

**National Assembly for Wales**  
Constitutional and Legislative  
Affairs Committee

**Inquiry into the Disqualification  
from Membership of the National  
Assembly for Wales**

July 2014



Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales

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## **The Constitutional and Legislative Affairs Committee**

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

### **Current Committee membership**



**David Melding (Chair)**  
Deputy Presiding Officer  
Welsh Conservatives  
South Wales Central



**Suzy Davies**  
Welsh Conservatives  
South Wales West



**Julie James**  
Welsh Labour  
Swansea West



**Eluned Parrott**  
Welsh Liberal Democrats  
South Wales Central



**Simon Thomas**  
Plaid Cymru  
Mid and West Wales

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## Summary

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In 2011, two Members elected to the National Assembly were disqualified after it emerged that they were members of public bodies that serving AMs cannot belong to.

One did not regain his seat after it was found that he had not checked the relevant rules for candidates. The other was reinstated after it was established that he had received out-of-date advice.

The events opened up the debate about what bodies elected members could be part of and, if a member was part of an organisation not allowed under the rules, when that connection should be severed.

In 2014 the First Minister asked the National Assembly's Constitutional and Legislative Affairs Committee to consider carrying out an inquiry into the rules concerning disqualification of members.

The Committee found that there are complications between part of the *Government of Wales Act 2006*, which deals with disqualification, and *the National Assembly for Wales (Representation of the People) Order 2007*, which deals with aspects of electoral law.

Currently, the disqualification from becoming an Assembly Member becomes relevant when candidate is nominated for election. At this point, according to the 2007 Order, a candidate should not be part of, or a member of, any organisations on long lists set out in the 2006 Act and the relevant Disqualification Order made under it..

But in this regard the 2007 Order effectively pre-empts the 2006 Act, which states that disqualification takes effect when Members are elected.

So, under the Act, a candidate need not resign from their positions until just before they are elected. Under the Order they must resign not knowing whether they will be elected, leaving some candidates facing the prospect of unemployment should they lose.

The Committee has suggested how the legislation can be changed to not only remove the complications but also ensure that the events following the 2011 election are not repeated.

The solution is not a simple one, as it requires amendments to both primary and secondary legislation (Acts and Regulations), and the powers to make these changes are shared between the UK Parliament and the Assembly.

To overcome this problem the Committee has identified changes that, it believes, should be made in time for the next Assembly general election in 2016, and for the subsequent one in 2021.

One of the Committees main recommendations, which probably cannot be in place until the 2021 election, would require amending the Government of Wales Act 2006.

The changes would mean that disqualification from membership of the Assembly should take effect on taking the oath or affirmation of allegiance as an Assembly Member, subject to a few exceptions because of the nature of the jobs being undertaken.

The Committee believes this would be a significant change that would enable more people to stand for election because they will not have to give up their employment to do so.

The change could be achieved in one of two ways - by requiring Assembly Members to resign a disqualifying post before taking the oath or affirmation of allegiance, or by deeming an Assembly Member to have resigned a disqualifying post on being elected.

The Committee suggests that the Law Commission investigate and report on this issue as part of a wider review across all UK legislatures.

The Committee didn't feel it was in a position to list definitively the public bodies and officeholders that should be the subject of future disqualification orders, but has nevertheless provided an indication of those it thinks should be included.

In light of evidence it received, the Committee also considered the issue of holding more than one political post in respect of the roles of



Assembly Member and local councillor, and Assembly Member and Member of the House of Lords.

In the case of the former, it believes further investigation is required.

However, the Committee does believe there is a clearer case for prohibiting individuals from standing as an Assembly Member and being a Member of the House of Lords, although such a ban should not apply to anyone who is currently serving as a member of both institutions.

## The Committee's Recommendations

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**Recommendation 1.** we recommend that the following principles, or ones similar to them, should inform who should be disqualified from membership of the National Assembly for Wales:

Principle 1: Promoting democratic participation and the right to stand as an Assembly Member are paramount.

Principle 2: Disqualification from membership of the National Assembly for Wales should be restricted to as few citizens as possible.

Principle 3: Political activity is inappropriate for some citizens in order to:

- i. protect the independence of the electoral process;
- ii. prevent conflicts of interest arising on election; and
- iii. protect certain public offices from political bias.

Principle 4: The following citizens should be affected by a disqualification order:

- i. those whose role involves an over-riding requirement for impartiality, including those whose responsibilities include the electoral process itself;
- ii. those who hold any public office which carries with it a significant financial benefit from the Welsh Government;
- iii. those who hold public office and in that role provide formal advice to the Welsh Government;
- iv. those who hold any public office which is subject to scrutiny by the Assembly.

Principle 5: Where disqualifications are necessary they must be:

- i. in line with these principles;
- ii. clear and unambiguous;
- iii. proportionate.

(Page 25)

**Recommendation 2.** we recommend that the UK Government brings forward appropriate legislation to amend the *Government of Wales Act 2006* to provide that disqualification from a particular public office should take effect on taking the oath or affirmation of allegiance as an Assembly Member. This change should not apply to a very

limited number of posts—as specified in section 16 of the 2006 Act or by order—where being a candidate would, for example, give rise to a conflict of interest or appear to undermine impartiality. (Page 38)

**Recommendation 3.** we recommend that the UK Government brings forward appropriate legislation to remove the relevant provisions in *The National Assembly for Wales (Representation of the People) Order 2007* requiring candidates, when accepting nomination, to declare that to the best of their knowledge and belief, they do not hold a disqualifying office. (Page 39)

**Recommendation 4.** we recommend that the Welsh and UK Governments ask the Law Commission to investigate and report on the various legislative options for delivering recommendation 2, and to make a recommendation on what it would consider to be the most appropriate, potentially as part of a wider review of this issue across all UK legislatures. (Page 40)

**Recommendation 5.** we recommend that the UK Government amends section 16 of the *Government of Wales Act 2006* to ensure that any disqualifications it contains are set out fully rather than by reference to other legislation and that all disqualifications it specifies take effect on nomination. (Page 40)

**Recommendation 6.** we recommend that the the UK Government amends section 16(1) of the *Government of Wales Act 2006* to remove the Auditor General and Public Services Ombudsman for Wales, so that they may be included in an appropriate disqualification order with other offices. (Page 40)

**Recommendation 7.** we recommend that the UK Government amends section 16(4) of the *Government of Wales Act 2006* so that a person who holds office as lord-lieutenant, lieutenant or high sheriff should be disqualified from being an Assembly Member. (Page 41)

**Recommendation 8.** we recommend that the Welsh and UK Governments, in asking the Law Commission to investigate and report in line with recommendation 4, also include a requirement to advise on the implications of retaining, replacing or removing section 17(3) of the *Government of Wales Act 2006*. (Page 41)

**Recommendation 9.** we recommend that any future legislative change to section 17(3) of the *Government of Wales Act 2006* should

only proceed following consultation with, and the consent of, the National Assembly for Wales. (Page 42)

**Recommendation 10.** we recommend that the order for the 2016 Assembly general election should specify two categories of persons who should be disqualified:

Category 1: those who should be disqualified from nomination because of the nature of their role.

Category 2: those who should be disqualified from return as an Assembly Member. (Page 48)

**Recommendation 11.** we recommend that the order for the 2021 Assembly general election should specify two categories of persons who should be disqualified:

Category 1: those who should be disqualified from nomination because of the nature of their role.

Category 2: those who should be disqualified having been elected but only from taking the oath or affirmation of allegiance. (Page 48)

**Recommendation 12.** we recommend that an order drafted for the 2016 Assembly general election to disqualify persons from nomination as an Assembly Member should include (but not necessarily be limited to) the following:

Auditor General for Wales  
Children's Commissioner for Wales  
Civil Service Commissioner  
Commissioner for Equality and Human Rights  
Commissioner for Older People in Wales  
Commissioner for Public Appointments  
Comptroller and Auditor General  
Her Majesty's Chief inspector of Education and Training in Wales  
Local Government Boundary Commissioner for Wales  
Members of the Independent Remuneration Panel for Wales  
Members and Staff of the Electoral Commission  
Parliamentary Commissioner for Administration  
Returning Officers and local authority staff involved in the

electoral process  
Statutory deputies of the persons in this list  
Welsh Language Commissioner (Page 49)

**Recommendation 13.** we recommend that an order should be drafted for the 2016 Assembly general election that disqualifies the following persons on return as an Assembly Member:

Members of judicial tribunals  
Persons appointed by Welsh Ministers  
Staff of local authorities not included in category 1  
Staff of National Park, Police, Fire and Rescue Authorities  
Staff of the organisations referred to in category 1  
Staff of Welsh Government Sponsored Public Bodies (Page 50)

**Recommendation 14.** we recommend that, in preparing a disqualification order for the 2016 Assembly general election, the Welsh Government consults widely on its contents, including in particular, all those organisations that it covers. (Page 51)

**Recommendation 15.** we recommend that the disqualification order for the 2016 Assembly general election is drafted, consulted on and made no later than 12 months before the date of that election. (Page 51)

**Recommendation 16.** we recommend that the disqualification order for the 2016 Assembly general election is made bilingually in the Privy Council. (Page 51)

**Recommendation 17.** we recommend that every public body in Wales reviews its rules governing political activities to ensure that all staff are clear about the internal rules that apply in the event that they wish to seek nomination for, and are eventually successful in, election to the National Assembly for Wales. Such rules should take account of any legislation that arises from this report and be subject to review at least 2 years before Assembly general elections that take place after 2016. (Page 56)

**Recommendation 18.** we recommend that the Welsh Government reviews the terms of appointment and guidance it gives to appointees, sponsored bodies and other relevant bodies regarding political activity. (Page 57)

**Recommendation 19.** we recommend that the Electoral Commission reviews its existing guidance on disqualification from membership of the National Assembly for Wales to ensure it is comprehensive and covers all of the relevant policy issues and legislation that apply.

(Page 57)

**Recommendation 20.** we recommend that the Welsh Government commissions an independent review of the feasibility of holding a dual mandate as an Assembly Member, and local authority councillor (including having regard to: the potential for conflicts of interest, time commitments involved and issues of public perception) and to make recommendations.

(Page 66)

**Recommendation 21.** we recommend that the UK Government prohibits the practice of standing as an Assembly Member and a Member of the House of Lords, but that such a prohibition should not be applied to anyone who is currently serving as a member of both institutions.

(Page 67)

# 1. Introduction

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## *The Committee's remit*

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

## *Terms of reference*

4. On 17 February 2014, we agreed to hold an inquiry into disqualification from membership of the National Assembly for Wales. The terms of references were to consider:
  - the principles underpinning the disqualifying posts and employments contained in *The National Assembly for Wales (Disqualification) Order 2010* and, so far as possible, to recommend a new list of disqualifying posts and employments;
  - the timing of when disqualifications take effect;
  - whether disqualification orders should be made by the Privy Council in bilingual form; and
  - any other matters relating to disqualification from being an Assembly Member.
5. The inquiry was prompted following a letter from the First Minister in January 2014 asking us if we would consider carrying out an inquiry into the rules pertaining to disqualification from Assembly membership. A copy of the letter is at Annexe 1.

6. The Welsh Government also provided a memorandum which included the context of the request for us to undertake the inquiry, the content of the disqualification order and incidental issues. The memorandum can be found at Annexe 2 to this report.

7. We issued a call for written evidence on 14 March 2014 and held 7 evidence sessions. Details of the responses received and witnesses who gave evidence can be found at the end of this report.



## 2. Background and evidence for change

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### *Legislative background*

8. The legislation governing disqualification of membership from the National Assembly for Wales is complex and includes the following:

- Sections 16 - 19 of the *Government of Wales Act 2006*, which sets out the broad legislative framework for disqualification from being an Assembly Member (and, in so doing, draws on the *House of Commons Disqualification Act 1975*).
- *The National Assembly for Wales (Disqualification) Order 2010*, (“the 2010 Disqualification Order”) made under section 16(6) of the *Government of Wales Act 2006*. The 2010 Disqualification Order designates persons who are disqualified from being a member of the National Assembly for Wales. Part 1 of the Order covers “Bodies the members of which are disqualified”, while Part 2 covers “Other disqualifying offices”.
- *The National Assembly for Wales (Representation of the People) Order 2007*, made under section 11 of the *Government of Wales Act 1998* and the *Political Parties, Elections and Referendums Act 2000*. Under rule 9(4)(c)(ii) of Schedule 5 to the 2007 Order, candidates for election to the Assembly are required to declare, to the best of their knowledge and belief, that they are not disqualified from membership. The power in section 11 of the *Government of Wales Act 1998* is now contained in section 13 of the *Government of Wales Act 2006*. Section 13 provides the Secretary of State with a power to, by order, apply or incorporate, with or without modifications or exceptions, any provision of or made under the 2000 Act and other enactments relating to Parliamentary elections.

9. Section B of the written evidence from Keith Bush QC, the former Chief Legal Adviser to the National Assembly, provides a more comprehensive analysis of the legislative framework. It is reproduced as Annexe 3 to this report and he provided further analysis during an oral evidence session.<sup>1</sup>

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<sup>1</sup> Constitutional and Legislative Affairs (‘CLA’) Committee, *RoP*, 16 June 2014

10. Section 23 of the *Government of Wales Act 2006* requires all Assembly Members to take the oath of allegiance to HM the Queen, or to make the corresponding affirmation. Until Members have done so, they may not take part in Assembly proceedings (except for the purposes of taking the oath and election of the Presiding Officer and Deputy Presiding Officer) or draw a salary or any other payment. This provision of the 2006 Act is particularly relevant to this report.

### ***Evidence about the existing arrangements***

11. Under the current legislative arrangements, the disqualification from becoming an Assembly Member becomes relevant when a candidate is nominated for election.

12. However, as the evidence of Keith Bush QC demonstrates, there are complications between the *Government of Wales Act 2006* and the electoral law contained in *The National Assembly for Wales (Representation of the People) Order 2007*. Keith Bush QC stated that the requirements of the 2007 Order “bite”:

“... at the time of acceptance of nomination, i.e. the candidate is required to make the declaration on the basis of the position at that date, which is anomalous, since GOWA 2006 only requires that a candidate is not disqualified when returned. If, therefore, a candidate is aware of a disqualification which exists at the time of nomination, he or she must not accept nomination unless the disqualification has already been removed, e.g. by resigning from the office prior to accepting nomination.

“So, in practice, the disqualification “takes effect” not when a disqualified candidate is elected but when a candidate accepts nomination, although, perversely, a candidate who is unaware of a disqualification has a further period of grace, ending when the return is submitted, to divest himself or herself of the disqualifying office.”<sup>2</sup>

13. We also heard from a number of witnesses about the lack of clarity of the legislation, particularly surrounding the 2010 Disqualification Order.

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<sup>2</sup> Written Evidence DQ 6

14. The Electoral Commission told us that the 2010 Disqualification Order:

“... is long, and it tends to get longer, because the list of bodies tends to be added to. They are usually removed only if the organisation no longer exists. So ... potentially, the net is quite wide. Also, it is not clear what criteria have been applied ... someone simply looking at the Order could not tell what the criteria are. It is not particularly transparent.”<sup>3</sup>

15. The Chief Executive<sup>4</sup> of Natural Resources Wales said:

“I must admit that, having never looked into this issue before your inquiry, until I read the Order, I had not fully realised that it affected board members and staff ... Also, I had not appreciated that it affects the nomination period as well as the actual election period. I think that the Electoral Commission makes both of these points. I agree with it; on the first reading, that was not clear to me. So, I think that they are unclear.”<sup>5</sup>

16. The Older People’s Commissioner for Wales expressed similar sentiments, stating:

“... I had not quite realised that my staff were all barred, which may have been an error on my part. So, on that basis, I would probably say that it is not very clear, because I did not know ... However, it is important, because I need to be clear about the terms and conditions of employment of my staff ... ”<sup>6</sup>

17. Lawyers in Local Government<sup>7</sup> did not find the existing disqualifications to be unclear,<sup>8</sup> but highlighted the potential dangers

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<sup>3</sup> CLA Committee, *RoP [paragraph 25]*, 28 April 2014

<sup>4</sup> The Chief Executive of Natural Resources Wales, Dr Emyr Roberts, indicated during his evidence session that he was representing largely his own views and they had not been discussed by the board or anyone else.

<sup>5</sup> CLA Committee, *RoP [paragraph 100]*, 2 June 2014

<sup>6</sup> CLA Committee, *RoP [paragraph 158]*, 2 June 2014

<sup>7</sup> Lawyers in Local Government was formed in April 2013 by the merger of the Association of Council Secretaries and Solicitors (ACSeS) and Solicitors in Local Government (SLG). Its primary purpose is to represent, promote and support the interests of its members. Membership is open to local government legal or governance officers, including Monitoring Officers and their deputies, solicitors, barristers, legal executives, licensed conveyancers and trainees.

<sup>8</sup> CLA Committee, *RoP [paragraph 13]*, 12 May 2014

of using a list-based system, namely of missing something out<sup>9</sup> or of the list becoming out of date.<sup>10</sup>

### ***Our view***

18. It is clear from all the evidence we have heard that there is a need to reform the legislative framework surrounding disqualification from membership of the National Assembly for Wales, as well as reviewing and revising the 2010 Disqualification Order.

19. Our report therefore includes consideration of:

- the principles that should underpin disqualification from membership of the National Assembly (Chapter 3);
- proposed changes required to the legislative framework (Chapter 4);
- proposed changes to *The National Assembly for Wales (Disqualification) Order 2010* (Chapter 5);
- the timing of the proposed changes (Chapter 6);
- raising awareness about the disqualification rules that apply (Chapter 7).

20. We also heard evidence about the appropriateness of holding more than one political position, so called “double jobbing” and this is considered in Chapter 8.

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<sup>9</sup> CLA Committee, *RoP [paragraph 13]*, 12 May 2014

<sup>10</sup> CLA Committee, *RoP [paragraph 15]*, 12 May 2014

### 3. Principles

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#### *The right to stand for election*

21. The right to stand for election and the desirability of maximising the opportunity to stand for election was a consistent theme of the evidence we received.

22. The First Minister stated in his letter to the committee of 27 January 2014:

“Past disqualification orders have sought to strike a balance in terms of disqualifying posts and employments: allowing as many citizens as possible to stand for election, whilst protecting the legislature from undue influence by government-paid office-holders, protecting the public purse by avoiding conflicts of interests, and protecting the impartiality of certain bodies from the appearance of party political bias.”<sup>11</sup>

23. The Welsh Government’s memorandum added that:

“Generally speaking, restrictions on membership are a basic feature of elected legislatures. While certain restrictions are necessary, they are a limit on people’s democratic rights. In the Welsh Government’s view, therefore, the rationale behind disqualifying people from Assembly membership must be well justified, and we should restrict exclusions to the minimum.”<sup>12</sup>

and concluded:

“...it is our view that the rules pertaining to disqualifications are increasingly unfit for purpose to the point that, in some instances, they pose a disincentive to potential candidates and thus fall foul of the logic of empowering democratic participation.”<sup>13</sup>

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<sup>11</sup> Letter from the First Minister, *Disqualification from membership of the National Assembly for Wales*, 27 January 2014

<sup>12</sup> Welsh Government, *Inquiry into disqualifications from Assembly membership: Memorandum by the Welsh Government*, March 2014

<sup>13</sup> Ibid

24. The Electoral Commission told us that:

“Disqualifications are a limit on people’s freedom to stand for election and indeed limit voters’ choice of as many candidates as possible. So, for that reason, disqualification should be justified and proportionate.”<sup>14</sup>

25. In their view:

“Justified and proportionate disqualification criteria should allow the widest possible choice of candidates for electors to choose from, striking a balance between preventing candidacy in limited, specified circumstances, while not unreasonably discouraging participation.”<sup>15</sup>

26. The Electoral Commission also told us that following a UK-wide consultation on standing for election the clear message coming through was:

“... the need for the rules to be as simple as they can be, as consistent as they can be, and as straightforward as possible. I am sure that candidates, especially those who do not have access to professional quality advice, think that they are doing something marvellous in standing for election, and it must be like a minefield with lots of things to trip them up along the way.”<sup>16</sup>

27. The Electoral Commission’s consultation also found that people consider the disqualifications to be too wide.<sup>17</sup>

28. The Electoral Reform Society Wales expressed similar views:

“We would view any kind of restriction on people’s ability to stand for the National Assembly and be Assembly Members as a restriction on their democratic freedom, so keeping those sets of restrictions to an absolute minimum would seem to be the guiding principle, to make it as light touch as possible.”<sup>18</sup>

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<sup>14</sup> CLA Committee, *RoP [paragraph 21]*, 28 April 2014

<sup>15</sup> Written Evidence DQ 1

<sup>16</sup> CLA Committee, *RoP [paragraph 83]*, 28 April 2014

<sup>17</sup> CLA Committee, *RoP [paragraph 51]*, 28 April 2014

<sup>18</sup> CLA Committee, *RoP [paragraph 92]*, 28 April 2014

29. We also asked the Older People’s Commissioner for Wales whether the existing rules create any barriers for older people to stand for election. In responding she said:

“I suppose that, at one level, you would have to look at the age profile of the organisations that currently had the bars running through them, and, if they are skewed to one age group, you could argue that that age group is disproportionately affected. The route that I prefer to take, as a human-rights-based commissioner, is more one of inclusion, opportunity and removing barriers for people. I think that there are many, many barriers that people face to go into the world of politics, and into political life, either at national or local level, and, actually, what we should really be focusing on is how to remove those barriers for people.”<sup>19</sup>

30. Peter Black AM also emphasised the importance of maximising the ability of people to stand for election, closing his oral evidence by stating:

“In terms of the disqualification rules ... it would be beneficial to Welsh democracy and the Assembly if we made those rules more permissive, rather than less permissive ... It seems to me that the whole point of the Assembly—or one of the rationales behind it—was to increase accountability and transparency and enable people to have a much greater say in terms of their own Government and running affairs in the Assembly. I think that it is important, therefore, in terms of the disqualification rules, that we try to ensure that as many people as possible are able to stand for election to the Assembly.”<sup>20</sup>

### ***General principles underpinning disqualification rules***

31. The Welsh Government’s memorandum (and a subsequent letter from the First Minister<sup>21</sup>) identified the categories of person disqualified as a result of applying the principles referred to in the First Minister’s letter of 27 January 2014 (see paragraph 22). These were:

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<sup>19</sup> CLA Committee, *RoP [paragraph 183]*, 2 June 2014

<sup>20</sup> CLA Committee, *RoP [paragraph 64]*, 2 June 2014

<sup>21</sup> Letter from the First Minister, *Disqualification from membership of the National Assembly for Wales*, 16 May 2014

- Holders of offices wholly or partly funded by the Welsh Government. This included salaried, pensionable and certain fee-paid posts, but excluded posts attracting expenses only. Office with remuneration of less than £10,000 per year should not normally attract disqualification.
- Appointments which were made, approved or confirmed by the First Minister, Welsh Ministers or the Counsel General, or appointments on which they had a statutory right to be consulted.
- Office holders whose functions would give rise to an unsustainable conflict of interest were they to be elected as Assembly Members.
- Office holders who were not, or were not seen as being, politically impartial.<sup>22</sup>

32. The Electoral Commission said the rules on standing for election should aim to promote the following principles:

- The rules should as far as possible facilitate participation in the electoral process.
- The rules should be straightforward, clear and unambiguous.
- Fair treatment as far as possible for all candidates.
- The rules should be as consistent as possible across different types of election.
- The rules should be up to date.<sup>23</sup>

33. It also said:

“We consider that there are at least two key principles that should underpin legislation on disqualifications:

- First, the Assembly may decide that there are certain officeholders or employees whose involvement as candidates in an election could compromise or undermine the integrity or impartiality of the election process.
- Second, the Assembly may decide that there are certain offices or employed positions which are incompatible with

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<sup>22</sup> Welsh Government, *Inquiry into disqualifications from Assembly membership: Memorandum by the Welsh Government*, March 2014

<sup>23</sup> Written Evidence DQ 1



membership of the Assembly, because the effective or impartial discharge of either function could be compromised or undermined by the appearance of a conflict of interest.”<sup>24</sup>

34. The Chief Executive of Natural Resources Wales also identified some basic principles:

- Rules should be designed to encourage participation and any barriers should be proportionate;
- Rules should be designed to deal with perceived conflicts as well as real ones;
- Rules should be clear and unambiguous;
- Rules should distinguish between individuals who are disqualified and office holders who are disqualified.<sup>25</sup>

35. Keith Bush QC felt that the next order should continue to be drafted so as to disqualify from membership of the Assembly those who hold any public office which:

- (a) carries with it a significant financial benefit to that person that emanates from the Welsh Government; or
- (b) is, itself, subject to scrutiny by the Assembly.<sup>26</sup>

36. He added:

“Clearly, the application of test (a) calls for a judgement as to what constitutes a significant financial benefit. It would seem obvious that an office which is unpaid, other than the reimbursement of expenses, ought not to generate a disqualification. The Memorandum from the First Minister suggests that in the past other remuneration, up to as much as £10,000 per annum, has been disregarded.”<sup>27</sup>

37. He confirmed that the two principles continued to be vital and that they “are absolutely the core principles to do with the separation of powers and the avoidance of conflicts of interest.”<sup>28</sup>

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<sup>24</sup> Written Evidence DQ 1

<sup>25</sup> Written Evidence DQ 9

<sup>26</sup> Written Evidence DQ 6

<sup>27</sup> Ibid

<sup>28</sup> CLA Committee, *RoP [paragraph 163]*, 16 June 2014

38. He added:

“If there is an argument for going further than that, and including certain organisations where their functions are non-devolved officially, but their relationship with the Assembly is so close that they are virtually in that same position—I am thinking, for example, of organisations involved in broadcasting in Wales—then fair enough; it is a matter of policy to do that. However, my fear is that, at present, there is no definitive and clear statement of those principles.”<sup>29</sup>

39. The Electoral Reform Society Wales felt that an open set of criteria should be published by which an office should be judged on whether it should be disqualified. The Society illustrated the kinds of issues that would need to be considered around, for example, Welsh Government funding:

“I am sure that the RSPB must get some Welsh Government funding to do some kind of programme work. The RSPB’s core funding comes from its own funding streams, whether that is fundraising or membership fees, commercial activities or whatever. That is kind of independently funded and I think, therefore, that it is appropriate that it is up to that organisation to determine its own policy in relation to who should be disqualified from standing. For an organisation like Cynnal Cymru, however, its core funding does come from the Welsh Government, so I think that that places it in a slightly different bag, if you like. The chief executive of that organisation is accountable to a sponsor team within the civil service, which the director of RSPB is not. So ... we should be careful not to draw too many organisations into that, but I think that there are kind of clear differences between the two types of organisation.”<sup>30</sup>

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<sup>29</sup> CLA Committee, RoP [*paragraph 182*], 16 June 2014

<sup>30</sup> CLA Committee, RoP [*paragraph 138*], 28 April 2014

## ***Our view***

40. As Keith Bush QC said in his evidence, “there can be no higher service to the public in Wales than to be an Assembly Member.”<sup>31</sup>

41. Promoting democratic participation and the right to stand for elected office must therefore be at the heart of any principles that underpin the rules governing disqualification from being an Assembly Member. We agree with those who have suggested that any disqualifications that do exist must be restricted to a minimum, as well as being proportionate.

42. We believe that more citizens are likely to consider standing for election if the rules are clear, easily explained, accessible and properly communicated to those organisations that are referred to in the legislation.

43. We also note the principles advocated in evidence provided to us.

**Recommendation 1: we recommend that the following principles, or ones similar to them, should inform who should be disqualified from membership of the National Assembly for Wales:**

**Principle 1: Promoting democratic participation and the right to stand as an Assembly Member are paramount.**

**Principle 2: Disqualification from membership of the National Assembly for Wales should be restricted to as few citizens as possible.**

**Principle 3: Political activity is inappropriate for some citizens in order to:**

- i. protect the independence of the electoral process;**
- ii. prevent conflicts of interest arising on election; and**
- iii. protect certain public offices from political bias.**

**Principle 4: The following citizens should be affected by a disqualification order:**

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<sup>31</sup> CLA Committee, *RoP [paragraph 231]*, 16 June 2014

- i. those whose role involves an over-riding requirement for impartiality, including those whose responsibilities include the electoral process itself;**
- ii. those who hold any public office which carries with it a significant financial benefit from the Welsh Government;**
- iii. those who hold public office and in that role provide formal advice to the Welsh Government;**
- iv. those who hold any public office which is subject to scrutiny by the Assembly.**

**Principle 5: Where disqualifications are necessary they must be:**

- i. in line with these principles;**
- ii. clear and unambiguous;**
- iii. proportionate.**

44. When we refer to public office (apart from references to specific public offices) we mean offices referred to in legislation to which appointment is made by the National Assembly or by Welsh or UK Ministers. They will include individual offices such as commissioners and members of collective authorities such as boards.

45. The principles in recommendation 1 have been taken into account in reaching our conclusions in Chapter 4, Proposed changes to the legislative framework and Chapter 5, Proposed changes to the 2010 Order.

## **4. Proposed changes to the legislative framework**

### ***Introduction***

46. As indicated in Chapter 2, there would appear to be anomalies within the legislative framework that need to be remedied.

47. In addition, one of the key issues to be considered by our inquiry is the timing of disqualifications. Any changes to the existing system would require changes to law that are outside the legislative competence of the National Assembly (such as changes to the *Government of Wales Act 2006*) or the powers of Welsh Ministers (such as the *The National Assembly for Wales (Representation of the People) Order 2007*).

48. Other issues have been raised during evidence sessions that equally need to be examined as part of the overall legislative framework or relate to amending the *Government of Wales Act 2006*. There may also be consequences for other primary legislation.

49. These matters are considered below.

### ***Timing of disqualification***

50. As the legislation currently stands, all disqualifications become relevant when a candidate is nominated for election.

51. The Electoral Commission considered that the current rules do not distinguish between standing as a candidate in an election and being disqualified if elected.<sup>32</sup> It felt that a clearer distinction<sup>33</sup> is needed and explained that it was about:

“... looking at whether the disqualification should bite at the time of candidacy, because there is an issue about standing and campaigning for election that potentially undermines the electoral process or the integrity of the organisation that they are representing, and that which is really only a conflict of interest between holding office of a body and being an

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<sup>32</sup> Written Evidence DQ 1

<sup>33</sup> Ibid

Assembly Member ... each body listed in the Order could potentially be looked at in terms of those criteria.”<sup>34</sup>

52. The Electoral Commission acknowledged however that this approach could risk making the order more complex, adding that a revised order would have to be drafted in a “very clear way”.<sup>35</sup>

53. Support for the approach of separating nomination from election came from the Electoral Reform Society Wales<sup>36</sup> and the Chief Executive of Natural Resources Wales.<sup>37</sup>

54. Many witnesses also considered that the disqualification could take effect on taking the oath or affirmation of allegiance, as required by section 23 of the *Government of Wales Act 2006*, and Standing Order 1 of the National Assembly’s Standing Orders.

55. Lawyers in Local Government suggested that disqualification should take effect on taking the oath of office.<sup>38</sup> They added:

“To effect an earlier date will impact on the number of potential candidates able to consider election to the NAW. The effective date of disqualification would enable potential candidates to seek election safe in the knowledge that they could do so without risking their livelihood.”<sup>39</sup>

56. When it was suggested that a conflict of interest applied from the declaration of candidature, Lawyers in Local Government said:

“I come from a position of not wanting to exclude people from being able to stand for the National Assembly. I think that, if you are expecting someone to resign their post at the point of candidature, you will lose people—it will restrict the number of people coming forward. I suggested the point of declaration of office because you are then expecting people to lose their jobs when they know that they have got the position. I can accept your argument in terms of that difficult period in between, but one thing has to override the other and, to me, it is not

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<sup>34</sup> CLA Committee, *RoP [paragraph 21]*, 28 April 2014

<sup>35</sup> CLA Committee, *RoP [paragraph 28]*, 28 April 2014

<sup>36</sup> CLA Committee, *RoP [paragraph 144]*, 28 April 2014

<sup>37</sup> CLA Committee, *RoP [paragraph 76]*, 2 June 2014

<sup>38</sup> Written Evidence DQ 3

<sup>39</sup> *Ibid*

excluding people from the political process—it is not excluding people from the Assembly.”<sup>40</sup>

57. Lawyers in Local Government explained its position by saying:

“You are employed, and you choose to stand for office. You are selected, you go for election and you are able to do all of that until you get to the point where you are elected and you have to take the oath. It does not matter what you do for a living. You can stand and you can be elected, but, when you are elected, you then must make a decision. You either stay as a Member of the National Assembly and give up your job or you keep your job and give up your office.”<sup>41</sup>

58. The Independent Remuneration Panel for Wales<sup>42</sup> felt that shortly before taking the oath as an Assembly Member would be the most appropriate time for a successful candidate to be required to resign from any disqualifying positions.<sup>43</sup> In their view;

“This would reduce the risk of discouraging persons from standing for election because they would be required to resign positions or employments whilst having no certainty of becoming elected.”<sup>44</sup>

59. The Electoral Reform Society Wales had “no strong view”<sup>45</sup> but considered that waiting until the oath is taken gives both the individual and the organisation from which they have come slightly more time to prepare, adding:

“ ... it would appear to me that there are probably more practical benefits to doing it that way, but I think that we would need to be satisfied that, perception wise, there were not drawbacks to that.”<sup>46</sup>

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<sup>40</sup> CLA Committee, *RoP [paragraph 21]*, 12 May 2014

<sup>41</sup> CLA Committee, *RoP [paragraph 25]*, 12 May 2014

<sup>42</sup> The Panel was appointed in January 2008 by the Welsh Government and established initially to determine the range and levels of allowances payable by county and county borough councils to their councillors and co-opted members with voting rights. The Panel’s remit was extended to include members of National Park authorities, Welsh fire and rescue authorities and community and town councils.

<sup>43</sup> Written Evidence DQ 5

<sup>44</sup> *Ibid*

<sup>45</sup> CLA Committee, *RoP [paragraph 159]*, 28 April 2014

<sup>46</sup> *Ibid*

60. The Older People’s Commissioner for Wales explained that she was not in favour of a person being barred at nomination because of the groups it would disadvantage, saying:

“I think that some of the very people that we want to bring into the political environment—people on low incomes, women, or people who are carers, for example—are the people who could not afford to give up their jobs, and I think would not just be barred, but would be barred from the circumstances of their life. Actually, I would struggle with that, because I think that it would then mean that those who could afford to come and put their names forward would be the ones put forward, and I want to see a really diverse political base...”<sup>47</sup>

61. Keith Bush QC said:

“There is therefore an overwhelming case, in the interests of attracting the widest choice of candidates for selection and, potentially for election to the Assembly, for changing the current arrangements so that a disqualification based on holding a disqualifying office takes effect after it is clear that the person in question has been elected.”<sup>48</sup>

62. He said that this could be achieved either by giving elected candidates the opportunity to divest themselves of disqualifying offices after election but before taking the oath or affirmation or, alternatively, by providing that candidates who hold disqualifying offices are deemed to have resigned from that office with immediate effect, if returned as an Assembly Member. Either of these approaches would, he said, require primary legislation.<sup>49</sup>

63. He also considered that the election rules (as currently contained in *The National Assembly for Wales (Representation of the People) Order 2007*) should no longer require candidates, when accepting nomination, to declare that, to the best of their knowledge and belief, they do not hold a disqualifying office at that time.<sup>50</sup>

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<sup>47</sup> CLA Committee, *RoP [paragraph 181]*, 2 June 2014

<sup>48</sup> Written Evidence DQ 6

<sup>49</sup> *Ibid*

<sup>50</sup> *Ibid*



64. When questioned on these approaches, he said:

“I have reflected a bit more on that, particularly in the light of some of the evidence that you heard ... With ... automatic divestiture of any disqualifying offices or employment ... having thought about it, it is clearly a matter that concerns some people, who have raised the issue of whether you would need to allow someone to give notice, clear their desk and hand over their job to somebody else. I think that there is a lot of force in that. So ... probably, of the two, I would tend towards the more conservative approach, which is to ... give people, in effect, up to two months in which they can get their act in order. In that time, they cannot vote and they cannot take part in proceedings. So, that is a burden. If they have not cleared things with their employers beforehand, then they will incur that burden and their parties will incur that burden. However, it seems to me that that would be less disruptive of people’s employment and so on than a system whereby somebody might wake up one morning to find that one of their employees had suddenly ceased to be an employee without any kind of effective warning whatsoever.”<sup>51</sup>

***Using internal administration rather than the law***

65. The Chief Executive of Natural Resources Wales highlighted how the law is not the only tool that can be used to control disqualification from standing as a candidate for the Assembly and that an organisation’s internal administrative arrangements could play a role.<sup>52</sup>

66. He felt that if a member of staff was selected as a candidate “we would have to discuss with that individual what their time commitment was going to be on their political activities” but that this would be the same as for example “someone had caring responsibilities” or “if a member of their family was ill”.<sup>53</sup> As a result, the Chief Executive felt that the activities of Natural Resources Wales:

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<sup>51</sup> CLA Committee, *RoP [paragraph 227]*, 16 June 2014

<sup>52</sup> CLA Committee, *RoP [paragraphs 83-84]*, 2 June 2014

<sup>53</sup> CLA Committee, *RoP [paragraph 124]*, 2 June 2014

“... are sufficiently detached from Government that we could handle the situation where somebody was selected ... However, at nomination, there would have to be a formal standing back.”<sup>54</sup>

67. He explained his position on nomination:

“... I would draw a distinction between people being nominated, having the right to stand as an Assembly Member, and the point of election. In my view, no problem arises as a result of their candidature. As an organisation, of course, we would have to make sure that they would stand down as a staff member or a board member, but in and of itself I do not see that as a problem. The only problem is if they are then elected to office and then there is a conflict, in my opinion, at least.”<sup>55</sup>

68. The Chief Executive also noted that, in terms of a member of staff on a sabbatical standing for a political party, he:

“... would be perfectly willing to accept a member of my executive team leaving the organisation for that period in order to stand for a political party, and I would expect them to be completely impartial when they came back.”<sup>56</sup>

69. The Chief Executive added that if they were elected, there would need to be discussions about contracts and agreements with staff concerned and the unions.<sup>57</sup>

70. The Electoral Reform Society Wales also illustrated how internal processes could be used:

“For example, there may be, say, a board member of the Arts Council for Wales who wants to chuck his or her hat into the ring and contest the election ... it would be unfortunate if they were forced to resign in order to contest an election. As long as it is clear in terms of how the arts council functions that that member was absenting themselves from any decision where it may be perceived that there was, or there actually was, a conflict of interest, then I think I would be satisfied with that.”<sup>58</sup>

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<sup>54</sup> Ibid

<sup>55</sup> CLA Committee, *RoP [paragraph 82]*, 2 June 2014

<sup>56</sup> CLA Committee, *RoP [paragraph 114]*, 2 June 2014

<sup>57</sup> CLA Committee, *RoP [paragraph 89]*, 2 June 2014

<sup>58</sup> CLA Committee, *RoP [paragraph 102]*, 28 April 2014

71. Following on from this, when it was suggested that there could be internal rules in organisations to deal with candidature, short of legislation, for many organisations, the Electoral Reform Society Wales said it “is certainly something that should be explored.”<sup>59</sup>

72. The Older People’s Commissioner for Wales spoke of her code of conduct that explicitly covers political activities and that staff are advised of on their induction. The code ensures that her staff:

“... know that they can come to me to discuss those issues ... in order to get the balance right—namely encouraging people to want to be a part of debates and to take an interest, but not to cross a line that would impact upon my role as a statutory, independent, apolitical commissioner.”<sup>60</sup>

73. She also agreed with the Chief Executive of Natural Resources Wales regarding dealing with staff wishing to stand for election by means of her organisation’s internal process, noting that “it is very hard to legislate for discretion”.<sup>61</sup>

### ***Distinguishing between staff within organisations regarding nomination as a candidate***

74. We asked the Chief Executive of Natural Resources Wales if he thought there was a question of proportionality when it came to staff and members at different levels within an organisation. In response, he said:

“For Welsh Government sponsored bodies, staff are not civil servants and we are principally delivery organisations. So, the amount of interaction with the political system is fairly small, and, mainly, it is through me and, obviously, the chairman. So, I do not see a distinction based on the level of grade. I think that someone from any grade within a WGSB should be allowed to stand to be an Assembly Member. Personally, and it is a personal view, I would not distinguish between various grades on that.”<sup>62</sup>

75. He went on to say:

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<sup>59</sup> CLA Committee, *RoP [paragraph 104]*, 28 April 2014

<sup>60</sup> CLA Committee, *RoP [paragraph 134]*, 2 June 2014

<sup>61</sup> CLA Committee, *RoP [paragraph 154]*, 2 June 2014

<sup>62</sup> CLA Committee, *RoP [paragraph 78]*, 2 June 2014

“... you would probably run into complications around which grades were eligible and which were not ... we have quite junior members of staff who regularly liaise with Assembly Members and Members of Parliament. Again, it would be quite difficult, I think, for them to continue in their job if they had a formal nomination to stand in an election”.<sup>63</sup>

76. The Older People’s Commissioner for Wales indicated that she and her deputy commissioner should be barred from standing for nomination as an Assembly Member (see also paragraphs 121 to 122), but added:

“I do not hold the view that any of my other staff should automatically be barred from standing ... I think the reason for that is that we want to encourage as many people as possible to be part of the democratic process ... I would find it very difficult to distinguish between what is a junior and what is a senior member of staff in terms of day-to-day activity.”<sup>64</sup>

### ***Employees and employers rights***

77. As is apparent from the preceding sections, the point at which a disqualification takes effect has implications for both employees and employers.

78. The Electoral Commission felt that:

“If certain disqualifications were to apply at the time of election and not at nomination, there remains the issue of notice periods. A conflict of interest would continue to apply while there was a contract of employment in place and a notice period being served. To address this issue, an elected candidate could be required to resign from the relevant post or office the first working day after the election in order to take up membership of the Assembly.”<sup>65</sup>

79. The Commission noted the potential problems that could exist:

“It is burdensome ... for candidates who are standing for election, because if you are an employee, not only do you need

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<sup>63</sup> CLA Committee, *RoP [paragraph 106]*, 2 June 2014

<sup>64</sup> CLA Committee, *RoP [paragraph 132]*, 2 June 2014

<sup>65</sup> Written evidence DQ 1

to have resigned, but you need to have served your notice, and for somebody who is on three months' notice, for example, that is a long period of time, and, ultimately, you may have given up your job and not get elected ...”<sup>66</sup>

80. The Electoral Commission agreed in questioning that there ought perhaps to be processes within the employment contracts of public bodies to take account of standing for election.<sup>67</sup>

81. Lawyers in Local Government also highlighted the potential problems with notice periods:

“In employment / contract law there will remain the difficulty of the notice period which is likely to range from 1 week to 12 weeks. In practice in Local Government most Authorities would be willing to hold a job open for a local authority staff member seeking election, should that employee be unsuccessful and equally waive contractual rights should the employee be successful. This to promote as far as possible the democratic process. The same cannot of course be said for all employers and it is doubtful that it could be argued that it would be reasonable to expect employers to do so.”<sup>68</sup>

82. Lawyers in Local Government were questioned on whether there could be a law in Wales simply saying that contract law is set aside when you become a Member of the National Assembly. In response, they felt it would be “extremely problematic” and “particularly hard on any employer.”<sup>69</sup>

83. The Chief Executive of Natural Resources Wales, when questioned about what would happen if a member of staff was elected as an Assembly Member but had for example to serve a 3-month notice period, indicated that this could be dealt with “internally quite easily”.<sup>70</sup> He agreed, when asked, that he would like to see flexibility lying with the organisation rather than in law.<sup>71</sup>

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<sup>66</sup> CLA Committee, *RoP [paragraph 51]*, 28 April 2014

<sup>67</sup> CLA Committee, *RoP [paragraphs 67-68]*, 28 April 2014

<sup>68</sup> Written evidence DQ 4

<sup>69</sup> CLA Committee, *RoP [paragraph 119]*, 12 May 2014

<sup>70</sup> CLA Committee, *RoP [paragraph 93]*, 2 June 2014

<sup>71</sup> CLA Committee, *RoP [paragraphs 95-97]*, 2 June 2014

## ***Section 16 of the Government of Wales Act 2006***

84. We did not receive much evidence on whether section 16 of the 2006 Act required any substantive change. This section not only includes the power to make a disqualification order, but also directly disqualifies large numbers of people, including all civil servants, members of the armed and police forces as well as staff of the National Assembly.

85. As regards section 16, the Electoral Reform Society Wales were “relatively content with how the legislation stands” and did “not have too much of an issue with how it is”.<sup>72</sup>

86. Lawyers in Local Government suggested that a person who holds office as lord-lieutenant, lieutenant or high sheriff should be totally disqualified rather than merely disqualified for the area in which they hold office.<sup>73 74</sup>

### ***The Assembly’s power to relieve individuals of the consequences of disqualification***

87. Keith Bush QC raised the issue of section 17(3) of the *Government of Wales Act 2006* whereby the Assembly may resolve that a disqualification be “disregarded” provided the ground had been removed (i.e. the person in question no longer holds the disqualifying office) and it is “proper” so to resolve. He explained the historical background to the case and how the power had been used in 2011.<sup>75</sup>

88. He stated:

“There is a strong case for saying that section 17(3) is an anomalous survival of the time when disqualification was based on a vague and uncertain principle rather than a precise list of disqualifying offices. There may still, of course, be exceptional cases where mistakes are excusable (as the Assembly judged to be the case in relation to the individual in whose favour section

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<sup>72</sup> CLA Committee, *RoP [paragraph 148]*, 28 April 2014

<sup>73</sup> Section 16(4) of the *Government of Wales Act 2006* contains a specific disqualification that a person who holds office as lord-lieutenant, lieutenant or high sheriff of any area in Wales is disqualified from being an Assembly member for any Assembly constituency or Assembly electoral region wholly or partly included in that area.

<sup>74</sup> Written Evidence DQ 4; CLA Committee, *RoP [paragraph 159]*, 12 May 2014

<sup>75</sup> Written Evidence DQ 6

17(3) was invoked in 2011) but individual hardship must be weighed against legal certainty and constitutional rectitude. Even without any change to the point in time when a disqualification bites, the existence of the power in the case of the Assembly seems hard to justify. If the scope for mistakes were further reduced by enabling a candidate who had been elected to carry out a last check and to divest himself or herself of any disqualifying office, then it would seem to be impossible to justify giving candidates who failed to do so a further chance to avoid the consequences.”<sup>76</sup>

89. He thought that the ability of Assembly Members to relieve somebody of a disqualification “is a very unsound procedure”.<sup>77</sup> He added:

“... looking at it from general principles, if you have a clear and understandable list of disqualifications that are well publicised in advance and give people the opportunity to think carefully about them before they take the oath of allegiance, the rationale and the practical reason for having that power to disapply the disqualification seems to me to cease. Then, all of the arguments are in favour of getting rid of it, because, undoubtedly, it is constitutionally a very strange procedure indeed.”<sup>78</sup>

### ***Our view***

90. We believe that the process for becoming an Assembly Member can be divided into four main stages:

- (i) selection as a prospective candidate;
- (ii) nomination as a candidate;
- (iii) being elected as an Assembly Member; and
- (iv) taking the oath or affirmation of allegiance.

91. As matters currently stand, all disqualifications become relevant when a candidate is nominated for election.

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<sup>76</sup> Written Evidence DQ 6

<sup>77</sup> CLA Committee, *RoP [paragraph 235]*, 16 June 2014

<sup>78</sup> CLA Committee, *RoP [paragraph 236]*, 16 June 2014

92. We are persuaded by the evidence of witnesses who have suggested that the disqualification should generally take effect on taking the oath or affirmation of allegiance as an Assembly Member (subject to our views in paragraphs 104-105).

93. In our view this approach is entirely consistent with the principles we outline in Chapter 3 of this report. In reaching this conclusion, we have taken account of the evidence of witnesses who have indicated that it is possible, and preferable, to deal with staff engaging in the electoral process through the internal administration processes of their organisations rather than by means of the law.

94. The approach outlined in paragraph 81 in relation to local authorities is very welcome. As all the offices and positions that give rise to disqualification are in the public sector, we would expect the other organisations affected to take a similar approach.

95. In our view, the change we advocate in paragraph 92 ensures that as many people as possible have the opportunity to stand for election as an Assembly Member, in particular because they do not have to give up their employment to do so.

96. We believe that this change should be effected by a change to the *Government of Wales Act 2006*. Such a change is outside the legislative competence of the National Assembly and is a matter for the UK Government and UK Parliament.

97. Consistent with our proposed change, we therefore believe that the election rules should no longer require candidates, when accepting nomination, to declare that to the best of their knowledge and belief, they do not hold a disqualifying office. Again, this is outside the legislative competence of the National Assembly, and the powers of Welsh Ministers. It is a change that needs to be effected by the UK Government.

**Recommendation 2: we recommend that the UK Government brings forward appropriate legislation to amend the *Government of Wales Act 2006* to provide that disqualification from a particular public office should take effect on taking the oath or affirmation of allegiance as an Assembly Member. This change should not apply to a very limited number of posts—as specified in section 16 of the 2006 Act or by order—where being a candidate**



would, for example, give rise to a conflict of interest or appear to undermine impartiality.

**Recommendation 3: we recommend that the UK Government brings forward appropriate legislation to remove the relevant provisions in *The National Assembly for Wales (Representation of the People) Order 2007* requiring candidates, when accepting nomination, to declare that to the best of their knowledge and belief, they do not hold a disqualifying office.**

98. We have considered how recommendation 2 could be delivered.

99. We believe there are merits in both of the alternatives considered by Keith Bush QC (see paragraph 62).

100. We accept that requiring persons to take responsibility for their own position by resigning prior to taking the oath is the more conservative of the two approaches. It would require all candidates to be familiar with the Disqualification Order in place at the time. Failure to resign prior to taking the oath would result in disqualification.

101. The more radical approach would involve successful candidates who hold specific public offices being deemed to have resigned by virtue of their election to the National Assembly. This approach would require an order to specify the public offices affected.

102. This is an issue of such significance that we believe it requires further investigation. We are conscious that we may not have heard all possible viewpoints on how recommendation 2 could best be delivered. Accordingly, we consider that it would be unwise to make a specific recommendation in the absence of such additional evidence. In reaching this view, we are mindful that there would be little time to undertake this investigation and put in place primary legislation before the next Assembly general election in 2016.

103. We therefore believe that it would be beneficial if the Law Commission investigated and reported on this issue, potentially as part of a wider review of this issue across all UK legislatures. In our view this would enable the UK Government to consider putting appropriate primary legislation in place in time for the Assembly general election in 2021.

**Recommendation 4: we recommend that the Welsh and UK Governments ask the Law Commission to investigate and report on the various legislative options for delivering recommendation 2, and to make a recommendation on what it would consider to be the most appropriate, potentially as part of a wider review of this issue across all UK legislatures.**

104. We accept that the holder of some politically restricted posts will need to be disqualified from nomination. Disqualification from nomination would also act as a natural deterrent to selection as a candidate.

105. In our view, there should be a very limited number of persons who would be disqualified from being candidates because of their statutory role. Examples would be Returning Officers and members and staff of the Electoral Commission. These issues are considered in Chapter 5.

106. We are broadly satisfied with section 16 of the *Government of Wales Act 2006*. Nevertheless, we consider that as part of the efforts to make legislation clearer, any disqualifications to be contained in the 2006 Act should be set out fully rather than by reference to other legislation. We also consider, for the avoidance of doubt, that those persons referred to in section 16 of the 2006 Act should be disqualified on nomination in line with our preferred approach.

107. We also consider that the Auditor General and Public Services Ombudsman for Wales should be removed from the 2006 Act and included in a disqualification order with other offices, the impartiality of which is equally paramount.

**Recommendation 5: we recommend that the UK Government amends section 16 of the *Government of Wales Act 2006* to ensure that any disqualifications it contains are set out fully rather than by reference to other legislation and that all disqualifications it specifies take effect on nomination.**

**Recommendation 6: we recommend that the the UK Government amends section 16(1) of the *Government of Wales Act 2006* to remove the Auditor General and Public Services Ombudsman for Wales, so that they may be included in an appropriate disqualification order with other offices.**

108. In addition, we agree with Lawyers in Local Government who said that lord-lieutenants, lieutenants and high sheriffs should be totally disqualified from being an Assembly Member, rather than, as is the case now, just for any Assembly Constituency or Assembly electoral region wholly or partly included in their area.

**Recommendation 7: we recommend that the UK Government amends section 16(4) of the *Government of Wales Act 2006* so that a person who holds office as lord-lieutenant, lieutenant or high sheriff should be disqualified from being an Assembly Member.**

109. As regards section 17(3) of the *Government of Wales Act 2006* and the ability of the Assembly to disregard a disqualification, we note the views of Keith Bush QC. We have some sympathy that section 17(3) may be an appropriate provision. However, we are concerned that we do not have a sufficient evidence base to make an informed recommendation about the retention or otherwise of section 17(3), in particular relating to the range of circumstances to be taken into consideration when deciding how change, if any, to section 17(3) should be effected.

110. This being the case, we consider that the Law Commission would be well-placed to undertake this work in tandem with work suggested under recommendation 4.

**Recommendation 8: we recommend that the Welsh and UK Governments, in asking the Law Commission to investigate and report in line with recommendation 4, also include a requirement to advise on the implications of retaining, replacing or removing section 17(3) of the *Government of Wales Act 2006*.**

111. Any decision taken at some point in the future to change section 17(3) of the 2006 Act by means of legislation, as with any other Assembly function, must be undertaken following consultation with, and the consent of the National Assembly for Wales (as well as the Welsh Government).

**Recommendation 9: we recommend that any future legislative change to section 17(3) of the *Government of Wales Act 2006* should only proceed following consultation with, and the consent of, the National Assembly for Wales.**

## 5. Proposed changes to the 2010 Disqualification Order

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### *Anomalies and inconsistencies*

112. Throughout our evidence sessions, information was provided regarding specific organisations and how they are affected by the current 2010 Disqualification Order.<sup>79</sup>

113. Keith Bush QC said that there are clearly a number of offices currently designated which do not conform with his criteria (see paragraph 35):

“... because they are neither remunerated by the Welsh Government nor subject to scrutiny by the Assembly. Their activities do not relate to devolved matters, are not within the legislative competence of the Assembly and are not affected by the exercise of executive functions of the Welsh Ministers.”<sup>80</sup>

114. He provided five examples of such offices, including the BBC Trust and the Health and Safety Executive,<sup>81</sup> adding:

“Clarity and consistency would therefore suggest that offices whose functions are not devolved should not give rise to formal disqualifications, particularly since the likelihood of someone wishing to be simultaneously a member of a body such as the BBC Trust and the Assembly is remote.”<sup>82</sup>

115. As was noted in the Welsh Government’s memorandum, our report on the 2010 Disqualification Order noted some anomalies and inconsistencies.<sup>83</sup> For example:

- while members of National Park Authorities (NPAs) are disqualified by the Order, members of other bodies that might be considered analogous to NPAs, such as Police and Fire Authorities are not;

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<sup>79</sup> See in particular the evidence of the Electoral Reform Society Wales: CLA Committee, *RoP [paragraphs 89-179]*, 28 April 2014

<sup>80</sup> Written Evidence DQ 6

<sup>81</sup> *Ibid*

<sup>82</sup> *Ibid*

<sup>83</sup> Constitutional Affairs Committee Report, CA(3)-28-10:24 November 2010 (See annex 1)

- In part 2 of the Schedule to the Order the staff of a number of office holders are disqualified (such as the Auditor General for Wales and the Children’s Commissioner), while others are not (for example, the Commissioners of the Boundary Commission).

### ***The structure of the Order***

116. The Electoral Commission felt the 2010 Disqualification Order was long, unclear about what criteria have been applied and not particularly transparent.<sup>84</sup> However, they did not feel qualified to comment in detail on the bodies and offices currently listed in the Order.<sup>85</sup>

117. The Electoral Reform Society Wales suggested that the list in the 2010 Disqualification Order looked more like a desk exercise of who should be restricted<sup>86</sup> and suggested the following approach to organising a review of the list:

“Once the guiding principles have been established and you have a long list of potential targets, if you like, then you need a process where you actually spend time with each of those organisations to properly understand their governance arrangements ...”<sup>87</sup>

118. Lawyers in Local Government suggested a different approach:

“It is suggested that there are two options on the drafting of the provisions, the current method of listing those posts determined to be incompatible and in place of the list, a broader statement setting out principles which are determined to be incompatible, those being applied to individual situations.

“Neither is entirely satisfactory, the list being capable of being out of date and the broader statement being open to interpretation and requiring a process of determination.

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<sup>84</sup> CLA Committee, *RoP [paragraph 25]*, 28 April 2014

<sup>85</sup> Written Evidence DQ 1

<sup>86</sup> CLA Committee, *RoP [paragraph 146]*, 28 April 2014

<sup>87</sup> *Ibid*

“A mixture of the two may be advantageous, with a list of those already known and a ‘catch all’ set of principles in respect of others.”<sup>88</sup>

119. When asked how this would work in practice, Lawyers in Local Government acknowledged that it was difficult, noting the complexity of the issues involved and that neither option is perfect.<sup>89</sup>

***Distinguishing between staff within organisations for the purposes of the Order***

120. In terms of the 2010 Disqualification Order, the Electoral Reform Society Wales struggled:

“... with the rationale for which organisations are on those two separate lists. There are instances where it appears, particularly in the second list, that it is members’ public appointments that are restricted in some form, and others where it is senior staff members in those bodies, and, for others, it is all staff members. Again, I do not really derive from the rules what the logic is for that. If a body is engaged in an area of work that would cause controversy or potential conflict of interest, then why should there be some kind of differential between public-appointed members and staff?”<sup>90</sup>

121. The Older People’s Commissioner for Wales told us:

“My view would be that the only two posts that should be barred or disqualified automatically would be mine and that of the deputy commissioner, because of the type of posts that we hold.”<sup>91</sup>

122. She expanded on why her post and that of the deputy commissioner should be disqualified:

“... first, ... I am required by law to appoint a deputy commissioner—it is in the Act, so it becomes a statutory post as part of that. Secondly, the deputy commissioner is very closely aligned to me. So, I will speak as the commissioner, but often, when I cannot do so, the deputy commissioner will go

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<sup>88</sup> Written Evidence DQ 4

<sup>89</sup> CLA Committee, *RoP [paragraph 75]*, 12 May 2014

<sup>90</sup> CLA Committee, *RoP [paragraph 94]*, 28 April 2014

<sup>91</sup> CLA Committee, *RoP [paragraph 132]*, 2 June 2014

and, by inference, is being me, in a sense. That is not to take away from her own voice and views, but she is often being me. Thirdly, one of the reasons that I have to appoint a deputy commissioner is that, if something happens to me and I am unable to fulfil my functions, she then steps into my shoes. That could be, potentially, for quite a considerable period of time. So, she could be me at short notice, and unexpectedly.”<sup>92</sup>

123. The Older People’s Commissioner for Wales also felt that the issue of the seniority of the staff “does not really work” because “some who might be called junior staff ... are out and about all the time engaging with people”.<sup>93</sup>

124. Keith Bush QC also questioned whether it was appropriate to differentiate between staff within an organisation, saying

“If we take one of the commissioners as an example, I do not think that there is any doubt that the Commissioner for Older People in Wales, as an individual scrutinised by the Assembly, should be disqualified from being a Member of the Assembly. Her close advisers—the chief executive, lawyers and so on—would clearly be in that same position. It would not make any sense for them to be Members of the Assembly while simultaneously—and this is what we are talking about—working for the commissioner.”<sup>94</sup>

### ***Timing***

125. The Electoral Commission said that the order should be introduced six months before nominations open and that its contents should be clearly communicated to the bodies it lists, political parties, and the Electoral Commission.<sup>95</sup>

126. They added:

“We say that legislation should be in place a minimum of six months before the election, but in the case of the disqualification Order, ideally, it should be in place six months before nomination in order to give people plenty of time. As

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<sup>92</sup> CLA Committee, *RoP [paragraph 137]*, 2 June 2014

<sup>93</sup> CLA Committee, *RoP [paragraph 134]*, 2 June 2014

<sup>94</sup> CLA Committee, *RoP [paragraph 179]*, 16 June 2014

<sup>95</sup> Written Evidence DQ 1



you said, the earlier the better, to allow for all of those things—the party conferences in the autumn, the selection processes, and so on. The clearer things are for people as far in advance as possible, the better. As I said, we normally publish our guidance in November, ahead of any election the following May, and then the appropriate links to the Order can be included.”<sup>96</sup>

127. Keith Bush QC considered that:

“.. one of the factors that appears to have contributed, in one case, to the situation that arose in 2011, was the late stage at which the 2010 Order was made, namely on the 15 December 2010. (It came into force on the 11 January 2011.) It was not made, therefore, until less than 5 months before the election, and would not have been generally available to the public until about three months before nominations for the election (which was held on 5 May) closed.”<sup>97</sup>

128. As a result, he considered that the order should be made at least twelve months before the date of the relevant Assembly general election, which would reduce the risk of new disqualifications being overlooked.<sup>98</sup> In making this case, he noted that political parties did not select their candidates in the last six months and in many cases did so a year or two years in advance.<sup>99</sup> As such, he felt that:

“... it should be possible, in my view, at least a year in advance, for somebody to sit down with the Order, go through it and work out whether or not they are disqualified.”<sup>100</sup>

### ***Bilingual Order***

129. All respondents who expressed a view on this issue agreed that the order should be made bilingually, including the Welsh Language Commissioner.<sup>101</sup>

130. Keith Bush QC could “see no constitutional reason why the Privy Council, in relation to Welsh legislation, cannot operate bilingually.”<sup>102</sup>

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<sup>96</sup> CLA Committee, *RoP [paragraph 73]*, 28 April 2014

<sup>97</sup> Written Evidence DQ 6

<sup>98</sup> *Ibid*

<sup>99</sup> CLA Committee, *RoP [paragraph 251]*, 16 June 2014

<sup>100</sup> *Ibid*

<sup>101</sup> Written Evidence DQ 3

## ***Our view***

131. We have difficulty in understanding the criteria and logic applied to the two lists included in the 2010 Disqualification Order, but recognise that this may be as a consequence of legislation inherited from Westminster.

132. We believe that an order-making power should be retained, but that the order should be restructured to deal with two categories of persons who should be disqualified. We believe persons in category 1 are those who should be disqualified from nomination because of the nature of their role (such as for reasons of political impartiality, their role in the electoral process or because their posts are created by statute). Category 2 persons are those who should be disqualified having been elected but only upon taking the oath or affirmation of allegiance.

133. However, in making this recommendation as regards category 2, we are conscious that the requirements of section 18 of the *Government of Wales Act 2006*, will mean that disqualification takes effect on return as an Assembly Member. Accordingly, we make two recommendations for the orders in 2016 and 2021, the latter in anticipation of primary legislation being introduced to deliver recommendation 2.

**Recommendation 10: we recommend that the order for the 2016 Assembly general election should specify two categories of persons who should be disqualified:**

**Category 1: those who should be disqualified from nomination because of the nature of their role.**

**Category 2: those who should be disqualified from return as an Assembly Member.**

**Recommendation 11: we recommend that the order for the 2021 Assembly general election should specify two categories of persons who should be disqualified:**

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<sup>102</sup> CLA Committee, *RoP [paragraph 248]*, 16 June 2014

**Category 1: those who should be disqualified from nomination because of the nature of their role.**

**Category 2: those who should be disqualified having been elected but only from taking the oath or affirmation of allegiance.**

134. The precise way in which category 2 provisions are drafted for the 2021 order may depend on any decisions arising as a consequence of recommendation 4.

135. We have sought to provide an indication of the public bodies and officeholders that we believe should be covered under each category by reference to the existing 2010 Disqualification Order. In so doing, we are mindful of the evidence of the Electoral Reform Society Wales at paragraph 115. The list included in the recommendations should not therefore be considered as an attempt to cover all public bodies and officeholders that should be covered in each category. The Welsh Government is better placed to be aware of those that need to be considered for inclusion or otherwise.

136. In the case of category 1, we believe that some people who hold an office created by statute should not be nominated to stand as an Assembly Member as this would potentially risk the independent and impartial role of the office they hold.

**Recommendation 12: we recommend that an order drafted for the 2016 Assembly general election to disqualify persons from nomination as an Assembly Member should include (but not necessarily be limited to) the following:**

**Auditor General for Wales  
Children’s Commissioner for Wales  
Civil Service Commissioner  
Commissioner for Equality and Human Rights  
Commissioner for Older People in Wales  
Commissioner for Public Appointments  
Comptroller and Auditor General  
Her Majesty’s Chief inspector of Education and Training in Wales  
Local Government Boundary Commissioner for Wales  
Members of the Independent Remuneration Panel for Wales**

**Members and Staff of the Electoral Commission  
Parliamentary Commissioner for Administration  
Returning Officers and local authority staff involved in the  
electoral process  
Statutory deputies of the persons in this list  
Welsh Language Commissioner**

137. Subject to any changes in the law creating these public bodies or officeholders, we believe that recommendation 12 should also apply in principle to the 2021 Order.

138. In the case of category 2 persons, it is clear to us that no distinction should be made between different people who work within an organisation and to whom principles 3 and 4 of recommendation 1 apply. If for example, it is inappropriate for the Chief Executive of a Welsh Public Body to serve as an Assembly Member, then logically the same principle must apply to the people who work for that Body.

139. As a consequence, any person working for a public body or officeholder in category 1 should be disqualified on return in 2016 and in 2021 from taking an oath or affirmation of allegiance to the National Assembly.

140. In terms of local authority staff, those directly involved in the electoral process and management of elections would be disqualified from being nominated and are included in category 1. We do not believe that it would be appropriate for other staff working for a local authority to serve as an Assembly Member. Accordingly, we consider that all local authority staff not included in category 1, should be included in category 2.

141. The issue of whether broadcasters should be disqualified from membership of the National Assembly was touched upon in evidence. However, we do not feel in a position to make recommendations as to whether broadcasters should be covered in category 2. The timeframe for this report has constrained our ability to investigate this particular issue.

**Recommendation 13: we recommend that an order should be drafted for the 2016 Assembly general election that disqualifies the following persons on return as an Assembly Member:**

**Members of judicial tribunals**

**Persons appointed by Welsh Ministers  
Staff of local authorities not included in category 1  
Staff of National Park, Police, Fire and Rescue Authorities  
Staff of the organisations referred to in category 1  
Staff of Welsh Government Sponsored Public Bodies**

142. We believe that the persons disqualified in recommendation 13 should, in 2021, be disqualified from taking the oath or affirmation of allegiance.

**Recommendation 14: we recommend that, in preparing a disqualification order for the 2016 Assembly general election, the Welsh Government consults widely on its contents, including in particular, all those organisations that it covers.**

143. The Order must be made in good time to ensure it is communicated and publicised as widely as possible.

**Recommendation 15: we recommend that the disqualification order for the 2016 Assembly general election is drafted, consulted on and made no later than 12 months before the date of that election.**

144. We agree, as do all respondents who expressed a view, with the suggestion contained in the First Minister's letter that the Disqualification Order for the 2016 Assembly general election should be made bilingually. In our view this would be in line with other Welsh legislation, such as Acts of the Assembly that are approved by the Privy Council bilingually.

**Recommendation 16: we recommend that the disqualification order for the 2016 Assembly general election is made bilingually in the Privy Council.**

145. The nature of the existing legislative framework is complex. The next chapter considers the timing of the proposed changes for clarity.

## 6. Timing of proposed changes

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### *Our view*

146. As we indicated at the start of our report, we believe that an overhaul of the entire legislative framework is needed for the rules governing the disqualification as a member of the National Assembly for Wales.

147. We have set out in Chapter 3 the principles that we believe should underpin a revised framework.

148. However, the issue of the timing of the proposed changes we suggest in Chapters 4 and 5 for the next Assembly general election in 2016 is complicated by:

- the need for primary legislation to deliver some of the changes we propose and the powers to effect such changes being outside the competence of the National Assembly;
- the power to effect changes we propose to *The National Assembly for Wales (Representation of the People) Order 2007* residing with the Secretary of State and UK Parliament;
- the need for the Welsh Ministers to revise the 2010 Disqualification Order and the power to effect such a change resting with the Privy Council following approval by the National Assembly.

149. Our preferred approach would be for all changes to be effected simultaneously but that is unlikely to be possible in good time for the 2016 Assembly general election, particularly because of the potential time constraints involved in bringing forward primary legislation.

150. This being the case we believe that recommendation 3 (changes in relation to *The National Assembly for Wales (Representation of the People) Order 2007*) and recommendations 10, 12 and 13 (regarding the content of the disqualification order for the 2016 Assembly general election) should be implemented simultaneously, with respective legislation in place no later than 12 months before the date of that election (see recommendation 15).

151. This would mean in practice that the disqualification requirement at the time of consent to nomination would be removed but that the

requirement disqualifying a person on election at the time of return (under section 18 of the *Government of Wales Act 2006*) would be retained. Two groups of potential candidates would benefit. The first would be those with no prospect of election who could stand without resigning the disqualifying position. The second would be those with a chance of election, who could delay their resignation until immediately before polling day, a period usually of 3-5 weeks following formal nomination.

152. If the UK Government does not implement the changes described in recommendation 3, then there is risk that the confusion that existed at the time of the 2011 Assembly general election will be repeated.

153. As will be apparent from the previous sections, recommendations 2, 4, 5, 6, 7, 8, and 11 should be implemented in time for the 2021 Assembly general election.

## 7. Raising Awareness

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### *Evidence*

154. The Electoral Commission told us:

“We are publishing our guidance earlier and earlier. We used to publish guidance in January before any election being held in May ... The earlier you can get guidance out there and returning officers doing briefing sessions for candidates and agents, the better. We also work with the political parties, and the parties, of course, do briefing sessions. It would be essential that any change that the committee was going to consider for the Order in terms of doing it in two stages was done as early as possible so that, for the 2016 elections, if there were to be a change, briefings could be done well in advance as well as having the published guidance.”<sup>103</sup>

155. The Electoral Commission agreed with a suggestion that they were the “go-to body” for potential candidates to obtain this information, adding:

“Obviously, the four big parties in Wales give their own advice to candidates. The ones who do not have anywhere to go for advice are usually independent candidates or those from the very smallest parties that do not have full-time permanent officials giving advice. They tend to rely on our guidance very much.”<sup>104</sup>

156. In the course of this report we have noted how some organisations were not aware of the extent to which disqualification rules applied to them.

157. When asked for her view about being disqualified from seeking membership of the National Assembly, the Older People’s Commissioner for Wales told us:

“... in a sense I did not know that I was disqualified, in that nobody had ever told me that when I took up the post of commissioner, but it does not come as any surprise. It is

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<sup>103</sup> CLA Committee, *RoP [paragraph 30]*, 28 April 2014

<sup>104</sup> CLA Committee, *RoP [paragraph 32]*, 28 April 2014



probably right and proper. However, I also was not aware that my staff are disqualified from standing as well, and I suppose that that did come as quite a surprise to me. You could argue that I could have thought, when I was appointed as commissioner, about looking back to check on that, but it did not occur to me, and it was not raised with me.”<sup>105</sup>

158. In terms of making a disqualification order available, and in a way that people could understand, the Electoral Reform Society Wales thought “that the Electoral Commission is probably the best-placed organisation to do that”, adding:

“...enough time needs to be given for each of the parties to digest what these new rules mean, so that they are able to do that kind of dissemination within their political parties—inside their party units—but also for those organisations that are on the list, so that the relevant departments within those bodies are able, again, to understand it and disseminate that information through to the staff.”<sup>106</sup>

159. Keith Bush QC felt that:

“I think there is a general issue about the accessibility of Welsh legislation ... The one place I would probably go to would be the Electoral Commission’s website, but, strictly, it is not the lawmaker ... The people whose job it is to do that are The Stationery Office, legislation.gov.uk ... In other words, that organ of the UK Government whose job it is to publish legislation throughout the UK.

“However ... because there are all sorts of people who feel that they should be doing something but do not have a very clear mandate and maybe do not have the resources to do it, that it slips through the cracks. If you now want to know what the current disqualifications are, you have to go through this process of finding it on one of those different sources. It obviously caused practical difficulties that this very important

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<sup>105</sup> CLA Committee, *RoP [paragraph 130]*, 2 June 2014

<sup>106</sup> CLA Committee, *RoP [paragraph 106]*, 28 April 2014

Order that goes to the heart of democracy in Wales was only approved a few months before the election.”<sup>107</sup>

160. Having discussed the merits of those who potentially have a role in publicising who is disqualified from standing as an Assembly Member, he acknowledged that “the Electoral Commission is obviously the body that people go to and look to in order to get that kind of information.”<sup>108</sup>

### ***Our view***

161. Disseminating information about who is disqualified from membership of the National Assembly is vital for ensuring the proper functioning of the institution as a democratic parliamentary body.

162. Many of the changes we are proposing would have implications for public bodies throughout Wales.

163. We believe therefore that all public bodies in Wales should ensure that they have administrative provisions in place to deal with circumstances in which any of their staff may wish to stand for election and that they keep them under review. In particular, we hope that they will review their internal policies and procedures as a result of any legislation that follows this report, and do so in such a way as to facilitate those elected being able to devote all their time to their new role as quickly as possible (see paragraph 94).

**Recommendation 17: we recommend that every public body in Wales reviews its rules governing political activities to ensure that all staff are clear about the internal rules that apply in the event that they wish to seek nomination for, and are eventually successful in, election to the National Assembly for Wales. Such rules should take account of any legislation that arises from this report and be subject to review at least 2 years before Assembly general elections that take place after 2016.**

164. We believe that the Welsh Government has a major role to play in disseminating and communicating information about political activities, including through the terms of appointment of those

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<sup>107</sup> CLA Committee, *RoP [paragraphs 253-254]*, 16 June 2014

<sup>108</sup> CLA Committee, *RoP [paragraph 260]*, 16 June 2014

appointed by it and its own guidance to bodies affected (regarding their staff).

**Recommendation 18: we recommend that the Welsh Government reviews the terms of appointment and guidance it gives to appointees, sponsored bodies and other relevant bodies regarding political activity.**

165. More generally, raising awareness of our proposed changes will be vital, as is the provision of advice to organisations which do not yet have appropriate internal systems and mechanisms in place.

166. In our view the Electoral Commission should take responsibility for leading on the provision of advice and guidance in relation to electoral rules, and accordingly playing a key role in disseminating information regarding who is disqualified from nomination and election as an Assembly Member. In performing this role it should liaise closely with the Welsh Government, public bodies, political parties and Electoral Returning Officers. We consider that Returning Officers are well-placed to provide advice to candidates seeking election to the National Assembly.

167. The Electoral Commission's guidance needs to be comprehensive and thorough, as well as being easily understood. It must also include a synopsis of all the legislation that applies to someone seeking nomination and election as an Assembly Member.

168. The guidance should also be provided in good time for potential candidates.

**Recommendation 19: we recommend that the Electoral Commission reviews its existing guidance on disqualification from membership of the National Assembly for Wales to ensure it is comprehensive and covers all of the relevant policy issues and legislation that apply.**

## 8. Holding more than one political role

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### *Background*

169. The UK Government's Wales Bill, introduced to the House of Commons on 20 March 2014, has highlighted the issue of double jobbing i.e simultaneously holding more than one political role. The Bill provides that members of the House of Commons are disqualified from being members of the Assembly, subject to some limited exceptions. The provision is in line with a recommendation contained in a 2009 report by the Committee on Standards in Public Life, *MPs' Expenses and Allowances: Supporting Parliament, safeguarding the taxpayer*.<sup>109</sup>

170. Lawyers in Local Government highlighted in their written evidence the likelihood of conflict in the roles of local, parliamentary and European membership, suggesting that:

“... the committee may wish to consider whether there is an inconsistency or conflict in the role of a NAW Member and other political role ie Local Government ...

“The issue of perceived /actual conflict applies equally to membership of parliament and the EU parliament.”<sup>110</sup>

171. The issue was also raised in written evidence by the Independent Remuneration Panel for Wales.<sup>111</sup>

172. The Petitions Committee wrote to us in April 2014 drawing our attention to a public petition on this issue<sup>112</sup> and the petitioner subsequently provided written evidence.<sup>113</sup>

173. We also sought evidence from Assembly Members holding more than one political role and received evidence from Peter Black AM,<sup>114</sup>

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<sup>109</sup> Committee on Standards in Public Life, *MPs Expenses and Allowances, Supporting Parliament and Safeguarding the Taxpayer*, November 2009

<sup>110</sup> Written Evidence DQ 4

<sup>111</sup> Written Evidence DQ 5

<sup>112</sup> Letter from the Chair of the Petitions Committee, April 2014

<sup>113</sup> Written Evidence DQ 7

<sup>114</sup> Written Evidence DQ 8

William Powell AM,<sup>115</sup> and Russell George AM<sup>116</sup>, all of whom are elected local councillors.

174. Following our request for information, we also received further evidence from William Powell AM<sup>117</sup> and Russell George AM<sup>118</sup> on their role as members of the Petitions Committee of the National Assembly.

***Dual political role: Assembly Member and local authority councillor***

175. The Independent Remuneration Panel for Wales noted the significant time commitment required to discharge the duties of an Assembly Member and said:

“It is the view of the Panel that the Committee should consider the incompatibility of the time commitments of holding posts both as an AM and as an elected member of a principal council and the acceptability of such remunerated ‘twin-hatting’ in the eye of the general public. The Panel has based its determinations on the principle that double remuneration should not occur. Therefore a Leader or Executive Member of a principal council, determined as full-time by the Panel, may not receive a second salary serving as a member appointed to a national park authority or a Welsh fire and rescue authority. The Committee may wish to consider the extent to which this principle is relevant to its deliberations.”<sup>119</sup>

176. A member of the public indicated that his petition to the National Assembly was to ask the Welsh Government to bring forward legislation to bar the practice of standing as an Assembly Member and local councillor.<sup>120</sup>

177. The Electoral Reform Society Wales said:

“Ultimately, it is for the voters to decide whether they are content for their local councillor to be their Assembly Member or their Member of Parliament as well. Where we draw a distinction, and where we are supporting the sections of the

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<sup>115</sup> Written Evidence DQ 10

<sup>116</sup> Written Evidence DQ 11

<sup>117</sup> Supplementary Written Evidence DQ 10

<sup>118</sup> Supplementary Written Evidence DQ 11

<sup>119</sup> Written Evidence DQ 5

<sup>120</sup> Written Evidence DQ 7

Wales Bill that would impose restrictions, is on double-jobbing between this place and the Commons.”<sup>121</sup>

178. On the specific issue of being a local councillor as well as an AM, the Electoral Reform Society Wales added:

“People might have different opinions on that. There might be benefits, there might be drawbacks from it, but ultimately, if there are any conflicts of interest, those should actually be dealt with within the system that exists at the moment. I do not think that a ban is particularly a good idea.”<sup>122</sup>

179. In terms of a possible conflict of interest, Lawyers in Local Government believed there were arguments for and against double jobbing by Assembly Members and local councillors,<sup>123</sup> but added:

“With regard to the time commitment to the organisations themselves, however, I think that that is a fundamental problem.”<sup>124</sup>

180. William Powell AM stated:

“It is my considered view that there is no material or inevitable conflict in being a County Councillor and simultaneously an AM. In fact, the dual role may be mutually supportive to the individual representative and their respective electorate.”<sup>125</sup>

181. Peter Black AM expressed similar views.<sup>126</sup> In so doing, he noted that:

“... the standing orders of the National Assembly for Wales and each Principal Council allows for the declaration of personal and pecuniary interests.”<sup>127</sup>

182. He also considered that:

“In the case of being a Councillor and an AM, the former role is part-time, tends to serve the same set of constituents and can

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<sup>121</sup> CLA Committee, *RoP [paragraph 172]*, 28 April 2014

<sup>122</sup> CLA Committee, *RoP [paragraph 173]*, 28 April 2014

<sup>123</sup> CLA Committee, *RoP [paragraphs 95 -97]*, 12 May 2014

<sup>124</sup> CLA Committee, *RoP [paragraph 103]*, 12 May 2014

<sup>125</sup> Written Evidence DQ 10

<sup>126</sup> Written Evidence DQ 8

<sup>127</sup> *Ibid*

be managed in addition to the full time job through good time management. Clashes of meetings can be avoided.”<sup>128</sup>

183. He agreed with the views of the Electoral Reform Society Wales saying “the decision as to whether to allow a dual role should belong to the electorate”,<sup>129</sup> a view also shared by William Powell AM<sup>130</sup> and Russell George AM.<sup>131</sup>

184. In his written evidence, Russell George AM referred to the time pressures involved in undertaking a dual role:

“... it is not always easy to manage the two workloads, which are sometimes competing and conflicting and I rely heavily on extremely efficient and competent members of my Assembly staff team, to effectively manage my Assembly casework with Powys County Council and ensure that there are appropriate Chinese Walls in place where my local authority casework may potentially conflict with my Assembly work ... that process works well. The other issue which is difficult to manage is fulfilling the meeting commitments of both the National Assembly and Powys County Council. It is impossible to maintain maximum attendance at all the relevant meetings of both institutions because of competing business and because of the geographic distance between Cardiff and Llandrindod Wells. In my view, each institution has equal status because they are equally important for the voters I represent. However, when a conflict does emerge, I examine the issues on both business agendas and I have to make a judgement call using a utilitarian interest test. The interests of my constituents are of course paramount, however being elected to a national legislature brings with it wider responsibilities for the national good. Therefore in the main, the balance does tend to tilt towards contributing to National Assembly business but that judgement is made on a meeting by meeting basis.”<sup>132</sup>

185. We explored these issues with Peter Black AM. In questioning on issues surrounding the Assembly’s rules for declaring an interest, he said:

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<sup>128</sup> Written Evidence DQ 8

<sup>129</sup> Ibid

<sup>130</sup> Written Evidence DQ 10

<sup>131</sup> Written Evidence DQ 11

<sup>132</sup> Ibid

“... the Assembly’s declarations of interest rules are much freer ... than those of local councils. In a council, you really are under an obligation to declare virtually everything, either personal or pecuniary; here, you only tend to declare an interest if you would benefit in a greater way than somebody else who is in your position, which really leaves quite a lot of latitude, I think. It is a matter for Assembly Members, and for the Standards of Conduct Committee, as to whether that is too lax a regime. However, I think that, in terms of the conflict—or lack of conflict—between being a councillor and an Assembly Member, I cannot think of a single occasion where you would want to declare that you are a councillor in the Assembly, though I do occasionally mention the fact that I am a councillor when I am making contributions on local government, or even in terms of asking questions, and I think that other councillors do the same thing as well.”<sup>133</sup>

186. When Peter Black AM was asked whether the public should know that he has a specific interest as a member of a local authority, he said:

“I think that that is possible, and ... I would tend to mention that if I felt that it was particularly pertinent ... However, you could equally make the same argument in terms of farmers, and other professionals.”<sup>134</sup>

187. He did not think that the Assembly oversees the performance and financing of local government, saying that, “local government is accountable to its own local electorate”<sup>135</sup>, before adding:

“In terms of an ordinary Assembly Member who does not hold an executive role within the Assembly, there is no conflict in terms of the decisions that are taken by the Government in relation to the financing and performance of local government. Even the Welsh Government does not have an oversight role in relation to Local government, apart from in terms of the money that it gives authorities and what is in statute.”<sup>136</sup>

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<sup>133</sup> CLA Committee, *RoP [paragraph 23]*, 2 June 2014

<sup>134</sup> CLA Committee, *RoP [paragraph 28]*, 2 June 2014

<sup>135</sup> CLA Committee, *RoP [paragraph 29]*, 2 June 2014

<sup>136</sup> *Ibid*



188. He stated that:

“... there is more potential for conflict between being a Welsh Minister and being a councillor, simply because Ministers have specific executive roles. As an Assembly Member, there are very few opportunities for conflict. Both roles can be performed adequately and without any potential problems”.<sup>137</sup>

189. He also said:

“I think that it would be more difficult to be a cabinet member and an Assembly Member, or a cabinet member here and a councillor there. There would be some conflict of interest. That is a matter that needs to be dealt with separately from the issue that you are scrutinising here, of course, because you are looking at whether you should bar councillors from becoming Assembly Members, which I think is a slightly separate issue ... I would not try to do an executive role on either body at the same time as serving on the other.”<sup>138</sup>

190. In terms of how resources are used, Peter Black AM said:

“You do not get many resources as a county councillor, but I do a lot of work in my own time as a councillor. I try to make sure that there is division there, but, sometimes, you do have a blurring. For example, I have an e-mail address as a councillor, an e-mail address as an Assembly Member and my personal e-mail address. Even I cannot manage three e-mail accounts. So, I tend to do everything through the one e-mail account. However, I make it clear to officers in what capacity they are being lobbied or approached. So, there is some blurring of the lines, but, by and large, I use the resources that are appropriate to the relevant case.”<sup>139</sup>

191. Keith Bush QC thought that it “is not really a legal issue”<sup>140</sup> and said that:

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<sup>137</sup> CLA Committee, *RoP [paragraph 33]*, 2 June 2014

<sup>138</sup> CLA Committee, *RoP [paragraph 62]*, 2 June 2014

<sup>139</sup> CLA Committee, *RoP [paragraph 60]*, 2 June 2014

<sup>140</sup> CLA Committee, *RoP [paragraph 271]*, 16 June 2014

“... it is a matter for public debate and a matter of policy. It is not a constitutional issue in the same way that disqualification on the grounds of conflicts of interest is”.<sup>141</sup>

192. He could see the arguments on both sides noting:

“The double-jobbing issue relates to people’s feelings as to whether it is appropriate that people who are Members of the Assembly should be devoting their time to other activities ... It is more difficult I think when you come to local government, because there is a rather unclear relationship between the Assembly and local government. Local government is, in theory, autonomous, but, in practice, is financed almost entirely by funds that are provided under the supervision of the Assembly. So, there is a potential conflict of interest argument, I suppose, there.

“On the other hand ... there are those who say that elected politicians and the public generally benefit from the involvement of Assembly Members in certain other activities.”<sup>142</sup>

193. In terms of reviewing the National Assembly’s code of conduct in how it deals with those sorts of conflicts of interest, he acknowledged that some rules:

“... are notoriously unclear ... particularly in relation to legislation. By all means look at their clarity and so on, but you may create other difficulties—there will be knock-on effects, undoubtedly. So, all Assembly Members may have conflicts of interest in relation to their everyday lives or whatever ... So, all of the time, you are having to manage your public functions as legislators with your individual situations as citizens affected by the legislation. It is not easy to draw a hard-and-fast line between those conflicts of interest, which have to be eliminated, those that you can tolerate and those in the middle, which you have to accept that you have to manage in some way.”<sup>143</sup>

194. When questioned on whether there was a particular conflict of interest with someone being a cabinet member of a local authority

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<sup>141</sup> CLA Committee, *RoP [paragraphs 271- 272]*, 16 June 2014

<sup>142</sup> CLA Committee, *RoP [paragraph 272]*, 16 June 2014

<sup>143</sup> CLA Committee, *RoP [paragraph 279]*, 16 June 2014

and then being an Assembly Member, if that particular authority is perhaps brought into special measures under the education provisions, he said:

“There, this is an even clearer conflict or potential conflict, as in the case of an ordinary Member, obviously. It is a question of degree in my view. Again, I am sure that there are strong views held on either side in relation to that. Of course, our system does not aspire to eliminate conflicts of interest altogether.”<sup>144</sup>

***Dual political role: member of the House of Lords and a local authority councillor***

195. The Electoral Reform Society Wales told us:

“To a degree, peers’ work is not as onerous as that of Members of the House of Commons and perhaps there is merit to having some people here who are members of the House of Lords and are able to go up to that place and provide a devolved aspect. They are obviously not working, full-time peers. They are only occasionally going to the other place. They are not being paid a full-time wage, as it were, as Members of Parliament are; they are only receiving allowances for when they are there—daily expenses. Again, I think that, on balance, we would probably say no, you should not stop people from being AMs and peers.”<sup>145</sup>

196. Lawyers in Local Government expressed concern about the time commitment<sup>146</sup> and failed to understand how both roles could be undertaken properly.<sup>147</sup> They added:

“Is the role of someone in the House of Lords a bar to their being a candidate here? Maybe there is not; but, because they scrutinise legislation, it could depend on what that legislation is.”<sup>148</sup>

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<sup>144</sup> CLA Committee, *RoP [paragraph 274]*, 16 June 2014

<sup>145</sup> CLA Committee, *RoP [paragraph 174]*, 28 April 2014

<sup>146</sup> CLA Committee, *RoP [paragraph 108]*, 12 May 2014

<sup>147</sup> CLA Committee, *RoP [paragraphs 95 and 103]*, 28 April 2014

<sup>148</sup> CLA Committee, *RoP [paragraph 108]*, 12 May 2014

## *Our view*

197. Although we did not seek specific comments on the issue of holding more than one political role, as the background to this section shows, it is an issue that has been raised by some witnesses and is currently being discussed in the UK Parliament as a consequence of provisions contained in the UK Government's Wales Bill.

198. This issue comes within the terms of reference of our inquiry and so we believe it is appropriate to consider this issue. In so doing, we are clear therefore that the scope of the inquiry has not been changed to accommodate consideration of this issue.

199. The evidence highlights the very real difficulties that exist in seeking to determine whether or not dual mandates are appropriate. There are clearly strong arguments on both sides.

200. In our view the dual mandate to serve as an Assembly Member and a local authority councillor requires further investigation and a more formal, specific review.

201. In coming to this view we are mindful of two issues.

202. First, we do not believe it would be feasible to resolve this matter before the 2016 Assembly general election. As such, following the review, should a legislative change be considered appropriate, it would make sense to make this change in time for the 2021 elections, in line with recommendations 2, 4, 5, 6, 7, 8, and 11 of our report.

203. Secondly, we are conscious that there are proposals to reform local government in Wales<sup>149</sup> and it would make sense to consider the dual role issue as part of the roles and responsibilities of local authority councillors that emerge from that reform.

**Recommendation 20: we recommend that the Welsh Government commissions an independent review of the feasibility of holding a dual mandate as an Assembly Member, and local authority councillor (including having regard to: the potential for conflicts of interest, time commitments involved and issues of public perception) and to make recommendations.**

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<sup>149</sup> Welsh Government, *Devolution, Democracy and Delivery: White Paper –Reforming Local Government*, 8 July 2014

204. As regards a dual mandate to serve in the House of Lords and as an Assembly Member, we believe the issues are clearer. We are satisfied that there is potentially a conflict of interest in having the ability to serve two legislatures that scrutinise primary and secondary legislation that potentially could cover the same policy area. The same argument can be made in relation to membership of other legislatures, although it is unlikely that anyone would seek to be a member simultaneously of more than one devolved legislature.

205. In our view, it would be unfair to effect such a change retrospectively given that a peerage is held for life and it would be unreasonable to expect any individual to make a choice now between being an Assembly Member and a member of the House of Lords.

**Recommendation 21: we recommend that the UK Government prohibits the practice of standing as an Assembly Member and a Member of the House of Lords, but that such a prohibition should not be applied to anyone who is currently serving as a member of both institutions.**

## Witnesses

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The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at

[www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?IId=1242](http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?IId=1242)

### ***28 April 2014***

Kay Jenkins                      Electoral Commission Wales

Stephen Brooks                Electoral Reform Society

### ***12 May 2014***

Andrew Jolley                 Local Government Lawyers

### ***2 June 2014***

Peter Black                     Assembly Member

Dr Emyr Roberts               Natural Resources Wales

Sarah Rochira                 Older People's Commissioner for Wales

### ***9 June 2014***

Keith Bush                     Queen's Counsel

## List of written evidence

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The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at [www.senedd.assemblywales.org/mgConsultationDisplay.aspx?id=115&RPID=1003564313&cp=yes](http://www.senedd.assemblywales.org/mgConsultationDisplay.aspx?id=115&RPID=1003564313&cp=yes)

<i>Organisation</i>	<i>Reference</i>
Electoral Commission for Wales	DQ 1
Wales Office	DQ 2
Welsh language Commissioner	DQ 3
Lawyers in Local Government	DQ 4
The Independent Remuneration Panel for Wales	DQ 5
Keith Bush, QC	DQ 6
Nortridge Perrott	DQ 7
Peter Black, AM	DQ 8
Emyr Roberts	DQ 9
William Powell AM	DQ 10 DQ 10A - Supplementary Evidence
Russell George AM	DQ 11 DQ 11A - Supplementary Evidence

# Annexe 1 – Letter from First Minister, 27 January 2014

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Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM  
Prif Weinidog Cymru/First Minister of Wales

27 JAN 2014

PO 668



Ein cyf/Our ref: MB-FM-5920-13

Llywodraeth Cymru  
Welsh Government

Dame Rosemary Butler DBE AM  
Presiding Officer  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA  
Private.office@wales.gov.uk

27<sup>th</sup> January 2014

Dear Rosemary

## Disqualification from membership of the National Assembly for Wales

I am sure you will recall that, in the period immediately following the last Assembly elections in 2011, issues arose about the election of two candidates, each of whom at the time of their election held public offices which disqualified them from membership of the Assembly. In the event, the Assembly agreed that one candidate should be allowed to become a member of the Assembly, but the other was disqualified from membership. This was a reputationally-damaging business for the Assembly, and one which I am sure none of us would wish to see repeated.

In that context, I am writing to ask if you would consider asking the Constitutional and Legislative Affairs Committee to carry out an inquiry into the rules pertaining to disqualification from Assembly membership. This is a matter that is of concern to all Assembly Members, and it seems right to me that an Assembly committee should have the opportunity to consider the issues and report on them. If you agreed and the Committee were minded to carry out an inquiry, the Committee's findings and conclusions could then inform our thinking on the content of the next National Assembly for Wales Disqualification Order, which will need to be made prior to the next Assembly elections in May 2016.

As you may be aware, section 16 of Government of Wales Act 2006 ('GOWA 2006') identifies a number of persons who, by reason of the offices or employments they hold, may not be members of the Assembly. Additionally, it provides for an Order in Council ("Disqualification Order") to designate further offices and employments, the holders of which would also be disqualified from becoming members of the Assembly.

This Order is to be laid before and approved by a resolution of the Assembly before a recommendation is made to Her Majesty in Privy Council. Section 16 of GOWA 2006 does not require the Order in Council to be laid before the UK Parliament and therefore the UK Parliament has no role in making this Order.

Past disqualification orders have sought to strike a balance in terms of disqualifying posts and employments: allowing as many citizens as possible to stand for election, whilst protecting the legislature from undue influence by government-paid office-holders, protecting the public purse by avoiding conflicts of interests, and protecting the impartiality of certain bodies from the appearance of party political bias.

Bae Caerdydd • Cardiff Bay  
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ps.firstminister@wales.gsi.gov.uk



The time is now right to start considering the principles which should be reflected in the next Order. I would like it to be as clear and accessible as possible, and to eliminate any unnecessary complexity. Most importantly, it should reflect a broad political consensus in the Assembly.

I am aware that CLAC's predecessor, the Constitutional Affairs Committee ('CAC'), raised concerns when it considered the last Disqualification Order in draft, prior to Assembly consideration of it. CAC identified disparities between treatment of bodies that were inherited unchanged from the previous list and those that were newly added to it. The Committee was also concerned that it had had no opportunity to shape the Order, but merely was being asked to recommend acceptance or rejection.

Given these concerns, I believe it would be beneficial for CLAC to examine the principles underpinning the disqualifying posts and employments contained in the previous Disqualification Order and, so far as possible, recommend a new list of disqualifying posts and employments. This is an issue of concern to the Assembly as a whole, and I believe that CLAC would be well-placed to assist in the creation of a broad consensus on the issues.

There are also a number of incidental issues that the Committee might wish to consider. One of these is the timing of when disqualifications take effect. A person who holds a disqualifying office at the point of consent to nomination currently needs to resign that office before consenting; otherwise they would be guilty of a corrupt practice (as per the National Assembly for Wales (Representation of the People) Order 2007). But it is hard to justify a requirement that an individual must resign membership of a public body simply on account of the possibility of later election to the Assembly. The Secretary of State for Wales makes the relevant Order covering this aspect in exercise of the powers conferred on him by section 13 of the 2006 Act and so the Welsh Government have no direct influence over it. Nevertheless, I see a clear disincentive in the process and would see advantage in the Committee also considering this issue.

Another such issue is whether Disqualification Orders should be made by the Privy Council in bilingual form. Even though an Order will be a statutory instrument extending to the whole of the UK, its practical application is limited to Wales and, as a matter of principle, in my view the Order should be made both in English and Welsh. I would be interested to hear the Committee's views on this issue too.

Should the Committee pursue this matter, it would be helpful if they could publish a Report by the end of this year's Summer Recess. The Assembly could debate the issues in the autumn, and we could then move forward to the drafting of the Order around this time next year. The Welsh Government would of course be willing to submit a memorandum to the Committee to assist their consideration of the issues.

I would be glad to know of your views on this issue.

I am copying this letter to David Melding AM.

Yours sincerely



CARWYN JONES

## **Annexe 2 – Welsh Government Memorandum**

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Following the First Minister's invitation in January 2014, the Assembly's Constitutional and Legislative Affairs Committee ('CLAC') have agreed to undertake an inquiry into matters pertaining to disqualifications from Assembly membership. As part of the scrutiny, they have asked the Welsh Government to submit a Memorandum which would aid them in their consideration of these matters.

The Welsh Government was pleased to learn that CLAC have agreed to undertake this inquiry which we hope will help to improve and streamline the rules relating to disqualifications from Assembly membership. We believe that this is an issue of concern to the Assembly as a whole, and CLAC is therefore well-placed to assist in the creation of a broad cross-party consensus on these matters. The inquiry also presents an opportunity to raise public awareness of these important matters which have a direct impact on the way Wales is governed.

To assist the Committee's scrutiny, this memorandum sets out the Welsh Government's consideration of these issues which is based on our experience of the operation of these rules.

The memorandum is divided into three parts – we first consider the contextual framework for disqualifications; then we turn to the issue of the content of the Disqualification Order; and lastly we discuss the incidental issues that are of relevance to disqualifications but are not directly within the Welsh Government's remit to deal with.

### **The Context**

Generally speaking, restrictions on membership are a basic feature of elected legislatures. While certain restrictions are necessary, they are a limit on people's democratic rights. In the Welsh Government's view, therefore, the rationale behind disqualifying people from Assembly membership must be well justified, and we should restrict exclusions to the minimum.

There are certain UK-wide qualifications that a prospective candidate must comply with in order to be able to stand for elections to any one of the legislatures in the UK. For example, the person must be at least

18 years old and must be a British citizen, an eligible Commonwealth citizen, or a citizen of any member state of the European Union. Specifically in relation to the Assembly elections, a prospective candidate, apart from meeting the above qualifications for standing for election, must not also be disqualified from standing as set out in the Government of Wales Act 2006 (“GoWA 2006”).

Section 16 of GoWA 2006 identifies a number of persons who may not be members of the Assembly. Additionally, it provides for an Order in Council (“Disqualification Order”) to designate further offices and employments, the holders of which would also be disqualified from becoming members of the Assembly. There are also posts appointed by the Assembly (for example, members of the Independent Remuneration Board and the Standards Commissioner) where the legislation establishing them debar AMs from being appointed to the posts and debar post-holders from standing for election.

### **The Content of the Disqualification Order**

A Disqualification Order has to be laid in draft before and approved by a resolution of the Assembly before a recommendation is made to Her Majesty in Council that the Order be made. In terms of their content, past Assembly Disqualification Orders have tried to strike a balance: allowing as many citizens as possible to stand for election, whilst protecting the legislature from undue influence by government-paid office-holders, protecting the public purse by avoiding conflicts of interests, and protecting the impartiality of certain bodies from the appearance of party political bias.

So, previous Orders aimed to disqualify:

- Holders of offices wholly or partly funded by the Welsh Government. This included salaried, pensionable and certain fee-paid posts, but excluded posts attracting expenses only. Office with remuneration of less than £10,000 per year should not normally attract disqualification.
- Appointments which were made, approved or confirmed by the First Minister, Welsh Ministers or the Counsel General, or appointments on which they had a statutory right to be consulted.

- Office holders whose functions would give rise to an unsustainable conflict of interest were they to be elected as Assembly Members.
- Office holders who were not, or were not seen as being, politically impartial.

These principles formed a basis for the disqualifying posts or employments contained in the previous Disqualification Order. However, Welsh Government officials have reviewed past practice in relation to the content of disqualification orders and highlighted the following issues:

- The disqualifications are long and complex, and individuals may inadvertently fall foul (as two did in 2011) of apparently unjustified disqualifications;
- The complex nature of some of the disqualifications may require prospective candidates to seek legal advice in order to determine whether they are caught by the particular disqualification.

CLAC's predecessor, the Constitutional Affairs Committee ('CAC'), also raised concerns when it considered the last Disqualification Order in draft, prior to Assembly consideration of it. CAC identified disparities between treatment of bodies that were carried forward from the previous list and those that were newly added to the list.

It would therefore be beneficial for CLAC to examine afresh the principles underpinning the disqualifying posts and employments contained in the previous Disqualification Order, propose new principles as appropriate and, so far as possible, recommend a new list of disqualifying posts and employments which could then be included in the next Disqualification Order. We would like the Order to be as clear and accessible as possible, and we would also like to eliminate any unnecessary complexity.

### **Incidental Issues**

There are also other considerations which are incidental to the Disqualification Order. Even though the Disqualification Order will be a statutory instrument with a UK-wide effect, as a matter of principle, we believe that the Order should be made both in English and Welsh.

Another issue to consider is when the disqualifications bite. Whereas the Disqualification Order is for the Assembly to approve in draft, it falls to the Secretary of State, with Parliamentary approval, to make the Order setting out the rules for conduct of Assembly elections. This Order includes requirements relating to nomination procedures. As matters stand, a person who holds a disqualifying office at the point of having to consent to nomination would need to resign that office before consenting, otherwise they would be guilty of a corrupt practice as per the most recent Order, the National Assembly for Wales (Representation of the People) Order 2007 (as amended by the National Assembly for Wales (Representation of the People) (Amendment) Order 2010).

The Secretary of State for Wales makes the relevant Order covering this aspect in exercise of the powers conferred on him by section 13 of the 2006 Act and so the Welsh Government have no direct influence over it. However, we see the current requirements as a clear disincentive to candidates because a person must resign their post or employment in order to stand as a candidate and, if unsuccessful in that election, reinstatement would depend on the terms and conditions of employment that apply. We would therefore see advantage in the Committee also considering this issue.

### **Conclusion**

It is our view that the current structures for excluding persons from Assembly membership do not properly reflect their *raison d'être*. The disqualifications purport to prevent AMs from holding offices or employments deemed to interfere with the proper fulfilment with their duties. But it is our view that the rules pertaining to disqualifications are increasingly unfit for purpose to the point that, in some instances, they pose a disincentive to potential candidates and thus fall foul of the logic of empowering democratic participation.

For these reasons, we are keen to see how the rules and principles underpinning disqualification can be changed to improve participation from candidates while maintaining public trust and confidence in the conduct of Assembly elections. The Welsh Government looks forward to the outcome of CLAC's inquiry, the results of which could then inform the content of the next National Assembly for Wales Disqualification Order, which will need to be made prior to the next Assembly elections in May 2016.

## **Annexe 3 – Section B, Written evidence DQ6, Keith Bush QC**

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### **B. Legislative framework and background**

- (a) Section 16(1) of GOWA 2006, which identifies classes of person disqualified from being Assembly Members, broadly follows the pattern set by section 1 of the House of Commons Disqualification Act 1975 (“the 1975 Act”). (There are some further disqualifications, covered by section 16(2) and (4) of GOWA 2006, e.g. that relating to persons imprisoned for more than twelve months for criminal offences, but these are not relevant to the issue of those disqualifications which are, through the mechanism of Orders in Council under section 16(1)(b), effectively under the control of the Assembly.)
- (b) The 1975 Act disqualifies from membership of the House of Commons:
- (i) holders of judicial offices;
  - (ii) civil servants;
  - (iii) members of the regular armed forces;
  - (iv) police officers;
  - (v) members of legislatures outside the Commonwealth;
  - (vi) holders of offices described in Part II or III of Schedule 1 to the Act.
- (c) GOWA 2006 disqualified from membership of the Assembly:
- (i) persons in categories (i),(ii),(iii),(iv) and (v) above;
  - (ii) holders of offices designated by Order in Council made under section 16;
  - (iii) the Auditor General for Wales;
  - (iv) the Public Service Ombudsman for Wales;
  - (v) members of the staff of the Assembly itself.

(d) Section 16(1) of GOWA 2006 is paralleled, in very similar terms, by section 15(1)(d) of the Scotland Act 1998 and section 3(1) of the Northern Ireland Assembly Disqualification Act 1975 (applied to the current Assembly by section 36 of the Northern Ireland Act 1998).

(e) Orders in Council under section 16(1)(b) of GOWA 2006 (and corresponding Scottish and Northern Ireland enactments) therefore fulfill the same function as Parts II and III of Schedule 1 to the 1975 Act, which may, itself be amended from time to time by Order in Council under section 5 of that Act.

206. The background to the 1975 Act (and therefore, by extension, to section 16 of GOWA 2006) is the doctrine of the “separation of powers”, i.e. the principle that, in a parliamentary democracy, one of the roles of the parliamentary body is to hold the executive (government) to account and that therefore members of the parliamentary body should, as far as possible, be free of interests which conflict with their ability to do so effectively. This principle was reflected in one of the fundamental constitutional statutes of the United Kingdom, the Act of Settlement 1701, which provided:

207. “That no Person who has an Office or Place of Profit under the King or receives a Pension from the Crown shall be capable of serving as a Member of the House of Commons.”

(f) It is a feature of parliamentary democracy that the separation between parliament and government is not absolute (as it is, for example, under the US Constitution) in that Ministers are drawn from members of the parliamentary body and, indeed, must enjoy the “confidence” (i.e. backing) of the parliamentary body. Nevertheless the exclusion of others holding “offices or places of profit” under the Crown was intended to eliminate from the House of Commons persons who were enjoying the patronage of Ministers and who were therefore less likely to scrutinise Ministers effectively.

(g) A second kind of conflict of interest which has become increasingly prominent, particularly over the last century, arises out of the development of offices and bodies exercising executive governmental functions, but not part of central government itself – the so-called “quangos”. Since such

institutions are themselves subject to parliamentary scrutiny, membership of them has been accepted to be incompatible, for that added reason, with membership of the parliamentary body.

- (h) One of the difficulties caused by the proliferation of “quasi-autonomous non-governmental organisations” (or “quangos”) in relation to disqualification from membership of the House of Commons was the wide variety of forms that such bodies can take. This made it difficult, sometimes, to decide whether membership fell within the “office of profit under the Crown” test. After considerable discussion, and reports by two House of Commons committees, Parliament eventually moved (via the House of Commons Disqualification Act 1957 and the House of Commons Disqualification Act 1975) to a system of specifying (by listing in Schedule 1 of the 1975 Act, as amended from time to time) those offices which disqualify from membership of the House of Commons.
- (i) Parts II and III of Schedule 1 to the 1975 Act originally listed some 300 disqualifying offices. This has since grown, by amendment, to almost 500. The 2010 Order (i.e. the corresponding enactment relating to the Assembly) contains only 107 entries.