

Mick Antoniw AS/MS

**Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution**



**Llywodraeth Cymru
Welsh Government**

Ein cyf/Our ref: CG/PO/387/2023

Alun Davies MS

Temporary Chair, Legislation, Justice and the Constitution Committee

16 November 2023

Dear Alun,

Thank you for your letter of 31 October 2023 detailing a number of follow-up questions pertaining to my attendance of the Committee's meeting of 16 October 2023, as part of your consideration of the Senedd Cymru (Members and Elections) Bill.

I have detailed my answers to these questions in an annex to this letter.

Yours sincerely,

A handwritten signature in blue ink that reads "Mick Antoniw". The signature is written in a cursive style and is positioned above a short horizontal line.

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Section 5 – Increasing number of Ministers

Question 1: Section 5 of the Bill permits the maximum limit of the Welsh Ministers to be increased, by regulations, from 17 to 18 or 19. Why is a regulation-making power being proposed and why would a new Bill not be more constitutionally appropriate?

The inclusion of a power to increase the number of Welsh Ministers arose from a recommendation by the Senedd's Business Committee in its December 2022 report.

The Business Committee concluded, following a public consultation, that:

“... it would be reasonable for the legislation to include a mechanism which would enable the Welsh Government to propose further increasing this limit to a maximum of 19 by way of secondary legislation, in order to future proof the legislation for the devolution of further powers, or other circumstances where an increase is considered to be merited. Such an increase should be subject to an affirmative (majority) vote of the Senedd.”¹

The delegated power in section 5 is thereby intended to build in an element of future proofing, allowing the Welsh Ministers some flexibility to increase further by regulations, the upper limit on the number of Ministers able to hold office at any time (up to a maximum of 19 Ministers). The Bill sets out in detail the scope of this delegated power.

As set out in the Statement of Policy Intent, the Welsh Government has no expectation to immediately utilise this power to increase the maximum from the 17 that would be established by the Bill. It would be necessary for a future Welsh Government to justify why circumstances necessitated that the limit on Welsh Ministers needs to be increased beyond 17. As the Business Committee stated, this might be due to the devolution of further powers, or otherwise other circumstances whereby an increase was merited.

Question 2: Why is there no power to subsequently decrease the maximum limit by regulations in future once the power has been used? As a result, for example, it would not be possible to temporarily increase the limit for specific purposes - such as a dedicated Minister for specific emergencies (e.g. Covid), or large events (e.g. the Commonwealth Games).

In its December 2022 report, the Senedd's Business Committee stated on this issue that “any proposed increase, once agreed by the Senedd, should be permanent.”² The Bill reflects the conclusion reached.

¹ Business Committee, Response to the Special Purpose Committee on Senedd Reform's report – Reforming our Senedd: A stronger voice for the people of Wales, Conclusion 1, <https://senedd.wales/media/e0vdos5w/cr-ld15530-e.pdf>

² Business Committee, Response to the Special Purpose Committee on Senedd Reform's report – Reforming our Senedd: A stronger voice for the people of Wales, Paragraph 16. <https://senedd.wales/media/e0vdos5w/cr-ld15530-e.pdf>

It may also be noted that the power provides for an increase in the maximum limit upon Welsh Ministers, not a minimum limit. Consequently, in practice a First Minister would be free to choose not to appoint to that maximum limit, without need for further legislation.

Question 3: What consideration was given for the section 5 power to be subject to a procedure requiring a super-majority of Members to vote in favour?

In its December 2022 report, the Senedd's Business Committee stated that:

“A majority of our membership consider that such a vote should be passed on a simple majority, whilst Darren Millar MS stated that it should require the support of two-thirds of Members voting.”³

As the Senedd would need to agree (by a super majority) to the principle that the maximum limit of Ministers should be increased to 17 and can be further increased within a limited range, it was considered proportionate that any regulations made under this power should be subject to the affirmative procedure, as the Business Committee concluded.

The affirmative procedure will ensure the Senedd has a role in approving any increase in the size of the government and reflects the fact that any regulations changing the upper limit on the size of government will amend primary legislation.

Section 7 – Job-sharing

Question 4: In your view, would section 7 of the Bill become redundant if a new Welsh Government published a statement on job-sharing in, for example, the first year of the Seventh Senedd?

Section 7 would remain in force even in the event a new Welsh Government published a statement. The key step in satisfying section 7 is for the Llywydd to table the motion. It would then be a matter for the Senedd to determine whether to agree to the motion, in light of any such statement. The duty on the Welsh Ministers to table a statement in section 7(5) is only triggered if the committee is established, and that committee lays its report before the Senedd.

Question 5: Why would a new Welsh Government not be obliged to take any steps in relation to the recommendations of a Committee established under section 7?

The Welsh Government would, as is established practice, respond to committee reports and recommendations that are directed to it. The Bill does not oblige the government of the day to accept the recommendations of a committee established to review job-sharing.

³ Business Committee, Response to the Special Purpose Committee on Senedd Reform's report – Reforming our Senedd: A stronger voice for the people of Wales, Paragraph 16.
<https://senedd.wales/media/e0vdos5w/cr-ld15530-e.pdf>

Rather, the Bill places a duty on the Welsh Ministers to lay a statement in response to such a committee report. The nature of the response, including any steps to be taken by the Government, would depend upon the recommendations that are made by any committee. The provision proposes an approach that follows the model of work that led to the Senedd Cymru (Members and Elections) Bill, whereby a Senedd committee considered the matter and made recommendations that were then taken forward by the government.

Question 6: Why is there no provision in the Bill to require a future Welsh Government to publish and consult on a draft Bill relating to job-sharing?

To do so would be premature and pre-empt the outcome of a committee's work. It is possible that a committee is unable to make recommendations that can be implemented through legislation, and therefore it would not be appropriate to require a future government to take such a step at this stage.

Section 19 – review provisions

Question 7: Please can you explain why section 19 requires the establishment of a new committee, when a committee established at the start of the Seventh Senedd may be better placed to undertake that work (should it wish to do so)?

Section 19 would not preclude the Senedd from deciding to include this work within the wider remit of a committee established at the start of the Seventh Senedd. The timings for the tabling of the motion would allow the Llywydd, in conjunction with the Business Committee, to consider options in relation to the establishment of the wider committee structure at the start of the Senedd term when all committees for that term are established. If it is considered appropriate for an established committee to conduct the review, it is open to any Member to table an amendment to the motion to this effect in accordance with Standing Order 12.22.

Question 8: What factors did you take into account before deciding that the “review must be completed by the committee no later than twelve months after the first meeting of the Senedd following the first general election held after 6 April 2026”? Why would a committee not set its own timetable for post-legislative scrutiny?

The reduction in the length of Senedd terms increases the frequency of Senedd elections. If there are lessons to be learned from the operation of the Act following the election in 2026, then it is important that there is sufficient time for those findings and any potential responses to be considered in advance of the subsequent election in 2030. Again, it is of course a matter for the Senedd as to whether there is support for the motion – including the timescales for reporting - and it remains open for any Member to table an amendment to the motion in accordance with Standing Order 12.22.

Accessibility (including overlap between electoral reform Bills)

Question 9: There is some overlap between this Bill and the Elections and Elected Bodies (Wales) Bill. For example, both amend the Senedd's disqualification regime, and both make provision about the (currently named) Local Democracy and Boundary Commission for Wales.

a. Please can you explain why provisions relating to disqualification are not consolidated in a single Bill.

In the course of developing and preparing the Senedd Cymru (Members and Elections) Bill, the Welsh Government, and their Co-operation Agreement partners in Plaid Cymru, considered a number of policies that related to the Special Purpose Committee's original recommendations but which were not themselves specific recommendations of the committee. This included the disqualification related to residency.

The disqualification provisions in the Elections and Elected Bodies Bill are part of a package of reforms which were consulted on as part of a white paper (Consultation on the electoral administration and reform White Paper). Such reforms also have specific implications for Local Authorities and Town and Community Councils. This did not include a disqualification related to residency.

Accordingly, it was considered more appropriate for these disqualifications to be addressed separately, through the two Bills.

Both Bills achieve their individual policies by way of amendment to the existing disqualification regime in the Government of Wales Act 2006. This will mean that, if the Bills are enacted, there will still be a single disqualification regime ensuring that the legislation remains accessible.

b. Please can you explain why provisions related to the (currently named) Local Democracy and Boundary Commission for Wales are not consolidated in a single Bill.

Where there are broad overlaps in the changes required to the Local Democracy and Boundary Commission for Wales from both a local government and Senedd reform perspective, then those changes have been included in one Bill - the Senedd Cymru (Members and Elections) Bill. These include changes to the name (to reflect new responsibilities) and maximum number of Commissioners for example. This has been done to avoid changes being made to the same provisions in close succession.

However, it is right that changes that relate to and modify specific functions (for example those relating to local government electoral reviews), are made in the most relevant Bill, leading to smaller and more focused legislation.

Both Bills achieve their changes to the Local Democracy and Boundary Commission for Wales by way of amendment to the existing legislative framework in the Local Government (Democracy) (Wales) Act 2013, to be renamed the Democracy and Boundary Commission Cymru etc. Act 2013. This will mean that, if the Bills are enacted, the legislation remains accessible in a single Act.

Question 10: Please can you explain how the forthcoming ‘gender quotas’ Bill is likely to interact with this Bill, and the extent to which both are interdependent?

The Senedd Cymru (Members and Elections) Bill is in functional terms internally coherent- it is not dependent upon the forthcoming Senedd Cymru (Electoral Candidate Lists) Bill. This Bill is to be introduced before the end of the year, at which point it will be subject to scrutiny by the Senedd. The Bill will be introduced by the Deputy Minister for Social Partnership.

I can assure the committee that consideration has been given to the interaction and interdependencies between these two Bills. While of course this is a matter for the Senedd Cymru (Electoral Candidate Lists) Bill, it is not intended for that legislation to change anything in respect of what is being proposed in the Senedd Cymru (Members and Elections) Bill with regard to the fundamental arrangements for returning and maintaining the Senedd including matters such as the length of lists, allocation of seats or the filling of casual vacancies.

Question 11: Section 4 of the Bill provides for the election of an additional Deputy Presiding Officer by making numerous amendments to section 25 of the Government of Wales Act 2006. The overall effect of the amendments on the face of the Bill is difficult to discern without reference to the Schedule of Amendments/Keeling Schedule in the Explanatory Memorandum. We acknowledge that section 25 of the 2006 Act could not be substituted in its entirety for reasons of legislative competence. However, please can you explain why the Bill did not substitute the majority of the text in section 25 for ease of reading, rather than making numerous separate amendments in section 4?

Fundamentally, this was a drafting approach, although it also reflects that the functions and responsibilities of the existing Deputy Presiding Officer as provided for under section 25(1)(b) are unchanged.

A keeling schedule has been provided in annex 3 of the Bill’s Explanatory Memorandum for ease of reading.

In addition, as referred to in this question, and as detailed in the Trefnydd’s correspondence to Business Committee on 21 June (regarding the Committee’s proposal that the titles of the Presiding Officer and Deputy Presiding Officer should be amended), the government cannot state that it would have full confidence that amendments to section 25(1)(a) - which creates the role of Presiding Officer and states how that role is referred to in GoWA – would be within the Senedd’s legislative competence.

Potential factors impacting implementation by 2026

Question 12: What assessment has the Welsh Government made of the risk of the Bill being referred to the Supreme Court by the UK Government Attorney General?

The government has carefully assessed the legislative competence of the provisions of the Bill, and I am confident that this Bill is within the legislative competence of the Senedd.

Question 13: Please can you explain the consequence of a Supreme Court referral on the ability of the Senedd to implement the electoral reforms under the Bill in time for the 2026 election.

A reference of the Bill under section 112 of GoWA would mean the entire Bill will be delayed after its passage but before receiving Royal Assent as GoWA prohibits the Llywydd from submitting a Bill for Royal Assent at any time when a reference remains live. If the Bill were to be referred, we would need to consider all the implications for implementation at that time.

However, as already stated, I am confident that the Bill is within the legislative competence of the Senedd.

Question 14: Please can you explain what other factors may impact the Senedd's ability to implement the proposed reforms in time for the 2026 election, and how the Welsh Government has mitigated those risks.

This is a large reform agenda with an ambitious timetable. Where appropriate, the Bill includes measures to ensure, as far as possible, that the reforms are in place for 2026. For example, the DBCC will acquire its new functions the day after Royal Assent so that the 2026 review can commence the day after Royal Assent; there is a statutory deadline by which the DBCC must provide their final report setting out their determinations for the 2026 review and the Welsh Ministers are under a duty to implement those recommendations within a specified period. The implementation plan also respects the Gould convention, which ensures that electoral administrators have sufficient time to take account of the changes to electoral legislation.

Future legislation

Question 15: Does the Welsh Government have plans for any further electoral reform legislation after the forthcoming 'gender quotas' Bill? If so, would the Counsel General commit to such legislation being introduced in draft form?

We hold an ambition to consolidate the statute book for Wales where we can, to deliver an accessible, bilingual legislative framework.

We intend to take steps to consolidate electoral law in Wales for devolved elections, as part of our longer-term goal of modernising electoral law.

In particular, the National Assembly for Wales (Representation of the People) Order 2007, ("the Conduct Order") sets out the detailed rules for the conduct of elections to Senedd Cymru. It sets out the way in which the election and the election campaign are conducted, including provisions for legal challenge to the election.

The Conduct Order has been reviewed and amended before each Senedd election. It was originally made and subsequently amended by the Secretary of State, before the function of making the Order was transferred to the Welsh Ministers by the Wales Act 2017. As the original Order was made in 2007, this represents a valuable

opportunity for us to consolidate and re-state the law as part of an accessible, bilingual framework for the first time.

In doing so, we will take account of the principles set out in the Legislation (Wales) Act 2019 and seek to produce an Order which uses modern and clear language which is accessible to the reader.

I am happy to confirm that we will consult on a bi-lingual, draft consolidated Conduct Order ahead of making this legislation.

In the processes of remaking the Order, we will reflect the changes arising from all three Bills, subject to them receiving Royal Assent, to ultimately achieve a consolidated, accessible, bilingual framework.