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Dear Martin,

SCOTTISH ELECTIONS (REPRESENTATION AND REFORM) BILL

Thank you for your letter of 3 May 2024 to my predecessor as Minister of Parliamentary Business in relation to the Scottish Elections (Representation And Reform) Bill. I look forward to working with the Committee on the Bill as it progresses.

I appreciate that the Committee would welcome more information in relation to:

- a) Examples of international best practice on disqualification from elected office for those on the sex offender register;
- b) Further detail on why the possibility of increasing of the maximum fine available to the Electoral Commission for breaches of electoral law (as featured in the Government 's consultation) has not been adopted in the Bill; and
- c) Whether a legal test to justify a decision on an emergency election postponement should be added to the Bill.

Disqualification from elected office – sex offender notification requirements

As my predecessor set out in his [letter](#) to the Committee on 2 February, the Government would welcome the views of the Committee on a Stage 2 amendment to the Bill barring persons subject to sex offender notification requirements from holding office as local authority councillors and as MSPs.

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In considering this issue, the Government has been informed by the [results](#) of the consultation in relation to councillor disqualification held in 2023. It has also considered the changes made in 2020 in relation to candidacy rights in the Welsh Senedd, in particular, the new [schedule 1A](#) to the Government of Wales Act 2006 which excludes “A person subject to the notification requirements of, or an order under, Part 2 of the [Sexual Offences Act 2003](#)” from membership of the Senedd. Similar prohibitions apply in relation to councillors in [England](#) and in [Wales](#), but no such provision is in place for Members of the House of Commons. However, the [House of Commons voted on 13 May](#) to amend its process for a risk-based exclusion to allow MPs accused of a violent or sexual offence to be excluded from the Commons from the point of arrest rather than charge.

This is not an area where straightforward international comparisons can be made as it depends on the rules in place in each country in relation to registering sex offenders. The situation is also complicated by the existing legal prohibitions on convicted persons serving as MSPs (if sentenced to over 12 months and detained in prison) or councillors (if sentenced to 3 months or more in the previous 5 years).

I am however grateful to the Committee Convener for highlighting the work of the Council of Europe’s Venice Commission in this area of barring offenders from elected office. The Commission’s 2015 [Report on Exclusion of Offenders from Parliament](#) is clearly of interest. That Report contains some comparative discussion of restrictions in Member States and its conclusions (at paragraphs 168 to 180) are pertinent. I thought that it would be worth quoting paragraph 170 in full:

“Ineligibility to be elected is a restriction of the right to free elections: it must therefore be based on clear norms of law, pursue a legitimate aim and observe the principle of proportionality. It is in the general public interest to avoid an active role of serious offenders. Proportionality limits in particular the length of the restriction; it requires that such elements as the nature of the offence, its severity and/or the length of the sentence be taken into account.”

This is clearly a complex and sensitive matter and – to repeat the position set out by my predecessor in his February letter – the Government wishes any change to be informed by the views of the Committee. I have in particular been considering the following points:

- a) Whether it would be appropriate to disqualify all convicted persons subject to a sexual offence notification from holding office as an MSP.
- b) Whether the same rules on disqualification in relation to sexual offence notifications apply to MSPs and to councillors.
- c) Whether the same rules that bar people who become subject to sexual offence notification from being candidates should also apply to serving elected representatives.
- d) Whether the existing criminal sentence thresholds for disqualification of councillors and MSPs (as you know, an issue raised by Graham Simpson MSP at the Committee session on the Bill on 2 May) should be re-considered.

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Electoral Commission Maximum Financial Penalties

As noted at the evidence session on 2 May, the Government's electoral reform consultation asked about increasing the maximum fine that the Electoral Commission should be able to impose for breaches of electoral law in Scottish Parliament and local government elections. The Electoral Commission in its response to the Consultation suggested a maximum penalty of £500,000.

In principle the Government is sympathetic to a change in this area. It would improve regulator oversight of elections and would be consistent with the rules for referendums as set out in schedule 5 of the Referendums (Scotland) Act 2020.

However, significant issues have been identified regarding the interaction with reserved matters and the scope to make changes for conduct in relation to Scottish Parliament and local elections alone. A particular challenge is that the Scottish Parliament cannot make a change in relation to the fine limit that can be levied for any Scottish Parliament election held in the 12 months prior to a UK General election. This is because of the operation of the reservation (in B3 (Elections) of schedule 5 of the Scotland Act 1998) on the subject matter of parts 5 and 6 of the Political Parties, Elections and Referendums Act 2000 ("PPERA") (expenditure in connection with elections) where a limit applies to expenditure in relation to a period determined by reference both to the date of the poll for an election within the legislative competence of the Scottish Parliament and to the date of the poll at an election for membership the House of Commons, and also sections 145 to 148 and 150 to 154 of PERA (enforcement) as they apply to expenditure limits in that period.

The spending limits that apply to elections apply during "the regulated period" which is calculated in relation to a particular election according to the rules in Schedule 9 of PERA. A UK Parliamentary general election will have a regulated period of 365 days, ending on the day of the election. A Scottish Parliamentary election will generally have a regulated period of four months ending with the date of the poll. However, where two or more regulated periods overlap, a combined regulated period applies to the Scottish Parliamentary election.

It is generally within the legislative competence of the Scottish Parliament to make provision in relation to campaign finance for elections to the Scottish Parliament and in relation to enforcement sanctions by the Electoral Commission where the regulated period is determined by reference to the Scottish election alone. However, this is not possible when a combined regulated period applies during any period of 12 months prior to a UK Parliament General Election. During a combined regulation period the reserved limits and enforcement sanctions would apply.

There is therefore a risk that pursuing a change in this area could create a confusing and inconsistent approach to enforcement across the UK. Making a change for Scottish Parliament elections would mean different maximum penalties depending on when the Scottish Parliament general election is held. The maximum fine that could be levied by the Electoral Commission for a breach of election spending rules would vary depending on the date of the UK Parliamentary general election. It would also result in a period of uncertainty for 12 months after every Scottish Parliament election, as it would not immediately be known if a UK Parliament general election would be called in that 12 month period.

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The Government is in dialogue with the Electoral Commission on this matter and would welcome the Committee's views.

Emergency postponement of elections - a legal test to justify a decision

The Bill's provisions on emergency re-scheduling of elections seek to cover situations where postponement is considered essential. They are deliberately not proscriptive, so as to cover a wide range of possible emergency situations. The Government is nonetheless keen to ensure that any power to postpone is proportionate and would especially welcome the views of the Committee in this area.

Section 25 of the Bill makes provision for the convener of the Electoral Management Board for Scotland to fix a new date for an ordinary local government election if it is considered "necessary or appropriate for any reason to do so". Similar wording is used in section 26 for a decision by a Returning Officer in relation to the poll at ordinary local government election in their area. Section 24 of the Bill also allows the Presiding Officer of the Scottish Parliament to decide not to hold a by-election in certain limited circumstances if it is considered "necessary or appropriate for any reason to do so".

By contrast, section 20 of the Bill, which modifies the existing power of the Presiding Officer to move the date of a Scottish Parliament ordinary general election does not contain the same "necessary or appropriate for any reason to do so" stipulation. This reflects that a power in this area already exists, as set out in section 2 of the Scotland Act 1998.

The Government is open to considering changes in this area and one option – if the Parliament considered it appropriate - could be to adopt a variant of the "necessary or appropriate for any reason to do so" stipulation to the Presiding Officer's decision to propose a new date for a Scottish Parliament ordinary general election. Another option, raised by witnesses to the Committee and which the Government will consider further, is to require any decision maker to provide a statement of reasons when making a decision.

I hope that this letter is helpful to the Committee.

Yours sincerely,



JAMIE HEPBURN

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