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Agenda - Constitutional and Legislative Affairs Committee

Meeting Venue:	For further information contact:
Committee Room 1 - Senedd	**Gareth Williams**
Meeting date: Monday, 5 December 2016	Committee Clerk
Meeting time: 14.45	0300 200 6565
	SeneddCLA@assembly.wales

1 Introduction, apologies, substitutions and declarations of interest

(14.45)

2 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

(14.45 - 14.50) (Pages 1 - 2)

CLA(5)-14-16 - Paper 1 - Statutory Instruments with clear reports

Negative Resolution Instruments

SL(5)038 - The Caseins and Caseinates (Wales) Regulations 2016

SL(5)039 - The Firefighters' Pension (Wales) Scheme (Amendment and Transitional Provisions) Order 2016

Cynulliad Cenedlaethol Cymru National Assembly for Wales

3 Paper(s) to note

(14.50 - 14.55)

Written statement by the Counsel General for Wales: Counsel General's written submissions to the Supreme Court – the Article 50 litigation

(Pages 3 - 31)

CLA(5)-14-16 – Paper 2 – Written statement by the Counsel General for Wales: Counsel General's written submissions to the Supreme Court – the Article 50 litigation
CLA(5)-14-16 – Paper 3 – Counsel General's written submissions to the Supreme Court – the Article 50 litigation

Report by the Wales Governance Centre: Reshaping the Senedd

(Pages 32 - 57)

CLA(5)-14-16 – Paper 4 – Report by the Wales Governance Centre: Reshaping the Senedd

4 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

(14.55)

(vi) the committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish; or is preparing itself to take evidence from any person.

5 Wales Bill: Legislative Consent Memorandum

(14.55 - 15.25) (Pages 58 - 60)

CLA(5)-14-16 – Paper 5 – Draft report

Date of the next meeting

Monday 12 December 2016

Statutory Instruments with Clear Reports

5 December 2016

SL(5)038 – The Caseins and Caseinates (Wales) Regulations 2016

Procedure: Negative

These Regulations implement EU Directive 2015/2203 relating to caseins and caseinates intended for human consumption.

The Regulations, among other things:

- prescribe definitions and standards for certain casein products,
- prohibit the use of any casein or caseinate in the preparation of food if it does not comply with particular standards,
- impose an obligation on each county council or county borough council to enforce the Regulations in its area.

Parent Act: Food Safety Act 1990

Date Made: 20 November 2016

Date Laid: 25 November 2016

Coming into force date: 22 December 2016

SL(5)039 – The Firefighters' Pension (Wales) Scheme (Amendment and Transitional Provisions) Order 2016

Procedure: Negative

This Order amends the Firefighters' Pension (Wales) Scheme (set out in Schedule 2 to the Firemen's Pension Scheme Order 1992 as it has effect in Wales) ("the Scheme").

Article 2(2) removes the obligation on firefighters to pay contributions for the period after they have reckoned the maximum permissible pension entitlement until they reach age 50, the minimum age to draw benefits. The change takes effect from 1 December 2006. Section 12 of the Superannuation Act 1972 permits provisions to have retrospective effect.

Articles 2(3) and 3 make provision for the repayment of any such contributions paid between 1 December 2006 and the date this Order comes into force.

Parent Act: Superannuation Act 1972

Date Made: 22 November 2016

Date Laid: 25 November 2016

Coming into force date: 31 December 2016

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	***Counsel General's written submissions to the Supreme Court- the Article 50 litigation***
DATE	***25 November 2016***
BY	***Mick Antoniw AM, Counsel General for Wales***

I have today filed my printed case with the Supreme Court and am including a copy of that case. In outline and from a Welsh perspective, I have sought to argue that the process of withdrawing from the EU must, and may only, be carried out consistently with the appropriate legal and constitutional arrangements. In my case, I submit that the prerogative power cannot be used to give notification under Article 50.

As I have emphasised before, I am not seeking to reverse the referendum result. The Welsh Government's position is that that result should be respected.

However, the process of withdrawal raises issues of profound importance in relation to the constitutional arrangements of the United Kingdom and the legal framework for devolution.

First, giving notification will modify the legislative competence of the National Assembly and the powers of members of the Welsh Government under the Government of Wales Act 2006, our devolution framework.

Secondly, any modification of the Assembly's legislative competence will engage the Sewel Convention. The UK Government does not have the power to short-circuit this important mechanism for dialogue between the democratically elected National Assembly and Parliament, by using the prerogative in this way.

In my view, an Act of Parliament is required for the UK Government to give notice under Article 50.

UKSC 2016/196

IN THE SUPREME COURT
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

BETWEEN

THE QUEEN

on the application of

(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Respondents

- and -

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

- and -

(1) GRAHAM PIGNEY AND OTHERS
(2) AB, KK, PR AND CHILDREN

Interested Parties

- and -

(1) GEORGE BIRNIE AND OTHERS
(2) THE LORD ADVOCATE
(3) THE COUNSEL GENERAL FOR WALES
(4) THE INDEPENDENT WORKERS UNION OF GREAT BRITAIN

Interveners

PRINTED CASE OF THE COUNSEL GENERAL FOR WALES

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1. This is the printed case of the Counsel General for Wales. The Counsel General is the Law Officer of the Welsh Government, appointed by Her Majesty pursuant to section 49 of the Government of Wales Act 2006 ("the 2006 Act").

2. The Counsel General's position (and that of the Welsh Government) is that the result of the referendum to leave the EU should be respected. However, it is submitted that the process of withdrawing from the EU must, and may only, be carried out consistently with the appropriate legal and constitutional requirements.

As explained below, these requirements are highly material to the devolution settlement in the United Kingdom. They are particularly important in an uncertain context such as the present where the terms of withdrawal are wholly unclear.

3. In its judgment, the Divisional Court held that, on a proper interpretation of the European Communities Act 1972 ("the ECA"), Parliament had left no room for a prerogative power to withdraw from the EU ([94]). Further, it held that the executive had no prerogative power to repeal domestic law rights without express authorisation or authorisation by necessary implication from Parliament, which was lacking ([96]). The Court therefore did not need to consider the devolution arguments raised by the second group of interested parties ([102]). However, the Counsel General submits that the effect of triggering Article 50 on the devolution settlement of the United Kingdom provides an additional reason to uphold the Court's judgment and/or finding that the prerogative cannot be used to trigger Article 50.

4. In outline, the Counsel General contends that the government does not have power under the prerogative to give notification to leave the EU under Article 50(2) TEU for two reasons:

   a. First, giving notification will modify the competence of the National Assembly for Wales ("Welsh Assembly") and the Welsh Government under the 2006 Act. The prerogative power cannot be used to dispense with statutory provisions in this way; and

   b. Secondly, any modification to the legislative competences of the Assembly will engage the Sewel Convention. The Sewel Convention is a convention in the sense of well-established arrangements and practices which operate between legislatures (the Westminster Parliament and, in Wales, the Welsh Assembly). The UK Government does not have the power to short-circuit it through the use of the prerogative.

The proper context of this appeal:

5. It is important to set the Counsel General's intervention in its proper context, namely (i) the permanence of devolution, and increasing empowerment, as features of the United Kingdom constitution; and (ii) the narrow, residual nature of the prerogative power.

6. As the Welsh Government recently said in its written evidence to the House of Lords Constitution Committee's inquiry *The Union and devolution*, devolution has become a fundamental and effectively irreversible feature of the constitution:[1]

   (i) Whatever its historical origins, the United Kingdom is best seen now as a voluntary association of nations which share and redistribute resources and risks between us to our mutual benefit and to advance our common interests.
   (ii) The principles underpinning devolution should be recognised as fundamental to the UK constitution, and the devolved institutions should be regarded as effectively permanent features of that constitution.
   (iii) Devolution is about how the UK is collectively governed, by four administrations which are not in a hierarchical relationship one to another. The relations of the four governments of the United Kingdom should therefore proceed on the basis of mutual respect and parity of esteem.
   (iv) The allocation of legislative and executive functions between central UK institutions and devolved institutions should be based on the concept of subsidiarity, acknowledging popular sovereignty in each part of the UK.
   (v) The presumption should therefore be that the devolved institutions will have responsibility for matters distinctively affecting their nations. Accordingly, the powers of the devolved institutions should be defined by the listing of those matters which it is agreed should, for our mutual benefit, be for Westminster, all other matters being (in the case of Wales) the responsibility of the Assembly and/or the Welsh Government.

7. The permanence of devolved government for Wales has recently been recognised in clause 1 of the Wales Bill, which provides for the following provision to be added to the 2006 Act:

   A1 Permanence of the Assembly and Welsh Government

[1] See Select Committee on the Constitution, 'The Union and devolution: written and oral evidence' p.727. Available at: http://www.parliament.uk/documents/lords-committees/constitution/union-and-devolution/FINAL-Evidence-volume-UDE.pdf .

> (1) The Assembly established by Part 1 and the Welsh Government established by Part 2 are a permanent part of the United Kingdom's constitutional arrangements.
>
> (2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Assembly and the Welsh Government.
>
> (3) In view of that commitment it is declared that the Assembly and the Welsh Government are not to be abolished except on the basis of a decision of the people of Wales voting in a referendum.

8. Equivalent provisions have already been inserted into a new section 63A of the Scotland Act 1998.

9. As recognised by this Court in *Re Agricultural Sector (Wales) Bill* [2014] 1 WLR 2622 at [42], the direction of travel for devolution in the United Kingdom is undoubtedly one of widening and deepening empowerment. Thus the Welsh Assembly acquired significant new powers to pass Acts, within the legislative competences set out in the 2006 Act, following a referendum held on 3 March 2011.[2] Similarly, the Wales Bill, if it comes into force, is intended to increase the powers of the Assembly by amending the 2006 Act from a 'conferred powers' to a 'reserved powers' model of devolved competences. As set out above, these reflect permanent transfers of power to the Welsh Assembly and Government.

10. In stark contrast to this direction of travel, a large number of the devolved functions of the Welsh Government derive from EU law, and will therefore be lost upon the UK's withdrawal from the EU Treaties. By way of example only:

    a. The Welsh Ministers have the power (indeed the duty) to designate sites as Special Areas of Conservation pursuant to certain provisions of the Habitats Directive 92/43.[3] These designating powers are designed to ensure the survival of Europe's most threatened species and habitats. Some of the designations depend upon mutual co-operation between EU Member States (such as the designation of certain sites for migrating birds).

[2] See sections 103-105 of the 2006 Act.
[3] See regulation 7 of the Conservation of Habitats and Species (England and Wales) Regulations 2010.

b. The Welsh Ministers, alongside the Natural Resources Body for Wales ("NRBW"), have been designated to operate certain aspects of the EU Emissions Trading Scheme under Directive 2003/87/EC.[4] For example, the Welsh Ministers have the power to issue directions to NRBW and to approve certain enforcement actions taken by it.

c. The Welsh Ministers have been designated as a competent authority under the Nutrition and Health Claims (Wales) Regulations 2007, in relation to certain provisions of Regulation (EC) 1924/2006 on nutrition and health claims made on foods. As a result, any food business operator who wishes to use a novel health claim on foods must apply to the Welsh Ministers. The Welsh Ministers have similar responsibilities in relation to the sale of foods for special medical purposes,[5] the registration of slaughterhouses,[6] and the labelling of particular types of food;[7]

d. The Welsh Ministers are a competent authority for the purposes of the REACH Regulation 1907/2006, which imposes a wide-ranging obligation upon companies importing or manufacturing chemical substances to register those substances.[8] The competent authorities are responsible for enforcing certain aspects of the REACH regime and are involved in the process of evaluating the safety of certain chemicals.

e. The Welsh Ministers have been designated as a competent authority in relation to Regulation (EC) No 1069/2009, which lays down health rules regarding animal by-products and derived products not intended for human consumption.[9] As the competent authority, the Welsh Ministers have a number of control and oversight functions associated with enforcement and compliance with the Regulation.

[4] See regulation 3 of the Greenhouse Gas Emissions Trading Scheme Regulations (S.I. 2012/3038).
[5] See the Medical Food (Wales) Regulations 2000 and Article 5 of Directive 1999/21.
[6] See the Poultrymeat (Wales) Regulations 2011 and Article 12 of Regulation (EC) 543/2008.
[7] See the Beef and Veal Labelling (Wales) Regulations 2011 which grants powers in relation to certain provisions of Regulation (EC) 1760/2000.
[8] See the REACH (Appointment of Competent Authorities) Regulations 2007 (S.I. 2007/1742) and the REACH Enforcement Regulations 2008 (S.I. 2008/2852).
[9] See the European Communities (Designation) (No. 2) Order 2008.

11. These functions (of which there are a vast number) will, to the extent they are maintained and/or modified, require a new legislative basis after the EU Treaties cease to apply. Moreover, whatever arrangements are put in place at that time, they will not be able to replicate the existing EU law frameworks (in particular, any replacement arrangements will not be able to provide for the involvement of EU institutions, or replicate any of the reciprocal obligations between EU Member States that exist under the current EU frameworks). Withdrawal from the EU will therefore inevitably change the Ministers' devolved functions, and the practical implications of this will be very significant indeed.

12. For the reasons set out below, the UK government in this case is claiming a prerogative power to dispense with certain provisions of the statutory framework for devolution in Wales. However, this is at odds with both the increasingly broad and permanent devolution arrangements within the United Kingdom, and the narrow, residual nature of the prerogative power.

13. Thus, Dicey described the prerogative power as:[10]

> [T]he residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.

14. Further, as the Divisional Court noted at [24] of its judgment, it has been held by Lord Reid in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 that:

> The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute (p.101).

15. Most recently, the Treasury Solicitors Department has affirmed the principle that *"The Crown cannot invent new prerogative powers. This is consistent with the residual nature of the prerogative"*.[11]

16. In the specific context of the executive's treaty-making powers, the prerogative has been constrained by the 'Ponsonby rule', which was placed on a statutory

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[10] A. V. Dicey, *Introduction to the Study of the Law of Constitution* (Liberty Fund, Indianapolis reprint of eighth edition, 1915, Macmillan, London. First edition published 1885), p.282.

[11] House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (Stationery Office, London, 2004), Fourth Report of 2003-04, HC 422, Ev 14.

footing in section 20 of the Constitutional Reform and Governance Act 2010. The rule, which requires treaties to be placed before Parliament before they are ratified, began as an undertaking that Arthur Ponsonby, Parliamentary Under-Secretary of State for Foreign Affairs, gave to Parliament on 1 April 1924.[12] It was the outcome of a programme of reform that Ponsonby and others had promoted during the First World War to constrain the prerogative power. Thus in 1914 he said that:[13]

> No treaty should be drawn up with any foreign country without Parliamentary sanction being given to its clauses in detail as well as to its formal ratification … No treaty, alliance or commitment should be entered upon without the express consent of Parliament. By commitment we mean any sort of understanding, contract, obligation, or liability involving national responsibilities, or necessitating under any circumstances military action.

17. The prerogative is therefore not only a narrow, residual power. It is subject to specific constraints, such as the Ponsonby rule, to control its use.

18. The contexts in which the Counsel General's submissions must be assessed are therefore (i) permanent and expanding empowerment for the devolved nations; and (ii) the narrow, residual nature of the prerogative.

19. The UK Government's case must also be seen in the context of two well-established mechanisms for changing the competence of the Welsh Assembly under the 2006 Act, namely (i) an Order in Council under section 109 of the Act (which requires the consent of Parliament and the Welsh Assembly) (see paragraphs 36-39 below); or (ii) an Act of Parliament amending the 2006 Act itself (which engages the Sewel Convention, and therefore normally requires the consent of the Assembly) (see paragraph 77-91 below). Extraordinarily, the government claims in these proceedings to have a <u>third</u> source of power, through the prerogative, to make changes to the Assembly's statutory competence which would enable it to bypass entirely the important safeguards that apply to these two established mechanisms.

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[12] Ministry of Justice/Ministry of Defence/Foreign and Commonwealth Office, *War powers and treaties: limiting Executive powers* (Stationery Office, London, October 2007), CM 7239, p.71.
[13] Arthur Ponsonby, *Parliament and Foreign Policy* (Union of Democratic Control, London, 1914) p.8.

1. Giving notification will alter the competences of the Welsh Assembly and Welsh Government under the 2006 Act

20. In the Counsel General's submission, there is no prerogative power to alter, or dispense with, statutory provisions. In this case, triggering Article 50 will dispense with certain provisions of the 2006 Act that define the competence of the Assembly and the Welsh Ministers. The prerogative therefore cannot be relied upon to give notice under Article 50.

21. The Counsel General supports the Divisional Court's finding that prerogative powers cannot be used to remove domestic law rights ([33]). However, the constitutional principle at stake is wider and does not permit the prerogative to dispense with primary legislation. It is not confined to legislation that affects individual rights (see paragraphs 28-29 below). It operates to prevent the prerogative from being used so as to have the effect of altering the competence of the Welsh Assembly and Welsh Ministers.

i) There is no prerogative power to dispense with statutory provisions

22. It is a simple and well-established principle of British constitutional law that the prerogative power cannot be used to dispense with primary legislation. The government accepts this at §55(b) of its printed case, where it cites:

> ... the uncontroversial proposition that the Government cannot purport to countermand laws passed by Parliament.

23. This principle has strong historical foundations. Thus in 1820, Joseph Chitty, a legal scholar, provided an account of the prerogative which included the following description of the limits on the prerogative power:[14]

> There are also various *boundaries*, which the constitution has set to the royal prerogative ...These consist in the actual and positive limitation of the powers of the Crown, in certain specified cases. Thus, though the King is supreme head of the church, he can neither legally alter his own, or establish any other, than the national religion; and must tolerate the dispassionate religious sentiments of others. His Majesty is invested with the exclusive right to assemble Parliament, but must

[14] Joseph Chitty, *A Treatise On the Law of the Prerogatives of the Crown* (Joseph Butterworth, London, 1820), pp.7-8.

> assemble one at least once in three years; is the fountain of justice, but has in person no judicial power, and cannot alter the law, or influence the determinations of his judges; may pardon offenders, but cannot prejudice civil rights and remedies; has the management of martial affairs, but cannot, without the consent of Parliament, raise land forces, or keep them on foot, in time of peace.

24. This is consistent with, and reflects, *The Case of Proclamations* (1610) 12 Co. Rep. 74, cited by the Divisional Court at [27], where Sir Edward Coke said:

> … the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.

25. The principle is also set out in section 1 of the Bill of Rights 1688, which provides:

> [The] Lords Spirituall and Temporall and Commons … Declare …
>
> That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall (emphasis added)

26. In *The Zamora* [1916] 2 AC 77, cited by the Court at [29], the Privy Council said:

> The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our constitution (p.90, emphasis added).

27. Finally, in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 Lord Oliver said at p.500B-C:

> … as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament (emphasis added).

28. It has thus been said that the executive may not through the prerogative *"change"*, *"dispense with"*, *"alter"*, *"countermand"*, *"override"* or *"set aside"*[15] statute

[15] For the Professor A.V. Dicey, *An Introduction to the Law of the Constitution* (8th edn, 1915), p.38 (cited by the Divisional Court at [22]: "[Parliament has] the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law … as having a right to override or set aside the legislation of Parliament".

law. As the Divisional Court said at [20], this reflects the long-established constitutional relationship between Parliament and the executive:

> It is common ground that the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme … Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen …

29. The Court went on to set out the basic principle that *"primary legislation is not subject to displacement by the Crown through the exercise of its prerogative powers"* ([25]).[16] The Counsel General respectfully endorses that principle.

<u>ii) Triggering Article 50 would dispense with certain provisions of the 2006 Act</u>

30. The triggering of Article 50 will dispense with a number of very significant provisions of the 2006 Act. In particular:

    a. It will dispense with the requirement that the Assembly may not legislate incompatibly with EU law (section 108(6)(c)), and associated statutory provisions;

    b. It will override the specific process for changing the Assembly's competence by Order in Council (section 109); and

    c. It will dispense with the requirement for the Welsh Ministers to comply with EU law (section 80).

31. These changes to the statute will significantly change the United Kingdom's devolution settlement as it applies to Wales.[17]

a) Competences of the Assembly

32. The competences of the Welsh Assembly are governed by section 108 of the 2006 Act, which provides:

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[16] See also [86], where the Divisional Court set out the *"powerful constitutional principle that the Crown has no power to alter the law of the land"*.

[17] And it goes without saying that triggering Article 50 will change the devolution settlement as it applies to the other devolved nations.

108 Legislative competence

(1) Subject to the provisions of this Part, an Act of the Assembly may make any provision that could be made by an Act of Parliament.

(2) An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.

(3) A provision of an Act of the Assembly is within the Assembly's legislative competence only if it falls within subsection (4) or (5).

(4) A provision of an Act of the Assembly falls within this subsection if–

> (a) it relates to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7 and, subject to subsection (4A), does not fall within any of the exceptions specified in that Part of that Schedule (whether or not under that heading or any of those headings), and
>
> (b) it neither applies otherwise than in relation to Wales nor confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales.

(4A) Provision relating to a devolved tax (as listed under the heading "Taxation" in Part 1 of Schedule 7) is not outside the Assembly's legislative competence by reason only of the fact that it falls within an exception specified under another heading in that Part of that Schedule.

(5) A provision of an Act of the Assembly falls within this subsection if–

> (a) it provides for the enforcement of a provision (of that or any other Act of the Assembly) which falls within subsection (4) or a provision of an Assembly Measure or it is otherwise appropriate for making such a provision effective, or
>
> (b) it is otherwise incidental to, or consequential on, such a provision.

(6) <u>But a provision which falls within subsection (4) or (5) is outside the Assembly's legislative competence if</u>–

> (a) it breaches any of the restrictions in Part 2 of Schedule 7, having regard to any exception in Part 3 of that Schedule from those restrictions,
>
> (b) it extends otherwise than only to England and Wales, or
>
> (c) <u>it is incompatible with the Convention rights or with EU law</u>.

(7) For the purposes of this section the question whether a provision of an Act of the Assembly relates to one or more of the subjects listed in Part 1 of Schedule 7 (or falls within any of the exceptions specified in that Part of that Schedule) is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

33. Section 108(6)(c) thus places a clear and unqualified restriction on the competence of the Welsh Assembly that it may not legislate contrary to EU law.[18]

34. *"EU law"* is defined for these purposes by section 158, which provides:

> "EU law" means–
>
> (a) all the rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties,[19] and
>
> (b) all the remedies and procedures from time to time provided for by or under the EU Treaties.

35. The effect of triggering Article 50 will, in substance, therefore be to dispense with section 108(6)(c) entirely so far as it concerns EU law because there will no longer be any "EU Treaties" upon which the restriction bites. The provision will be hollowed out entirely. This would therefore be a paradigm case of the prerogative being used to dispense with a statutory provision, which is not permitted according to the principles set out at 22-29 above. In substance, using the prerogative to trigger Article 50 will amount to the executive drawing a black line through (the relevant part of) section 108(6)(c), thereby removing it from the statute book.

36. Furthermore, the use of the prerogative power to dispense with the EU law restriction in section 108(6)(c) would cut across the specific procedure that the executive must follow if it wishes to alter the competence of the Assembly under section 109 of the 2006 Act, which provides:

> **109 Legislative competence: supplementary**
>
> (1) Her Majesty may by Order in Council amend Schedule 7.
>
> (2) An Order in Council under this section may make such modifications of–
>
> > (a) any enactment (including any enactment comprised in or made under this Act) or prerogative instrument, or

[18] Notably there is no equivalent restriction for types of international obligations other than those found in section 108(6)(c), which are dealt with in section 114(1)(d). That provision gives the Secretary of State a power to veto an Assembly Act which is incompatible with any international obligation, but does not place such Acts outside the competence of the Assembly.

[19] The words "EU Treaties" are clearly intended to mean the treaties to which the UK is a party. Otherwise the provision would produce the extraordinary result that Wales would remain bound by EU law even if the Treaties no longer applied to the UK, creating a very substantial asymmetry in the UK's devolution arrangements.

(b) any other instrument or document,

as Her Majesty considers appropriate in connection with the provision made by the Order in Council.

(3) An Order in Council under this section may make provision having retrospective effect.

(4) No recommendation is to be made to Her Majesty in Council to make an Order in Council under this section unless a draft of the statutory instrument containing the Order in Council–

(a) has been laid before, and approved by a resolution of, each House of Parliament, and

(b) except where the Order in Council is the first of which a draft has been laid under paragraph (a), has been laid before, and approved by a resolution of, the Assembly.

(5) The amendment of Schedule 7 by an Order in Council under this section does not affect–

(a) the validity of an Act of the Assembly passed before the amendment comes into force, or

(b) the previous or continuing operation of such an Act of the Assembly.

37. The explanatory note to section 109 states:[20]

> The purpose of this section is to allow amendments to be made to Schedule 7, so as to enhance, restrict or change the Assembly's legislative competence to pass Acts.

38. Section 109 thus provides a specific and comprehensive procedure for altering the competences of the Assembly (either by "enhancing" or "restricting" its powers), as set out in Schedule 7 to the Act.[21] The process requires express approval by each House of Parliament and the Assembly (section 109(4)).

39. Crucially, section 109 does not permit the executive to amend the limits on the competences of the Assembly set out in the body of the 2006 Act itself (including the EU law restriction in section 108(6)(c)). Instead, Parliament deliberately confined the amending power to the competences set out in Schedule 7. In the

[20] Explanatory Note to the 2006 Act, paragraph 410.

[21] Schedule 7 contains a list of the competences, and exceptions to the competences, of the Assembly. For example, paragraph 1 of Part 1 provides that the Assembly may legislate in the fields of agriculture, horticulture, forestry, fisheries and fishing, animal health and welfare, plant health etc. Part 2 provides a number of general exceptions to the Assembly's competence. For example, the Assembly may not pass Acts which have the effect of amending certain statutes (including the ECA) (paragraph 2(1)). Part 3 provides a list of exceptions to the exceptions.

Counsel General's submission, it would be a clear subversion of section 109 if the executive were able to rely on the prerogative to alter the restrictions on the Assembly's competences contained in section 108, including the EU law restriction in the 2006 Act, thereby bypassing the requirement for parliamentary approval under section 109(4)(a).

40. Triggering Article 50 will also dispense with section 113 of the 2006 Act, which enables the Assembly to re-consider a Bill where a reference on its compatibility with EU law has been made to the CJEU. Section 113 provides:

> **113 ECJ references**
>
> (1) This section applies where–
>
> (a) a reference has been made in relation to a Bill under section 112,
>
> (b) a reference for a preliminary European Court ruling has been made by the Supreme Court in connection with that reference, and
>
> (c) neither of those references has been decided or otherwise disposed of.
>
> (2) If the Assembly resolves that it wishes to reconsider the Bill–
>
> (a) the Clerk must notify the Counsel General and the Attorney General of that fact, and
>
> (b) the person who made the reference in relation to the Bill under section 112 must request the withdrawal of the reference.
>
> (3) In this section *"a reference for a preliminary European Court ruling"* means a reference of a question to the European Court under Article 267 of the treaty on the Functioning of the European Union or Article 150 of the Treaty establishing the European Atomic Energy Community.

41. This procedure will obviously disappear once the EU Treaties cease to apply to the United Kingdom because the Supreme Court will no longer have the power to make references to the CJEU. Section 113 is thus a further statutory provision which the government is claiming the power to dispense with by triggering Article 50.

42. Finally, withdrawal from the EU will have very significant effects on the future interpretation of Acts of the Assembly. Section 154 of the 2006 Act provides:

> **154 Interpretation of legislation**
>
> (1) This section applies to–

(a) any provision of an Assembly Measure, or proposed Assembly Measure, which could be read in such a way as to be outside the Assembly's legislative competence,

(b) any provision of an Act of the Assembly, or a Bill for such an Act, which could be read in such a way as to be outside the Assembly's legislative competence, and

(c) any provision of subordinate legislation made, or purporting to be made, under an Assembly Measure or Act of the Assembly which could be read in such a way as to be outside the powers under which it was, or purported to be, made.

(2) The provision is to be read as narrowly as is required for it to be within competence or within the powers, if such a reading is possible, and is to have effect accordingly.

43. Section 154(2) thus requires Acts of the Assembly to be interpreted, where possible, in a way which brings them within the Assembly's competences. It follows that, wherever possible, a court must interpret an Act of the Assembly in a way which complies with EU law (even if that is not the most natural interpretation) in order to comply with the restriction on the Assembly's competence in section 108(6)(c). As set out at paragraph 35 above, section 108(6)(c) will, in substance, be repealed when the UK withdraws from the EU. It follows that this interpretative requirement will cease to apply. Although the Counsel General does not rely upon this as a free-standing reason for finding that there is no prerogative power to trigger Article 50, it demonstrates the significant effects that withdrawal from the EU will have on Acts of the Assembly, and therefore the devolution framework for Wales as a whole.

44. In summary, the Counsel General therefore submits that the act of triggering Article 50 by the government would:

a. dispense with section 108(6)(c) of the 2006 Act entirely;

b. cut across the specific statutory procedure for altering the competences of the Assembly under section 109; and

c. remove the Assembly's power to reconsider a Bill where a reference to the CJEU is made under section 113.

b) Powers of the Welsh Ministers

45. Triggering Article 50 will also have an important impact on the statutory powers and functions of the Welsh Ministers. In addition to powers conferred directly by primary legislation, powers may be conferred upon the Welsh Ministers by Orders in Council, which must be approved by Parliament and the Welsh Ministers (section 58 of the 2006 Act).

46. Section 80 of the 2006 Act requires the Welsh Ministers to comply with EU law:

> **80 EU law**
>
> (1) A community obligation of the United Kingdom is also an obligation of the Welsh Ministers if and to the extent that the obligation could be implemented (or enabled to be implemented) or complied with by the exercise by the Welsh Ministers of any of their functions.

47. Section 80(8) then provides:

> (8) The Welsh Ministers have no power–
> (a) to make, confirm or approve any subordinate legislation, or
> (b) to do any other act,
> so far as the subordinate legislation or act is incompatible with EU law or an obligation under subsection (7).

48. There is therefore a "red-line" restriction on the Welsh Ministers' competences that they may not act contrary to EU law. This will be hollowed-out entirely when the UK withdraws from the EU because, as explained at paragraph 35 above, there will no longer be any "EU law" upon which the restriction will bite. The government is thus claiming a power to dispense with this statutory provision entirely. As noted at paragraph 35 above (in relation to section 108(6)(c)), the UK Government will essentially be drawing a black line through this provision on the statute book.

49. As well as dispensing with this important restriction on Welsh Ministers' powers, the statutory arrangement whereby those Ministers are vested with powers to implement EU law under section 2(2) of the ECA will also be lost. Section 59 of the 2006 Act currently provides the UK Minister with a power to designate Welsh Ministers for this purpose:

> **59 Implementation of EU law**

> (1) The power to designate a Minister of the Crown or government department under section 2(2) of the European Communities Act 1972 (c.68) may be exercised to designate the Welsh Ministers.
>
> (2) Accordingly, the Welsh Ministers may exercise the power conferred by section 2(2) of the European Communities Act 1972 in relation to any matter, or for any purpose, if they have been designated in relation to that matter or for that purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council designating them.

50. This power has been used on many occasions to transfer powers to the Welsh Ministers. By way of example only, it has been used to empower the Welsh Ministers to make provisions in relation to protection of public health, [22] environmental impact assessments,[23] the prevention and management of waste,[24] the prevention and management of environmental damage, [25] certain public procurement functions,[26] and the construction of buildings.[27] By triggering Article 50, the UK government is claiming a prerogative power to empty section 59 of all meaningful content, thereby dispensing with its statutory discretion to vest Welsh Ministers with very significant powers, such as those listed above. It goes without saying that this will have major practical implications for the Welsh Government.

51. For completeness, clause 19 of the Wales Bill, which is currently before Parliament and will be the subject of an LCM before the Assembly, will insert a new section 58B into the 2006 Act. The text of new section 58B provides:[28]

> **58B Implementation of EU law: general**
>
> (1) Section 2(2) of the European Communities Act 1972 (secondary legislation implementing EU obligations, etc) applies to the Welsh Ministers as if they were a Minister of the Crown or government department designated by Order in Council under that provision.
>
> (2) But subsection (1) confers no power to make provision that would be outside the legislative competence of the Assembly if it were included in an Act of the Assembly (see section 108A).

[22] European Communities (Designation) (No.2) Order 2008 (SI 2008/1792).
[23] European Communities (Designation) (No.3) Order 2007 (SI 2007/1679).
[24] European Communities (Designation) (No.2) Order 2010 (SI 2010/1552).
[25] European Communities (Designation) (No.2) Order 2014 (SI 2014/1890).
[26] European Communities (Designation) (No.2) Order 2015 (SI 2015/1530).
[27] European Communities (Designation) Order 2016 (SI 2016/161).
[28] The Bill is expected to be passed by late February 2016.

52. If this provision comes into force before the EU Treaties cease to apply to the UK (which is likely), the Welsh Ministers will acquire a direct power to implement EU law within Wales. However, that statutory power would subsequently be deprived of all content upon the UK's withdrawal from the EU. Although the Counsel General does not rely upon this (as yet unimplemented) provision in support of his argument that there is no prerogative power to trigger Article 50, it provides a further demonstration of the way in which withdrawal from the EU will unravel the devolution relationship between the United Kingdom and Wales. That makes it all the more surprising that the government is claiming a power to achieve this result through the use of a prerogative power.

iii) The 2006 Act is a statute of fundamental constitutional importance

53. The principle that the executive may not dispense with statutory provisions applies with particular force to statutes which are of fundamental constitutional importance (although the Counsel General's arguments set out above do not depend upon the status of the 2006 Act as a constitutional statute).

54. The 2006 Act has been recognised as a constitutional statute on several occasions. In *Thoburn v Sunderland City Council* [2003] QB 151, Laws LJ expressly recognised the Government of Wales Act 1998, the predecessor to the 2006 Act, as a constitutional statute at [62]. This was subsequently confirmed in *R (Governors of Brynmawr School) v Welsh Ministers* [2011] EWHC 519 (Admin), which was a case about the Welsh Ministers' powers to delegate their education functions under the 2006 Act. Beatson J (as he then was) said:

> It is clear that the statutes devolving power from the Westminster Parliament to Scotland, Wales and Northern Ireland are major constitutional measures: see *HM Advocate v R [2002] UKPC D3* per Lord Rodger at [121]; *Robinson v Secretary of State for Northern Ireland [2002] UKHL 32* at [25], and *Thoburn v Sunderland City Council [2003] QB 151* per Laws LJ who at [62] included GOWA 1998 in a list of constitutional statutes. Lord Mance has described the Scotland Act 1998 and the Human Rights Act 1998 as "essential elements of the architecture of the modern United Kingdom": *Somerville v Scottish Ministers [2007] UKHL 44* at [169]. Despite the important differences between the devolution settlement in Scotland and Northern Ireland and that in Wales, this description is equally applicable to both the Government of Wales Acts. Accordingly, in applying the rules of statutory construction in order to determine the

> scope of the powers conferred on the Welsh Ministers or the Assembly by GOWA 2006, the court will take into account its constitutional status ([73], emphasis added).

55. This designation of the 2006 Act as a major constitutional measure reflects the fact that the devolution framework has become a permanent feature of the United Kingdom constitution, as set out at paragraphs 7-8 above.

56. The Counsel General relies upon the recognition of the 2006 Act as a constitutional statute not in support of any particular interpretation of the Act (there is no relevant ambiguity) but rather to demonstrate the unreality of the government's claim to have a prerogative power to trigger Article 50 in circumstances where that will override not only ordinary statutory provisions but the provisions of a statute which is of fundamental constitutional importance.

57. Indeed, if provisions of the 2006 Act, as a constitutional statute, may only be repealed by express (or very specific) words in primary legislation (as Laws LJ said in *Thoburn* at [62]-[63]) it would be very surprising indeed if the government could achieve the same result without any primary legislation through the prerogative (as the Divisional Court observed at [88]).

iv) The Northern Ireland High Court's judgment in McCord's Application

58. The effect of triggering Article 50 on the United Kingdom's devolution legislation was considered by the Northern Ireland High Court in *McCord's (Raymond) Application* [2016] NIQB 85. In that case, Maguire J found that various provisions of the Northern Ireland Act 1998, including those which govern the competence of the Northern Ireland Assembly and the Northern Ireland Ministers,[29] did not bar the use of the prerogative to trigger Article 50 ([108]).

59. In his judgment, Maguire J said that it was common ground that, unless the prerogative had been displaced by statute, the government's reliance upon it to give notice under Article 50 was unobjectionable.[30] However, that is not the right test. For the reasons set out at paragraphs 22-29 above, the question is simply

[29] See sections 6(2) and 24(1) of the Northern Ireland Act 1998, respectively.
[30] Judgment, §67.

whether the use of the prerogative will dispense with one or more statutory provisions.

60. For the same reason, the Maguire J also set the bar too high when he said that:

> … it is [not] accurate to say that a cornerstone of the new institutions, without which the various edifices would crumble, is continued membership of the EU. The devolved institutions and the various North/South and East/West bodies do not as their *raison d'etre* critically focus on EU law.

61. However, it is irrelevant whether compliance with EU law is the *"raison d'etre"* of the devolved institutions (it clearly is not). The question is simply whether one or more provisions of the devolution legislation will be dispensed with. For the reasons set out above, the UK's withdrawal from the EU will hollow out a number of important provisions of the 2006 Act (as well as their Scottish and Northern Irish counterparts).

62. Maguire J also appeared to base his decision upon the fact that it cannot be predicted with any certainty what will happen after Article 50 is triggered. Thus at §107 of the judgment he said *"The reality is, at this time, it remains to be seen what actual effect the process of change subsequent to notification will produce … Whilst the wind of change may be about to blow the precise direction in which it will blow cannot yet be determined"*. In the Counsel General's submission, this 'uncertainty' point is misconceived. All that matters is that the government is claiming a power to bring about the changes to the devolution settlement described above. It would be absurd for the government to suggest that this claim is premature because the consequences of triggering Article 50 (including the possibility of revoking a notice given under Article 50) cannot yet be predicted, in circumstances where (i) the government claims that the power to trigger Article 50 (and therefore necessarily the power to revoke any notification) is within its own gift; (ii) the government has confirmed that it will not, in fact, revoke any notification given under Article 50; and (iii) by the time the Counsel General and any other parties know whether or not the notification has been revoked, it will be too late to bring a claim because the effects of the EU Treaties ceasing to apply will already have been caused.

63. The Counsel General therefore respectfully submits that the judgment of Maguire J does not provide any assistance in this appeal.

v) Summary on the 2006 Act

64. In summary, the Counsel General submits that:

    a. The prerogative cannot be used to dispense with statutory provisions (especially, although not limited to, those contained in constitutional statutes);

    b. The use of the prerogative to give notice to leave the EU under Article 50 would dispense with a number of provisions of the 2006 Act governing the legislative competence of the Welsh Assembly and the powers of the Welsh Government;

    c. There can therefore be no prerogative power to trigger Article 50.

65. As a matter of form, the relevant provisions of the 2006 Act will remain on the statute book unless and until they are repealed. However, as a matter of substance they will be hollowed-out entirely. Any argument that this does not amount to a "dispensation with" statute law would be a triumph of form over substance (especially since the prerogative could never truly be used to strike provisions from the statute book).

66. Of course, the other side of the coin to dispensing with these provisions of the 2006 Act is that Welsh residents will lose a large number of EU law rights. In this regard, the Counsel General respectfully endorses the submissions of the Lead Claimant that the prerogative power cannot be used to remove domestic law rights. However, the Counsel General's argument is different, and additional, to that of the Lead Claimant because it focuses on the absence of any prerogative power to override *statutory provisions*.

67. Finally, it is important to note that the referendum held under the 2015 Act has no legal relevance to the arguments set out above as to the limits of the executive's power to dispense with statutory provisions (indeed, a striking feature of the government's case is that it would have the prerogative power to issue a

withdrawal notice under Article 50, and therefore make fundamental changes to the devolution settlement and people's rights, even without a referendum).

2. There is no prerogative power to circumvent the Sewel Convention

68. In the Counsel General's submission, the fact that withdrawing from the EU Treaties will dispense with certain provisions of the 2006 Act is sufficient to establish that there is no prerogative power to trigger Article 50.

69. However, an additional reason for finding that there is no prerogative power to give notification under Article 50(2) is that this would short-circuit the Sewel Convention, which requires Parliament not (normally) to legislate with regard to devolved matters without obtaining the consent of the Assembly. For the reasons set out below, the Convention is engaged by any legislation modifying the powers of the Assembly.

70. For the avoidance of doubt, the Counsel General is not submitting in this appeal that the Welsh Assembly has a legally enforceable right to veto any Westminster legislation authorising Article 50 to be triggered. He is therefore not asking the Court to enforce the Convention. Rather, he submits that there can be no prerogative power to short-circuit the Sewel Convention which in giving proper respect to, and grounding a process of dialogue with, the devolved legislatures is a fundamental part of the United Kingdom's devolution framework. This is an important distinction from *McCord's (Raymond) Application* [2016] NIQB 85, where the claimant invited the court to enforce the Sewel Convention directly by arguing that there was a requirement to obtain a Legislative Consent Motion from the Northern Ireland Assembly before triggering Article 50 (see judgment, §19(c)).

i) The scope of the prerogative should be interpreted in line with constitutional conventions

71. It is well-established that the common law may be developed and interpreted in accordance with constitutional conventions. In *Attorney-General v Jonathan Cape* [1976] QB 752, the government sought an injunction against the publication of certain cabinet papers on the ground that this would breach the convention of

collective cabinet responsibility. The defendant publisher argued that the court did not have power to enforce the convention because it was *"an obligation founded in conscience only"* (p.765F).

72. Lord Widgery CJ said that he *"[could] not see"* why the courts should not find that publication of the information would amount to a common law breach of confidence (p.769H), and that the convention of collective cabinet responsibility was *"not merely ... a gentleman's agreement to refrain from publication"* (p.770A). The court thus used the convention of collective cabinet responsibility to inform its interpretation and development of the common law doctrine of confidence.

73. *Jonathan Cape* is therefore authority for the principle that existing common law doctrines may be interpreted and applied to give effect to constitutional conventions (even if the conventions themselves may not be directly enforced).

74. The source of the prerogative power is the common law. As Lord Scarman said in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374:

> Without usurping the role of legal historian, for which I claim no special qualification, I would observe that <u>the royal prerogative has always been regarded as part of the common law</u>, and that Sir Edward Coke had no doubt that it was subject to the common law: Prohibitions del Roy (1608) 12 Co. Rep. 63 and the Proclamations Case (1611) 12 Co. Rep. 74. In the latter case he declared, at p. 76, that "the King hath no prerogative, but that which the law of the land allows him" (p.407C).

75. Similarly, Lord Diplock said:

> The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., <u>that part of the common law that is given by lawyers the label of "the prerogative"</u> (p.409C).

76. The limits of the government's prerogative powers are therefore a question of common law, which the Court is being asked to interpret and apply in this appeal. The Counsel General submits that the Court should interpret the common law limits on the prerogative in compliance with the Sewel Convention. For the

reasons set out below, that requires the decision to trigger Article 50 to be taken by Parliament, not the executive.

ii) The Sewel Convention requires a dialogue between legislatures

77. The Sewel Convention is an essential part of the United Kingdom's devolution settlement. It requires the Westminster Parliament not (normally) to legislate with regard to devolved matters without obtaining the consent of the Welsh Assembly. Consent is sought by asking the Assembly to pass a 'Legislative Consent Motion' ("LCM") endorsing the relevant Westminster legislation.

78. Under the Welsh Assembly's Standing Order 29, a member of the Welsh Government must lay a 'Legislative Consent Memorandum' in relation to any *"relevant Bill"* under consideration in the UK Parliament.[31] Once a Memorandum is laid, any member of the Assembly may table an LCM seeking the Assembly's agreement to the Bill (SO 29.6),

79. The Sewel Convention is recognised in the Memorandum of Understanding between the UK government and the devolved governments, which states:[32]

> 14. The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.

80. If the Wales Bill is passed, the Convention will be placed on a statutory footing. Clause 2 of the Bill provides for a new section 107(6) of the 2006 Act in the following terms:

> (5) This Part does not affect the power of the Parliament of the United Kingdom to make laws for Wales.

[31] Standing Order 29 of the Welsh Assembly, paragraph 29.2. For the definition of "relevant Bill", which is significant for the purposes of this appeal, see paragraph 88 below.
[32] Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013), §14.

> (6) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly.

81. The Convention has already obtained statutory recognition in section 28(8) of the Scotland Act 1998, as amended by section 2 of the Scotland Act 2016.

82. Crucially, as can be seen from the wording of the Bill, the Sewel Convention is a convention which operates between legislatures. Whilst it only requires the Westminster Parliament to "normally" abstain from legislating on devolved matters without obtaining the consent of the Welsh Assembly, the decision of whether or not to do so rests firmly with Parliament, not the executive.

83. In the Counsel General's submission, the prerogative cannot be relied upon to simply short-circuit the Convention by removing the decision to trigger Article 50, and therefore the dialogue envisaged by the Sewel Convention, from Parliament.

iii) The Sewel Convention applies to Bills which modify the Assembly's competence

84. The Sewel Convention is engaged by legislation which modifies the Assembly's competence. For the reasons set out at paragraph 35 above, the act of triggering Article 50 will affect competence by removing the EU law restriction in section 108(6)(c) of the 2006 Act. [33]

85. Such legislation is dealt with expressly in one of the UK government's 'Devolution Guidance Notes', which are documents published by the Cabinet Office setting out advice on the working arrangements between the UK Government and the devolved administrations. Devolution Guidance Note No.17 ("DGN17") is titled *"Modifying the Legislative Competence of the National Assembly for Wales"*. Paragraph 13 of the Note states:

> The UK Government and the Welsh Government have agreed that the Welsh Ministers should seek the consent of the Assembly when such provisions [modifying the Assembly's legislative competence] are included in Bills. Any such provision should be included in Bills on

[33] In *McCord's (Raymond) Application* [2016] NIQB 85, Maguire J held that the Sewel Convention as it applies to Northern Ireland was not engaged by triggering Article 50 ([121]). His reasoning was extremely brief and is not accepted by the Counsel General.

Introduction. Further advice on the content of parliamentary Bills which relates to Wales can be found in DGN 9.

86. DGN17 is to be read alongside DGN 9, which provides general guidance about the operation of the Sewel Convention. Paragraph 36 of the Note says:

> The UK Government would not normally ask Parliament to legislate in relation to Wales on subjects which have been devolved to the Assembly without the consent of the Assembly.[34] The Assembly grants consent by approving Legislative Consent Motions (LCMs).

87. The application of the Sewel Convention to Bills which affect the legislative competence of the Assembly is clearly reflected in Standing Order 29 of the Welsh Assembly, which provides:

> **UK Parliament Bills Making Provision Requiring the Assembly's Consent**
>
> 29.1 In Standing Order 29, "relevant Bill" means a Bill under consideration in the UK Parliament which makes provision ("relevant provision") in relation to Wales:
>
> > (i) for any purpose within the legislative competence of the Assembly (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Assembly.
> >
> > (ii) which modifies the legislative competence of the Assembly.

88. Paragraphs 29.2 and 29.3 of the Standing Order go on to require the Welsh Government to lay a Legislative Consent Memorandum ('LCM') before the Assembly, and allow the laying of a motion seeking the Welsh Assembly's agreement to the relevant provision. Whether or not the Welsh Assembly provides its agreement is then communicated by the Clerk to the Assembly to the Clerk of the House of Commons.

[34] This would include modifications of Welsh Ministers' functions within the Assembly's competence. See paragraph 50 of DGN 9.

89. It is thus clear that the Sewel Convention applies to Bills which modify the Assembly's competence (as well as those which fall within the Assembly's existing competences).[35]

90. Finally, it should be noted that the ordinary procedure envisaged by DGN17 for modifying the Assembly's competence is an Order in Council under section 109 of the 2006 Act. Thus, the Guidance Note states that:[36]

> Exceptionally, there may be occasions when it would be more straightforward to modify the Assembly's legislative competence in a parliamentary Bill rather than by a Section 109 Order (for example, if the scope of a Bill covered the subject area in which the UK Government and Welsh Government had agreed legislative competence should be conferred on the Assembly).

91. The norm envisaged by DGN17 is thus that the Assembly's competences will be modified by an Order in Council made under section 109 of the 2006 Act. As set out at paragraph 38 above, such an Order requires the consent of Parliament and the Welsh Assembly. This makes it all the more surprising that the government is claiming a power to modify the Assembly's competences through the prerogative, thereby bypassing both the Sewel Convention process between Parliament and the Assembly and the consent process envisaged under section 109.

iv) Summary on Sewel Convention

92. For the reasons set out above, the Counsel General submits that:

    a. The scope of the prerogative should be interpreted in accordance with the Sewel Convention;

    b. The Sewel Convention operates between legislatures. It requires the Westminster Parliament to consider on a case-by-case basis whether to seek the consent of the Assembly. The convention is that it will normally do so; and

[35] An example of an LCM in respect of a Bill modifying the Assembly's legislative competence is afforded by the LCM laid by the Welsh Government in relation to what is now the Wales Act 2014. The relevant letter from the Clerk to the Assembly to the Clerk to the House of Commons communicating the result of the vote on the motion is dated 2nd July 2014. It evidences a vote agreeing that the provisions in the Bill which modified the legislative competence of the Assembly should be considered by the UK Parliament.

[36] DGN17, §13.

c. The Sewel Convention applies to legislation which modifies the competence of the Welsh Assembly. The effect of relying on the prerogative to trigger Article 50 will therefore be to short-circuit the Convention entirely, because triggering Article 50 will modify the Assembly's competence.

3. Summary

93. In summary, the Counsel General submits that the government does not have the prerogative power to give notification under Article 50 for two reasons:

    a. First, the act of notification will dispense with certain provisions of the 2006 Act; and

    b. Second, the use of the prerogative in this way would short-circuit the Sewel Convention.

RICHARD GORDON QC

TOM PASCOE

Brick Court Chambers

25 November 2016

Agenda Item 3.2

Reshaping the Senedd

How to elect a more effective Assembly

Proportionality

Simplicity and Coterminosity

Sustainability and Stability

Broad-based consensus

Strong and Equal Mandates

Representativeness

Substantial support

Canolfan Llywodraethiant Cymru

Wales Governance Centre

Electoral Reform Society Cymru

About Us

Wales Governance Centre at Cardiff University

The Wales Governance Centre is a Cardiff University research centre undertaking innovative research into all aspects of the law, politics, government and political economy of Wales, as well the wider UK and European contexts of territorial governance. A key objective of the Centre is to facilitate and encourage informed public debate of key developments in Welsh governance not only through its research, but also through events and postgraduate teaching.

Electoral Reform Society Cymru

Electoral Reform Society Cymru is an independent campaigning organisation working to champion the rights of voters and build a better democracy in Wales. We offer an independent voice, and work to shape the democratic debate at all levels. We put the interests of the citizens within our democracy first.

We believe:

- Every vote and every voice has value and should be heard
- Everyone should be able to shape the decisions that affect their lives
- Our institutions should reflect the people they serve
- People should be able to hold those in power to account
- Politics should offer people real alternatives

For more information, or to join the Electoral Reform Society Cymru, please visit **www.electoral-reform.org.uk/wales**

Preface

In 2013, the UK's Changing Union project, in collaboration with the Electoral Reform Society Cymru, produced a report, *Size Matters: Making the National Assembly More Effective*, which made a reasoned case for increasing the number of Assembly Members (AMs). To bring it into line with the capacity of other comparable legislatures, the report suggested, the National Assembly for Wales should have around 100 members.

Since 2013, there has been further devolution of taxation powers with the Wales Act (2014); yet more change is on the horizon with the forthcoming Wales Bill, and the implications of Brexit on devolution. These developments strengthen further the core argument of *Size Matters*: as more powers accrue to Wales it is necessary to ensure that there are enough Assembly Members to scrutinise a powerful Welsh Executive.

But one question which our previous report left entirely unaddressed was *how* a larger Assembly might be elected. Increasing the number of AMs would require some adjustment in current electoral arrangements – but how, and on what basis, should this be done? This is the subject of our new report.

We do not, in *Reshaping the Senedd*, seek to promote one specific pet scheme for electing a larger Assembly. Rather, we seek to promote debate about the following:

- The principles on which any reform should be based;
- The key political realities with which any proposals for reform will have to deal; and
- The extent to which alternative potential electoral reforms might or might not be consistent with those principles and realities.

We hope that *Reshaping the Senedd* can make an important contribution to public debate about these matters.

November 2016

Wales Governance Centre at Cardiff University

Professor Roger Scully

Professor Richard Wyn Jones

ERS Cymru

Dr Owain Llyr ap Gareth

Introduction

In a previous report, *Size Matters*, we argued strongly that the membership of the National Assembly for Wales should be substantially increased – preferably to around 100 AMs.[1]

One thing we did not do in that report was make recommendations as to how this larger Assembly should be elected. Increasing the chamber's size would require some change to the electoral system. But change to electoral arrangements in Wales is now very likely anyway. Implementation of the 'reduce and equalize' legislation for the House of Commons, due to occur before the 2020 general election, means that Wales' Westminster representation will likely be reduced from 40 MPs to 29. And with the number of Westminster constituencies going down, some change to how we elect members to the Assembly would be inevitable – even if it was only the minimal change of abandoning the 'coterminosity' of Westminster and Assembly constituencies (that is, having identical constituencies for both institutions' elections).

The Wales Bill intends to transfer powers over the electoral arrangements for devolved elections to the Assembly. However, the Bill also sets a high 'supermajority' threshold for agreement, requiring the support of two-thirds of members. This means that there will be an opportunity for politicians in Wales to shape how our National Assembly is elected. But there is also an obvious question. Will it be possible to achieve sufficient cross-party agreement on a method of electing a larger Assembly?

This is the question that *Reshaping the Senedd* seeks to address by offering a framework based around first principles about what an electoral system seeks to do. We do not set out our own pet scheme for electoral reform. Rather, in an area where party self-interest can produce considerable heat but precious little light, we attempt to introduce principles and evidence. We do so in a way that seeks to take account of the political realities and the particular context in which the National Assembly for Wales operates. While one of the partners producing this report, ERS Cymru advocates the Single Transferable Vote, our aim here is to provide policy makers with options and a framework within which to come to a judgement – to provide evidence and promote reasoned debate, rather than to be overly prescriptive. In providing the basis from which to work towards agreement, we hope to prompt a process of negotiation and consensus-building towards an effective, workable and sustainable solution.

Specifically, in *Reshaping the Senedd* we do three things:

- First, we set out several basic principles that we think should guide debate on electoral reform in Wales.
- Second, we show that several major electoral systems clearly cannot satisfy these principles, and therefore do not offer a satisfactory way forward.
- Finally, we outline three potential routes to electing a larger Assembly, and present estimates as to the electoral outcomes that these systems might have produced if they had been used in the 2016 Assembly election.

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1 *Size Matters: Making the National Assembly more effective* (2013) (https://www.electoral-reform.org.uk/sites/default/files/Welsh-Assembly-Size-Matters.pdf).

1. Key Principles for a Good Electoral System

Debates around the rules of the political game should be different in character to everyday partisan politics.

Though political parties inevitably and unavoidably have a deep interest in how an electoral system is constructed, members of all parties and of none have a common interest in developing a system based on principles that all can recognise and respect. That is the process we are seeking to advance here.

Our analysis is based around seven key principles. These principles, we believe, provide the basis for a stable and lasting electoral system for the National Assembly for Wales. Prospective voting systems will be tested against these principles:

1. PROPORTIONALITY: A new electoral system should be likely to produce outcomes no less proportional than those produced by the present system, and ideally more proportional than the current system.
2. SIMPLICITY AND COTERMINOSITY: Electoral boundaries for the National Assembly should, as far as possible, be coterminous with others (such as mirroring Westminster boundaries). This makes things simpler for both voters and parties.
3. SUSTAINABILITY AND STABILITY: Any reformed electoral system should be sustainable. It should not need to change again fundamentally in the near future. This may require that it is also flexible and adaptable to minor changes as necessary.
4. BROAD-BASED CONSENSUS: Decisions on the electoral 'rules of the game' should always be based on as broad a consensus as possible; there should be checks against individual parties being able to change electoral systems for partisan gain.
5. STRONG AND EQUAL MANDATES: All Assembly Members should have clear and equal mandates; if mandates are different there should be no sense of some representatives being 'second-class' AMs.
6. REPRESENTATIVENESS: Insofar as possible, the electoral system should produce a body of representatives who reflect the electorate, in terms of race, gender, disability, religion, age, social class and diversity of opinions.
7. SUBSTANTIAL SUPPORT: Election to the National Assembly should require a substantial level of public support; the effective threshold for election should reflect this.

We acknowledge that balancing these key principles is precisely that – a question of balance. There are overlaps and tensions, and different and legitimate viewpoints will put more weight on some principles than others. Nevertheless, it is our contention that these principles constitute the basis around which future electoral arrangements of the National Assembly should be constructed.

We will now examine each of these principles in more detail.

1.1. Proportionality

A new electoral system should be likely to produce outcomes no less proportional than those produced by the present system, and ideally more proportional than the current system.

The more a party's share of seats reflects its share of the vote, the more proportional an electoral system is. The system currently used in Assembly elections is generally termed the **Additional Member System** (AMS). AMS is a hybrid voting system: it combines elements of First Past the Post (FPTP) where voters choose a candidate to represent their constituency, and party-list Proportional Representation. List seats are allocated to parties in a way that partially compensates for the disproportionality associated with First Past the Post elections.

How AMS works in Wales is different from Scotland. In Wales 40 AMs are elected through the constituency seats, and 20 on the list. In Scotland, 73 are elected through the constituency seats, and 56 from the party regional list. Having only one-third of members allocated proportionally via the list is a relatively low percentage and means that the Welsh version of AMS is inherently less proportional than that used in Scotland or in most other countries and regions that use the AMS system. At least half of all members of the German Bundestag are normally elected via the list,[2] and 42 per cent of New Zealand MPs. However, AMS as used in Wales is substantially more proportional than the results generally produced by FPTP for general elections in Wales. The system might thus most appropriately be described as **semi-proportional representation.**

Given that the current AMS system was an important part of the devolution settlement endorsed by the Welsh people in the 1997 referendum, any new system should be likely to produce outcomes no less proportional than the current one; ideally, we believe that it should be significantly more proportional, although we recognise that different political parties will have a direct interest in the system being either more or less proportional.

1.2. Simplicity and Coterminosity

Electoral boundaries for the NAW should, as far as possible, be coterminous with others (such as mirroring Westminster boundaries). This makes things simpler for both voters and parties.

Any voting system should be as simple as possible for voters to use and not generate any unnecessary confusion.

Electoral boundaries that mirror others (or, 'coterminosity' as it is termed) are preferable as they make things simpler for both voters and parties.[3] Therefore, using either Westminster boundaries or local government units as the basic geographic unit of representation is preferable to having differently-sized units for local, devolved and Westminster elections (as now happens in Scotland).

Losing coterminosity may also matter in terms of public service delivery, as having different boundaries adds to complexity there as well. The Williams Commission on

2 Indeed, following the Constitutional Court's *(Bundesverfassungsgericht)* decision on 25 July 2012 that disproportionality through the Constituency seats violated the Constitutional right to equal votes, the Bundestag now increases the number of list seats allocated to arrive at better proportionality. In 2013 this meant that the body of 598 was increased to 631 to ensure that parties who reached the minimum threshold were accorded their fair proportion of seats.

3 Although there is little detailed published research of which we are aware on public attitudes to coterminosity. However, the Arbuthnott Commission in Scotland did commission focus group work. This concluded that "the majority across the focus groups felt that the boundaries for the Scottish Parliament and the Westminster Parliament should be the same. The need for clarity and the need to avoid duplication were the main reasons that the interviewees gave to support their view that boundaries should be co-terminous". George Street Research Limited, *Final Report for the Commission on Boundary Differences and Voting Systems* (August 2005, p.21).

Public Service Delivery noted that Wales' public services map is very complex, and this has the effect of making citizens' rights and entitlements unclear, 'requiring them to understand and navigate complex overlapping responsibilities to access the services they need.'[4] With such a complex public services map, AMs and MPs often serve as the first point of contact for their electorate and as a guide and advocate through the system. Separating the Westminster and Assembly boundaries from each other would likely lead to yet greater difficulty and less clarity in this regard, particularly as the public often have very limited knowledge of what is and is not devolved.[5]

We would not expect decoupling the link in UK and Welsh Assembly constituencies to have as dramatic an effect as the advent of a new devolved institution and polity. However, it will have an effect on parties' organisation, how party members' organise local electoral campaigning, and raise issues about which level of governance should have primacy within the party organisation.

Currently, whether Westminster boundaries will change remains somewhat uncertain. Boundary changes are expected to be implemented before the 2020 election (in line with the Parliamentary Voting System and Constituencies Act 2011); this would reduce the number of Westminster MPs from 650 to 600. Wales has long been over-represented (due to generally having constituencies with smaller electorates than the average) and will therefore lose proportionately more MPs than the rest of the UK. The number of Welsh MPs is therefore scheduled to be reduced from 40 to 29.

National Assembly constituencies are at present identical to Westminster ones, so either the two levels will have to be decoupled or there will have to be some change to the Assembly electoral system anyway. Moreover, equalising Westminster constituencies through a strict formula based on the electoral roll for all future boundary reviews would make the Assembly's electoral arrangements vulnerable to instability caused by demographic changes – and not necessarily even changes only in Wales. Demographic changes, or large increase in the electoral roll in one part of the UK will impact on the constituency boundaries of other parts of the UK. As well as volatile levels of representation, the new boundary rules are also likely to promote volatile boundaries themselves, with constituencies liable to radical change at each successive election.[6]

With Westminster parliamentary constituencies likely to change, it would be prudent to have an electoral system flexible enough to adapt to such changes.

1.3. Stability & Sustainability

Any reformed electoral system should be sustainable. It should not need to change again fundamentally in the near future.

Whatever electoral system is adopted, it should be sustainable for the long term. There should be sufficient Assembly Members to adequately scrutinise the Welsh Government, even if the Assembly and Government's powers are widened or deepened by further developments in the Welsh devolution settlement, beyond those anticipated in the current Wales Bill. An electoral system should also be immune to, or able to adapt to, other plausible changes (such as changes in the number of Westminster constituencies over time).

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4 *Summary Report,* Commission on Public Service Governance and Delivery, p.14.

5 On public knowledge of devolution, and responsibility for major Services, see, for example, http://blogs.cardiff.ac.uk/electionsinwales/2016/03/09/who-runs-things-in-wales/.

6 For a broader discussion of the instability promoted by the 2011 Act's provisions on boundaries, see David Rossiter, Ron Johnston and Charles Pattie, 'Representing People and Representing Places: Community, Continuity and the Current Redistribution of Parliamentary Constituencies in the UK', *Parliamentary Affairs* (2013) 31: 856-886.

1.4. Broad-Based Consensus

Decisions on the electoral 'rules of the game' should always be based on as broad a consensus as possible; there should be checks against individual parties being able to change electoral systems for partisan gain.

As stated earlier, debates around the rules of the political game should be different in character to everyday partisan politics. To sustain public confidence in the integrity of democratic politics it is vital that the electoral system should be protected from the possibility – or even the perception – of manipulation for partisan gain.

Both the St David's Day Command Paper and the Wales Bill provide for a substantial 'supermajority requirement': while powers over electoral arrangements for the Assembly in Wales are to be devolved, changes must gain the support of "at least two-thirds of the total number of Assembly seats".[7] We strongly support this safeguard. But we also note its implications for our recommendations here. Any recommended electoral system for the National Assembly must be able to surmount the two-thirds threshold within the Assembly. This will make a broad-based consensus not merely desirable but actually essential. We believe that adopting the principles outlined here as building blocks to consensus will make this process easier and more attainable.

1.5. Strong and Equal Mandates

All Assembly Members should have clear and equal mandates; if mandates are different there should be no sense of some representatives being 'second-class' AMs.

AMs' mandates should be clear to the electorate: it should be readily apparent on what basis someone is elected, and for what geographical area. All AMs should be seen as equal in terms of mandate. There should be no sense that some members are 'second-class AMs', and all should have broadly equal expectations in terms of responsibilities in their role as AMs. If members' mandates are different, it is important that they are still of equal status.

1.6. Representativeness

Insofar as possible, the electoral system should produce a body of representatives who reflect the electorate, in terms of race, gender, disability, religion, age, social class and diversity of opinions.

Proportionality of representation is usually evaluated in terms of fairness between political parties. But an electoral system should also be concerned with other aspects of the representation of a society. An electoral system should facilitate, or at a minimum not inhibit, the election of a body of representatives who reflect the broader electorate in all its diversity of characteristics and opinions. The system should not be an additional barrier to members of traditionally under-represented groups seeking election.

Some types of electoral system are more amenable to parties producing a 'balanced ticket' than others; it is certainly easier when more than one candidate from a party stands in the same geographic area. This opens up space and potential for parties to take action to increase representation of under-represented groups, such as by age, gender, disability, and race.

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7 Section 9.4 of the Draft Wales Bill, p.12.

1.7. Substantial support

Election to the NAW should require a substantial level of public support; the effective threshold for election should reflect this.

While a strong democracy requires the inclusion of a diversity of voices, there are also potential negative consequences for a political system when elected representation 'fractionalises' into a large number of small parties. Among these consequences can be that extremist parties, with limited public support, gain the legitimacy of an elected platform; that such parties may sometimes be in a strong bargaining position to influence government formation and policy; and that effective governments become more difficult to form and sustain across the multitude of parties.

We therefore maintain that individual representatives, and political parties, should require the support of a substantial section of the electorate in order to gain representation to the National Assembly. In practice, some form of electoral 'threshold' should operate to ensure this is the case. This can be achieved in two ways:

- Electoral Law: An electoral system can include in its design a specific level of support that a party must reach to win representation. For example, in Germany there is a national threshold of 5% in order for a party to gain representation in the Bundestag. Under some electoral systems, it would be possible to put in place such a threshold;
- Effective Threshold: This is not a threshold set out in electoral law, but rather reflects that under some electoral systems a certain minimum level of support would be required to stand a chance of election. The fewer the number of members elected from the same geographic area, the higher the effective threshold generally will be.

Any new Assembly electoral system should balance a diversity of opinions and political standpoints with the avoidance of fractionalisation.

The principles outlined here offer a sound basis through which to evaluate systems that might be used in National Assembly elections. The following section will review some of the main available electoral systems, and identify several which do not plausibly satisfy all, or even most, of these seven criteria.

2. FAIL! Systems that do not pass the test

The seven principles outlined in Section 1 can be used to assess different electoral systems that might be used to elect an enlarged National Assembly for Wales. Here we outline several systems that clearly fail to pass this test.

2.1. Single member constituency voting systems

Variants:

- *First Past the Post (FPTP)*
- *Alternative Vote (AV) (which also encompasses Supplementary Vote (SV) in this analysis)*

These systems all elect a single representative from a constituency. Under First Past the Post (FPTP) voters cast a single vote for their chosen candidate; the candidate with most votes wins. Under Alternative Vote (AV), voters rank candidates in order of preference. Candidates are elected outright if they gain more than half the votes as first preferences. If not, the bottom candidate is eliminated and their votes re-allocated to the second preference marked on the ballot papers. This process continues until one candidate has more half of the votes and is elected. Supplementary Vote (SV) is an abbreviated variant of AV. Under SV, there are two columns on the ballot paper – one for voters' first choice and another for their second choice. The count follows a similar procedure to AV. For our purposes here SV and AV can be treated as similar.

What do these systems do well?

The main benefit of FPTP is simplicity. Voters are used to it, voting is easy, and voters know who represents them. AV is also fairly simple, with voters placing their candidates in order of preference.

Under these systems each member has a strong and equal mandate: each member is elected on the same basis to represent a distinct geographic area.

These systems also require a high threshold of public support for a candidate to be elected, with AV requiring a still higher threshold.

Where do they fail?

Proportionality: FPTP tends to produce distributions of seats that bear little relationship to the proportion of votes won by parties. In the 2016 Assembly election, the Labour party won 67.5 per cent of the constituency seats from 34.7 per cent of the vote. If FPTP had been used in devolved elections, Labour would have won strong to overwhelming majorities in every Assembly election, despite never approaching a majority of the vote.

A primary aim of increasing the number of AMs is to increase the National Assembly's capacity to scrutinise the Welsh Government. But this aim would be neutered if that increase were accompanied by a change in electoral system that entrenched single-party dominance.

Using AV rather than FPTP would likely make little difference. Indeed, AV can sometimes produce even less proportional outcomes than FPTP.

Stability and Coterminosity: If, as is likely, the number of Welsh Westminster constituencies are to be subject to frequent change in future, single-member systems are problematic in terms of establishing a stable number of AMs. For sustainability and stability Assembly constituencies would probably have to be decoupled from Westminster ones. As noted in Section 1, this presents its own difficulties for voters and parties.

Broad-based consensus: While the two largest UK parties – Labour and Conservatives – have generally supported FPTP for Westminster, Conservative AMs have taken a pragmatic approach and supported PR for the National Assembly.[8] It is unlikely that they would provide Labour with the two-thirds super-majority to change the system if that change would entrench Labour dominance to all other parties' detriment. Both Plaid Cymru and Liberal Democrats support other systems, as do the Greens and UKIP. It is thus difficult to envisage consensus on a single member system.

Representativeness: International experience has shown that single member systems provide less of an incentive for gender balance and diversity than multi member systems.[9] With one candidate to choose there is more likelihood of selecting what is perceived as a 'safe' candidate; more than one candidate encourages a more 'balanced ticket'. Despite this, Labour have achieved better gender-balance than other parties in the Assembly, even with its AMs coming largely from FPTP constituencies. The ways to achieve this were sometimes necessarily prescriptive (Twinning and All-Women Shortlists[10]) and prompted some internal party conflict. Other parties in the Assembly have to a greater or lesser extent used mechanisms regarding regional lists to help achieve greater equality.

Assessment: FPTP and AV are both unsuitable for electing a larger National Assembly.

2.2. Multi-Member Majoritarian Systems (no List)

Variants:

- *Two member First Past the Post*
- *Multi member FPTP*
- *Two member STV (often referred to as 2-member AV)*

Two member and multi member FPTP work similarly to single member FPTP, but with voters putting an X next to more than one candidate, and more than one member elected to each constituency. Under two member STV, voters rank the candidates in order of preference. Candidates are elected outright if they gain a threshold of first

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8 Martin Steven et al, 'The Conservative Party and Devolved National Identities: Scotland and Wales Compared', *National Identities* (2012) 14: 71-81.

9 See, for example, Enid Lakeman, Power to Elect: the Case for Proportional Representation. London: Heinemann, 1982; Pippa Norris, *Electoral Engineering: Voting Rules and Political Behaviour.* Cambridge: Cambridge University Press, 2004; Paul Chaney, Laura McAllister and Fiona Mackay, *Women, Politics and Constitutional Change.* Cardiff: University of Wales Press, 2007.

10 Under 'Twinning', a party's selection process will pair two constituencies together, and will select one male and one female candidate for each. Under All-Women Shortlist (AWS), only women are able to stand for selection in a constituency's party selection process.

preferences. If not, the bottom candidate is eliminated and their votes move to the second preference marked on the ballot papers. When one candidate is elected his/her surplus votes are also transferred. This process continues until two candidates reach the necessary threshold and are elected.[11]

What do these systems do well?

As with single member systems, these systems are relatively simple for voters, and would provide a strong and generally equal mandate for each AM.

There is more scope to provide gender balance and diversity when parties select two or more candidates to a constituency. It provides an incentive for a balanced ticket (of a man and a woman for example). This incentive can be reinforced by party rules (that they must select a man and a woman) or even by legal quotas for parties.[12]

These systems would require substantial support for candidates to be elected.

Where do these systems fail?

Proportionality: As with single member systems, these systems would likely be substantially less proportional than the current AMS system. In local government, it is far from unknown for one party to win 100% of the representation from a multi-member ward on a minority (sometimes quite a narrow minority) of the vote. Repeated across different wards, this can make particular councils grossly imbalanced. There is little reason to expect a different outcome for the Assembly. If the 2016 Assembly election had been conducted on two member FPTP, with the current forty constituencies, our best estimate is that Labour would have won 54 of the 80 seats. If it had used three member FPTP, on the revised boundaries envisaged for 29 constituencies in Wales, then Labour would have won an estimated 57 of the 87 seats.

Under STV, introducing only one extra member per constituency provides so little proportionality it would make very little difference outside very marginal constituencies.

In terms of proportionality these systems are therefore, at best, every bit as unacceptable as single member systems.

Coterminosity and Stability: If coterminosity with Westminster boundaries is maintained, then two member representation would mean an Assembly with 58 members. This provides for no progress towards the goal of a larger Assembly – quite the reverse.

Simplicity: If one merit of single member system is that electors know their single representative, then two member systems clearly undermine that simplicity. The 'sacred bond' of the single member constituency link would be foregone without the balancing benefits of more proportional multi-member systems.

Broad-based consensus: These systems are unlikely to enjoy broad cross party support.

Assessment: These systems are all unsuitable for electing a larger National Assembly.

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11 For the purposes of this analysis, 2-member STV is categorised within majoritarian systems, as with only two members elected in a constituency the element of proportionality introduced is very small.

12 It should be noted that where there are two spaces for candidature, not all parties will necessarily select two candidates, especially where relatively weak. Many parties will be disproportionately weak in many areas under these systems.

2.3. Mixed Member Majoritarian (MMM)

Mixed Member Majoritarian (MMM) systems are similar in many respects to the current AMS/MMP system: members are elected both via FPTP in constituencies and party lists. The big difference is that, unlike with AMS, *constituency results do not affect the allocation of list seats* – they are essentially two parallel elections to the same chamber. List seats thus allow some representation for smaller parties but do not compensate for disproportional constituency results.

What does this system do well?

MMM systems retain some of the strengths of the current system. It allows smaller parties that cannot win constituency seats some opportunity to secure representation. However this is less so than under the current system.

The list allows parties to ensure gender equality and diversity in ways probably less contentious than in FPTP systems alone.

It would require parties to gain a substantial level of support to gain entry into the Chamber.

Where does this system fail?

Proportionality: Because constituency results are ignored in allocating list members, MMM systems are inherently much less proportional than AMS. For example, if the 2016 Assembly election had been conducted on the existing boundaries but under MMM rules – so that list seats were allocated without regard for the constituency results – then Labour would have won 9 list seats, on top of its 27 constituency seats. That would have given Labour nearly a three-fifths majority in the Assembly, on an overall vote-share below one-third.

In order to retain similar levels of proportionality to the present, the ratio of list to constituency members would need to be adjusted substantially. Constituency members would have to be greatly outnumbered by list members in the chamber. For example, under the revised boundaries with 29 constituency seats, we estimate that between 60-70 list AMs would be required to achieve the same level of proportionality as actually obtained in the 2016 Assembly election. Given some of the controversies on list members over the course of devolution, as well as the British tradition of constituency work, this seems an unlikely scenario.

Simplicity and Coterminosity: In terms of simplicity, MMM offers no clear gain over the current system. In terms of flexibility to allow for linking with boundaries at the UK or local level, it would retain a similar level of flexibility as the AMS system, and we could add list members to fit with the total number of AMs required (although there would be debate about the desirability of different ratios).

Strong and Equal Mandates: Mandates would be more or less the same as in the current system. The different mandates might be less controversial, as the largest party would be likely to have more list AMs, so the differences in mandate would lose some of their partisan flavour. However, this would come either at the cost of lower proportionality, or (as described above) one would require many more list than constituency members.

Broad-based consensus: It seems unlikely that this system would achieve widespread consensus.

Assessment: MMM systems would retain the main problems identified with AMS, while reducing its benefits. This is a less desirable system for National Assembly elections than the current AMS/MMP system.

2.4. National list as part of any AMS/MMP system

The five regional lists currently used in Assembly elections would be replaced with a single national list for the whole of Wales. Within an enlarged National Assembly, more than the current twenty list AMs would likely be elected. Moving from regional lists to a national list could be part of a broader package of reforms to how we elect the Assembly.

What does this system do well?

This system would increase the number of parties likely to gain election into the Assembly, as the 'effective threshold' for election would be a lower percentage of the vote. Indeed, to adhere to the principle of 'substantial support', and avoid excessive fragmentation of the political system, it would likely be necessary to create a legal threshold, where a party would need to gain, say, 5% of the vote in order to be eligible for election into the legislature.

A National list would retain some of the strengths of the current system, in allowing positive action for gender equality and diversity on the list, for example. Indeed, this would be likely to increase, since academic research suggests that a larger 'district magnitude' (a larger constituency with more members elected) will often lead to a more diverse group.[13]

Where does this system fail?

Strong and Equal Mandates: This system might exacerbate tensions between constituency and list AMs, with list AMs losing even the broad regional link they currently have, and dozens of AMs all representing Wales as a whole (or choosing to target particular areas). Losing AMs' link to particular regions which feel less connected to the Assembly in Cardiff (such as North Wales) could exacerbate these problems. It may also encourage parties to choose representatives from the areas in which they have the most strength and membership, so there is a danger that parties may be less diverse in terms of their geographical representativeness. List AMs would also be encouraged to try to play to the areas with the greater population for votes (such as Cardiff).

Simplicity: While the way the system operates would be similar to the present system, so there are few gains in simplicity. Indeed, bringing five regions into one electoral list could make things more complicated for voters. Notably, the list would likely be very long.

Broad-based consensus: Given parties' stated preference for some form of local (or at least regional) representation, this option is unlikely to be preferred to a variant of the current AMS/MMP system, if one favours a mixed system for elections to a larger National Assembly.

Assessment: A national list appears to offer few advantages for National Assembly elections.

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13 See, for an introduction, the discussion in David Farrell, *Electoral Systems: a Comparative Introduction*. Basingstoke: Palgave, 2001, chapter 7.

Table 1: Summary Evaluation of How Different Electoral Systems Perform on Seven Key Principles

Electoral System	Proportionality	Simplicity and Coterminosity	Sustainability and Stability	Likely to Offer Broad-based consensus	Strong and Equal Mandates	Representativeness	Substantial support required?
Single-member systems (FPTP or AV/SV)	X	Simplicity ✓ Coterminosity X	X	X	✓	X	✓
Multi-member majoritarian (FPTP; 2 member STV)	X	Simplicity ✓ Coterminosity X	X	X	✓	X	✓
Mixed Member Majoritarian	X	Simplicity ? Coterminosity ?	✓	X	X	?	✓
National List	✓	?	✓	X	X	✓	?
AMS	✓	?	✓	?	X	✓	✓
STV	✓	✓	✓	?	✓	✓	✓
Open List	✓	✓	✓	?	✓	✓	✓

3. Adapting the Current System – AMS

An obvious starting point for designing a future electoral system for the National Assembly should be the current system. Could it be adjusted, and made to work for the future?

Perhaps, but only with some difficulty.

Implementation of the 'reduce and equalize' legislation, and the ensuing decline in the number of Welsh Westminster constituencies to 29, would inevitably lead to some changes in how the National Assembly is elected. This is one instance in which no change really would not be an option. If Wales were to opt to maintain coterminosity of Westminster and Assembly constituencies, and also to keep the same proportion of constituency and list AMs as at present, then we would still see a large change: that change would be one of substantially reducing the size of the National Assembly – to 29 constituency AMs and 14 or 15 list members! The Assembly is already inadequately small at 60 members; one of 43/44 AMs would be disastrous.

To avoid that fate, while keeping the AMS electoral system, we would need to do one of two things. The first option is to abandon coterminosity. If that were done, then significant flexibility is created. The current size of the Assembly could be maintained, with the 40/20 split between constituency and list members. Or constituency boundaries could be re-drawn to increase further the number of constituencies; the number of list members could also be increased to maintain the existing proportion of constituency and list AMs. Abandoning coterminosity is clearly possible – it has already been done in Scotland. But for reasons we discussed earlier, requiring two completely different sets of constituency boundaries is not ideal either for voters or for parties.

The second option would be to maintain the same constituency boundaries as for Westminster, but to elect two AMs for each constituency. (This would give a total of 58 constituency AMs; the number of list AMs might then be increased to 29). This could, in turn, be done in one of two ways: either splitting each constituency into two geographic halves; or by choosing constituency members via two member FPTP, as described above.

However, both of these options also come with some difficulties. Splitting Westminster constituencies in two requires yet a further set of boundaries to be drawn, a task which will create scope for additional boundary disputes, and which will have to be repeated every five years once new Westminster boundaries are set. Electing two members per constituency, as discussed earlier, undermines the whole point of having a single constituency representative. It would also require that voters in Assembly elections be given three votes in total: two for both of their Assembly constituency AMs, and a further one for the party list members. This would complicate further an electoral system that some voters already struggle to fully understand.

Furthermore, whichever of these two approaches was taken, there would be further potential problems. A minor one is that the five-yearly boundary reviews can produce, and currently has produced, numbers of constituencies for Wales that do not translate very neatly into an AMS system with one-third list members. Allocating 29 list seats across five regions would presumably mean that four regions would get six list members and one would have only five.

A more serious objection about using AMS to achieve a larger Assembly, and one that would apply pretty much however it was done, is that increasing the numbers of list members for each region would also increase the chances of small, and extreme, parties gaining seats in the Assembly. By having more list seats per region, the effective threshold (the share of the list vote you need to win representation) is lowered. We note that the BNP would have won the sixth regional list seat in North Wales in 2007.

None of these objections to AMS strike us as necessarily a 'knock-out blow'. Using AMS and 29/30 constituencies as the basis for a larger Assembly clearly could be done. But it could not be done very elegantly. Moreover, all of the *existing* problems with AMS – most obviously the fact that the existence of the two types of members has created tensions, such as the arguments over 'dual candidacy' – would remain if the system were to be adjusted to try to provide for a larger Assembly within an overall total of 29 constituencies. And in at least some respects, those existing problems of AMS might be added to, such as the added complications of two members per Westminster constituency.

All this suggests to us that, while AMS should certainly remain under consideration as a route towards achieving a larger National Assembly, some alternative potential solutions should be explored.

4. Systems that are Workable, Sustainable and Pass the Principles Test

Which electoral systems could provide for a larger National Assembly for Wales while also according with the principles outline in section 1 (no reduction in proportionality, strong and equal mandates etc.)? Section 2 outlined a number of electoral systems that, to our mind, are clearly not suitable. The previous section showed how AMS could be adapted for a larger Assembly, though only with some difficulties. Here, we explore two more promising options.

In recent years there has been increasing academic interest in the use of Proportional Representation systems in fairly small districts. Such systems have the benefits of keeping representation fairly close to the people with all representatives having a similar mandate. They also has the advantage of generally avoid giving seats to small, extreme parties, through having a high effective threshold for representation. At the same time, they can produce results that are fairly proportional between the major parties. Thus, it has been suggested, PR in fairly small districts hits an 'electoral sweet spot'.[14] This work suggests to us two alternative ways in which the National Assembly for Wales's electoral system could be re-designed. Both of them are based around the new, 29-seat, constituency map.

4.1. Single Transferable Vote (STV)

One approach would be to use the STV system that has long been advocated by the Electoral Reform Society. This system is used for nearly all elections in Ireland (north and south), in Malta, in Australia (Senate) and also in Scotland (local government); STV was also advocated for use in National Assembly elections by the Richard Commission in 2004.

How would it work? As is fairly well known, STV uses smallish multi-member constituencies. Parties can (and often do) stand more than one candidate in a constituency. Voters cast their choices as a numbered order of preferences, rather than a categorical all-or-nothing ballot.[15]

There are several ways in which STV could be used for National Assembly elections.[16] But if Wales moves towards 29 constituencies for Westminster elections, then a simple way of applying STV would be to use those same constituencies as the electoral boundaries for elections to the Assembly. If we elected three AMs for each constituency, one would arrive at a chamber of 87 members. This would provide for a significant increase in the size of the Assembly – albeit not to quite the extent advocated in *Size Matters*.

Used in this way, the STV system would not normally be a particularly proportional system: the more representatives are elected per district under STV, the higher the level of proportionality. The system might not also be *wholly* stable: the number of AMs would change if the number of Westminster constituencies were to be altered in the future.

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14 John Carey and Simon Hix, 'The Electoral Sweet Spot: Low-Magnitude Proportional Electoral Systems', *American Journal of Political Science* (2011) 55: 383-297.

15 For a fuller explanation of STV, see http://www.electoral-reform.org.uk/single-transferable-vote.

16 See also the discussion in Roger Scully and Richard Wyn Jones, 'STV in Wales: How it Could be Made to Work (Easily) and What it Would Mean', *Briefing Paper 9, ESRC Programme on Devolution and Constitutional Change* (2004).

However, such a form of STV would achieve at least the following goals:

- It would allow for the maintenance of coterminosity between Westminster and Assembly constituency boundaries;
- It would avoid difficulties in re-calculating and allocating respective numbers of constituency and list seats if future boundary reviews changed the number of Westminster constituencies;
- It would put an end to all current arguments about dual candidacy under AMS, as under STV all AMs would be elected on the same basis; and
- As best we can judge, such a system would achieve a very similar overall level of proportionality as now, while avoiding lowering the thresholds for representation to parties with little substantial public support.

Table 2 presents outline results from our best attempt to simulate the use of this form of STV in the 2016 Assembly election, alongside estimates for other alternative systems. We see that, compared to the actual election outcome, the overall level of disproportionality (as indicated by the Gallagher Index figures) is almost identical.

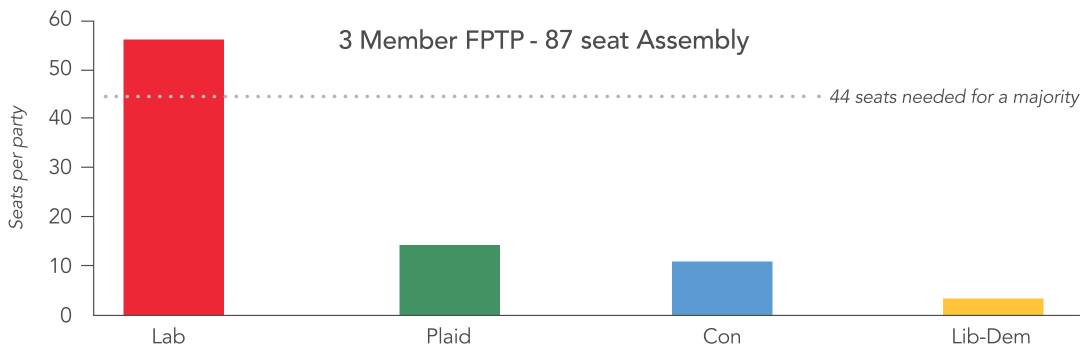
Table 2: Estimated Results of 2016 Election Under Different Electoral Systems in a 87-Seat National Assembly

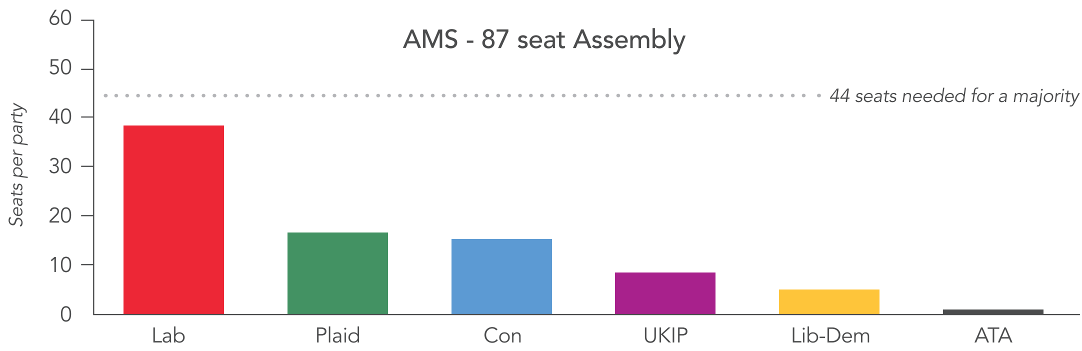
	3 Member FPTP	AMS [17]	STV	Open List, D'Hondt	Open List, Modified Sainte-Laguë
Seats per Party	57 Lab 15 Plaid 12 Con 3 Lib-Dem	39 Lab 17 Plaid 15 Con 9 UKIP 6 Lib-Dem 1 ATA	41 Lab 20 Con 18 Plaid 4 UKIP 4 Lib-Dem	47 Lab 18 Plaid 17 Con 4 Lib-Dem 1 UKIP	44 Lab 18 Con 18 Plaid 4 Lib-Dem 3 UKIP
Gallagher Index Score#	24.4	9.7	11.1	16.2	13.4

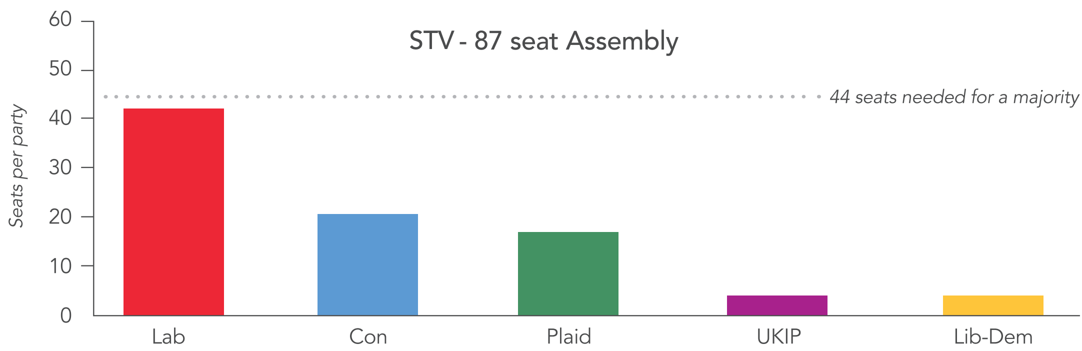
 # Gallagher Index score for the actual election was 11.5

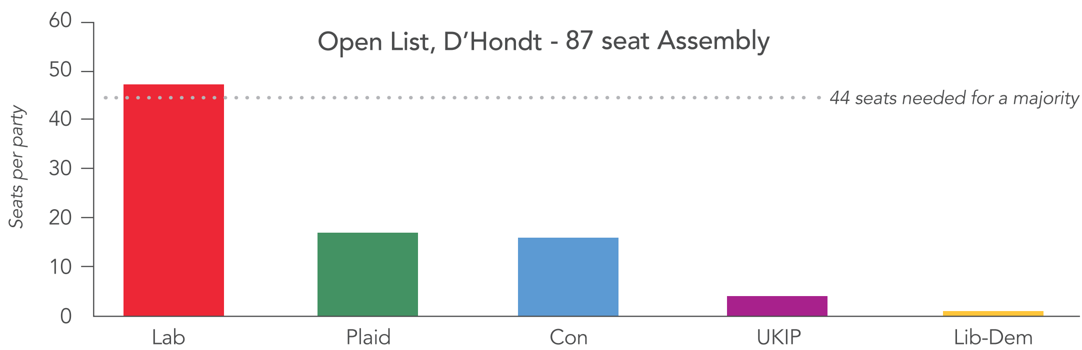
We should make clear that such a form of STV would not be our ideal electoral system. All the authors of this report would personally prefer a more proportional form of STV. It might in time be possible to achieve the necessary consensus within the Assembly for such a system – one could transition fairly smoothly from a system based on three members per constituency to four, which would make the system distinctly more proportional. But a three-member version of STV as outlined here it would be a perfectly workable means of producing a significantly larger NAW based around 29 Westminster constituencies., while maintaining the current degree of proportionality in how the Assembly is elected.

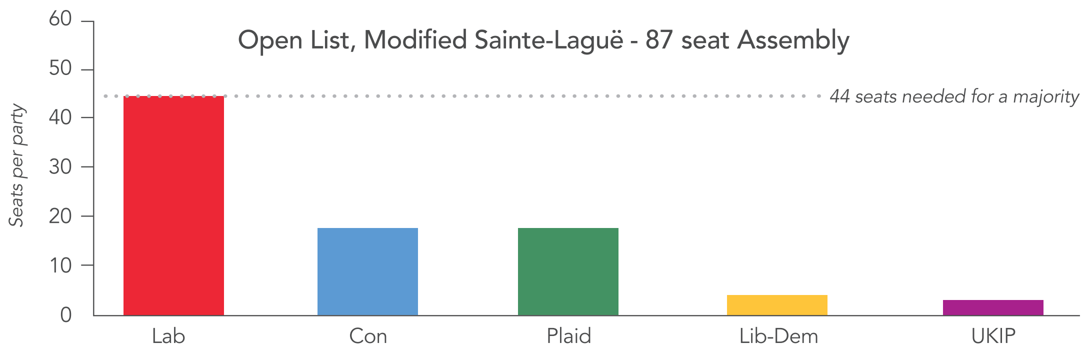
17 The AMS estimates are based on electing 58 constituency members by two-member first past the post from the 29 new constituencies, and 29 list members. Six list seats were assumed for each region, except for the smallest, South Wales West, which was allocated five list members.


3 Member FPTP - 87 seat Assembly
Seats per party
60
50
40
30
20
10
0
44 seats needed for a majority
Lab
Plaid
Con
Lib-Dem


AMS - 87 seat Assembly
Seats per party
60
50
40
30
20
10
0
44 seats needed for a majority
Lab
Plaid
Con
UKIP
Lib-Dem
ATA


STV - 87 seat Assembly
Seats per party
60
50
40
30
20
10
0
44 seats needed for a majority
Lab
Con
Plaid
UKIP
Lib-Dem


Open List, D'Hondt - 87 seat Assembly
Seats per party
60
50
40
30
20
10
0
44 seats needed for a majority
Lab
Plaid
Con
UKIP
Lib-Dem


Open List, Modified Sainte-Laguë - 87 seat Assembly
Seats per party
60
50
40
30
20
10
0
44 seats needed for a majority
Lab
Con
Plaid
Lib-Dem
UKIP

4.2. Open List

An alternative method to STV would be some form of party list system. Under this type of system, each constituency could again elect three members; thus, with 29 constituencies one would have an 87-member NAW.

There are different types of party list system that could be used. One could potentially use a 'Closed List' system, such as is currently deployed for European Parliament elections in mainland Britain. Here, voters choose between party lists, and seats are allocated proportionally to the parties; if a party wins two seats in a region, those seats go to the top two candidates on that party's list.

However, this Closed List system has substantial drawbacks for the voter. Closed party lists are impersonal, weakening the link between the representative and the constituency. The system offers very little in the way of voter choice: all the power, save that of choosing a party for government, resides with party leaders and the party machines. Parties can stifle independent and minority opinion within their ranks. As nearly all the power over who gets seats lies with the party machine, so too does the power to voice opinions. As candidates are selected by the party networks, they may also be more likely to put 'safe' candidates near the top of the list, at the expense of traditionally under-represented groups.

Among party list systems, our very strong preference would therefore be for an Open List system. Under this form of electoral system, voters normally cast a single, categorical vote, just as they do in a Closed List system.[18] The main difference with Open List is that voters can choose to cast their votes for an individual candidate. Seats would then be allocated proportionally to parties according to the total number of votes their candidates received. But which individuals are actually elected depends not on their place on a party list, but instead on the number of individual votes they receive.

The key benefit of Open List is the greater degree of voter choice it provides compared to Closed List, while maintaining overall proportionality between the parties. As with STV, although in a slightly different way – voters cast one, categorical vote rather than an ordered series of preferences – voters are able to choose not only between parties but also between candidates (if parties stand more than one candidate), and so all elected representatives would have a clear personal mandate.

If Open List were to be used for National Assembly elections, one would also need to give careful consideration to the Electoral Formula used. Our figures (see Table 2) suggest that using a 3-member system with the current *D'Hondt* formula would substantially favour the largest party: if it had been used in the 2016 Assembly election, our estimates suggest that the system would have produced a clear majority for the Labour party, and increased the overall disproportionality of the system considerably. But use of the *Modified Sainte-Laguë* formula – which is currently, for example, in Norway and Sweden, and which is slightly more helpful to smaller parties – would produce levels of disproportionality only slightly greater than STV, or than the actual election outcome in 2016.[19]

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18 There are almost innumerable variations in list-based electoral systems. (For an excellent discussion, see Alan Renwick and Jean-Benoit Pilet, *Faces on the Ballot: The Personalization of Electoral Systems in Europe*. Oxford: Oxford University Press, 2016.) Our proposal would be for a simple version of Open List.

19 The following Wikipedia entries give excellent and accessible introductions to the D'Hondt and Sainte-Laguë formulae respectively: https://en.wikipedia.org/wiki/D%27Hondt_method; https://en.wikipedia.org/wiki/Webster/Sainte-Lagu%C3%AB_method.

5. Conclusions

Following on from the publication of *Size Matters* in October 2013, this report has sought to answer the one unanswered question of that document: how do you elect a larger National Assembly for Wales? An increase in the number of AMs in Wales will require some change in the electoral system. The key question is how this might be done.

In *Reshaping the Senedd*, as in our previous report, we have followed a principle- and evidence-based approach. We have drawn on international examples of different electoral systems to identify all plausible options, and provided a framework for judgement based on the balancing of clear but essential principles. We have also used the best evidence available on the likely electoral implications of different systems to evaluate them in an open and rigorous manner.

Following the principles we outlined in section 1, some electoral systems immediately fail the tests we set out (as we discuss in section 2). These systems, we believe, do not come close to meeting the principles that should underpin any electoral system used to elect the National Assembly for Wales. But we believe that there are three more viable options – electoral systems that might or do meet these principles.

One of these systems is the current one, Additional Member System. But we observe some potential problems with using AMS to elect a larger Assembly. We believe that two other systems, the Single Transferable Vote and Open List, may offer more attractive routes towards achieving a larger National Assembly. Indeed, we believe that both the latter systems could readily be implemented alongside, and in tandem with, the move to 29 constituencies in Wales.

Prominent figures from nearly all the main political parties in Wales have agreed that there needs to be an increase in the number of Assembly Members. But the Wales Bill requirement of a supermajority for change ensures that consensus building will be needed. We believe that is it now time for political leaders in Wales to move forward on this issue on that basis.

We offer this report to them, and to the people of Wales, in the hope that it can advance the debate.

Appendix 1: Assumptions Made for Estimating STV and Open List Elections

The following assumptions are the basis for estimates of the result that the 2016 National Assembly for Wales election might have produced if conducted under STV and Open List, applied to 29 constituency seats.

The 29 constituency seats are assumed to be those outlined by the Boundary Commission in September 2016 for Wales in line with the proposals under the 2011 Act to 'reduce and equalize' representation in the House of Commons. The actual constituency results from the 40 constituencies used in the 2016 National Assembly election have been translated into 'notional' estimated results for these 29 seats. These notional estimates were produced by Anthony Wells, Director of Polling at YouGov UK. (We are grateful to Anthony for supplying these figures; he bears no responsibility for our interpretation and use of them).

For Open List, each party is assumed to gain the same number of votes as in the 2016 notional constituency vote results. Seats are then allocated to the parties via either the D'Hondt or the Modified Sainte-Laguë formulae.

For STV, matters are a little more complicated. The following assumptions are made:

1. In each constituency, every party is assumed to get the same number of first preference votes under STV as the total number of votes received on the constituency ballot in May 2016.
2. Each party is assumed to stand two candidates per seat. The party's aggregate total of votes is initially divided between these two candidates on the following proportions: 0.6 and 0.4. Surplus votes for elected candidates, and votes from eliminated candidates are assumed to transfer entirely to the other candidate of the same party in the first instance.
3. Once both candidates for a party have been either elected or eliminated, votes to be transferred are then re-allocated to the leading candidates from each of the other parties in proportions based on data drawn from the 2016 Welsh Election Study. This asked all survey respondents the following question:

"Please indicate how you would have voted in the National Assembly for Wales election if you had been asked to rank the parties in your order of preference. Put 1 for your most preferred party, then 2 for your second best party, 3 for your third choice etc. You may rank as many or as few choices as you wish."

Votes are therefore transferred to candidates of other parties according to the proportion of respondents selecting a party as their first preference who told the 2016 Wales Election Study that they considered another party to be their second preference. For example, of all those Welsh Election Study respondents who gave Labour as their first preference, 43.5% indicated that they would have chosen Plaid Cymru as their second preference. Therefore, 43.5% of any surplus Labour votes would be transferred to the lead Plaid Cymru candidate.

4. The detailed figures given for second preferences in the 2016 Welsh Election Study were:

Labour: Of those indicating that their first preference would have been Labour, the following second preferences were chosen:

- 43.5% of those choosing Labour as their first preference listed Plaid Cymru as second
- 15.0% nominated the Greens
- 13.8% chose the Liberal Democrats
- 6.1% chose UKIP
- 3.4% selected the Conservatives
- 8.0% chose 'Other' parties

The remaining 10.2% of those choosing Labour as their first preference did not indicate any second preference. That proportion of Labour votes was therefore not transferred.

Conservatives: of those indicating the Conservatives as their first preference, the following second preferences were indicated:

- 32.5% UKIP
- 21.0% Plaid Cymru
- 19.9% Liberal Democrats
- 5.7% Labour
- 3.3% Greens
- 4.7 'Others'

The remaining 12.9% of those choosing the Conservatives as their first preference did not select a second preference party. That proportion of Conservative votes was therefore not transferred.

Plaid Cymru: For those nominating Plaid Cymru as their first preference, the following pattern of second preferences were indicated:

- 35.6% Labour
- 20.4% Greens
- 11.7% Liberal Democrats
- 8.6% Conservatives
- 8.6% UKIP
- 5.9% 'Others'
- The remaining 9.2% of Plaid supporters did not nominate a second preference party. That proportion of Plaid Cymru votes was therefore not transferred.

Liberal Democrats:

- 29.4% Plaid Cymru
- 25.7% Labour
- 17.3% Greens
- 15.9% Conservatives
- 2.3% UKIP
- 4.2% 'Others'
- The remaining 5.2% of Lib-Dem supporters did not nominate a second preference party. That proportion of Lib-Dem votes was therefore not transferred.

UKIP:

- 34.3% Conservatives
- 18.0% Plaid Cymru
- 8.9% Labour
- 6.9% Liberal Democrats
- 3.2% Greens
- 15.4% 'Others
- The remaining 13.3% of UKIP supporters did not nominate a second preference party. That proportion of UKIP votes was therefore not transferred.

Greens:

- 37.4% Labour
- 34.0% Plaid
- 11.6% Liberal Democrats
- 3.4% Conservatives
- 2.7% UKIP
- 5.4% 'Others'
- The remaining 5.5% of Green supporters did not nominate a second preference party. That proportion of UKIP votes was therefore not transferred.

Appendix 2: Simulated 2011 Election Results for 87-Seat NAW based around 29 Constituencies

Constituency	Open List, D'Hondt	Open List, Modified Sainte-Laguë	STV
Alyn & Deeside	2 Lab, 1 Con	2 Lab, 1 Con	2 Lab, 1 Con
Blaenau Gwent	2 Lab, 1 PC	2 Lab, 1 PC	1 Lab, 1 PC, 1 UKIP
Brecon, Radnor & Mont.	2 LD, 1 Con	2 LD, 1 Con	2 LD, 1 Con
Bridgend & Vale of G West	2 Lab, 1 Con	2 Lab, 1 Con	2 Lab, 1 Con
Caerfyrddin	2 PC, 1 Lab	2 PC, 1 Lab	1 PC, 1 Lab, 1 Con
Caerphilly	2 Lab, 1 PC	1 Lab, 1 PC, 1 UKIP	1 Lab, 1 PC, 1 UKIP
Cardiff North	2 Lab, 1 Con	2 Lab, 1 Con	2 Lab, 1 Con
Cardiff South & East	2 Lab, 1 LD	2 Lab, 1 LD	2 Lab, 1 LD
Cardiff West	2 Lab, 1 PC	2 Lab, 1 PC	1 Lab, 1 PC, 1 Con
Ceredigion & Gog. Sir Benfro	2 PC, 1 LD	2 PC, 1 LD	2 PC, 1 LD
Colwyn & Conwy	1 Con, 1 Lab, 1 PC	1 Con, 1 Lab, 1 PC	1 Con, 1 Lab, 1 PC
Cynon Valley & Pontypridd	2 Lab, 1 PC	2 Lab, 1 PC	2 Lab, 1 PC
De Clwyd & Gog. Sir Faldwyn	1 Con, 1 Lab, 1 PC	1 Con, 1 Lab, 1 PC	1 Con, 1 Lab, 1 PC
Flint & Rhuddlan	2 Lab, 1 Con	2 Lab, 1 Con	2 Lab, 1 Con
Gogledd Clwyd & Gwynedd	2 PC, 1 Con	1 PC, 1 Con, 1 Lab	1 PC, 1 Con, 1 Lab
Gower & Swansea West	2 Lab, 1 Con	2 Lab, 1 Con	2 Lab, 1 Con
Llanelli & Lliw	2 Lab, 1 PC	2 Lab, 1 PC	2 Lab, 1 PC
Merthyr Tydfil & Rhymney	2 Lab, 1 UKIP	2 Lab, 1 UKIP	1 Lab, 1 UKIP, 1 PC
Monmouthshire	2 Con, 1 Lab	2 Con, 1 Lab	2 Con, 1 Lab
Neath & Aberavon	2 Lab, 1 PC	2 Lab, 1 PC	2 Lab, 1 PC
Newport	2 Lab, 1 Con	2 Lab, 1 Con	2 Lab, 1 Con
Ogmore & Port Talbot	3 Lab	2 Lab, 1 PC	2 Lab, 1 PC
Rhondda & Llantrisant	2 PC, 1 Lab	2 PC, 1 Lab	2 PC, 1 Lab
South Pembrokeshire	2 Con, 1 Lab	2 Con, 1 Lab	2 Con, 1 Lab
Swansea East	3 Lab	2 Lab, 1 UKIP	2 Lab, 1 UKIP
Torfaen	2 Lab, 1 Con	2 Lab, 1 Con	2 Lab, 1 Con
Vale of Glamorgan East	2 Lab, 1 Con	2 Lab, 1 Con	2 Lab, 1 Con
Wrexham Maelor	2 Lab, 1 Con	2 Con, 1 Lab	2 Con, 1 Lab
Ynys Môn & Arfon	2 PC, 1 Lab	2 PC, 1 Lab	2 PC, 1 Lab
Overall	47 Labour 18 Plaid Cymru 17 Conservative 4 Lib-Dems 1 UKIP	44 Labour 18 Conservative 18 Plaid Cymru 4 Lib-Dems 3 UKIP	41 Labour 20 Conservative 18 Plaid Cymru 4 Lib-Dems 4 UKIP
Gallagher Index Score	16.2	13.4	11.1

Agenda Item 5

By virtue of paragraph(s) vi of Standing Order 17.42

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