

**REPORT OF THE CONSTITUTIONAL AND LEGISLATIVE AFFAIRS
COMMITTEE, “INQUIRY INTO THE DISQUALIFICATION FROM MEMBERSHIP
OF THE NATIONAL ASSEMBLY FOR WALES” (pub. July 2014)
RESPONSE OF THE WELSH GOVERNMENT**

Introduction

1. The Welsh Government is particularly grateful to the Committee for this Report. The inquiry was undertaken at the Government’s request (a somewhat novel procedure), and the result is an extremely useful Report which has stimulated some fresh thinking on our part about this difficult, but fundamentally important, issue. The fact that, as will be seen below, we are not able to agree with each and every recommendation which the Committee has brought forward in no way diminishes the value of the Report, to the Government and we would suggest to the Assembly also.
2. The background to the inquiry, as the First Minister’s letter to the Presiding Officer of January 2014 (reproduced as Annexe 1 to the Report) makes clear, is a concern to avoid in 2016 what happened in 2011: the election of two individuals as Assembly Members who, as it subsequently became known, held offices which under the relevant Order in Council in force at the time were inconsistent with their taking up their Assembly responsibilities. In the event, one person was enabled to become a Member, and one was not; but in the Welsh Government’s view the Assembly probably suffered reputational damage in having, immediately following the elections, to deal over some weeks with a matter very far from the electorate’s concerns. We must do whatever we can to avoid such a situation in 2016.

The Report: Some General Observations

3. As noted above, the Committee’s Report has given the Government an opportunity to think afresh about our general approach to the issues, and it may be helpful before responding to the individual recommendations to set out some general observations.
 - (i) Conflating the Issues?
4. First, we now think that the root of many of the difficulties around disqualification is that the principal legislation, sections 16-19 of the Government of Wales Act 2006 (“GOWA”), conflates two matters which should be kept separate. The first such matter is an individual’s right to be a candidate in public elections; in accordance with the jurisprudence of the European Court of Human Rights under Article 3 of Protocol 1 to the Convention, this should be generally available to adult citizens, and it will only be in relatively limited circumstances that such a right to candidacy should be denied as a matter of law. The second matter is one of conflict of interest: the Assembly, and voters, have a legitimate expectation that any person elected to the Assembly should be capable of discharging his or her responsibilities without fear or favour, uninhibited by the simultaneous holding of offices which may allow a perception to arise that an individual’s contribution to the Assembly’s work may be inappropriately constrained.

5. Section 16(1)(a) of GOWA identifies five classes of persons who “are disqualified from being an Assembly member”: judges, civil servants, members of the armed forces, members of police forces, and members of foreign legislatures. Section 16(1)(c) and (d) likewise disqualify the Auditor-General for Wales and the Public Services Ombudsman for Wales. Section 16(4) disqualifies from Assembly membership anyone holding office as lord-lieutenant, lieutenant or high sheriff for a part of Wales and whose constituency or electoral region encompasses or includes the area for which service in that office is being given.
6. In the Government’s view, the mischief aimed at here is to prevent the holders of such offices engaging in any public political activity (including electoral candidacy) at all, because they need at all times publicly to demonstrate political impartiality in the discharge of their existing responsibilities. The matter can be tested in this way: if a person covered by any of these disqualifications presented himself or herself as a candidate, then engaged in the ensuing public/political debate, but was unsuccessful at the election, could he or she reasonably expect, and would the public generally expect him or her, to be able to return to their original employment or office, regardless of opinions expressed on matters of political controversy during the election campaign? The Government’s view is that would not be acceptable, and so the policy should be that individuals falling within any of these categories should be disqualified from being candidates at Assembly elections (unless they beforehand permanently divest themselves of the disqualifying office or employment, without possibility of return/reappointment); they fall within the narrow category of people whose right to be a candidate has to be abridged in the interests of wider public policy considerations.
7. This situation can be contrasted with that of conflict of interest. Here, we think the policy should be that individuals holding offices which, if they were elected, might be thought to constrain their ability properly to discharge their Assembly responsibilities, should be able immediately after election to resign those offices: in other words, and consistently with the Convention jurisprudence, their right to candidacy should not be inhibited, but if elected they should only be able to serve as Assembly Members if any potential conflicts of interest are removed.
8. The provisions in GOWA, and in particular the Order-making powers available to the Assembly under GOWA, do not reflect this position, and apply the same penalty of disqualification from Assembly membership (as distinct from disqualification from candidacy) to individuals falling into either category. It is not likely to be possible to secure amendments to these provisions before the next Assembly elections in 2016, but the Welsh Government will pursue this issue with the UK Government with a view to securing reform in the next Parliament.

(ii) Staff of Public Bodies

9. Another class of individuals disqualified from membership of the Assembly, by virtue of s.16(1)(e) of GOWA, are those “employed as a member of the staff of the Assembly” itself. This raises a specific, but also more general issue. The current National Assembly for Wales (Disqualification) Order (SI 2010/2969),

which was in force for the 2011 Assembly elections, specifies a large number of disqualifying offices, but in certain instances (for example the Children's Commissioner, the Older People's Commissioner) also specifies that members of staff supporting the holders of those offices should also be disqualified.

10. If we start from the position that individuals should be able to offer themselves for elected public office save in exceptional circumstances, it is not at all obvious why the staff of some public bodies (but not all) should be disqualified in this way. The Welsh Government is inclined to think that, with the possible exception of Assembly Commission staff mentioned above, the next Assembly Disqualification Order should not make disqualifying provision for the staff of any public body, and instead leave it to the public body concerned to manage any situation arising if a member of staff becomes a candidate at the Assembly election. (And it can fairly be assumed that any successful such candidate would resign their employment on election as an Assembly Member, since continuing in the employment of the public body while discharging Assembly responsibilities would make impossible demands on the individual).

Transparency

11. The background to the difficulties mentioned in paragraph 2 above in relation to 2011 was confusion about exactly which offices were to be regarded as disqualifying for the purposes of the 2011 elections. Producing and effectively publicising a new Disqualification Order will not however fully address this problem. The list of disqualifying offices is derived from several sources (GOWA, the Disqualification Order in force at the time, together with any relevant provisions made by extant Assembly legislation), and in certain instances there appears to be repetition; as previously noted, holding the office of Auditor General for Wales disqualifies an individual from membership of the Assembly by virtue of GOWA s. 16(1)(c), but the 2010 Disqualification Order also specifically disqualifies the Auditor General for Wales and members of his or her staff.
12. Given these various sources for disqualification provisions, it may be extremely difficult for any potential candidate to be sure that he or she has not inadvertently infringed any of the prohibitions. In addition, therefore, to bringing forward a new draft Disqualification Order in 2015, the Welsh Government intends, working as necessary with the Electoral Commission, to produce a comprehensive, non-statutory, list of all of the disqualifying provisions of which we are aware, from whatever source, and make it publicly available to parties and potential candidates.

Law Commission

13. Finally, we mention a matter of less significance in the present context, but of wider importance. The Committee in two of its recommendations has proposed that the Welsh Government should ask the Law Commission to investigate and report on two matters. The Welsh Government shares the Committee's enthusiasm for working with the Law Commission (and welcomes the provision in the current Wales Bill that will make this much easier), but we need to bear in mind both that the Commission's resources are limited, and that its services are

not a free good; it will frequently be the case that the Welsh Government will have to fund any work specifically requested of the Commission. We hope therefore that Committee recommendations for reference of matters to the Commission will be both sparing and strategic in their approach. In the present case, the Welsh Government intends to address the issues raised in the particular recommendations in a different way to that proposed by the Committee.

The Welsh Government's responses to the Committee's Recommendations

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.*

Response: Accept in Principle.

14. This recommendation is broadly consistent with the general approach we set out in paragraphs 4-8 above, in recognising that while most citizens should be encouraged to stand for elected public office, a limited class of people should not be permitted to be candidates by reason of their holding their current office or employment. However, and understandably given the current legislative position, the Committee expresses this in terms of disqualification from membership of the Assembly; the Welsh Government would after 2016 prefer the policy to be achieved, for many of those mentioned in this recommendation, by way of disqualification from candidacy.

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.

Response:

15. **This is a matter for the UK Government**, but as noted in paragraph 8 above, the Welsh Government will want to pursue this general approach with that Government following the 2015 General Election.

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.*

Response:

16. **This is a matter for the UK Government**, but the Welsh Government will seek to discuss the issues with that Government ahead of the making of the equivalent Order for the 2016 Assembly elections.

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.*

Response: Reject

17. Given our general approach to Law Commission referrals set out in paragraph 13 above, the Welsh Government is not persuaded that a reference on this matter would be appropriate.

18. The Committee's report has however already raised the profile of this issue and put it on the political agenda, and we believe it should be possible to take forward reforms without referring to the Law Commission. An amendment to the Wales Bill tabled by Lord Thomas of Gresford on 9 October proposed that section 16 of the Government of Wales Act 2006 should be amended so that, where offices are disqualifying offices because they are included in the Disqualification Order in Council, they are not disqualified from standing and have an 8 day grace period following election to resign the disqualifying office. This amendment was discussed during Committee stage in the House of Lords on 13 October. Baroness Randerson, Parliamentary Under Secretary of State for Wales, was supportive of the purpose of Lord Thomas' amendment, and undertook to work with the Welsh Government on these issues. She agreed that "only those offices

for which there is a strong case for inclusion” should be included in the next Disqualification Order.

19. While it is for the Welsh Government to lead on the Disqualification Order under section 16, and for the Wales Office to lead on any Secretary of State order under section 13 of the Government of Wales Act 2006 dealing with conduct of Assembly elections, we welcome this commitment to work together. We will be looking for legislative changes prior to the 2021 Assembly elections, with a view to pursuing the approach outlined in your recommendation 2. For the 2016 Assembly elections, we will bring forward a draft Disqualification Order for consultation in the New Year, on the basis of the approach we have outlined in our response to recommendations 12 and 13 below.

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.*

Response: Accept in part

20. Given the reference to nomination, we take this recommendation to mean that s.16 should be amended to focus on disqualification of a limited range of individual office-holders, and members of a limited range of classes, from candidacy at Assembly elections. On that basis the Welsh Government accepts the recommendation and will pursue the matter with the UK Government (although we think it likely that s.16 would need to be repealed and replaced, rather than amended, to achieve the desired result). In practice, however, we doubt that even a completely new provision would be able to stand alone, and we envisage taking order-making powers to enable us to keep up to date the list of those who should be debarred from candidacy.

Recommendation 6. *We recommend that 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.*

Response:

21. **This is a matter for the UK Government**, but the Welsh Government’s initial view is that if it is agreed to replace s.16 of GOWA with a provision as described in our response to recommendation 5, that provision should include mention of these two offices, among others, as ones disqualifying the holders from candidacy (as well as providing for order-making powers to enable us to keep up to date the list of those who should be debarred from candidacy).

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.

Response:

22. This is a matter for the UK Government but the Welsh Government would support an amendment to debar the holders of these offices from electoral candidacy (and the offices could be mentioned alongside references to the Auditor General and the Public Services Ombudsman in a replacement for s.16 of GOWA as described in our response to recommendation 7)

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.*

Response: Reject

23. We have set out our general approach to Law Commission references in paragraph 13 above, but we have particular concerns about s.17(3) and are not persuaded that it should remain a part of a reformed statutory scheme about disqualification. The subsection enables the Assembly in effect to waive a breach of the disqualification rules if the ground of disqualification has been removed and “if it is proper so to resolve”. It is not clear to the Welsh Government why the Assembly should in future have such a power if, as proposed in recommendation 2, a successful candidate is enabled immediately after election to divest himself or herself of a disqualifying office and then proceed to assume Assembly responsibilities. Further, in reality the exercise of this power by the Assembly is very likely to be influenced by party political considerations, and there is the potential for reputational damage to the Assembly if the electorate’s choices can appear to be frustrated in such circumstances. The Welsh Government concludes therefore that for the Assembly to possess the power in s.17(3) is undesirable, and in any event it should not be necessary if recommendation 2 is given effect.

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.*

Response: Accept.

24. The Welsh Government anticipates that changes to the existing statutory disqualification regime, including any in relation to s.17(3), would be the subject of consultation, and would require the consent of the Assembly via a legislative consent motion.

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:*

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.

Response: Reject.

25. The Welsh Government is wholly in sympathy with the thinking behind recommendations 10 and 11, but as was mentioned in paragraph 8 above, the Order-making powers currently available to us do not reflect the important distinction the Committee makes, and it will not be possible to proceed for the 2016 Assembly elections as the Committee proposes. The order-making powers the Welsh Government would wish to take in a reformed statutory regime for disqualification would however enable us to proceed in the way proposed for 2021 and beyond.

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

Response: Reject.

26. Our current order-making powers do not enable us to disqualify persons from nomination for Assembly elections, they only permit us to disqualify persons from Assembly membership (but as explained above, we will want in the future to take order-making powers permitting the debarring of a limited range of individual office-holders, and members of a limited range of classes, from candidacy).
27. For the 2016 Assembly elections, insofar as the persons listed above are not already disqualified from membership by virtue of section 16 of the Government of Wales Act 2006, we will consult on the disqualification of these persons from membership through the Disqualification Order we intend to take forward under the current order-making powers. In practice, of course, if these persons are included in our Disqualification Order, then they would have to resign from their offices when they are nominated as candidates, assuming the Secretary of State's Order under section 13 of GOWA 2006 requires candidates for election to declare, to the best of their knowledge and belief, that they are not disqualified from membership.

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

Response: Accept in part

28. We agree it would normally be appropriate that "Persons appointed by Welsh Ministers" should be disqualified, but each case will need to be considered on its own merits, and the statutory language to give effect to this will need to be carefully considered. We similarly agree that Members of judicial tribunals should be disqualified. However, for the reasons set out in paragraphs 9-10 above, we are not currently persuaded that it would be appropriate to disqualify from Assembly membership the large numbers of public service staff described in recommendation 13. This is particularly the case under our current order-making powers, as we cannot specify when the disqualification will bite. However, we believe it may not be necessary to disqualify large numbers of public service staff even if we could provide that the disqualification only applies upon return as an Assembly Member, as we could safely assume that they would not be able to continue with their employment as a member of staff of a public body and discharge their responsibilities as an Assembly Member at the same time.

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.*

Response: Accept. Our intention is to begin consultation on a draft Order in Council early in 2015.

***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.*

Response: Accept in principle

29. The Welsh Government is fully persuaded of the need to have a new Order in Council in place as early as possible. However, following publication of the Committee's Report in the summer, the First Minister wrote to the Presiding Officer, noting some potential difficulties in precisely meeting the Committee's suggested timetable, and setting out a proposed way forward (including making provision for consultation as required by recommendation 14); that letter is at Annexe 1. The Chair, on behalf of the Committee, has agreed that the First Minister's proposal, which would lead to a draft Order in Council being submitted to the Privy Council in June or July 2015, is acceptable.

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

Response: Accept. We will pursue this with the Privy Council Office as necessary.

***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.*

Response: Accept in principle.

30. This recommendation is fully in accord with our general approach in relation to the staff of public bodies, that (with the possible exception of the staff of the Assembly Commission) they should be eligible to seek elected public office. We will give further consideration to how this recommendation should be communicated to, and given effect by, Welsh public bodies.

***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.*

Response: Accept.

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.*

Response:

31. **This is a matter for the Electoral Commission,** but as noted in paragraph 12 above, the Welsh Government intends to produce a comprehensive, non-statutory, list of all of the disqualifying provisions of which we are aware, from whatever source, and make it publicly available to parties and potential candidates; and we will work with the Electoral Commission as necessary on this.

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.*

Response: Agree in principle.

32. The Welsh Government accepts that this is an issue that merits careful consideration and public debate, but we are not persuaded of the need to commission an independent review of the matter to facilitate that. Early in 2015 we will be publishing, in connection with our programme of local government reform, a White Paper inviting views on a wide range of relevant issues, and it will be appropriate to include this issue as one on which to seek views. Any ensuing new statutory provision could then be included in the Local Government Bill to give effect to local authority mergers, which we intend to introduce shortly after the next Assembly election in 2016.

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.*

Response:

33. **This is a matter for the UK Government.** It is not however clear to the Welsh Government what has led the Committee to this conclusion. Membership of the House of Lords does not seem of itself to produce a potential conflict of interest with Assembly membership, either in terms of competing time commitments (attendance at the House of Lords is largely voluntary) or competing interests. Matters would however be likely to be different if members of the House were to gain their positions through election, and provisions equivalent to those contained in the current Wales Bill in respect of simultaneous membership of the Assembly and the House of Commons would then presumably be necessary.

Conclusion

34. The Welsh Government reiterates its appreciation for the Committee's work, and looks forward to hearing Members' views on these important issues.

October 2014