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Counsel General



Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref CG/PO/169/2024
Ein cyf/Our ref CG/PO/169/2024

All Members of the Senedd
Senedd Cymru
Cardiff Bay
Cardiff
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25th June 2024

Dear Member of the Senedd,

Elections and Elected Bodies (Wales) Bill - Government Amendments

I am enclosing detail of the Government amendments tabled to the Elections and Elected Bodies (Wales) Bill, together with an explanation of their purpose and effect.

Members will note that I have tabled an amendment to remove section 64 from the Bill, a section inserted by a non-government amendment at Stage 2. I wanted to set out my reasons for doing so and to explain my profound concerns about the provisions included within section 64, and to seek your support for that amendment.

In short, Section 64 creates a new offence of deception, and disqualifies individuals convicted of that offence from membership of the Senedd, or candidacy to be a Member for a period of 4 years from the date of conviction. Whilst I agree with the important principle of enhancing the accountability of Members for deceptive statements they may make, I consider the current provisions unworkable and have significant concerns about the principle of creating a new speech crime applicable to Members of the Senedd and candidates for membership of the Senedd. I fear it would have unintended adverse consequences.

Parliamentary privilege, in particular the freedom of parliamentarians and others taking part in proceedings to speak freely without fear of criminal or civil action in the courts, has been one of the fundamental principles of our democracy since the Bill of Rights 1688. The principle was built into the devolution settlement for Wales in a more limited form by section 42 of the Government of Wales Act 2006, which gives anyone participating in Senedd proceedings absolute privilege for the purposes of the law of defamation. This includes civil and criminal defamation actions.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

I am particularly mindful that Senedd privilege does not exist for the benefit of Members of the Senedd. The privilege exists to promote the effectiveness of the legislature and to benefit the people of Wales. It pursues (in ECHR terms) the legitimate aim of protecting free speech in the legislature and maintaining the separation of the powers between the legislature and the judiciary.

Section 64 of the Elections and Elected Bodies (Wales) Bill overturns this fundamental principle of our constitution and presents a serious risk of political debate being stifled and effective scrutiny of the government undermined. It provides for a more wide-ranging speech crime applicable to Members of the Senedd and candidates for membership of the Senedd than the old defamation offences. It criminalises “wilfully and with the intent to mislead” making or publishing of statements that are “false or deceptive” regardless of whether the statement causes any specific harm, unlike the abolished offence of defamatory libel where harm to the reputation of a person must be demonstrated. It also applies to statements made inside and outside the Senedd, setting aside the privilege that applies to Senedd proceedings.

While the underlying intentions behind the provision seem morally right, the proposed new crime represents a radical departure from modern constitutional norms in this country that has the potential to do much more harm than good. I do not overstate my concerns by highlighting that it is the kind of criminal law that was used as a tool to suppress dissent in the distant past in this country, is still used for that purpose in other countries today, and I worry that the good intentions that lie behind this provision could be abused in that way again here under different political circumstances.

In addition to my concerns about the principle of creating a crime like section 64 of the Bill, I also have practical concerns related to implementation of the Bill. The provision has several serious technical defects adversely affecting its clarity and effectiveness. There is also a risk of referral of the Bill to the Supreme Court, which would delay implementation of the Bill and prevent reforms from being implemented before the next Senedd election. Alternatively, if the Secretary of State for Wales were to exercise his section 114 power, this would prevent the Bill from receiving Royal Assent and becoming law at all.

There has also been no consultation with representatives of the police or the justice system, to understand the practical and implementation issues that will result from this new offence. I believe that it is irresponsible to legislate on an issue with no understanding of the resource implications for the Police or of the risk of vexatious complaints - and the impact that such complaints could have on Members. I do not believe that relying on wasting police time as a deterrent is necessarily sufficient. When the Hate Crime and Public Order (Scotland) Act came into force in April of this year, Police Scotland logged more than 3,000 complaints within the first 48 hours and over 7,000 complaints in the first week - and that was with a three year implementation period between the legislation being passed in Holyrood, and it coming into effect.

I do not think it is appropriate for a change to constitutional law of this importance to be given effect at the amending stages of the Elections and Elected Bodies (Wales) Bill. The Bill is about various administrative matters relating to devolved elections and elected bodies in Wales. While the Bill deals with disqualification from elected office, I do not think that extends to the creation of new political crimes in respect of which disqualification rules can then be made. This issue was not considered as part of Stage 1 scrutiny of the Bill, and the matter deserves full consideration, which I believe the Standards of Conduct Committee may provide, giving those affected (which is everyone in Wales) genuine opportunity to consider detailed proposals and make representations.

I consider it appropriate that the Committee is given the time and space to consider this issue as part of its inquiry into Individual Member Accountability, so that developing a single, integrated and coherent system for addressing breaches to the Code of Conduct for

Senedd Members remains a possibility. I am concerned that Section 64 would create a fragmented approach, as it creates a separate legal process uniquely for the purpose of addressing wilful deception rather than considering this issue as part of the wider picture on member accountability.

It is important that alternative approaches to ensuring the honesty of Members are also considered, and whilst it's for the Committee to consider these alternatives, I believe that these could include:

- The route to removal for deception being through the Standards of Conduct process, strengthened by a recall mechanism, putting the powers to remove a Member in the hands of electors.
- Whether this should include a revision to the Code of Conduct for Senedd Members to include an explicit standard on deception, set out in a similar way to how it is currently set out in section 64, and options to specify this as such in legislation.
- Whether it is possible and appropriate to develop a process by which a person who is found to have wilfully deceived is automatically disqualified, but without the creation of a criminal offence.

I provided evidence to the Committee on 17 June, and I set out that the Government remains committed to seeing this legislation in place by 2026 – legislation that will have benefited from the detailed scrutiny processes that follow from specific consideration, and not from being added on to an electoral administration Bill at the amending stages.

I will be happy to continue to contribute and engage with the Committee's work, and the government stands ready to support the practical implementation of the Committee's recommendations that are endorsed by the Senedd.

Yours sincerely,

A handwritten signature in blue ink that reads "Mick Antoniw". The signature is written in a cursive style and is positioned above a short horizontal line.

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol
Counsel General

ELECTIONS AND ELECTED BODIES (WALES) BILL –STAGE 3 GOVERNMENT AMENDMENTS

This table provides information about the amendments tabled in the name of Mick Antoniw MS on 21 June 2024

No.	GOVERNMENT AMENDMENT	GWELLIANT Y LLYWODRAETH	PURPOSE AND EFFECT
1	Section 40, page 35, line 19, after ‘ties’, insert ‘(including local ties connected to the use of the Welsh language)’.	Adran 40, tudalen 35, llinell 18, ar ôl ‘lleol’, mewnosoder ‘(gan gynnwys cwlwm lleol sy’n gysylltiedig â defnyddio’r Gymraeg)’.	<p>The purpose is to include the Welsh language as an example of a local tie at section 40.</p> <p>The effect is that the Democracy and Boundary Commission for Wales must consider whether any local ties relating to the Welsh language would be broken when considering whether to make recommendations for changes to the electoral arrangements for a principal area.</p>
2	Section 44, page 37, line 1, leave out ‘in review reports’.	Adran 44, tudalen 37, llinell 1, hepgorer ‘mewn adroddiadau adolygu’.	The purpose and effect is to broaden the scope of the provision beyond the content of review reports.
3	Section 44, page 37, after line 12, insert – <p>‘(3) Before making a report under section 35(2), 36(3) or 36(4), the Commission or a principal council (as the case may be) must have regard, in particular, to any representations</p>	Adran 44, tudalen 37, ar ôl llinell 12, mewnosoder – <p>‘(3) Cyn llunio adroddiad o dan adran 35(2), 36(3) neu 36(4), rhaid i’r Comisiwn neu brif gyngor (yn ôl y digwydd) roi sylw, yn benodol, i unrhyw sylwadau a gafwyd oddi</p>	<p>The purpose is to clarify that the orthography of the name or proposed name of an electoral ward is a matter to be considered as part of a review process.</p> <p>The effect is to require the Commission or a principal council to give proper consideration to any representations made by the Welsh Language</p>

No.	GOVERNMENT AMENDMENT	GWELLIANT Y LLYWODRAETH	PURPOSE AND EFFECT
	received from the Welsh Language Commissioner on the orthography of the name or proposed name of an electoral ward to which the report relates.’.	wrth Gomisiynydd y Gymraeg ynghylch orgraff enw ward etholiadol, neu orgraff enw arfaethedig ward etholiadol, y mae’r adroddiad yn ymwneud â hi.’.	Commissioner about the orthography of electoral ward names or their proposed names during a review process.
4	Section 51, page 41, after line 28, insert – () in paragraph (c), after “ties” insert “(including local ties connected to the use of the Welsh language)”.’.	Adran 51, tudalen 41, ar ôl llinell 28, mewnosoder – () ym mharagraff (c), ar ôl “lleol” mewnosoder “(gan gynnwys cwlwm lleol sy’n gysylltiedig â defnyddio’r Gymraeg)”.’	The purpose is to include the Welsh language as an example of a local tie at section 51. The effect is that the Democracy and Boundary Commission for Wales or a principal council must consider whether any local ties relating to the Welsh language would be broken when considering whether to make recommendations for changes to the electoral arrangements of a community.
5	Page 56, line 15, leave out section 64	Tudalen 56, llinell 14, hepgorer adran 64.	The purpose and effect is to remove section 64 of the Bill which makes provision for a new criminal offence of deception and related disqualification rules from membership of the Senedd.