

# SCOTTISH GENERAL ELECTION (CORONAVIRUS) ACT 2021

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Application of Act*

##### ***Section 1: Application of this Act to 2021 election***

6. This introductory section provides that the Act applies to the ordinary general election for membership of the Scottish Parliament which is due to be held on 6 May 2021 (by operation of section 2(2) of the Scotland Act 1998). It does not apply to any other national or local election.

#### *Disapplication of existing law*

##### ***Section 2: Disapplication of section 2 of Scotland Act 1998***

7. This section nullifies the effect of certain provisions in the Scotland Act 1998 that would otherwise apply to the 2021 election. Specifically, these provisions are section 2(3) and (4), which relate to the dissolution of the Parliament before an election and the first meeting of the Parliament following an election; section 2(5), which gives the Presiding Officer of the Parliament a power to propose an alternative date for an election a month either side of when it would otherwise be due to occur; and section 2(5ZZA) and (5ZA), which are consequential to section 2(5). These provisions are replaced, for the purpose of the 2021 election, by sections 6 to 11 of the Act.

#### *Postal voting arrangements*

##### ***Section 3: Closing date for application to vote by post or amend existing absent vote arrangements***

8. The effect of section 3 is to bring forward the deadline for applications for a postal vote for the 2021 election to the twenty-first day before the polling day (for the election held on 6 May, this would mean the deadline is expected to be 6 April). Under paragraph 9 of schedule 3 of the Scottish Parliament (Elections etc.) Order 2015 (S.S.I. 2015/425) (“the 2015 Order”) the deadline is normally the eleventh day before the polling day. The purpose of this provision is to allow for more time to process what is expected will be a much higher number of applications than usual due to the effects of the coronavirus pandemic.
9. Subsection (5) allows the Scottish Ministers to change the deadline by regulations – but under subsection (6) this can only be used to move the deadline closer to the polling day.

#### ***Section 4: Report on uptake of postal voting at closing date***

10. This section requires the Scottish Ministers to report to the Parliament on the uptake of postal voting for the 2021 election as at 7 April 2021 (i.e. the day after the deadline which is expected to apply under section 3 if the election proceeds on 6 May).
11. By subsection (1), the report must set out the number of persons who are registered to vote at the 2021 election; the number of persons who have been granted a postal vote at the election; and the number of pending applications for a postal vote. The subsection does not place any new duties on electoral registration officers (the officials who administer applications for postal votes) to collate or provide information; instead, it merely requires the Scottish Ministers to use the most recent information which is available to them.
12. The report must also specify any funding provided by the Scottish Ministers to local authorities for the purpose of ensuring that electoral registration officers have adequate resources to deal with any increase in applications for postal votes resulting from the pandemic (see subsection (2)(a)).
13. Subsection (3) provides that the report must be published and laid before the Parliament by Ministers as soon as reasonably practicable after 7 April 2021.

#### ***Section 5: Power to provide for all-postal vote***

14. This section confers a regulation-making power on the Scottish Ministers to make provision for the 2021 election to be conducted solely by means of postal voting. No physical polling would take place.
15. Subsection (3) would allow regulations made under subsection (1) to modify any enactment: including section 3(2) and (3) of the Act, which make provision relevant to postal voting as described above, but not including the rest of the Act.
16. The effect of subsection (4) is that regulations may be made only if a draft of the regulations has been laid before, and then approved by a resolution of, the Parliament. At the same time as laying draft regulations, the Scottish Ministers must – under subsection (5) – lay a statement of the reasons for the regulations.
17. Subsection (6) requires the Scottish Ministers to consult those persons listed before making regulations under this section. Information on what the consultees say must be included in the statement of reasons mentioned above.

#### ***Other arrangements for 2021 election***

#### ***Section 6: Dissolution of current Parliament***

18. The effect of section 13 of the Scotland Act 1998 is that when the Parliament dissolves before a general election, members of the Parliament (MSPs) cease to hold office, and the Parliament cannot be convened to debate or pass legislation. For previous general elections, dissolution (which is set by secondary legislation) has usually lasted 28 days.
19. However, the possibility exists that, once the Parliament dissolves, there is an event connected with the coronavirus pandemic (such as a spike or surge of coronavirus infections) that could potentially endanger the general election being safely held on 6 May.
20. The purpose of this section is therefore to provide a kind of insurance policy against that situation occurring by making dissolution happen on 5 May 2021. This means that MSPs will still retain office until a single day before the election, and therefore up to that point the Parliament would be able to debate and pass an emergency Bill to postpone or alter arrangements for the election, if coronavirus were to threaten the election occurring as normal. It is anticipated that the Parliament will instead go into recess for the campaign

27 days prior to the election (although it is ultimately for the Parliamentary Bureau to decide on this after discussions with the business managers of the different political parties), but this would not prevent the Parliament from being recalled to sit as required.

21. Subsection (2) reflects that if the election is postponed by the Presiding Officer under section 11(1), the date of dissolution will also be postponed, under section 11(8).

### ***Section 7: Dissolution of current Parliament: consequential modifications***

22. This section makes adjustments to certain provisions of the 2015 Order in consequence of the change to the timing of dissolution made by section 6.
23. Article 80(1) of the 2015 Order provides that a person becomes a “candidate”, in relation to a Scottish Parliamentary election, on the dissolution of the Parliament. Subsection (2) of section 7 modifies this to 27 working days before 6 May 2021 – this is expected to be 25 March, which is also anticipated to be the point at which the Parliament enters recess for the election campaign. A person would then remain a candidate from then on (barring deselection or resignation) even if the election were to be postponed – in other words, they would not become a candidate in legal terms for a second time.
24. Another effect of this provision of the 2015 Order, in combination with section 7 of the Act, is that a number of individuals will be both serving MSPs and election candidates from 25 March until 4 May (if the election is not postponed by the Presiding Officer, in which case section 11(8) of the Act would also postpone dissolution). However, MSPs will remain subject to the MSP Code of Conduct in terms of their use of Parliamentary privileges and resources during this period, meaning that it will be possible for the new Parliament to consider any complaints against a successful candidate who was alleged to have abused their position as a sitting MSP in this period.
25. This provision also has implications for the “regulated period” for campaign expenditure for an election under the Political Parties, Elections and Referendums Act 2000, which covers expenditure by political parties and others in the run up to a poll date. 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 section 7(2) of the Act, the short campaign is expected to commence on 26 March 2021.
26. Paragraph 1(2) of schedule 1 of the 2015 Order links the supply of electoral registers, by electoral registration officers to local authority returning officers, to the date of dissolution. Section 7(3) of the Act changes this to 27 working days before the election takes place. If the election were to be postponed, the duty on electoral registration officers to supply the register as soon as practicable after that date would be reactivated.
27. For the purpose of calculating the dates mentioned in this section, the Scottish Parliamentary Election Rules are set out in schedule 2 of the 2015 Order, with paragraph 2 the relevant provision on the computation of time.

### ***Section 8: Power to provide for polling on additional days***

28. This section gives the Scottish Ministers the power to specify in regulations one or more additional days over which the poll for the 2021 election is to take place. The purpose of this provision is to allow for the possibility that in-person voting will take longer than normal due to the imposition of physical distancing and other measures to prevent the transmission of coronavirus. The power may be exercised whether or not the day of the poll for the 2021 election is postponed by the Presiding Officer under section 11.
29. It is important to note that the Scottish Ministers may make the regulations only if to do so gives effect to a recommendation of the convener of the Electoral Management Board for Scotland. The Board, established under section 1 of the Local Electoral

Administration (Scotland) Act 2011, has the general function of co-ordinating the administration of Scottish parliamentary elections and local government elections in Scotland. In addition, the Scottish Ministers must consider that making regulations to give effect to the Board's recommendation is necessary for a reason relating to coronavirus.

30. Subsection (2) limits what may be recommended by the convener of the Board. Unless there is a reason to recommend otherwise, there is not to be a break in the polling days specified – so, for example, a three day poll commencing on a Thursday would continue to the Saturday. In addition, no polling can occur later than on the eighth day following the day fixed for the poll, as defined in subsection (3).
31. Subsection (4) provides that the regulations may specify particular days or times when certain descriptions or categories of persons eligible to vote in person may do so. This would, for example, allow provision to be made requiring voters of a particular age, or in a particular area, who do intend to exercise their right to vote, to do so only on specified days or at specified times.
32. The effect of subsection (5) is that regulations may be made only if a draft of the regulations has been laid before, and then approved by a resolution of, the Parliament. At the same time as laying draft regulations, the Scottish Ministers must – under subsection (6) – lay a statement of the reasons for the regulations.
33. Before making regulations under subsection (1), subsection (7) provides that the Scottish Ministers must consult the Presiding Officer of the Parliament, the Electoral Commission, the convener of the Electoral Management Board for Scotland and the Chief Medical Officer of the Scottish Administration. Information on what the consultees say must be included in the statement of reasons mentioned above.
34. Subsection (8) has the effect that regulations under subsection (1) do not prevent the exercise of the power to postpone the election conferred on the Presiding Officer of the Parliament by section 11. If that power were exercised, the convener of the Electoral Management Board would need to consider whether to make a fresh recommendation of additional days in respect of the election occurring on the new date fixed by the Presiding Officer.
35. Subsection (9) allows the Scottish Ministers to make regulations modifying the meaning of references to the day or date of the poll in any enactment or document (e.g. the 2015 Order) as regards the 2021 election, if regulations under subsection (1) are in force. But otherwise such references are unaffected and are still to be read as references to 6 May 2021 (or the date fixed by the Presiding Officer under section 11 of the Act in the event that the 6 May poll date is postponed).
36. This confirms, for example, that despite the poll taking place over a number of days, 6 May (or the day fixed by the Presiding Officer under section 11) is the relevant date for determining eligibility to vote on the basis of a person's age. By virtue of section 2 of the Representation of the People Act 1983 and section 11 of the Scotland Act 1998, a person must be at least 16 years of age on the day of the poll to be eligible to vote at an election for membership of the Parliament.

### ***Arrangements for new Parliament***

#### ***Section 9: First meeting of new Parliament and choice of new First Minister***

37. This section allows the Presiding Officer discretion to fix a day for the first meeting of the new Parliament after the 2021 election takes place, in consultation with the Electoral Commission and the convener of the Electoral Management Board for Scotland. The usual rule, disapplied by section 2 of the Act, is that the first meeting of a new Parliament must take place within 7 days of a general election. It is anticipated that a longer interval might be needed to allow for the possibility of extended polling and counting taking

place due to the impact of coronavirus measures. However, subsection (2) still requires that the first meeting is fixed as soon as reasonably practicable after the election.

38. Section 46 of the Scotland Act 1998 requires the Parliament to nominate a First Minister within 28 days of an election. Because the period within which the first meeting of the new Parliament will occur following the 2021 election is not certain, subsections (3) and (4) make provision to ensure that any delay beyond the normal 7 day deadline for the first meeting is not counted as part of the 28 day period under section 46.

### ***Section 10: Election of new Presiding Officer***

39. This section modifies section 19(1A)(b) of the Scotland Act 1998 so that, rather than having to take place within 14 days of the election, as would normally be the case, the selection of a new Presiding Officer (and two deputies) by MSPs must occur as soon as reasonably practicable after the 2021 election. Under section 19 of the 1998 Act this would also have to take place before any other business is conducted by the new Parliament, except for MSPs taking their oaths of office.

### ***Reserve power of Presiding Officer to postpone 2021 election***

#### ***Section 11: Power of Presiding Officer to postpone election***

40. This section gives the Presiding Officer the power to postpone the 2021 election by up to 6 months.
41. The Presiding Officer may only postpone the election if satisfied that it is necessary or appropriate to do so; and, additionally, if the power is to be exercised for a reason relating to coronavirus, if satisfied that the Parliament could not safely meet in order to pass a Bill to delay the election (the presumption being that it is Parliament first and foremost that should take the decision to delay).
42. Under subsection (4), the new date for the election must be as soon as reasonably practicable after the old date.
43. Where the power is exercised, subsection (5) requires the Presiding Officer to publish the new date for the election along with a statement of reasons for exercising the power – this information must be published on the Parliament’s website as soon as reasonably practicable.
44. Subsection (6)(a) allows for the power to be exercised multiple times (so long as the relevant conditions are met on each occasion). However the effect of subsection (6)(b) is that the power could not be used to postpone the election beyond 5 November 2021.
45. Subsection (7) also requires the Presiding Officer to consult those persons listed before exercising the power.
46. By the operation of subsection (8), the Parliament will automatically be dissolved on the day immediately before the new date fixed for the election – including after any re-exercise of the power to postpone. This is for the same reasons as those behind section 6 of the Act.

### ***Supplementary***

#### ***Section 12: Effect of Act on existing power to make provision about elections***

47. The purpose of this section is to ensure that the Act does not cast doubt on the width of the Scottish Ministers’ existing power to make provision about the conduct of elections in section 12 of the Scotland Act 1998. This is because some of the provisions of the Act – sections 3 and 5 for example – provide for things that could potentially be made using the power under section 12 of the 1998 Act.

***Final provisions***

***Section 13: Interpretation***

48. This section provides definitions for certain terms used in the Act. One of these is “coronavirus”, which is defined by reference to its scientific name of SARS-CoV-2.

***Section 14: Ancillary provision***

49. Subsection (1) gives the Scottish Ministers a freestanding regulation-making power to make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, or in connection with, giving full effect to the Act. Subsection (2) allows such regulations to modify any enactment, including the Act itself. These regulations would be required to be laid before the Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010, but they are not otherwise subject to any Parliamentary procedure.

***Section 15: Commencement***

50. This section provides that the Act comes into force on the day after Royal Assent.

***Section 16: Short title***

51. This section provides that the Act will be referred to as the Scottish General Election (Coronavirus) Act 2021.