

EEB 02

Bil Etholiadau a Chyrff Etholedig (Cymru)

Elections and Elected Bodies (Wales) Bill

Ymateb gan: Yr Athro Alistair Clark

Response from: Professor Alistair Clark

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Introduction

1. My expertise is in electoral systems, integrity and administration, with numerous published research articles and reports on these themes. I write in a personal capacity (<http://www.ncl.ac.uk/gps/staff/profile/alistairclark.html#background>).

Summary

2. The Bill represents an important set of proposals to reform electoral administration and aspects of the electoral process in Wales. These seek to modernise existing processes while introducing new responsibilities and structures. Wales has been at the forefront of such reforms in GB and, implemented effectively, this could provide an example for the rest of GB about how such reforms might work.

3. The Bill's main principles, aims and measures are welcome and to be supported. In this written evidence, I outline some issues which the Committee may wish to consider about the overall quality of the legislation and issues which arise from this so that they might be explored with the Welsh government during Stage 1 scrutiny of the Bill.

Electoral Management Board

4. The Bill provides legislation to establish a Welsh Electoral Management Board. This is a welcome move. Scotland has had such a body, in both non-statutory and now statutory form, for its local and now parliamentary elections for well over a decade. Research has shown that Scottish election administration has performed at a higher level than its equivalents across the rest of Great Britain since the EMB's establishment, even from its earliest non-statutory form.¹ It has provided a focus, advice, leadership and direction to electoral administrators. A similar body in Wales should provide similar leadership. A Welsh EMB should benefit positively the conduct of elections in Wales.

5. There are three main issues to raise with regard to establishing a Welsh EMB. Firstly, the Scottish EMB benefits from being independent of other actors – government, Electoral Commission, Boundary Commission etc. This is not the case with the proposed Welsh EMB. Its powers are to be delegated from the Democracy and Boundary Commission Cymru. Even if the EMB is intended to be a Statutory Committee of that Democracy and Boundary Commission Cymru, this is not the same as being independent. If a conflict of interest develops between the two bodies, it is unclear how that may be resolved and which would have precedence under the current Bill. I already have some reservations about the potential for confusion between the Electoral Commission and the Democracy and

¹ Clark, A. (2015) 'Public Administration and the Integrity of the Electoral Process in British Elections', *Public Administration*, 93, (1), pp86-102; Justin Fisher, Yohanna Sällberg (2020) Electoral integrity–The winner takes it all? Evidence from three British general elections', *British Journal of Politics & International Relations*, 22(3), pp404-420.

Boundary Commission Cymru (see my written evidence and recommendation on this to the current Reform Bill Committee on the Senedd Cymru (Members and Elections) Bill).²

6. Independence of electoral management boards is generally seen as international best practice in this field to deliver impartial, free and fair elections. I would therefore recommend strongly that the Welsh EMB's functions are clearly set out in legislation, and that it be an entirely independent body with statutory functional and operational independence from any other body in the electoral sphere including the new Democracy and Boundary Commission Cymru. This would avoid any conflict, ambiguity or conflict about purpose. It is notable and regrettable that EMB independence has not been considered (Explanatory Notes, pp.81-82). While there should certainly be oversight and accountability to the Senedd, independence would lead to a clearer delineation of responsibilities and ability to understand performance of the new EMB separate from that of the Democracy and Boundary Commission Cymru.

7. Secondly, the power of direction from the Chair of the EMB in Scotland developed gradually. Even in its advisory form, their recommendations proved helpful in providing consistency and focus where necessary to electoral administrators and registration officers. The power of direction has undoubtedly helped further improve consistency and clarify the Chair's decisions since. It is therefore welcome to see that the power of direction has been incorporated into this Welsh Bill. Having power of direction from the Welsh EMB's establishment will avoid any ambiguity as to decisions and responsibilities.

8. Thirdly, sufficient resources have been a key issue throughout the history of the Scottish EMB, with several councils, particularly Edinburgh, providing support and secondment. It is therefore necessary to ensure that its Welsh equivalent will be adequately resourced, in terms of finance, equipment and personnel. On this point, the Bill's Explanatory Notes (pp.83-86) are frustratingly opaque. I would therefore suggest that the Committee explore with the Welsh government the actual running costs and resourcing for the EMB, including under the circumstance where this was independent of any Democracy and Boundary Commission.

Electoral Registration

9. I have argued elsewhere, along with my colleague Prof. Toby James (UEA), for the introduction of automatic electoral registration.³ This would remove one barrier to participation, and help with the completeness of electoral registers. It is therefore welcome to see the Bill contain measures around the automatic registration of electors. This will be innovative in Britain, and provide an important example for the other constituent parts of the UK.

10. There will be a couple of challenges in implementing automatic registration. Firstly, while this will help with completeness of registers, maintaining their accuracy will remain a challenge as people move address, or pass away for instance. This will presumably need revision of practices around maintaining the register. There would seem to be some potential for duplication given different electoral law around registration for UK parliamentary elections.⁴ For example, would canvasses need to be conducted more regularly, or some alternate procedure introduced? Additional data mining would seem necessary in this regard, and it seems the idea is to run this alongside an Annual Canvass. I would suggest that the Committee explore the practicalities of these issues with the Welsh government.

² See my paragraph 30 in that evidence.

³ Toby S. James, Bite the Ballot and Alistair Clark (2019) *Missing Millions Still Missing: A Vision for Electoral Modernisation in the UK*. London: All Party Parliamentary Group on Democratic Participation.

⁴ i.e. the Electoral Registration and Administration Act 2013.

11. Secondly, it is unclear how an ERO will satisfy themselves that a person is entitled to be registered in the electoral register (Chapter 3, (2)). Presumably this would be through a combination of age and residency from various sources, as per the recent changes in Wales to the franchise around age and resident voting. This might be clearer in the legislation however, although this presumably will be established in guidance.

12. The intention to remove the open register by regulations is a welcome move, both for privacy and data protection reasons as set out in the Bill's explanatory notes, and also for the purposes of protecting potentially vulnerable electors. Such a reform could helpfully provide a model for the implementation of this necessary reform elsewhere in GB. It seems strange to delay implementation of this objective given the current legislation before the Senedd. I would suggest that these regulations be implemented at the earliest opportunity. The Committee may wish to explore why such a power has not been written into the current bill.

Voter Information and Accessibility

13. As with automatic registration, I have argued elsewhere with colleagues for the necessity of developing and implementing voter information services.⁵ It is therefore pleasing to see such a measure contained in Section 27 of the Bill.

14. Three points should be borne in mind as this develops. Firstly, there is a clear need to ensure that the material posted to this website or resource is seen as independent. It is not evident from the legislation or explanatory notes which organisation would be tasked with managing this platform. This is crucial. Ownership of the resource should be clear, both in the legislation, and on any resource developed. I would strongly recommend that this is run by a body independent of the Welsh government, to avoid any potential inference of electoral bias.

15. Secondly, and relatedly, the material posted to this website should be sufficiently different from that which is posted to other bodies' websites or might be found elsewhere (i.e. Electoral Commission, Senedd etc), even if it might draw upon some of that material. It ought to be focused very clearly on what voters need to know to be able to cast their vote. In addition to information about candidates and constituencies, for example, it might usefully also include information on polling stations, and other practical aspects. It ought to highlight prominently any applicable deadlines, such as for postal or proxy votes.

16. Thirdly, as this develops, it will need rigorous testing to ensure it becomes a trustworthy 'go to' resource for electors. While political parties and candidates are obviously stakeholders, it must be the needs and interests of voters which are paramount in the information published and tested. Voters' groups, including those for traditionally excluded or from low participation groups, should be involved in testing any new resource, as should academics and other experts.

17. With regard to the candidate survey, the overall aims of this survey are welcome and important. The Bill's explanatory notes highlight the low response rate for the survey, while also noting that the form and questions for the survey are set out in regulations by ministers. Survey implementation and design is a complex task. This is not best practice in survey implementation. It is therefore welcome to see this power weakened in the Bill to 'may give a direction'.

18. While survey fatigue is a real issue, there is likely to be scope for this survey to be designed and implemented by an external contractor, if it is not already (e.g. University research unit, consultancy

⁵ Toby S. James, Bite the Ballot and Alistair Clark (2019) *Missing Millions Still Missing: A Vision for Electoral Modernisation in the UK*. London: All Party Parliamentary Group on Democratic Participation.

etc). While this would have a cost attached, it may also mean that any contractor has incentives to maximise response rates.

Electoral Pilots

19. Wales has been at the forefront, with Scotland, of pioneering reforms in electoral policy and administration. Increased powers to conduct electoral pilots are therefore welcome. This will enable potential innovations to be tested. A non-exclusive list of potential issues where pilots may be conducted is included in the explanatory notes, (para 3.46).

20. I note the power for Welsh ministers to compel pilots. Compulsion should be used sparingly and as a last resort, however. The Committee should reassure itself on the circumstances under which such compulsion would be used. As I have mentioned above, there is a constant need for the introduction of potential electoral reforms and pilots to be seen as free from potential bias. Compulsion by government risks complaints and perceptions of such bias. Electoral reforms and their pilots which proceed through institutional consensus and cross-party agreement tend to be more effective and lasting.

21. In practical terms, and however a pilot is arrived at, it is necessary that evaluation of any pilots be seen as independent to avoid any such accusations of electoral bias. With this in mind, the Committee might therefore wish to explore with the Welsh government the desirability of including the facility of tendering for independent academic evaluations, alongside those conducted by the Electoral Commission or other contractors, of any pilots that are conducted under this legislation.

Legislative Process

22. The Bill leaves quite a lot to the discretion of Welsh ministers via secondary legislation. It is important that the Senedd retains oversight however. The Explanatory Notes (Table 5.1) summarise the procedures to be used in these cases. While I have no specific points to raise here, the Committee might wish to satisfy itself that the procedures indicated are appropriate. The affirmative procedure for instance would seem to confer more of a role for the Senedd, and would seem to be preferable as the default option given the importance of electoral law, particularly where primary legislation is to be amended.

23. Innovation in electoral policy in Wales has led to a proliferation of Acts in this area. To only mention three current Bills, these include the current Bill before the Committee, the Senedd Cymru (Members and Elections) Bill before the Reform Bill Committee, and the forthcoming electoral quotas Bill. Electoral law was already notoriously complex and difficult to understand quickly and easily. For the sake of clarity, it might be worth the Committee exploring whether a Consolidation Act would be beneficial for Welsh electoral law once passage of these current bills is complete. The Law Commission has recommended just such a consolidation at UK level, although this has not yet been acted upon.⁶

⁶ <https://lawcom.gov.uk/project/electoral-law/> [7/11/2023].