

**Explanatory Memorandum to The Local Government (Coronavirus)
(Postponement of Elections) (Wales) (No. 2) Regulations 2020.**

This Explanatory Memorandum has been prepared by Education and Public Services and is laid before the Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Local Government (Coronavirus) (Postponement of Elections) (Wales) (No. 2) Regulations 2020. I am satisfied that the benefits justify the likely costs.

Julie James MS
Minister for Housing and Local Government
3 December 2020

PART 1

1. Description

- 1.1. Under The Local Government (Coronavirus) (Postponement of Elections) (Wales) Regulations 2020, postponed by-elections for county and county borough councils or town and community councils that were due to take place between the period commencing on 16th March 2020 and ending on 31st January 2021 are required to be held between 1st February 2021 and 16th April 2021.
- 1.2. These No. 2 Regulations provide for supplementary issues to ensure that the postponed by-elections are conducted in accordance with electoral law and good practice, and that Returning Officers (RO) are able to carry out their duties. They make provision about postal ballots already cast, people who were candidates and their expenses and donations, proxy voting for those following Government advice, and allowing public notices for vacancies to be published electronically.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1. In accordance with section 11A(4) of the Statutory Instruments Act 1946, as inserted by Sch.10 para 3 of the Government of Wales Act 2006, the Llywydd has been informed that the Regulations will come into force less than 21 days from the date of laying.
- 2.2. The Regulations will come into force on 4th December. This is necessary in order to ensure Returning Officers (ROs) have enough time to prepare for the first postponed by-elections which are scheduled to take place in early February. An RO must publish a notice of election not later than 25 working days before the date of the election. Many ROs have expressed a preference for holding their by-elections early in February 2021 to avoid overlapping with the regulatory period for the Senedd election in May 2021. Therefore, if a by-election were to be held at the earliest opportunity, on 4 February 2021, the election notice would need to be published no later than 31 December 2020. If the 21 day rule was observed for these Regulations, they would not be in force by the time a RO would need to lay the notice of election in order to have the by-election. In view of these circumstances, the reduced period is thought necessary and justifiable in this case.
- 2.3. These Regulations have partial retrospective effect as they change the status of candidates who were due to stand in by-elections postponed by the previous regulations as a result of Coronavirus pandemic. They provide that candidates should no longer be regarded as having stood at such a by-election, and that they should not held liable for any act or omission in respect of donations or expenses claims arising from their candidacy. Section 68 of the Coronavirus Act 2020, which provides the power to make these Regulations, expressly enables retrospective provision to be made.

3. Legislative background

- 3.1. The powers to make these Regulations are in section 68 of the Coronavirus Act 2020 (CA 2020). The Act enables the Governments of the UK to respond to an emergency situation and manage the effects of the COVID-19 pandemic.
- 3.2. In relation to elections, Section 68 of the Coronavirus Act 2020 provides Welsh Ministers with the power to make by regulations any consequential, supplementary, incidental, transitional or saving provisions in connection with section 66 or regulations made under section 67 of the Act. The provision which may be made includes provision about electoral activity prior to the postponement of a poll, the conduct of elections, the manner of voting in elections that have been postponed, the terms of office of incumbent officer holders, nominations of candidates, expenses incurred in relation to the election by those other than local authorities, and compensation for local authorities or candidates as a result of the provisions within the Act.

4. Purpose and intended effect of the legislation

- 4.1. The Coronavirus Act 2020 enables the Governments of the UK to respond to an emergency situation and manage the effects of a COVID-19 pandemic.
- 4.2. The Act contains temporary measures designed to either amend existing legislative provisions or introduce new statutory powers which are designed to mitigate these impacts. The provisions are time limited for two years. The Act contains a number of provisions around elections and a regulation making powers for Welsh Ministers.
- 4.3. The postponement of elections as a result of COVID-19 created uncertainties and gaps in electoral law. Electoral law does not provide for scenarios where elections are postponed in the way they have been this year. Therefore the Welsh Government must amend the legislative framework for the polls which have been postponed to address the administrative consequences. This SI makes provision in four areas:

Postal ballots already cast

- 4.4. This instrument makes provision about postal ballots issued to electors for certain county or county borough and community council by-elections which were postponed by regulations made under the CA 2020. These are the only polls where postal ballots could have been issued because of the timing of the postponement. These postal ballot papers will have been sent out and some may have been completed and returned.
- 4.5. The instrument provides that a postal ballot paper which was returned by a postal voter has no effect for the purpose of the postponed poll for the local by-election when it eventually takes place. This means the voter will need

to cast a new vote at the postponed poll. The instrument then makes provision about what a RO has to do with returned postal votes and other documentation that may have been created before the poll was postponed.

- 4.6. The instrument makes provision which follows closely the existing rules for when a poll is not held due to the death of a candidate. The RO is not required to open or otherwise process any returned postal vote that has not already been dealt with in accordance with the relevant statutory rules. Instead, the Regulations require the RO to seal and forward any returned postal votes and other documentation, such as the marked copies of the postal voters list and the proxy postal voters list, to the electoral registration officer (ERO), who will retain the documents for a year before destroying them. The Regulations also make provision allowing a court (by order) to allow the inspection of such documents in respect of a prosecution.

People who were candidates and their expenses and donations,

- 4.7. Some of the by-elections that were due to take place were postponed after the point at which individuals whose intention to stand as candidates was declared and they became candidates under electoral law. The application of a number of rules relating to the candidacy of these individuals is unclear due to the unusual circumstances of the postponed polls. These regulations ensure the rules are clear and appropriate for those circumstances.
- 4.8. These Regulations ensure that candidates do not remain as candidates in respect of a postponed by-election; though it does not of course prevent them standing again for the rescheduled election in the usual way should they wish to. The Regulations ensure that they are no longer candidates and are treated as though they had never been candidates for the postponed polls. Otherwise, they would be subject to spending and donations controls for a much longer period of time than usual.
- 4.9. The Regulations also deal with the rules on donations to candidates. Normally these would have to be dealt with in candidate returns, but the provision discussed above removes the requirement for returns (as individuals are no longer treated as candidates in respect of postponed by-elections). As a result, any donations received will instead be covered by the rules for donations to 'regulated donees' under Schedule 7 to the Political Parties, Elections and Referendum Act 2000, meaning they may need to be reported to the Electoral Commission. This will be the case where the recipient of the donation is already a holder of elected office.
- 4.10. When those donations are reported to the Electoral Commission, the recipients will likely have missed their deadlines under the regulated donee regime. This is as a result of the delays caused by the postponed by-elections. This instrument extends the deadlines for reporting these donations to 31 January 2020 to ensure no one commits an offence as a result of the elections postponement.

Proxy voting for those shielding

- 4.11. Paragraph 4 of Schedule 4 of the Representation of the People Act 2000 makes provision for absent voting at a particular election. Paragraph 4(2)(a) specifically provides that the RO shall grant an application to vote by proxy where they are satisfied that the applicant's circumstances on the date of the poll will be, or are likely to be, such that the applicant cannot reasonably be expected to vote in person at a relevant polling station. The circumstances of individuals self-isolating would fall into this category.
- 4.12. These Regulations amend regulation 56 of the Representation of the People (England and Wales) Regulations 2001, with the effect that the categories of people that can apply for an emergency proxy are extended to include individuals who cannot vote in person because they are following relevant legislation, Welsh Government guidance or medical advice in relation to coronavirus and self-isolating.
- 4.13. The changes are temporary and will only apply to elections postponed by the previous The Local Government (Coronavirus) (Postponement of Elections) (Wales) Regulations 2020.
- 4.14. An application for an emergency proxy on medical grounds must be accompanied by attestation from a relevant professional. These Regulations do not place an attestation requirement on individuals who cannot vote in person because they are following Welsh Government or medical advice to self-isolate. This reflects the difficulty that someone self-isolating or shielding may have in getting an attestation from a suitable independent person.

Allowing public notices for vacancies to be published electronically

- 4.15. Section 116 of the Local Government (Wales) Measure 2011 states that if members of a community council seek to fill a vacancy by way of co-opting they must give public notice in accordance with section 232 (public notices) of the Local Government Act 1972. This states that "Save as otherwise expressly provided, a public notice required to be given by a local authority shall be given— (a) by posting the notice in some conspicuous place or places within the area of the local authority; and (b) in such other manner, if any, as appears to the local authority to be desirable for giving publicity to the notice."
- 4.16. In light of social distancing measures, it would not be practicable for community council officials to post notices in conspicuous places and so these Regulations amend sections 116 and 117 of the Local Government (Wales) Measure 2011 to allow for public notices given in relation to a decision to co-opt a member of a town or community council due to insufficient nominations or a casual vacancy to be posted electronically to a community council's website. This regulation will only relate to vacancies which arise on community councils during the period caught by the initial postponement Regulations (16th March 2020 – 31st January 2021).

5. Consultation

- 5.1. Due to the emergency nature of these Regulations the Welsh Government did not undertake a public consultation before the Regulations came into force. Views have been sought from stakeholders such as the Electoral Commission, the Wales Electoral Coordination Board (WECB) and the Association of Electoral Administrators (AEA).

6. Regulatory Impact Assessment (RIA)

Introduction

In relation to these Regulations and the postponed by-elections, Welsh Government will consider requests for the reimbursement of reasonable costs incurred by a Returning Officer on actual expenditure prior to the enactment of the Coronavirus Act 2020 in relation to a postponed by-election.

Such payments for re-imbursement are not referenced in these Regulations as they could be made under existing Welsh Ministers' powers under section 58A of the Government of Wales Act 2006, or in combination with other local government elections' powers. The Welsh Government intends to write to local authorities with details of the eligible criteria for reimbursement, inviting appropriate applications.

Option 1 – Do nothing. Returning Officers would not be reimbursed any costs

Option 2 – Reimburse Returning Officers for actual costs incurred at postponed elections. This is the preferred option.

Cost and benefit analysis

Option 1 – Do Nothing

County and county borough councils are required to appoint a Returning Officer to conduct elections on their behalf. The Returning Officer is then personally responsible for the management of elections. Each county or county borough council is required to place the services of its staff at the disposal of the Returning Officer to help run the election. The cost of running local elections falls entirely on county and county borough councils and community Councils.

The Representation of the People Act 1983 (the 1983 Act) section 36(4) requires councils to cover all expenditure incurred by the returning officer in holding of an election for all or any seats on it. The Council may set scales of expenditure which the returning officer must not exceed.

In the case of the costs of community Council elections the 1983 Act also prescribes under Section 36(5A) that all expenditure properly incurred by a

returning officer in relation to the holding of an election of a community councillor be paid by the principal council; and if the principal council so require, any expenditure so incurred shall be repaid to them by the community council.

The costs of running an election result from having to meet a range of fees, charges and expenses incurred in paying staff, the expenses of printing notices and (for contested elections), ballot papers, postal voting forms etc. hiring polling stations and conducting the counts.

When the coronavirus pandemic began in March 2020 some local authorities had issued notices for by-elections to fill casual vacancies on county and county borough councils and community councils.

These by-elections were duly postponed by the Local Government (Coronavirus) (Postponement of Elections) (Wales) Regulations 2020. The Regulations postponed by-elections which were due to be held during the period from 16 March 2020 to 31 January 2021.

Preparation for holding some by-elections would have commenced prior to the postponement. This would have resulted in some costs being incurred such as the printing of notices, printing poll cards and ballot papers and hiring of polling stations.

Doing nothing would mean that the local authority would have incurred costs in the preparation of a poll which was subsequently postponed. The same costs will be incurred again when the poll is rescheduled.

Option 2 – Reimburse Returning Officers for Actual Expenditure

At least five local authorities have been identified as having to begun preparation for by-elections in March and April 2020 which were subsequently postponed.

Principal councils are already under financial pressure due to the coronavirus. Returning officers are also likely to face higher costs for conducting the postponed poll due to health and safety requirements in light of the ongoing situation to ensure the safety of polling station staff and voters.

Reimbursing the actual costs incurred for postponed polls would support councils during this difficult financial period.

The costs which are likely to have been incurred and which will be reimbursed include the printing and posting of poll cards, ballot paper and postal voter packs. It is not proposed to include staff costs as county and county borough councils are required to make staff available to the returning officer for elections. Also there is no provision in existing legislation for returning officers to be paid a personal fee for the conduct of local elections. The costs of notices is likely to be insignificant as most would have been prepared in house.

Based on data from the five local authorities identified as having elections postponed in March and April, the total costs incurred in preparing for the poll is in the region of £16,302.

However, there may be other county or county borough councils, not yet identified, which also postponed by-elections therefore the maximum amount likely to be required to be reimbursed is in the region of £25,000

Reimbursement will be on the basis of actual expenses incurred. It will be expected that receipts or evidence of costs incurred will be produced.

Competition Assessment

The Regulations are not expected to impact on the level of competition in Wales or the competitiveness of Welsh firms.