for a corrupt practice begins from the date a person has been reported guilty by an election court or convicted and lasts for five years <sup>7</sup>.

The Bill does not seek to change these disqualifications. This means that foreign nationals standing for election to the Scottish Parliament would be subject to the same bars as those which currently apply to candidates <sup>8</sup>.

## Local government disqualifications

Individuals are disqualified from standing for election to local government in Scotland if:

- they were a councillor prior to the 2007 local council elections and received a severance payment under the [Local Governance \(Scotland\) Act 2004](#);
- they hold a politically restricted post;
- their estate has been sequestrated by a court in Scotland and the individual has not been discharged;
- they have been adjudged bankrupt by a court elsewhere, or are the subject of a bankruptcy restrictions order under either the [Bankruptcy \(Scotland\) Act 2016](#) or the [Insolvency Act 1986](#);
- they have been sentenced to a term of imprisonment of three months or more (including a suspended sentence), without the option of a fine, during the five years before polling day;

- they have been disqualified under the [Representation of the People Act 1983](#) (disqualification for an illegal practice begins from the date a person has been reported guilty by an election court or convicted and lasts for three years; disqualification for a corrupt practice begins from the date a person has been reported guilty by an election court or convicted ,and lasts for five years.)

A person may also be disqualified from election if they have been disqualified from standing for election to a local authority following a decision of the [Standards Commission for Scotland](#) or the [Accounts Commission for Scotland](#).

The Bill does not seek to change these disqualifications. This means that foreign nationals standing for election to local government would be subject to the same bars as those which currently apply to candidates.

## Prisoner voting

The [Representation of the People Act 1983](#) establishes the current legal basis for the disenfranchisement of prisoners in the UK. Section 3 of that Act provides that someone who has been convicted and is detained is legally incapable of voting. The ban applies irrespective of the length of sentence.

People who are held on remand (awaiting trial but not convicted) and people on parole or home detention curfew are able to vote by post or proxy as they are not 'detained'.

These rules apply to all parliamentary elections (to the UK Parliament, the Scottish Parliament, the European Parliament and the Welsh and Northern Ireland Assemblies), and all local government elections.

Under the [Scotland Act 1998 \(Schedule 5, Part II, B3\)](#), the Scottish Parliament did not have the power to change these rules as many aspects of electoral law, including rules on the franchise, were reserved to Westminster.

The [Scotland Act 2016](#) changed this by transferring powers over the franchise for local and Scottish Parliament elections to the Scottish Parliament. This means that the Scottish Parliament can now legislate on prisoner voting for Scottish Parliament and Scottish local government elections.

## Why does the law on prisoner voting need to change?

In 2005, in the case of [Hirst v United Kingdom \(No 2\)](#), the European Court of Human Rights found that the UK's blanket ban on prisoner voting was in breach of [Article 3 of Protocol 1 of the European Convention on Human Rights](#) (ECHR) which requires states to "hold free elections (...) under conditions which will ensure the free expression of the opinion of the people".

“ The court emphasised that electoral legislation differs widely in Europe and that human rights law gives Council of Europe States a wide degree of discretion (known as "margin of appreciation") in setting electoral rules . However, it held that the ban fell outside of any acceptable margin of appreciation as it was a blanket one which applied to all prisoners given a custodial sentence irrespective of length or gravity of the offence. The punishment was therefore not proportionate. Given that different states have addressed prisoner voting in different ways, the Court did not rule on compliance. It left it to the United Kingdom Parliament to determine the means of complying with its judgment. ”

Evans, 2017<sup>9</sup>

In 2012, the UK Government published a draft Bill which set out three options on prisoner voting in UK Westminster Parliamentary and European Parliament elections: the status quo – an outright ban; a ban for prisoners sentenced to 4 years or more, or a ban for prisoners sentenced to more than 6 months.

In December 2013, a Joint House of Lords and House of Commons Committee recommended that the Government introduce a Bill so that all prisoners serving sentences of 12 months or less would be entitled to vote in all UK elections <sup>10</sup> . The Government did not formally respond to the Committee's recommendation and its proposals did not progress to legislation.

The issue was not raised in the Queen's Speech of 2015. In October 2015, in the case of [Thierry Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde](#), the Court of Justice of the European Union, ruled that a French law which deprived certain convicted prisoners of the vote, was not an unlawful breach of the right of EU citizens to vote in elections for the EU Parliament, as protected by the Charter of Fundamental Rights of the European Union.

The judgment also explained that the French law in question was lawful because it was proportionate, which in these circumstances meant that the law took into account “the nature and gravity of the criminal offence committed and the duration of the penalty”.

In December 2015, Michael Gove, then Secretary of State for Justice, indicated that the Government would in 2016 produce a substantive response to the 2013 report by the Joint Committee on the draft voting Eligibility (Prisoners) Bill, after the publication of the consultation on reform of the Human Rights Act 1998. Neither a response to the Committee nor a consultation on the Human Rights Act has yet been published <sup>11</sup> .

“ Hirst (No 2) is regarded by some as an example of the ECtHR overstepping its proper role and encroaching upon Parliament's legislative authority. The judgment has also been criticised by some as an example of the misuse of human rights, in the sense that the ECtHR's interpretation of Article 3 of Protocol No 1 went beyond the drafters' intentions.”

Commons Briefing papers CBP-7461, Prisoners' voting rights: developments since May 2015

In November 2017, then Secretary of State for Justice, David Lidington MP, published proposals for prisoner voting which were more limited in scope than previous proposals. The main change proposed is to allow prisoners on Temporary Licence to vote. In December 2017 the Council of Europe welcomed the proposals, agreeing to them as an acceptable compromise that would address the criticisms raised by Hirst (No 2). The UK Parliament does not need to approve these changes <sup>12</sup> .

In July 2018, the UK Government confirmed in an answer to a Parliamentary question that guidance was recently issued to prison governors in England and Wales to inform them of this policy change. This was accompanied by a leaflet for prisoners informing them of their voting rights <sup>13</sup> .

There have been questions raised over whether the UK Government's policy approach is sufficient, given the lack of legislative change to the principle of law – the Representation of the People Act 1983 – which the ECtHR's ruling was concerned with.

In [a blog published in November 2018](#), Andreas von Staden of the University Hamburg commented on the UK's agreed solution in terms of its 'minimalist compliance'. He argues that the solution "fails to respond adequately to the judgments". In a [UK Constitutional Law Association blog](#) from January 2019, Elizabeth Adams argues that the compromise agreed may be insufficient to prevent further cases that may again question the UK's compliance with ECHR.

The issue of prisoner voting for elections to the Scottish Parliament and for local government elections in Scotland is no longer reserved to the UK Parliament because of the transfer of powers over franchise under Section 3 of the [Scotland Act 2016](#).

The ECHR provides a framework within which the Scottish Government and all other public bodies must act and is given legal force in Scotland through the [Human Rights Act 1998](#) and [the Scotland Act 1998](#).

Under the Human Rights Act 1998, all public authorities in Scotland must act in accordance with the Convention rights (ECHR) in everything they do: this includes private bodies that are carrying out public functions.

The Scotland Act places a specific duty on Scottish Ministers and the Scottish Parliament to act in accordance with the 'Convention rights'. As such, Acts of the Scottish Parliament must be in line with the ECHR. The effect of the Scotland Act 1998 and the Human Rights Act 1998 is that Scots law can be challenged and declared unlawful (struck down) in the Scottish courts if it does not comply with the Convention.

The position for legislation made by the UK Parliament which might be incompatible with Convention rights is different. The Human Rights Act 1998 allows courts to declare Acts of the UK Parliament incompatible with the Convention, but Acts of the UK Parliament cannot be struck down because they breach Convention rights.

A [SPICe briefing on prisoner voting](#) is available.

## **What does the Bill propose on prisoner voting?**

Section 4 of the Bill provides that prisoners serving sentences of 12 months or less have the right to vote by post or proxy (section 7). The Bill enfranchises prisoners serving sentences of under 12 months at both Scottish Parliament and Scottish local government elections.

This right will not extend to people who are convicted and sentenced to consecutive or concurrent terms of imprisonment which, when taken together, exceed 12 months.

The Scottish Government's view is that 12 months is sensible as it "is consistent with the distinction within the Scottish criminal justice system between the sentencing powers of courts of summary jurisdiction and courts of solemn jurisdiction" <sup>14</sup> .

Solemn procedure involves the most serious of criminal cases and may lead to a trial on indictment, either before a judge in the High Court or before a sheriff in one of the sheriff courts. Trials under solemn procedure are conducted with a jury. Summary procedure is used for less serious offences and may lead to a trial before a sheriff or, in justice of the peace courts, before a bench of one or more lay justices. Trials under summary procedure are conducted without a jury <sup>15</sup> .

The presumption against short sentences has been extended from three months to 12 months. In June 2019, [MSPs voted in favour of the extension](#). This extension does not mean that the courts are banned from passing sentences of 12 months or less. Rather, it is in an effort to increase the use of alternatives to incarceration, such as Community Payback Orders. There have been questions over whether this policy sits with the Scottish Government's proposals on enfranchising prisoners on short sentences <sup>16</sup> .

The Scottish Government's position is that "there is no fundamental contradiction between the concept of granting prisoners on short sentences a right to vote and a reduction in the number of prisoners who receive short sentences."

## Scottish Government Consultation

In December 2018, the Scottish Government launched [a consultation on prisoner voting](#). [This followed an inquiry on prisoner voting](#) by the [Equalities and Human Rights Committee](#) of the Scottish Parliament which recommended that all prisoners should have the vote.

The [Scottish Government's consultation on prisoner voting](#) opened on 14 December 2018 and closed on 8 March 2019.

The consultation paper sought views on four options for change:

- Option 1: to link enfranchisement to the length of a prisoner's custodial sentence.
- Option 2: to make disenfranchisement an additional sentencing option, to be applied at the discretion of the sentencing judge.
- Option 3: to link disenfranchisement to the type of crime committed.
- Option 4: to link a prisoner's regaining the right to vote to the length of time remaining on their custodial sentence.

The consultation paper did not include an option to maintain a blanket ban on prisoner voting. The Scottish Government stated that this "is not consistent with the ECHR" <sup>17</sup> . Likewise, options to enfranchise all prisoners were not included. The Scottish Government stating that this "is neither appropriate, nor necessary to ensure compliance with the ECHR. <sup>18</sup> "

The Scottish Government received 265 responses : 35 from groups or organisations and 230 from members of the public: "Respondents to the consultation were split fairly evenly across three main positions" <sup>19</sup> .

28% of respondents thought that voting rights for prisoners should be linked to sentence length (option 1) <sup>20</sup> . Question 1 asked whether voting rights should be linked to a prisoner's length of sentence. Respondents who said that voting rights should not be linked to sentence length included those who thought that all prisoners should have the right to vote, as well as those who thought that no prisoners should have the right to vote <sup>21</sup> .

210 respondents to the consultation answered question 2 which asked "If your answer to Question 1 is 'no', what would be your preferred approach to extending prisoners' voting rights?" <sup>22</sup> . 181 of those 210 respondents had said that they did not feel that voting rights should be linked to sentence length. The 181 respondents fell into two broad categories:

- Around 1 in 2 respondents were of the view that no prisoners should be able to vote. All but one of the respondents to put forward this view were individuals <sup>23</sup> .
- Around 2 in 5 of respondents said that all prisoners should have the right to vote <sup>23</sup> .

Some respondents argued that the Scottish Government's favoured option of linking the right to vote and sentence length was not consistent with a human rights focus.

“ It was also noted that while the ECHR does leave a state wide margin to determine the proportionate disenfranchisement of prisoners, it defines the floor rather than the ceiling of human rights protection. Given this, it was suggested that general human rights principles and international human rights standards (for example around suffrage, inclusion, proportionality and against arbitrariness) should be at the heart of decisions about which approach would be most proportionate and would best protect and promote human rights.”

Prisoner voting consultation: analysis of responses, paragraph 2.9, Scottish Government

The Faculty of Advocates also raised a question as to whether enfranchisement of prisoners on short sentences, when there is a presumption against these, will meet the requirements of ECHR and the ruling of the European Court of Human Rights (ECtHR).

“ While the ECtHR has stated that the margin of appreciation is wide, it has indicated that it has a role to ensure that any limitations do not impair the very essence of the rights, that limitations are imposed in pursuit of a legitimate aim and that they are proportionate (Hirst v United Kingdom (No. 2) (2006) 42 EHRR 41 at §62). The wider the scope of any continuing ban on prisoner voting, the more scope there may be for arguing that it impairs the essence of the right and/or is disproportionate. It has recently been suggested that a strong presumption should be introduced against sentences of less than one year. If the introduction of such a presumption were to mean that an extension of the franchise to prisoners serving sentences of less than a year would have very little practical impact, a colourable argument might be made that such a limited alteration to domestic law would not cure the Convention incompatibility of the current arrangements. ”

Faculty of Advocates, [response to Q4](#) of Scottish Government prisoner voting consultation

The Scottish Government has published [a full analysis of the consultation responses](#).

## Equalities and Human Rights Committee inquiry

In 2017 the Scottish Parliament's [Equalities and Human Rights Committee](#) held an [inquiry into prisoner voting](#).

In its [report](#), published in May 2018, the Committee asked "the Scottish Government to legislate to remove the ban on prisoner voting in its entirety"<sup>24</sup>. Conservative MSPs on the Committee dissented from this view. A number of respondents to the Scottish Government's consultation on prisoner voting noted that the Government's preferred option did not reflect the Committee's recommendation of ending, in its entirety, the ban on prisoner voting<sup>25</sup>.

The report also highlighted that the issue of prisoner voting had been considered ahead of the Scottish independence referendum in 2014.

The Scottish Independence Referendum (Franchise) Bill, followed the UK position and prohibited prisoners from voting in the referendum. Amendments were lodged during Stage 3 of the Bill which aimed to give prisoners the right to vote in the referendum<sup>26</sup>. These amendments were not agreed to.

In 2014 the ban on prisoners voting in the referendum was challenged in the Supreme Court on human rights grounds in the case of [Moohan v The Lord Advocate](#). The challenge was unsuccessful; the court ruled that the Convention rules (Article 3 of Protocol No 1) only cover elections and not referendums.

## Franchise for Shetland by-election

[Section 12](#) of the [Convention Rights \(Compliance\) \(Scotland\) Act 2001](#) allows Scottish Ministers to make a remedial order where necessary or expedient to ensure compatibility with the [European Convention on Human Rights](#) (ECHR).

On 1 August 2019, the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, announced that the Scottish Government would make a Remedial Order to extend the franchise for the Shetland by-election (to be held 29 August 2019).

The Scottish Government's position is that the provision made by the Order is "necessary or expedient in consequence of section 3 of the Representation of the People Act 1983 being incompatible with a Convention right"<sup>27</sup>.

“ The courts have been crystal clear – the blanket ban on prisoner voting is not compliant with the ECHR. Whether people agree with that or oppose it, one thing everyone should agree on is that elections must be compliant with the law. And, unlike the UK Government, who did not rectify this issue for more than a decade, the Scottish Government is legally obliged under the Scotland Act to comply with the ECHR. The timing of the by-election means action must be taken now, on a temporary basis, to ensure Scotland does not breach the ECHR.”

Cabinet Secretary for Government Business and Constitutional Relations , Scottish Government press release, 1 August 2019

[The Representation of the People Act 1983 Remedial \(Scotland\) Order 2019](#) allows prisoners serving sentences of 12 months or less, and who meet the other franchise criteria, to register to vote in the by-election. This is in line with the proposal on prisoner voting in the [Scottish Elections \(Franchise and Representation\) Bill](#).

[Section 3 of the Representation of the People Act 1983](#) disenfranchises convicted persons during the time that they are detained in a penal institution in pursuance of their sentence. The Representation of the People Act 1983 Remedial (Scotland) Order 2019 makes changes to the effect of the law as provided for in section 3 of the Representation of the People Act 1983.

[The Representation of the People Act 1983 Remedial \(Scotland\) Order 2019](#) will be repealed prior to the Parliament debating the issue through the passage of the Scottish Elections (Franchise and Representation) Bill <sup>28</sup> .

# Electoral legislation

Electoral legislation is complex and fragmented with both primary and secondary legislation covering elections. Key legislation is set out below.

## Representation of the People Act 1983

The [Representation of the People Act 1983](#) is the primary piece of election legislation. The Act was a consolidating Act, bringing together the laws governing UK Parliamentary elections and local government elections. Its core provisions set out:

- (1) the franchise for UK Parliamentary and local government elections;
- (2) the infrastructure for registering voters and running elections;
- (3) the regulation of electoral campaigns, and
- (4) the mechanism for challenging elections.

Schedule 1 to the Act contains the detailed rules - election rules - governing the conduct of UK Parliamentary polls and counts. Every other set of election rules, for each particular species of election in the UK, is in secondary legislation.

## Representation of the People Act 1985

The [Representation of the People Act 1985](#) provides for British citizens resident outside of the UK to be “overseas voters”; allows postal and proxy voting for citizens who may not be able to attend a polling station, and modifies the rules on deposits at parliamentary elections.

## Representation of the People Act 2000

The [Representation of the People Act 2000](#) changes electoral procedures in relation to electoral registration and absent voting and allows for experiments involving innovative electoral procedures.

It also makes changes to electoral law to make it easier for people with disabilities to vote and to create an offence of supplying false particulars on a nomination form.

## Political Parties, Elections and Referendums Act 2000

The [Political Parties, Elections and Referendums Act 2000](#) sets out how political parties, elections and referendums are to be regulated in the United Kingdom.

# Devolution of power over elections

The [Scotland Act 1998](#) contains provisions on elections and devolved competence over local government elections.

[Section 11 of the Act](#) provides that the franchise for local government elections in Scotland also applies at Scottish Parliament elections.

[Schedule 5 Head B, Section B3 of the Act](#) reserved legislative competence for UK, Scottish and European parliamentary elections and the franchise at local government elections.

The Act makes provision at Section 2(2) for the timing of ordinary general elections.

Under the Act an extraordinary general election of the Parliament can be held in two instances:

- When the Parliament, with a two-thirds majority, agreed to its dissolution.
- When a First Minister is not nominated within the allowed time frame.

[The Scotland Act 2012](#) transferred some executive competence relating to the administration of Scottish Parliament elections to Scottish Ministers at Section 1. Ministerial competence was shared with the UK Government for Scottish Parliament elections.

The [Smith Commission report](#), published on 27 November 2014, recommended near complete legislative competence for the Scottish Parliament over its own elections (further detail is available in the [Devolution of Powers: The Smith Commission section](#) of this briefing).

[The Scotland Act 2016](#) devolved powers over elections and the franchise for local government elections to the Scottish Parliament.

Sections 3 to 10 of the 2016 Act transfers powers in relation to elections to the Scottish Parliament and the franchise for local government elections. The relevant sections came into force on 18 May 2017 by [The Scotland Act 2016 \(Commencement No 6\) Regulations 2017](#).

Elections to the House of Commons and to the European Parliament remain a specific reservation under Schedule 5, Head B, of the Scotland Act 1998.

## Devolution of powers: The Smith Commission

The [Smith Commission report](#) published on 27 November 2014 recommended near complete legislative competence for the Scottish Parliament over its own elections.

The [Heads of Agreement Pillar 1](#) outlined that:

“The Scottish Parliament will have all powers in relation to elections to the Scottish Parliament and local government elections in Scotland (but not in relation to Westminster or European elections). This will include powers in relation to campaign spending limits and periods and party-political broadcasts. The Scottish Parliament already has many of these powers in relation to local government elections in Scotland.”

The Heads of Agreement did contain reservations to the devolution of powers over elections:

- The Scottish Parliament will have no powers over the regulation of political parties (including donations).

- The Electoral Commission will continue to operate on a UK-wide basis. The Scottish Parliament will have competence over the functions of the Electoral Commission in relation to Scottish Parliament elections and local government elections in Scotland. The Electoral Commission will report to the UK Parliament in relation to UK and European elections and to the Scottish Parliament in relation to Scottish Parliament and local government elections in Scotland.
- The Boundary Commission for Scotland will continue to operate as a UK public body. It will report to the Scottish Parliament in relation to boundary reviews for the Scottish Parliament. UK Government powers in relation to Scottish Parliament boundaries will transfer to the Scottish Government.
- UK legislation will prevent the Scottish Parliament deciding that general elections should be held on the same day as general elections to the UK Parliament, European Parliament or local government elections in Scotland.
- UK legislation will give the Scottish Parliament powers to make decisions about all matters relating to the arrangements and operations of the Scottish Parliament and Scottish Government, including:
  - Powers over the overall number of MSPs or the number of constituency and list MSPs.
  - Powers over the disqualification of MSPs from membership and the circumstances in which a sitting MSP can be removed.
  - Super-majority for legislation on Scottish Parliament franchise, electoral system and membership.
- To provide an adequate check on Scottish Parliament legislation changing the franchise, the electoral system or the number of constituency and regional members for the Scottish Parliament, UK legislation will require such legislation to be passed by a two-thirds majority of the Scottish Parliament.

# Joint project on electoral law by the Law Commissions

In 2014, a joint project on electoral law was undertaken by the Scottish Law Commission, the Law Commission for England and Wales and the Northern Ireland Law Commission. The project was to review electoral law in the UK. A [joint consultation paper](#) was published in December 2014 with an [interim report](#) published in February 2016.

The main recommendation of the interim report was the formulation of a draft UK Bill promoting a new general framework which could be adopted for all elections and referendums. The Commission has stated that “the intention was that the Bill would serve as a possible template for the devolved legislatures to adapt and adopt if they so wished”.

The Scotland Act 2016 devolved powers over elections to the the Scottish Parliament. The Scottish Government indicated in December 2017 that it would consider the matter of electoral law in Scotland (more information is available in the [Background to the Bill section of this briefing](#)).

Towards the end of 2017, the UK Cabinet Office asked the Law Commission for England and Wales to take forward the next stage of the project by drafting secondary legislation to reform the conduct rules of local elections and local referendums in England and Police and Crime Commissioner elections in England and Wales.

## Developments at UK Parliament

The [House of Commons Public Administration and Constitutional Affairs Committee](#) is conducting an [Electoral Law inquiry](#).

The inquiry is considering "how urgent electoral reform is; what should be prioritised, and whether there is a need to go beyond the Law Commission's proposals? <sup>29</sup> "

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