

SCOTTISH ELECTIONS (REDUCTION OF VOTING AGE) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Scottish Elections (Reduction of Voting Age) Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

The Bill contains 19 sections. It:

- lowers the voting age to 16 for Scottish Parliament and local government elections, and any other elections on Scotland that adopt the local government franchise;
- provides for modifications to electoral registration forms to capture the details of all those eligible to register;
- makes provision for how young persons in particular situations are to be dealt with within electoral registration systems; and
- sets out specific protections to be placed on any data collected on electors aged under 16.

3. Further information about the Bill's provisions is contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill <number>, and in the Policy Memorandum published separately as SP Bill <number>.

Rationale for subordinate legislation

4. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

- the fact that the Individual Electoral Registration system was introduced by the UK Government in Scotland from September 2014, which means that the systems being adjusted in consequence of the reduction in voting age are relatively novel even for older voters and may require adjustment, particularly in the light of experience from the household canvass which is planned from summer and autumn 2015 and the invitations to register which will follow it;
- the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation, for example if the UK Government decides itself to make a reduction in voting age for other elections;
- the desire to allow adjustments to the technical detail of electoral registration arrangements for young voters, or the controls over use of their data, to be made without the need for further primary legislation.

5. Despite these considerations, the Scottish Government has decided to adopt the approach of setting out in the Bill as fully as it can the provision that is needed at present. The delegated powers that are taken are not powers that the Scottish Government has any developed plans to use, nor do they exist to fill out detail that is currently absent from the Bill. All three delegated powers are intended to allow adjustment of provision, or supplement provision to be made, if necessary. As a result, all three powers are comparatively general in what they enable.

Delegated powers

6. The Bill contains the following delegated powers provisions:

Section 4: Invitations to register: Further provision for persons aged under 16

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Provision

7. Subsection (1) empowers the Scottish Ministers to make further provision about invitations to apply to register that may be given to persons under the age of 16. Subsection (2) gives particular examples of what such regulations may include, which (broadly) relate to form design and procedures for giving of invitations. Subsection (3) allows functions to be conferred on the Electoral Commission, while subsection (4) allows regulations to make incidental, supplemental, consequential, transitional, transitory or saving provision, and to modify any enactments. Subsections (5) and (6) requires that before making regulations there must be consultation with the Electoral Commission and any such regulations must be laid in draft before the Scottish Parliament for approval.

Reason for taking this power

8. The Scottish Government currently does not intend to use this power. Section 3 of the Bill sets out adjustments to the existing system for giving invitations to register to voters, where the person being given the invitation is under the age of 16. The intention is that these adjustments will allow a single invitation to be used for all persons, of whatever age. However,

as this is an untested system, it is possible that experience of operating it will suggest that it would be better to have a specific form of invitation for persons under 16, and that there should be procedural changes to take account of their special circumstances. This power is therefore sought to enable that change without the need for further primary legislation, if change proves desirable. This includes the power to modify any enactment, since the likelihood is that any use of the power would require to modify at least section 9E of the Representation of the People Act 1983 and associated Regulations, as is done by section 3 of the Bill.

9. The requirement to consult the Electoral Commission is in line with current requirements for such matters, and as that Commission designs the form of the current invitation to register, a power is taken to confer functions on the Commission. The most likely use would be to require the Commission to design a form for use for under-16s.

Choice of procedure

10. The Scottish Government recognises this power's potentially broad application and the likely close interest of members of the Scottish Parliament in the procedures by which persons under 16 are invited to register. Also, it is appropriate that the Parliament has the opportunity to consider the conferral of functions on the Electoral Commission and any use of the equivalent power in the Representation of the People Act 1983 (which is at section 9E of that Act) requires a draft to be laid before and approved by each House of the Westminster Parliament. For these reasons any use of this power will require the high level of parliamentary scrutiny attached to the affirmative procedure.

Section 14: Further provision for exceptions

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Provision

11. This section empowers the Scottish Ministers to make further provision for or about the disclosure of entries in the register of local government electors relating to persons who, at the time of disclosure, are under the age of 16. Subsection (2) gives particular examples of what such regulations may include, which allows prohibitions and restrictions to be attached to any disclosure (amongst other things). Subsection (3) allows modification of enactments, including modifications of section 13 of the Act that will result from the Bill, and enables the creation of criminal offences. Subsection (4) allows regulations to make incidental, supplemental, consequential, transitional, transitory or saving provision, and to modify any enactments. Subsections (5) and (6) requires that before making regulations there must be consultation with the Electoral Commission and such other persons as the Scottish Ministers consider appropriate and provide that any such regulations must be laid in draft before the Scottish Parliament for approval.

Reason for taking this power

12. The Scottish Government is aware that the stringent protections being attached to the information Electoral Registration Officers will hold on 14 and 15 year olds are novel, though broadly preceded in what was provided for the Register of Young Voters that was compiled

for the referendum on Scottish independence in September 2014. Elections raise some different issues from referendums, in that they have candidates and a different system of donation control. Also, in developing the Bill there has not been the opportunity to consider fully with stakeholders all situations in which there might be a reason to allow access to that information for electoral purposes.

13. The power is therefore sought to provide flexibility to develop either the list of relevant supply enactments in section 13(3) of the Bill or to make separate provision. The power is also sought to create criminal offences (though not with an imprisonment sanction) to ensure that the offence and sanction at section 13(6) to (8) of the Bill can be applied to any provision created using this power, or an equivalent sanction created. This offence relates to impermissible disclosure of the information that the Bill requires to be protected; the penalty for contravention of the relevant supply enactments is identical (it is contained at regulation 115 of the Representation of the People (Scotland) Regulations 2001 (SI 2001/497)).

Choice of procedure

14. Members of the Scottish Parliament would wish to scrutinise closely any exceptions that are created to the prohibition on disclosure that they have agreed, and it is proper that they should also have the opportunity to scrutinise any amendment of primary legislation or creation of a criminal offence. The Scottish Ministers therefore consider that any use of this power should require the high level of parliamentary scrutiny attached to the affirmative procedure.

Section 17: Ancillary provision

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Affirmative procedure - where regulations amend primary legislation. Negative procedure - where the regulations do not amend primary legislation.

Provision

15. Section 17 confers on the Scottish Ministers a power to make incidental, supplementary, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to, any provision of the Act. This includes power to make provision in consequence of, or in connection with, any modification or proposed modification of any electoral registration enactment.

Reason for taking this power

16. The changes the Act makes to the registration system may give rise to a need for ancillary provisions. Without the power to make incidental, supplementary and consequential provision it would probably be necessary to return to the Parliament, to address them through primary legislation, when they are likely to be minor matters that relate to the purposes already clearly set out in the Bill. That would not be an effective use of resources. The power itself is circumscribed by being entirely ancillary to the provisions of the Bill and any such provision must be for the purposes of the Bill or in consequence of it or for giving full effect to it.

17. It is also possible that there will be a need to adjust the provision made by the Bill to take account of adjustments that are proposed, or made, to the electoral registration legislation that the Bill amends. Although the Bill adopts a drafting approach that is designed to minimise the potential for such adjustments, it substantially operates by textual amendment of either the Representation of the People Act 1983 or the Representation of the People (Scotland) Regulations 2001. As a result, any modifications to that legislation, perhaps as a result of experience of the operation of the relatively new Individual Electoral Registration system, may require consequential or related modification of provision for those aged under 18 and entitled to vote at Scottish elections. The same principle about effective use of resources that is mentioned in the previous paragraph applies; additionally there may be merit in being able to respond swiftly through Regulations to provide suitably for young electors.

18. There is an element of overlap between this power and the two specific delegated powers that are provided for by sections 4 and 14 of the Bill. However, the specific powers relate to specific purposes. That at section 4 of the Bill would be used, as previously explained, to change the approach taken to invitations to register as an elector from the approach taken by section 3 of the Bill. That at section 14 of the Bill sets out a detailed scheme for provision about information disclosure. Both of these are matters where the Scottish Parliament should be able to see in detail what the proposed power is, in more detail than would be apparent (or appropriate) as an ancillary power, which inevitably is drafted to cover potentially the wide range of matters that could arise.

Choice of Procedure

19. Section 17(4) of the Bill provides that any Regulations will be subject to affirmative procedure if they contain provisions which make textual changes to an Act. Otherwise, they will be subject to negative procedure. This provides the appropriate level of parliamentary scrutiny for the textual amendment of primary legislation, where affirmative procedure is normally provided for, while ensuring that other ancillary provision is still subject to an appropriate level of scrutiny by Parliament. Negative procedure is considered appropriate in terms of expedition and convenience for provision that does not amend primary legislation, such as any use of the power that amends electoral regulations. The sort of administrative detail which is likely to be covered by amendments to regulations is unlikely to be such as would necessitate the use of affirmative procedure. Where provision was being made that went beyond administrative detail, it is likely that it would require to amend both primary and secondary legislation, and in that eventuality it is probable that a single, affirmative procedure, instrument would be the vehicle by which the Scottish Government would progress the making of ancillary provision.

This document relates to the Scottish Elections (Reduction of Voting Age) Bill (SP Bill 66) as introduced in the Scottish Parliament on 2 April 2015

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