

## NATIONAL ASSEMBLY FOR WALES

### RE: JOHN DIXON and ALED ROBERTS

#### ADVICE

#### Introduction

1. This document advises the Presiding Officer on the legal position relating to two motions, seeking resolutions under section 17(3) of the Government of Wales Act 2006 (“the Act”), which were tabled on 25 May 2011 by Peter Black AM, and which are likely to be considered by the Assembly on Wednesday 6 July.
2. It should be read in conjunction with the report, dated 30 June 2011, of an investigation carried out by Gerard Elias QC into the circumstances surrounding the nomination and purported return as Assembly Members, at the general election held on 5 May, of John Dixon and Aled Roberts when each was disqualified from being a Member by reason of membership of, respectively, the Care Council for Wales and the Valuation Tribunal for Wales. **(But see also the Addendum to this Advice, which refers to an issue that has arisen since Mr. Elias’s report was completed.)**

#### Section 17(3) of the Act

3. Section 17(3) of the Act provides that:

“The Assembly may resolve that the disqualification of any person who was, or is alleged to have been, disqualified from being an Assembly member on a ground within section 16(1) or (4) is to be disregarded if it appears to the Assembly-

  - (a) that the ground has been removed, and
  - (b) that it is proper so to resolve.”
4. Section 17(4) provides that a resolution under section 17(3) does not affect any disqualification imposed by the courts in proceedings under Part 3 of the Representation of the People Act 1983 (or an Order made under that Act) or under section 19 of the Government of Wales Act 2006 itself (or any disqualification that would flow from proceedings under the 1983 Act such as that which would arise if a candidate were convicted of a corrupt practice). No such proceedings have been brought and section 17(4) does not, therefore present any bar to consideration of these motions by the Assembly.

5. The power under section 17(3) is not unique to the Assembly. The House of Commons has the same power under section 6(2) of the House of Commons Disqualification Act 1975 (which continued an identical power in the House of Commons Disqualification Act 1957). Both the Scottish Parliament and the Northern Ireland Assembly also have equivalent powers (Scotland Act 1998 section 16(4) and Northern Ireland Act 1998 section 37(2)).
6. The effect of a resolution under any of these provisions is that the disqualification is disregarded and that the return of the person who was disqualified is retrospectively validated. In all cases it is one of the conditions for exercise of the power that the ground for disqualification has been removed (i.e. that the person in question has, by the time the motion is considered, resigned from the body which gave rise to the disqualification).

### **Consequences of an unlawful exercise of the power to disregard a disqualification**

7. The Assembly's decisions on these resolutions will be "quasi-judicial" in nature. That is, they are subject to review by the courts and can be overturned if they are not taken in accordance with the correct legal principles. The purpose of this advice is to set out what those principles are, so as to ensure that whatever decisions the Assembly takes will, if necessary, bear scrutiny in the courts.
8. What, however, would be the position if the Assembly were to resolve to disregard the disqualification of one or both of the individuals, but that decision were to be challenged successfully in the courts? The effect would be that the original disqualification would stand. What effect would that have on the validity of Assembly proceedings? This is specifically covered by section 18(8) of the Act, which provides that the validity of any Assembly provisions is not affected by the disqualification of any person from being an Assembly Member.
9. If, therefore, the Assembly decides that it is proper to disregard the disqualification of one or both of the individuals in question, that decision cannot affect the validity of subsequent Assembly proceedings.

### **The validity of the original nomination**

10. I am aware that some Members have posed the question of whether the passing by the Assembly of a resolution under section 17(3) would

be ineffective on the ground that the original nomination of the individual in question was unlawful.

11. As explained in paragraph 4 above, the legal machinery for challenging the result of an election by election petition is not affected by a resolution of the Assembly under section 17(3). The time for lodging an election petition (21 days from the date of the return) has now elapsed.
12. It is clear, however, that there is no evidence that either of the two individuals was not validly nominated. That is because a valid nomination only requires a candidate to declare that he or she is not disqualified “to the best of my knowledge and belief”. The issue of whether either of the candidates *knew or believed* that he was disqualified has now been investigated, both by the police and by Mr Elias, and in both cases no evidence has been found to suggest that they did.
13. For the purpose of considering the motions under section 17(3) of the Act, the Assembly must therefore proceed on the basis that both individuals were validly nominated.

#### **Legal requirements for a valid resolution under section 17(3)**

14. A resolution under section 17(3) can only be passed lawfully if:
  - a) the ground of disqualification has been removed (section 17(3)(a));  
and
  - b) it appears to the Assembly that it is “proper” for the power to be exercised (section 17(3)(b)).
15. Both individuals have now resigned from the body which gave rise to the disqualification as is recorded in Mr Elias’s report. The first of these requirements is therefore satisfied in both cases.

#### **Under what circumstances would it be “proper” for the Assembly to resolve to disregard a disqualification?**

16. The Act itself gives no guidance as to what factors are relevant to such a judgement and the question has never been subject to testing in the courts. The history of the legislation on which the power is based does, however, establish the principles on which decisions must be based. General legal principles also establish that certain considerations are irrelevant.

## **History of the power**

17. Prior to the coming into force of the House of Commons Disqualification Act 1957 the only mechanism for disregarding the disqualification of a person from being an MP, in a particular case, was a special Act of Parliament. Over the years, Parliament did, from time to time, pass such Acts in order to lift disqualifications to which it was found that MPs had become subject because they held an “office of profit under the Crown”. What amounted to an “office of profit under the Crown” was sometimes unclear and it was possible for an individual to find that he or she was disqualified, or might be disqualified, without previously suspecting that this was the case.
18. The modern system of disqualifications (under what is now the House of Commons Disqualification Act 1975 and the corresponding provisions in the three devolution statutes) is based on listing specific disqualifying offices (instead of the general concept of “office of profit under the Crown”) and also provides a mechanism under which a disqualification can be disregarded by simple resolution of the legislature in question, where it appears to that legislature that it is “proper” to do so.
19. The only precedent for the use of this power anywhere in the UK is that of Dr Michael Winstanley, an MP who was a general medical practitioner who, in 1974, was found to have, for many years, held surgeries at a Royal Ordnance Factory for which he was paid by the Ministry of Defence. As a result it was ruled that he held “an office of profit under the Crown” and was therefore disqualified from membership of the House of Commons. Dr Winstanley’s disqualification was lifted and he was reinstated as an MP by a resolution of the House of Commons under section 6 of the House of Commons Disqualification Act 1957 (i.e. the corresponding provision to section 17(3) of the Government of Wales Act 2006).

## **The purpose of the power**

20. From the history of these statutory provisions it is clear, therefore, that they are intended to enable the relevant legislature, in a particular case, to relieve individuals of the consequences of a disqualification where there are particular circumstances which justify mitigating what would normally be the consequences of a disqualification, for example uncertainty as to whether an obscure ground of disqualification applies or reasonable reliance on apparently authoritative but

misleading information as to the existence of a relevant disqualification.

21. Whether, in each of these cases, there are circumstances which *could* justify disregarding the disqualification and, if so, whether those circumstances should be regarded as sufficiently weighty to make it proper to disregard the disqualification, are matters on which Assembly Members will have to make their own individual judgements based on a fair consideration of the facts, in the light of relevant considerations.

### **Fairness of the process**

22. Every effort has been made to ensure that in taking their decisions Assembly Members have clear, comprehensive, objective statements of the relevant facts. This has been done by asking Gerard Elias QC to undertake an *ad hoc* investigation (bearing in mind the fact that the individuals in question are not, as things stand, Assembly Members and are not therefore under his jurisdiction as the Assembly's statutory Commissioner for Standards). Both individuals have agreed to co-operate with the investigation. The legal requirement for consideration of the motions to be based on a fair process means that Assembly Members must base their decision on the facts as established by Mr Elias.
23. Although Assembly Members may, given the publicity that these cases has attracted, have formed provisional views on how to approach the motions under consideration, they must now be willing to consider the matter afresh, in the light of Mr Elias's report, and be prepared, having done so, to adopt a different approach if that is what their conscience dictates.
24. Each Member must decide, as an individual, how to vote on the motions. That does not mean that they may not take into consideration the views of others, insofar as they are relevant. But their final decision must be their own.
25. The case of each individual must be considered separately.

### **Relevant considerations**

26. **Members will need to consider, in each case, whether the conduct of the individual in question, as established by Mr Elias, provides sufficient justification to relieve him of the normal consequences of the disqualification.**

27. In the case of Aled Roberts there is an additional consideration which needs to be taken into account, in view of Mr Elias's finding that he relied on an incorrect statement on the Welsh language pages of the Electoral Commission's web-site that disqualifications were still defined by the National Assembly for Wales (Disqualification) Order 2006. Had he chosen to consult the English language pages he would have been alerted to the fact that the 2006 Order had been superseded by the 2010 Order. The clear inference of Mr Elias's report is therefore that the fact that he was unaware of the disqualification, and, as a result, failed to resign from the Valuation Tribunal for Wales, was because he chose to use the Welsh language rather than the English language when consulting the Electoral Commission's website.
28. Section 35 of the Act requires the Assembly, *in the conduct of proceedings*, to treat the English and Welsh languages on a basis of equality. Although not directly applicable (because it relates to the *conduct* of proceedings rather than the outcome of such proceedings) this principle has been applied more generally by the Assembly, for example by incorporating the principle of equality of treatment in section 1 of the Welsh Language Measure 2011. Members will therefore need to bear in mind, when considering the case of Aled Roberts, the principle that he should not be disadvantaged by reason of having chosen to use the Welsh language rather than the English language.

### **Irrelevant considerations**

29. Disagreement with the way in which the current system of disqualifications operates should not be a factor. The power given to the Assembly under section 17(3) is intended to enable the consequences of that system to be mitigated in exceptional cases, not to call the system itself, established through legislation that the Assembly has itself approved, into question.
30. Party affiliations should not be allowed to influence decisions as to whether the disqualifications should be set aside.

### **Summary of conclusions**

31. My conclusions may be summarised as follows:
- i) the Assembly has the power to resolve, under section 17(3) of the Government of Wales Act 2006, to disregard, in individual

cases, disqualifications under section 16 of the Act and the National Assembly for Wales (Disqualification) Order 2010 (paragraphs 3-6 above);

- ii) the Assembly's decisions on the motions seeking such resolutions in relation to Aled Roberts and John Dixon are quasi-judicial in nature and therefore subject to being challenged in the courts if not taken in accordance with correct legal principles (paragraph 7);
- iii) in the event that a decision to disregard a disqualification were to be overturned in the courts that would not affect the validity of Assembly proceedings in which the individual in question had participated (paragraphs 8 and 9);
- iv) the findings of the police and of Mr Elias mean that there are no grounds for calling into question the validity of the nominations of the two individuals in question – the sole question for decision by the Assembly is whether, in each case, it is proper to disregard the disqualification which prevented the person in question from being validly *returned* (i.e. elected) (paragraphs 10–13);
- v) each motion must be considered separately, on the basis of the circumstances relating to the individual in question (paragraph 25);
- vi) the fairness of the process requires the Assembly's decision to be based on the relevant facts as established by Mr Elias (paragraph 22);
- vii) Members will need to exercise their own independent objective judgement in relation to each motion (paragraphs 23 and 24);
- viii) Members should not base their decisions on criticisms of the way in which the system of disqualifications currently operates, or on party political considerations (paragraphs 29 and 30);
- ix) The question that Members must ask themselves, in each case, is whether the conduct of the individual in question, as established by Mr Elias, provides sufficient justification to relieve him of the normal consequences of the disqualification (paragraph 26); and

- x) In the case of Aled Roberts, Members will, in view of the findings of Mr Elias, need to bear in mind the principle that he should not be disadvantaged by reason of having chosen to use the Welsh language rather than the English language (paragraphs 27 and 28).

**Keith Bush**  
**Chief Legal Adviser**  
**National Assembly for Wales**

**30 June 2011**



## ADDENDUM

1. The second bullet of paragraph 14 of the report of Gerard Elias QC sets out the evidence of Aled Roberts that:

“At his Party Conference on 4-6 March 2011, he attended a PowerPoint presentation by the Electoral Commission which provided a further reference, in a slide under the Heading “Disqualifications”, to the 2006 Order – an order which he knew did not disqualify him.”
2. Mr. Elias commented on this evidence as follows:

*“The Electoral Commission confirms that such a PowerPoint presentation was made with the slide as described (Appendix 1).”*
3. On being made aware of the comment in question, the Electoral Commission have challenged its accuracy, and that of the evidence of Aled Roberts to which it relates, since they assert that although a PowerPoint presentation was made by the Electoral Commission at the Conference in question it did not refer to disqualifications.
4. They do however, accept that a PowerPoint presentation, incorporating the slide shown at Appendix 1 of Mr. Elias’s report was prepared by them, but say that it was not shown at the Conference but was circulated to returning officers to use with candidates in their localities.
5. In the time available it has not been possible to investigate these discrepancies further. Mr. Elias has told me, however, that if it is the case that Aled Roberts’s evidence relating to the Electoral Commission presentation at the Liberal Democrat Conference is incorrect, that would not affect his conclusion that Aled Roberts did everything he could have reasonably been expected to do in ensuring that he was not a disqualified person, as set out in paragraph 16 of his report.

**Keith Bush**  
**Chief Legal Adviser**  
**National Assembly for Wales**  
**5 July 2011**