

# Welsh Elections (Coronavirus) Bill: Bill Summary

January 2021



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## 1. Background

The next Senedd general election (the “**2021 Election**”) is scheduled for Thursday 6 May 2021.

On 15 June 2020, the First Minister **outlined** that arrangements for the 2021 Election may need to be adjusted in connection with the Coronavirus pandemic.

The **First Minister has stated** that he is ‘very committed’ to having an election in May 2021. In Plenary, **he expressed** it was “not right that this Senedd should be extended beyond its current term” and felt strongly that “the Senedd needs a democratic refresh”.

However, in the same statement, the First Minister noted that the Welsh Government wants:

[...] an election in which every Welsh citizen feels that they can go to the polling station and is not put off from doing so because the state of public health at the time might be very off-putting to them. It’s just foolish not to be willing to contemplate that and to think about how we would cope with it were we to be faced by it.

The First Minister **has expressed that** it would be irresponsible of the Welsh Government “not to make plans in case the pandemic is so serious in May [2021] where it wouldn’t be safe to hold an election”.

### Elections Planning Group

The Welsh Government established an Elections Planning Group in June 2020 to consider the potential impact of Coronavirus on the administration of the 2021 Election, and whether adjustments were needed to the relevant legislation to ensure a safe election.

The Group met five times and its **report** was published on 6 November 2020. The report was **debated** in Plenary on 17 November.

Members across the political spectrum agreed that, as far as possible, the 2021 Election should go ahead as planned in May. There was general agreement that contingency arrangements should be put in place to make the election as safe as possible. However, the Group did not agree on all matters. Most notably, there was no overall consensus on the need for contingency arrangements to postpone the election.

## Who was on the Elections Planning Group?

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The Group consisted of political parties, Welsh and UK government officials, and stakeholders involved in running the election, such as the Electoral Commission and Returning Officers.

## What did the Elections Planning Group find?

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The Group agreed a set of **principles** and conclusions to support more detailed planning and preparations for the 2021 Election, including:

- The continuing aim should be for the Senedd elections to be held on 6 May as planned;
- To achieve this, it recommended considering ways of instilling flexibility into the election planning process which reflected public health advice;
- There should be an early drive to encourage postal vote applications, especially for voters who have previously been shielding or those considered vulnerable;
- Some degree of greater flexibility in respect of postal and proxy votes may be appropriate while maintaining appropriate checks to protect against the risk of voting fraud. However, the report stated this required further detailed consideration;
- Voting should be considered a ‘reasonable excuse’ for leaving the house if any Coronavirus regulations were in place at the time of an election; and
- The count could be conducted over an extended timeframe if this would greater protect the health and safety of those involved.

On 6 November 2020, the First Minister **confirmed in a written statement** that the Welsh Government would implement the areas of consensus reached by the Elections Planning Group.

The Elections Planning Group did not reach a consensus on extending the Llywydd’s powers to vary the date of Senedd elections. However, most political parties were **willing to consider** this as a “contingency measure in extremis”.

## Power to vary the date of a Senedd general election

The date of a Senedd general election is set by statute.

Section 3 of the Government of Wales Act 2006 (“**GoWA**”) **provides that** each ordinary general Senedd election is to be held on the first Thursday in May in the

fifth calendar year following the previous ordinary general election. The previous (then) National Assembly general election took place on 5 May 2016.

The Llywydd has an existing power under Section 4 of GoWA to vary the date of a Senedd general election by up to one month, earlier or later, from the statutory election date.

It follows that the Llywydd, using the existing power, could vary the date of the 2021 Election to 6 June 2021, but no later. The Llywydd has full discretion in determining what circumstances would make the use of this power appropriate.

The only option for varying the 2021 Election beyond 6 June is via primary legislation.

## Responsibility for running Senedd elections

Returning Officers are responsible for running Senedd elections within the parameters of election conduct rules, set out in legislation.

The Welsh Ministers have powers to make provisions about the conduct of Senedd elections (and other matters relating to Senedd elections) under Section 13 of GoWA.

The current conduct rules, created under these powers, are contained in the **National Assembly for Wales (Representation of the People) Order 2007**, as amended (the “**Conduct Order**”). The Conduct Order is discussed in greater detail in the Key Provisions section of this Bill Summary (under the analysis of Section 10).

The Bill’s Explanatory Memorandum states that ‘[w]hilst the Welsh Ministers make the secondary legislation, there is a clear distinction in roles and responsibilities, the conduct and administration of the election being a matter for Returning Officers’.

In October 2020, the Electoral Commission prepared a **guide** outlining the role and responsibilities of Returning Officers for the 2021 Election.

It stated that Constituency Returning Officers are ‘personally responsible for the conduct of the Senedd election’, including:

- Administering the nomination process;
- Encouraging participation;

- Provision and equipment of polling stations, including staffing;
- Conduct of the poll;
- Management of the postal vote process;
- Verification and counting of the votes for both the constituency contest and that part of the regional contest that falls within the constituency; and
- Declaring the constituency result.

The Bill's Explanatory Memorandum also states that actions are being taken by Returning Officers and electoral administrators to mitigate risks associated with running the election during the pandemic, including encouraging the use of postal voting and planning for social distancing measures.

## Coronavirus: Background

The four governments of the UK have introduced various measures to protect public health and respond to the Coronavirus pandemic over the past year.

On 14 December 2020, the Welsh Government published its **updated Coronavirus control plan** ("Control Plan"). The Control Plan sets out four alert levels and contains key indicators to determine which alert level should apply. Specific key indicators include the number of cases per 100,000 of the population, case rate in those over the age of 60 and the percentage of positive Coronavirus tests. The Control Plan also describes the applicable control measures at each level.

Currently, the whole of Wales is under alert level four. This is the highest level under the Control Plan, which means the risk from Coronavirus is very high.

At alert level four, there is a requirement for people to stay at home unless they have a reasonable excuse, such as obtaining food and medical supplies. People are required to self-isolate after testing positive for Coronavirus or after being in close contact with another person who has tested positive. There's also a requirement to wear a face covering in certain indoor settings.

The current restrictions are underpinned in law by **The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020, as amended** (the "**Coronavirus Regulations**"). Whilst the current restrictions apply nationally, the Coronavirus Regulations allow the flexibility to apply different alert levels on a regional or local basis.

The Coronavirus Regulations provide that 'travelling to vote in an election' is a reasonable excuse for leaving home under alert level 4 restrictions (Schedule

4, paragraph 1(4)(i)). There is no corresponding exemption under alert levels 1-3, however, the 'stay at home' requirement is only applicable to alert level 4. Separately, the Coronavirus Regulations provide that 'travelling to vote in an election' is a reasonable excuse for travelling 'to and from' all alert levels across Wales.

It is not possible to accurately predict the prevalence of Coronavirus in May or foresee which alert level and associated restrictions will be in place.

## Running elections during Coronavirus

In October 2020, the **Electoral Commission published** its 'objectives for well-run elections in the current public health context'.

The following objectives were identified for voters, candidates and campaigners, and electoral administrators:

### **Voters**

- There should be reasonable voting options available to all electors that minimise the risk of virus transmission, including for vulnerable people and those whose circumstances change at short notice (e.g. because of lockdown or isolation requirements);
- Voters should be entitled to access the same voting methods and information regardless of where they live;
- Voters with disabilities should still be able to access the level of support they need in order to be able to vote with confidence;
- Voters should have clear and comprehensive information in advance about available voting options to help them plan how to vote safely;
- Applying to vote by post or proxy should be simple and accessible for all electors; and
- Voters should have clear, accessible and comprehensive information to help them understand how to vote using their chosen method.

### **Candidates and campaigners**

- Campaigners should have clarity about how the elections will be run and regulated (including information about regulated campaign periods), sufficiently far in advance to put in place appropriate plans;

- Candidates should have options for completing and submitting nomination papers that minimise virus transmission risk;
- It should be possible for campaigners to put their arguments and give information to voters before polling day in ways that minimise virus transmission risk; and
- All involved parties should have a widespread understanding and acceptance of any changes to the administrative process necessitated by the public health situation.

### **Electoral administrators**

- Returning Officers should have clarity about how the elections should be run sufficiently far in advance of polling day to be able to put in place appropriate plans;
- Election processes for election administrators should be practically manageable, deliverable and appropriately resourced – particularly for any new or changed processes introduced at relatively short notice;
- Any new or changed election processes should not reduce or undermine existing procedures for safeguarding electoral integrity; and
- Appropriate protections should be put in place for electoral administration staff in key public environments (for example, protective equipment and physical distancing measures).

### **Police and Crime Commissioner elections**

Elections to appoint Police and Crime Commissioners for England and Wales (the “PCC Elections”) were scheduled for 7 May 2020.

Under the UK Government’s Coronavirus Act 2020, the PCC Elections were postponed to the same day as the 2021 Senedd Election.

The voting franchise for each election is different. An election’s franchise governs who is eligible to vote in the election. The franchise for Senedd elections was extended by the **Senedd and Elections (Wales) Act 2020**, which lowered the voting age to 16 and enabled foreign nationals to vote. However, the franchise for PCC Elections is narrower. The Bill’s Explanatory Memorandum confirms that:

[...] some voters will be allowed to vote in one poll, but not the other. The PCC boundaries also differ from the constituency and regional boundaries of the Senedd election, which will add to the complexity.

It further states that the UK Government has responsibility for PCC Elections

and that ‘the Welsh Government has consulted with the UK Government on this matter’.

**Guidance notes** prepared by the Electoral Commission for Returning Officers stated ‘there will be two different electoral systems in use, incorporating two methods of voting, with three ballot papers’.

The Elections Planning Group **concluded** that the differences in the franchise ‘would result in added complexity for administering the elections on the same day and Coronavirus considerations increase this complexity further’.

## Bill announcement

On 17 November 2020 , the **First Minister announced** that the Welsh Government was preparing to draft a Bill to make provision for postponing the 2021 Election by up to six months if necessary. The First Minister continued:

This will allow us to bring forward legislation to the Senedd if the situation after Christmas suggests that we will need to do this as a final resort.

The Welsh Elections (Coronavirus) Bill (the “**Bill**”) has now been introduced by the Welsh Government as an emergency bill. A guide to emergency bills and their scrutiny arrangements in the Senedd can be found **here**.

An overview of the Bill’s provisions and an analysis of its key provisions are contained in the following sections.

## 2. Overview of Bill provisions

The Bill proposes to introduce contingency electoral arrangements, solely for the purposes of the 2021 Election.

The Explanatory Memorandum states that the Bill ‘responds to the potential risks to the 2021 Election arising from the Coronavirus pandemic with the objective of ensuring the election can be administered and proceed safely and that the electorate can participate and vote’.

### Overview

- **Section 1 (The 2021 Election)** confirms that a reference to the “2021 election” in the Bill means the Senedd ordinary general election due to be held in 2021. This definition encompasses an election held as scheduled on 6 May 2021, or a postponed election.
- **Section 2 (Application of provisions of Government of Wales Act 2006)**
  - Disapplies provisions under GoWA which determine the usual Senedd dissolution period and the date of the first Senedd meeting after an election. (The Bill makes replacement provisions for the purposes of the 2021 Election under Sections 3 and 4, respectively);
  - Makes the statutory election date in GoWA (6 May 2021) subject to the power under the Bill to delay the election for up to 6 months;
  - Disapplies the statutory time limit for the Senedd’s first meeting if the election date is varied by Royal Proclamation. (The Bill makes replacement provisions under Section 4, solely for the purposes of the 2021 Election); and
  - Makes the provisions on vacant Senedd constituency seats in GoWA subject to Section 7 of the Bill, which empowers the Llywydd to postpone by-elections.
- **Section 3 (Dissolution of the current Senedd)** prescribes that the Senedd will be dissolved on 29 April 2021, seven days before the scheduled 2021 Election. Alternatively, if the election is postponed, the Section provides that dissolution will take place seven days in advance of any subsequent election date.
  - This Section is considered in greater detail in the ‘Key Provisions’ section of this Bill summary.

- **Section 4 (Date of first meeting after the 2021 election)** provides that the Senedd must meet within 21 calendar days after the 2021 Election is held. This applies whether the 2021 Election is held as scheduled or postponed.
  - Under current arrangements, the Senedd **must meet within fourteen days** of the 2021 Election, excluding Saturdays and Sundays. Without the Bill, if the election was held as scheduled on 6 May 2021, the Senedd would have to meet by 26 May 2021.
  - Under Section 4 of the Bill, if the 2021 Election was held as scheduled on 6 May 2021, the Senedd would have to meet by 27 May 2021. Therefore, the Bill provides an additional day before the Senedd must meet under current arrangements.
  - The Bill’s Explanatory Memorandum states that ‘[t]he purpose of the extension is to provide some flexibility to cater for a potential delay in counting ballots’. It further explains that this also protects the time period between the election poll and the Senedd’s first meeting.
- **Section 5 (Power to postpone 2021 election for up to 6 months)**
  - Provides that the First Minister may propose to the Llywydd that the 2021 Election is postponed for a reason relating to Coronavirus if the ‘First Minister considers it necessary or appropriate to do so’.
  - Providing the Senedd has not been dissolved, the Llywydd may postpone the 2021 Election to the earliest date considered to be reasonably practicable. However, this date cannot be later than 5 November 2021, which is 6 months from the scheduled election date.
  - The Llywydd’s power under this Section is conditional on Senedd Cymru approving the proposed rearranged date by a supermajority vote consisting of ‘not less than two thirds of the total number of Senedd seats’.
  - As soon as possible after a new date is fixed, the Llywydd must lay a statement before the Senedd confirming the new date and the reason for exercising the postponement powers.
  - If requested to do so by the Llywydd or the First Minister, the Electoral Commission must provide advice in relation to postponing the poll.
  - The Llywydd’s powers to postpone the election under this Section may be used more than once provided that on each occasion, the re-arranged election date is not after 5 November 2021.
  - This Section is considered in greater detail in the ‘Key Provisions’ section of this Bill summary.

- **Section 6 (Further power to vary date of 2021 election)** provides that the Llywydd may vary the date of an election postponed under Section 5 by one month before or after the newly fixed date, provided it is no later than 5 November 2021. A variation under this Section does not have to relate to Coronavirus.
  - This Section is considered in greater detail in the ‘Key Provisions’ section of this Bill summary.
- **Section 7 (Power to postpone Senedd by-elections)** enables by-elections for Senedd constituency seats that arise after 6 May 2021, to be postponed. The Section confers a power on the Llywydd to postpone such by-elections to the earliest day considered to be reasonably practicable, after consultation with Welsh Ministers. The power can be exercised more than once, but it cannot be used to fix a date after 5 November 2021.
  - This Section is considered in greater detail in the ‘Key Provisions’ section of this Bill summary.
- **Section 8 (Power to postpone local authority by-elections)** contains a regulation making power enabling the Welsh Ministers to postpone local government by-elections that fall between 6 May 2021 and 5 November 2021. The powers expire on 5 November 2021 and will have no effect on the local government elections due to be held in May 2022.
  - A local government by-election is defined as an election to fill a casual vacancy in the office of councillor in a county council, county borough council or community council in Wales.
  - The Explanatory Memorandum states the power is designed to be used where the public health situation would not allow for the safe delivery of local government by-elections.
  - This Section is considered in greater detail in the ‘Key Provisions’ section of this Bill summary.
- **Section 9 (Effect of this Act on existing power to make provision about elections)** preserves the Welsh Ministers’ existing powers to make provisions about the conduct of Senedd elections under Section 13 of GoWA. These powers were used to make the current Conduct Order, set out in the background section of this Bill Summary.
- **Section 10 (Modification of the 2007 Order)** makes a number of consequential amendments to the Conduct Order for the purposes of the 2021 Election. These include amendments to determine when a person becomes a “candidate” in light of the shorter dissolution period proposed by the Bill, and to instil flexibility

for proxy voting and nomination paper arrangements, as recommended by the Elections Planning Group.

- All amendments made by Section 10 of the Bill are explained in the Key Provisions section of this Bill Summary.
- **Section 11 (Interpretation)** sets out five defined terms for the purposes of the Bill, including “Coronavirus” and “the 2021 election”.
- **Section 12 (Power to make consequential and transitional provision etc.)** confers a regulation making power, including a power to amend primary legislation, on the Welsh Ministers to make supplementary, incidental, consequential or transitional provisions considered necessary to giving full effect to the Bill.
  - This Section is considered in greater detail under the Key provisions section of this Bill Summary.
- **Section 13 (Coming into force)** confirms that the Bill would come into force on the day after the day on which it receives Royal Assent.
- **Section 14 (Short title)** provides that the short title of the Act would be the Welsh Elections (Coronavirus) Act 2021.

## Legislative Competence

The Wales Act 2017 devolved powers to the Senedd in relation to its electoral arrangements.

The Bill’s Explanatory Memorandum states that Senedd Cymru has the legislative competence to make the provisions in the Bill under Part 4 of GoWA as amended by the Wales Act 2017.

## 3. Key Provisions in the Bill

### Section 3 - Dissolution of the current Senedd

Dissolution is the official term for the end of a parliament.

Section 3 of the Bill provides alternative dissolution arrangements for the purposes of the 2021 Election. If the Bill is passed, the usual dissolution arrangements in GoWA (explained below) will not apply.

In respect of the 2021 Election only, Section 3(1) of the Bill provides that Senedd Cymru will be dissolved on 29 April 2021, unless:

- The Llywydd exercises the power to postpone the election for up to six months under Section 5 of the Bill; or
- The Senedd is dissolved by Royal Proclamation under Section 4(2) of GoWA following the Llywydd proposing to hold the election one month earlier or later than 6 May 2021.

However, if the 2021 Election is postponed under Section 5 of the Bill, Section 3(2) automatically moves the dissolution date to seven days before the postponed election date.

Section 3(3) ensures that dissolution occurs at least 7 days before an election, even if it is postponed multiple times. It provides that if the power to postpone the election under Section 5 is exercised again before the Senedd is dissolved under Section 3(2) (i.e. a second or subsequent postponement), the Senedd would be dissolved 7 calendar days before the newly fixed date. The Explanatory Notes describe this as the dissolution date 'track[ing] the new date fixed for the poll'.

### Usual dissolution arrangements

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The Senedd's dissolution date before a general election is usually determined by provisions in GoWA and the Conduct Order.

If the poll is to be held on the first Thursday in May (as the 2021 Election is scheduled to be), Section 3(2)(a) of GoWA provides that the Senedd is dissolved at the beginning of the 'minimum period', ending with the day of the poll in the election.

In this context, the 'minimum period' is 21 days before a poll excluding a Saturday,

Sunday or a number of listed public holidays (as established by Article 148 in conjunction with Rule 2 of Schedule 5 of the Conduct Order).

Therefore, under current arrangements, the Senedd would be dissolved on 7 April 2021.

### Effect of Dissolution

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The Welsh Government and Senedd Cymru are two separate institutions. Whilst the Welsh Government does not resign on dissolution, Members of the Senedd cease to hold office under Section 14 of GoWA. When the Senedd is dissolved, Members of the Senedd cannot be recalled to debate or pass legislation.

The Explanatory Memorandum states that the prevalence of the Coronavirus pandemic in the period before the 2021 Election ‘may mean that there is a spike or surge in infections that would require a legislative response’ and therefore Members would need to be in office to pass any such legislation. It further explains that the purpose of the shortened dissolution period is:

[...] to provide a mechanism to enable the current Senedd to respond, if required to do so, to the unfolding public health issues leading up to the election. It also means that the Senedd is sitting and able resolve to fix a date for the poll for the ordinary general election if there is a need to postpone the election for a reason relating to Coronavirus in the period up to 7 calendar days before the day of the poll

The **Scottish General Election (Coronavirus) Bill 2021** (the “**Scottish Bill**”, discussed further in section 5 of this Bill Summary) provides for a shortened dissolution period of one day before the Scottish Parliamentary election scheduled for 6 May 2021. Its **Explanatory Notes** state ‘it is anticipated that the [Scottish] Parliament will instead go into normal recess period for the campaign 28 days prior to the election’ but not be formally dissolved until one day before.

The Explanatory Notes to the Welsh Elections (Coronavirus) Bill do not confirm the practical arrangements in lieu of dissolution, or confirm whether Senedd Cymru is likely to resolve to go into recess.

The effect of the Bill is that Members of the Senedd will retain office until at least 29 April 2021. This means that if the Senedd was in recess leading up to this date, Members could be recalled to discuss and debate legislation, including Coronavirus regulations or the postponement of the 2021 Election.

## Section 5 - Power to postpone 2021 election for up to 6 months

Section 5 of the Bill contains contingency powers to postpone the 2021 Election for up to six months.

This Section does not automatically change the date of the 2021 Election. The election will proceed as scheduled on 6 May 2021 unless the date is varied by the Llywydd using existing powers under Section 4 of GoWA, or it is postponed under Section 5 of the Bill.

Section 5(1) of the Bill provides that the First Minister may propose to the Llywydd, for the 2021 Election only, that the poll for the election is postponed if the First Minister considers it necessary or appropriate to do so. However, such a proposal must be 'for a reason relating to Coronavirus'. The First Minister does not have a power to propose a postponement for a reason other than Coronavirus under this Section. The Bill does not specify the format of the First Minister's request under this Section or the information or data that must be provided to the Llywydd in support of the proposal.

If a postponement proposal is made by the First Minister, the Llywydd may fix an alternative date for holding the 2021 Election subject to Senedd approval. This power is discretionary. The Llywydd is not required to put a proposed alternative date before the Senedd after the First Minister initiates a request. The Explanatory Memorandum states it is important that this discretion lies with the Llywydd 'as the politically impartial office-holder who presides over the Senedd'.

If the Llywydd decides to fix an alternative date, it must be the earliest day considered by the Llywydd to be reasonably practicable (Section 5(3)(a)). The power cannot be used by the Llywydd to fix a date that is later than 5 November 2021 (Section 5(3)(b)). The postponed date must be within 6 months from the scheduled election date.

In a [letter](#) to the First Minister on 12 November 2020 (before this Bill was announced), the Senedd's Legislation, Justice and Constitution Committee stated that, in its view:

[...] any alternative to the exercise of [the Llywydd's] existing power that would change the date of the next Senedd election as a result of the pandemic should be made by the Senedd.

Announcing the Welsh Government was preparing a draft elections Bill on 17 November 2020, the [First Minister stated](#) he realised that providing powers to

the Llywydd to postpone the elections for up to six months would be a ‘major constitutional step’ which may require safeguards. Commenting on the nature of such safeguards, the First Minister **suggested** these may include a requirement for a ‘two-thirds majority vote’ before the power could be exercised and certain consultation requirements.

Whilst the Bill includes a requirement for a confirmatory supermajority Senedd vote, it does not place general consultation requirements on the First Minister or Llywydd.

Under Section 5(2)(a) of the Bill, any alternative date proposed by the Llywydd under Section 5(2) must be approved by a resolution of the Senedd passed by a supermajority of two-thirds of the total number of Senedd seats. This means that to postpone the 2021 Election under Section 5 of the Bill, 40 or more Members of the Senedd must vote in favour of any new date fixed by the Llywydd.

In respect of consultation, whilst the Electoral Commission must provide advice to the Llywydd or First Minister if requested, there is no general requirement in the Bill on either to actively consult or receive advice before exercising their powers under Section 5 of the Bill.

This differs from the Scottish Bill. A postponement of the Scottish Parliament elections under the Scottish Bill is triggered by the Presiding Officer. However, before exercising such postponement powers, they must consult the Scottish Ministers, Electoral Commission, Chief Medical Officer of the Scottish Administration and the convener of the Electoral Management Board for Scotland.

As soon as reasonably practicable after an alternative election date has been fixed, the Llywydd must lay a statement before the Senedd confirming the new date and the reason for exercising the powers under Section 5 of the Bill (**Section 5(4)**).

Both the First Minister’s power to initiate a postponement request under Section 5(1) of the Bill and the Llywydd’s power under Section 5(2) to fix a new election date may be exercised more than once. However, on each occasion, the postponed date cannot be after 5 November 2021.

Finally, Section 5(7) confirms that the Llywydd’s power to postpone an election for up to six months under the Bill does not limit the Llywydd’s power to vary the 2021 Election date using the powers under Section 4 of GoWA. These are the Llywydd’s existing powers which provide discretion to vary the election date by a month, earlier or later, than 6 May 2021.

## Welsh Government position

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Whilst the Bill proposes contingency measures to enable the 2021 Election to be postponed, the Explanatory Memorandum states that:

[...] the overriding objective of the Welsh Government is that the election will proceed on 6 May 2021 as planned, and the adjustments made by the Bill are prudent contingency measures to ensure that the election can be delivered by Returning Officers in the context of the unfolding pandemic.

Explaining why the Bill proposes a power to delay the 2021 Election for up to 6 months, the Explanatory Memorandum suggests that the Llywydd's existing powers to delay an election for up to one month are insufficient. It states:

[...] in the event of a surge in the pandemic, a postponement of one month may not be enough time to allow for rates to fall again to a level where an election can safely proceed, and therefore the existing power is unsuitable for these purposes.

## Section 6 - Further power to vary date of 2021 election

If the date of the 2021 Election is postponed under Section 5 of the Bill, this Section confers a power on the Llywydd to further vary the postponed date by up to a month earlier or later than the fixed date.

For example, if the Senedd approved postponing the election from 6 May 2021 to 6 July 2021 under Section 5 of the Bill, the Llywydd could propose further varying the postponed election date under Section 6 of the Bill to 6 June or 6 August 2021.

Consistent with Section 5 of the Bill, the power cannot be used to fix a date that is later than 5 November 2021.

However, in contrast to Section 5, the Llywydd's exercise of this power does not have to relate to Coronavirus. The Bill does not define the reasons for the Llywydd's exercise of the proposed power, meaning that the Llywydd has full discretion in its exercise. There is no requirement for a confirmatory Senedd vote.

If the Llywydd proposes to vary the date under Section 6, the Senedd may be dissolved under Royal Proclamation.

In effect, the power under Section 6 of the Bill mirrors the Llywydd's existing powers under Section 4 of GoWA (to vary the election day by a month) in the context of a postponed election.

The Explanatory Memorandum explains that the power under Section 6 is required in addition to the Llywydd's existing power as the latter is limited to varying the 2021 Election date by up to one month before or after 6 May 2021. That is, the existing power is linked to the statutory election date and would be unavailable after 6 June 2021.

In practice, this means that without Section 6, there would be no mechanism for postponing the election for a reason other than Coronavirus after 6 June 2021.

## Section 7 – Power to postpone Senedd By-Elections

This Section confers a power on the Llywydd to postpone by-elections for Senedd constituency seats (“Senedd By-Election”) that arise between 6 May 2021 and 5 November 2021.

If the seat of Senedd Member is vacant, a Senedd By-Election must be held to fill the vacancy. The Llywydd has existing duties under Section 10 of GoWA to fix a date for such Senedd By-Elections.

Under current arrangements, the date fixed must be within three months of the date of the vacancy (Section 10(5) of GoWA). Alternatively, if the vacancy does not come to the Llywydd's attention within a period of one month of the vacancy arising, the date fixed must be within three months of the date on which the vacancy came to the Llywydd's notice. Section 66 of the Coronavirus Act 2020 permits the Llywydd to fix a date outside of the three month period but this power cannot be exercised to fix a date after 6 May 2021.

The Explanatory Notes to the Bill state that ‘the period for fixing the date for a Senedd By-Election should be adjusted to respond to the unfolding Coronavirus pandemic’.

The Bill confers a power on the Llywydd to fix a date for a Senedd By-Election that falls outside the statutory time limits set by Section 10 of GoWA after consultation with the Welsh Ministers.

Consistent with the powers under Section 5 of the Bill, the new date must be the earliest day the Llywydd considers to be ‘reasonably practicable’. This is not defined in the Bill. The power may also be used more than once, however, on each occasion, it cannot be used to fix a date after 5 November 2021.

## Section 8 – Power to postpone local authority by-elections

Section 8 of the Bill confers a power on the Welsh Ministers to postpone local authority by-elections. These are defined in the Bill as elections to fill casual vacancies in the office of councillor in a county council, county borough council or a community council in Wales (“Local Authority By-Election”).

If a Local Authority By-Election in Wales is scheduled to fall between 6 May 2021 and 5 November 2021, Section 8 of the Bill enables the Welsh Ministers to vary the date of such by-election by regulations made by statutory instrument. Section 67 of the Coronavirus Act 2020 makes similar provision for any Local Authority By-Election which is scheduled to fall before 6 May 2021. The Bill’s Explanatory Memorandum states that any regulations made under Section 8 would be subject to the Senedd’s negative procedure. The Bill does not impose any consultation requirements on the Welsh Ministers before making regulations under Section 8.

Whilst this regulation making power may be used more than once in relation to any Local Government By-Election, it cannot be used to fix a date beyond 5 November 2021. The Bill’s Explanatory Memorandum explains that the provision will ‘expire’ on 5 November 2021 as ‘no local government by-elections can take place in Wales [after this date] in line with the Local Government Act 1972’.

It further explains that the power is designed to be used in the event of:

[...] a public health situation whereby the holding of polls is considered to present such significant challenges that the Welsh Ministers do not believe mitigating actions would allow for the safe delivery of local government by-elections and the holding of polls is not within the public interest.

In 2019, Welsh local government elections scheduled for May 2021 were **moved** to May 2022 to **prevent them being held** on the same day as the 2021 Senedd Election. The provisions in Section 8 will have no effect on such local elections.

## Section 10 - Modification of the 2007 Order

The National Assembly for Wales (Representation of the People) Order 2007, as amended (“**Conduct Order**”) contains the detailed rules for the conduct of Senedd elections.

It **sets out the way** in which the election and the election campaign are conducted, and includes provisions for legal challenge to an election. It also includes provisions relating to postal and proxy voters and requirements in

connection with absent votes.

The Conduct Order is reviewed, and has **generally been amended**, before each Senedd general election.

Section 10 of the Bill proposes consequential modifications to the Conduct Order. The Explanatory Memorandum states that such changes are required to reflect the amendments to the dissolution period proposed by the Bill and to implement **recommendations** made by the Elections Planning Group for flexibility in certain areas in the conduct of the election.

### Timing of when a person becomes a 'Candidate' for 2021 Election

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Under **Article 84(2)(b)** of the current Conduct Order, a person becomes a 'candidate' for a Senedd election on the date of the Senedd's dissolution.

As the Bill proposes a shorter dissolution period, Section 10(3) of the Bill severs the link between dissolution and the timing of becoming a candidate, solely for the purposes of the 2021 Election.

Instead, the Bill provides that a person will become a candidate 21 days before 6 May (excluding weekends and certain public holidays).

The effect of this is that a person will become a candidate for the 2021 Election at the same time as they would have done, had the Bill not proposed a shorter dissolution period. The Explanatory Notes confirm that a person would remain as a candidate after the 21 day period commenced (barring their resignation or deselection) even if the election was postponed under the Bill.

Separately, this provision is also relevant in the context of political campaign expenditure. Under the **Political Parties, Elections and Referendums Act 2000**, the "regulated period" for campaign expenditure is linked to the date of the 2021 Election and begins four months before 6 May 2021. However, the Bill's Explanatory Note confirms that the regulated period will remain linked to 6 May 2021, irrespective of any postponement to the 2021 Election under Section 5 of the Bill.

### Flexibility for Proxy Voting

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If a voter is unable to vote in person, they may arrange for a person to vote on their behalf in certain circumstances. This is called a 'proxy' vote, or voting 'by proxy'.

The **Elections Planning Group supported** '[s]ome degree of greater flexibilities in respect of postal and proxy votes' for the 2021 Election.

The Group's report outlined four 'examples of areas for further detailed discussion':

- Explore whether there can be an increase in certain circumstances in how many people one individual can be a proxy voter for, for example if a household with multiple voters is required to self-isolate;
- Amend the requirement for emergency proxy votes, so that medical attestation is not required in relation to Coronavirus;
- Ensure the process for emergency proxy votes has the capacity to deal with higher demand (if for example, a significant number of individuals or households are required to self-isolate very close to the polling day); and
- Arrangements for the collection of postal votes should be made available and communicated, but with the responsibility remaining with the voter.

The Bill does not include provision in relation to postal voting. This is in contrast to the Scottish Bill, discussed further in section 5 of this Bill Summary. However, the Explanatory Memorandum states:

As many voters may be unable or unwilling to attend polling stations, there will be promotional activities to encourage voters to make use of absent voting options, such as postal voting and proxy voting. These measures are being put in place through non-legislative methods and would be no [sic] changes made to electoral rules through legislative changes.

In respect of proxy voting in the 2021 Election, the Bill proposes some flexibility to current arrangements.

Section 10(4) of the Bill amends the Conduct Order to provide flexibility for people applying to vote by proxy (or applying to appoint a proxy) for reasons relating to Coronavirus.

Under the proposed amendment, a person may apply to vote by proxy or appoint a proxy up to 5pm on the day of the 2021 Election on the grounds that the person could not reasonably be expected to vote in person as a result of the need to comply with Coronavirus legislation, or follow Welsh Government guidance relating to Coronavirus (for example, the need to self-isolate). A medical attestation will not be required in these circumstances.

The Bill does not make provision for increasing the amount of people an individual can be a proxy for. This was one of the Elections Planning Group's

recommendations for further discussion, however, the Explanatory Memorandum states:

[...] after further exploration and reflection the Welsh Government believes that such arrangements could be open to abuse and would potentially put vulnerable voters at risk of being disenfranchised.

### Delivery of nomination papers

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The **Elections Planning Group recommended** greater flexibility in respect of nomination papers for the 2021 Election.

Under the Conduct Rules, each candidate for a Senedd election must be nominated by completing a nomination paper. Thereafter, the nomination paper must be delivered to the applicable Returning Officer and the candidate must consent to their nomination.

The Bill adjusts current arrangements in respect of nomination papers in the following ways:

- Allowing nomination papers to be delivered to the applicable returning officer on a candidate's behalf. This can be by a person nominated by the candidate, but only after they have informed the returning officer in writing or electronically (*Sections 10(5)(b) and (c)*);
- Providing an additional two hours each day to deliver such nomination papers (achieved in practice by amending the permitted time for deliveries from 10am-4pm currently, to 9am-5pm) (*Section 10(5)(a)*);
- Enabling candidates to consent to their nomination either in writing at the applicable place for delivery or electronically (*Section 10(5)(d)(ii)*); and
- Removing the requirement for a witness to attest a candidate's consent to nomination (*Section 10(5)(d)(i)*)

### Section 12 – Power to make consequential and transitional provisions

The Bill's Explanatory Memorandum states that:

[...] not all of the potential impacts on the conduct of the ordinary general election for membership of the Senedd may have been foreseen and catered for in the provisions of the Bill. Similarly, there may be a need to deal with the practical consequences of cancelling or postponing the election [...] by way of secondary legislation.

Section 12(1) of the Bill proposes to confer a regulation making power on the Welsh Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provisions that they consider appropriate for the purposes of, or in connection with, giving full effect to the Bill.

Regulations made under this power may modify, repeal or revoke any enactment, including a provision in the Bill itself (this is known as a **Henry VIII power**). They may also be used to ‘make different provision for different purposes or areas’.

Section 12(2)(a) of the Bill also provides that regulations made by the Welsh Ministers under Section 12(1) may make retrospective provision in respect of Local Authority By-Elections. The Explanatory Notes to the Bill state that this approach is consistent with **Section 68 of the UK Parliament’s Coronavirus Act 2020**. This provision enabled the Welsh Ministers to make retrospective provision in relation to the postponement of local government by-elections held before 6 May 2021.

Any regulations made by the Welsh Ministers under Section 12 would be subject to annulment using the Senedd’s negative resolution procedure. The Explanatory Memorandum suggests that this ‘balance[es] scrutiny against the need for any regulations to be made on an urgent basis to respond to the ever changing Coronavirus climate’.

## 4. Regulatory Impact Assessment

### Regulatory Impact Assessment

The Regulatory Impact Assessment (“RIA”) contained within the Bill’s Explanatory Memorandum explains that the Bill’s policy objective is:

[...] to respond to the potential risk to the 2021 Senedd election arising from the pandemic with the objective of ensuring the election can be administered and proceed safely and that the electorate can participate and vote.

Against this policy objective, the RIA sets out the merits and provisional costs of two options:

**Option 1: Business as usual** allowing the 2021 Election to proceed as normal without any changes to electoral legislation; and

**Option 2: Introduce legislative** changes providing increased flexibility in electoral law, including the ability to postpone the date of the election.

#### Option 1 – Business as usual

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The RIA acknowledges that it is difficult to predict how the pandemic will have progressed by the scheduled 2021 Election date. It notes that higher levels of infection bring with them additional risks to the election, stating:

Voters may be unwilling or unable to participate in the poll due to illness, or a requirement to self-isolate or simply a reluctance to attend a polling station where they may come into contact with the virus.

The RIA also states that ‘high levels of sickness could also reduce the number of staff available to administer the poll’ which could put ‘the election itself at a significant risk of failure’.

The RIA confirms that certain non-legislative measures are being introduced to mitigate risks. Such measures include social distancing and hygiene measures at polling stations and at the count, as well as the encouragement of the electorate to use postal and proxy voting.

Whilst the RIA notes that such non-legislative measures serve to meet the Bill’s policy objectives, it concludes that they “provide insufficient flexibility and no contingency in the worst case scenario”.

## Option 2 – Introduce legislative changes

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The RIA identifies that under current arrangements:

[...] the lack of flexibility available for making changes to electoral rules is not appropriate for responding to the pandemic, which has so far required pace and pragmatism in responding quickly to a rapidly changing situation.

It continues by outlining the ways ‘the Bill provides a contingency for dealing with a ‘worst case scenario’, including by:

- Shortening the dissolution period, which will allow the Senedd to sit for longer and offer greater scrutiny of Coronavirus related legislation;
- Protecting the time period between the election poll and the Senedd’s first meeting, in light of potential delays in counting votes;
- Allowing greater flexibility in proxy voting rules and the submission of nominations; and
- Extending the Llywydd’s ability to move the date as a contingency.

Whilst reiterating that the Welsh Government is ‘committed to proceeding with the election’ as scheduled, the RIA states that ‘the Bill provides an extra level of risk mitigation that the business as usual scenario cannot provide’. As such, the RIA concludes that “option 2 better meets [its] policy objective’.

## Costs and benefits

### Option 1 – Business as usual

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The costs associated with option 1 are the estimated costs of administering the 2021 Senedd election. These costs will be incurred regardless of whether the Bill is passed or not.

The base costs are derived from the costs of administering the 2016 Senedd election and have been adjusted to account for inflation.

**Table A: Costs of the 2016 election and the estimated cost of the 2021 election**

		<b>2016 cost</b>	<b>2021 estimate</b>
Local authority	Polling stations	1,429,000	1,554,000
	Postal votes	515,000	560,000
	Poll cards	749,000	814,000
	Count	440,000	479,000
	Staff	197,000	214,000
	Returning Officer fees	201,000	219,000
	<b>Total</b>	<b>3,531,000</b>	<b>3,840,000</b>
	Coronavirus measures		4,000,000
Welsh Government	Royal Mail contract	4,000,000	4,000,000
<b>Final total</b>		<b>7,531,000</b>	<b>11,840,000</b>

\*Figures are rounded to the nearest thousand

Source: RIA, Table A

The total estimated cost of administering the 2021 election is £11,840,000. This figure is inclusive of additional expenditure required in connection with Coronavirus mitigation measures, estimated at £4,000,000 in the RIA.

As Table A identifies, the majority of the election costs will fall to local authorities. Such costs will subsequently be charged back to the Welsh Consolidated Fund via the Welsh Government.

### Option 2 – Introduce legislative changes

The RIA confirms that the main costs associated with the Bill would only be incurred if the election was postponed, as it is primarily an ‘enabling Bill’.

Table B, below, sets out the costs associated with the Bill in the event that the 2021 Election is postponed. The RIA confirms that the figures are based on the assumption that many of the costs set out in option 1 had been committed to and would necessarily be re-incurred for the new election date. The RIA describes this assumption as a ‘worst-case scenario’ but suggests that it may be possible for Returning Officers to ‘negotiate a saving of additional costs in advance of postponement’.

**Table B: Estimated cost of the 2021 election and additional costs in the event of the election being postponed.**

		<b>2021 estimate</b>	<b>Additional costs caused by the delay</b>
Local authority	Polling stations	1,554,000	1,554,000
	Postal votes	560,000	560,000
	Poll cards	814,000	814,000
	Count	479,000	479,000
	Staff	214,000	214,000
	Returning Officer fees	219,000	219,000
	Coronavirus measures	4,000,000	
	Communicating the change of date		350,000
	To cover UK Government contribution		1,766,000
	<b>Total</b>	<b>7,840,000</b>	<b>5,938,000</b>
Welsh Government	Royal Mail contract	4,000,000	4,000,000
<b>Final total</b>		<b>11,840,000</b>	<b>9,938,000</b>

\*Figures are rounded to the nearest thousand

Source: RIA, Table B

The total estimated cost for the 2021 Election in the event of a postponement is £21,778,000. This figure is inclusive of the costs associated with both the original election and the additional costs for the postponed poll.

It follows that the Bill would incur estimated additional costs on local authorities of £5,938,000 for a postponement. As with the costs for the original election, such additional costs will subsequently be charged back to the Welsh Consolidated Fund via the Welsh Government.

The RIA also states that there are “potential additional costs to the Senedd Commission for communication and engagement activities” in the event of a postponement. However, these costs are not quantified in the RIA.

## Costs associated with a shorter dissolution period

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The Scottish General Election (Coronavirus) Bill 2021 reduces the dissolution period in advance of the Scottish Parliament elections to one day. The **Financial Memorandum** accompanying the Scottish Bill set out the costs associated with this measure, which were primarily the salary costs of Members of the Scottish Parliament (“MSP”) and their staff.

MSPs cease to hold office on the dissolution of the Scottish Parliament. Current MSPs who are standing down also cease to be paid on dissolution. However, candidates standing for re-election continue to be paid, notwithstanding dissolution.

The Financial Memorandum stated that “modifying the dissolution period will mean continued payroll costs for those MSPs not standing for re-election, and their staff”.

The analysis above is equally applicable in relation to Members of the Senedd and their staff. Currently, candidates standing for re-election to the Senedd continue to be paid after dissolution but Members who are standing down do not. The RIA for the Welsh Government’s Bill does not quantify the additional salary costs associated with a shortened dissolution period.

## 5. Scottish General Election (Coronavirus) Bill 2021

### General overview

The next Scottish Parliament general election is **scheduled for** 6 May 2021. On 16 November 2020 the Scottish Government introduced the **Scottish General Election (Coronavirus) Bill** (the “**Scottish Bill**”). It was passed by the Scottish Parliament on 23 December and is expected to receive Royal Assent soon.

The primary contingency measures introduced by the Scottish Bill are to:

- Bring forward the deadline for postal vote applications and give the Scottish Ministers power to make regulations to provide for an all-postal vote election;
- Make the dissolution period ahead of the Scottish Parliament elections one day;
- Allow the Scottish Ministers to make regulations to hold polling over multiple days;
- Make arrangements for the first meeting of the new parliament and election of a new Presiding Officer; and
- Give powers to the Presiding Officer to postpone the election by up to 6 months.

### Comparison with the Welsh Elections (Coronavirus) Bill

#### Comparable provisions in the Scottish Bill and Welsh Bill

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##### **Dissolution period**

Both the Welsh Bill and Scottish Bill provide for a shorter dissolution ahead of the elections.

The Welsh Bill provides for a seven day dissolution period, starting on 29 April 2021. The Scottish Bill provides for a one day dissolution, starting on 5 May 2021. If either election is postponed, both provide that those shorter dissolution periods automatically apply in advance of the postponed polls.

Both the Scottish Bill and Welsh Bill sever the connection between dissolution and the timing of a person becoming a candidate in the election. The Welsh

Bill provides that a person becomes a candidate 21 days before 6 May 2021. The Scottish Bill provides for 27 days before 6 May 2021.

The Scottish Bill's Explanatory Notes highlight that this will result in "many individuals [having] dual status as both serving MSPs and election candidates" and explains the effects of this in practice. This analysis is not included in the Welsh Government's Explanatory Memorandum.

The **policy memorandum** which accompanied the Scottish Bill stated:

It is anticipated that the Parliament will vote to go into recess on or around 25 March 2021 (the date previously set for dissolution) and remain in recess unless and until there is a need to meet in emergency session (e.g. to postpone the election). This will allow the pre-election campaign period to begin as normal.

The Explanatory Memorandum accompanying the Welsh Government's Bill does not confirm whether the Senedd is likely to go into recess when dissolution is scheduled under current arrangements.

### **First meeting after the election**

Under the Welsh Government's proposed Bill, the Senedd must first meet within 21 calendar days of the election poll. This provides one additional day from current arrangements.

The Scottish Bill provides that the Scottish Parliament's Presiding Officer must fix the date of the first meeting "as soon as reasonably practicable after the poll", after consulting with the Electoral Commission and the Electoral Management Board for Scotland.

### **Powers to postpone the election**

Both the Welsh Government's Bill and Scottish Bill make provision for the 2021 elections to be postponed for up to six months. However, the mechanisms for doing so differ.

In the Welsh Government's Bill, a request to postpone the election is triggered by the First Minister.

In the Scottish Bill the proposal to postpone the election is triggered by the Scottish Parliament's Presiding Officer who "must be satisfied that the Scottish Parliament could not safely meet for the purpose of passing a Bill" to change the

polling day.

The Welsh Government's Explanatory Memorandum states "it would not be appropriate to require the Llywydd to initiate the request given the more limited powers and resources available to them".

Under the Welsh Government's Bill, the Llywydd is required to set out the reason for exercising this power and may request advice from the Electoral Commission. The Scottish Bill provides that the Presiding Officer must consult with the Scottish Ministers, Electoral Commission, Electoral Management Board for Scotland and the Chief Medical Officer for Scotland before using the postponement power.

Section 5(7) of the Welsh Government's Bill expressly provides that the Llywydd retains the existing power to vary the election date by one month under Section 4 of GoWA.

The Scottish Parliament's Presiding Officer currently has a similar power under the Scotland Act 1998, however, the Scottish Bill disapplies it for the purposes of the 2021 election. The Explanatory Notes state this is because it is "not considered that the maximum delay of a month [...] provides sufficient scope to move polling day".

### **Regulation making powers**

Section 12 of the Welsh Government's Bill confers regulation making powers on the Welsh Ministers to make consequential and transitional provisions to give full effect to the Bill. The Scottish Bill makes similar provision.

### **Additional provisions in the Scottish Bill which are not in the Welsh Bill**

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#### **Postal voting**

The Scottish Bill brings forward the deadline for postal vote applications to 21 days prior to the poll. The Explanatory Notes say this is to "allow for more time to process what is expected will be a much higher number of applications than usual".

The Scottish Bill requires the Scottish Ministers to lay a report on the 'uptake of postal voting' as soon as practicable after 7 April 2021. The report must set out the number of people who are registered to vote in the 2021 election, the number of people granted a postal vote and the number of applications that have been received but not determined.

The Scottish Bill gives the Scottish Ministers powers to make regulations that

provide for an all-postal vote election. Before making such regulations, the Scottish Ministers must consult the Presiding Officer, the Electoral Commission, the Electoral Management Board for Scotland and the Chief Medical Officer for Scotland.

The **policy memorandum** which accompanied the Bill as introduced stated “this power is not intended to be used if the election proceeds on 6 May” and that “an all postal election would necessitate a delay of at least six months to polling day”.

### **Additional polling days**

The Scottish Bill confers powers on the Scottish Ministers to make regulations providing for the poll to take place on more than one day if necessary due to Coronavirus. The Scottish Ministers’ powers under this provision are triggered when the Electoral Management Board for Scotland recommends that the election should be held on one or more days. The power is conditional on consultation with a number of offices and officials.

The Explanatory Notes state the purpose of this provision is to allow for the “possibility that in-person voting will take longer than normal due to the potential imposition of physical distancing measures”.

**Announcing the proposal for a Welsh Government Bill** in the Senedd, the First Minister stated the Welsh Government was ‘considering the establishment of early voting centres’, which would ‘allow people to vote in the days prior to election’. Whilst the Bill does not contain provision for early voting, the Explanatory Memorandum states:

[...] the Welsh Government has continued to engage with the Electoral Commission, the Association of Electoral Administrators, the Wales Electoral Co-ordination Board and other stakeholders to explore the feasibility of early voting ahead of the poll and to discuss with the UK Government applying this to the PCC elections which take place on the same day as the Senedd election.