Policy Response to: House of Commons Welsh Affairs Committee on the Draft Wales Bill

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Written Evidence submitted to the House of Commons Welsh Affairs Committee on the Draft Wales Bill, by Professor Roger Scully[1]

Introduction

While the Draft Wales Bill (2013) covers many important matters, here I will concentrate on the proposed reform to National Assembly for Wales (NAW) elections regarding 'dual candidacy'. I will address two areas: the substance of the proposed reform, and the process of reform.

Dual Candidacy: Substantive Considerations

The Government of Wales Act 2006 (GOWA) made a change to the electoral system used for NAW elections, introducing a provision to prevent individuals from standing as candidates both in a constituency and for a regional party list. The justification offered for this change in the Government White Paper preceding the 2006 Act was that "voters are confused and concerned by the way the Assembly's electoral system permits candidates who lose in a first past the post constituency ballot still to become Assembly Members representing the same area through the regional list system and competing with Assembly Members who defeated them" (*Better Governance for Wales*, 2005, p.3). The White paper later also argued that "For losing candidates to become Assembly Members regardless of their constituency election results both devalues the integrity of the electoral system in the eyes of the public and acts as a disincentive to vote in constituency elections" (*Better Governance for Wales*, 2005, pp.28-29).

In evidence given to this committee during consideration of the 2006 Act, I argued against the ban on dual candidacy. I believe that the main arguments I developed then remain intact:

- No substantial independent evidence was produced at the time of the GOWA (or, to my knowledge, has been produced subsequently) of significant public concern about dual candidacy. The claims made about dual candidacy 'devaluing the integrity of the electoral system', and 'acting as a disincentive to vote' therefore remain wholly unsupported by solid evidence.

- It is impossible to take seriously the idea, suggested at the time by some favouring the ban, that dual candidacy in Wales is in any sense an 'anomaly'. In countries and regions that use the Additional Member System, dual candidacy is very much the norm. AMS systems come in two forms: Mixed Member Proportional (MMP) where (as in Wales) the allocation of list seats takes into account the success of parties in the constituency races; and Mixed Member Majoritarian (MMM), where the list allocations are conducted separately.
    - Among MMP systems used for national and regional elections around the world, Wales is the **only** one to ban dual candidacy.[2] Although bans on dual candidacy

[1] I thank Prof David Farrell (University College Dublin), Dr Thomas Lundberg (University of Glasgow), Prof Louis Massicote (Laval University, Quebec) and Dr Alan Renwick (University of Reading) for assistance and advice in drafting this evidence.

have been considered in recent years in both New Brunswick and Prince Edward Island in Canada, these were in the context of broader proposed electoral reforms that were not ultimately implemented. A ban was also considered in New Zealand, as I discuss below, but decisively rejected. Dual candidacy *is* permitted in Bolivia, Germany (federal elections, plus state elections in Baden-Wurttenburg, Berlin, Brandenburg, Bremen, Hesse, Lower Saxony, Mecklenburg, North-Rhine Westphalia, Rhineland-Palatinate, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia),[3] Hungary, Lesotho, and New Zealand. Within the UK, dual candidacy is permitted in elections to the Scottish Parliament and the Greater London Assembly. MMP was also operated in Italy between 1993 and 2005, and until recently in Venezuela, without a ban on dual candidacy.[4]
    - Outside Wales, it is only among MMM systems that I have been able to locate examples where dual candidacy has been banned – in South Korea, Taiwan, Thailand, Ukraine. These are, we might wish to note, not all places that are exactly exemplars of good democratic practice.[5] There are several other MMM systems that do not ban dual candidacy (including Lithuania, Mexico, Japan and – since 2010 – Venezuela).

- It is also very difficult to see any consistency of principle underpinning the GOWA dual candidacy ban, given that:
    - Dual candidacy was not banned in the 1998 Acts when the AMS system was introduced for Scotland and Wales (even though it was well known at the time that dual candidacy was widespread practice in places that used AMS). If there were principled objections to dual candidacy, this would have been the obvious point at which to ban it.
    - The Welsh Labour party used dual candidacy both in the inaugural 1999 NAW election (when both Rhodri Morgan and Sue Essex stood as constituency and list candidates) and in 2003 (when *all* of Labour's constituency candidates were also placed on the regional lists). It is difficult to see how that practice could be legitimate in 1999 and 2003, but somehow become fundamentally objectionable just a few years later.
    - While in government until 2010, the Labour party did not seek to introduce ban on dual candidacy for either Scotland or for elections to the Greater London Assembly – again, this is puzzling if dual candidacy is fundamentally objectionable.

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[2] See evidence by Prof David Farrell of University College Dublin to the Irish Convention on the Constitution, in *Fourth Report of the Convention on the Constitution*, August 2013 (https://www.constitution.ie/AttachmentDownload.ashx?mid=fdf70670-030f-e311-a203-005056a32ee4).

[3] Bavaria offers an interesting variant of MMP: it uses open-list MMP, where Bavarians vote for individual party list candidates, not closed party lists. It does not allow for the dual listing of candidate names *in the particular single-member constituency in which a candidate stands*, because the constituency candidates' names would be on the ballot papers twice. These candidates, however, *must* be dual candidates and are on their parties' ballot paper lists everywhere else in the electoral region.

[4] It should be pointed out, for the sake of accuracy that Hungary's system, and Italy's between 1993-2005, are/were only semi-proportional.

[5] The ban on dual candidacy in Ukraine was introduced prior to the 2002 parliamentary elections – by the same party that not long afterwards attempted to fix the result of the presidential election and poison the main opposition candidate.

However, while the arguments used to support the 2006 ban do not stand up to any serious scrutiny, the ban is now in place. The question is whether it should remain.

Neither AMS with dual candidacy nor AMS without dual candidacy would be my most preferred system for electing the NAW. (I am personally a supporter of the Single Transferrable Vote, as advocated by the Richard Commission). However, of these two versions of AMS, I think that one with dual candidacy is clearly preferable.

I find it very difficult to see *any* strong principled arguments against dual candidacy. Opponents of dual candidacy have argued that it is inappropriate for those who have already been rejected by the electorate in a particular constituency to nonetheless end up being elected.[6] This, I believe, represents a fundamental misunderstanding of the AMS electoral system – at least in its MMP variant. Defeated constituency candidates have, of course, been rejected for that particular constituency. But list seats are a wholly different type of mandate, and under MMP these seats are allocated in a way that specifically allows for the representation of parties who have *not* been very successful in constituency contests – parties who have, in a sense, been rejected at the constituency level. If parties that are defeated at constituency level can still win representation through the list, then it is difficult to see why that should not also apply to individuals.

Banning dual candidacy under the MMM variant of AMS makes a little more sense. Under MMM, the constituency and list elections are wholly separate, with the allocation of list seats unrelated to success in the constituencies. In this context, requiring parties to offer separate groups of candidates for these separate contests perhaps makes some sense. For MMP, it makes no sense whatsoever. This is probably why no countries or regions other than Wales who have implemented the MMP version of AMS have seen any compelling reasons to ban dual candidacy.

There are also some good practical reasons for favouring dual candidacy. First, banning dual candidacy helps to create some perverse incentives. In particular, banning dual candidacy makes it electorally advantageous for a party's list candidates to see their constituency candidates lose. Similarly, voters wishing to see a particular list candidate elected may have an incentive to vote against that candidate's party in the constituency election.

Second (and I think, far more importantly), there is a compelling need to ensure that the electoral system does not inhibit the quality of elected representation within the NAW. The Assembly has only 60 members – as many have argued, a wholly inadequate number. Given the paucity of AMs, we should certainly not impose restrictions on the ability of the parties to ensure that their best people (or at least those whom the parties believe are their best people) are elected to the Assembly. This was a principal conclusion of the recent detailed investigation of AMS conducted in New Zealand, where the system was introduced to replace First Past the Post in the 1990s. As the final report of this commission stated, "It is both proper and desirable under MMP that political parties can protect good candidates contesting marginal or unwinnable electorates [constituencies] by positioning them high enough on their

[6] In debates preceding the 2006 GOWA, particular attention focused on the example of the 2003 constituency contest in Clwyd West, where three defeated constituency candidates all ended up being elected as list AMs.

list to be elected." (*Report of the Electoral Commission on the Review of the MMP Voting System*, 2012, p.38)

Thirdly, there are better ways than a ban on dual candidacy to remove the problems that have occasionally been reported with constituency representatives being concerned that list AMs are encroaching on 'their turf'. One way would be to implement the Richard Commission recommendation of STV. STV would remove the problem of there being two categories of elected representative (constituency and list), and place all AMs on the same footing. A second way of addressing the problem might be to elect list AMs from a national list (with a 5% minimum threshold imposed to prevent the system fragmenting excessively). This would remove any sense of local representation from list members, and might well therefore reduce the scope for friction between constituency and list members.

By far the most detailed examination of AMS conducted in recent times is that produced in New Zealand.[7] The report of this Commission, which drew on substantial evidence from numerous sources, is an impressive piece of work. On dual candidacy, the report's conclusion was unambiguous: "Candidates should continue to be able to stand both for an electorate [constituency] seat and be on a party list" (*Report of the Electoral Commission on the Review of the MMP Voting System*, 2012, p.37).

I see no reason to disagree with this conclusion.

Reforming the NAW Electoral System: Improving the Process

Debates about dual candidacy, both in 2006 and now, raise questions of process as well as substance. The following statements are so obvious as to border on the banal, but they have, I think, important implications for when and how electoral systems are reformed:

- In any healthy political system, *how* things are done, as well as what is done, is of importance. Due process matters.
- Political parties are inherently – indeed, unavoidably – interested actors with regard to the rules governing elections.
- Democratic politics should be about fierce competition within rules; not about trying to win through changing the rules to benefit yourself.

From these statements, it follows fairly directly that political parties should be inhibited from changing electoral rules to their own benefit. It also follows that any changes to the rules that are implemented should command widespread, cross-party support.

Evaluated in relation to these standards, the 2006 dual candidacy ban fell a long way short of the ideal. The ban was mentioned in the 2005 Labour manifesto, so there was in some sense

[7] *Report of the Electoral Commission on the Review of the MMP Voting System*, 2012; available at: http://www.mmpreview.org.nz/have-your-say/final-report.

an electoral mandate for the change.[8] However, as described above, the ban was introduced on the basis of very dubious arguments, and underpinned by little or no obviously principled conduct. The ban was also introduced by one party against widespread opposition: not only that of *all* the other major parties, but also against the views of most other relevant non-partisan actors (the Electoral Commission, the Electoral Reform Society, and most academic commentators). This is surely an example, in terms of the *process* of electoral reform, that we in Wales should seek never to repeat.

One could also question the procedural legitimacy of Westminster continuing, over the long-term, to legislate over electoral arrangements for the NAW, given that the Assembly is a body with its own democratic mandate. Such questions may become particularly stark in the future if one sees UK governments elected with very limited electoral support from Wales.

I therefore propose that the Wales Bill should be amended to transfer powers over the conduct of NAW elections to the National Assembly. However, to prevent any possibility of manipulation of the electoral rules by any one party, the Bill should also provide for a 'super-majority' requirement for any change to the current law, with a three-quarters majority of all NAW members needed to approve any changes. This would prevent any single party from changing the electoral system to suit its own interests; indeed, a three-quarters majority would also have prevented the 2007-11 Labour-Plaid coalition from changing the electoral system without the support of at least one other party.

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[8] One might reasonably question the extent to which voters had been informed about, never mind endorsed, the dual candidacy ban in the 2005 general election. The issue was barely discussed in the main Labour manifesto, which stated only that "In Wales we will develop democratic devolution by creating a stronger Assembly with enhanced legislative powers and a reformed structure and electoral system to make the exercise of Assembly responsibilities clearer and more accountable to the public" (p.108, *Britain Forward not Back*). The dual candidacy ban was only mentioned explicitly on pp.108-110 of the Welsh Labour manifesto, *Wales Forward not Back*.