

**RE: COOPERATION AGREEMENT BETWEEN THE WELSH GOVERNMENT AND
PLAID CYMRU**

JOINT OPINION

Summary

1. On 22 November 2021, a co-operation agreement was announced between the Welsh Government and Plaid Cymru (“**the Co-operation Agreement**”). We have been asked to advise on several matters in relation to the Agreement.
2. In summary, and for the reasons set out below:
 - (1) The Plaid Cymru Group is not a group with an executive role for the purposes of section 25 of the Government of Wales Act 2006 (“**GoWA**”).
 - (2) The Plaid Cymru Group is not a group with an executive role for the purposes of the Standing Orders of the Welsh Parliament (“**SOs**”).
 - (3) The Plaid Cymru political party is not “*represented*” in the Welsh Government for the purposes of “*The Independent Remuneration Board of the Senedd’s Determination for the Sixth Senedd Number Two*”, published in March 2021 (“**the 2021 Determination**”).
 - (4) The leader of the Plaid Cymru political party is a leader of a group not in Government for the purposes of the 2021 Determination.
 - (5) The Independent Remuneration Board of the Senedd (“**the Board**”) has a discretion to adjust the allowances and remuneration paid to (i) the Plaid Cymru political party, and (ii) Members of the Plaid Cymru Senedd Group who are appointed by the Leader of Plaid Cymru as ‘Designated Members’ pursuant to the Co-operation Agreement.
 - (6) Although the status of ‘Designated Members’, and the role they will play within the Co-operation Agreement Unit is unusual, it is not constitutionally improper or otherwise unlawful.

- (7) Although the other opposition parties may object for political reasons, they have no legal basis to challenge the Co-operation Agreement, which would be considered by the courts to be a non-justiciable political decision.

The Co-operation Agreement

3. The Welsh Government and Plaid Cymru have agreed to work together to jointly develop and oversee delivery of 46 policy areas over a three year period. The Co-operation Agreement is not a coalition:
 - (1) Plaid Cymru will not be represented by Ministerial or Deputy Ministerial appointments in the Welsh Government.¹
 - (2) The formal and legal responsibility for the decision made will rest with Welsh Ministers.²
 - (3) Plaid Cymru designated members will not have access to civil servants beyond the machinery agreed by the Ministers.³
 - (4) All issues outside the Co-operation Agreement will be handled in the normal course of political engagement.⁴
4. There are three relevant organisational structures put in place to support the Co-operation Agreement:
 - (1) Co-operation Agreement Unit: A civil service unit, led by a senior civil servant, whose function is, among other things, to support joint decision-making and to provide logistical and administrative support.⁵
 - (2) Joint Policy Committees: Convened jointly by Welsh Government Ministers and Plaid Cymru's designated members, these committees will aim to meet regularly

¹ Co-operation Agreement Mechanisms, p.3.

² Co-operation Agreement Mechanisms, p.3.

³ Co-operation Agreement Mechanisms, p.7.

⁴ Co-operation Agreement Mechanisms, p.12.

⁵ The list of eight functions is found at Co-operation Agreement Mechanisms, p.4. See also, pp.6-7.

and reach agreement by consensus in respect of issues within the scope of the Co-operation Agreement.⁶

- (3) Joint Oversight Board: Convened jointly by the First Minister and the Leader of Plaid Cymru, the Joint Oversight Board will aim to, among other functions, provide strategic direction to the Joint Policy Committees, agree timelines, and resolve disputes which may arise.⁷ Meetings will be chaired by the First Minister.

Issue 1: Is the Plaid Cymru Group a group with an executive role for the purposes of s.25 GoWA?

5. Section 25(8) GoWA provides that:

*“For the purposes of this Act a political group is a political group with an executive role if the **First Minister or one or more of the Welsh Ministers** appointed under section 48 belong to it.”⁸*

6. The explanatory notes of GoWA describe the effect of s.25(8) at paragraph 111 using different words:

“the Presiding Officer and the Deputy Presiding Officer must not both belong to the same political group nor must they both be members of political groups with an executive role (i.e. groups to which Ministers belong).”

7. This definition of “political group with an executive role” provided by s.25(8) GoWA is to be applied to all other places where that term is used in GoWA, pursuant to s.149, entitled “Index of defined expressions”.⁹

8. Lord Hope, for the Supreme Court, said in *A-G v National Assembly for Wales Commission* [2013] 1 AC 792, paragraph 80, that although the GoWA is “an Act of great constitutional significance [...] I do not think that this description, in itself, can be taken to be a guide to its interpretation. The rules to which the court must apply in order to give effect to it are those laid down by the statute, and the statute must be interpreted like any other statute”.

⁶ Co-operation Agreement Mechanisms, pp.5-6.

⁷ Co-operation Agreement Mechanisms, p.6.

⁸ Emphasis added here, and wherever else in bold.

⁹ s.30; para 5(5)(b), Sch.7B; para 12(3)-(4).

9. On a straightforward application of the legislation to the present facts, Plaid Cymru is not a political group with an executive role, because Plaid Cymru will not be represented by Ministerial or Deputy Ministerial appointments in the Welsh Parliament. On the correct reading of s.25 GoWA, the current arrangements are lawful: the Llywydd is a Plaid Cymru member (not a member of a political group with an executive role) and the Deputy Presiding Officer is a Welsh Labour member (a member of a political group with an executive role).

Issue 2: Is the Plaid Cymru Group a group with an executive role for the purposes of the SOs?

10. Various SOs draw a distinction between the rules applicable to members of the Senedd who belong to a political group with, or without, an executive role.¹⁰ As noted in our Instructions, the SOs do not define the term “*political group with an executive role*”.
11. The term should bear the same meaning as in s.25(8) GoWA:
- (1) The ordinary meaning of the term “*executive role*” is a role performed by the executive. Executive ministerial functions are exercisable by the Welsh Ministers pursuant to s.58A GoWA. The Welsh Ministers are all members of the Welsh Labour political group.
 - (2) SOs are to be construed by reference to GoWA. They were first created by the Secretary of State following the 2007 election, pursuant to para 20(1), Schedule 11 GoWA. The Senedd is entitled to remake them (s.31 GoWA), but SOs must be compatible with the requirements set out by the GoWA. Where the SOs use the phrase “*executive role*”, the drafters have clearly adopted the definition in the GoWA. GoWA is primary legislation, and SOs cannot depart from the mandatory conditions laid out in s.25 GoWA. The content of s.25 GoWA is transposed by SO 6.12 to 6.14 using the same language of “*political group with an executive role*”. An instrument like the SOs is to be read as a whole. The only way that the term “*political group with an executive role*” could bear a different, and broader, meaning

¹⁰ SOs 6.12(ii)-(iii), 6.14(ii)-(ii), 11.5(iv), 11.21(iii), 17.18, 18.6, 18.13, 25.28, 34.11.

to the definition in s.25 GoWA is if SOs adopted mutually inconsistent definitions for the same term. That would be contrary to ordinary principles of drafting.

Issue 3: Is the Plaid Cymru political party “represented” in the Welsh Government for the purposes of the Determination?

12. The Senedd Commission is the body corporate which is responsible for providing or ensuring that the Senedd is provided with the property, staff, and services required for the Senedd’s purpose: s.27 GoWA. One function of the Senedd Commission is to provide financial support for political parties to support the discharge of their work in the Senedd.

13. Section 24 GoWA, entitled “Assistance to groups of Members of the Senedd”, provides:

“(1) The Senedd Commission must make to (or in respect of) political groups to which Members of the Senedd belong such payments as the Board from time to time determines for the purpose of assisting Members of the Senedd who belong to those political groups to perform their functions as Members of the Senedd.

(2) A determination under subsection (1) may make provision –

(a) for calculating the amount of any payment to (or in respect of) a political group,

(b) for the conditions subject to which payments to (or in respect of) a political group are to be made, and

(c) for claims for such payments to be made to the Senedd Commission.

(3) A determination under subsection (1) may make different provision for different political groups.

(4)

(5) The standing orders must include provision for determining for the purposes of this Act whether any Member of the Senedd belongs to a political group and, if so, to which; and (in particular) –

(a) may include provision for treating a Member of the Senedd as not belonging to a political group unless a specified number of Members of the Senedd belong to it, and

- (b) *must include provision requiring the Presiding Officer to decide any questions arising under the provision included by virtue of this subsection.*
 - (6) *The Senedd Commission must lay before the Senedd every determination made by the Board under section 24(1) as soon as is reasonably practicable after it is made.*
 - (7) *The Senedd Commission must ensure that information concerning the sums paid under this section is published for each financial year."*
14. The Independent Remuneration Board of the Senedd ("**the Board**") was established by s.1 National Assembly for Wales (Remuneration) Measure 2010 ("**NAfWRM**"). The Board is not, in the exercise of its functions, subject to the direction or control of the Senedd or the Senedd Commission: s.2 NAfWRM.
15. In March 2021 the Board published a document called "*The Independent Remuneration Board of the Senedd's Determination for the Sixth Senedd Number Two*" ("**the 2021 Determination**"). Paragraph 8.2.1 of the 2021 Determination provides:
- "a. the total Support for Political Parties' Allowance available is £1,018,450;*
 - b. any Political Party or Parties represented in the Welsh Government will receive a core administration allowance of £11,190 per Member up to a maximum of £167,790;*
 - c. any Political Party not represented in the Welsh Government, with three or more Members, will be entitled to a core administration allowance of £55,390;*
 - d. following the allocation of core administration allowances, the remaining Support for Political Parties Allowance will be allocated on a per capita basis among all Members whose parties are not represented in the Welsh Government."*
16. The term "*Welsh Government*" is defined by s.45 GoWA as referring to:
- "(a) the First Minister or Prif Weinidog (see sections 46 and 47),*
 - (b) the Welsh Ministers, or Gweinidogion Cymru, appointed under section 48,*
 - (c) the Counsel General to the Welsh Government or Cwnsler Cyffredinol i Lywodraeth Cymru (see section 49) (referred to in this Act as "the Counsel General"), and*
 - (d) the Deputy Welsh Ministers or Dirprwy Weinidogion Cymru (see section 50)."*

17. For a political party to be “*represented*” in the Welsh Government, a member of that party must occupy one of those four roles. Note that the 2021 Determination does not stipulate that the higher core administration allowance is to be provided for “*any Political Party or Parties represented in the decision-making process of the Welsh Government*”. Plaid Cymru is not represented in the Welsh Government and so is entitled to the higher amount of financial support for political parties on the basis of the 2021 Determination.

Issue 4: For the purposes of the Determination, is the leader of the Plaid Cymru political party the leader of a group not in government?

18. Section 20(1) GoWA provides that provision must be made for the payment of salaries to Members of the Senedd. Provision is to be made by the Board: s.20(6) GoWA.
19. Paragraph 3.1.2 of the 2021 Determination provides that members of the Senedd are paid a salary of £67,649 together with an additional office holder’s salary if the Member holds one of the offices listed in Table 1. The “*Leader of a Political Group not in Government*” (where “*political group*” is defined in the SOs) can be paid a total salary in the range from £84,561-£105,701. The salary of a Leader of a Political Group not in Government is capped at the salary payable to a Welsh Minister.
20. The leader of the Plaid Cymru political party is not in Government, and so is entitled to the additional office holder’s salary for leaders of political groups not in Government pursuant to the 2021 Determination.

Issue 5: What is the scope of the discretion of the Board to adjust the allowances paid to Plaid Cymru based on the mechanisms of the relationship established by the Agreement between Plaid Cymru and the Welsh Government?

21. Section 3 NAFWRM, entitled “*Functions of the Board*” provides:
 - “(1) *Subject to subsections (3) and (4), the functions of the Board are those conferred on it by sections 20, 22, 24, 53 and 54 of the Act, as amended by this Measure.*
 - (2) *The Board must exercise its functions with a view to achieving the objectives of –*
 - (a) *providing Members of the Senedd with a level of remuneration which –*

- (i) *fairly reflects the complexity and importance of the functions which they are expected to discharge, and*
- (ii) *does not, on financial grounds, deter persons with the necessary commitment and ability from seeking election to the Senedd,*
- (b) *providing Members of the Senedd with resources which are adequate to enable them to exercise their functions as Members of the Senedd, and*
- (c) *ensuring probity, accountability, value for money and transparency with respect to the expenditure of public funds.*
- (3) *The Board must keep under review the extent to which, having regard to –*
 - (a) *experience gained from the operation of the Board's determinations,*
 - (b) *changes in the functions of Members of the Senedd, and*
 - (c) *any other relevant changes in circumstances,**those determinations appear to be achieving the objectives set out in subsection (2)*
- (4) *The Board may, from time to time, consider any other matter which is relevant to the discharge of its functions, either on its own initiative or at the written request of the Clerk."*

22. The Board has a discretion to adjust the allowances paid to:

- (1) The Plaid Cymru political group. There is no requirement for all political parties in the Senedd to be treated in the same way in providing the Political Parties' Allowance. On the contrary s.24(3) GoWA states that a determination "*may make different provision for different political groups*". The Board would be entitled to take the view that, even though Plaid Cymru is not a party in an executive role, the Co-operation Agreement places that political group in a unique position. The Board could determine that the Plaid Cymru group required more funding in light of the role it is playing in devising policy. The Board would be entitled to make such a decision, provided any change in funding would not deprive Plaid Cymru of adequate resources to enable them to exercise their functions as Members of the Senedd, pursuant to s.3(b) NAFWRM.
- (2) Plaid Cymru Members, such as Designated Members. With respect to remuneration of Members of the Senedd, different provision may be made by the Board with respect to different cases: s.22(1) GoWA. The 2021 Determination makes provision for the payment of an additional annual salary for the Senedd Commissioner or a committee chair (higher), committee chair (lower), business

committee member, or leader of a political group not in Government. There is no express provision for the payment of this additional annual salary in the GoWA, SOs, or NAFWRM. These categories will have been created in the discretion of the Board to adequately remunerate Members based on their particular functions. On that basis, the Board could reasonably take the view that Designated Members should be afforded additional remuneration in light of the role they perform.

Issue 6: Does Leading Counsel have any observations on the status of ‘Designated Members’?

23. In legislatures which use the additional member electoral system, such as Wales and Scotland, it is more likely that one party will not receive an overall majority and will need to form a government by coalition or through an agreement based on confidence and supply of opposition parties. The institutionalising of the relationship between the minority government and their support party, as through the Co-operation Agreement, is an example of what has been called ‘contract parliamentarism’ but the scope and detail of these agreements can vary substantially. There are two domestic examples of such arrangements:

- (1) A co-operation agreement between the Scottish Government and the Scottish Green Party parliamentary group (“**Green Group**”) was published in August 2021 (“**2021 Scottish Agreement**”). Through this agreement, the Scottish Government and the Green Group commit to delivering a shared programme throughout the Parliamentary session. Although this is not a coalition, the First Minister agreed to nominate two Green Group Members of the Scottish Parliament for appointment as Ministers.¹¹ To facilitate the agreement, the Scottish Government has committed to consult the Green Group on its programmes for Government and its legislative programme, to provide early notice, and “*to give the Green Group the opportunity to comment on and influence the direction and content of Programmes for Government and the legislative programme.*”¹²

¹¹ 2021 Scottish Agreement, para 28. As the Scottish Government operates on the basis of collective responsibility, all decisions reached by Scottish Ministers, individually or collectively, are binding on all members of the Government (see the 2021 Scottish Agreement, paragraph 43).

¹² The co-operation agreement between the Scottish Government and the Scottish Green Party parliamentary group, paragraph 15.

- (2) A looser form of arrangement can be seen by the June 2017 confidence and supply agreement between the DUP and the Conservatives which provided that the DUP would support the Conservative minority government on all votes in the UK Parliament relating to: motions of confidence; the Queen’s Speech; the Budget; finance bills, money bills and appropriation legislation; legislation pertaining to the UK’s exit from the European Union; and legislation pertaining to national security. In return, the DUP secured an additional £1 billion of funding for Northern Ireland, with money focused on health, infrastructure, and education budgets. A co-ordination committee was created to oversee the agreement, but the committee was attended by Members of Parliament.¹³
24. What distinguishes the Co-operation Agreement from the 2021 Scottish Agreement and the DUP-Conservative 2017 Agreement is the role of the civil service and the participation of the Designated Member in decision-making. In our view, although this is unusual, it is not, in its existing formulation, constitutionally improper, far less unlawful. Civil servants serve the Government of the day to implement its policies. Ministers may direct civil servants to involve think tanks, NGOs, or advisory bodies such as SAGE in the development of Government policy. In principle, there is no reason why a Minister could not direct civil servants to involve a Member of an opposition party in the delivery of the policy commitments of the Co-operation Agreement so long as (a) the decision reached is formally taken by the Welsh Government, and (b) the Welsh Government bears responsibility for it. From a constitutional perspective, it difficult to see how it could be improper to adopt a procedure which develops policy by seeking to build consensus, thereby gaining the support of those representing a greater proportion of the electorate. Certain practical considerations will need be taken into account as the Co-operation Agreement is realised through the Co-operation Agreement Unit. In particular, as civil servants are politically impartial and cannot be involved in political compromises between the Welsh Government and Plaid Cymru, any political issues must be agreed as between the groups without impinging on the neutrality of the civil servants.

¹³ See the minutes of these meetings at: <https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland>

Issue 7: Does Leading Counsel have any further observations on the Agreement and, in particular, the position of the other opposition party during the operation of the Agreement?

25. In our view, it is unlikely that the other opposition parties who are not party to the Co-operation Agreement (the Welsh Conservative party and the Welsh Liberal Democrat party) would have grounds to challenge the arrangement by way of a judicial review. Although the arrangement is novel, the majority of the Supreme Court in R (Miller) v Secretary of State [2018] AC 61 approved, at paragraph 40, Professor AV Dicey's description of the UK constitution as "*the most flexible polity in existence*". The constitution affords considerable political flexibility, for the reasons set out by Lord Bingham in Robinson v Secretary of State for Northern Ireland [2002] NI 390 at paragraph 12:

"But matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgment they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude."

26. A good indication of how a Court might respond to such a challenge is R (McClellan) v First Secretary of State [2017] EWHC 3174 (Admin), where the claimant sought permission to apply for judicial review of the Conservative-DUP 2017 Agreement on the basis that: (i) the confidence and supply agreement would result in expenditure of public funds for an improper purpose, namely for the advantage of the Conservatives as a political party; and (ii) the agreement was made in violation of the Bribery Act 2010. The claimant was refused permission, and the claimant was extraordinarily required to pay the defendants' costs of preparing the acknowledgment of service and the costs of the defendants' attendance at the oral permission hearing. The Court held that the agreement was non-justiciable, for the reason that the making of a confidence and supply agreement was a political act "*which cannot be challenged, declared unlawful or struck down in a court of law*": paragraph 20.

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