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20th June 2024

Dear Vikki,

Thank you for the opportunity to give evidence to the Committee on this important inquiry. As I set out, whilst it is not for Government to present a fully formed preferred policy position on recall at this stage, I wanted to write to the committee to clarify my thinking on a few areas that were covered in the discussion. I look forward to the Committee's conclusions on what such a system should look like.

Underlying principles

The evidence I gave, reflecting the consideration that I have given to this issue to date, is underpinned by a series of general principles. I have set these out below, in case they offer a useful starting point.

A system of recall or removal should:

- Genuinely enhance the accountability of individual members of the Senedd whilst remaining fair to those involved.
- Be compatible and consistent with the new electoral system.
- Be linked to the Senedd's Standards regime.
- Not have a chilling effect on Standards Committee processes.
- Be compatible with the disqualification regime; and
- Be clear and understandable to the electorate, including by being as consistent and familiar to voters as possible within the wider electoral landscape in Wales.

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Thresholds in paired constituencies

Mark Drakeford MS raised the issue of thresholds within paired constituencies, and rightly pointed out that such pairing may link two very different constituencies, suggesting that one could 'out vote' the other in a recall vote. The discussion considered whether any threshold should apply separately to both 'halves' of a new constituency, rather than just to the whole of the new constituency.

There are two separate issues here, one of practicality, and one of principle. On practicality, the pairing of Westminster constituencies is only being done in order to allow for the rapid creation of sixteen constituencies in time for the 2026 election. The 32 Westminster constituencies are only the building blocks to be used for the creation of the new Senedd constituencies. Once the 2026 boundary review is complete and the regulations made to give effect to those boundaries in law, the Westminster constituencies will have no further relevance for Senedd elections. Each of the sixteen constituencies will be a single entity rather than two halves. The Senedd Cymru (Members and Elections) Bill then provides for a broader review of boundaries ahead of the 2030 election, and every eight years subsequently. Over time, it is likely that Senedd constituency boundaries will diverge from the pair of Westminster constituency boundaries on which they will initially be based.

However, the underlying question of principle remains. I am aware that some systems of recall require an overall threshold plus a minimum number of signatures in each local area, for example. It is my view that the committee will need to balance the sense of geographic justice this might provide, with the tension it might raise with the constituency-wide vote which elected them in the first place. However, my main concern would be as to the practicalities of such a system which has no precedent in our elections. The views of electoral administrators would be important to any such question.

Vacancies arising from a recall process

I also wanted to expand on my comments on how vacancies might be filled following a successful vote to remove the Member. Leaving aside, for now, the process that led to that point, I was asked some interesting questions on situations where members or candidates had left the party whose list they were elected on, or where party lists were exhausted.

The context of my answers is my belief that any such vacancy should be filled in the normal way. That is, that the 'recall' system would consider the removal of the MS, and would then dovetail with the rest of the system in order to fill any such vacancy created in consequence of the outcome of the recall system, rather than attempting to create different approaches to fill vacancies arising in different ways, which I don't believe would be justified.

The first question concerned Members who had changed parties since the election. As I set out in the session, I have concerns about Members being able to move between political groups in the Senedd during the Senedd term, preferring that they should only be able to sit as an independent if they wish to leave the group from whose party list they were elected. Putting that aside, it seems clear to me that any vacancy arising from recall would have to be filled from the list on which the removed MS was elected. Anything else would not respect the original vote of the electorate in that constituency. This would mirror the position where a vacancy arises for other reasons e.g. death or resignation.

The second asked what would happen if the next person on the party list – so the prospective member – had left the party at that point. The process at the moment for filling

regional vacancies allows the party's nominating officer to object to the return of the next person on the list if they are no longer a member of the party at the time of the vacancy arising. This would mean that the party could simply object to the non-party member being returned for the party, and it would pass to the next person. Again, this would ensure consistency as between vacancies arising as a result of recall and those arising in other circumstances.

The final question on this area asked what would happen if the party list was exhausted. As the system I envisage would simply make use of the in-built process of filling vacancies, this would lead to the seat remaining vacant until the next general election. This would also be the case for any independent MS that was successfully recalled. This is the position currently in GoWA for regional member vacancies and has been replicated for vacancies arising in the new system.

Offence of Deception

I have 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.

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 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 intend 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 your committee may provide, giving those affected (which is everyone in Wales) a genuine opportunity to consider detailed proposals and make representations.

I remain of the view that it is appropriate that you as a Committee are given the time and space to consider this issue as part of your inquiry, so that developing a single, integrated and coherent system for addressing breaches to the Code of Conduct for Members of the Senedd 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. I will therefore be tabling an amendment to remove Section 64 from the Bill and will be seeking support for that amendment.

It is important that alternative approaches are also considered, and whilst it is 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 s64, 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.

As I set out in my evidence on Monday, 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.

As with your consideration on recall issues, I will be happy to continue to contribute and engage with you as your inquiry continues, and the government stands ready to support the practical implementation of the Committee's recommendations that are endorsed by the Senedd.

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