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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Scottish Local Government Elections (Candidacy Rights of Foreign Nationals) Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 1 and 15 March 2022, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Scottish Local Government Elections (Candidacy Rights of Foreign Nationals) Bill (“the Bill”) at Stage 1.ⁱ
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ The Bill as introduced is available [here](#)

Overview of the Bill

3. The Scottish Government Bill was introduced by John Swinney MSP, Deputy First Minister and Cabinet Secretary for Covid Recovery on 7 February 2022. The Lead Committee is the Standards, Procedures and Public Appointments Committee.
4. The purpose of the Bill is to ensure compliance with treaty obligations in relation to candidacy for Scottish local government elections. It will amend Scottish electoral law to implement treaties which the UK Government has agreed that confer reciprocal voting and candidacy rights in relation to local elections.
5. The United Kingdom has entered into bilateral agreements with Luxembourgⁱⁱ, Polandⁱⁱⁱ, Portugal^{iv} and Spain^v on local election participation. In the agreements, the United Kingdom undertakes to grant the nationals of those countries who are legally resident in the United Kingdom, the right to stand as candidates at local elections in the United Kingdom subject to the same conditions and disqualifications as apply to nationals of the United Kingdom^{vi}.
6. To comply with the United Kingdom's obligations under those agreements, the Bill makes limited amendments to section 29 of the Local Government (Scotland) Act 1973^{vii} ("the 1973 Act"). That section sets out the eligibility requirements for nomination, election and holding office as a member of a local authority in Scotland.
7. Section 1(2)(a) of the Bill amends section 29(1) of the 1973 Act to allow a fourth category of person – referred to as a "schedule 6A national" – to stand for election, be elected and hold office as a member of a local authority in Scotland. To fall within the category of a "schedule 6A national", a person must meet two eligibility requirements. The first requirement is based on nationality: the person must be a national of a country for the time being listed in new schedule 6A (added by section 1(3) of the Bill). The countries which are listed in new schedule 6A are the countries who are the parties to the agreements with the United Kingdom (being Luxembourg, Poland, Portugal and Spain). The second requirement is based on holding lawful immigration status: the person must be someone who either (a) does not require

ii [Agreement between the United Kingdom of Great Britain and Northern Ireland and the Grand Duchy of Luxembourg on the Participation in Certain Elections of Nationals of Each Country Resident in the Territory of the Other \(publishing.service.gov.uk\)](#).

iii [Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Poland on the Participation in Certain Elections of Nationals of Each Country Resident in the Territory of the Other \(publishing.service.gov.uk\)](#).

iv [Agreement between the United Kingdom of Great Britain and Northern Ireland and the Portuguese Republic Regarding the Participation in Local Elections of Nationals of Each State Resident in the Other's Territory \(publishing.service.gov.uk\)](#)

v [Agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain on the Participation in Certain Elections of Nationals of Each Country Resident in the Territory of the Other \(publishing.service.gov.uk\)](#).

vi In accordance with the agreements, nationals of the United Kingdom who are legally resident in Luxembourg, Poland, Portugal and Spain are to be granted reciprocal candidacy rights in each of those countries.

vii [The Local Government \(Scotland\) Act 1973 \(legislation.gov.uk\)](#)

leave under the Immigration Act 1971 to enter or remain in the United Kingdom, or (b) does require, and for the time being has, such leave.

Delegated Powers

8. The Bill confers three powers to make subordinate legislation on the Scottish Ministers. The Scottish Government has prepared a Delegated Powers Memorandum which sets out the reasoning for taking the delegated powers in the Bill and the parliamentary scrutiny procedure that has been chosen.^{viii}
9. At its meeting on 1 March 2022, the Committee was content with the following delegated powers:
 - Section 1(3) – Duty to add a country to the list of countries referred to in the definition of “schedule 6A national”; and
 - Section 2 – Ancillary Provision.
10. It did, however, agree to write to the Scottish Government to raise questions in relation to the following delegated power:
 - Section 1(3) – Power to remove a country from the list of countries referred to in the definition of “schedule 6A national”
11. The Committee considered the Scottish Government’s response at its meeting on 15 March 2022.
12. A copy of this correspondence can be found in the **Annex**.
13. The issues considered by the Committee in relation to this power, together with its recommendations, are set out below.

Section 1(3) – Power to remove a country from the list of countries referred to in the definition of “schedule 6A national”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish Statutory Instrument

Parliamentary procedure: negative

Provisions

14. Paragraph 3 of the new schedule provides that Scottish Ministers may make regulations to remove a country from the list where the country and the United Kingdom cease to be party to a treaty containing provision relating to eligibility to stand as a candidate at local government elections.
15. Regulations made under paragraph 3 are subject to the negative procedure.

Committee consideration

16. The Committee asked the Scottish Government why the power is framed as a discretionary power, whereas the provision relating to the addition of a country to the list requires the Scottish Ministers to make regulations. The Committee also

viii The Delegated Powers Memorandum is available [here](#)

asked whether this discretionary power granted the Scottish Ministers a policy choice as to whether a country should be removed from the list where they are no longer a party to an international treaty with the United Kingdom.

17. In its response, the Scottish government stated that it is not the intention to create a policy choice as to whether a country should remain on the list where this is no longer required under an international obligation, but is instead only intended to provide Ministers with a “limited discretion” in relation to the timing of the removal of a country from the list as doing so immediately after a treaty is terminated could cause “disruption or unfairness.” The Scottish Government also stated that it would still be required to amend the list of countries to properly reflect any changes in the United Kingdom’s international treaty obligations.
18. The Committee acknowledged the Scottish Government’s assurance that it considers itself bound to remove a country from the list where that country is no longer a party to a treaty with the United Kingdom. However, the Committee noted that the Scottish Government’s interpretation of the duty that it considers itself bound by might not be accepted by a future government.
19. The Committee also noted that requirements to make regulations do not compel a government to make regulations within a set time period. Instead, the Committee considers that the Scottish Ministers could still exercise discretion in relation to the timing of removing a country from the list by regulations where that may prove disruptive if the legislation was framed in such a way as to require such regulations to be made., However, if the Scottish Government is concerned that such a requirement would mean regulations had to be made immediately in such circumstances, the Committee considers that it could amend the provision to require the Scottish Ministers to make regulations “within such reasonable time as it may determine”.

20. **The Committee welcomes the Scottish Government's response. Nevertheless, the Committee recommends that the Scottish Government should bring forward an amendment to this effect at Stage 2 which would require the Scottish Ministers to remove a country from the list of countries referred to in the definition of “schedule 6A national”.**

Annex

1 March 2022, correspondence from the Committee to the Scottish Government

The Delegated Powers and Law Reform Committee today considered the delegated powers in the Scottish Local Government Elections (Candidacy Rights of Foreign Nationals) Bill.

The Committee noted that the purpose of the Bill is to ensure compliance with treaty obligations in relation to candidacy for Scottish local government elections. It will amend Scottish electoral law to implement treaties which the UK Government has agreed that confer reciprocal voting and candidacy rights in relation to local elections.

As you know, section 1(3) of the Bill inserts a new schedule 6A to the Local Government (Scotland) Act 1973. Paragraph 2 of that new schedule provides Scottish Ministers with a duty to add a country to the list of countries referred to in the definition of “schedule 6A national”.

Similarly, paragraph 3 of new schedule 6A gives Scottish Ministers the power to remove a country from the list of countries referred to in the definition of “schedule 6A national” where the country and the United Kingdom cease to be party to a treaty containing provision relating to eligibility to stand as a candidate at local government elections.

Does the Scottish Government agree that rather than being a duty, the discretion provided in the power for the Scottish Ministers to remove countries from the list could present a policy choice as to whether a country should remain on the list where this is no longer required under an international obligation? If so, is this the intention of the power in paragraph 3 of new schedule 6A? Or, does the Scottish Government consider that it is still required to “respond promptly to and ensure compliance with any change under an international treaty”, where countries are removed from the list?

Given the tight Stage 1 timetable for the Bill, I would be grateful for a response by midday on Wednesday 8 March 2022. I understand you are also giving evidence to the Standards, Procedures and Public Appointments (SPPA) Committee on the Bill at its meeting on Thursday 3 March. I am therefore copying this letter to its Convener of the SPPA Committee for its interest ahead of that session.

The Scottish Government responded on 8 March 2022:

Thank you for your letter of 1 March in relation to the delegated powers set out in the Scottish Local Government Elections (Candidacy Rights of Foreign Nationals) Bill (“the Bill”). I am grateful to the Committee for its consideration of the Bill.

You asked about the power set out in paragraph 3 of new schedule 6A of the Local Government (Scotland) Act 1973 (to be inserted by section 1(3) of the Bill). This power will enable the Scottish Ministers, by regulations, to remove candidacy rights from the nationals of any country that ceases to be a party to a candidacy eligibility agreement with the United Kingdom. As the Committee has noted, it is framed as a discretionary power to remove a country from the list of countries referred to in the definition of “schedule 6A national”, whereas paragraph 2 of new schedule 6A is framed as a duty to add a country to the list.

However, I can confirm that it is not the intention of the Scottish Ministers to create a policy choice as to whether a country should remain on the list where this is no longer required under an international obligation. This is because the Bill is focused narrowly upon compliance with relevant candidacy rights treaties. The list of countries in paragraph 1 of new schedule 6A, therefore, is based on the existence of candidacy eligibility agreements (which is what distinguishes “schedule 6A nationals” from “qualifying foreign nationals”).

As a result, the power is simply intended to provide Ministers with a limited discretion in relation to the timing of removal for the reasons set out in paragraph 19 of the Delegated Powers Memorandum to the Bill. That is where the removal of a country from the list immediately after a treaty is terminated could cause disruption or unfairness, for example in the event of a treaty agreement ceasing to be in force during a local government election period.

Accordingly, the Scottish Government considers that it would still be required to amend the list of countries to properly reflect any changes in the United Kingdom’s international treaty obligations and ensure that the nationals of countries which no longer have a candidacy eligibility agreement with the United Kingdom do not continue to have greater candidacy rights than “qualifying foreign nationals” (who, if they require leave to remain in the United Kingdom, must have indefinite leave to remain or pre-settled status).

I am copying this letter to the Convener of the Standards, Procedures and Public Appointments Committee.

