**Resilience Planning – Elections in the context of CoVid 19**

**An Approach to Local Authority By-Elections**

*“A secure election must protect the health of the voter and the health of democracy”*

**28 May 2020**

**The Electoral Management Board for Scotland**

# Introduction

* 1. This paper considers the circumstances under which council by-elections currently postponed due to the Coronavirus outbreak would be either further postponed or allowed to proceed on the rescheduled date chosen by the Returning Officer (RO). If the by-election is to proceed some proposals are made to ensure that the event is “Covid-secure” considering the safety of all stakeholders while delivering an accessible, fair and secure electoral event delivering results in which the voter can have full confidence.

# Background

* 1. Section 70 of The Coronavirus Act 2020 allows ROs in Scotland to postpone by-elections for the filling of casual vacancies, following consultation with Scottish Ministers and the Convener of the EMB. There are currently 11 by-elections postponed with the dates rescheduled through October and November.
  2. As the dates for these by-elections approach there will be a need to assess whether there is a justification for further postponement or whether the polls can safely proceed on the dates chosen. This is a decision for the RO. A further postponement would again require consultation.
  3. The timetable for local authority by-elections is lengthy with the notice of election published a maximum of 35 working days ahead of poll. If a further postponement was to be required it would ideally need to be considered and effected before the timetable of key events and activities commences.
  4. This paper proposes a procedure to be undertaken by the EMB to prompt this consideration by the RO in sufficient time, from 50 days prior to the poll. A template risk assessment is provided to support this review. If no further postponement is required a checklist of issues is proposed to support the RO in delivering a safe, accessible, secure and robust election.

# Considering the need for further postponement

* 1. The Coronavirus Act under Section 70 allows for the postponement of by-elections but does not provide an explicit framework under which to decide that postponement is appropriate.
  2. A basic principle of democracy is that polls should not be unnecessarily delayed (“democracy delayed is democracy denied”).
  3. The part of the explanatory note to the Act dealing with the postponement of electoral activities states:

*“The need for the postponement arises from concerns that running a poll will be, at best, inadvisable and, at worst, impossible if* *candidates, campaigners, electors, electoral administrators and those providing supply and support to them are affected by either COVID-19 or the measures around it. Concerns have already been raised by electoral administrators that there would be insufficient staff available to them or their suppliers. Additional risks include polling station safety, the possible demands on Local Authority electoral staff to support other key services, and the impracticality or potential impossibility of campaigning activity. Attempting to run a poll in those circumstances could lead to questions as to legitimacy of the outcome and sets a context for legal challenge to the results and the more general question of why it went ahead in the circumstances.”*

* 1. From this can be extracted a principle on which the decision for postponement can be taken:***are the circumstances such that that the legitimacy of the result could be questioned due to the impact on electors, candidates, campaigners, RO/ERO staff and suppliers?***
  2. The fundamental principle is that the vacancy should be filled as quickly as practicable; the default position then is that the by-election takes place on the rescheduled date.
  3. This default could be overridden. The RO will need to consider the current public health advice applying in Scotland as communicated through <https://www.gov.scot/coronavirus-covid-19/> and other channels including Public Health Scotland, the relevant IJB and the council’s own Resilience/Health and Safety teams. This will allow the RO to review how Cov19 and the actions being taken to control it will affect:
     + Voters;
     + Campaigners;
     + Electoral administrators – including ERO staff;
     + Suppliers – including printers and the venues used for polling and the count; and
     + Other support provided from across the council.
  4. Scottish Government publications identifying a [route map for moving out of lockdown](https://www.gov.scot/news/route-map-for-moving-out-of-lockdown/) and [framework for decision making](https://www.gov.scot/publications/coronavirus-covid-19-framework-decision-making-further-information/) on moving through the current outbreak indicate that some restrictions, such as physical distancing and improved hygiene practice will be in force for many months. As such Covid19 and the actions being taken to control it will be likely to impact all of the stakeholders identified above to some extent. Further guidance is expected from the Scottish Government on 28 May.
  5. It will be for the RO to assess whether the impact is such that attempting to run the poll:
     + Allows appropriate campaigning activity;
     + Maintains the safety of candidates and agents;
     + Is possible within the capacity of council and supplier staff;
     + Maintains the safety of polling, postal vote and count staff
     + Maintains the safety of the elector; and
     + Will not be likely to lead to questions as to legitimacy of the outcome or set a context for legal challenge to the results.
  6. A Covid-secure election must promote democracy and protect health. **It must be both safe and produce a legitimate result** following a free, accessible, secret poll in which the health of all stakeholders is protected.
  7. The RO will need to make this assessment in good time to allow further postponement should that be deemed appropriate. Given that the by-election timetable sees the Notice of Election published at a maximum of 35 working days before the poll the RO should make this assessment no later than **around 50 working days** before the poll.
  8. It is proposed that the Convener of the EMB contacts each RO **55 working days** before the rescheduled date to advise that they should initiate a risk assessment of the circumstances and to determine **by 40 days** before the poll whether it is appropriate for the by-election to be run.
  9. This is ultimately and appropriately a decision for the RO. The EMB will provide support in these assessments as needed. ROs should also consider advice from Public Health Scotland, the relevant IJB and the council’s own resilience/contingency planning teams as appropriate.
  10. Should it be determined that a further postponement is warranted the RO will need to consult with Scottish Minsters and the Convener of the EMB, as required by the Coronavirus Act, and with the Electoral Commission.
  11. The Coronavirus Act is clear that the RO “must fix a date ….. for the poll at the election to be held as soon as reasonably practicable”. There would therefore need to be clear justification should a further postponement be proposed.
  12. The process is illustrated below. In Appendix 1 a checklist is offered to support the RO’s risk assessment.

Assuming that the by-election proceeds, RO plans and implements range of actions to ensure a safe democratic event is delivered for voters.

RO undertakes risk assessment, using input from range of factors and agencies: ***Can this event be safe and produce a legitimate result***

# Issues to consider if the by-election goes ahead

* 1. If it is decided that the by-election should proceed then the RO will need to determine how it should be conducted legally, with integrity, while preserving the safety of all those involved: electors, candidates, campaigners, staff and suppliers. This will require a thorough review of all processes: registration, nominations, polling, postal voting, count and other elements. Appendix 2 will be developed over the coming months to reference these issues.
  2. The EMB has initiated work to review the impact of Covid19 on all of these elements and will provide updates to ROs as this work continues. The RO will also wish to consider all appropriate guidance issued by Scottish Government with respect to working practices.
  3. In the period leading up to these scheduled by-elections the legal framework for by-elections is unlikely to be altered. These events will therefore need to be delivered under the current legislative framework, predominantly the Scottish Local Government Elections Order 2011 (Local Government Rules 2011).
  4. As ever, the objective is to deliver a result in which the voter can have full confidence. A range of modifications to practice, within the rules, to provide for the safety and security of all those involved: campaigners, candidates, agents, voters and RO staff may be needed. However, these modifications must not be such as to call into question the legitimacy of the poll. The basic principles of accessibility to all electors, consistency across the ward and secret, secure voting need to be maintained.

# Recommendations

* 1. It is recommended that the EMB agree to implement the procedure outlined above, with the Convener of the EMB contacting each RO 55 working days before the date of the rescheduled poll to request that a risk assessment is undertaken on the basis of which the RO should decide whether or not to proceed with the poll.
  2. If agreed this procedure will be communicated to all ROs and EROs immediately.

# Appendix 1: Risk Assessment Checklist

In assessing whether or not the by-election should go ahead on the scheduled date or be further postponed the RO will need to consider a range of factors:

|  |  |
| --- | --- |
| Has RO consulted with Public Health Scotland and reviewed relevant guidance from <https://www.gov.scot/coronavirus-covid-19/> ? e.g. <https://www.gov.scot/publications/coronavirus-covid-19-phase-1-business-and-physical-distancing-guidance/> |  |
| Has RO consulted with local IJB? |  |
| Has RO consulted with council’s own Resilience/Contingency Planning /Health and Safety Team |  |
| Do the circumstances allow sufficient campaigning activity – e.g. via social media, local newspapers etc? |  |
| Is there sufficient capacity within the Council and ERO to undertake all of the associated administration? Can the ERO cope with likely increase in postal votes? Can facilities be arranged for submission of nominations? |  |
| Is there sufficient capacity from suppliers – print, postal vote verification, etc? |  |
| Are the polling places available, accessible and able to be modified where necessary to maintain physical distancing and frequent cleaning? Can any replacements be designated if necessary? |  |
| Is a count venue available that can accommodate the chosen count method, either eCount or manual, with sufficient space for physical distancing? |  |
| What can be done to support “shielded” voters or those forced to self-isolate – e.g. targeted invitations to apply for postal votes? |  |
| Can enough polling and count staff be recruited/trained? What PPE be needed? |  |
| Will any of the proposed modifications give grounds for challenge as to the legitimacy of the by-election? |  |

# Appendix 2 – Delivering a Covid-Secure Election

The EMB will update this guidance in the coming weeks and months are the circumstances develop and as its own working groups propose approaches to the key tasks and workstreams of:

* Registration
* Nominations
* Postal Voting
* Polling
* Count
* Post Event Activity
* Public Awareness/Campaigning