NATIONAL ASSEMBLY FOR WALES

CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE

Inquiry into Disqualification of Membership from the National Assembly for Wales

Evidence submitted to the Committee by Keith Bush QC

28 April 2014

A. Introduction

(a) The author of this submission is a Barrister (Gray's Inn 1977) and was, between 2007 and 2012, Chief Legal Adviser to the National Assembly for Wales. Prior to that he had practised at the Bar from 1977 to 1999 and from 2006 to 2007 and had been a legal adviser to the Welsh Government (1999 to 2006). This included a period as Legislative Counsel, when he was responsible for instructing Parliamentary Counsel on a number of UK Parliament Bills, including the Bill which became the Government of Wales Act 2006 ("GOWA 2006"). He is currently Honorary Director of the Legal Wales Foundation, an Honorary Research Fellow of Swansea University College of Law, Part-time Senior Lecturer in Legislation at that University and a Recorder who sits regularly in the County Court. He is a member of the Law Commission's Advisory Committee for Wales.

(b) As Chief Legal Adviser to the Assembly, the author was responsible for advising the Presiding Officer, Clerk, and Assembly Members generally, in relation to the situation that arose following the 2011 Assembly elections, when it emerged that two individuals who had been returned as Assembly Members at that election were, in fact, disqualified from being Assembly Members under section 16(1)(b) of GOWA 2006 because each continued to be a member of a body listed in Part 1 of the Schedule to the National Assembly for Wales (Disqualification) Order 2010 (SI 2010 No.2969) ("the 2010 Order").

(c) The submission will deal, in turn, with the specific questions raised by the Committee in its invitation to submit evidence.

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 Disqualfication 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 parallelled, 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.

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:

"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 exlusion 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 membeship 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 orginally 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.

1.0 What rules and principles should underpin the disqualifying posts and employments contained in a revised National Assembly for Wales (Disqualification) Order?

1.1 The intention of Parliament in enacting section 16(1)(b) of GOWA 2006 was clearly to ensure that the same principle was applied in relation to the Assembly as that applied to the House of Commons by section 1(1)(f) and Parts II and III of Schedule 1 to the 1975 Act, namely that membership of the Assembly should not be open to those who hold an office that conflicts with the functions of a parliamentarians because:

(a) the office carries with it a significant financial benefit emanating from the Welsh Government; or

(b) the office is one which is, itself, subject to scrutiny by the Assembly.

1.2 Quite apart from any question of the lawfulness of any departure from that principle (i.e. from the principle that Orders in Council under section 16(1)(b) of GOWA should be framed according to the principles on which Parts I and II of Schedule 1 to the 1975 Act are based), the principle itself is a fundamental constitutional principle which should be preserved. It would be contrary to the exceptionally high standards of probity that the Assembly has set itself since its inception for the rules for avoiding conflicts of interest between membership of the Assembly and the holding of other offices to be relaxed.

1.3 Orders in Council under section 16(1)(b) of GOWA 2006 should therefore 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.

1.4 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. The author of this submission does not feel it appropriate to express a view on whether this is the right cut-off point but it is clearly an issue to which the Committee will want to give careful attention.

2.0 What changes should be made, if any, to the existing list of disqualifying posts and employments?

2.1 The application of the criteria identified in paragraph 1.3 above is a matter for informed consideration and the author is not, in general, equipped to scrutinise the extent to which the offices listed in the 2010 Order conform to those criteria or whether other offices, not currently listed, do so.

2.2 The exception is that there are clearly a number of offices currently designated which do not conform with the criteria in question 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 affected by the exercise of executive functions of the Welsh Ministers.

2.3 Examples are:

The BBC Trust,

The British Transport Police Authority,

The Health and Safety Executive,

The Health Service Commissioner (i.e. for England) and

The Independent Case Examiner for the Department of Work and Pensions.

2.3 The above are examples. There are obviously many more that fall into the same category. It may be argued, of course, that the Assembly is closely, if indirectly, concerned with the activities of some of these offices or bodies, for example the BBC Trust (or, indeed Sianel Pedwar

Cymru) even if it has no direct mandate in relation to them. But that is equally true of many other bodies (e.g. the Crown Estate Commissioners, who figure in the disqualifications from being a Member of Parliament but not from being an Assembly Member). 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.

3.0 When should disqualifications take effect?

3.1 Currently, disqualification takes effect at the point at which a person is appointed to a disqualifying office (if that person is already an Assembly Member) or, if a person holding a disqualifying office seeks election as an Assembly Member, at the point at which that person, if successful, is "returned" i.e. formal notification is given by the returning officer to the Presiding Officer that the person has been elected (or, in fact "purportedly elected" because the return in question is void - see section 18(1) of GOWA 2006).

3.2 The matter is currently complicated by the fact that electoral law imposes a related, but separate, requirement relating to acceptance of nomination. 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 of the Assembly (see Rule 9(4)(c)(ii) of the Election Rules set out in Schedule 5 to the National Assembly for Wales (Representation of the People) Order 2007 (SI 2007 No. 236)).

3.3 This second requirement bites 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.

3.4 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.

3.5 In either case, the holder of a disqualifying office is required to divest himself or herself of that office before the outcome of the election is known. Since the purpose of disqualifications is to eliminate conflicts of interest on the part of those elected there seems to be no logical justification for, in effect, applying the disqualification to candidates rather than to those who have actually been elected.

3.6 There is ample logical justification for applying the disqualification after a candidate knows that he or she has been elected but before actually taking up office (i.e. before taking the oath or affirmation of allegiance). That is because any other rule requires a candidate to resign from an office before knowing whether or not he or she will be elected, with the result that those who do not wish to risk losing the office in question are deterred from standing for election or, alternatively, that office-holders are required to stand down from offices in which they are giving valuable public service only to find that they fail to be elected.

3.7 It is axiomatic, of course, that no-one can ever be *absolutely* certain of being elected, and, in practice, there are likely to be many candidates whose likelihood of being elected may be impossible even to estimate accurately in advance. This is particularly true of candidates for regional list seats, whose chances of being elected can depend entirely on their party's performance in individual constituencies in the region. Ironically, the prospect of a candidate on a party'r regional list being

elected is often inversely proportional to that party's performance generally. A stark illustration of this effect is the fact that the Leader of the Opposition in the Third Assembly failed to be elected to the Fourth Assembly as a direct result of his party's success in winning an extra constituency seat in the Mid and West Wales region.

3.8 The operation of the Additional Member system in Wales therefore adds to the unpredictability of a candidate's prospects of election and adds to the dilemma faced by the holder of a disqualifying office who is considering whether to offer himself or herself for election.

3.9 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. The precise point at which this would occur depends on the alternative model chosen (alternatives are discussed below).

3.10 The point in time at which a disqualification takes effect is governed not by the terms of the Orders in Council designating the disqualifying office but by section 18 of GOWA 2006 ("Effect of disqualification") and any change would therefore require an amendment to that Act. The material provision is that in section 18(1) and (2) (with also the need for a consequential amendment to section 19 ("Judicial proceedings as to disqualification"). The implications of any change in relation to section 17 ("Exceptions and relief from disqualification") is also worth considering (see below). The proposals set out below are only relevant to those who are elected whilst holding a disqualifying office (of any kind – there is no reason to limit any change to those designated by Order in Council). There is no case for interfering with the effect of a sitting Assembly Member accepting a disqualifying office, i.e that this automatically results in the seat becoming vacant (section 18(3)).

3.11 There are two obvious ways in which section 18(1) and (2) might be amended to eliminate the current difficulty.

3.12 One solution would be to develop the approach taken, in part, by the Police and Social Responsibility Act 2011 in relation to Police and Crime Commissioners. That Act distinguishes between factors which disqualify a candidate from being *elected* as Commissioner and those which disqualify a candidate from *holding office*. The latter currently applies only to membership of parliamentary bodies (including Parliament and the Assembly) (see section 67) but it enables an MP or AM to stand for election as Commissioner and then to resign from the conflicting office *if elected*. Under section 70 a candidate who is elected is required to make a declaration of acceptance of office (which cannot be made if the candidate remains *at that stage* a Member of one of the specified legislatures) and may not act in the office of Commissioner until he or she has done so. If no declaration is made within two months the office of Commissioner for the area becomes vacant and a further election must be held.

3.13 This approach could very easily be adapted to the procedures of the Assembly which have a parallel mechanism to the declaration of acceptance of office, namely the taking of the oath or affirmation of allegiance. This must take place within two months (subject to extension by the Assembly) failing which the seat becomes vacant. It would not therefore involve any radical change if sections 18(1) and (2) of GOWA 2006 were amended to prevent a person disqualified from membership of the Assembly taking the oath or affirmation. This would provide a candidate with a period of grace of up to two months (during which period that person could not act as an Assembly Member or be paid a salary) to divest himself or herself of disqualifying offices. In practice this could be done by an immediate resignation, following election, from any such office so that current arrangements would not in fact change materially other than that a

candidate would be able to defer resigning from a disqualifying office until immediately after election rather than before nomination.

3.14 A more radical approach would be for any person who holds a disqualifying office to be deemed to have resigned from that office, with immediate effect, if returned as an Assembly Member.

3.15 The advantage of the former approach is that it involves the minimum change from current arrangements, and builds on the precedent set by the Police and Social Responsibility Act 2011. It would however continue to place the onus for carefully checking the current disqualifications before taking the oath or affirmation and would not eliminate altogether the potential for mistakes and misunderstandings. That potential would be very much reduced, of course. The fact of having been elected would concentrate the mind of the person in question on the issue of disqualification and in cases of doubt advice could be sought.

3.16 The latter, novel, approach would eliminate any potential for a disqualification being overlooked, but might give rise to uncertainties on the part of bodies of which elected candidates were members, since they would not necessarily receive any communication from those persons divesting themselves of membership.

3.17 Whichever solution were adopted would also require an amendment to the election rules so as to remove the requirement for candidates, when accepting nomination, to declare to that they are not (to the best of their knowledge and belief) disqualified *at that time.* There are, of course, some disqualifications under GOWA 2006 which are intended to prevent a person from being a *candidate*, e.g. the prohibition on standing in more than one constituency or region, and the need for a candidate to declare that he or she is not disqualified from *standing for election* in the particular constituency or region on that ground would need to be retained. But it is unclear, even under the law as it

currently stands, why it was ever thought necessary for the election rules to impose, in effect, a more stringent test (although modified by the "best of my knowledge and belief" qualification) to that imposed by GOWA 2006 itself.

4.0 Should Disqualification Orders be made by Privy Council bilingually?

4.1 Orders in Council under section 16(1)(b) of GOWA 2006 are Welsh legislation, in that they require approval by the Assembly alone and are made by Her Majesty on the advice of those Privy Councillors who advise her in relation to devolved matters, i.e. the First Minister. They are not subject to any scrutiny or approval by Parliament but only by the Assembly, whose official languages are English and Welsh (see section 35 of GOWA 2006, as amended).

4.2 Although Orders in Council are not (since they are formally made by Her Majesty) subject to any statutory requirement that they should be made bilingually (nor is there any legal reason why they should not). But the principle that the two language should be treated equally, which is fundamental to all aspects of devolved government in Wales suggests that such Orders in Council should be made in both languages.

5.0 What other matters should the Committee consider in considering this issue?

5.1 If the first suggestion made in answer to Question 4 were to be implemented (so that the point at which disqualifications based on disqalifying offices "bite" is deferred until after election) there would still be some potential (albeit a much reduced potential) for mistakes and misunderstandings. Would this justify the retention of the mechanism under section 17(3) of GOWA 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?

5.2 The existence of the mechanism implies that there may be cases where genuine and excusable mistakes are made and that it is appropriate, in such cases for the person who has made the mistake to be relieved of the normal consequences of such a mistake.

5.3 The existence of such a mechanism appears to reflect the fact that, prior to the coming into force of the House of Commons Disqualification Act 1957 there were, from time to time, examples of Members of Parliament who had inadvertently fallen foul of the notoriously imprecise "office of profit under the Crown" disqualification. In such cases Parliament was prepared to relieve the individual, in cases of understandable misunderstanding, of the consequences, by passing an "Indemnity" Act (e.g. the Arthur Jenkins Indemnity Act 1941) reinstating the MP.

5.4 The 1957 Act retained, in part, the general "office of profit under the Crown" disqualification and, understandably, provided an alternative mechanism to individual Indemnity Acts as a means of dealing with the continuing risk of inadverent and excusable disqualifications. This mechanism was carried over into the House of Commons Disqualification Act 1975 (section 6(2)) and hence into the devolution statutes, despite the fact that the 1975 Act (and section 16 of GOWA 2006 and the corresponding Scottish and Northern Ireland provisions) are now based entirely on exhaustive lists of designated offices.

5.5 The power in section 17 of GOWA 2006 was used by the Assembly to relieve one of the disqualified persons who had been purportedly elected from the consequences of the disqualification. The revelation that the Assembly had the power to take such a step was clearly puzzling and troubling to many inside and outside the Assembly, particularly in view of the fact that the corresponding power had only

been used by the House of Commons on one occasion since 1975. It is certainly an unusual state of affairs that a legislative body should have the power to disapply the law in relation to a particular individual and the uniqueness of the procedure is underlined by the fact that the decision is entrusted not to the courts but to other legislators who are therefore required to sit in judgement on one of their own number and (if they are to avoid the possibility of challenge in the courts) to seek to do so without being influenced (either way) by party considerations.

5.6 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 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.

5.7 Finally, 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.

5.8 The 2010 Order added disqualifications which had not applied to the previous election. This was of direct relevance to one of the

disqualified candidates subsequently elected. Since candidates for election are usually selected much earlier than the last few months before the election this gave rise to the obvious risk that plans might be made on the basis of the previous order and that the fact that requirements had become more stringent might be missed (as was, it appears, the case in relation to that candidate).

5.9 A very simple step, which would reduce the risk of new disqualifications being overlooked, would be to ensure that any major revision of the relevant Order in Council take place earlier – for example so that the Order is made at least a year before the relevant election. This would not be so early that the Welsh Government, when drafting the proposed Order, would be unable to foresee the creation of further disqualifying offices prior to the election and incorporate them into the Order.

Summary of Conclusions

(a) Orders in Council under section 16(1)(b) of GOWA 2006 should continue to be drafted so as to disqualify from membership of the Assembly those who hold any public office which:

(i) carries with it a significant financial benefit to the person in question which emanates from the Welsh Government; or

(ii) is, itself, subject to scrutiny by the Assembly;

(b) The question of what amounts to a significant financial benefit (the current cut-off appears to be £10,000 per annum) is a matter of judgement to which the Committee will need to give careful consideration;

(c) Disqualifications under Orders in Council should be limited to offices whose functions relate directly to devolved matters;

(d) The law should be changed so that disqualifications "bite" after, rather than before, a person is elected, but before that person seeks to take

up the office of Assembly Member, thereby enabling candidates to know whether or not they have been elected prior to having to relinquish a disqualifying office;

(e) 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 are elected automatically cease to hold disqualifying offices. Either of these approaches would require primary legislation;

(f) 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;

(g) Orders in Council under section 16(1)(b) are a form of Welsh legislation and should be made bilingually;

(h) The power of the Assembly, under section 17, to relieve individuals of the consequences of disqualification should, if the point in time at which disqualifications bite is deferred until after election, be abolished;

(i) Orders in Council under section 16(1)(b) should be made at least twelve months before the date of the relevant Assembly general election.

Keith Bush QC