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Llywodraeth Cymru
Welsh Government

Rt. Hon Elin Jones MS
Y Llywydd and Chair of the Business Committee

9 November 2022

Dear Elin

Thank you for your letter of 17 October, inviting views to inform the Business Committee's consideration of four recommendations made by the Special Purpose Committee (SPC) on Senedd Reform. This response focuses in particular on:

- the size of the Welsh Government in a larger Senedd (recommendation 4); and
- the consequences of a Member changing their political party if elected through a closed proportional list system (recommendation 10).

The Welsh Government has not sought to provide a specific view on the number of Deputy Presiding Officers in a larger Senedd (recommendation 5) nor on the number of Senedd Commissioners in a larger Senedd (recommendation 6) but acknowledges the statements by the SPC that increases in the Senedd's capacity should be to enable the capacity to scrutinise policy and legislation, and to hold the Government to account.

The Welsh Government's consideration of recommendations 4 and 10 are detailed in the annexes to this letter.

Regards

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Annex 1: Size of the Welsh Government in a larger Senedd

In considering this issue, the Welsh Government has been mindful that Section 51(1) of the Government of Wales Act 2006 (GOWA 2006) limits the number of persons holding “Welsh Ministerial office” to 12. This includes Ministers (appointed under section 48) and Deputy Ministers (appointed under section 50) but does not include the Offices of First Minister and Counsel General, meaning the effective limit on the size of the Welsh Government is 14. The current limit was itself an increase from the previous limit of 9, which occurred in 2006.¹ There has been no increase in the subsequent years, despite the Senedd gaining primary legislative powers and a wider competence.

In recommending an increase in the number of Members of the Senedd, the Special Purpose Committee on Senedd Reform said that it anticipated that its recommendations on an increased size of the Senedd would result in consideration of whether there should be an associated change to this limitation. Nevertheless, it commented that “the primary purpose of an increase in size must be to enable an improved level of parliamentary representation, legislation and scrutiny of government.”² It also noted that any increase in the size of the Welsh Government “will mean a corresponding decrease in the Senedd’s capacity for delivering scrutiny.”³

The executive powers and responsibilities of Welsh Ministers have increased significantly since the passing of the Government of Wales Act 2006. For example, since the passing of the Wales Act 2017, the Welsh Ministers have been able to exercise executive ministerial functions by virtue of the transfer of functions under section 58A of the Government of Wales Act 2006. Welsh Ministers’ executive powers and responsibilities have also increased as a result of the UK’s withdrawal from the EU (particularly in the fields of environment and rural affairs and economic affairs).

Welsh Ministers also have a substantially increased role in inter-governmental relations, with inter-ministerial meetings to co-ordinate policies, programmes, and the operation of the intergovernmental frameworks.

As a result, the breadth of some Ministers’ portfolios are now very substantial, requiring some Ministers to be accountable for decisions on a particularly wide range of policy areas. Looking forward, although further discussions on the operational implications of the larger Senedd will be required, it is a natural expectation that the cumulative scrutiny demands on Welsh Ministers are likely to increase.

¹ In the first iteration of the Welsh devolution settlement, there were no limits on the size of the “Assembly Cabinet,” as set out in primary legislation. Rather, Section 53(3) of the Government of Wales Act 1998 (GOWA 1998) provided that the Standing Orders of the Assembly must specify the maximum number of “Assembly Secretaries” (i.e. Ministers) that could be appointed. The initial Standing Orders were made by the Secretary of State under section 50 GOWA 1998 and provided that: “There shall be no more than nine members of the Assembly Cabinet, including the First Secretary.” No amendments were subsequently made to this limit in Standing Orders, until it was superseded by the limit in the Government of Wales Act 2006.

² Special Purpose Committee on Senedd Reform (SPC), May 2022, *Reforming Our Senedd: A stronger voice for the people of Wales*, Para 42.

³ *Ibid*, Para 43.

Concerns have also previously been expressed about the existing limit potentially compromising the Welsh Government's flexibility to react to events. In February 2020, the then Minister for Finance and Trefnydd commented in correspondence to the Committee on Senedd Electoral Reform that whereas:

*"The Scottish Government was able to appoint an additional Cabinet Minister to be responsible for managing the very extensive new policy and inter-governmental matters arising [from Brexit]... in contrast, the Welsh Government, with a full set of Ministers already in place in line with the statutory limit, has been able to manage these additional responsibilities only by asking the Counsel General to assume them, in addition to his other responsibilities as the Government's Law Officer."*⁴

The Special Purpose Committee also noted that part of its rationale for increasing the size of the Senedd was to "future-proof the Senedd's capacity to scrutinise the Welsh Government's increasing powers and responsibilities."⁵ Increasing the current limitation on Welsh Ministers could similarly be seen as future-proofing for the devolution of further powers.⁶ For example, the Commission on Justice in Wales, in recommending a substantial devolution of justice functions, commented that such devolution must be accompanied by "a new Justice Department in the Welsh Government led by a Cabinet Minister."⁷

In considering this issue, the Welsh Government has also noted that there is no legal limit on the size of the Scottish Government. Although removing the limit on the number of Welsh Ministers altogether would be advantageous in providing flexibility, it could also put at risk the Special Purpose Committee's recommendation that the primary purpose of an increase in the Senedd's size must be to enable an improved level of parliamentary representation, legislation and scrutiny of government.

The Welsh Government's view is therefore that the number of Welsh Ministers should be increased from 12, but that there should continue to be a legal limit upon this number. The Welsh Government considers that this limitation should be increased to a specific number, stated in primary legislation.

As a contribution to the discussions of this matter by the Business Committee, taking into account the points outlined above, and the Welsh Government considers that this specific number would appropriately be in the range of 16-19 (in addition to the First Minister and Counsel General).

⁴ Committee on Assembly Electoral Reform: inquiry into the capacity of the Assembly, Minister for Finance and Trefnydd, 10 February 2020, <https://business.senedd.wales/documents/s98990/CAER5-5-20%20Paper%20to%20note%205.pdf>

⁵ Ibid, Para 26.

⁶ This is notwithstanding that the further devolution of powers and Ministerial responsibilities since 2006 could already be seen to provide a basis for an increase in the limitation.

⁷ Commission on Justice in Wales, Justice in Wales for the People of Wales, October 2019, Para 68.

Annex 2: Consequences of a Member changing their political party if elected through a closed proportional list system

The Welsh Government notes that a change of the Senedd's electoral system, to one based on closed proportional lists, raises the question of whether there should be consequences for a member changing their political party, given that voters have voted for a party rather than an individual. There is an argument that by not introducing controls democracy could be seen to be undermined when an elected representative leaves a party under a closed list proportional system.

The Welsh Government is also mindful, however, both of the link between elected members and the constituency that elected them, and that consideration of this matter needs to be undertaken in recognition that sanctions against party movements could increase the internal power of political groups and the control they have over elected members. There are circumstances where a member may consider that dissenting from their party group's line is, in their view, the most appropriate representation of the interests of their constituents, reflects the mandate upon which they were elected, or is a critical point of personal principle.

There are currently no legislative measures in the Senedd, or indeed in any UK legislature that would result in an elected representative having to give up their seat if they voluntarily or involuntarily leave their party. Elected representatives can change political group within a parliamentary term in all the UK's parliaments subject to any limitations in Standing Orders.

Kenneth Janda's paper *Laws Against Party Switching, Defecting, or floor-crossing in National Parliaments* estimates that internationally 14% (5 of 36) of established democracies require parliamentary members to forfeit their seats if they change political parties. The majority of these legislatures have measures that would result in an elected representative being expelled from the legislature for changing political parties, with 7 having rules that result in a representative having to give up their seat if they fail to vote with their party on strategic issues.

This is not to say that expulsion from a legislature is the only possible consequence for a member that walks away from the political party or group for which they were elected. It is embedded in the Portuguese Constitution that an MP is not able to change political party, but can resign to sit as an independent. As an independent they retain their seat and the rights of other MPs, including the ability to propose bills and to suggest amendments. Similarly, if a Portuguese MP is expelled from the party they retain their seat, but lose some rights as they are classed as unattached rather than independent. Spain's approach shares some similar characteristics (though there are a number of differences as well) and is implemented by way of standing orders, rather than directly through legislation.

The Welsh Government is also mindful that if a member was to lose their Senedd seat for changing their political group, this would have implications for the number of casual vacancies that could be expected to arise between any two general elections. Currently, if a casual vacancy occurred for a regional seat in the Senedd, it would be filled by the next candidate of the party that won that seat (rather than by a by-election). If a party's list had been exhausted, the seat would remain vacant. Based on the presumption that the same approach will be adopted, there is a higher likelihood that seats will remain vacant as a result of exhausted party lists.

Should measures be considered that propose a member automatically losing their seat for changing political groups, consideration would also need to be given to the European Convention of Human Rights and the freedom of political expression contained within it.

The Welsh Government notes that some consequences for members leaving political parties already exist in the Senedd's Standing Orders. Standing Order 1.3ii for example provides limitations on the formation of a new political group. Similarly, Standing Order 17.12 stipulates that a member ceases to be a member of a committee if he or she joins or leaves a political group. This is not to say that Standing Orders have unlimited flexibility in this regard, as the Government of Wales Act 2006 provides limitations on what Standing Orders can do.

Taking these various issues into account, as a contribution to the Business Committee's consideration of this matter, the Welsh Government is of a view that whilst Senedd members should be able to resign from their political group and sit as an independent without losing their seat, there is a case for limitations on them joining or creating a different political group. It further believes that consideration should be given as to whether Standing Orders should be the vehicle through which any such restrictions could be achieved.