

Explanatory Memorandum to the Senedd Cymru (Disqualification) Order 2020

This Explanatory Memorandum has been prepared by the Office of the First Minister and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister/Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Senedd Cymru (Disqualification) Order 2020.

Mark Drakeford MS
First Minister of Wales
29 September 2020

PART 1

Description

1. Section 16 of the Government of Wales Act 2006 allows an Order in Council to designate particular offices so that, if a person holds one of those offices, they are disqualified from being a Member of the Senedd (but not from being a candidate to be a Member of the Senedd). While the Welsh Government believes that disqualification from membership of the Senedd should be restricted to as few citizens as possible, we recognise that political activity is inappropriate for the holders of certain offices. In particular, there is a need to protect certain public offices from political bias, and to ensure that the independence of the electoral process is upheld.

Matters of special interest to the Legislation, Justice and Constitution Committee

2. In 2014 the Constitutional and Legislative Affairs (CLA) Committee carried out an inquiry into the rules pertaining to disqualification from membership of the Senedd¹. This included 21 recommendations and proposed an overhaul of the legislative framework surrounding disqualifications from membership of the Senedd. The Welsh Government agreed with the overall thrust of the CLA Committee's report².
3. In its response to the CLA Committee's report the Welsh Government made a commitment to consult on the National Assembly for Wales (Disqualification) Order 2015 and by consulting on the draft Senedd Cymru (Disqualification) Order 2020 we continued to honour that commitment.
4. The consultation for the draft Senedd Cymru (Disqualification) Order 2020 was carried out between 22 June 2020 and 1 September 2020, and the draft Order takes account of the outcome of that consultation.
5. The criteria for determining which offices were to be included in the National Assembly for Wales (Disqualification) Order 2015 were based on the principles set out in the CLA Committee's report with some additional considerations by the Welsh Government. This same criteria has continued to be used for the draft Senedd Cymru (Disqualification) Order 2020. This criteria was published in the Welsh Government's consultation on the draft Senedd Cymru (Disqualification) Order 2020.

¹[Constitutional and Legislative Affairs Committee Inquiry into the Disqualification from Membership of the National Assembly for Wales July 2014](#)

²[Response of the Welsh Government to the Constitutional and Legislative Affairs Committee, Inquiry into the Disqualification from Membership of the National Assembly for Wales](#)

6. General principles, as set out in recommendation 1 of the CLA Committee's report:

Principle 1: Promoting democratic participation and the right to stand as a member of the Senedd are paramount.

Principle 2: Disqualification from membership of Senedd Cymru 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,
- ii. including those whose responsibilities include the electoral process itself;
- iii. those who hold any public office which carries with it a significant financial benefit from the Welsh Government;
- iv. those who hold public office and in that role provide formal advice to the Welsh Government;
- v. those who hold any public office which is subject to scrutiny by the Senedd.

Principle 5: Where disqualifications are necessary they must be:

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

- The offices described in recommendation 12 should be disqualified, and should be included in the Disqualification Order unless they are already disqualified under section 16 of GOWA 2006.
- Members of judicial tribunals should be disqualified.
- Normally, persons appointed by Welsh Ministers should be disqualified, but there may be instances where such persons should not be disqualified (in which case consideration of the five principles referred to above will be important).
- Public staff as described in recommendation 13 (e.g. staff of National Park, Police, Fire and Rescue Authorities, staff of Welsh Government Sponsored Bodies) should not be disqualified – it can be safely assumed such staff would give up their employment if elected, as continuing with employment at the same time as discharging Senedd member responsibilities would make impossible demands on the individual.

Legislative background

7. Section 16 of the Government of Wales Act 2006 lists persons who are disqualified from being a Member of the Senedd. In addition to those offices listed in section 16, the Government of Wales Act 2006 provides for an Order in Council (“Disqualification Order”) to designate further offices, the holders of which would be disqualified from becoming Members of the Senedd. Such an Order may only be made by Her Majesty in Council, if a draft has been laid before, and approved by, a resolution of the Senedd.

The Senedd and Elections (Wales) Act 2020

8. Other recommendations from the CLA Committee’s report of 2014 were that the Government of Wales Act 2006 be amended to provide that disqualification from a particular public office should in relation to certain posts take effect on taking the oath or affirmation of allegiance as a Member of the Senedd. Likewise that 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 be amended to reflect this.
9. In relation to Senedd elections at which the poll is held on or after 5 April 2021³, Part 4 of the Senedd and Elections (Wales) Act 2020 amends section 16 of the 2006 Act to create a distinction between disqualification both from being a Member of the Senedd and from being a candidate for election to the Senedd, and disqualification from membership only.
10. Section 16 has also been amended to provide that persons holding an office specified in an Order in Council are not disqualified if the person resigns the office before taking the oath (or making the corresponding affirmation) as a Member of the Senedd.
11. By contrast, new provision has been inserted into section 16 of the 2006 Act to provide that a person is disqualified from being a Member, and from being a candidate to be a Member of the Senedd, if they fall within any of the categories of person specified in Part 1 of new Schedule 1A to the 2006 Act, or hold any of the offices specified in Part 2 of Schedule 1A (inserted by section 29(7) of the Senedd and Elections (Wales) Act 2020). If a person who is disqualified from being a candidate for membership of the Senedd is nominated as a candidate at an election, the nomination is void⁴.
12. The draft Senedd Cymru (Disqualification) Order 2020 has been drafted to reflect these changes and should be read alongside these. So, where an office is now listed in the new Schedule 1A of the Government of Wales Act 2006 (as introduced by Schedule 3 to the Senedd and Elections (Wales) Act 2020), or is already disqualified from membership of the Senedd by section

³ See section 42 (coming into force) of the Senedd and Elections (Wales) Act 2020.

⁴ See section 18A of the Government of Wales Act 2006 as amended by section 34 of the Senedd and Elections (Wales) Act 2020.

16 of the Government of Wales Act 2006, these offices have not been included in the new draft 2020 Order.

13. Ahead of 5 April 2021 changes will be made to the National Assembly for Wales (Representation of the People Order) 2007 to amend the requirement for people to declare that they do not hold a disqualifying office before accepting nomination as a candidate.

Purpose and intended effect of the legislation

14. Prior to each Senedd general election an Order in Council under section 16 of GOWA 2006 is made, that specifies offices whose holders are disqualified from membership of the Senedd.
15. At present, the National Assembly for Wales (Disqualification) Order 2015 is still in force, therefore persons holding any of the offices specified in the 2015 Order are disqualified from membership of the Senedd.
16. The intended effect of this draft Order, therefore, is to revoke the 2015 Order, and set out an updated list of disqualifying offices before the next Senedd general election. The Order will take effect at the first Senedd election on or after 5 April 2021. It will sit alongside the disqualifications set out in section 16 of and Schedule 1A to the Government of Wales Act 2006, as amended by the Senedd and Elections (Wales) Act 2020 and any other specific disqualifications provided for in other legislation to produce the full list of disqualifying offices. The Explanatory Note to the Order makes clear that it should be read alongside section 16 of, and Schedule 1A to, the Government of Wales Act 2006.
17. Its purpose is to disqualify the holders of certain offices from membership of the Senedd (but not from being a candidate to be a Member of the Senedd) where this is necessary to protect the independence of the electoral process, prevent conflicts of interest, or to protect particular public offices from political bias.

Consultation

18. On 22 June 2020, the Welsh Government issued a consultation on the draft Senedd Cymru (Disqualification) Order 2020. This consultation sought views on which offices should be included in the new Order which will revoke and replace the current Order, the National Assembly for Wales (Disqualification) Order 2015.
19. The consultation closed on 1 September 2020. As well as being publicly available on the Welsh Government website, offices that were listed for disqualification under the draft Order were contacted directly, to ensure they had the opportunity to give their views on whether they deemed their inclusion in the Order appropriate, and whether there were any other offices that they considered should be included.

20. Eleven substantive responses were received to the consultation. Most of these responses were from bodies who confirmed they were content with the proposed disqualification of the offices listed in the draft Order which were relevant to them. A summary of the changes to the draft Order post consultation are as follows:
21. The Chief Executive of the Local Democracy and Boundary Commission for Wales is currently a joint post with the Boundary Commission for Wales. However, this arrangement may not always be in place, and therefore we have included the Secretary of the Boundary Commission for Wales in the draft Order, as the Secretary would be the head of the Commission if the Boundary Commission for Wales became a standalone organisation with its own Secretariat.
22. After considering the response requesting that consideration should be given to the inclusion of the Information Commissioner the Welsh Government has concluded that as there is a need for the Information Commissioner to be able to make objective and impartial judgements about the conduct of the Welsh Government and Welsh Ministers in respect of data and information the Information Commissioner will be added to the draft Order.
23. It had been brought to our attention that the Commissioners and Non-Executive Board Members of the Law Commission should be included in the draft Order. The Wales Act 2014 allowed Welsh Ministers to refer projects to the Law Commission. The same Act also obliges the Welsh Ministers to report on Law Commission proposals in Welsh devolved areas, and required a Protocol to be established between the Law Commission and the Welsh Ministers.
24. Commissioners of the Judicial Appointments Commission (JAC) were also added to the draft Order as the JAC conducts appointments to devolved tribunals on behalf of Welsh Ministers by means of an agreement under Section 83 of the Government of Wales Act 2006.
25. The Judicial Appointments and Conduct Ombudsman will also be included in the draft Order as the Ombudsman can be involved in disciplinary cases for judges and members of the Welsh Tribunals.
26. These additions were consistent with Principle 4 of the criteria adopted by the Welsh Government to decide which offices should be included.
27. All the organisations outlined above have been emailed directly to inform them that the offices relevant to their organisation will be included in the draft Order.
28. It was also brought to our attention that the UK Commission for Employment and Skills closed in March 2017 and as such has been removed from the draft Order.

29. An analysis of the consultation responses is available as part of the Welsh Government's response to the consultation, published on the Welsh Government website:

<https://gov.wales/sites/default/files/consultations/2020-09/the-draft-senedd-cymru-disqualification-order-2020-responses-document.pdf>

Regulatory Impact Assessment (RIA)

30. The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to this Order. As a result, it was not considered necessary to carry out a regulatory impact assessment as to the likely costs and benefits of complying with the Order as the draft Senedd Cymru (Disqualification) Order falls within the exemption contained within the Code where routine technical amendments or factual amendments are required to update regulations.

31. A Welsh Government Integrated Impact Assessment has been completed for the draft Senedd Cymru (Disqualification) Order 2020. The changes brought about by the draft Order (relative to the 2015 Order) are technical in nature and specific in their application to the people who occupy the designated offices. Throughout this process no impacts have been identified on the people, culture and Welsh language, economy and environment of Wales as a result of the draft Senedd Cymru (Disqualification) Order 2020.

32. This Order has no impact on the statutory duties of Welsh Ministers relating to equality of opportunity (section 77 of GOWA 2006), the Welsh language (section 78 GOWA), or sustainable development (section 79 GOWA 2006), and will have no impact on the local government, voluntary sector or business schemes under section 73, 74 and 75 of GOWA 2006 respectively.

33. Section 1 and Section 7 of the Welsh Government's Integrated Impact Assessment for the draft Senedd Cymru (Disqualification) Order 2020 are available on the Welsh Government website:

<https://gov.wales/sites/default/files/consultations/2020-09/integrated-impact-assessment-summary-for-the-draft-senedd-cymru-disqualification-order-2020.pdf>