

Cyflwynwyd yr ymateb hwn i [ymgyngoriad y Pwyllgor Biliau Diwygio](#) ar [Fil Senedd Cymru \(Aelodau ac Etholiadau\)](#).

This response was submitted to the [Reform Bill Committee consultation](#) on the [Senedd Cymru \(Members and Elections\) Bill](#).

SCME(P)18 Ymateb gan: | Response from: Keith Bush



SENEDD CYMRU
REFORM BILL COMMITTEE
SENEDD CYMRU (MEMBERS AND ELECTIONS) BILL

Evidence by:

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Introduction

1. The purpose of this submission is to assist the Reform Bill Committee in its scrutiny of the Senedd Cymru (Members and Elections) Bill (“the Bill”) currently before Senedd Cymru. The author was a Barrister in private practice in Cardiff for over 20 years before joining the Legal Department of the then Welsh Assembly Government, where he led the team instructing Parliamentary Counsel on a number of Bills relating to Wales, in particular the one that became the Government of Wales Act 2006, establishing the current structure of devolved government in Wales. He then became Chief Legal Adviser to the National Assembly (as re-constituted by the 2006 Act) and was instrumental in the formulation of legislation related to the governance of the Assembly – the National Assembly for Wales Commissioner for Standards Measure 2009, the National Assembly for Wales (Remuneration) Measure 2010 and the National Assembly for Wales (Official Languages) Act 2012. He has subsequently taught the law of devolution at both Swansea and Cardiff Universities. He was, between 1990 and 2018, a Recorder on the Wales (and Chester) circuit and served (2014-19) as first President of the Welsh Language Tribunal.
2. The views expressed in this submission are the author’s personal views and not those of any institution with which he is, or has been, associated.

Expansion of membership of the Senedd

3. Based on his experience and expertise, the author is strongly supportive of the Bill generally. From his own observations he believes that the number of members of what was originally the National Assembly for Wales (now Senedd Cymru) has never matched the breadth of the body’s responsibilities and this has been accentuated by the growth of those responsibilities since 2007. The Senedd is now Wales’s primary legislature in relation to most aspects of the everyday lives of its citizens, yet the demanding task of giving effective scrutiny to proposed legislation falls on the same number of members as the original National Assembly whose powers were restricted to scrutinising the limited executive powers transferred from the former Welsh Office.

4. The seminal report of the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (the Richard Commission) published almost 20 years ago, recommended an increase in membership to 80, at a time when the full extent of the development that has since taken place in the role of the Assembly in relation to Welsh legislation could not have been foreseen. In coming to its conclusion the Richard Commission stressed the need for the number of committees on which members were required to serve to be reduced if they were to be able to develop the expertise in particular subject areas necessary for them to be able to give informed consideration to complex legislation.

Electoral arrangements

5. The Richard Commission, having concluded that the membership of what is now the Senedd needed to be substantially expanded, inevitably had also to concern itself with the method by which they should be elected. The model then current (and which remains in place) of constituency members representing 40 constituencies in Wales (coterminous with those for Westminster) plus 4 additional members elected on a party list system to represent five regions could not simply be expanded by adding extra list seats. The pressing need for reform to the Senedd's electoral arrangements is now based on somewhat different factors, in particular the reduction of Wales's Westminster constituencies from 40 to 32. But this does not affect the validity of the Richard Commission's careful consideration of the merits of different alternative models.
6. The Commission concluded that the best option would be for the 80 members which it proposed to be elected by the Single Transferable Vote system with four to six members (exceptionally three where the constituency would otherwise be impracticably large) representing new constituencies (there would, by implication, have been around 16 of them) whose boundaries would be determined by the Boundary Commission for Wales. The Commission felt that this would achieve a good balance between proportional representation of different parties and local accountability. It ruled out the alternative of an extension of the closed party list system by which the regional "top-up" members were elected under the current arrangements, one of the objections to which was that it reduced voter choice in favour of party control, since parties would not only chose the candidates but also determine their order on the list and hence which ones got elected.
7. Nothing has happened during the past 20 years to call into question the careful judgment of the Richard Commission as to the relative merits of a closed party-list system and the single transferable vote (STV) as methods of electing Members of the Senedd. Indeed, as will be discussed below, there have since been a number of developments which have demonstrated its wisdom. A similar conclusion has also been reached, of course, by a number of other independent studies of the issue, in particular the Senedd's Expert Panel on Assembly

Electoral Reform, chaired by Professor Laura McAllister, which reported in November 2017.

8. Against this background, the proposed provision in the Bill for MS's to be elected on the basis of closed party lists rather than STV runs contrary to every considered, authoritative, independent view expressed on the subject over the last twenty years and the author urges the Senedd to think again. The remainder of this submission will set out his judgment as to the relative merits of STV and closed party lists when assessed by reference to the criteria of voter empowerment, respect for diversity and representation of minority interests and consistency with the principles of devolution, plus the only criterion on which a closed party list system has some advantage, namely that of simplicity.
9. The superiority of STV over any other comparable system is supported by the fact that when, in the Local Government and Elections (Wales) Act 2021, the Senedd legislated to provide local authorities with an alternative to the first-past-the-post (FPTP) system, the one that it selected was STV. This system is also the one adopted by the other devolved legislature within the UK which is wholly elected on a proportional system – the Northern Ireland Assembly.
10. The fact that the Northern Ireland Assembly is elected using the STV system provides an invaluable source of comparative material for better understanding of how that system would work in Wales. Obviously there are important differences in the pattern of support for parties in Northern Ireland as compared to Wales. But even so, a number of clear lessons emerge. In order to facilitate comparison, the Appendix to this submission summarises the result in the May 2022 Assembly election in one of the multi-member constituencies. (The 90 MLs represent 16 constituencies, each of which returns 5 Members.) The one selected, Belfast South, which contains the campus of Queen's University, is an area which, in a number of ways, is closer to the makeup of many Welsh communities than others in Northern Ireland.

ASSESSMENT AGAINST OBJECTIVE CRITERIA

Simplicity

11. There is no doubt that a closed party list system (in principle independent candidates could also stand but would be under the disadvantages that independents face nowadays in seeking election, under whatever system, at this level) is inherently simpler to operate than STV. The former merely requires a voter to place a cross against the name of a party (or individual) on a ballot paper listing each participating party. The translation of votes into seats allocated to that party in respect of the constituency, using the d'Hondt system, is arithmetically undemanding.

12. The closed party list system is that used for electing regional list additional members since the inception of the then National Assembly for Wales and Welsh voters are therefore very familiar with it.
13. STV, on the other hand, requires voters to identify which candidates they wish to vote for and then to rank them in preference. Allocating seats is complex although the process is nowadays computerised. Whereas Welsh voters are currently unfamiliar with it, the same was true of Northern Irish voters before 1998 and of local government voters in Wales in the areas of any councils that opt to adopt STP instead of FPTP.
14. The complexity of the STV voting process can also be over-stated. One factor often mentioned is the size of the ballot paper. But as the Appendix demonstrates, the practice which parties sensibly adopt in Northern Ireland is not to nominate candidates who have no chance of being elected. In Belfast South both Alliance and the SDLP confined themselves to two candidates and Sinn Fein, the DUP and the Ulster Unionist Party to only one candidate. This appears to be based on a belief that too many candidates could result in first preference votes being spread too thinly, particularly in an area where a high proportion of voters would wish to distribute preferences amongst more than one party. Had the poll been conducted on a list system there would have been 10 parties plus 1 independent on the ballot paper, compared to the 13 candidates listed under STV – an insignificant difference.

Voter empowerment

15. A closed party list system gives the voter no opportunity to distinguish between different candidates. The fact that this is a very real issue is again demonstrated by the Belfast South result. In the case of those parties who fielded more than one candidate there were significant differences in the number of first preference votes given to those candidates. This was particularly pronounced in the case of the two SDLP candidates, the more popular of whom (who was elected) attracted almost three times as many votes as the other (who was not). Presented with an opportunity to exercise a preference for which individual candidates should be elected, voters embraced that choice, with decisive results.
16. Based on the criterion of voter empowerment and democratic accountability, STV wins “hands down”.

Respect for diversity and representation of minority interests

17. In the same way as a closed party list system prevents voters from expressing preferences as between different candidates, it prevents them from distributing their preferences between different parties. A vote cast can only benefit one party and there is no facility for a voter to give first preference votes to a preferred party but to give lower preferences to another party whom the voter also judges worthy of representation. The ability for STV to encourage this kind

of nuanced voting, fostering the development of parties or individuals representing minority groups or viewpoints has been of considerable interest in Northern Ireland and may help to explain two significant changes in representation in the Northern Ireland Assembly since 1998, namely:

- The growth in representation of the cross-community Alliance party from less than 6% of the seats in the original Assembly to almost 20% in that elected in 2022;
- The variety of minority interests represented, with the 2022 election leading to the election of 4 MLAs (2 independents, 1 TUV and 1 People before Profit) who did not belong to the 5 main parties and who represent 4½% of the total membership.

18. The d'Hondt system (sometimes referred to, particularly in America, as the Jefferson system) of allocating seats between party lists is, on the other hand, recognised to provide a small but significant bias in favour of larger parties. According to Lijphart¹, "The consensus is that d'Hondt disproportionately favours the larger parties,..".
19. Schuster, Pukelsheim, Drton and Draper² set out to quantify this bias and concluded that the d'Hondt method "is seat biased, favouring larger parties at the expense of smaller parties". They calculated that "the largest party in a system of three³ can expect five extra seats per twelve elections⁴ in excess of their ideal share, that is, a rate of about one excess seat every other election, under the Jefferson (d'Hondt) method." It follows that in a Senedd general election, involving 16 individual contests, the largest party could expect to be allocated 6 or 7 more seats than their proportion of the vote would have predicted.
20. A closed party list system also transfers to the political parties the power to select not only who can be a candidate in their name in an election but, in addition, whether or not that person is elected, something which is determined by the position on its list allocated to a candidate by the party. Whilst the entrusting of that responsibility to parties under the current AMS system for Senedd elections may be just about acceptable, because it operates as a supplement and corrective to the basic FPTP system under which individual candidates have a mandate from the electors, its extension to encompass the entire membership of the Senedd calls for a fundamental re-appraisal. Quite apart from the principle of transferring so much control over the electoral process away from electors, the question must also be posed as to whether the governance of political parties is sufficiently robust for this to be done fairly and transparently.

¹ "Degrees of proportionality of proportional representation formulas" in Grofman and Lijphart *Electoral Laws and Their Political Consequences* (1986) pp 171-172.

² "Seat biases of apportionment methods for proportional representation" *Electoral Studies* 22 (2003) pp 651-676. nor

³ The effect is more pronounced the larger the number of parties - Ibid, Fig 7 at p664.

⁴ i.e. individual contests.

21. Political parties are voluntary self-governing bodies. Only in the sphere of finance does the law (through the Political Parties, Elections and Referendums Act 2000 and the Electoral Commission) regulate their activities. In order to be registered as a political party a body has to lodge a copy of its constitution, but it is not part of the role of the Electoral Commission to influence its content, still less to enforce compliance with it. In recent years there have been numerous allegations of discriminatory conduct relating to the internal affairs of all political parties and of ineffective responses by parties to such allegations. Given the absence of any form of statutory regulation of their affairs (other than in relation to finance) it is solely a matter for the leadership and members of political parties to remedy such deficiencies. The lack of external regulation of the affairs of political parties can currently be justified on the grounds of the need to safeguard their independence from the state. But that argument is no longer valid if political parties are given the power effectively to determine membership of representative bodies like the Senedd by the adoption of an electoral system based on closed party lists.

Consistency with devolution

22. The Bill seeks, in one regard, to strengthen the devolved nature of Welsh political institutions by requiring all candidates for election to the Senedd to be registered as electors in Wales. It is inconsistent with this aim that its proposals for reform of the electoral system would transfer effective control over membership of the Senedd to bodies all of which (with the exception of Plaid Cymru) are legally UK bodies which, at most, decentralise decisions over some matters to Welsh or Scottish structures under purely internal arrangements which can be revised by them at any time. This, of course, is quite apart from the less formal influence that can be wielded centrally over choices of candidates, their positioning on the list and so on. In an STV system, the choice of who is elected is ultimately that of the electors and an intrusive or heavy-handed interference in the process of selecting candidates is open to being punished by them. In a closed party list system the electors, on the other hand, have no say at all in how candidates are selected and ranked. Such a system is therefore centralising in its effect and runs counter to the principle of de-centralisation on which devolution is based.

Conclusions

23. i) Measured against the criteria of:
- voter empowerment,
 - respect for diversity and representation of minority interests, and
 - consistency with the decentralising principle of devolution,

the closed party list system for electing members of Senedd Cymru proposed by the Bill is far inferior to the STV system recommended by the Richard

Commission and the Senedd Expert Panel on Electoral Reform chaired by Professor McAllister, and which is used in elections to the Northern Ireland Assembly and is now authorised by the Senedd for use by local authorities in Wales;

- ii) The only criterion by which the proposed system is superior to STV is that of simplicity. The relative complexity of STV, which calls upon an elector to make considered choices between candidates of the same party and as to whether to distribute preferences between candidates of more than one party, can however be over-stated. This system is in operation in many other jurisdictions, Northern Ireland being of particular relevance, and the demands it places on electors did not deter the Senedd from legislating to make it available as an alternative to FPTP in local government elections in Wales;
- iii) Any objective comparison of the merits of the two systems must inevitably conclude that the Single Transferable Vote system is far and away superior to a closed party list system;
- iv) The Bill should be amended at the earliest opportunity to incorporate, instead of the current provisions, ones paralleling those in the Northern Ireland Act 1998 which provide for elections to the legislature using STV.

Keith Bush

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APPENDIX

BELFAST SOUTH CONSTITUENCY

MAY 2022 NORTHERN IRELAND ASSEMBLY ELECTION

	Party	Candidate	% First Preference Votes	Number of First Preference Votes	Whether Elected
1	Green (NI)	<u>Clare Bailey</u>	8.65%	4,058	
2	Alliance	<u>Paula Bradshaw</u>	13.85%	6,503	✓
3	TUV	Andrew Girvin	4.12%	1,935	
4	Sinn Féin	<u>Deirdre Hargey</u>	20.26%	9,511	✓
5	Workers' Party	Paddy Lynn	0.30%	139	
6	Aontú	Luke McCann	1.72%	806	
7	Ulster Unionist	Stephen McCarthy	6.52%	3,061	
8	Socialist Party	Neil Moore	0.75%	353	
9	Alliance	<u>Kate Nicholl</u>	11.08%	5,201	✓
10	Independent	Elly Odhiambo	0.23%	107	
11	SDLP	<u>Matthew O'Toole</u>	11.49%	5,394	✓
12	DUP	<u>Edwin Poots</u>	15.36%	7,211	✓
13	SDLP	Elsie Trainor	4.32%	2,030	