

Report on the Senedd Cymru (Members and Elections) Bill

January 2024



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January 2024



About the Committee

The Committee was established on 26 May 2021. Its remit can be found at www.senedd.wales/SeneddLJC

Current Committee membership:



Committee Chair:
Huw Irranca-Davies MS
Welsh Labour



Alun Davies MS
Welsh Labour



Samuel Kurtz MS
Welsh Conservatives



Adam Price MS
Plaid Cymru

The following Members were those involved in the scrutiny of the Bill and agreeing the Report:



Temporary Committee Chair:
Alun Davies MS
Welsh Labour



James Evans MS
Welsh Conservatives



Luke Fletcher MS
Plaid Cymru



Carolyn Thomas MS
Welsh Labour

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1. Introduction

On 18 September 2023, Mick Antoniw MS, Counsel General and Minister for the Constitution (the Counsel General) introduced the Senedd Cymru (Members and Elections) Bill (the Bill),¹ and accompanying Explanatory Memorandum (the EM).²

1. The Senedd's Business Committee referred the Bill to the Reform Bill Committee on 12 September 2023, and set a deadline of 19 January 2024 for reporting on its general principles.³
2. On 18 September 2023, the Counsel General issued a Statement of Policy Intent for subordinate legislation to be made under the Bill.⁴

The purpose of the Bill

3. The long title of the Bill states that it is:

“An Act of Senedd Cymru to make provision about Members of the Senedd and offices held by those Members; Senedd Cymru constituencies; returning and maintaining Senedd Cymru; the Local Democracy and Boundary Commission for Wales; and for connected purposes.”

4. A written statement by the Counsel General was published on 18 September 2023.⁵

¹ [Senedd Cymru \(Members and Elections\) Bill](#), as introduced

² Welsh Government, [Senedd Cymru \(Members and Elections\) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes](#), September 2023

³ Business Committee, [Timetable for consideration: Senedd Cymru \(Members and Elections\) Bill](#), September 2023

⁴ [Letter from the Counsel General to David Rees MS, Chair of the Reform Bill Committee](#), 18 September 2023, enclosing the Senedd Cymru (Members and Elections) Bill: Statement of Policy Intent for Subordinate Legislation

⁵ Welsh Government, [Written Statement: Senedd Cymru \(Members and Elections\) Bill](#), 18 September 2023

5. In summary, the Bill proposes to:

- increase the size of the Senedd to 96 Members, by providing 16 constituencies, each with six seats;
- increase the legislative limit on Welsh Government Ministers to 17 (in addition to the First Minister and Counsel General), with power to further increase this limit to 18 or 19;
- increase the maximum number of Deputy Presiding Officers who may be elected from within the Senedd to two;
- change the Senedd’s electoral system so that all Members are elected via a closed proportional list system, with votes translated into seats via the D’Hondt formula;
- repurpose and rename the Local Democracy and Boundary Commission for Wales including:
 - provide the renamed Democracy and Boundary Commission Cymru with the functions necessary to establish new Senedd constituencies and to undertake ongoing reviews of Senedd constituency boundaries;
 - provide instructions for the Democracy and Boundary Commission Cymru to follow in undertaking their boundary reviews;
- provide that the normal length of time between Senedd ordinary general elections is four years;
- require candidates to, and Members of, the Senedd to be resident in Wales;
- enable a review of the operation and effect of the new legislative provisions following the 2026 Senedd general election; and
- provide a mechanism for the Senedd’s consideration of job-sharing of offices relating to the Senedd, in the Seventh Senedd.⁶

The Committee’s remit

6. The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and

⁶ EM, paragraph 23 and Annex 1, Explanatory Notes

26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.

7. In our scrutiny of Bills introduced into the Senedd, our approach is to consider:

- matters relating to the competence of the Senedd, including compatibility with the European Convention on Human Rights (ECHR or the Convention Rights);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation;
- any other matter we consider relevant to the quality of legislation.

8. We took evidence from the Counsel General on 16 October 2023.⁷

9. Following our evidence session, we wrote to the Counsel General on 31 October 2023 with a series of additional questions in relation to the Bill.⁸ The Counsel General responded to our questions on 16 November 2023.⁹

10. On 11 December 2023, the Counsel General wrote to us to provide a schedule of amendments that would be made to certain Acts as a consequence of the Bill and the Elections and Elected Bodies (Wales) Bill.¹⁰

Recommendation 1. The Counsel General should respond to the conclusions and recommendations we make in this report at least two working days before the Stage 1 general principles debate takes place.

⁷ [Legislation, Justice and Constitution \(LJC\) Committee, 16 October 2023, RoP](#)

⁸ [Letter to the Counsel General](#), 31 October 2023

⁹ [Letter from the Counsel General](#), 16 November 2023

¹⁰ [Letter from the Counsel General](#), 11 December 2023. The [Elections and Elected Bodies \(Wales\) Bill](#) was introduced on 2 October 2023.

2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.¹¹

11. We considered the Bill under the reserved powers model of legislative competence, as set out in section 108A of the *Government of Wales Act 2006* (the 2006 Act).

12. In her statement on legislative competence, the Llywydd, Elin Jones MS, stated that the Bill as introduced would be within the legislative competence of the Senedd.¹²

13. The Counsel General confirmed that he was satisfied that the Bill is within the Senedd's legislative competence and told us:

*"I have considered the competence issues in detail, and I do not consider that there are any competence issues in this Bill as drafted."*¹³

14. The Counsel General also made reference to the need for certain modifications to the Secretary of State's functions under section 13A(1)(b) of the 2006 Act, which are a consequence of the Bill removing the scope for a Senedd by-election (by virtue of Part 2 of the Bill), and therefore the Secretary of State's powers involving by-elections. He informed us that he has consulted the appropriate UK Minister about the provision, as required following the removal of the functions and added that he did not consider there to be "any Minister of the Crown consent requirements as well within the legislation that is before you."¹⁴

15. One of the requirements which must be met for a Bill to be within the legislative competence of the Senedd is set out in section 108A(2)(e) of the 2006 Act. It requires all provisions of a Bill to comply with the Convention Rights.

16. The Counsel General told us that he had undertaken an assessment of the Bill's impact on the ECHR,¹⁵ noting also that it is not normal to publish such an

¹¹ EM, Member's Declaration, page 1

¹² *Presiding Officer's Statement on Legislative Competence*, 18 September 2023

¹³ LJC Committee, 16 October 2023, RoP [7]

¹⁴ LJC Committee, 16 October 2023, RoP [22]

¹⁵ LJC Committee, 16 October 2023, RoP [25]

assessment.¹⁶ He noted that “this is a matter of a Parliament setting out its own electoral arrangements within its framework”¹⁷ and also said:

“There are no human rights convention issues, I think, that are of any consequence that would need raising specifically.”¹⁸

17. Section 6 of the Bill proposes disqualifying a person from standing as a candidate or from being a Member of the Senedd unless they are registered in the register of local government electors in Wales. When we asked whether this section of the Bill is compatible with the Convention Rights the Counsel General said:

“Section 6 is compatible. Many other countries set their own residency requirements. We are completely in accord with that. Where it has been tested in legal cases has only actually been as a peripheral issue, and there was no need, I think, within that particular case for there to be any specific commentary. It was taken that a state setting its own residential requirements in terms of its own electoral system is something that is not in breach of that, provided it fits within the parameters of those human rights conventions. We are in accord with a number of countries that set that position, Ukraine being one of them.”¹⁹

Our view

18. We note the Llywydd’s statement that, in her view, the provisions of the Bill would be within the legislative competence of the Senedd.

19. We note the evidence from the Counsel General in relation to matters of legislative competence, and in particular compatibility with the Convention Rights. Given the constitutional importance of the Bill, we believe there would be merit in publishing the Counsel General’s impact assessment in relation to the ECHR.

Recommendation 2. The Counsel General should publish the Welsh Government’s assessment of the Bill’s impact on the European Convention on Human Rights two working days before the Stage 1 debate.

¹⁶ LJC Committee, 16 October 2023, RoP [27]

¹⁷ LJC Committee, 16 October 2023, RoP [27]

¹⁸ LJC Committee, 16 October 2023, RoP [25]

¹⁹ LJC Committee, 16 October 2023, RoP [29]

3. General observations

Need for the Bill

20. Since the start of the Fifth Senedd, the following key reports²⁰ have been produced in relation to Senedd reform:

- A Parliament that works for Wales: The report of the Expert Panel on Assembly Electoral Reform;²¹
- Senedd reform: The next steps (Fifth Senedd Committee on Senedd Electoral Reform);²²
- Reforming our Senedd: A stronger voice for the people of Wales (Sixth Senedd Special Purpose Committee on Senedd Reform (the Special Purpose Committee));²³
- Response to the Special Purpose Committee on Senedd Reform's report – Reforming our Senedd: A stronger voice for the people of Wales (Sixth Senedd Business Committee).²⁴

21. The Counsel General states in the Bill's EM that its overall purpose is to:

*"... make the Senedd a more effective legislature for, and on behalf of, the people of Wales. This purpose reflects the intention of the Special Purpose Committee, stated in its report, of delivering "a strengthened parliament to represent the people of Wales"."*²⁵

22. Introducing the Bill, the Counsel General said:

"It presents us and the people of Wales with a once-in-a-generation opportunity to make the changes necessary to modernise the Senedd, reflecting our 21st Century Wales. A more effective Senedd, with the ability and capacity to hold the

²⁰ A summary of the first three reports listed is contained in: Senedd Research, [Senedd reform – the story so far](#), 4 October 2023

²¹ [A Parliament that works for Wales: The report of the Expert Panel on Assembly Electoral Reform](#), November 2017

²² Committee on Senedd Electoral Reform, [Senedd reform: The next steps](#), September 2020

²³ Special Purpose Committee on Senedd Reform, [Reforming our Senedd: A stronger voice for the people of Wales](#), May 2022

²⁴ Business Committee, [Response to the Special Purpose Committee on Senedd Reform's report – Reforming our Senedd: A stronger voice for the people of Wales](#), December 2022

²⁵ EM, paragraph 22

*Welsh Government to account; a more representative Senedd to better serve the people of Wales.*²⁶

23. The Counsel General noted in evidence to the Reform Bill Committee that since the original National Assembly for Wales in 1999, the Senedd has become “a fully-fledged legislature” with enhanced responsibilities.²⁷ He added that:

*“... the growth of those responsibilities, the need to legislate in very complex areas, the need also to engage on inter-governmental relations with counterparts across the UK, and to deal with a very substantial UK Government legislative programme that engages with many of our responsibilities—it is about the capacity to have the depth of scrutiny that is needed, and for having enough Members who will be able to develop the particular skills, the expertise, the specialisms that are necessary. And I think increasing the size of the Senedd enables that to happen.”*²⁸

24. The Counsel General also suggested that while the detail for Senedd reform had not appeared in party political manifestos, “the reality is that what has been in the manifestos is that there is a need for reform, there is a need to change the Senedd, to increase its size.”²⁹

Preparation of the Bill

25. The Counsel General told us:

*“... the Welsh Government's in a sort of unusual position in this—or, I'm in an unusual position in this—in the sense that my job is to actually implement the recommendations that come from the special purpose committee and to ensure that legislation is effective, viable and within competence. So, there has been that discussion by way of, almost, engagement with all Members through that special purpose committee, as well. I don't know if there's anything to add to that.”*³⁰

²⁶ Plenary, 19 September 2023, RoP [204]

²⁷ Reform Bill Committee, 5 October 2023, RoP [8]

²⁸ Reform Bill Committee, 5 October 2023, RoP [8]

²⁹ Reform Bill Committee, 5 October 2023, RoP [25]

³⁰ LJC Committee, 16 October 2023, RoP [11]

26. The Counsel General also told the Reform Bill Committee that the Bill is “not a Government Bill”,³¹ that the Welsh Government is “facilitating the ability of a Bill to pass through the Senedd”³² and that his function “is carrying out the wishes of the Senedd, and if those wishes have a two-thirds majority in the Senedd, then that's what this legislation will be representing.”³³

27. He also said that:

“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.”³⁴

28. In the context of a response given in relation to our questions on section 7 (Review of possible job-sharing of offices relating to the Senedd) of the Bill, the Counsel General noted that the Bill “does not oblige the government of the day to accept the recommendations of a committee established to review job-sharing.”³⁵ He also acknowledged that:

“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.”³⁶

29. We asked the Counsel General why a draft Bill had not been brought forward and to explain the processes followed in developing the Bill as published. He told us:

“I think the reason is not that it's a decision not to do that, but it's a question of whether it was feasible or practical to actually do so ... for legislation like this, it has to be in place at least six months ahead of the elections themselves ... So, when you start counting back on the dates and so on, the timescale just doesn't enable that to happen. In terms of justification for really

³¹ Reform Bill Committee, 5 October 2023, RoP [16 and 124]

³² Reform Bill Committee, 5 October 2023, RoP [16]

³³ Reform Bill Committee, 5 October 2023, RoP [124]

³⁴ Letter from the Counsel General, 16 November 2023, response to question 9

³⁵ Letter from the Counsel General, 16 November 2023, response to question 5

³⁶ Letter from the Counsel General, 16 November 2023, response to question 5

not doing so, this is an issue that we've been discussing probably for the past 20 years ... and there has been quite considerable engagement with the electoral bodies as well that would be involved and with the Senedd as well. So, basically it's not feasible to do so. But we do hope that we will have the legislation—there will be enough time for scrutiny—in place in good time to enable the 2026 elections to operate in accordance with all the requirements and conventions that we have.”³⁷

30. When we asked whether it was more important to get the legislation right rather than to get it through the Senedd quickly, the Counsel General said:

“Well, it's a question of getting it done in time so that it can actually be implemented, because, within the tight timescales that we're in, any delay that takes us beyond that could mean that the legislation would not actually operate.”³⁸

Accessibility

31. Under the *Legislation (Wales) Act 2019* (the 2019 Act), the Welsh Ministers and the Counsel General must prepare and lay before the Senedd a programme to improve the accessibility of Welsh law. Each programme must make provision to consolidate and codify Welsh law, maintain codified law, promote awareness and understanding of Welsh law, and facilitate use of the Welsh language.

32. We noted that there is some overlap between the Bill and the *Elections and Elected Bodies (Wales) Bill*. We therefore explored the accessibility of the suite of electoral reform legislation being brought forward in terms of provisions relating to the Senedd's disqualification regime³⁹ and the (currently named) *Local Democracy and Boundary Commission for Wales*.⁴⁰

33. On disqualification the Counsel General told us:

*“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*

³⁷ LJC Committee, 16 October 2023, RoP [9]

³⁸ LJC Committee, 16 October 2023, RoP [11]

³⁹ Section 6 of the Bill and sections 61 to 63 of the *Elections and Elected Bodies (Wales) Bill*.

⁴⁰ Sections 11 to 16 of the Bill and sections 65 and 66 of the *Elections and Elected Bodies (Wales) Bill*.

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.”⁴¹

34. In relation to the provisions about the (currently named) Local Democracy and Boundary Commission for Wales, the Counsel General said:

“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.”⁴²

⁴¹ Letter from the Counsel General, 16 November 2023, response to question 9

⁴² Letter from the Counsel General, 16 November 2023, response to question 9

35. The Counsel General also told us that the Bill “is in functional terms internally coherent” and as such is not dependent upon the forthcoming Senedd Cymru (Electoral Candidate Lists) Bill (often referred to as the Gender Quotas Bill).⁴³ The Gender Quotas Bill was scheduled to be introduced in December 2023 but at the time our report was agreed, it is still awaited.⁴⁴ The Counsel General noted that the Gender Quotas Bill is not intended “to change anything in respect of what is being proposed” in the Bill⁴⁵ and that it “engages a much more complex series of legislative issues, and ... is ... essentially work in progress”.⁴⁶

36. The Counsel General also highlighted that as part of the Welsh Government’s ambition to consolidate the statute book for Wales:

“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.”⁴⁷

37. The Counsel General also noted the Welsh Government’s intention to consolidate and re-state prior to the 2026 Senedd general election the National Assembly for Wales (Representation of the People) Order 2007 (the Conduct Order), which sets out the detailed rules for the conduct of elections to Senedd Cymru. In doing so, he indicated that account would be taken of principles set out in the 2019 Act “to produce an Order which uses modern and clear language which is accessible to the reader”.⁴⁸

Our view

38. We note the Counsel General’s view that the Bill is not a government proposed Bill. From our understanding, the Counsel General’s reasoning is, essentially, because the Bill builds upon the report of the Special Purpose Committee, which was noted, and its recommendations for policy instructions for Senedd Reform legislation endorsed, by the Senedd in plenary on 8 June 2022.⁴⁹

39. The Bill is one brought forward by a member of the Welsh Government. It is, therefore, a government proposed Bill, albeit one whose preparation has:

⁴³ Letter from the Counsel General, 16 November 2023, response to question 10

⁴⁴ See Plenary, 13 December 2023, RoP [111]

⁴⁵ Letter from the Counsel General, 16 November 2023, response to question 10

⁴⁶ LJC Committee, 16 October 2023, RoP [18]

⁴⁷ Letter from the Counsel General, 16 November 2023, response to question 15

⁴⁸ Letter from the Counsel General, 16 November 2023, response to question 15

⁴⁹ Plenary, 8 June 2022, RoP [179 to 440 and 535 to 537]

- been informed by the recommendations of the Special Purpose Committee, with some provisions included based on a development of that Committee's recommendations;
- taken account of recommendations of a report by the Business Committee.

40. Notably, it is a Bill which:

- includes provisions that were not covered by either the Special Purpose Committee or Business Committee reports;
- stems in part from the Co-operation Agreement 2021⁵⁰ as acknowledged by the Counsel General.⁵¹

41. We also note the Counsel General's suggestion, by inference, that the Welsh Government was not obliged to either accept or implement the recommendations of the Special Purpose Committee. This is a view we share.

42. It is legitimate for a government to introduce constitutional legislation, which in this case, seeks to reform Senedd Cymru.

43. As a government proposed Bill, we expect the Bill to proceed through the Senedd as any other government proposed Bill would, with recommendations made by Senedd Committees either accepted or not accepted, and the Welsh Government subsequently tabling amendments based on its acceptance or otherwise of those recommendations and based on its own priorities.

Conclusion 1. For the purposes of taking this legislation through the Senedd, the Senedd Cymru (Members and Elections) Bill is a government proposed Bill.

44. In its report *The Process of Constitutional Change*, the House of Lords Constitution Committee noted that:

*"The nature of a significant constitutional change is that its impact will outlast whichever government initiated it."*⁵²

⁵⁰ Welsh Government, [The Co-operation Agreement: 2021](#), November 2021. See also [Letter to Huw Irranca-Davies MS, Chair, Special Purpose Committee on Senedd Reform from Mark Drakeford MS, First Minister of Wales and Adam Price MS, Leader of Plaid Cymru](#), 10 May 2022

⁵¹ Letter from the Counsel General, 16 November 2023, response to question 9. See also LJC Committee, 16 October 2023, RoP [49, 87 and 91]

⁵² House of Lords Constitution Committee, [The Process of Constitutional Change](#), 15th Report of Session 2010-12, 18 July 2011, HL Paper 177, paragraph 90

45. We believe this is an important point and, as the House of Lords Committee report itself identifies, highlights the desirability of undertaking both pre-legislative and post-legislative scrutiny in relation to constitutional legislation.⁵³

46. As regards pre-legislative scrutiny, draft Bills provide opportunities to consider the actual, legislative detail of proposals before formal introduction. In doing so, Senedd Committees and Members of the Senedd could discuss that detail with stakeholders and consider at an early stage how the Welsh Government proposes to turn policy objectives into law. Pre-legislative scrutiny is particularly important for constitutional Bills, where it is often the case, as the Counsel General suggested, that policy discussions have taken place over many years, and, as the House of Lords Constitution Committee notes, the legislation itself is likely to have a longer timeframe than most other Bills.

47. We note the Counsel General's views regarding the tight timescales for ensuring that the Bill, if enacted, receives Royal Assent in time for all necessary preparations for the 2026 Senedd general election to be implemented and completed. While we acknowledge this point, we also believe that it is vital to get this legislation right because there is danger that if the Bill and its implications are not fully considered and explored, unintended consequences could arise as a result.

Conclusion 2. Given the significance of the Bill for the constitution of Wales, space should have been found with the timetable to prepare and seek views on a draft Bill.

48. We consider post-legislative scrutiny as part of our consideration of section 19 of the Bill in Chapter 4.

49. We note the Counsel General's explanation for the use of (potentially) three Bills in the space of 12 months to deliver changes to electoral law in Wales. As we have already noted, the Welsh Ministers are now under a duty to keep the accessibility of Welsh law under review, and the Welsh Government is making some progress on its plans to improve such accessibility. While we acknowledge the reasons put forward by the Counsel General for three separate and new pieces of primary legislation, we have some concerns that such an approach will add to an already complicated statute book and this is less than ideal.

⁵³ House of Lords Constitution Committee, *The Process of Constitutional Change*, 15th Report of Session 2010-12, 18 July 2011, HL Paper 177, paragraphs 91 to 95 and 102 to 104

50. Nevertheless, we welcome the Counsel General's positive comments about consolidating electoral law over the longer term.

51. As an initial part of that process, we also welcome the Welsh Government's intention to consolidate and re-state the Conduct Order.

52. We note that some information has been provided to the Reform Bill Committee regarding the timing of the Conduct Order.⁵⁴ However, given our role in scrutinising this important piece of subordinate legislation, we would welcome an early and more precise indication from the Counsel General of when the Conduct Order is likely to be laid for scrutiny.

Recommendation 3. The Counsel General should write to the Committee to provide details of the timetable for the preparation, scrutiny and implementation of the re-statement of the National Assembly for Wales (Representation of the People) Order 2007 (the Conduct Order), required for the Senedd general election in 2026.

53. We discuss specific sections of the Bill in the next Chapter.

54. However, as a general observation, we are concerned that a Bill whose aims include increasing the scrutiny depth of the Senedd and its capacity to hold the Welsh Government of the day to account is seeking to influence and potentially constrain the Seventh Senedd's committee system, which should be a matter for that Senedd to determine.

55. We note that there are five delegated powers in the Bill to make subordinate legislation and we consider some of these in Chapter 4.

⁵⁴ Letter from the Counsel General to David Rees MS, Chair of the Reform Bill Committee, 1 December 2023

4. Specific observations on sections in the Bill and the powers to make subordinate legislation

56. The Bill comprises 25 sections and two Schedules. It is split into five Parts:

- Part 1 – The Senedd and Welsh Ministers;
- Part 2 – Voting system at Senedd general elections and allocations of seats;
- Part 3 – Democracy and Boundary Commission Cymru;
- Part 4 – Senedd constituency boundary reviews; and
- Part 5 – Review of operation of Act etc. and general provisions.

57. There are five provisions in the Bill containing powers for the Welsh Ministers to make regulations.⁵⁵ Of these five powers:

- two powers are subject to the affirmative resolution procedure;
- one power is subject to either the affirmative or negative resolution procedure depending on whether the power is used to amend primary legislation; and
- two powers are subject to no procedure.

58. Our consideration below focuses on specific sections and regulation-making powers within those sections that we wish to highlight and, accordingly, draw to the attention of the Senedd.

Part 1 – The Senedd and Welsh Ministers

Section 4 – Additional Deputy Presiding Officer

59. Section 4 makes provision for the Senedd to be able to elect a second Deputy Presiding Officer, in addition to the Deputy Presiding Officer that must be elected at the first meeting of the Senedd under Section 25(1)(b) of the 2006 Act.

⁵⁵ These powers are summarised in the EM, Chapter 5: Power to make subordinate legislation

60. We asked the Counsel General why section 4 of the Bill did not replicate the majority of section 25 of the 2006 Act for ease of reading, rather than making numerous separate amendments to section 25 within the body of section 4. In so doing we recognised that section 25 of the 2006 Act could not be substituted in its entirety for reasons of legislative competence. The Counsel General said:

“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, ... 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.”⁵⁶

Our view

61. We note the Counsel General’s comments regarding the Welsh Government’s drafting approach to section 4 of the Bill.

62. The overall effect of the amendments to section 25 of the 2006 Act as provided in section 4 of the Bill is difficult to discern without reference to the Keeling Schedule in Annex 3 (Schedule of Amendments) of the EM. While we welcome the clarity that Annex 3 provides, it is not the same as providing information on the face of the Bill. Moreover, the purpose of an EM is to aid scrutiny by the Senedd, rather than to assist the reader should a Bill become an Act. The latter purpose is best served by amending the face of the legislation, particularly for those people who do not have access to subscription databases such as Westlaw.

63. The inaccessible drafting in section 4 of the Bill contrasts starkly with section 8 of the Bill, which reproduces, with appropriate amendments, sections 6 to 8 of the 2006 Act such that they are easily readable.

64. We note that paragraph 7(2)(ix) of Schedule 7B to the 2006 Act has the effect that section 25(1)(a) of that Act cannot be modified (and is therefore a restriction

⁵⁶ Letter from the Counsel General, 16 November 2023, response to question 11

on competence). As such we recognise that it may not be possible to consolidate all of section 25 of the 2006 Act.

Recommendation 4. The Counsel General should confirm whether or not, in his opinion, the reservation in relation to section 25(1)(a) of the *Government of Wales Act 2006* would prevent its restatement in the Bill.

65. Notwithstanding the position regarding section 25(1)(a) of the 2006 Act, we believe even a partial consolidation of section 25 would make for more accessible legislation. In reaching this view we also note the Counsel General’s comments that the approach adopted in section 4 of the Bill was “Fundamentally ... a drafting approach”.

Recommendation 5. The Counsel General should table an amendment to section 4 of the Bill for the purpose of achieving a consolidation (and subject to recommendation 4 a re-statement) of section 25 of the *Government of Wales Act 2006*, within the boundaries of the Senedd’s legislative competence.

Recommendation 6. If recommendation 5 is not achievable because of restrictions in the *Government of Wales Act 2006*, rather than it being a drafting choice, the Counsel General should provide a detailed explanation of why this is the case.

Section 5 - Increase in maximum number of Welsh Ministers

66. Section 5 of the Bill makes provision for an increase to the maximum number of Welsh Ministers that can hold office at the same time, from 12 to 17, including Deputy Ministers (but not the First Minister and Counsel General). It achieves this change by an amendment to section 51 (Limit on number of Ministers) of the 2006 Act.

67. Section 5 also proposes a regulation-making power for the number of Welsh Ministers to be increased to a maximum of 19. Regulations made under this section would be subject to the affirmative procedure. The EM states that the additional level of scrutiny is appropriate given that the power would “vary the upper limit on the number of Welsh Ministers set out in primary legislation”.⁵⁷ The Statement of Policy Intent for making the regulations states:

“If enacted, there is no expectation to immediately utilise this power to increase the existing maximum. It would be necessary for a future Welsh Government to justify why circumstances

⁵⁷ EM, Chapter 5, page 123

necessitated that the limit on Welsh Ministers needs to be increased beyond 17. This could be due to the devolution of legislative powers, or otherwise there may be specific circumstances whereby an increase is merited. ...

The effect of this power is permanent. Once the power has been exercised to increase the limit within the permitted range, that will become the statutory limit for that Senedd and all future Seneddau, unless and until the power is exercised to increase the limit again, up to a maximum of 19. However, future First Ministers would continue to have discretion to appoint fewer Welsh Ministers than the maximum permitted in legislation.

The inclusion of this power in the Bill follows a recommendation from the Senedd's Business Committee 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."⁵⁸

68. In our consideration of section 5, we noted that the Counsel General (in the Statement of Policy Intent) had indicated that the Welsh Government had no intention of using the powers to increase the number of Welsh Ministers to 19. We therefore asked why the powers were being taken. In response the Counsel General said:

"It would only be able to be achieved by an affirmative vote of the Senedd itself. So, the Senedd would have to approve. There would be no obligation on the First Minister to actually do that. At the moment, as things stand, the figure of 17 is what is considered that would be appropriate for the 2026 Senedd, but there is a capacity to futureproof whereby the First Minister can come back and actually say, 'Well, we have certain additional responsibilities that have been given; we need to

⁵⁸ Letter from the Counsel General to David Rees MS, Chair of the Reform Bill Committee, 18 September 2023, enclosing the Senedd Cymru (Members and Elections) Bill: Statement of Policy Intent for Subordinate Legislation

create an additional ministerial post. Do you approve?' And that would be a vote of the Senedd in order to achieve that."⁵⁹

69. We also asked how the figure of 17 was reached and why the figure of 19 was not included on the face of the Bill, rather than allowing another Minister in another Senedd at another time the potential to make that change themselves. In response an official accompanying the Counsel General said:

*"The special purpose committee recommended that there should be an increase, but asked the Business Committee of the Senedd to look at it in more detail. ... it was a conclusion of the Business Committee that it should be raised to 17— ... it's currently 12 Ministers plus the First Minister and the Counsel General—so, to raise it to 17, but also to have that ability to increase it further through a delegated power, with the approval of the Senedd."*⁶⁰

70. When we asked the Counsel General whether using a new Bill would be more constitutionally appropriate than the use of a regulation-making power, the Counsel General said:

"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.

(...)

*As the Business Committee stated, this might be due to the devolution of further powers, or otherwise other circumstances whereby an increase was merited."*⁶¹

71. We asked why there is no power in section 5 to subsequently decrease the maximum limit on the number of Welsh Ministers by regulations in future once the power has been used, for example, to temporarily increase the limit for specific purposes. In his response the Counsel General said:

"In its December 2022 report, the Senedd's Business Committee stated on this issue that "any proposed increase,

⁵⁹ LJC Committee, 16 October 2023, RoP [58]

⁶⁰ LJC Committee, 16 October 2023, RoP [63]

⁶¹ Letter from the Counsel General, 16 November 2023, response to question 1

once agreed by the Senedd, should be permanent.” The Bill reflects the conclusion reached.

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.”⁶²

72. A Bill that relates to a protected subject-matter set out in section 111A of the 2006 Act⁶³ requires the approval of two-thirds of the total number of Members of the Senedd to pass. This is often referred to as a ‘supermajority’ of the Senedd.

73. In terms of why the affirmative procedure should be applied to the making of regulations under section 5 rather than requiring a supermajority of all Members of the Senedd to vote in favour, the Counsel General explained:

“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.”

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.”⁶⁴

⁶² Letter from the Counsel General, 16 November 2023, response to question 2

⁶³ *Government of Wales Act 2006, section 111A*

⁶⁴ Letter from the Counsel General, 16 November 2023, response to question 3

Our view

74. We note the Counsel General's comments regarding section 5 of the Bill.

75. A majority of the Committee considers that a better approach for section 5 would be to set a maximum limit of Welsh Ministers on the face of the Bill (of for example, 17, 18 or 19) and to remove the provisions allowing for the figure to be amended by regulations. As the Counsel General indicated, a future First Minister would be free to choose not to appoint to that maximum limit of Welsh Ministers. Removing the regulation-making power in section 5(b) of the Bill would ensure that any future changes to the limit on the number of Welsh Ministers provided by section 51(1) of the 2006 Act would require a further Bill, at some future date, which may offer a more constitutionally appropriate approach given the significance of the change. Such a Bill may arise for example as a consequence of post-legislative scrutiny (see our consideration of section 19 of the Bill).

76. A majority of the Committee considers, therefore, that section 51 of the 2006 Act, which provides the limit on the number of Welsh Ministers, should not be capable of being amended by regulations. Section 5(a) of the Bill which amends section 51 of the 2006 Act should provide the limit on the number of Welsh Ministers.

77. One member of the Committee, Luke Fletcher MS, is content with section 5 of the Bill as introduced into the Senedd.

Recommendation 7. A majority of the Committee considers that the Counsel General should table an amendment to the Bill to leave out section 5(b).

Section 6 - Disqualification from being a Member of the Senedd or a candidate

78. Section 6 proposes to disqualify from standing for election to the Senedd, or from remaining as a Member of the Senedd, a person who is not registered in the register of local government electors at an address within a Senedd constituency. Section 6 achieves this by inserting a new paragraph (paragraph 8) into Schedule 1A of the 2006 Act.

79. As regards section 6 of the Bill, we asked the Counsel General to explain the Welsh Government's aim in pursuing the introduction of residency requirements for candidates. He told us:

"I think it's relatively straightforward. Firstly, in terms of residency, residency is well defined within existing legislation in terms of the Representation of the People Act 2000, so that

gives clarity in terms of the residency qualification there. The question is, really, whether it is appropriate that persons who don't live within Wales, who are not subject to the laws of Wales, should be in a position to actually make the laws of Wales that do apply to the people of Wales. So, I think it is a very basic democratic feature for us as a new democracy ... it seems to me to be a logical parameter in terms of the reforms that we're carrying forward.”⁶⁵

80. In response to questions exploring the policy behind section 6, the Counsel General said that preventing someone not living in Wales from standing in a Senedd election was not considered an issue of equality,⁶⁶ and added:

“... the reality is that I think you still come back to the same thing, which is that you have to set a framework, you have to draw a line somewhere within which residency is the criteria, (...) It seems to me it fits very much within the democratic framework that would be appropriate within Wales, if you accept the principles that candidates should live within Wales, they should not only be accountable to the laws of Wales, as well as the fact that they would actually be making the laws of Wales.”⁶⁷

81. We asked the Counsel General whether a person who had a primary address in England but a second home in Wales would meet the residency requirement for standing in a Senedd general election. He indicated that would be the case, stating “the only requirement is that you're on the electoral register, and if you're on the electoral register, then you qualify to be a candidate, you qualify to stand to become a Senedd Member”,⁶⁸ adding:

“... it's simple, it's clear, and it's one that probably is the clearest in terms of ensuring there is no confusion as to qualifying rights.”⁶⁹

⁶⁵ LJC Committee, 16 October 2023, RoP [34]

⁶⁶ LJC Committee, 16 October 2023, RoP [45]

⁶⁷ LJC Committee, 16 October 2023, RoP [49]; See also LJC Committee, 16 October 2023, RoP [34 to 51] for general discussion on this issue.

⁶⁸ LJC Committee, 16 October 2023, RoP [53]

⁶⁹ LJC Committee, 16 October 2023, RoP [55]

Our view

- 82.** We note the Counsel General’s observations on section 6 of the Bill.
- 83.** We have considered the compatibility of section 6 of the Bill with human rights in Chapter 2 of the report, as part of our consideration of the question of whether the Bill is within the Senedd’s legislative competence.
- 84.** We note that, in theory and as acknowledged by the Counsel General, there are circumstances in which a person can be included on the electoral register at an address in Wales but have their main residence outside Wales. Such persons would be able to stand for election and would only be disqualified from being a Member of the Senedd, if elected, should they cease to be on the register.
- 85.** We note the Counsel General’s view that you have to “draw a line somewhere” and that the amendment to Schedule 1A of the 2006 Act as set out in section 6 of the Bill provides simplicity and clarity.
- 86.** Nevertheless, it would appear that, as drafted, section 6 would allow a person, for example, to purchase a property in Wales for the sole purpose of standing for election, provided they were registered in the electoral register at that address. We consider that would be contrary to the intended purpose of section 6 of the Bill.
- 87.** In our discussions about the purpose behind section 6, the Counsel General said:

“The question is, really, whether it is appropriate that persons who don’t live within Wales, who are not subject to the laws of Wales, should be in a position to actually make the laws of Wales that do apply to the people of Wales.”

- 88.** We note this argument but would highlight that the Welsh Government does not apply this logic when agreeing to use UK Bills to legislate in devolved areas in the UK Parliament.

Section 7 – Review of possible job-sharing of offices relating to the Senedd

- 89.** Section 7 makes provision requiring the Presiding Officer of the first Senedd elected after 6 April 2026 to table a motion (as soon as practicable following the first meeting of that Senedd, but in any case within six months of that meeting) proposing that the Senedd establishes a committee to review the extent to which persons should be able to jointly hold a relevant office (i.e. to ‘job-share’) or to

temporarily hold a relevant office while the person holding that office is unavailable.

90. The Counsel General states in the EM that:

“The Welsh Government considers that any review of job-sharing should be led by the Senedd itself, while ensuring that there is an effective mechanism for the Welsh Government to play its part in responding to any recommendations and in mapping out next steps. These provisions give effect, as far as possible, to the principle established by the Special Purpose Committee report that:

“further consideration should be given, on a cross-party basis, to exploring the feasibility and legislative challenges associated with enabling election on the basis of job sharing”.⁷⁰

91. We asked the Counsel General whether it is constitutionally appropriate for a government proposed Bill, in the context of both section 7 (and section 19) of the Bill, to impose a duty on the Presiding Officer in the Seventh Senedd to table motions in relation to the establishment of two new Senedd committees. In response, the Counsel General said:

“Can I say that I think it is? I think this isn't a traditional Government Bill in that sense—this is Government facilitating legislation that it is bringing, but it's on behalf of the Senedd. There can be semantics about how that is interpreted, but the Welsh Government is not determining, effectively, the policy. We know there are obviously discussions that go on through the co-operation agreement and so on. We're talking about the two things: job sharing and the review.”⁷¹

92. The Counsel General added that:

“Job sharing is an issue that has arisen in the special purpose committee, but in particular from the co-operation agreement. Again, it doesn't in any way create any legislative obligation. What it does is ensure that it will be debated or be on the floor. How the Senedd chooses to deal with that, the nature of that

⁷⁰ EM, paragraph 206; Special Purpose Committee on Senedd Reform, Reforming our Senedd: A stronger voice for the people of Wales, May 2022, recommendation 13

⁷¹ LJC Committee, 16 October 2023, RoP [85]

*debate, the parameters of that debate, will be completely a matter for the Senedd. So, it means that it will be discussed, but it goes no further than that.*⁷²

93. The Counsel General emphasised that the “duty is something that has come via the co-operation agreement ... to ensure that it actually happens”⁷³ but also noted that:

*“... once that motion is tabled, it is completely a matter that's within the ambit of the Senedd. The Senedd could, in fact, do it in any event, but I think it was felt appropriate that this would strengthen that happening by having it on the face of the Bill.”*⁷⁴

94. An official accompanying the Counsel General said that the Presiding Officer was chosen for the task given the Presiding Officer’s role as Chair of the Business Committee and its consideration of the organisation of committees.⁷⁵

95. When we asked whether consideration was given to potentially imposing a duty to table the motion under section 7 (and section 19) on the Welsh Ministers, the Counsel General responded by saying:

*“I think from the starting principle that this is a Bill that emanates from recommendations from the Senedd itself, it seems to me this is also a matter for the Senedd rather than government to determine. It belongs to the Senedd, and where it proceeds beyond the tabling of the motion is ultimately a matter for the Senedd.”*⁷⁶

96. He added:

*“I think it is the Senedd asking the Government to put this on the face of the Bill, rather than the other way round.”*⁷⁷

97. We asked the Counsel General whether section 7 of the Bill would become redundant if a new Welsh Government published a statement on job-sharing in, for example, the first year of the Seventh Senedd. He replied by saying that

⁷² LJC Committee, 16 October 2023, RoP [87]

⁷³ LJC Committee, 16 October 2023, RoP [91]

⁷⁴ LJC Committee, 16 October 2023, RoP [91]

⁷⁵ LJC Committee, 16 October 2023, RoP [92]. Section 28 (Committees and sub-committees) and section 31 (Standing orders) of the 2006 Act, in particular, make provision about committees. The Business Committee is established in accordance with [Standing Order 11](#).

⁷⁶ LJC Committee, 16 October 2023, RoP [94]

⁷⁷ LJC Committee, 16 October 2023, RoP [96]

section 7 “would remain in force even in the event a new Welsh Government published a statement.”⁷⁸

98. When we asked the Counsel General to explain why a new Welsh Government would not be obliged to take any steps in relation to the recommendations of a committee established under section 7, he said:

“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.

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.”⁷⁹

99. The Counsel General explained why the Bill does not include provision to require a future Welsh Government to publish and consult on a draft Bill relating to job-sharing. He said:

“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.”⁸⁰

100. When we asked what other options the Welsh Government considered, the Counsel General said:

“Well, the only other option is, really, not to put it in the Bill at all, on the basis that the Senedd could do it in any event, and there

⁷⁸ Letter from the Counsel General, 16 November 2023, response to question 4

⁷⁹ Letter from the Counsel General, 16 November 2023, response to question 5

⁸⁰ Letter from the Counsel General, 16 November 2023, response to question 6

isn't a strict necessity for the Llywydd to have that duty imposed."⁸¹

101. The Counsel General also said that "if the Senedd says it doesn't want to do it, it, basically, doesn't happen."⁸²

Our view

102. We note the Counsel General's view on section 7 of the Bill.

103. It is not a matter for this Committee to consider the principle or merits of job-sharing and the report does not seek to address this issue.

104. Our focus has been to consider the constitutional propriety of section 7 and whether the Welsh Government should ask the Sixth Senedd to pass legislation which would impose duties on the Seventh Senedd and its Presiding Officer. As such our report is only concerned with the process provided by section 7.

105. Section 7 of the Bill contains provisions which would bind the Presiding Officer of the Seventh Senedd into taking a set action, namely to table a motion to establish a Committee.

106. Craies on Legislation states that:

*"The only thing that an Act of Parliament cannot do is constrain the freedom of action of a future Parliament."*⁸³

107. We make the following observations on section 7 of the Bill:

- developing policy is a significant task that requires appropriate expertise and resource and, as a matter of principle, is, in the main, a matter for government;
- in a Bill designed to increase the capacity of the Senedd to hold the government to account, it seems counter-intuitive, and constitutionally inappropriate, for a government in the Sixth Senedd to propose through a Bill that the Presiding Officer in the Seventh Senedd must table a motion proposing that a committee is established for the purpose of undertaking policy development;

⁸¹ LJC Committee, 16 October 2023, RoP [103]

⁸² LJC Committee, 16 October 2023, RoP [105]

⁸³ Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation, Twelfth Edition, Section 2, Potential scope of Act, page 119

- if the new Welsh Government in the first year of the Seventh Senedd announces its policy on job-sharing, and after a motion to establish a committee in accordance with section 7(1) has been passed, there would be little purpose in that committee undertaking its work, not least because the Welsh Government would, as the Counsel General acknowledged, not be obliged to take account of its recommendations;
- if the Bill is enacted, a motion agreed in the Seventh Senedd and the relevant committee established, there is no guarantee that the policy development work will be implemented by the government, calling into question the use of Senedd resources that would be better utilised on scrutiny and holding the government to account;
- a committee established in the Seventh Senedd with the appropriate remit would be well-placed to scrutinise any Welsh Government proposals on job-sharing contained in a green paper, white paper and draft Bill that it publishes for consultation.

108. In light of our observations above, we consider that section 7 of the Bill is not constitutionally appropriate and could be seen as intruding on the capacity of the Senedd to hold the Welsh Government to account.

Conclusion 3. The job-sharing of offices relating to the Senedd is a matter which the next Senedd and next Welsh Government could consider in accordance with their respective functions, and section 7 of the Bill is not an appropriate mechanism by which to require both institutions to consider such an issue.

Recommendation 8. The Counsel General should take account of our comments on section 7 of the Bill and its constitutional propriety, and consider whether section 7 is appropriate for inclusion in the Bill.

Recommendation 9. If the Counsel General decides to retain section 7 in the Bill he should write to the Committee and all Members of the Senedd in advance of the Stage 1 debate on the general principles of the Bill and set out in detail why it is constitutionally appropriate for the Welsh Government to ask the Sixth Senedd to pass legislation which would impose duties on the Seventh Senedd and its Presiding Officer, in so doing breaching the principle that an Act of a Parliament should not constrain the freedom of action of a future Parliament.

109. In making recommendations 8 and 9, we wish to re-iterate that in no way do we seek to question the merits of job-sharing, as that is a separate matter which is not for this Committee to pass judgement on.

Part 2 – Voting system at Senedd general elections and allocations of seats

Section 9 – Vacant seats

110. Section 8 of the Bill makes provision for changing the Senedd’s electoral system (by substituting section 6 to 9 of the 2006 Act with new sections) so that all Members are elected under a proportional closed list system, with votes translated into seats via the D’Hondt formula.

111. Section 9 of the Bill amends the 2006 Act so as to set out the position regarding vacancies arising between elections in the new proportional closed list electoral system. In so doing, it repeals section 10 (Constituency vacancies) and replaces the existing section 11 (Electoral region vacancies) with a new section 11 (Vacant seats). Section 9 of the Bill proposes that vacant seats will be filled by the next eligible person on the relevant closed list, negating the need for by-elections.

112. We asked the Counsel General about the implications of section 9 for situations in which:

- i. an independent member is elected but then, for example, resigns with no candidates available from a list to replace that candidate;
- ii. where a political party’s list of candidates is exhausted in a constituency.

113. The Counsel General responded:

“I suppose the starting point is that, looking at the experience of the past couple of decades, really, the number of situations where this has arisen—because we obviously have a closed list system already for one third of the seats—has been very remote. But it’s a valid point to raise, and it’s one that a lot of thought has been given to. I think the view we’ve come to is this: if we’re now establishing what is a wholly proportional system using the closed list system, if that, I suppose, fairly rare situation might arise where the list of eight is exhausted, that is, there are six Members there, it’s unlikely that any single party is going to win all six of those, so you’d have to be going down through quite a number of places before you actually exhausted that list, but, if you came to the end of that, well, then that remains vacant. The same would be the case if there was an independent that stood, and that person for some reason either became

*disqualified or for some reason wasn't there. And it is one of those areas we've had to give a lot of thought to as to, 'Well, should there be a mechanism for replacing that individual?' And again, I'm open to thoughts on this."*⁸⁴

114. The Counsel General identified difficulties with such a mechanism:

*"... what you are then beginning to do is disturb the proportionality basis on which the electoral system actually works itself. My view is that that probably is acceptable within a system of where you are increasing the number of Senedd Members from 60 to 96. But it does mean that it is a possibility; it might be very rare, or may not happen at all during the lifetime of a Senedd, but it is a possibility that is there. But I think the conclusion that I've come to on this is that it should remain vacant. I think that was also probably the position of the special purpose committee on that, were that situation to arise."*⁸⁵

115. The Counsel General acknowledged that if a vacancy cannot be filled "it is not a strengthening of democracy"⁸⁶ and that there is a risk, albeit a remote one, that the provision increases the risk of seats remaining vacant until the next election.⁸⁷

116. He also told us:

*"The question is whether attempting to have a sort of by-election system that then really can't reflect the proportional basis, whether that weakens democracy by weakening the proportionality element, or it intrudes within it, and those are really the balances to consider: which one do you prefer, one over the other? The position that we've come to—and I think it was the position of the special purpose committee—was that in those circumstances it should remain vacant. Obviously, if there are recommendations or views from the committee, those are obviously ones that can be considered."*⁸⁸

⁸⁴ LJC Committee, 16 October 2023, RoP [131]

⁸⁵ LJC Committee, 16 October 2023, RoP [132]

⁸⁶ LJC Committee, 16 October 2023, RoP [134]

⁸⁷ LJC Committee, 16 October 2023, RoP [138]

⁸⁸ LJC Committee, 16 October 2023, RoP [134]

117. The Counsel General explained that a first-past-the-post by-election would be problematic because “it goes totally contrary then to what has happened in terms of the balance through the proportional voting system.”⁸⁹

118. An official accompanying the Counsel General noted an alternative having a:

“... count-back mechanism, where you apply the original vote, but the returning officer would go to the next party, obviously after you've discounted the party that had exhausted its list, but the conclusion that the Counsel General and Ministers took was that the best way to protect the proportionality of the original vote was to carry the vacancy.”⁹⁰

Our view

119. We note the Counsel General comments regarding section 9 of the Bill.

120. We agree with the Counsel General that section 9 of the Bill, which substitutes a new section 11 into the 2006 Act, would not result in a strengthening of democracy in circumstances where a seat remains vacant.

121. In our view, that position needs to be addressed such that an appropriate mechanism is used to ensure no vacant seat exists. Leaving a seat vacant will in itself disrupt the proportionality of an election that has taken place and, while not an ideal approach, filling a vacancy using an appropriate mechanism would represent a better and more democratic approach.

122. We have not taken evidence on this matter and therefore are not in a position to provide an evidence-based solution.

123. However, we do consider this matter to be of sufficient importance to highlight our concerns.

⁸⁹ LJC Committee, 16 October 2023, RoP [136]

⁹⁰ LJC Committee, 16 October 2023, RoP [139]

Part 4 – Senedd constituency boundary reviews

Section 17 – Senedd constituencies for the first general election after 6 April 2026 and Section 18 – Senedd constituencies for general elections after 1 April 2030

124. Section 17 introduces Schedule 1 which makes provision about the Senedd constituencies for which Members of the Senedd will be elected for the first general election held after 6 April 2026.

125. Paragraph 8 of Schedule 1 proposes that the Local Democracy and Boundary Commission for Wales⁹¹ (the Boundary Commission) must, before 1 April 2025, make and publish a final report on the 2026 boundary review, and send this report to the Welsh Ministers.

126. Paragraph 9 of Schedule 1 proposes how the final report is to be implemented. The Welsh Ministers must make regulations implementing the determinations in the Boundary Commission’s final report as soon as reasonably practicable and within 14 weeks of laying of the final report before the Senedd, unless there are exceptional circumstances. Where there are exceptional circumstances, the Welsh Ministers must within 14 weeks of laying the final report, lay a statement setting out the exceptional circumstances. The Welsh Ministers must continue to lay such statements every 4 weeks until the regulations are made.

127. Section 18 introduces Schedule 2 which proposes to insert a new Part 3A (Senedd Constituency Boundary Reviews) into the *Local Government (Democracy) (Wales) Act 2013*⁹² (the 2013 Act) which makes provision about the Senedd constituencies for which Members of the Senedd will be elected for general elections after 1 April 2030. As proposed, Part 3A consists of new sections 49A to 49L.

128. Section 49J of the 2013 Act proposes how a final report on the boundary review (required by section 49I) must be implemented by the Welsh Ministers. Where changes are required to be made to Senedd constituencies, the Welsh Ministers must make regulations giving effect to the determinations made in a final report of the Boundary Commission as soon as reasonably practicable after

⁹¹ Section 12 of the Bill proposes renaming the Local Democracy and Boundary Commission for Wales as the Democracy and Boundary Commission Cymru

⁹² Section 11 of the Bill proposes renaming the *Local Government (Democracy) (Wales) Act 2013* as the *Democracy and Boundary Commission Cymru etc. Act 2013*

laying the report before the Senedd and, unless there are exceptional circumstances, in any event within 6 months.

129. Section 49J also proposes the actions to be taken by the Welsh Ministers in the event of any such exceptional circumstances (which are identical to those required under Schedule 1 of the Bill) Regulations under section 49J are to be made by statutory instrument, which must be laid before the Senedd as soon as reasonably practicable after they are made. Subsection (8) would ensure that the coming into force of the regulations does not affect the return of a Member of the Senedd or the constitution of the Senedd until the dissolution of the Senedd in connection with the next ordinary general election.

130. We asked the Counsel General to explain why regulations to be made under paragraph 9 of Schedule 1, and new section 49J of the 2013 Act (to be inserted by Schedule 2), in order to implement the Boundary Commission's boundary recommendations, must be laid in the Senedd, but are not subject to any formal Senedd scrutiny procedure.

131. The Counsel General indicated that this was to keep “the politics out of a decision over a boundary” so that “there would be no political interference from political parties, ultimately, in the recommendations of the new boundary commission.”⁹³

132. The Bill proposes that regulations to implement the Boundary Commission's boundary recommendations in time for the 2026 general election must be laid within 14 weeks of its report being laid before the Senedd. Regulations to implement Boundary Commission recommendations in time for the 2030 elections must be laid within six months of its report being laid. We asked the Counsel General to explain this discrepancy in time limits for the laying of the respective regulations.

133. The Counsel General replied by saying:

“I think it purely comes down to the time frame that we're in in order to get the recommendations there in time, and again, counting back. The way I've looked at this is I think that we'd be looking at a commission report, if the legislation goes through in accordance with the timescale and all the things that need to take place, somewhere around the beginning of April 2025. You've then got for 14 weeks in which the regulations need to be put together, which takes you to July 2025. The Gould

⁹³ LJC Committee, 16 October 2023, RoP [70]

*convention is a convention that came in as a result of, I suppose, problems that arose over electoral legislation in Scotland but is one that I think we very much adhere to. If you count back from that, that leaves only a leeway of approximately three months. So, basically, going through the timescale within 14 weeks allows very little room for manoeuvre, to ensure that those conventions are complied with. But, of course, it'll be different then. Once you're past 2026, you're starting right from the beginning of the four-year period, so the ability to have a longer period of time for that process is there, is built in to that.*⁹⁴

Our view

134. We note that the Counsel General's rationale for the regulation-making powers in paragraph 9 of Schedule 1 and section 49J(1) of the 2013 Act (to be inserted by Schedule 2) being subject to no procedure (in relation to implementing the outcome of boundary reviews) is to avoid political interference. We agree with this rationale and that no procedure is appropriate for these powers.

135. It is unclear why a six-month period has been chosen as the period within which regulations must be laid (unless there are exceptional circumstances) in order to implement Boundary Commission boundary recommendations for Senedd general elections held after 1 April 2030. This seems to us to be a longer period of time than is necessary, particularly as a shorter period will provide electoral administrators with more time for relevant preparations to be made to give effect to the regulations. In addition, we understand that the equivalent period for UK general elections is four months as provided by the *Parliamentary Constituencies Act 2020*.⁹⁵

Recommendation 10. The Counsel General should justify why new section 49J (to be inserted by Schedule 2 of the Bill) of the *Local Government (Democracy) (Wales) Act 2013* (to be renamed by virtue of section 11 of the Bill) requires that regulations, to implement recommendations of the Local Democracy and Boundary Commission for Wales (to be renamed by virtue of section 12 of the Bill)

⁹⁴ LJC Committee, 16 October 2023, RoP [72]. The Gould convention (or principle) provides that electoral legislation should not be applied to any election held within six months of the new provision coming into force (for further discussion see the [Electoral Commission, Scottish elections 2007. The independent review of the Scottish Parliamentary and local government elections 3 May 2007](#), October 2007, page 112)

⁹⁵ [Parliamentary Constituencies Act 2020](#).

for Senedd general elections held after 1 April 2030, must be laid within six months and accordingly, to explain why a period of 4 months as used in relation to UK general elections was not chosen.

Part 5 – Review of operation of Act etc. and general provisions

Section 19 – Review of operation of Act etc. after 2026 general election

136. Section 19 places a duty on the Presiding Officer to table a motion proposing that the Senedd establishes a committee to review the operation and effect of Parts 1 and 2 of the Bill, should it be enacted, as well as to review the extent to which the elements of a healthy democracy are present in Wales.

137. We asked the Counsel General about section 19 together with section 7 (see above) as they relate to a similar principle about whether it is constitutionally appropriate to impose a duty on a Presiding Officer in a future Senedd.

138. As regards section 19, he said that:

“... what it does do is facilitate and ensure that there is a debate that takes place. The debate doesn’t impose any duties on the Senedd itself. What it does do is impose a duty on the Llywydd, who has an obligation to table a motion as soon as practical, not later, if I recall right now, than six months, but certainly to report within 12 months, firstly on how this legislation has operated, including, I think, a very useful term that’s in there, ‘democratic health’, as one of the criteria, but, basically, how has this reform actually worked, et cetera. That brings the matter completely into the hands of the Senedd. The Senedd could be doing this in any event if it wished, but the legislation merely ensures that it does actually happen, by the tabling of a motion.”⁹⁶

139. We subsequently asked the Counsel General why section 19 is necessary. He said:

“Section 19, I think, is there, really, for the same reasons, but, essentially, that this is an important piece of legislation. It makes an important change to the structure of the Senedd for the future. It makes important changes in terms of the voting system. I think the clause you’re referring to also includes a

⁹⁶ LJC Committee, 16 October 2023, RoP [86]

provision in respect of democratic health, which is something I'm particularly interested in and something I think Parliaments should be looking at. And I think it is appropriate for Parliaments to actually review the operation of legislation that is passed and I think it follows on from the other clause as well. This is something that is considered to be appropriate to be on the face of the Bill to make sure that that debate happens and it happens very early on ... I would hope that it would be universally welcomed.”⁹⁷

140. An official accompanying the Counsel General noted that, as with the requirement included in section 7, if the Senedd did not want to set up a committee “then it has the ability to reject the motion, and it's precisely for that reason that it's set up that way.”⁹⁸

141. In terms of alternative options, the Counsel General thought that:

“... the only logical alternative way of doing this is what might normally happen in progress and that is the Senedd choosing, of its own volition, that this is something it would want to consider very early on, and that applies to the previous discussion we've had about the job-sharing issue. All those powers lie with the Senedd and all these clauses actually do ensure that a debate actually does take place. So, it's an interesting provision in the way it operates, and I think it is no more than that.”⁹⁹

142. We also noted that, if established under section 19, the committee would be required to review “the extent to which the elements of a healthy democracy are present in Wales”. We asked the Counsel General what the elements of a healthy democracy encompass. He said:

“The elements of a healthy democracy—it's a phrase I have been using ever since I've had this area of responsibility. Because, I think, apart from various well-being provisions that we all consider—environmental, equality, and so on—the state of our democratic institutions and our democratic system, our civic system, is important. I think it would relate specifically to looking at how the election, how the system, has actually

⁹⁷ LJC Committee, 16 October 2023, RoP [111]

⁹⁸ LJC Committee, 16 October 2023, RoP [112]

⁹⁹ LJC Committee, 16 October 2023, RoP [114]

operated, how the voting system has worked, what the turnouts are, what the accessibility issues that have been learnt are. I think all those are things that go into the question of democratic health. If you have a situation where people aren't participating, then I think that falls within the democratic health, or why people are not participating—what is it, et cetera? So, all the issues that relate to accessibility, motivation, the impact of the voting system, how that has operated and impacted and engaged as well, maybe specifically in terms of sections of the community that have or have not participated within elections; I think all those fit within the broad frame. I think it is open for the Senedd itself to broadly interpret how it sees the issue of democratic health, but, for me, I actually think it is a very, very important part of discussion that needs to take place on a regular basis in the Senedd.”¹⁰⁰

143. We also asked the Counsel General to 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). The Counsel General replied:

“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.”¹⁰¹

144. In deciding that the “review must be completed by the committee no later than twelve months after the first meeting of the Senedd after 6 April 2026”, the Counsel General told us he took the following factors into account:

“The reduction in the length of Senedd terms increases the frequency of Senedd elections. If there are lessons to be learned

¹⁰⁰ LJC Committee, 16 October 2023, RoP [118]

¹⁰¹ Letter from the Counsel General, 16 November 2023, response to question 7

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.”¹⁰²

145. Following the conclusion of any review into job sharing, under section 7 of the Bill, the Welsh Ministers are required to formally respond to the report setting out what steps, if any, they intend to take in response to the recommendations. We asked the Counsel General why there is no corresponding duty on the Welsh Government to formally respond to any committee recommendations arising under section 19 of the Bill. The Counsel General said:

“I’m not sure why that’s the case, because I just take it for granted that, if a committee produces a report, Government has a political and ethical responsibility to respond to that. It’s part of our democratic process. But it is a matter that can be dealt with by Standing Orders, rather than legislating per se, and I would have thought that would be the direction. I’m trying to think off the top of my head now what the Standing Orders provision actually is.”¹⁰³

146. An official accompanying the Counsel General said:

“I don’t know off the top of my head, but there is a Standing Order provision in relation to it, if helpful. The distinction, I think, between section 7 and section 19 was that, of course, section 7 in relation to job sharing is looking at the feasibility of introducing provision in relation to something that doesn’t currently exist, whereas section 19 was reviewing the introduction of new law, so it didn’t necessarily follow, with the section 19 review, that there would then be action for Government to take. Whereas, with section 7, Ministers were keen to follow or to provide a pathway that followed the model of the special purpose committee, so for Senedd consideration for it, and, if endorsed by the Senedd, then an action on

¹⁰² Letter from the Counsel General, 16 November 2023, response to question 8

¹⁰³ LJC Committee, 16 October 2023, RoP [122]

*Government to then bring forward proposals to give effect to that.*¹⁰⁴

Our view

147. We note the evidence from the Counsel General on section 19 of the Bill.

148. Section 19 of the Bill differs from section 7 in that it seeks to require, with the consent of the Senedd, a Senedd Committee to undertake post-legislative scrutiny rather than policy development.

149. In requiring a future Presiding Officer to table a motion to establish a Committee to undertake such work, and in line with our comments on section 7, we consider that section 19 of the Bill is also not constitutionally appropriate.

150. We do however recognise the vital role that post-legislative scrutiny can play in ensuring that law, once enacted, is operating effectively and as intended. We therefore agree with the observations made by the House of Lords Constitution Committee in 2011, which still hold true over a decade later:

“In our 2004 report, Parliament and the Legislative Process, this Committee also examined the benefits of post-legislative scrutiny: that it would bring to the attention of Parliament legislation which had failed to fulfil its intended purpose along with any unintended consequences; that it might make it possible to identify alternative means of achieving the original goals of the legislation; that it might impose a greater discipline on government; and that it would enable lessons to be learnt about the process leading up to the passing of the relevant Act. In relation to significant constitutional legislation, we believe that post-legislative scrutiny would have the particular benefit of leading to an assessment of whether that legislation had had an adverse impact on other areas of the constitution.

*That report argued that the case for the greater use of post-legislative scrutiny was “compelling” and that the problem with carrying it out was one primarily of limited resources.*¹⁰⁵

¹⁰⁴ LJC Committee, 16 October 2023, RoP [123]

¹⁰⁵ House of Lords Constitution Committee, The Process of Constitutional Change, 15th Report of Session 2010-12, 18 July 2011, HL Paper 177, paragraphs 102 to 103

151. Our predecessor Committee in the Fourth Assembly also highlighted the value and importance of post-legislative scrutiny.¹⁰⁶

152. We consider that post-legislative scrutiny of the Act, should the Bill be passed, would be of considerable benefit. Post-legislative scrutiny could take place without the need for section 19 and it would be a matter for the Seventh Senedd's Business Committee (once established in accordance with Standing Order 11) to decide whether it should form part of the specific remit of any future committee. Furthermore, any relevant committee of the Seventh Senedd could itself agree to undertake post-legislative scrutiny of the Act should it wish to do so in line with any decision it takes regarding its future work programme.

153. As well as section 19 being in our view constitutionally inappropriate and the wrong mechanism to deliver post-legislative scrutiny, we also believe that it is potentially fraught with practical difficulties. In that regard we make the following observations:

- we do not believe it is appropriate for a government proposed Bill to suggest the timeframe for post-legislative scrutiny of an Act. This is because the remit of any future committee, including any responsibilities arising from Standing Order obligations, may impact on its ability to meet the 12-month deadline, particularly if, for whatever reason, a motion under section 19(1)(b) is not tabled until towards the end of the six-month deadline. Such work could potentially impact on any other scrutiny functions that committee has;
- the scale of the task in reviewing Parts 1 and 2 of the Act is considerable and could take longer than 12 months.

154. We also note the comments of the Counsel General and his official highlighted above at paragraphs 145 and 146, regarding Senedd Committee recommendations. We are not aware of the Standing Order requirements that are being referred to and any obligations that are placed on the Welsh Government in providing responses to Committee recommendations.

155. We note that section 19(2)(a)(ii) of the Bill would require a committee established under section 19 to review "the extent to which elements of a healthy democracy are present in Wales". While in principle this concept is welcome, it is also subjective and ultimately not a matter that should or needs to be specified on the face of the Bill. We believe a committee should be responsible and

¹⁰⁶ Constitutional and Legislative Affairs Committee, *Making Laws in Wales*, October 2015, paragraphs 338 to 346

capable of determining its own remit for post-legislative scrutiny of a piece of law without interference from a former government or Senedd.

156. On this specific issue, we would also observe that, in preparing the Bill for introduction, the Welsh Government should also have had regard to the elements of a healthy democracy in Wales as a means to inform the Bill's preparation. Linked to this point, such pre-introductory work should also provide a suitable benchmark for the Welsh Government in undertaking its own review, evaluating the legislation's effectiveness, and learning lessons from its implementation.

Conclusion 4. Any arrangements for post-legislative scrutiny after the 2026 Senedd general election are matters for the next Senedd (including any relevant committee or committees established) to determine.

Recommendation 11. The Counsel General should take account of our comments on the constitutional propriety of section 19 of the Bill and consider whether section 19 is an appropriate provision to include in the Bill.

Recommendation 12. If the Counsel General decides to retain section 19, he should write to the Committee and all Members of the Senedd in advance of the Stage 1 debate on the general principles of the Bill and explain why he believes that a committee of the Seventh Senedd would not on its own initiative be better placed to undertake appropriate post-legislative scrutiny and in so doing determine its own terms of reference and timeframe for that work.

Recommendation 13. The Counsel General should write to the Committee setting out in detail how the Welsh Government has ensured that the elements of a healthy democracy have been incorporated into the preparation and drafting of the Bill.

157. Also, we note that, for example, section 21 of the *Public Health (Minimum Price for Alcohol) (Wales) Act 2018*¹⁰⁷ requires the Welsh Ministers to report on the operation and effect of that Act within a set timeframe. Similarly, section 38 of the *Senedd and Elections (Wales) Act 2020*¹⁰⁸ requires the Welsh Ministers to report on the operation of certain provisions within that Act.

Recommendation 14. The Counsel General should write to the Committee and all Members of the Senedd in advance of the Stage 1 debate on the general principles of the Bill and explain why he did not include a mechanism for the

¹⁰⁷ *Public Health (Minimum Price for Alcohol) (Wales) Act 2018*

¹⁰⁸ *Senedd and Elections (Wales) Act 2020*

Welsh Ministers to report on the operation and effect of this Bill (if and when enacted), similar to provisions included in previous legislation.

Section 20 – Power to make consequential, transitional etc. provision

158. Section 20 proposes that the Welsh Ministers may by regulations make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate, in order to give full effect to any provision of the Bill or any provision made under the Bill. This includes a power to amend, repeal, revoke or modify any enactment whenever passed.

159. We asked where a consequential, incidental or transitional provision ends and where a more substantive matter begins. The Counsel General replied:

“Consequential is essentially changes that occur as a result of your legislation or other legislative changes—the type of changes because a name needs to be changed and so on—but they do not change the actual policy intent of the legislation itself. So, it is basically just making the legislation consistent in terms of the way it operates.”¹⁰⁹

160. An official accompanying the Counsel General added:

“... the purpose of that power, and the scope of that power, is that it's to do anything for the purposes of, in consequence of, or for giving full effect to the provisions of the Bill. So, that, as the Counsel General said, it's anything that's in consequence of those provisions, not something that's directly contradictory to those provisions, and you couldn't do anything more substantive to the main operative provisions within the scope of that power.”¹¹⁰

161. The Counsel General also indicated that using the powers to change the number of Members of the Senedd (as set out in section 1 of the Bill):

“... would not be achievable under this legislation, and it would not be a reasonable interpretation of 'consequential' to do that. That would be a very substantial change and would, in fact, expose the legislation to legal challenge as well.”¹¹¹

¹⁰⁹ LJC Committee, 16 October 2023, RoP [75]

¹¹⁰ LJC Committee, 16 October 2023, RoP [76]

¹¹¹ LJC Committee, 16 October 2023, RoP [78]

Our view

162. We note section 20 of the Bill and are content.