

Standards, Procedures and Public Appointments Committee

**9th Meeting 2021 (Session 6), 25
November 2021**

Elections Bill (UK Parliament legislation

The following letters have been received—

- Letter received from Alison Johnstone MSP, Presiding Officer, Scottish Parliament; and
- Letter received from Kemi Badenoch MP, Minister of State for Equalities and Levelling Up Communities, UK Government.

Clerks
Standards, Procedures and Public Appointments Committee
November 2021

Letter from Alison Johnstone MSP, Presiding Officer, Scottish Parliament

Thank you for your letter of 3 November 2021 seeking views from the SPCB to assist your Committee in its consideration of the Legislative Consent Motion for the UK Elections Bill. As you point out in your letter, we have also shared our views with the Cabinet Office and the Scottish Government as part of its focussed consultation on the Bill.

As you will appreciate, my comments only relate to the provisions as they impact on the Scottish Parliamentary Corporate Body (SPCB). The SPCB has had the opportunity to consider provisions as they relate to its responsibilities.

As you say in your letter, the SPCB has responsibility for funding the Electoral Commission in respect of its devolved electoral functions in Scotland. Specifically of interest to the SPCB are two proposals relating to the Electoral Commission. These are:

- 1) The proposal to make provision for the introduction of a Strategy and Policy Statement prepared by the Cabinet Office that will provide the Electoral Commission guidance on the exercise of its functions. Under the Bill, the UK Government would be required to consult with Scottish Ministers on the Statement.
- 2) The proposal to amend the role and powers of the Speaker's Committee on the Electoral Commission to give it the power to examine the Commission's compliance with its duty to have regard to the Strategy and Policy Statement.

While funding is the primary role of the SPCB regarding the Commission, to support this funding activity the Scottish Elections (Reform) Act 2020 also provides that the Commission must present its five-year plan to the SPCB at the same time as it presents the plan to the Speaker's Committee on the Electoral Commission. The SPCB must decide whether it is satisfied that the plan is consistent with the economical, efficient and effective discharge by the Commission of their devolved Scottish functions, and if it is not so satisfied, may recommend such modifications to the plan as it considers appropriate for the purpose of achieving such consistency.

In respect of the Statement on Strategy and Policy for the Commission, the SPCB supports and provides funding for a number of other officeholders on behalf of the Parliament - for example, the Scottish Public Services Ombudsman and Scottish Information Commissioner. The Scottish Parliament has made it clear by way of the legislation relating to these officeholders that they are independent regarding their functions and not subject to the direction or control of the Scottish Government or the SPCB.

This Statement is therefore new territory, especially given the Commission's regulatory role regarding political parties. There is an argument that the SPCB should also be a statutory consultee, given the SPCB provides the funding for the Commission's devolved activity in Scotland.

In saying this, the primary function of the SPCB is to provide the Parliament with the property, staff and services it requires. The SPCB has no locus regarding the policy of the Commission and other organisations it provides support for and, importantly, it cannot speak on behalf of the Parliament on issues outside its remit. Even when considering the strategic plans of the officeholders it supports, any comment on the plans is limited to financial implications.

We have seen from the illustrative Statement provided to us by the Cabinet Office that it is at a high level and it would be difficult to quantify in monetary terms. Therefore, whilst the SPCB will clearly want to be aware of the content of the Statement in the context of discharging its responsibilities under the 2020 Act, there does not seem to be value in the SPCB seeking to become a statutory consultee on what is a policy-focussed Statement. We, therefore, consider that consultation should be left - as proposed in the Bill - with the Scottish Ministers, while making the point that funding is provided by the SPCB.

On the second proposal regarding oversight of the Statement, this does to an extent impact on the role of the SPCB in scrutinising the Commission's five-year plan. This is because the plan will, in future, be based around the Statement and so it is possible that any comments the SPCB would make on the plan could be negated if they impact on the Statement.

In practice, however, we consider that the relevant part of the five-year plan for the SPCB (covering devolved Scottish functions) is more likely to set out how the Commission in Scotland will meet its requirements relating to elections and the resourcing of these and will thus remain the key document for the SPCB. Again, we noted the proposals, and we reflected back to the Cabinet Office the role of the SPCB regarding the five-year plans.

I hope these comments are helpful.

Yours sincerely
Alison Johnstone MSP
Presiding Officer

Letter from Kemi Badenoch MP, Minister of State for Equalities and Levelling Up Communities, UK Government

I am writing regarding the Elections Bill which was introduced to the House of Commons on 5 July 2021. The Bill delivers on the UK Government's manifesto commitments to strengthen the integrity of our elections and ensure that our democracy remains secure, fair, modern and transparent.

The legislation delivers on a number of manifesto commitments including the introduction of the requirement for voters to show photographic identification to vote at polling stations and increasing the safeguards for postal and proxy voting. The Bill also fulfils the UK Government's manifesto commitment to remove the arbitrary 15-year rule for overseas electors voting in United Kingdom Parliamentary elections. In addition to the above, the Bill also introduces measures which will:

- Improve the voting experience of voters with disabilities;
- Tackle the rising level of intimidation in public life;
- Modernise and clarify our laws surrounding political finance;
- Introduce a new digital imprint regime for political campaigning material shared online;
- Make the law associated with undue influence crimes clearer;
- Increase the Parliamentary oversight and accountability of the Electoral Commission;
- Amend the local franchise in England and Northern Ireland so that future local voting and candidacy rights will rest on the principle of a mutual grant of rights, through voting and candidacy rights agreements with EU Member States. The existing rights of EU citizens who were resident in the UK before 1 January 2021 will be preserved; and
- Bring greater consistency across the electoral system and reduce complexity for the voter and administrator by changing the voting system to First Past the Post for mayoral and local authority mayor elections in England, and Police and Crime Commissioner in England and Wales.

The Bill is a product of a wide range of views and engagement with the electoral sector, civil society organisations, parliamentarians and the UK's Parliamentary Parties Panel. Many elements have stemmed directly from reports and reviews conducted by Parliamentarians, such as the 2016 Pickles report on electoral fraud. The digital imprints, overseas electors, intimidation and accessibility measures are all a product of Government consultation.

The UK Government has, and continues to work with a number of charities and Civil Society Organisations including, Scottish Youth Parliament, Young Scot, Deaf Scotland, Inclusion Scotland, LGBT Youth Scotland, Equality Network, Scottish Trans Alliance and Women's Aid, to ensure that the voter identification proposals are implemented in a way that is inclusive for all eligible voters across the UK. The accessibility measures were developed through consultation with the Government's Accessibility of Elections Working Group which includes UK-wide organisations such as the Royal Mencap Society, RNIB, United Response, NHS and the

Association of Electoral Administrators (AEA). The intimidation (new electoral sanction) and undue influence proposals have benefitted from close engagement with organisations including but not limited to, the Crown Office and Procurator Fiscal Service, Police Scotland and the Electoral Management Board for Scotland. The Government has and will continue to engage closely on proposals with the Electoral Commission and representative bodies such as the AEA, Scottish Assessors Association and SOLACE.

The UK Government remains committed to the Sewel Convention and the associated practices for seeking legislative consent as well as to working closely with the devolved administrations to ensure that wherever possible we can provide consistency for electoral administrators, voters and those regulated by electoral law. There has been open and positive engagement between officials in both Governments in the preparation of the policies for drafting into legislation to ensure that the clauses as drafted would work effectively across devolved and reserved polls.

Legislative Consent Memorandum

The measures set out above will considerably strengthen the delivery of UK Parliament General elections and other reserved polls. For a number of the measures contained in the Bill, coherence and consistency across both devolved and reserved polls was considered beneficial to providing voters with clarity and ensuring operability for electoral administrators and those regulated by electoral law. In order to deliver these benefits, the UK Government sought legislative consent from the Scottish Parliament for certain measures which engaged the legislative consent process as set out below.

Intimidation

The Bill introduces a new electoral sanction to protect candidates, future candidates, campaigners and elected officeholders from intimidation and abuse, both online and in person. It is reserved insofar as it relates to the qualifications of persons elected to office at reserved elections in Scotland, but the legislative consent process is expected to be engaged insofar as it relates to the qualifications of persons elected to office at devolved elections. If legislative consent was given, the five-year disqualification from standing for, being elected to and holding elective office would apply to all UK elective offices. This would make the five-year disqualification order easier to enforce, thereby increasing its deterrent effect. It would send out a clear signal that the intimidation of those who participate in elections and contribute to our public life anywhere and in any election in the UK deserve the same level of additional protection from intimidation.

I welcome the Scottish Government's indication of interest to legislate comparably in this area prior to the Scottish Parliament election in 2026. However, a delay in the application of the new electoral sanction would substantially weaken the enforcement of the new electoral sanction in Scotland. During this period it would be inconsistent - and would be difficult to justify - that an offender who is disqualified from standing for UK parliamentary elections in Scotland as a result of intimidation is

not disqualified from standing at Scottish parliamentary or local government elections.

Clarification of undue influence

Although it is already an offence to unduly influence an elector, there is general agreement that the current legislation is in need of modernising.¹ Updating the corrupt practice, by building on recommendations from the joint report by the Scottish Law Commission and the Law Commission England and Wales (2020) will improve this clarity and reduce confusion, providing electors with the protection they deserve.

Amending and clarifying the existing corrupt practice of undue influence is reserved insofar as it relates to reserved electoral events. The UK Government sought legislative consent to make the equivalent amendment to section 115 of the Representation of the People Act 1983 for local government elections in Scotland. The legislative consent process was also engaged to ensure that electoral incapacities arising from the corrupt practice of undue influence apply uniformly across the UK. This would provide electors in Scotland with the same level of protection from malicious interference and intimidation at all electoral events. Legislative consent would also mean that someone convicted, or reported personally guilty, of undue influence anywhere in the UK is incapable of holding elective office in all parts of the UK. The Electoral Commission highlighted that these changes will 'help to protect voters against exploitation' and also 'make it easier for the police and prosecutors to take action where appropriate'.

I welcome the Scottish Government's indication of interest to legislate in this area prior to the Scottish Parliament election in 2026. However, if there is a delay between the coming into force of the relevant provisions of the Elections Bill and the subsequent Scottish legislation then electors in Scotland will have different levels of protection from undue influence at different elections. This would make it harder for Scottish electors, police, prosecutors and electoral administrators to identify and enforce the corrupt practice of undue influence. It is especially problematic in a scenario where the election periods for UK parliamentary elections and Scottish local government elections overlap. If an elector was subjected to, for example, intimidatory behaviour during the election period, it could be very ambiguous whether the elector should benefit from the improved protection against intimidation in the updated corrupt practice or not. Ultimately, it would leave some citizens without the full protection this measure seeks to provide.

Electoral Commission accountability

To improve the parliamentary accountability of the Electoral Commission, the Bill makes provision for a Strategy and Policy Statement that will set out guidance and

¹ In 2018, the UK Government launched the Protecting the debate consultation to seek input on clarifying the existing corrupt practice of undue influence. The consultation received 41 formal responses and numerous pieces of correspondence from a wide range of individuals and organisations from all parts of the UK. 100% of respondents to the consultation agreed that the law of undue influence required greater clarity.

principles, which the Commission will have to have regard to in the discharge of its functions. The Commission will remain independent, and the Statement will not replace or undermine the Commission's other statutory duties. The Statement will be subject to a statutory consultation before being submitted for the approval of the UK Parliament.

The Commission is a UK-wide body with some functions operating in relation to devolved matters in Scotland. To avoid unnecessary complexity for the Electoral Commission in exercising its regulatory powers, the Government proposed that the Statement should apply to both the Commission's reserved and devolved functions. A UK-wide Statement would ensure consistency across the UK in terms of the Commission's exercise of its functions because the Commission would only be required for its planning to give regard to a single document setting out clearly the expectations of the UK Parliament. This means that the UK Government and the Scottish Government (as one of the statutory consultees on the draft Statement) could provide a clear outline of the expectations of the UK, Scottish and Welsh Governments for the Commission's functions across all four nations for devolved and reserved polls and would reflect their shared interests through consultation on the draft Statement. The Commission will remain independent and the Statement will not replace or undermine the Commission's other statutory duties.

Political finance

Notional expenditure

The Bill amends the law on notional expenditure, enabling campaigners and agents to understand with confidence their legal responsibilities. Clauses 16 to 18 contain provisions within the legislative competence of the Scottish Parliament in relation to the application of the rules on campaign expenditure at devolved elections. This would ensure that the changes to the provisions on notional expenditure for political parties and third-party campaigners are consistent across all reserved and devolved elections. The Bill only contained amendments to primary legislation. In order to have consistent rules on notional expenditure across all reserved and devolved elections, the Scottish Government would also need to make equivalent amendments to the Scottish Parliamentary Elections Order 2015.

The purpose of these amendments are to provide clarity on the rules following the 2018 Supreme Court case (*R v Mackinlay and others*) to ensure that candidates and election agents understand their legal responsibilities and can perform them with confidence. A lack of consistency across elections could in fact increase confusion for candidates and their agents and lead to a lack of compliance.

Restriction on which third parties may incur controlled expenditure and Recognised third parties: changes to existing limits etc (new tier of third-party campaigner registration)

Clauses 22 to 24 contain provisions within the legislative competence of the Scottish Parliament in relation to third-party campaigning rules and the notification of third parties for elections devolved to the Scottish Parliament. In practice, applying these

measures on a UK-wide basis would strengthen the transparency and fairness of controls against ineligible third-party spending at devolved and reserved elections alike. Consistency in the rules would mean that political parties and third-party campaigners can be sure of their legal responsibilities, which will support compliance and make it easier for the Electoral Commission to regulate. It will also mean that the public are presented with consistent information about such campaigners at all elections.

If there are divergences in the rules in this area, regulatory complexities will arise. For example in reference to the creation of a lower tier of third-party campaigner, third party campaigners may campaign in multiple elections at the same time (reserved and devolved) and they will need to attempt to apportion their spending at the registration stage in order to work out whether they meet the thresholds set by the different legislatures. Furthermore, some foreign spending would continue to be legal at devolved elections but would be prohibited at reserved elections. This could lead to challenges in enforcement, a lack of understanding amongst foreign campaigners and criticism that some foreign spending is still allowed at elections in Scotland.

Joint campaigning by registered parties and third parties

Clause 25 contains provisions within the legislative competence of the Scottish Parliament in relation to campaign expenditure for both political parties and third-party campaigners for standalone devolved elections. It would be beneficial for these measures to apply to all elections (both devolved and reserved), as otherwise it may lead to dissatisfaction or confusion amongst campaigners as they would have to account for spending differently at different elections. This could lead to issues of compliance and will mean that level of transparency differs between elections allowing groups to potentially expand their spending limits at devolved elections, which could be seen as undermining the level playing field.

While I welcome the Scottish Government's indication of interest to legislate comparably in these areas prior to the Scottish Parliament election in 2026, a delay or divergence in the application of these political finance measures will create a complicated situation for candidates at elections in Scotland, political parties and third-party campaigners, whereby they may need to comply with a different set of rules at different elections.

Wider Bill measures

While devolution means that there are already different arrangements for devolved and reserved elections, in some areas there are clear benefits associated with applying electoral law uniformly UK-wide across all polls as with the UK Government's proposals for digital imprints.

The digital imprint regime set out in these provisions is not an online version of the existing imprint regime for printed documents. It is far wider in scope, requiring an imprint on some types of political electronic material at all times - not limited to specific elections or referendums or particular periods of time. Its purpose, therefore, is to regulate electronic material of a political nature on the internet and behaviour

and conduct on the internet by users and internet service providers at all times, not just during elections themselves. A UK wide regime will ensure a coherent and consistent approach for both those enforcing the regime and for campaigners. It will enable voters from across the UK to benefit from the high level of transparency and will avoid the fragmentation of internet regulation.

A number of the measures in the Bill are designed to strengthen the integrity of the electoral process for UK Parliamentary elections and other reserved polls. This includes the introduction of identification to vote at polling stations and safeguards for postal and proxy voting, as well as changes to improve the support available to voters with disabilities. We will continue to work closely with the Electoral Commission, the wider electoral sector and the devolved administrations to ensure that the proposed changes work well in the interests of electoral administrators, voters and those regulated by electoral law.

Future Scottish legislation

Given that the Scottish Government have expressed sympathies for a number of areas within the Elections Bill in their Legislative Consent Memorandum, I am disappointed by the request to be removed from all aspects of the Bill which relate to devolved matters in Scotland. We are currently in the process of evaluating the implications of carving out Scotland from the devolved measures in the Bill.

While divergence is a potential consequence of devolution, where the UK Government and Scottish Government are principally in agreement, it is our two Governments' responsibility to legislate in such a way that provides the best outcomes, not only in terms of clarity for voters, operability for electoral administrators but critically our legislation must be functional for those who are regulated by electoral law.

To this end, I welcome the Scottish Government's indication in their Legislative Consent Memorandum that they will consider legislating comparably on a number of areas. UK Ministers remain committed to continuing working closely with colleagues in the Scottish Government as they develop their legislative proposals to ensure where possible, that clarity and coherence is achieved for voters, the electoral sector and those regulated by electoral law.

Yours sincerely,

KEMI BADENOCH MP