

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)21 Ymateb gan: | Response from: Thomas Glyn Watkin



SENEDD CYMRU

REFORM BILL COMMITTEE

INQUIRY INTO THE SENEDD CYMRU (MEMBERS AND ELECTIONS) BILL

Written Evidence from Professor Thomas Glyn Watkin KC (*hc*)

1. I am grateful to the Committee for the invitation to make a written submission in relation to this inquiry. Unless otherwise stated, the opinions expressed in this paper are entirely my own and do not represent the views of any body or institution with which I am or have been associated.
2. I shall confine my comments in the main to Parts 1 and 2 of the Bill, as those are the parts which correspond to matters with which I have dealt during my professional career.

Part 1 – The Senedd and Welsh Ministers

The case for increasing the number of Senedd members

3. The Senedd's predecessor body, the National Assembly for Wales, was established by the Government of Wales Act 1998. It was created as a body corporate with both legislative and executive functions. In both instances, the functions were derived from those previously exercised by the Secretary of State, and which had been obtained by a process of accumulation since the creation of that office in 1964. The Assembly's legislative powers, therefore, were confined to the making of subordinate legislation by statutory instrument, unlike the power to enact primary legislation in the form of Acts granted to the Scottish Parliament.
4. During the quarter century following its creation, the functions of the Assembly were transformed very substantially. Under the Government of Wales 2006, it obtained the power to enact primary legislation, initially in 2007 in the form of Measures, and then, in 2011, in the form of Acts. In addition in 2011, by vote of the Welsh electorate, it obtained primary law-making powers over a substantial number of subjects grouped under 20 headings. To these were added, by the Wales Act 2014, certain tax raising powers, and finally, by virtue of the Wales Act 2017, it was accorded a similar form of legislative competence as that which had been given to the Scottish Parliament in 1999, namely the power to enact laws on any matter not reserved to the UK Parliament.
5. The body subsequently renamed Senedd Cymru differs therefore from the original National Assembly not only in name, but also in terms of its functions, the breadth of those functions, and consequently the responsibilities which its members are called upon to discharge. It is no longer a body corporate, and the legislative and executive functions, which were both to be discharged by the original body, have since 2007 been the separate responsibilities of the Senedd and the Welsh Government respectively.
6. It is somewhat surprising therefore that the body, which now has such significantly greater duties to undertake, remains in size and composition virtually unchanged from that which came into being to perform much more limited functions in 1999. In

particular, it has responsibility for holding the Welsh Ministers to account for their exercise of executive functions, including since 2007, the making of subordinate legislation, and also the detailed scrutiny of proposals to enact primary legislation whether they emanate from the Welsh Government, private members or the Senedd Commission. Much of this work has to be undertaken by Senedd Committees composed of its members.

7. The body created to exercise much more limited functions in 1999 was composed of 60 members. The much greater responsibilities of the current Senedd fall to a membership of the same size. From this number must be subtracted the Llywydd and the Deputy Presiding Officer who do not sit on Senedd Committees. The First Minister, Welsh Ministers, Deputy Welsh Ministers and Counsel General (if a Senedd member) are likewise precluded from doing so. This leaves the number of members available to sit on scrutiny committees at roughly 44. In particular, in a Senedd with a roughly equal number of members from government and opposition parties – a situation which has been the rule rather than the exception for most of the period since 1999 – the number of backbench members from the government party available to sit on committees is rarely greater than 15. Where, as with the One Wales Coalition in 2007–11, the governing parties' number of members is greater, a commensurate depletion occurs in the number of opposition members. Add to this that the party political composition of committees has to reflect that of the Senedd itself and the burden upon those members becomes almost unsustainable – unfair to the members and unfair to those whom they have been elected to represent. Larger legislatures are obviously able to distribute the task of scrutiny among a greater number of members, enabling them to develop expertise in the areas which they are called upon to scrutinize, and also to devote more time to the interests of their constituents.
8. Against this background, the case for increasing the number of Senedd members in terms of ensuring informed and effective scrutiny both of legislative proposals and the conduct of government becomes, in my view, unanswerable. Not to recognize this necessity and act upon it risks condemning Wales' democratic institutions to an inevitably poorer level of performance. To discharge the duties placed upon them effectively, the institutions of Welsh governance require the necessary numbers. The current bill is aimed at achieving this. To argue that now is not the right time because of other problems facing the nation or because of increased cost misses the point that these other problems can only be properly addressed and resolved by properly resourced bodies.

The case for increasing the number to 96

9. While the need to increase the number of Senedd members is, in my view, patent, the extent of that increase is more debatable. The Bill proposes an increase to 96 members. The number appears to me to be well-chosen.
10. The current number of 60 members is based upon the number of MPs from Wales in the UK Parliament. There being 40 such members, the Senedd is composed of 40 members elected from the same constituencies by the same method of election – 'first past the post'. The remaining 20 members are elected for five regions, each composed of several of the constituencies and electing four members by the D'Hondt highest average system of proportional representation.
11. This 40:20 split of constituency to regional members was intended to prevent one-party dominance of the Assembly and to ensure that those who had voted for

unsuccessful candidates in the constituency elections were not left totally unrepresented in the legislature. These goals have, in my view, been achieved. Although Welsh Labour has been in government throughout, it has rarely been able to govern other than in coalition with, or with the co-operation of, another party, and, in May 2007, a coalition government composed of other parties was a very real possibility.

12. The proposed increase to 96 members has, in my view, the virtue of maintaining the link between Senedd representation and that at Westminster. With the number of Welsh constituencies being reduced to 32, basing the Senedd representation on the same areas and a multiple of that number will mean that voters can identify who represents them on different issues in the area in which they live.
13. Undoubtedly, the proposed linking of the 32 constituencies into 16 pairs for the purpose of the Senedd elections complicates this, but it has, in my view, the virtue of allowing parties with lower levels of support to gain seats and therefore prevents those who voted for those parties from being unrepresented in the legislature. If three Senedd members were to be elected from each of the 32 constituencies rather than six from each of the 16 pairs, the likelihood of such representation would be significantly decreased.

Increase in the maximum number of Welsh Ministers

14. A further benefit of increasing the number of Senedd members is that permits a concomitant increase in the number of Welsh Ministers. The maximum number was fixed at 12 in 2007 when the formal separation of the Assembly and Welsh Government occurred, and when the Assembly's functions were far narrower than the Senedd's now are. The number 12, which does not include the First Minister or the Counsel General is one-fifth of the Senedd membership. A similar proportion in a membership of 96 would allow the number of ministers and deputy ministers to be increased to 19. The proposal to increase to a maximum of 17 appears therefore entirely appropriate, as does reserving a power to further increase the number to 18 or 19 as required.
15. The mechanism for the further increase is also in my view correct. The power to do so is exercisable by the Welsh Ministers through the making of regulations in the form of a statutory instrument. Although this is an example of a 'Henry VIII' power, it is an appropriate use of such a power in that a proposal to increase the number to 18 or 19 neither changes the principles of the enabling statute nor amends the detail in a manner which requires anything more than simple agreement or disagreement. The use of the affirmative procedure, allowing the Senedd to approve the change before it takes effect, is also entirely in accordance with democratic principles.
16. Even if the number of Welsh Ministers and Deputy Ministers reaches the full quota of 19, that will still leave 72 back benchers to serve on committees and to scrutinize legislative proposals and the conduct of government. The effect will be to double the capacity of the Senedd to perform its basic responsibilities. In itself, this benefit to Welsh democracy more than justifies the increase in personnel.

Part 2 – Voting System at Senedd General Elections and Allocation of Seats

The method of election

17. The most difficult issue is perhaps the choice of the method of election. The ‘first past the post’ system has the virtues of being easily understood and familiar to the electorate, while its disadvantages and unfairness are arguably less widely appreciated. Any deviation from it risks unfamiliarity breeding incomprehension and dislike, while the advantages of other systems require explanation. Nevertheless, the experience of the last quarter century has, in my view, endorsed the benefit of departing from ‘first past the post’ in the interest of achieving fairer representation and preventing one-party dominance in government.
18. Coupled with the choice of electing six members from each of the proposed 16 Senedd constituencies, the choice of extending the application of the D’Hondt system of proportional representation to the whole electoral process for the Senedd will in my view retain the benefits achieved over the last 25 years in terms of preventing one-party dominance and ensuring representation for those who have voted for smaller parties. There will, however, in my view, undoubtedly be widespread criticism of the process in terms of its complexity and, perhaps more accurately, its unfamiliarity. A great deal needs to be done to prepare voters for the change and educate them regarding how the process works. There is at present insufficient knowledge among voters that every Welsh citizen has five representatives in the Senedd, while they only have one at Westminster. The difference becomes crucial if the member is also a government minister. In those circumstances, there is precious little point in a constituent complaining about government policy or its effects to their MP at Westminster, while in Wales they will almost certainly be able to enlist the support of another MS who represents their region (and possibly the party for which they voted) to vent their grievance. Under the proposed new method of election, the number of MSs representing a Welsh citizen will increase to six.
19. While a law teacher at Cardiff and later Bangor in the 1990s and 2000s, I was responsible for lecturing and tutoring students concerning the electoral systems of other European nations, particularly Italy and Spain. Both nations employed the D’Hondt system for elections to one of the chambers of their bicameral legislatures – the lower house in Spain; the Senate in Italy. While students found the D’Hondt system complex and unfamiliar at the outset, study of its workings often, indeed usually, led to a recognition of its greater fairness when compared to ‘first past the post’ in terms of democratic government.
20. Italy was forced to reform its electoral system in the 1990s following the abrogation of its existing system in a popular referendum. The subsequent change to a majority of parliamentarians being elected by ‘first past the post’ led to the rise of populist parties.

Voting for Parties rather than candidates

21. A further unfamiliar, and therefore probably controversial, feature of the method of election is the fact that voters will vote for a party rather than a candidate – unless voting for an individual standing for election independently. Where so much is being achieved elsewhere in the bill to ensure that voters can feel that their votes have counted in electing a representative and not merely been counted, breaking the link between their vote and the identity of their representative risks undermining the good achieved elsewhere. It should not, in my view, be impracticable to devise a system

whereby, having voted for a party, a voter could then proceed to indicate a preference for a candidate of that party's list, or even for one male and one female candidate on the party list. One problem with such an approach is probably that it would result in a long and unwieldy ballot paper. Again, however, I would venture to believe that before too long paper voting will give way to ballots conducted electronically, where proceeding from choice of party to choice of candidate/s on that party's list should be relatively straightforward. Voting *in* the Senedd has been electronic from the outset; it is perhaps time for voting *for* the Senedd to catch up.

Conclusions

22. In sum, it is my clear view that the bill as drafted delivers a long-needed reform to the size of the Senedd so as to enable it to better discharge its constitutional duties. While the method chosen to elect the larger body may excite some controversy, it is my belief that the key factor must be the election of a body which is truly representative and able to do its work. To opt for a simpler or more familiar method of election is too great a price to pay if the body which results is less able to deliver that level of representation. Moving to an – at first - less familiar and less easily understood method of election is justifiable in the interest of increasing both democratic representation and accountability.

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* Professor Thomas Glyn Watkin, since retiring, has been an honorary professor at both Bangor and Cardiff Law Schools. Prior to retirement, he was First Welsh Legislative Counsel to the Welsh Assembly Government (2007–10), Professor of Law and Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), having previously been successively Lecturer, Senior Lecturer and Reader in Law at Cardiff (1975–2001) and Legal Assistant to the Governing Body of the Church in Wales (1981–1998). He is a King's Counsel (*honoris causa*), a Fellow of the Learned Society of Wales, and an ordinary academic bencher of the Middle Temple. His *Legislating for Wales*, written with Daniel Greenberg, was published by the University of Wales Press in 2018.