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Dear Martin,

Thank you for your letter of 6 September. I appreciate the Committee's desire to come to an agreed position on this important issue.

The proposals in this area originated with the idea that most if not all of those persons subject to sex offender notification requirements (SONR) should be disqualified from holding elected office. This was proposed in respect of councillors in the Government's 2023 [Consultation Paper](#) on Disqualification Criteria for Councillors and in relation to MSPs on introduction of the Scottish Elections (Representation and Reform) Bill.

### **Orders under consideration**

Chapter 5 of the Consultation Paper on Disqualification Criteria for Councillors outlined the notification requirements being considered as part of this proposed change. This referred to the requirements in [Section 80](#) of the Sexual Offences Act 2003, Sexual Harm Prevention Orders (SHPOs), and Sexual Risk Orders (SROs). The consultation explained that Sexual Harm Prevention Orders (SHPOs) came into being in Scotland on 31 March 2023, replacing Sexual Offences Prevention Orders (SOPOs) and that Sexual Risk Orders (SROs) came into force in Scotland on 31 March 2023, replacing Risk of Sexual Harm Orders (RoSHOs).

Please note that SHPOs also replaced the Foreign Travel Order provided for in section 113 of the Sexual Offences Act 2003. There will still be instances of the previous orders (e.g. SOPOs) imposed in Scotland and being monitored, breach of which would impose SONR. The number will reduce over time.

I am also considering disqualification in the context of certain requirements other than SONR notification. This could include persons subject to measures obtained by application to the court by the police:

- a risk of sexual harm order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005; and

- a sexual risk order under section 27 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

Further information in relation to restrictions being considered is set out in Annexes A and B.

### Options under consideration

Broadly, there are three options for reform that could be considered for at Stage 2:

- A 'broad' approach, with disqualification applied to both councillors and MSPs on the same basis and including all instances of a person being subject to SONR (including cases not involving a conviction for an offence in schedule 3) and instances where a person is subject to some other measures;
- A 'narrow' approach, where disqualification for both councillors and MSPs would be tied to conviction (or an approximate equivalent such as being found not guilty by reason of insanity, as detailed in section 80 of the Sexual Offences Act 2003) and the imposition of SONR; or
- An 'intermediate' approach, where disqualification would be set out in detail for councillors and MSPs depending on the measures involved. This would include the possibility of a difference in approach between councillors and MSPs.

### The proposed guiding principles for reform

In assessing these options, I have continued to make reference to the four guiding principles for reform set out in my letter of 2 September:

- Restrictions on qualification for elected office are founded on protecting the public in personal encounters with elected representatives, upholding the rule of law and the democratic nature of the state and on maintaining the trust and confidence of the public in our system of democracy.
- Any difference in treatment between disqualification from councillor or MSP status should have a clear rationale.
- Disqualification/ineligibility must be carefully assessed in terms of proportionality human rights law and international obligations.
- No change in the law can disqualify any representative serving at the time the change becomes live, that is to say not retrospective in effect. Anyone subject to a new restriction after the 'go live' date would be disqualified and it would apply to all candidates at subsequent elections.

In relation to point (b), my preference - as I indicated at the session on 5 September - is to pursue equivalent treatment between councillors and MSPs. However, I do consider that there are points of distinction which could provide scope to accommodate differences on disqualification if that is the preference of Parliament. In particular, the rules around councillor suspension and disqualification in [section 19](#) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 are relatively constrained as they are focused on the Standards Commission for Scotland, and only then if the conduct in question can be said to have arisen in the course of the councillor's duties. This is not the case for MSPs, where the Parliament has scope to regulate its own membership through Standing Orders.

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This point may suggest that an overly restrictive approach could result in instances where councillors subject to restrictions are not covered by any change in the law.

## Human rights obligations and proportionality

In relation to point (c), in order to comply with the European Convention on Human Rights (ECHR), any provision limiting rights must be prescribed by law, proportionate and have a legitimate aim (see Articles 8, 10 and 11). In addition, Article 3 of Protocol No. 1 of the ECHR enshrines the principle of efficient political democracy in the context of parliaments. It also protects individual rights of participation: the right to vote and the right to stand for election. In assessing this issue, I have considered and will continue to consider as proposals develop:

- Maintenance of trust and confidence of the public in our system of democracy, and how we determine the suitability of individuals to serve, or continue serving, as elected representatives.
- Safety and security of the public in approaching elected representatives, allowing full use of their services. There is the point, also, that the public have to feel safe in consulting elected representatives in what may be one-on-one meetings, with a potential power imbalance.
- That a behavioural order can only be imposed by a court, having made an assessment that this is necessary in order to protect the public in general, or particular members of the public, from sexual harm, or in some cases, serious sexual harm. In many cases it will be capable of imposition only as a result of the conviction for a sexual offence. There will always be a route to challenge the imposition of the order, terms of its variation, or refusal to discharge, whether directly or through seeking permission. These are existing orders which are themselves compatible with convention rights.
- That any change will be future facing. No serving elected representatives subject to a relevant restriction when the requirements take effect will be removed from office automatically as a result. Even if they do not choose to step down when the change takes effect, they will be able to plan for the fact that they will not be able to stand for re-election (subject of course to the amount of time for which they are to continue to be subject to the SONR or the order). Nobody will be disqualified beyond the end of the period for which they are actually subject to the SONR or order. So they could choose to stand again for election once they are no longer subject to the restrictions. The change would also apply to disqualify serving representatives who become subject to a relevant restriction after the date on which the provisions are commenced.
- The change will apply to anyone standing for election in a by-election or a national election after the Bill's provisions in relation to disqualification come into force. Anybody who wishes to stand for election or re-election at the next round of elections, or in the event of any by-election, should be aware of the potential implications of certain types of behaviour.

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## Equalities Impact Assessment

The Equality Impact Assessment conducted prior to the Bill's introduction discussed disqualification from elected office in the context of intimidatory conduct. The Government's [report](#) on that Assessment included the following conclusion:

**“Barring those found guilty of offences involving intimidation of campaigners, candidates, elected representatives and electoral workers from being Members of the Scottish Parliament (MSPs) and councillors**

The Bill contributes to advancing equality of opportunity between persons who share a relevant protected characteristic and those who do not, eliminating discrimination, harassment and victimisation of those with protected characteristics, and encouraging participation in public life by introducing measures to discourage intimidation of election campaigners, candidates, elected representatives and electoral workers... The Bill removes the right of someone convicted of an offence involving harassing or intimidating those involved in the electoral process to be a Member of the Scottish Parliament or a councillor in Scotland for a period of five years. In seeking to discourage intimidation, which is disproportionately experienced by women compared to men, the Bill contributes to advancing equality of opportunity and eliminating discrimination, harassment and victimisation of women, and encouraging participation in public life.”

While the Government considers that similar principles apply in relation to the proposal discussed here, it will consider a new assessment on this issue.

## Changes in England and Wales

### Councillors

Section 20 of the [Local Government and Elections \(Wales\) Act 2021](#) amended the law to prevent persons subject to the notification requirements or orders under Part 2 of the Sexual Offences Act 2003 from being councillors in Wales. The [Local Government \(Disqualification\) Act 2022](#) made similar provision in relation to councillors and mayors in England by amending the Local Government Act 1972. However, the provision in relation to councillors in England goes further than the provision for councillors in Wales as it includes those subject to notification requirements or orders in the Channel Islands or Isle of Man. In Wales a person is only disqualified from being elected as, or remaining in office as, a councillor if they are subject either to the notification requirements in Part 2 of the Sexual Offences Act 2003, or an order under that Act.

### Parliamentarians

The Welsh Senedd legislated in the [Senedd and Elections \(Wales\) Act 2020](#) to restate disqualification criteria from the Senedd. The 2020 Act included in the list of disqualification criteria inserted in paragraph 7 of [Schedule 1A](#) of the Government of Wales Act 2006 provision which disqualifies “a person subject to the notification requirements of, or an order under, Part 2 of the Sexual Offences Act 2003”.

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The change in the Senedd was made with reference to the UK Government's 2018 consultation on its intention to disqualify persons subject to the notification requirements set out in the Sexual Offences Act 2003 from serving as Councillors and Mayors<sup>1</sup>. 83 per cent of respondents to the consultation agreed with the intention.

No absolute disqualification tied to SONR has been introduced in relation to the House of Commons. The [House of Commons voted on 13 May](#) to amend its process for a risk-based exclusion to allow MPs accused of a violent or sexual offence to be excluded from the Commons from the point of arrest rather than charge. The law on outright disqualification of MPs has not been changed, although the recall procedure permits a recall petition where an MP has been convicted of an offence in the UK and receives a custodial sentence (including a suspended sentence) or is ordered to be detained, other than solely under mental health legislation and if an MP has been suspended from the House of Commons for 10 sitting days or 14 calendar days.

I understand that these changes in England and Wales have not had a direct impact on police forces, with this type of disqualification from elected office treated in the same way as other categories, where it is the responsibility of potential election candidates to be satisfied that they are eligible to stand for election. Declarations of eligibility on candidate nomination papers are generally taken at face value by Returning Officers unless they are made aware of ineligibility. Making a false declaration on candidate nomination papers is already a criminal offence.

## Engagement

Officials have highlighted the proposed changes to the Scottish Parliament Political Parties Panel, COSLA, the Electoral Commission, the Electoral Management Board for Scotland and Police Scotland. I will separately send this letter to the Scottish Human Rights Commission with an invitation to engage further on this matter.

I hope that this information is of assistance to the Committee.

Yours,



**JAMIE HEPBURN**

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<sup>1</sup> See paragraphs 81 to 83 of the [Explanatory Memorandum](#) to the Senedd and Elections (Wales) Bill, published February 2019

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## Annex A

### Conviction-based or equivalent orders

- i. a sexual harm prevention order under section 103A of the Sexual Offences Act 2003
- ii. a sexual offences prevention order under section 104 of the Sexual Offences Act 2003
- iii. a sexual harm prevention order under section 345 of the Sentencing Act 2020
- iv. a restraining order under Article 10 of the Sex Offenders (Jersey) Law 2010
- v. a sexual offences prevention order under section 18 of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law 2013
- vi. a sexual offences prevention order under section 1 of the Sex Offenders Act 2006 (an Act of the Tynwald of the Isle of Man)

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## Annex B

### Civil-orders – conviction not required

- i. a sexual risk order under section 122A of that Sexual Offences Act 2023,
- ii. a risk of sexual harm order under section 123 of that Act,
- iii. a risk of sexual harm order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005,
- iv. a sexual risk order under section 27 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016,
- v. a child protection order under Article 11 of the Sex Offenders (Jersey) Law 2010,
- vi. a risk of sexual harm order under section 22 of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law 2013,
- vii. a risk of sexual harm order under section 5 of the Sex Offenders Act 2006 (an Act of the Tynwald of the Isle of Man)

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