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# Scottish General Election (Coronavirus) Bill

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The [Scottish General Election \(Coronavirus\) Bill](#) was introduced in Parliament on 16 November 2020. The Bill makes arrangements for the 2021 Scottish Parliament election which the Scottish Government believes are necessary, or may become necessary, because of the coronavirus (COVID-19) public health emergency.



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# Executive Summary

The [Scottish General Election \(Coronavirus\) Bill](#) was introduced on 16 November 2020 in light of the public health emergency created by the coronavirus (COVID-19) pandemic. It is understood that the Bill will be considered by the Parliament on an accelerated timetable.

The need for the accelerated timetable reflects the fact that electoral administrators require as much notice as possible of any legislation which affects an election. The [Gould Report](#) which investigated the issues that arose in the 2007 Scottish Parliament and local government elections concluded that electoral legislation should not be applied to any election held within six months of the new provision coming into force <sup>1</sup>.

The Bill seeks to make arrangements so that the general election to the Scottish Parliament can be held on Thursday 6 May 2021 as scheduled in spite of the coronavirus (COVID-19) public health emergency. The Bill does not seek to make long-term changes to electoral law.

“ The provisions in the Bill are a dedicated response to the coronavirus pandemic and do not seek to make any permanent changes to electoral law. ”

[Scottish Government Policy Memorandum](#), paragraph 4

Given that the impact of the coronavirus pandemic on how things may stand in May 2021 is not yet known, the Bill contains a number of provisions which may not be required.

The key provisions in the Bill provide for the following:

- bringing forward the deadline for postal vote applications;
- giving a power to Scottish Ministers so that they may provide, by regulations, for an all-postal election to be held;
- changing the dissolution date of the Scottish Parliament to 5 May 2021, or the day immediately before any delayed poll;
- allowing Scottish Ministers to make regulations to hold polling over multiple days;
- making arrangements for the first meeting of the new Parliament and the election of a new Presiding Officer;
- giving a power to the Presiding Officer of the Scottish Parliament to postpone the 2021 election by up to 6 months in certain circumstances and allow for the same measures as set out above to apply if the election is postponed.

The Bill reflects likely virus circumstances and the resulting restrictions on individuals at the time of the election. The Bill therefore makes provisions for a poll to be conducted whilst maintaining a physical distance (i.e. what is commonly referred to as social distancing) and the possibility of a poll being delayed because of virus conditions (for example in the event of a national lock-down). The Bill also provides a power for Ministers to hold an all-postal voter election.

Planning for the 2021 election has been undertaken by the Scottish Government in conjunction with electoral administrators, the Electoral Commission, officials of the Scottish

Parliament and representatives of each political party currently represented at the Scottish Parliament. It can be reasonably assumed that this inclusive planning should be reflected in the provisions of this Bill.

“ This planning has been carried out in conjunction with the EMB, the Electoral Commission, Scottish Parliament officials and representatives of each political party represented in the Scottish Parliament. ”

[Scottish Government Policy Memorandum](#), paragraph 10

The [Scottish General Election \(Coronavirus\) Bill](#) does not negate the need for the Scottish Government to prepare the Conduct Order for the election. A Conduct Order sets out the rules for holding an election and can address matters, such as proxy voting, which do not require primary legislation. A draft of [The Scottish Parliament \(Elections etc.\) \(Miscellaneous Amendments\) Order 2020](#) has been laid before the Parliament

“ The Government is also preparing the normal Conduct Order for the Scottish Parliament election in 2021, setting out rules for holding the election. The Order will include provisions for emergency proxies for those who are following Government guidelines and therefore will not be able to vote in person. They will not be required to provide attestation as is the case for other types of proxy.”

[Scottish Government Policy Memorandum](#), paragraph 7

The Electoral Commission has published [objectives for well-run elections in the current public health context](#). These are a set of high-level objectives for delivering successful elections given the coronavirus (COVID-19) pandemic. The Electoral Commission will use these objectives to:

- assess and test policy options and implementation approaches;
- identify and manage significant risks to successful delivery of the elections;
- inform research, analysis and reporting on the polls.

The objectives state that:

“ Voters should be able to participate in the polls safely and confidently, and campaigners and parties should be able to put their case to the electorate.”

The Electoral Commission, objectives for well-run elections

# Why is the Bill needed?

The schedule of ordinary general elections to the Scottish Parliament is provided for by the Scotland Act 1998. Section 2(2) of the Scotland Act 1998 as amended provides that general elections to the Scottish Parliament be held every fifth year<sup>i</sup>.

Scottish Ministers have powers under [section 12 of the Scotland Act 1998](#) to make provision by Order as to the conduct of elections for membership of the Scottish Parliament. These 'Conduct Orders' set the rules for the campaign and the poll and by so doing deal with an array of technical and administrative issues from proxy voting to the appointment of election agents.

This combination means that for most ordinary general elections to the Scottish Parliament further primary legislation is not required.

Given the coronavirus (COVID-19) pandemic, however, primary legislation is required to make provision for certain matters deemed necessary by the Scottish Government for the 2021 election, including, for example, disapplying sections of the Scotland Act which provide for dissolution.

Although Scottish Ministers could have addressed certain matters provided for in the Bill (for example, changing the deadline for postal vote applications) through an Order (made under Section 12 of the Scotland Act 1998), the decision has been made to also provide for these in the Scottish General Election (Coronavirus) Bill. The Bill does, however, propose that these regulations be subject to no parliamentary procedure. Such instruments are also known as 'laid only' as while they are laid before the Parliament for technical scrutiny after they are made, the Parliament cannot reject them. Regulations can also be subject to the negative (those which can be made and brought into force but which the Parliament can annul by a vote in the Chamber); affirmative (those which must be approved by a vote in the Chamber before they can be made); or made affirmative procedure (those which can be made and come into force straight away but which require subsequent approval by the Parliament to remain in force)<sup>ii</sup>. Ministers' powers to make provision under section 12 of the Scotland Act 1998 are subject to the affirmative procedure<sup>2</sup>.

Nevertheless, the introduction of a Bill arguably provides greater transparency around the planning for the election and gives the Parliament the opportunity to debate the package of measures being suggested in the round.

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i Under the Scotland Act 1998 a general election to the Scottish Parliament was to be held every four years, but the [Scottish \(Elections\) Reform Act 2020](#), passed by the Parliament on 3 June 2020, amended the Scotland Act to provide that general elections to the Scottish Parliament be held every fifth year. This means that MSPs elected in the anticipated 2021 election will serve a five year term.

ii More detail on Scottish Statutory Instruments is available on the Scottish Parliament's [Delegated Powers and Law Reform Committee webpage](#).

“ The purpose of this section is to clarify that the Scottish Ministers’ existing power to make provision about the conduct of elections in section 12 of the Scotland Act 1998 is unaffected by this Act (as sections 3 and 5 provide for things that provision made under section 12 of the 1998 Act could already do, but without the requirement for affirmative Parliamentary procedure, in order to allow for greater urgency in responding to pandemic conditions). ”

[Explanatory Notes](#), paragraph 43

# Key provisions in the Bill

The Scottish Government has stated that its aim is to ensure the election is held on 6 May 2021 as scheduled if virus conditions allow. Its plan is to facilitate in-person voting (i.e. polling places) with social distancing and increased postal voting.

“ The Government’s overall aim is to ensure that the election will be held as planned on 6 May 2021 with ‘in-person’ voting supported by appropriate physical distancing measures and a substantial increase in numbers of people voting by post. ”

[Policy Memorandum](#), paragraph 6

The Bill contains provisions which the Scottish Government believes are necessary or may become necessary in order to hold the election. The key provisions in the Bill:

- bring forward the deadline for postal vote applications;
- give a power to Scottish Ministers so that they may provide, by regulations (not subject to Parliamentary procedure), for an all-postal election to be held;
- change the dissolution date of the Scottish Parliament to 5 May 2021, or the day immediately before any delayed poll;
- allow Scottish Ministers to make regulations (not subject to Parliamentary procedure) to hold polling over multiple days;
- make arrangements for the first meeting of the new Parliament and the election of a new Presiding Officer;
- give a power to the Presiding Officer of the Scottish Parliament to postpone the 2021 election by up to 6 months in certain circumstances and allow for the same measures as set out above to apply if the election is postponed.

In its Policy Memorandum, the Scottish Government set out why the election might be postponed:

“ If reversion nationally or locally to a “lockdown” involved conditions that made in-person voting at polling places unsafe for all, or a significant proportion of the electorate had not applied for postal or proxy votes, it may be considered necessary to postpone the election. ”

[Policy Memorandum](#), paragraph 12

## Postal vote deadline

The Bill proposes to bring the postal vote application deadline forward to 5pm on 6 April 2021 (21 working days prior to the election). Section 3 of the Bill provides for this change.

At present, individuals wanting to apply for a postal vote for the election to the Scottish Parliament scheduled for 6 May 2021 would need to apply by 5pm on 20 April 2021 - 11 working days prior to the poll (not including the May Day holiday). This deadline is set out in the [Scottish Parliament \(Elections etc.\) Order 2015](#). This is the Conduct Order which provides for the rules of the poll. A draft of [the Scottish Parliament \(Elections etc.\)](#)

[\(Miscellaneous Amendments\) Order 2020](#) which amends certain aspects of the 2015 Order has been laid before the Parliament.

It is anticipated that the number of voters applying for a postal vote ahead of the 2021 election will rise significantly in light of the coronavirus (COVID-19) pandemic. Research conducted by the Electoral Commission in August 2020 on '[Public attitudes towards voting in Scotland in the context of COVID-19](#)' found that 20% of those people who usually vote at a polling place would prefer to vote by post. The research states that:

“ for context if this did happen it would mean approximately 350,000 people who would have voted at a polling station opting to vote by post.”

[Public attitudes towards voting in Scotland in the context of COVID-19](#), the Electoral Commission, August 2020

Postal votes have been rising steadily in recent years with 18% at the 2016 Scottish Parliament election and the 2019 UK general election <sup>3</sup> . At the 2016 Scottish Parliament election postal votes accounted for around 23.7% of all votes cast <sup>4</sup> .

All individuals who are eligible to vote are [able to apply for a postal vote](#). An individual who is granted a postal vote is able to apply to have this on an ongoing basis for elections so that they need not apply at each electoral event.

Postal vote applications take time to process. They have to be checked to ensure that the requests are genuine, for example, to uphold the integrity of a poll. In order for this processing to take place, a deadline for postal vote applications is set prior to any electoral event.

New postal vote applications tend to be received close to the deadline for applications ahead of any electoral event. This is a challenge for electoral administrators who are required to process and validate applications in time for ballot papers to be issued. The Policy Memorandum notes that ahead of the 2014 referendum on Scottish independence 50% of new applications for postal votes 'arrived in the last few weeks with a peak on the final day'. These applications for a postal vote represented under 3% of electors at the 2014 referendum <sup>5</sup> . The Scottish Government notes that ahead of the 2021 election there could be a 20% increase in those requesting postal votes <sup>6</sup> .

With such a potential increase in the number of electors applying for postal votes, electoral administrators have raised concerns that they simply would not be able to process all applications if the postal vote application deadline was left as 11 working days prior to the election. As such, the Bill proposes to bring the deadline forward to give electoral administrators sufficient time to process all applications received by the deadline.

“ The EMB, EROs, ROs and the Electoral Commission have indicated that it will not be possible to process an increase of that magnitude in time for the election if the application deadline remains at 20 April. ”

[Policy Memorandum](#), paragraph 17

Section 3(5) of the Bill provides Ministers with the power to amend the deadline for the 2021 election further. However, the power can only be exercised where regulations would move the postal vote application deadline closer to polling day. Such regulations are not subject to Parliamentary procedure.

Section 4 of the Bill requires Ministers to prepare a report and lay it before the Parliament on the uptake of postal voting as at 7 April 2021 (i.e. the day after the new deadline).

Ministers must report to Parliament on this as soon as reasonably practicable after 7 April 2021 and, it is anticipated, ahead of the election. The Bill provides that Ministers must report on:

- the percentage of the total number of persons entitled to vote at the 2021 election who have been granted a postal vote for the election, and
- the number of pending applications for a postal vote for the election.

## All-postal election

Section 5 of the Bill gives Ministers powers to provide for an all-postal election by regulation. The section 5 power is not subject to parliamentary procedure.

Section 5 appears to be a contingency provision should the election not be able to be held in May 2021 as planned and if virus conditions prevented mixed voting (i.e. in person voting at polling places and the usual availability of postal votes and proxy voting) at a delayed election. A delay to the election would, however, require the Parliament to pass further primary legislation or the Presiding Officer to exercise his power provided by section 11(1) of the Bill. For further explanation on this see [dissolution of the Scottish Parliament and power of the Presiding Officer](#).

The Scottish Government has indicated that it does not intend to use the section 5 power for an election on 6 May 2021. Rather, it could be exercised if virus conditions prevent the poll from being held in May 2021 and voting in person at a postponed election is deemed not possible because of coronavirus (COVID-19). It is unclear as to whether this provision could be used, and if it could whether it would be administratively possible, to provide for an all-postal ballot in one area for an election on 6 May 2021 if virus conditions made in-person polling unsafe.

If Ministers wish to exercise the section 5 power they first have to consult the Parliament's Presiding Officer, the Electoral Commission, the convener of the Electoral Management Board for Scotland (EMB) and the Chief Medical Officer of the Scottish Administration. It is unclear what the consultation requirements are and there is no indication of whether responses from the Presiding Officer, Electoral Commission, the EMB, and the Chief Medical Officer would be made public.

“ The power is not subject to Parliamentary procedure as a result of the potential need to respond very swiftly to the impact of the coronavirus pandemic on the election, at a time when Parliament may be in recess.”

[Policy Memorandum](#), paragraph 21

Ministers would be able to use the power under section 5 to amend any enactment, including section 3(2) and section 3(3) of the Bill. They would not be able to use the power to amend any other provision in this legislation. Sections 3(2) and 3(3) are concerned with the postal vote deadline being 21 days prior to the 2021 election.

A move to an all-postal vote election would "necessitate a delay of at least six months"<sup>7</sup>. As outlined above, a delay to the election would require the Parliament to pass further primary legislation or the Presiding Officer to exercise his power provided by section 11(1) of the Bill if the Parliament could not meet because of coronavirus.

“ Although powers under section 12 of the 1998 Act allow Scottish Ministers to make provision by statutory instrument (if approved by affirmative procedure) in relation to the conduct of Scottish Parliament elections, including provision on an all-postal ballot (and moving the deadline for postal vote applications) in the Bill assists the Parliament in considering these issues and allows for dedicated arrangements to be made, such as the requirement for Scottish Ministers to consult in arranging an all-postal vote and the ability to reduce the deadline without Parliamentary approval being needed. ”

[Policy Memorandum](#), paragraph 47

There are a number of concerns about all-postal vote elections. Research conducted by the Electoral Commission in August 2020 found that for the majority (54%) of Scottish voters who planned to vote at the next election, the preferred method of voting was at a polling place with appropriate hygiene measures <sup>8</sup>. The same research indicated that 38% would prefer to vote by post and 1% by proxy. Although this research provides a snapshot in time and cannot be used to accurately predict voter behaviour at the election planned for May 2021, it does provide a helpful insight into how Scottish voters feel about the method by which they cast their vote.

In addition, the Electoral Commission has previously advised against all-postal vote polls as it is best for voters to have a choice in the manner by which they vote <sup>9</sup>.

“ Our position, following evaluation of the 2004 pilot schemes, is that all-postal voting does not offer an appropriate level of choice.”

The Electoral Commission Delivering Democracy? The future of postal voting, 2004

There is also the likelihood that a significant number of voters would fail to return postal vote application forms in the event of an all-postal election, essentially disenfranchising themselves. The Policy Memorandum notes that this could risk the disenfranchisement of up to 1.5 million electors.

“ Based on average return rates across Scotland for Invitations to Register and Household Enquiry Forms the EMB has identified a risk that between 646,000-1.5 million forms would not be returned, effectively disenfranchising those voters. ”

[Policy Memorandum](#), paragraph 47

There is, nevertheless, evidence in favour of all-postal voting. Dr Toby James, Head of Politics at the University of East Anglia, has highlighted the positive effect that postal voting can have on turnout <sup>10</sup>.

“ Robust evidence repeatedly shows that making it easier for citizens to cast their vote can lead to small, but significant increases in voter turnout. Advance voting, where citizens can vote before the usual day of the poll, is especially popular with young people. Holding the election at a weekend or on a public holiday could also make a difference. It is worth noting that the UK has undertaken pilots with some of these innovations. One lesson from these pilots, drawn from my evaluation, was that it was actually all-postal elections that had the biggest effect on turnout. This involved sending a postal vote to citizens automatically instead of asking them to go to the polling station. In the first year of pilots (2000), all-postal voting took place in wards in seven local authorities, and turnout rose in every instance on the previous year. In Gateshead, turnout jumped up from 26.4% in 1999 to 57.3% with all-postal elections. If increasing turnout is the aim, then all-postal elections should be considered.”

The [Policy Memorandum](#) details (at paragraphs 46 and 47) some of the challenges identified by the Scottish Government if an all-postal election were to be held. This includes the administrative impact of an all-postal vote poll. Although further legislation could negate the need for electors to apply for a postal vote, instead allowing returning officers to send ballots to all electors, this would bypass the signature verification stage which is a part of the application process - the result being a significantly increased risk of fraud.

As such, if an all-postal vote election were to be held, all electors would need to be provided with a postal voter application form and follow up reminders to apply thereby engaging the signature verification process and protecting the poll from potential fraud. Although a protection from fraud this process does risk disenfranchisement of electors who fail to return their postal voter application form.

“ An all-postal election would therefore require every registered elector to complete and return a postal vote application form. EROs would have to write to the approximately 3.4 million electors who currently do not have a postal vote requesting that they complete and return a form (followed up by two reminders as is currently done for Invitations to Register and Household Enquiry Forms).”

[Policy Memorandum](#), paragraph 46

Postal voting also creates other challenges for both electoral administrators and electors. Writing for [SPICe spotlight on the possible impact of COVID-19 on the 2021 election](#), Dr Alistair Clark, Reader in Politics at Newcastle University explained that:

“ Around 3% of postal votes were rejected at the 2016 Scottish Parliament election because they failed to meet the security requirements (in place to ensure the integrity of the poll) prior to being opened. These can be issues such as mismatches with identifiers and failures to provide complete information. This could be a vital factor in an election with a substantially increased number of postal votes. Postal voting also raises other challenges, like getting replacement ballot papers out in time if needed and ensuring that individuals are clear on when they must send back their ballot paper for it to be counted.”

The [Electoral Commission's report of the 2016 Scottish Parliament election](#) highlights that across Scotland postal votes were unable to be counted because they were returned after the close of poll.

“ ROs [Returning Officers] also reported that they received 1,538 postal votes after the close of poll, which averaged 21 across the constituencies. It is regrettable that despite the use of the postal votes sweep service provided by Royal Mail by all of Scotland's ROs postal voters have returned votes too late or placed the postal vote pack in the post box after the sweep.”

Electoral Commission report of the 2016 Scottish Parliament election, paragraph 3.54

The coronavirus (COVID-19) global pandemic may necessitate some difficult decisions being taken around the manner in which the 2021 election is held. Finding the balance between the desire to hold an election with the need to balance the interests of electors in terms of their preferred method of voting and ensuring they are able to vote as easily as possible is a challenge. Adding to that challenge would be the administrative complexities of an all-postal ballot, including the security requirements needed to maintain the integrity of the poll and confidence in the result.

# Dissolution of the Scottish Parliament and power of the Presiding Officer

Sections 6 and 7 of the Bill are concerned with dissolution.

Dissolution is the official term for the end of a parliamentary session. It occurs before elections to the Scottish Parliament take place<sup>iii</sup>. The [Scotland Act 1998](#) provides that, in advance of an ordinary general election the Scottish Parliament will be dissolved. Dissolution usually takes place around six weeks ahead of an election.

The Bill seeks to do one key thing in relation to dissolution - it moves it to the day immediately before polling day. This change to dissolution is in response to the possibility that the Parliament will need to consider legislation to delay the election if virus conditions are such that holding a poll on 6 May 2021 would be unsafe.

It is to be presumed that a poll may also require to be delayed if there is the potential for it to be deemed to be unfair and therefore the result questioned. There is this potential if, for example, the poll in one area could be unduly influenced because it was unable to vote because of local restrictions and other areas were allowed to go ahead with polling and declare results. In these circumstances it is unclear as to whether the poll in its entirety would be delayed, or within what parameters that decision would be made.

The change is needed because at dissolution Members of the Scottish Parliament cease to be MSPs. Section 13 of the Scotland Act 1998 provides that an MSP's term of office ends with dissolution of the Parliament. The result is that after dissolution the Parliament cannot be re-called. Rather, a new Parliament must be elected.

“ The term of office of a member of the Parliament begins on the day on which the member is declared to be returned and ends with the dissolution of the Parliament. ”

The Scotland Act 1998

The Bill anticipates that rather than the Parliament being dissolved on 25 March 2021, it will go into recess until the day prior to the election<sup>11</sup>. This would need to be approved by the Parliament agreeing a motion on the recess and is entirely a matter for the Parliament<sup>iv</sup>. If the election does not go ahead as scheduled on 6 May 2021 then it is envisaged that the Parliament will continue to sit, or in the event that it is already in recess, that the recess will end and the Parliament will resume sitting as usual.

“ It is anticipated that the Parliament will vote to go into recess on or around 25 March 2021 (the date previously set for dissolution) and remain in recess unless and until there is a need to meet in emergency session (e.g. to postpone the election).”

[Policy Memorandum](#), paragraph 25

In the first instance, the Bill assumes that the election will take place on 6 May 2021 as scheduled and makes provision to move dissolution to 5 May 2021 (section 6(1)). If the

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iii The terms 'dissolution period' and 'pre-election period' are sometimes used to describe the period before an election when Parliament has been dissolved and there are restrictions in place on the activities of government in terms of publications and announcements. It is expected that during the pre-election period Ministers will carry out only essential government business and not make any major policy decisions or announcements. The Scottish Government remains responsible for governing during the pre-election period and the First Minister and other Ministers remain in office until a new First Minister and Ministers are appointed. Historically the term 'purdah' was used to describe this period.

iv [Standing Orders of the Scottish Parliament](#), Rule 2.3

poll cannot be held on 6 May 2021 it is the Government's intention, as highlighted above, that the Parliament will consider primary legislation to provide for a delay.

The Bill does, however, build in a contingency around a delayed poll and dissolution in circumstances where the Parliament cannot sit to consider primary legislation because of coronavirus (COVID-19).

“ at the time of the introduction of this Bill, the possibility exists that, once Parliament dissolves, there is a spike or surge of coronavirus infections that could potentially endanger the general election being safely held on 6 May...The purpose of this section [section 6] is to provide a kind of insurance policy against that situation occurring by making the dissolution period last only one day”

[Explanatory Notes](#), paragraphs 19-20

Section 11 of the Bill provides the Presiding Officer with a power to propose to Her Majesty that the date of the poll is postponed if he *"considers it necessary or appropriate for any reason to do so"*. The reason for the delay does not have to be coronavirus. In the event that the delay is proposed due to coronavirus section 11(3) provides that the Presiding Officer must be satisfied that the Parliament could not safely meet to pass primary legislation to change the date of the poll.

This power extends only to fixing a day for the poll which is after 6 May 2021. If the Presiding Officer exercises this power, the poll must be rescheduled to be held on the earliest practicable day. It cannot, however, be used to fix a poll for a date after 5 November 2021.

If the Presiding Officer exercises his section 11(1) power to move the date of the poll, the date of dissolution moves to the day immediately before polling day (section 11(8)). In the event that the power is exercised again, section 11(9) provides that the date for dissolution likewise moves and is again the day immediately prior to polling day.

There is no limit on the number of times that the Presiding Officer is able to exercise this power.

If the Presiding Officer plans to exercise the section 11(1) power he must first consult:

- Scottish Ministers;
- the Electoral Commission;
- the convener of the Electoral Management Board for Scotland; and
- the Chief Medical Officer of the Scottish Administration.

Under section 2(5) of the Scotland Act 1998 the Presiding Officer of the Scottish Parliament has the power to propose to Her Majesty a new date for the poll at a Scottish Parliament election which is not more than one month before or after the first Thursday in May. This power has always been exercisable if the Parliament has not yet been dissolved. Section 3 of the [Scottish Elections \(Reform\) Act 2020](#) amends the Scotland Act 1998 to provide that the Presiding Officer is also able to exercise the section 2 power to propose a new date for a general election to the Scottish Parliament if the Parliament is already dissolved. Section 2 of the Bill disapplies these provisions in the Scotland Act in relation to the 2021 election.

## Implications of waiving dissolution

Dissolution usually occurs around six weeks prior to the election. For example, session four of the Parliament ended at midnight on 23 March 2016 and dissolution began immediately after that on 24 March 2016.

[Section 2\(3\) of the Scotland Act 1998](#) provides that dissolution occurs at the beginning of the 'minimum period' and that the 'minimum period' ends on the day of the poll. For the purpose of calculating the minimum period days weekends and certain holidays are not counted<sup>v</sup>. Scottish Ministers are able to set the 'minimum period' by an Order made under [section 12\(1\)](#) of the same Act. The minimum period set in the 2015 Order was 28 days. This is provided for by [article 84 of the Scottish Parliament \(Elections etc.\) Order 2015](#). In line with this time frame, the session five Parliament would be dissolved on 25 March 2020. A draft of [The Scottish Parliament \(Elections etc.\) \(Miscellaneous Amendments\) Order 2020](#) is available. The draft 2020 Order makes some changes to the 2015 Order, but not in relation to the minimum period.

If the approach proposed in the Bill is adopted, it means that MSPs will continue to be MSPs until the day immediately before the day of the poll.

Usually, during dissolution, MSPs are not able to use any parliamentary facilities or resources and they and their staff only have the same access to the Scottish Parliament building as members of the public. Constituency or regional offices are allowed to remain open but only to deal with on-going casework (work which was started on behalf of constituents prior to dissolution). These measures are put in place to ensure that all candidates are treated equally and that candidates who were MSPs or the staff of MSPs before dissolution are not given any advantage over others.

The Scottish Parliament issues [guidance](#) for MSPs and their staff ahead of dissolution. If the Parliament goes into recess rather than dissolution ahead of the 2021 election, revised guidance will need to be issued by the Scottish Parliament and matters such as the ability of sitting MSPs taking on new casework will need to be addressed.

Session five MSPs seeking re-election will, however, hold dual status - as MSP and candidate - from 25 March 2021 until 4 May 2021 (see [section on Candidates](#) for explanation). Given that MSPs are subject to the [Code of Conduct](#), any complaint made about an MSP found to be using parliamentary resources or privileges inappropriately in advance of polling day could be considered by the new Parliament. This would apply equally to MSPs who are returned and those who are not.

The proposal not to have a dissolution period also has significant resource implication for the Parliament, particularly in terms of MSPs' salary and staff costs. The Financial Memorandum sets out the associated costs if the election were to be held as scheduled on 6 May 2021<sup>12</sup>. MSPs not standing for re-election usually cease to be paid at dissolution. Not having dissolution means that they and their staff will continue to be paid for an additional period of time. 27 MSPs are known to be standing down at the 2021 election. The Financial Memorandum therefore sets out the costs associated with their continued salary (including pension and ERNIC) as £264,523. For the staff of the 27 MSPs the maximum additional cost is estimated as £343,740. The Financial Memorandum does not

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<sup>v</sup> As provided for in Rule 2 of the Scottish Parliamentary Election Rules (computation of time), Schedule 2 The Scottish Parliament (Elections etc.) Order 2015

provide costs associated with these continuing salaries should the election be delayed further, or on multiple occasions.

## Candidates

People standing for election to the Scottish Parliament usually become candidates in legal terms on the [dissolution of the Parliament](#). Given the proposed changes to dissolution, this link between candidacy and dissolution requires to be changed.

Section 7 of the Bill amends the Scottish Parliament (Elections etc.) Order 2015 (in which those standing for election became candidates on dissolution) to provide that those standing for election become candidates 28 working days prior to polling day.

Paragraph 22 of the Explanatory Notes explains that candidates will remain candidates (unless they are deselected or resign) from 25 March 2021 until the date of the poll. This is whether the poll takes place on 25 March 2021 or is delayed.

## The regulated period

Ahead of an election in the UK there is a 'regulated period'. This is provided for by the [Political Parties, Elections and Referendums Act 2000](#). During this regulated period certain rules on campaigning and spending apply.

The Bill does not make direct provision about campaigning and campaign expenditure. However, section 7(2) does have an impact on the regulated period.

There are, in effect, two regulated periods for candidates contesting seats at the Scottish Parliament, known as the 'long campaign' and the 'short campaign'. Separate spending limits apply in each of these periods.

The long campaign period is the period during which pre-candidacy election expenses are regulated. For ordinary general elections to the Scottish Parliament this long campaign starts four months prior to polling day<sup>vi</sup>. As the Explanatory Notes (paragraph 24) to the Bill highlight, the long campaign will commence on 6 January 2021.

The short campaign period is the period when a candidate's election expenses are regulated. This period begins on the day a person legally becomes a candidate. Section 7(2) of the Bill (see [section on Candidates](#) for explanation) means that the short campaign is expected to begin on 26 March 2021.

It is unclear what would happen to campaign spending in the event that the poll was delayed. The Policy Memorandum notes at paragraph 38 that the Scottish Government is in discussions with the Electoral Commission about arrangements for campaign expenditure in the event of a delay to the 2021 poll.

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vi Political Parties, Elections and Referendums Act 2000, Schedule 9 Part II paragraph 5(4)

“ The regulated period is split into the “long” and “short” campaigns, each having different rules for the recording of expenditure for the purposes of returns that require to be submitted to the Electoral Commission. The long campaign will commence on 6 January 2021. The short campaign commences the day after a person becomes a candidate – by the operation of subsection (2) of section 7 of the Bill, the short campaign is expected to commence on 26 March 2021. ”

[Explanatory Notes](#), paragraph 24

## Multiple day poll

Section 8 of the Bill provides Ministers with the power to make regulations to allow for polling over multiple days at the 2021 election. The provision recognises that in-person voting may take longer with social distancing requirements.

Regulations made using the section 8 power are not subject to Parliamentary procedure - known as '[laid only](#)'.

Before making regulations under section 8(1) Ministers must consult:

- the Presiding Officer;
- the Electoral Commission;
- the convener of the Electoral Management Board for Scotland; and
- the Chief Medical Officer of the Scottish Administration.

As with consultation requirements under section 5 of the Bill, it is unclear what the consultation requirements are before Ministers exercise the section 8 power to make regulations. It is also unclear as to whether the responses of those required to be consulted will be made public.

“ The purpose of this provision is to allow for the possibility that in-person voting will take longer than normal due to the potential imposition of physical distancing measures to protect against the transmission of coronavirus. ”

[Explanatory Notes](#), paragraph 27

The first day of the poll must be polling day. Polling day being 6 May 2021 or the date fixed as the date of the 2021 election if the Presiding Officer exercises his power under section 11 of the Bill. Section 8(3) of the Bill specifies this.

Voting must start on polling day, but could be extended to allow polling over multiple days. These additional voting days can only be in the 8 days immediately following on from polling day. They do not, however, require to be successive days. This is provided for by section 8(2) of the Bill. It could, for example, be that polling is allowed on 3 days across the 9 day period.

“ A day may be specified only if it is one of the 8 days immediately succeeding the day of the poll (but there is no requirement for it to be consecutive to the day of the poll or any other day so specified).”

[Scottish General Election \(Coronavirus\) Bill](#), Section 8(2)

The Bill provides that it is the date fixed for polling day which is relevant in terms of calculating an individual's eligibility to vote. For example, an individual would have to be 16 by polling day to be eligible to vote. Therefore, if a voter's 16th birthday was the day after polling day and polling was taking place across four days they would not be entitled to vote.

Sub-section 4 provides that regulations can specify particular days or times on particular days when particular categories of electors may vote. This would allow Ministers to set specific days and/or times on which, for example, only people in a particular age group could vote.

There are other factors which may also have an impact on how quickly people are able to vote in person. There may, for example, need to be additional hygiene measures in place to ensure that hard surfaces are regularly sanitised.

## First meeting of the new Parliament

Section 2(5)(c) of the Scotland Act 1998 requires that within seven days of polling day the Scottish Parliament must meet. The Bill disapplies this section of the Scotland Act in relation to the session six Parliament.

The Bill (section 9(1)) provides for the Presiding Officer to fix a day for the first meeting of the Session 6 Parliament, consulting with the Electoral Commission and the convener of the Electoral Management Board for Scotland. Section 9(2) of the Bill provides that the first meeting of the Parliament must take place as soon as reasonably practicable after the election.

This provision reflects the fact that extended polling (see [section on multiple day polling](#)) may be required and that it is likely to take longer to conduct the count because of the need for social distancing and other measures to limit the spread of coronavirus.

## Election of the Presiding Officer

A new Parliament must elect a Presiding Officer and two deputies within 14 days of a general election. This is provided for by [section 19\(1A\)\(b\) of the Scotland Act 1998](#).

The Bill provides that a Presiding Officer and deputies be appointed as soon as is reasonably practicable after the election. Section 10 of the Bill provides that in relation to the 2021 election, the Scotland Act provision be read as "as soon as reasonably practicable after".

The Bill is silent on the issue of the election of a First Minister. Section 46 of the Scotland Act 1998 provides that the Parliament will elect a member to be First Minister within 28 days of a general election.

“ Choice of the First Minister. (1)If one of the following events occurs, the Parliament shall within the period allowed nominate one of its members for appointment as First Minister. (2)The events are— (a)the holding of a poll at a general election, (b)the First Minister tendering his resignation to Her Majesty, (c)the office of First Minister becoming vacant (otherwise than in consequence of his so tendering his resignation), (d)the First Minister ceasing to be a member of the Parliament otherwise than by virtue of a dissolution. (3)The period allowed is the period of 28 days which begins with the day on which the event in question occurs; but— (a)if another of those events occurs within the period allowed, that period shall be extended (subject to paragraph (b)) so that it ends with the period of 28 days beginning with the day on which that other event occurred, and (b)the period shall end if the Parliament passes a resolution under section 3(1)(a) or when Her Majesty appoints a person as First Minister. (4)The Presiding Officer shall recommend to Her Majesty the appointment of any member of the Parliament who is nominated by the Parliament under this section.”

The Scotland Act 1998

# Electoral challenges presented by coronavirus (COVID-19) not addressed by the Bill

There are significant challenges to running an election during a pandemic. Below are some of the matters which will require consideration<sup>vii</sup>.

It is not suggested that these matters necessarily require legislation, but they are issues which relate to the ability of electoral administrators to deliver a successful poll.

- **Nomination processes** may need to adapt by, for example, moving online.
- **Candidate meetings** which are absolutely necessary meetings are likely to be held individually with social distancing, rather than as a group as in previous elections.
- **Printing ballot papers** and ensuring they are sent out in a timely fashion will depend on printers and the postal service not experiencing COVID-19 outbreaks and disruptions.
- **Polling places:** Electoral Commission data shows that there were 2,689 polling places at the 2016 Scottish Parliament election, most of which would have had two or three polling stations within them. Glasgow had 201 polling places and just under 500 polling stations, while Edinburgh had 147 and around 300. A predominantly rural constituency like Argyll and Bute had 117 polling places, although more widely dispersed. Many of the buildings traditionally used as polling places may raise challenges around voting in a pandemic with concerns about transmission and the requirement for social distancing. Some may be poorly ventilated or have limited space. Lots of buildings are church halls or schools. There may be a question over whether they will be able to be used, and what the public health implications of doing so may be.
- **Polling staff:** polling places need to be staffed. Each polling station will have at least two people working at it. Research carried out by Dr Alistair Clark of Newcastle University and [Professor Toby James, of the University of East Anglia](#) suggests that many of these polling station staff will be in potentially higher risk groups as they would tend to fall into the older age group. The average age of polling station workers in four councils in the 2016 Scottish parliament election was 54.8, with around 39% over 60, and the oldest being 84. There are already difficulties in recruiting enough staff. If large numbers fail to volunteer because of health concerns, this could make the elections very difficult to deliver.
- **Hygiene measures:** there will likely be a need for a sufficient supply of hand sanitizers in each polling station. Polling booths and ballot boxes may also need to be sanitized after each voter has used them. Extra staff may be required for this.

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vii Much of the content of this section was originally published on [SPICe spotlight as part of a guest blog](#), written by Dr Alistair Clark, Reader in Politics at Newcastle University, on the potential impact of coronavirus on the 2021 election. Edits made for the sake of brevity .

- **Shared pencil, or single use pens/pencils:** it is unclear whether pencils used to mark the ballot will be provided as usual. If so, will they require to be sanitized after each use, or will a single use pencil or pen (in the UK the tradition is to vote by pencil because ink can smudge, dry out or spill over a ballot paper making a vote invalid) be provided.
- **Risk of infection in the administrative teams delivering the election:** if a key administrator such as a deputy returning officer or electoral registration officer were infected, and their team told to self-isolate, then it is unlikely that the election could be delivered in their area.
- **Count staff:** potential difficulties in recruiting enough count staff presents a challenge in providing election results.

# Conclusions

The Bill and supporting documents are silent on a number of issues. There is no clarity, for example, on the circumstances in which an election would be deemed untenable. Might this be if one area was in local lockdown, or only if there was a return to national lockdown?

Similarly, it is unclear as to what will happen with election results if, for example, one area is delayed in polling. If polling in other areas took place and the result was declared, this could result in claims of undue influence in the last area to poll. In those circumstances would all counts be delayed or would all results be delayed? If the former, this would have implications for the secure storage of ballot boxes.

The main purpose of electoral legislation is to provide clarity around the poll. According to the [Gould Principle](#) such legislation should be in place six months prior to an election. The Bill, taken with the Election Orders in place for the election, fails to provide absolute clarity about what the 2021 election will look like. This may create a degree of confusion for administrators, the regulator and crucially campaigners, candidates and voters.

In addition, the Bill provides Ministers with powers to make regulations in two key areas - polling on multiple days and all-postal voter polling. It is entirely possible that such regulations may be made in advance of the poll meaning that new legislation within six months of the election (if it is held as scheduled on 6 May 2021) seems likely. That will be a challenge for electoral administrators and there is the danger that it causes confusion for voters.

# The Gould principle

The administrative challenge of running an election is significant. It is important, therefore, that electoral administrators have clarity on the rules for any election in good time to run the election as smoothly as possible.

In 2007, the Scottish Parliament and Scottish Local Government elections were held on the same day. There were significant administrative issues at this poll leading to the suspension of several counts and the rejection of more than 140,000 ballot papers.

The Electoral Commission established the Scottish Elections Review after the poll to report independently on the administration of the elections. The [report which came from the Scottish Elections Review](#) is known as the Gould report (named after Ron Gould, the Chair of the review).

One of the recommendations to come from the report is known as the Gould principle – that is that any legislation required for elections should be in place six months before the election (and it follows that no new electoral legislation should be introduced in this six month period).

# Historic changes to dates for general elections to the Scottish Parliament

The pattern of a Scottish general election every four years was broken when the election due to take place in 2015 was delayed until 2016 to avoid a clash with the UK general election. This was provided for by section 4 of the [Fixed-term Parliaments Act 2011](#) which moved the Scottish Parliament election from 7 May 2015 to 5 May 2016.

Scottish legislation has also been used to provide for a change to the date of a Scottish general election. On 25 February 2016, the Parliament passed the [Scottish Elections \(Dates\) Act 2016](#). This Act provides for a change to the date of the Scottish Parliament general election that would otherwise be held on 7 May 2020 to instead be held on 6 May 2021. The Act was passed so that the general election to the Scottish Parliament did not coincide with the then scheduled general election to the UK Parliament. The Act also changed the date of Scottish local government elections due to be held on 6 May 2021 to 5 May 2022. This change was to ensure that Scottish local government elections did not coincide with the scheduled general election to the Scottish Parliament.

Given that at the time the Scottish Elections (Dates) Bill was introduced, the Scotland Act 2016 had not been passed, it was agreed by the Scottish and UK Governments (on the request of the Presiding Officer) that power to address the issue be transferred to the Scottish Parliament ahead of the completion of the then Scotland Bill's passage through the UK Parliament.

# Glossary

**Dissolution:** the official term for the end of a parliamentary session.

**Elector:** a person who has the right to vote in an election

**Electoral Commission (EC):** the Electoral Commission is the independent body which oversees elections and regulates political finance in the UK. It works to promote public confidence in the democratic process and ensure its integrity.

**Electoral Management Board for Scotland (EMB):** the EMB is made up of five ROs (or their deputies) and three EROs from across Scotland. The EMB coordinates the administration of elections by supporting electoral administrators across the country and by promoting best practice. The Electoral Management Board's prime focus is ensuring that the interests of the voter are kept at the centre of all elections planning and administration.

**Electoral Registration Officers (EROs):** responsible for compiling and maintaining the register of electors in a local authority area. They are a senior official and have statutory duties, such as the annual canvass.

**Pre-election period:** the period prior to an election during which the activity of political parties is regulated and restrictions are placed on government in terms of publications and announcements.

**Regulated period:** a formal campaigning period prior to an election during which certain rules on campaigning and spending apply.

**Returning Officers (ROs):** Responsible for the administration of the election in a local authority area. Often the Chief Executive of the local authority area but that is not a legal requirement. Scotland has 32 ROs.

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