

SCOTTISH PARLIAMENT ELECTION 2021 AND COVID-19: BRIEFING PAPER

Background

1. Contingency Planning for the Scottish Parliament Election 2021 in the context of Covid-19 has been carried out in conjunction with the Electoral Management Board for Scotland (the “EMB”, which includes representatives of Electoral Registration Officers (EROs) and the Electoral Commission) and Scottish Parliament officials. Papers circulated ahead of previous meetings with MSPs are attached at Annexes A and B.

Timing

2. Although some or all of the measures outlined below might not prove necessary, for them to be available primary legislation will be needed prior to the current date for dissolution of Parliament on 25 March 2021. After that date, Parliament cannot be recalled¹ and, with no change to the law, the only facility for any delay to the election would be the power of the Presiding Officer² to recommend a change of date by up to one month from the first Thursday in May. The need for some or all these measures may not become clear until very close to polling day (e.g. mid to late April 2021). Early commencement for the Bill will be pursued with a view to permitting commencement from late January 2021 onward.

Proposed legal changes

3. It is proposed that a Bill be introduced in November containing the following measures:
- a) modification to the deadline for new applications for a postal vote in order to allow processing of the anticipated increased volume of postal vote applications;
 - b) conferring power on Ministers to enable polling over two days;
 - c) a delay to the dissolution of Parliament to the day before polling;
 - d) provision to allow the new Parliament to convene more than 7 days after polling day³;

Possible additional measures include:

- e) provision to permit an all-postal ballot;
- f) to extend the existing power of the Presiding Officer to postpone the election nationally;
- g) to allow the Presiding Officer to postpone the election at a local level;
- h) provision to prevent MSPs seeking to use the privileges of MSP status during the period between 25 March and the postponed dissolution date (due to any actual or perceived advantage that continuing MSP status might provide to incumbent candidates).

Options (a) and (c) and (e) could be progressed under existing secondary legislation powers, but inclusion in the Bill would promote scrutiny of the proposals as a whole, and ensure that the required provisions can be enacted timeously. The other changes all require primary legislation. The Gould Principle⁴ recommends introduction of electoral changes at least six months ahead of any election.

¹ Once dissolved, the Parliament ceases to exist. In addition, section 13 of the Scotland Act 1998 (the “1998 Act”) provides that each MSP’s term of office ends with the dissolution of the Parliament. Accordingly it is impossible for Parliament to reconvene after dissolution has occurred. This has significant negative impacts - for example, a delay to polling day by six months arranged after dissolution (and which would itself require legislation, perhaps via an extension to the existing power of the Presiding Officer) would mean that there would be no sitting Parliament from the end of March until November.

² Under section 2(5) of the 1998 Act.

³ Section 2(3)(b) of the 1998 Act requires Parliament to meet within the period of seven days beginning immediately after the day of the poll.

⁴ Articulated at page 112 of [The independent review of the Scottish Parliamentary and local government elections 3 May 2007](#)

Further detail on these options is set out in the following table.

Required changes			
Option	Circumstances in which required	Additional possibilities	Other
a) Modification to the deadline⁵ for new applications for a postal vote in order to allow processing of the anticipated increased volume of postal vote applications (although electoral professionals have asked that the deadline be brought forward to allow the additional applications to be processed).	All circumstances – an increase in postal voting from 18% of the electorate to at least 30% ⁶ is anticipated – each application has to be processed by both Returning Officers and EROs. They have indicated more time is needed to process the applications.	Modelling in discussion with EROs is underway to establish the optimal date – balancing the need to process applications with the need to ensure people can register. This change could be made by secondary legislation.	Steps will be taken to encourage vulnerable voters to register for a postal vote early, but it is anticipated that there will be a substantial volume of postal voting applications close to the deadline, whenever it is set.
b) Polling over two days , at the discretion of Ministers (by order) – changes to references to polling day and calculation of dates during the election period. Polling over Wed-Thurs rather than Thurs-Fri has the advantage of a day of counting before the weekend but has the disadvantage of taking a day out of the timetable of processing time for administrators	Lockdown to Phase 2. Helpful if virus conditions necessitate a reduction in footfall at polling stations (with publicity highlighting the second day).	It is highly likely that it will not be clear until shortly before the election if polling over 2 days is necessary. The timetable needs to be clear for planning purposes and to take account of the regulated period. A late decision would cause cost and disruption issues (e.g. to schools used as polling places) – it may be preferable to decide upon 2 day polling well in advance.	The need to sanitise polling venues such as schools before and after polling could require use of the venue for up to four days. Electoral professionals have called for this change to be adopted in January if it is to be pursued so that they can plan accordingly. The EC have also called for clarity on the timetable in January.

⁵ The current deadline for postal vote applications is set for 5pm on 20 April (11 working days prior to the election and so excluding the May Day holiday).

⁶ Recent Electoral Commission [polling](#) found that 38% of respondents said they would cast their vote by post if an election took place now

Required changes			
Option	Circumstances in which required	Additional possibilities	Other
<p>c) A delay to the dissolution of Parliament from 25 March to the day before polling. This will allow Parliament to be recalled from recess in the event of a need to postpone the election in order to debate and pass appropriate further legislation and for it to continue to meet once any delay takes effect.</p>	<p>The virus situation in March may not provide any more clarity on any need to postpone an election in May than at present. As some form of change before dissolution is essential, it is recommended to simply make this change outright – and to the day before the election, rather than risk the uncertainty of a succession of postponed dissolution dates.</p>	<p>It would be possible to make the decision to move dissolution subject to a ‘trigger’ mechanism, under which the Presiding Officer⁷ decides to recommend a change to dissolution. However, this retains the risk of Parliament having been dissolved at the point at which an issue emerges. [other options such as a modification to MSP status or facility to reconstitute the Parliament were discounted on 16/9/10].</p> <p>The dissolution change could be made by secondary legislation, but including it in the Bill would allow Parliament more scope to consider.</p>	<p>A form of recess would apply to allow for campaigning during the election period, but Parliament could be meet in emergency session (e.g. to postpone the election). As MSP status will remain, measures will be needed to restrict use of parliamentary resources and other benefits of MSP status.</p> <p>In the event of Parliament enacting legislation for a substantial delay, the Parliament could resume meeting on a more regular basis again until dissolution.</p>
<p>d) to allow the new Parliament to convene more than 7 days after polling day⁸</p>	<p>This is required to accommodate a prolonged count, which is expected to occur in all circumstances involving physical distancing</p>	<p>Avoiding a prolonged count whilst applying physical distancing would require significant resource (e.g. additional staff and venues)</p>	<p>Potential related change to section 19(1A)(b) of the 1998 Act, which requires a new Presiding Officer within 14 days of the election.</p>

⁷ having consulted Scottish Ministers, the Parliamentary Bureau, the Electoral Commission, the EMB and healthcare professionals. A statement of reasons could also be required.

⁸ Section 2(3)(b) of the 1998 Act requires Parliament to meet within the period of seven days beginning immediately after the day of the poll

Possible additional changes			
Option	Circumstances in which required	Additional possibilities	Other
e) Provision to permit an all-postal ballot - changes to statutory references to polling in person (secondary legislation) and a 'trigger' provision to activate this change, such as a decision by the Presiding Officer (primary legislation)	Lockdown or Phase 1 conditions. The removal of references to voting in person could be made by SSI. Primary legislation would be needed to make authorisation for an all postal ballot contingent on a decision by the Presiding Officer	A contingent measure in the event of an in person election proving impossible in the long term	An all postal election cannot be arranged in time for May 2021 ⁹
f) to extend the existing power of the Presiding Officer¹⁰ to postpone the election nationally up to a period of six months in total, having consulted Ministers, the Bureau, the Electoral Commission, the EMB and healthcare professionals. A statement of reasons could also be required.	Moving the dissolution date means that Parliament will be able to legislate itself for a delay, which appears to make this extension unnecessary – it could in theory be of assistance if the virus situation is such that Parliament cannot easily meet and there is no question that a delay is required.	A version of this power could be used in the event of a local lockdown occurring shortly before polling day – as set out in option (g).	
g) to allow the Presiding Officer to postpone the election at a local level , having consulted Ministers, the Bureau, the Electoral Commission, the EMB, the local Returning Officer and healthcare professionals. A statement of reasons could also be required.	This provision could be used in the event of a local lockdown occurring shortly before polling day, where the assessment is that conditions will prevent some people (e.g. shielders without a postal or proxy vote) from voting. A power to delay polling in a closely confined geographic area could be employed to prevent postponement of the entire election.	Alternative measures to resolve any local outbreak would include seeking to encourage vulnerable voters to register for postal voting in advance and the use of proxy voting for those without a postal vote who are unable to vote in person because of the virus conditions.	Any power for a local delay to polling would have to be accompanied by measures to allow the affected individuals vote as quickly as possible in order to reduce any impact on the calculation of regional seats.

¹⁰ Under section 2(5) of the 1998 Act

Possible additional changes			
Option	Circumstances in which required	Additional possibilities	Other
h) provision to prevent MSPs seeking to use the privileges of MSP status during the election period (due to any actual or perceived advantage that MSP status continuing (as a result of the delay to dissolution) might provide as incumbent candidates).	If considered appropriate, this would apply in the event of the dissolution date being moved.	Devising a workable sanction for a breach of this prohibition is likely to prove challenging, especially in the time available. Allowing an election result to be contested for a breach of these rules would appear excessive and a regulator-imposed financial penalty could be difficult to administer.	One option might involve the MSP Code of Conduct and scope for the new Parliament to consider any complaints, with the option of censuring any (successful) candidate.

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ANNEX A – PAPER CIRCULATED FOR 3 SEPTEMBER MEETING

SCOTTISH PARLIAMENT ELECTION 2021 AND COVID-19: BRIEFING PAPER

1. Contingency Planning for the Scottish Parliament Election 2021 in the context of Covid-19 has been carried out in conjunction with the Electoral Commission and the Electoral Management Board for Scotland (EMB), which includes representatives of Electoral Registration Officers (EROs).

Local Government by-elections

2. The EMB has, with Public Health Scotland, produced guidance on delivering elections safely under COVID-19 conditions – this will be deployed in relation to the local government by-elections scheduled over October-November 2020 (most of which were originally scheduled for spring 2020). A summary of these measures is attached and an assessment of their operation will inform preparations for elections in 2021.

Postal Voting

3. At the 2016 Scottish Parliament election postal votes were issued to 17.7% of the total electorate and accounted for around 23.7% of all votes cast. EMB analysis carried out with EROs suggests that an increase in postal voting of up to 30-35% of the electorate and 40-45% of those voting in total could be feasible, but that this depends on encouraging the public to apply sufficiently far ahead of the election to allow time for processing. It would only be possible to process a maximum increase of 7.6% in the month before the election itself. Electoral Commission polling¹ found that 38% of respondents said they would cast their vote by post if an election took place now.

4. It is considered that an all-postal ballot could not be arranged in time for May 2021, both as a result of processing around 3.4 million postal vote applications (applications would still be required as part of the security check process) and also the capacity of suppliers to issue postal vote packs for the Scottish Parliament election in addition to the other elections being held on 6 May elsewhere in the UK.

5. Increasing postal voting levels is likely to have some adverse impact in terms of failed attempts to vote. At the 2016 election just over 3% of postal votes were not included in the count after checks on voters' personal identifiers were conducted².

Legislation

6. The Government is preparing the Conduct Order for the Scottish Parliament Election 2021. A draft is out for consultation and a copy sent to all party leaders. The Order includes a number of changes which are not related to the impact of Covid-19. However, provisions for emergency proxies for those who are shielding and self-isolating are being included in the Order. Other provisions related to the impact of Covid-19 could be made by secondary legislation, but a number of potential changes have been identified that would require primary legislation.

¹ <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/public-attitudes-towards-voting-scotland-context-covid-19>

² <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/scottish-parliamentary-elections/results-and-turnout-2016-scottish-parliament-election>

7. Primary legislation would be required in order to achieve the following:
- polling over two days;
 - an all postal voting election;
 - postponement of the election beyond the 1 month extension already available to the Presiding Officer³;
 - for the new Parliament to convene more than 7 days after polling day⁴ (e.g. following a prolonged count, which is expected to be required in all circumstances involving physical distancing; and
 - to allow the current Parliament to meet if a decision to postpone the election for a lengthy period was made after dissolution.

8. Although some or all of these measures might not be required, for them to be available primary legislation would be needed prior to the dissolution of Parliament, expected to be around 25 March 2021. The need for some or all these changes may not be clear until very close to polling day (e.g. mid to late April 2021).

Postponing the election

9. If Parliament had not been dissolved at the point at which it became clear that an extension was required, the Presiding Officer would be able to propose up to a month's delay to the Poll under existing legislation (the Order to do so being made by the Queen) or it would be possible to set a new election date by emergency primary legislation. The alternative would be to expand the Presiding Officer's ability to postpone the poll by more than a month. It is suggested that this be for a period of up to six months, and that the Presiding Officer would be obliged to consult with Scottish Ministers, the EMB, the Electoral Commission and appropriate expert healthcare advice in reaching any decision. A statement of reasons would also be required.

Reconvening Parliament

10. Section 13 of the Scotland Act 1998 provides that each MSP's term of office ends with the dissolution of the Parliament. Left unchanged, this would make it impossible for Parliament to reconvene after dissolution. For example, a delay to polling day by six months arranged after dissolution would mean that there would be no sitting Parliament from the end of March until November.

11. There appear to be two options to allow the current Parliament to sit in the event of such a postponement:
- a) to delay dissolution of Parliament to a date sufficiently close to polling day so that any postponement to the election would also postpone dissolution. A form of recess would apply to allow for campaigning during an election period, but Parliament could be meet in emergency session (e.g. to postpone the election. This option has implications for the status of MSPs and their staff during the election period, although it would be possible to address these issues in the Bill; and
 - b) to allow dissolution to occur in late March with MSP status removed, but to make provision for former MSPs to be 'recalled' to office in the event of a postponement. This option would allow the pre-election period to operate as at present, but raises complex questions about re-instating MSP status.

³ Under section 2(5) of the Scotland Act 1998 (the "1998 Act")

⁴ Section 2(3)(b) of the 1998 Act requires Parliament to meet within the period of seven days beginning immediately after the day of the poll

12. A possible variant to option (a) would be to allow dissolution to occur in late March, but to modify its effect on MSP status so that remains for certain purposes such as permitting Parliament to be reconvened in certain specified circumstances (such as a delay). This would require provision on the circumstances in which Parliament could be recalled and would complicate the status of MSPs in the period in question.

13. At present, former MSPs can continue to deal with ongoing constituency casework during the dissolution period but are notified that correspondence must not give the impression they are a Member of Parliament. MSP salaries continue to be paid unless not standing again as a candidate (in which case a resettlement grant is paid)⁵. Former MSPs also face a number of restrictions on the use of parliamentary resources and on communications that refer to MSP status⁶. In Scottish Local Government elections, councillors do not lose their status until polling day, although are prohibited from using council resources for political purposes.

14. The following table provides a comparison:

Issue	Delayed Dissolution	Recall MSPs after dissolution
Impact on pre-election period	Continued payment of salaries for MSPs not seeking re-election and staff, continued ability to handle constituency business, implications for campaign material A need to establish how and to what extent normal election restrictions on former MSPs using parliamentary resources should apply during this recess/campaign period.	None – all parliamentary mechanisms as regards MSP conduct continue to apply.
Legal issues	Change to dissolution period could be made by secondary legislation but the change could also be included in any Bill	Primary legislation needed. Complex issues on status as MSP and employment status of staff.
Other issues	This would allow Parliament to meet during the recess/campaign period ahead of the election in the event of an emergency (e.g. to pass emergency legislation such as a Bill rescheduling the election). Dissolution could be delayed again in relation to any rescheduled polling day	Potential complications if the delay to the election is relatively short (e.g. would it be worth recalling MSPs for a 2 month delay?) or if there were repeated postponements to polling day.
Employment of staff	A need to establish impact on MSP staff during the recess/campaign period (e.g. would normal leave of absence options be acceptable if Parliament could be recalled?)	Impact on MSP staff as for an election in normal circumstances (e.g. members of staff taking leave in order to campaign)

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⁵ https://www.parliament.scot/Allowancesandexpensesresources/Members_Salary_Scheme.pdf

⁶ For example, on IT and Parliamentary Services, offices, expenses, staff and communications, as set out by the SPCB for the [2016 election](#) and the [EU referendum](#).

ANNEX B - PAPER CIRCULATED FOR THE 16 SEPTEMBER MEETING

SCOTTISH PARLIAMENT ELECTION 2021 AND COVID-19: OPTIONS AROUND DISSOLUTION OF PARLIAMENT

Issue

1. There is no facility in the current law for Parliament to be recalled after dissolution, which is expected to occur on or around 25 March 2021 (indeed, logic suggests it redundant to conceive of recalling an entity deemed no longer to exist). If a need arose after that date to postpone the election, the only option would be the existing ability of the Presiding Officer to recommend a one month delay to polling day¹. This is because section 13 of the Scotland Act 1998 provides that each MSP's term of office ends with the dissolution of the Parliament. To provide a longer delay than a month in response to circumstances in April or May 2021 will require legislation, either to allow the Presiding Officer to propose a longer extension or to allow Parliament to meet after 25 March to legislate for a new polling day. Whichever option is adopted, it will also be necessary to ensure Parliament can resume business in light of a delay to the poll of more than a month.

The pre-election period

2. At present, former MSPs can continue to deal with ongoing constituency casework, but not take on any new cases, during the period after dissolution but are notified that correspondence must not give the impression they are a Member of Parliament. MSP salaries continue to be paid unless not standing again as a candidate. Members who stand down receive a resettlement grant which is normally paid the next available pay run after the election². Staff of MSPs standing for re-election may be placed on notice of possible redundancy. Former MSPs also face a number of restrictions on the use of parliamentary resources and on communications that refer to MSP status³. In Scottish Local Government elections, councillors do not lose their status until polling day, although are prohibited from using council resources for political purposes.

3. The following scenarios envisage a need to revise Scottish Parliament corporate policies on the use of parliamentary resources during the election period. Guidance will also be required on the conduct of Members' standing as candidates. In addition, there has to be a clear understanding of the rules on Government activity during the election period

Options

4. We have identified three options to allow the current Parliament to sit in the event of such a postponement to polling day of several months:
- c) to delay dissolution of Parliament to a date sufficiently close to polling day so that any postponement to the election would also postpone dissolution. A form of recess - agreed by the Parliament on a motion of the Parliamentary Bureau - would apply to allow for campaigning during an election period, but Parliament could meet in emergency session (e.g. to postpone the election). This option has implications for the status of MSPs and their staff during the election period, although it would be possible to address these issues in the Bill;
 - d) to allow dissolution to occur in late March, but to modify its effect on MSP status so that it remains for certain purposes such as permitting Parliament to be reconstituted in certain specified circumstances (such as a delay). This would require provision on the

¹ This power is expressly exercisable even if dissolution has already occurred (as per the amendment made by [section 3](#) of the Scottish Elections (Reform) Act 2020). That section also requires the Presiding Officer to consult with the Electoral Commission.

² https://www.parliament.scot/Allowancesandexpensesresources/Members_Salary_Scheme.pdf

³ For example, on IT and Parliamentary Services, offices, expenses, staff and communications, as set out by the SPCB for the [2016 election](#) and the [EU referendum](#).

circumstances in which Parliament could be reconstituted and the status of MSPs in the period in question; and

- e) to allow dissolution to occur in late March with MSP status removed, but to make provision for former MSPs to be 'recalled' to office in the event of a postponement. This option would allow the pre-election period to operate as at present, but raises complex questions about re-instating MSP status.

5. We have discounted option (c) because of the complexities inherent in 'restoring' MSP status after it has been removed.

Option (a) – delaying dissolution

6. This option fits with the existing scheme of the Scotland Act 1998 as it preserves the status of dissolution without creating a half-way house where Parliament is dissolved but in which there may be circumstances in which dissolved status can be reversed. If a decision is taken to delay the election, no further changes would be needed for Parliament to resume ordinary business until the new dissolution date before the rearranged election. It also avoids complications around the status of MSPs.

7. If this option were favoured it might be preferable to postpone dissolution so that it technically only occurs on the day before polling day. This would seem to be clearer and less confusing than the potential alternative of permitting dissolution to be postponed in increments, which also creates a risk that there could be a decision to allow dissolution shortly (e.g. a week) before the election that could prove misguided in the face of a sudden spike in the virus.

Option (b) – modifying MSP status

8. This option is similar in effect to moving the dissolution date, but allows dissolution to occur and the 'normal' election period to apply. MSP status would remain in order to allow Parliament to meet in certain circumstances (e.g. at the discretion of the Presiding Officer, having consulted party leaders), but steps would otherwise be taken to dissuade MSPs from obtaining any advantage from MSP status during the election period. The normal restrictions on access to parliamentary assets could be applied. Potentially complex provision would be required to address how the dissolved Parliament could be capable of being reconstituted (for example, establishing the status of any outstanding business at the point of dissolution).

MSP status

9. Options (a) and (b) share a number of similarities. They both seek to continue MSP status into the election period so as to allow Parliament to decide on a postponement of polling and to resume meeting in the event of a delay. A central issue with both options lies in restricting any actual or perceived advantage that continuing MSP status might provide to incumbent candidates. One possible option could be a statutory prohibition on seeking to use the privileges of MSP status during the dissolution period.

10. Devising a workable sanction for a breach of this prohibition is likely to prove challenging, especially in the time available. Allowing an election result to be contested for a breach of these rules would appear excessive and a regulator-imposed financial penalty could be difficult to administer. One option might involve the MSP Code of Conduct and scope for the new Parliament to consider any complaints, with the option of censuring any (successful) candidate.