Disqualification for membership of the House of Commons

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This note examines the history of disqualification provisions applicable to Members of the House of Commons. Apart from common and statute law exclusions of aliens and minors, and disqualification for electoral offences set out in the *Representation of the People Act 1983*, the main legislation is consolidated in the *House of Commons Disqualification Act 1975*. It also summarises recent changes, such as developments in the law of bankruptcy and mental health and the removal of the prohibition on non-Commonwealth legislators.

Contents

A. Introduction

The major legislation governing disqualification from the Commons is consolidated in the *House of Commons Disqualification Act 1975*. However other enactments and the common law also disqualify a range of people, such as minors and aliens, amongst other categories.[1] Certain electoral offences carry the punishment of disqualification and these are set out in the *Representation of the People Act 1983.*This note does not address all these categories of disqualification. Chapter 3 of *Erskine May* provides a comprehensive guide.[2]

The main purpose of disqualification is to ensure that Members are fit and proper to sit in the House, and are able to carry out their duties and responsibilities free from undue pressures from other sources. These considerations may be called "House-based" and are the basis not only of disqualifications under the *House of Commons Disqualification Act 1975* but of the whole range of earlier disqualifications for the Commons. However, there is also another consideration which may be called "office based". This is the wish to ensure that an office held by an individual is not adversely affected by his membership of Parliament. This is of more recent origin.

There are two main "House-based" objectives. The first is that a Member should be free from possible conflicts of interest which might distort his behaviour as an independent member of the legislature and his freedom to represent the best interests of his constituents. These include financial or other dependence on Ministerial, Prime Ministerial or Crown Patronage; and also membership of a foreign (though not Commonwealth) legislature. Historically, this has been the basis of the great majority of disqualifications.

The second "House-based" objective is perhaps more concerned with the personal qualities and circumstances of a potential Member than with outside influences upon him. The concepts of 'fitness' and 'propriety' lie behind the restriction of minors, the mentally ill, the dishonest, criminals[3] and bankrupts. Corrupt practices at elections may also have the effect of disqualification from the House of Commons. A person may, at an election, be disqualified for being elected by reason of corrupt practices committed at a previous election. So also a person not disqualified before an election may, during the election, become disqualified by reason of corrupt practices being committed at the election; but the latter disqualification can only arise ex post facto upon an investigation into such election. This disqualification always existed at common law, and the statutory provisions are intended only to give fuller effect to

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1 Aliens are disqualified by the *Act of Settlement 1701* as amended. Persons under 21 are disqualified by a range of enactments beginning with the *Parliamentary Elections Act 1695.*

2 23rd ed 2004 Chapter 3

3 *The Representation of the People Act 1981* provides (a) for the disqualification of any person who is detained anywhere in the British Islands or the Republic of Ireland (or who is unlawfully at large at any time when he would otherwise be detained) for more than a year for any offence, (b) that the election or nomination of such persons shall be void, and (c) that the seat of a Member who becomes so disqualified shall be vacated. This Act was passed as a result of a hunger-striker, Bobby Sands, who was elected MP in an April 1981 by-election in the Northern Ireland constituency of Fermanagh and South Tyrone while he was serving a long term of imprisonment

the common law of Parliament. It has also been possible to use the penal powers of the Commons to expel Members. More recently, this power has not been exercised, due to concerns over natural justice and the loss of a representative service to constituents. No Member has been expelled since 1947 without a previous criminal conviction[4]

However, there has also been concern that, even though a Member may have other commitments, he must still be able to attend the House and have sufficient time to devote proper attention to his duties. Disqualification of judges and ambassadors first arose for example in times when the duties of such posts would have precluded normal attendance at Westminster.[5]

The way the 1975 Act has been applied for "office-based" reasons reflects a third, substantially different, objective. That is that, where a Member holds some other publicly funded position, his performance in that position should not be jeopardised by his role as a Member, either on conflict of interest grounds or because the position might require demonstrable political neutrality.

B. The history of disqualification provisions

Disqualifications of certain office-holders from membership of the House of Commons have existed since the early seventeenth century. These were previously scattered through public and private Acts and the Journals of the House. By the 1940s, confusion about the actual and intended scope and effect of existing disqualifying provisions, together with fears about the effects on parliamentary democracy of special wartime appointments of Members, led to the appointment of a Select Committee (the Herbert Committee).[6]

The Herbert Committee looked particularly at the law and practice governing the disqualification of those holding "offices or places of profit under the Crown" and the report[7] contained recommendations for legislation to replace earlier statutes. After the war and the reconstruction period, work began in 1949 on drafting a bill to put the Herbert Committee recommendations into effect. However, there were serious difficulties in arriving at a satisfactory legal expression of some of the concepts recommended by the Herbert Committee and it was not until 1955 that a bill finally went to the House.

Progress was difficult and a further Select Committee, the Spens Committee[8], was set up in 1956 to reconsider the Bill. The Committee stated ‘ certain offices are incompatible with

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4 See Chapter 6 of The Joint Committee on Parliamentary Privilege HL 43? HC 214 1998-99 at http://www.publications.parliament.uk/pa/jt/jtpriv.htm

5 This passage is based on a Cabinet Office memorandum in 1984 *House of Commons Disqualification Act 1975: A Factual Analysis* Dep (NS)820

6 see Chapter 11 of *Erskine May* (16th ed 1957) for a description of disqualification prior to the 1957 Act

7 HC 120, 14 October 1941

8 HC 349 Special Report from the Select Committee on the House of Commons Disqualification Bill session 1955/56

membership of the House of Commons, some as involving physical impossibilities of simultaneous attendance in two places, some because of possible patronage, and others because of a conflict of duties' (para 2). The Spens Committee examined the Bill after second reading and made several recommendations but the revised bill was not finally enacted until the 1956-7 session.[9]
Legislation was finally enacted as the *House of Commons Disqualification Act 1957*. This was re-enacted, unchanged in substance and as a consolidating measure, in 1975 when offices disqualifying from the Northern Ireland Assembly were separated out and covered by the *Northern Ireland Assembly Disqualification Act 1975.*

C. Practicalities

The *House of Commons (Disqualification) Act 1975* disqualifies a large number of public office holders. It is the single most important legal measure affecting eligibility for parliamentary candidature. It lays down six classes of office holders who are disqualified, namely: (1) holders of certain judicial offices including High Court and Court of Appeal judges (Law Lords are disqualified already by virtue of being Members of the House of Lords); (2) civil servants, whether established or not, and whether full or part time; (3) members of the regular armed forces; (4) full time police officers; (5) members of the legislature of any country outside the Commonwealth; and (6) holders of any of the offices listed in the Act. The Act also limits the number of ministers who sit in the Commons.

This list is set out in Schedule 1 of the Act, and is very lengthy. Regular updates are published, and it is also available through on-line legislation services. The Act enables the government to add to or vary the list from time to time by way of parliamentary resolution and an Order in Council. The Judicial Committee of the Privy Council has jurisdiction to decide matters in relation to jurisdiction under the 1975 Act provided that an election petition is not pending or that the Commons has not made an order directing that the disqualification should be disregarded.[10]

Disqualification does not generally take place until after election.[11] A sitting Member may also become disqualified. In these circumstances he is required to vacate his seat or to relinquish the office and seek relief under Section 6(2) of the Act.

D. Recent developments

There have been a series of changes which are worth noting:

- Hereditary peers are no longer disqualified from membership of the Commons, following the passage of the *House of Lords Act 1999.* Only the 92 hereditary peers who have been selected to sit in the Lords remain disqualified.[12]

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9 As background see *Public Law* 1957 'House of Commons Disqualification'

10 See section 7 and comments by Erskine May at p 59

11 But see the drafting of s2(1) of the *Representation of the People Act 1981,* which is intended to prevent nomination of candidates who would be disqualified by its provisions on convicted prisoners

- *The House of Commons (Removal of Clergy Disqualification) Act 2001* removed prohibitions against certain clergy sitting in the Commons which had dated back to the seventeenth century. Bishops who sit in the House of Lords continue to be disqualified from the Commons.[13]
- The *Enterprise Act 2002* amended the provisions on bankruptcy, so that a person in respect of whom a bankruptcy restrictions order has effect is disqualified.[14] A court making a bankruptcy restrictions order, or an interim order, in respect of a Member is required to notify the Speaker. The Speaker must also be notified if the Secretary of State accepts a bankruptcy restrictions undertaking made by a Member. These provisions came into force in April 2004. For Members sitting for Scottish or Northern Irish constituencies, the provisions of the *Insolvency Act 1986* continue to apply.
- The draft *Mental Health Bill*, published in September 2004, will amend the provisions relating to mental health incapacities. The *Mental Health Act 1983* has a statutory procedure under section 141 for vacating the seat of a Member of unsound mind. The draft bill will make some minor amendments when a Member becomes subject to compulsory provisions. The Bill is due to be scrutinised by a joint committee on both Houses due to report by the end of March 2005.[15] Interestingly, it does not address the position of members of the Lords, despite recommendations from the Committee for Privilege that mental health legislation should make explicit that peers were liable for detention and would therefore be disqualified from sitting or voting or receiving a writ of summons.[16]

E. The *Disqualifications Act 2000 and the Irish dimension*

Until the *Disqualifications Act 2000*, only members of other Commonwealth legislatures were qualified to sit in the House of Commons. The Republic of Ireland left the Commonwealth in 1949[17], and although there have been press reports that it is considering rejoining[18] no initiative in this direction is expected in the near future. The *Disqualification* Act amended section 1 of the 1975 Act so that members of the legislature in Ireland are also eligible to sit in the Commons. In practice members of legislatures outside the Commonwealth would also certainly be aliens, and therefore not eligible for membership of the Commons anyway. The Republic of Ireland is in an anomalous position in that its citizens are not 'aliens' for electoral purposes, and yet it is not a member of the Commonwealth. Irish

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12 Section 2, *House of Lords Act 1999*

13 See Research Paper 01/11 for full details

14 Section 266. This section also inserts a Section 426B into the *Insolvency Act 1986* to apply similar provisions to Members of the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly

15 See Committee press notice at http://www.parliament.uk/parliamentary_committees/jcdmhb.cfm

16 HL 253 1983-4. See Erskine May p49

17 See the interesting discussion of the circumstances in which Ireland can be said to have left the Commonwealth in *Northern Ireland Legal Quarterly* 1984 'The Armagh Election Petition'

18 "Ireland in secret talks to end rift", *Times* 24 December 1999

citizens may stand for and vote in all types of UK elections as long as they fulfil the relevant residence requirements.[19] British citizens may vote in Irish elections, if resident there.

The *Northern Ireland Act 1998* also disqualified members of the Dail (the Irish lower house) from sitting in the Northern Ireland Assembly. Under s36(5) Members of the Seanad (upper house) were however made eligible. In 1982 Seamus Mallon had lost a case in the ECHR against his disqualification as member of the Northern Ireland Assembly, due to his membership of the Seanad.[20] The *Disqualifications Act* repealed s36(5) as unnecessary following amendment to the 1975 Act and thus allows both members of the Dail and Seanad to be members of the Commons.

Section 2 of the Act prohibits ministers of the Government of Ireland from standing for election or being elected as First Minister, or Deputy First Minister, or other minister or junior minister in the Executive. A ministerial post in the Northern Ireland Executive is lost if the member of the Assembly becomes a minister in the Government of Ireland. The provision is achieved by adding a new section 19A to the *Northern Ireland Act 1998*.

There are similar provisions in the *Scotland Act 1998* to prohibit ministers from holding office in the Scottish Executive at the same time as holding Ministerial office at Westminster.[21] No such prohibition applies in Wales. However there does not appear any precedent for prohibiting membership of a foreign executive. There is currently no prohibition on ministers of the Northern Ireland Executive from holding ministerial office in Westminster. Members of the Northern Ireland Executive, created under the *Government of Ireland Act 1920,* were disqualified from sitting in the House of Commons at Westminster.[22]

Under s41 of the Irish *Electoral Act 1992* only Irish citizens may stand for election to the Dail, but there is no specific disqualification for members of foreign legislatures or for the Northern Ireland Assembly. Citizens of Northern Ireland can claim Irish citizenship.[23] The All Party Oireachtas Commission on the Constitution has been examining the possibility of allowing representatives from Northern Ireland Assembly some form of representation in the Oireacthas. Following the Belfast Agreement of 1998 the Taoiseach, Bertie Ahern, wrote to the Commission recommending that it 'consider the proposals that MPs elected in the North should be entitled to sit in the Dail and that Irish citizens living in the North should be entitled to vote in Presidential elections and referendums'. The seventh progress report of the

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19 See the Home Affairs Select Committee report *Electoral Law and Administration*, paras 117-8 HC 768 1997-8 for further details

20 *M v UK Appl* 10316/83 37 D& R 110,116. See *Northern Ireland Legal Quarterly* 1984 'The Armagh Petititon' for an account of the initial disqualification on election petition

21 s 44(3)

22 *House of Commons Disqualification Act 1957*, schedule 1,part III. See *Constitutional Law in Northern Ireland*, by Harry Calvert p 147-8

23 S6 and 7 of the *Irish Nationality and Citizenship Act 1956* allows people born in Northern Ireland to declare themselves to be Irish citizens

Commission.[24] The Eighth Report contains useful historical background on attempts by northern Nationalists to act as representatives in the south.[25] In the republic, it became the practice for the Taoiseach to nominated selected Northern politicians to the Seneadd (upper house):

> The Northern protestant, Denis Ireland, became a senator in 1948. More recently, from the 1980s onwards, the practice has become common, to the undoubted benefit of the Oireachtas. Distinguished individuals drawn from both communities have been nominated: these include Séamus Mallon, Brid Rodgers, John Robb, Gordon Wilson, Sam McAughtry, Stephen McGonagle, Maurice Hayes and Edward Haughey. It is widely recognised that many of these senators have made an outstanding contribution to national debate, primarily on Northern Ireland issues but not exclusively so. [26]

The report recommended against allowing direct representation of Northern Ireland in the Dail, but was prepared to consider a right of audience for Northern Ireland Westminster MPs. It recommended formalising the practice of encouraging Northern Ireland representatives in the Seneadd, in the context of overall reform of the method of nomination/election to the upper house.

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[24] *The Examiner* 22 December 1999 'Ahern under pressure to allow Northern politicians to contest elections in South'

[25] The report is on-line at www.taoiseach.gov.ie, under Publications in 2002

[26] All-Party Oireachtas Committee on the Constitution Eighth Progress Report, Chapter 4