

T: 0300 244 4000  
E: [scottish.ministers@gov.scot](mailto:scottish.ministers@gov.scot)

Martin Whitfield MSP  
Convener  
Standards, Procedures and Public Appointments  
Committee  
The Scottish Parliament  
Edinburgh  
EH99 1SP

Email: [SPPA.Committee@parliament.scot](mailto:SPPA.Committee@parliament.scot)

02 September 2024

Dear Martin,

## **SCOTTISH ELECTIONS (REPRESENTATION AND REFORM) BILL**

Ahead of the discussion with the Committee on 5th September I thought that it would be helpful to write with an indication of my current intentions ahead of Stage 2 of the Bill. I had hoped to be in a position to write to you sooner but I hope that providing this in advance of 5th September is helpful for the Committee's consideration of the Bill.

Work is progressing with proposed government amendments to the Bill. This includes changes to the constitution of the Electoral Management Board for Scotland (EMB) and proposals to disqualify those subject to sex offender notification requirements or relevant sexual behavioural orders from elected office. The Annexes to this letter provide further detail on each issue. There are some areas that do not set out a definitive position as we continue to think through the implications of any approach we take and I am keen to hear what the Committee thinks about these issues.

I also thought it would be helpful to provide the following brief update on issues highlighted in my letter of 20 June in response to the Committee's Stage 1 Report:

- a) On rescheduling of elections, amendments are being prepared to adjust the maximum period of postponement for local government elections to four weeks and to require a statement of reasons to be published by any person granted the ability to make a rescheduling decision under the Bill.
- b) On electoral innovation pilots, amendments are being prepared to add the Electoral Commission as a statutory consultee and to ensure pilots can encompass electoral registration changes.
- c) On digital imprints, discussions are underway in relation to the statutory requirement for the police to take account of Electoral Commission guidance on digital imprints.

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I hope that this update is helpful and look forward to our discussion on 5 September.

Yours,

**JAMIE HEPBURN**

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## Constitution of the Electoral Management Board for Scotland (EMB)

Amendments are being prepared to restate and expand the existing constitution of the EMB, as set out in the [Local Electoral Administration \(Scotland\) Act 2011](#) (the “2011 Act”)

**Status of the EMB:** the amendments will preserve section 47(2) of the Bill as introduced which amends section 1 of the 2011 Act to provide that the EMB continues to exist and becomes a body corporate, with the same general functions. The amendments will make clear that this body corporate, its members and staff are not Crown servants.

**Membership of the EMB:** section 2 of the 2011 Act currently sets out that the EMB’s Board is to consist of Returning Officers (ROs) or deputies serving in Scotland and Electoral Registration Officer (EROs) serving in the Scotland. It is proposed to expand this so as to allow former ROs, former deputies and former EROs from any part of the UK to be eligible for appointment to the Board. The expansion would also allow serving ROs and deputies from other parts of the UK to be Board members (including allowing any serving or former RO or deputy to act as Convener and Deputy Convener) and serving EROs from the rest of the UK to be appointed as Board members.

**Appointment of Convener and Board Members** – we propose a 4-year term of office, with scope for a second 4-year term. The Convener is to be nominated by the Scottish Parliament.

**Early removal of Convener** – other than resignation, to be achieved by His Majesty if — (a) the Scottish Parliamentary Corporate Body (SPCB) is satisfied that the Convener has breached the terms and conditions of office and the 2/3rds of the members of Parliament resolve that the Convener should be removed from office for that breach, or (b) 2/3rds of the Members of the Parliament resolve that they have lost confidence in the Convener’s willingness, suitability or ability to perform the functions of the Convener.

**Depute Convener** – to ensure there is one depute (who has to be a Returning Officer or former Returning Officer) with power to issue directions in the event of the Convener being incapacitated, and another depute without direction-making power who can be an ERO (or former ERO).

**Members’ remuneration** – the EMB would have the ability to pay remuneration. The specific formal consent of the SPCB on remuneration, allowances and expenses would not be required, but the SPCB would have a general approval role in relation to the EMB’s budget.

**Staff appointments** – To ensure that the Board may appoint staff. The staff are to be employed on terms and conditions as may, with the approval of the SPCB, be determined by the Board.

**Political restrictions** – to prevent staff from participating in political activities.

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**Public bodies legislation** – addition of the EMB to: the Ethical Standards in Public Life etc. (Scotland) Act 2000, the Freedom of Information (Scotland) Act 2002, the Public Appointments and Public Bodies etc. (Scotland) Act 2003 the Public Services Reform (Scotland) Act 2010 and the Gender Representation on Public Boards (Scotland) Act 2018. The effect of these additions is more fully explained in [schedule 2 of the Explanatory Notes for the Consumer Scotland Act 2020](#).

**Priority Statement** - we have considered if there should be a formal mechanism by which the Scottish Government and/or the Scottish Parliament should be able to request that the EMB consider possible areas of work (for example, in relation to voter education). To avoid any suggestion of interference with the EMB, this could take the form of a “priority statement”. It would not be binding, and the wording could be made so that the EMB would simply be obliged to “have regard” to its terms.

**Funding** – it is proposed to modify funding arrangements for the EMB so that they are funded by the SPCB, following a corresponding budget transfer from the Scottish Government. The model being considered is the arrangement for the Electoral Commission set out in paragraph 14A of schedule 1 to the [Political Parties, Elections and Referendums Act 2000](#), with an annual budget, SPCB reimbursement and subsequent accounting. One aspect of this change is assessing to what extent it might involve additional cost compared to the current model of funding directly from the Scottish Government.

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## Disqualification from Elected Office – sexual offences

Previous letters to the Committee (from [February](#) and [May](#) 2024) set out background detail to the proposed disqualification of persons subject to a sex offender notification from holding office as local authority councillors or MSPs.

### Background

Section 31 of the Local Government (Scotland) Act 1973 prevents individuals standing, or holding office, as a local authority member if they have, within five years prior to the day of the election, or since their election, been convicted in the UK, Channel Islands, Isle of Man or the Republic of Ireland of any offence and have received a custodial sentence, suspended or not, for a period of not less than three months without the option of a fine.

For elections to the Scottish Parliament, people are disqualified from standing or continuing to serve as an MSP if they have been convicted of an offence and have been sentenced to be imprisoned or detained for more than a year and are detained anywhere in the UK, the Republic of Ireland, the Channel Islands or the Isle of Man, or are unlawfully at large (section 1 of the Representation of the People Act 1981, as it applies to Scottish Parliament elections by virtue of section 15 of the Scotland Act).

Article 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR) enshrines the principle of efficient political democracy. It also protects individual rights of participation: the right to vote and the right to stand for election to a legislature. Any limitation must be prescribed by law, proportionate and in furtherance of a legitimate aim in order to be compatible with the Convention.

### England and Wales

In England and Wales, people are barred from being a councillor when subject to certain orders, some of which do not require a conviction, and where they are subject to the Sex Offender Notification Requirements (SONR), even if this does not involve a conviction for an offence of a sexual nature. This could be, for example, where a Sexual Risk Order (SRO) has been put in place and breached. An SRO is a civil order which can be sought by the police against an individual who has not been convicted or equivalent of an offence under [Schedule 3](#) of the Sexual Offences Act 2003 but who is nevertheless thought to pose a risk of harm to children and/or adults. SONR do not automatically apply to an individual subject to a SRO, however, breach of an SRO can result in the individual becoming subject to the notification requirements.

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## Further consideration based on international comparisons

International practice in relation to whether people convicted of offences should be allowed to be members of parliament varies widely. The Council of Europe's European Commission for Democracy through Law (the "Venice Commission"), in 2015, reviewed the legal provisions on exclusion of offenders from parliaments in Council of Europe member states and selected other countries, and concluded that, while "the vast majority of the states examined limit the right of offenders to sit in Parliament, at least in the most serious cases", "there is no common standard on the cases, if any, in which such restrictions should be imposed".<sup>1</sup>

In some countries (e.g. Ireland, Canada) restrictions on the right to stand are automatic and set out in the country's constitution or electoral legislation (stipulating the conviction, type of sentence or offence which triggers the deprivation). In others (e.g. France, the Netherlands) restrictions are decided by a court as a punishment on a case-by-case basis and set out in criminal legislation. In some countries (e.g. Germany, Spain) it is a mixture of both.

Summary points on international practice relevant to the Committee's considerations include:

- It is more common for countries to disqualify offenders from being candidates or elected members based on the length of their sentence, rather than the nature of the offence committed. Among those countries that set a criminal conviction sentence threshold, the most frequent sentence length trigger among Venice Commission member states is 1 year, however a small number of countries have a shorter sentence length trigger of 6 months (e.g. Ireland, Austria), and some have a longer sentence length trigger (e.g. for parliamentarians, two years in Italy, and three years in New Zealand).
- There is a wide range of practice in relation to whether countries set the same threshold for councillors and parliamentarians or not. Countries including Ireland, Austria, Germany and Spain set the same disqualification rules for both, although not necessarily in the same legislation. And countries including New Zealand, Denmark, Belgium and Australia have different exclusion rules for different levels of government.
- Similarly there is a wide range of international practice in relation to whether countries with disqualification provisions for offenders bar the convicted person from elected office only for the period of their sentence or for an additional period after the sentence has expired. For example, in Ireland and Spain the person is disqualified only for the duration of their sentence, while in France (5-10 years), Germany (2-5 years) and Canada (5-7 years) accessory penalties can extend after terms of imprisonment. In the German example, anyone imprisoned for a term of at least one year for a serious criminal offence loses the ability, for a period of five years beginning after their sentence has been served, to hold public office and be elected in public elections. If a judge delivers a sentence of less than one year, they can deprive the offender of the right to be elected for between two or five years, but only for specific offences.

The Council of Europe's Venice Commission Report on Exclusion of Offenders from Parliament noted above concluded:

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<sup>1</sup> European Commission for Democracy Through Law (Venice Commission)(2015) [Report on Exclusion of Offenders from Parliament](#), Council of Europe

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“168. Legality is the first element of the Rule of Law and implies that the law must be followed, by individuals and by the authorities. The exercise of political power by people who seriously infringed the law puts at risk the implementation of this principle, which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state. It is therefore justified to restrict their right to be elected.

170. 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.

174. The Venice Commission considers that, if the exclusion of offenders from elected bodies does not happen by the simple functioning of the electoral mechanisms, legislative intervention becomes necessary.

176. The duration of ineligibility is subject to the principle of proportionality. In the Commission’s opinion, it is most justified during the execution of the sentence and its admissibility decreases with time.

177. The Venice Commission considers that the deprivation of political rights before final conviction is contrary to the principle of presumption of innocence, except for limited and justified exceptions. In practice, exceptions are applied in only a few states under consideration.”

## **Proposed guiding principles for reform**

The Government’s consideration in this area has included the following points:

- a) Restrictions on qualification for elected office are founded on protecting the public in personal encounters with elected representatives, upholding the rule of law and the democratic nature of the state and on maintaining the trust and confidence of the public in our system of democracy.
- b) There should not be a difference in treatment between disqualification from councillor or MSP status without a clear rationale.
- c) Disqualification/ineligibility must be carefully assessed in terms of proportionality human rights law and international obligations.
- d) No change in the law can disqualify any representative serving at the time the change becomes live. Anyone subject to a new restriction after the ‘go live’ date would be disqualified and it would apply to all candidates at subsequent elections

## Factors for discussion

The Government is considering Stage 2 amendments to the Bill on disqualification from elected office. It is of the view that barring persons subject to sex offender notification requirements and/or those subject to relevant sexual behavioural orders from elected office would bolster public confidence and trust in democracy and the standards expected of elected representatives. It would also play a role in protecting the public in personal encounters with elected representatives.

There are arguments, as a matter of public policy, for treating sexual offences differently from other forms of offences. Such crimes are treated differently by the courts as evidence by the sex offenders register in terms of legacy and ongoing issues of protection. The same considerations are also important in terms of faith in elected representatives. Sexual offences have a significant impact on society. It can be argued that those with sexual offence notification requirements or relevant sexual behavioural orders should not be allowed to hold office whilst subject to conditions imposed in court. For an individual to be subject to notification requirements or a sexual behavioural order there is a stage of independent judicial oversight. These notification requirements or orders have been put in place to protect the public and the inclusion of those individuals in office may erode public confidence in the system.

Article 3 of Protocol No. 1 of the European Convention on Human Rights, which enshrines the principle of efficient political democracy, protects individual rights to vote and stand for election. The right to stand for election applies to the legislature so, in our case, the Scottish Parliament. Any limitation on this right must be prescribed by law, proportionate and in furtherance of a legitimate aim in order to be compatible with the Convention.

As set out in the guiding principle above, the Government considers that there should not be a difference in treatment between disqualification from councillor or MSP status without a clear rationale. However, there are some significant differences between MSPs and councillors in this area. Councillors cannot be suspended under parliamentary procedure (the approach adopted at Westminster in relation to MPs) and there is no equivalent of the recall procedure in place at Westminster.

## Areas that I would be particularly interested to hear from the Committee include:

- a) What threshold should be imposed for MSPs and councillors? Is there scope for a wider range of restrictions to apply to councillors, for example those subject to SONR where no conviction for a sexual offence is involved and also listed risk orders?
- b) Should all impositions of notification requirements and risk orders by a court elsewhere in the UK, Channel Islands or Isle of Man be accepted for the purposes of the proposed disqualification (where appropriate)?
- c) What should be the impact of an ongoing appeal against conviction? Section 12 of the Bill makes provision (in the context of disqualification tied to intimidatory conduct) so that any disqualification will not take effect until appeal rights are exhausted, although there is a 3 month back stop for this. Note: section 16(4) of the Scotland Act 1998 provides some scope for the Parliament to resolve to disregard any disqualification of an MSP if it considers that (a) the ground has been removed, and (b) it is proper to disregard any disqualification so incurred.

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