Agenda – Legislation, Justice and Constitution Committee

Meeting Venue:	For further information contact:
Hybrid – Committee room 4 Ty Hywel and video conference via Zoom	**P Gareth Williams**
	Committee Clerk
Meeting date: 14 March 2022	0300 200 6565
Meeting time: 13.30	SeneddLJC@senedd.wales

1 Introductions, apologies and substitutions

13.30

2 Scrutiny session with the Counsel General and Minister for the Constitution

13.30 – 14.30 (Pages 1 – 51)

Mick Antoniw MS, Counsel General and Minister for the Constitution

Piers Bisson, Director: European Transition, Welsh Government

Adam Turbervill, Senior Lawyer, Welsh Government

Attached Documents:

LJC(6)-09-22 – Paper 1 – Briefing

LJC(6)-09-22 – Paper 2 – Senedd Research briefing – Legislative consent

LJC(6)-09-22 – Paper 3 – Letter from the Counsel General and Minister for the Constitution, 1 March 2022

LJC(6)-09-22 – Paper 4 – Letter to the Counsel General and Minister for the Constitution, 15 February 2022

LJC(6)-09-22 – Paper 5 – Letter from the Counsel General and Minister for Constitution, 22 February 2022

LJC(6)-09-22 – Paper 6 – Letter from the Counsel General and Minister for the Constitution, 28 February 2022

LJC(6)-09-22 – Paper 7 – Letter to the First Minister, 10 December 2021

3 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

14.30 - 14.35 (Pages 52 - 56)

Attached Documents:

LJC(6)-09-22 - Paper 8 - Statutory instruments with clear reports

Made Negative Resolution Instruments

3.1 SL(6)164 - The Relaxation of School Reporting Requirements (Wales) (Coronavirus) Regulations 2022

Affirmative Resolution Instruments

3.2 SL(6)166 - The Crime and Disorder Act 1998 (Additional Authority) (Wales) Order 2022

3.3 SL(6)168 - The Corporate Joint Committees (General) (Wales) Regulations 2022

4 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3

14.35 - 14.40

Made Negative Resolution Instruments

4.1 SL(6)163 - The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 6) Regulations 2022

(Pages 57 - 60)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-09-22 - Paper 9 - Draft report

LJC(6)-09-22 - Paper 10 - Letter from the First Minister to the Llywydd, 24 February 2022

Affirmative Resolution Instruments

4.2 SL(6)167 - The Council Tax (Long-term Empty Dwellings and Dwellings Occupied Periodically) (Wales) Regulations 2022

(Pages 61 - 63)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-09-22 - Paper 11 - Draft report

5 Instruments that raises no reporting issues under Standing Order 21.7

14.40 - 14.45 (Page 64)

Attached Documents:

LJC(6)-09-22 - Paper 12 - Statutory instruments with clear reports

5.1 SL(6)165 - The Security and Emergency Measures (Water and Sewerage Undertakers and Water Supply Licensees) Direction 2022

6 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3 - Previously considered

14.45 - 14.50

6.1 SL(6)126 - The Health Protection (Coronavirus, International Travel and Public Health Information to Travellers) (Wales) (Miscellaneous Amendments) Regulations 2022

(Pages 65 - 69)

Attached Documents:

LJC(6)-09-22 - Paper 13 - Report

LJC(6)-09-22 - Paper 14 - Welsh Government response

6.2 SL(6)157 - The Food (Withdrawal of Recognition) (Miscellaneous Amendments and Transitional Provisions) (Wales) (EU Exit) Regulations 2022

(Pages 70 - 72)

Attached Documents:

LJC(6)-09-22 - Paper 15 - Report

LJC(6)-09-22 - Paper 16 - Welsh Government response

7 Common frameworks

14.50 - 14.55

7.1 Correspondence from the Deputy Minister for Mental Health and Wellbeing to the Health and Social Care Committee: Provisional food compositional standards and labelling common framework

(Page 73)

Attached Documents:

LJC(6)-09-22 - Paper 17 - Letter from the Deputy Minister for Mental Health and Wellbeing to the Health and Social Care Committee, 18 February 2022

7.2 Correspondence from the House of Lords Common Frameworks Scrutiny Committee to the Secretary of State for Environment, Food and Rural Affairs: Agricultural Support framework

(Pages 74 - 77)

Attached Documents:

LJC(6)-09-22 - Paper 18 - Letter from the House of Lords Common Frameworks Scrutiny Committee to the Secretary of State for Environment, Food and Rural Affairs, 4 March 2022

8 Inter-Institutional Relations Agreement

14.55 - 15.00

8.1 Correspondence from the Minister for Rural Affairs and North Wales, and Trefnydd: The Ivory Prohibitions (Civil Sanctions) Regulations 2022 and The Ivory Act 2018 (Commencement No. 2 and Transitional Provision) Regulations 2022

(Pages 78 – 79)

Attached Documents:

LJC(6)-09-22 – Paper 19 – Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 3 March 2022

8.2 Correspondence from the Minister for Climate Change: Interministerial Group on Net Zero, Energy and Climate Change

(Page 80)

Attached Documents:

LJC(6)-09-22 – Paper 20 – Letter from the Minister for Climate Change, 7 March 2022

8.3 Written Statement by the Minister for Economy: Meeting of the UK-EU Relations Interministerial Group

(Page 81)

Attached Documents:

LJC(6)-09-22 – Paper 21 – Written Statement by the Minister for Economy, 10 March 2022

8.4 Correspondence from the First Minister: Trade and Cooperation Agreement

(Pages 82 – 85)

Attached Documents:

LJC(6)-09-22- Paper 22 – Letter from the First Minister, 10 March 2022

LJC(6)-09-22 – Paper 23 – Letter to the First Minister, 15 February 2022

8.5 Correspondence from the Minister for Finance and Local Government: Finance Inter-ministerial Standing Committee

(Page 86)

Attached Documents:

LJC(6)-09-22 - Paper 32 - Letter from the Minister for Finance and Local Government, 11 March 2022

9 Papers to note

15.00 - 15.10

9.1 Correspondence from the Minister for Health and Social Services to the Health and Social Care Committee: Supplementary Legislative Consent Memoranda (Memoranda No. 2 and No. 3) on the Health and Care Bill

(Pages 87 - 89)

Attached Documents:

LJC(6)-09-22 - Paper 24 - Letter from the Minister for Health and Social Services to the Health and Social Care Committee, 18 February 2022

9.2 Correspondence from the Minister for Education and Welsh Language: Supplementary Legislative Consent Memorandum (Memorandum No. 3) on the Professional Qualifications Bill

(Pages 90 - 92)

Attached Documents:

LJC(6)-09-22 - Paper 25 - Letter from the Minister for Education and Welsh Language, 8 March 2022

9.3 Written Statement by the Minister for Social Justice and the Counsel General and Minister for the Constitution: Welsh Government Response to UK Government Consultation

(Pages 93 - 94)

Attached Documents:

LJC(6)-09-22 - Paper 26 - Written Statement by the Minister for Social Justice and the Counsel General and Minister for the Constitution, 8 March 2022

9.4 Correspondence from the Secretary of State for Business, Energy and Industrial Strategy: Legislative Consent Memorandum on the Subsidy Control Bill

(Pages 95 - 96)

Attached Documents:

LJC(6)-09-22 - Paper 27 - Letter from the Secretary of State for Business, Energy and Industrial Strategy, 9 March 2022

LJC(6)-09-22 - Paper 28 - Letter to the Secretary of State for Business, Energy and Industrial Strategy, 17 December 2021

9.5 Written Statement by the Minister for Economy: Update on Border Control Posts

(Pages 97 - 98)

Attached Documents:

LJC(6)-09-22 - Paper 29 - Written Statement by the Minister for Economy, 10 March 2022

9.6 Correspondence from the Minister for Finance and Local Government: Welsh Tax Acts etc. (Power to Modify) Bill

(Pages 99 - 127)

Attached Documents:

LJC(6)-09-22 - Paper 33 - Letter from the Minister for Finance and Local Government, 11 March 2022

LJC(6)-09-22 - Paper 34 - Letter to the Minister for Finance and Local Government, 24 February 2022

10 Motion under Standing Order 17.42 to resolve to exclude the public from the remainder of the meeting

15.10

11 Supplementary Legislative Consent Memoranda (Memorandum No. 3 and Memorandum No. 4) on the Building Safety Bill - consideration of draft report

15.10 - 15.20 (Pages 128 - 145)

Attached Documents:

LJC(6)-09-22 - Paper 30 - Draft report

12 Consideration of international agreements

15.20 - 15.30 (Pages 146 - 149)

Attached Documents:

LJC(6)-09-22 - Paper 31 - Briefing paper

13 Scrutiny session with the Counsel General and Minister for the Constitution - consideration of evidence

15.30-15.45

Agenda Item 2

Document is Restricted

Document is Restricted

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair, Legislation, Justice and Constitution Committee
Senedd Cymru

1 March 2022

Dear Huw,

Thank you for your letter of 15 February regarding the committee's future work planning in relation to the UK Government's forthcoming legislative programme.

The current UK Parliamentary legislative programme has seen an unprecedented number of legislative consent memoranda. This has been the result of both the number of Bills containing provisions within the Senedd's competence as well as a large number of amendments to those Bills during their passage, sometimes as a result of amendments we have requested. I also indicated many of the challenges faced by the committee, particularly around the sharing of information and ensuring adequate time for consideration, are ones we share.

You ask me to share my expectation of the extent to which the current volume of memoranda will continue into the next legislative session. It is too early to be able to make a judgement on the likely volume of memoranda. Consideration of whether a Bill requires a LCM cannot begin until we have received the text of the Bill itself. Whilst there will be Bills in which we are requesting provision there will also be Bills in which we consider there to be provisions within the Senedd's competence which have not been subject to such requests. Even after the UK Government's legislative plans have been published in the Queen's Speech, it will only be once some of the Bills have been published that we will be able to indicate whether a LCM is required.

I share the committee's desire to be able to provide effective scrutiny of Bills affecting the devolution settlement. We also want to maximise the Senedd's ability to scrutinise Welsh provisions included in UK Government Bills at our request. For this reason we are working with the Business Committee on their review of the LCM process. This will include consideration of both the content and timing of legislative consent memoranda. Whilst the review is being undertaken we will, for our part, consider how we might provide as early an indication as possible of Bills containing Welsh provisions. I am sure you will appreciate we cannot place information into the public domain that has been shared with us in confidence.

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Mick.Antoniw@llyw.cymru
Correspondence.Mick.Antoniw@gov.Wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

However where we are able to provide advance notification, particularly where we make a request for Welsh provisions within a UK Bill, we will be happy to do so.

Finally you ask me to outline how I intend to keep the committee updated on my responsibilities more generally. I would be happy to continue engaging with the committee in the usual way. I will of course keep the committee, and indeed the Senedd, updated on key developments within my areas of responsibility. In particular I will ensure the committee is updated on inter-governmental meetings in line with the requirements of the inter-institutional agreement.

Yours sincerely,

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

–

Legislation, Justice and Constitution Committee

Senedd Cymru
Bae Caerdydd, Caerdydd, CF99 1SN
SeneddDCC@senedd.cymru
senedd.cymru/SeneddDCC
0300 200 6565

–

Welsh Parliament
Cardiff Bay, Cardiff, CF99 1SN
SeneddLJC@senedd.wales
senedd.wales/SeneddLJC
0300 200 6565

Mick Antoniw MS
Counsel General and Minister for the Constitution

15 February 2022

Dear Mick

Common frameworks and retained EU law: request for further information

We would like to thank you and your officials for your oral evidence to the Committee on 31 January 2022.

We note you agreed to write on the divergence between Welsh law and EU law, and how you and the Welsh Government would see these matters being managed and, where necessary, what public scrutiny and public information is to be made available.

Within your anticipated correspondence, we would also be grateful if you could provide further information in relation to the following matters.

Progress of the common frameworks programme

In correspondence with us in November 2021, you said it would be 'hugely desirable' for common frameworks to be scrutinised and finalised by the time of the dissolution of the Northern Ireland Assembly. Due to delays in the publication of frameworks, this timeline is no longer realistic. We welcome your continued commitment to not finalising common frameworks until committees have had the opportunity to carry out scrutiny.

1. We consider it a significant step forward for transparency that most provisional common frameworks have now been published. Could you confirm if you expect that all common frameworks will be published at least in provisional form by the time of the dissolution of the

Northern Ireland Assembly, with the exception of the frameworks for recognition of professional qualifications and services?

Transparency and accountability

We asked you about ensuring that the Senedd and stakeholders can understand common frameworks and their impact on Welsh Government decision-making.

We very much welcome your positive responses on:

- notifying the Senedd when legislation relates to a common framework;
- notifying the Senedd when a common framework dispute is escalated to Ministers;
- notifying the Senedd and stakeholders when a common framework is reviewed, and considering their recommendations before the review process concludes; and
- publishing annual reports on all individual common frameworks.

2. Could you confirm that the Welsh Ministers will abide by these commitments, and set out in writing the processes that you will follow?

We also asked about meeting your commitment in the Inter-institutional Relations Agreement to "maintain a dedicated page of its website providing all relevant formal intergovernmental agreements, common frameworks, concordats, memorandums or other resolutions that the Welsh Government has in place with the UK Government." You explained that finalised frameworks would be published on the Welsh Government website.

3. Given that common frameworks have now been in operation for over a year, we consider this insufficiently transparent. We believe that such a page should be set up as soon as possible, even if you consider it expedient to provide links to the UK Government website until frameworks are finalised. Could you confirm the date when you expect this to become available?

Making decisions and resolving disputes

We discussed how the four governments will make decisions and resolve disputes through common frameworks.

4. Common frameworks do not generally provide for stakeholders to be routinely involved in intergovernmental decision-making processes. Could you explain the reasons for this approach? How you will keep stakeholders routinely informed of intergovernmental discussions through common frameworks?

5. Some common frameworks provide for the making of legislation or policy to be postponed until the four governments have agreed on how to proceed. What risks have you identified with this approach?

6. Have any Welsh Government policies or initiatives been delayed because of the common frameworks process?

Cross-cutting issues

We discussed the intergovernmental agreement on the process for agreeing exclusions from the Internal Market Act in common framework areas and the agreement of standard text for common frameworks on international obligations and UK-EU agreements. We would be grateful for further information about how these processes will work in practice.

UK Internal Market Act

7. Is the Welsh Government seeking, or does it plan to seek, any exclusions through the process for agreeing exclusions from the Internal Market Act in common framework areas?

8. Does the Welsh Government support the Scottish Government's request for an exclusion from the Act for single use plastics legislation?

9. What principles or evidence would the Welsh Government rely on if it sought an exclusion?

10. Would the Welsh Government be likely to seek broad exclusions of whole policy areas, or exclusions of specific items of legislation?

11. At what point in policy development or the legislative process would the Welsh Government seek an exclusion?

12. Is the Welsh Government content to notify the Senedd and stakeholders when it seeks an exclusion?

13. Do you consider that finalised frameworks should make reference to the exclusions process?

Subsidy Control Bill

14. What concerns, if any, do you have about the impact of the UK Subsidy Control Bill on any common frameworks?

Professional Qualifications Bill

15. Do you have any concerns about the impact of the Professional Qualifications Bill on any common frameworks?

International obligations

16. You stated that the UK faces difficulties regarding international obligations. Could you give details of any difficulties you have identified arising from international obligations, particularly in devolved areas or in areas that affect Wales?

17. The agreed text on international obligations for common frameworks suggests that frameworks will be based on an updated International Relations Concordat following the conclusion of the Intergovernmental Relations Review. Are there plans to update this concordat, and do you consider that there are any risks if an updated concordat is not agreed?

18. The agreed text on international obligations states that the governments will consider "any implications stemming from international trade which have a direct bearing on the operation of the common framework". Do you consider that this gives the Welsh Government adequate involvement in the negotiation of international trade agreements in common framework areas?

UK-EU obligations

19. Agreed text in some common frameworks describes provision for Welsh Government attendance at meetings established by the UK-EU Trade and Cooperation Agreement's institutional framework. How will you ensure that Welsh Government policy teams in common framework areas coordinate with Welsh Government representatives at UK-EU meetings?

20. Agreed text on the Northern Ireland Protocol indicates that if the law in a common framework area changes in Northern Ireland by virtue of the Protocol, the four governments will consider the implications of that change in Great Britain and whether to take action. At what point in the EU legislative process will the four governments do this?

21. Some stakeholders in Northern Ireland have raised concerns about the limited extent to which common frameworks are taking account of cross-border links on the island of Ireland. What consideration are the Welsh Ministers giving to this issue in deciding whether to approve common frameworks?

Changes to the status of retained EU law

You set out your initial response to the UK Government's announcement of plans to legislate on the status of retained EU law.

22. What is your assessment of the extent to which changing the legal status of the body of retained EU law within devolved competence is devolved?

23. Do you think that the status of that law needs to be changed? If so, why and how should it be changed? If not, why not?

24. The UK Government has set out plans to enable retained EU law to be amended more quickly. Could you confirm that any such changes in common framework areas will be managed through common frameworks?

Future divergence from EU law

You said that the Welsh Government should hold EU standards as a minimum and that the Welsh Government intends to maintain and improve upon standards. You also confirmed that the Welsh Government will not be keeping pace with planned changes to EU law on blood, tissues and cells because a joint UK approach is preferred. In correspondence with us in November, you said that the Welsh Government does not have a "central mechanism" to monitor differences between EU and Welsh law.

25. Without a central mechanism, how is the Welsh Government monitoring EU law to learn about and understand differences that may develop between Welsh and EU law?

26. What assessment have you made of the risks of involuntary or 'passive' divergence developing between EU law and Welsh law?

27. On what basis do you assess whether a joint approach with other parts of the UK, keeping pace with EU law, or distinct Welsh legislation would be preferable?

28. How will your approach differ in different areas, for example Welsh Government priority areas or areas subject to the Trade and Cooperation Agreement's level playing field provisions?

29. Do you think there are any risks that making decisions jointly through common frameworks could impede Welsh Government ambitions to improve upon standards?

We would be grateful to receive a response to these questions by 1 March.

Yours sincerely,

Huw Irranca-Davies
Chair

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru

seneddLJC@senedd.wales

22 February 2022

Dear Huw,

Further to your letter of 10 December addressed to the First Minister and my appearance at Committee on 17 January, I am writing to provide further information in relation to the legislative capacity of the Welsh Government.

There continues to be pressure on our capacity to legislate but we take steps to meet that demand. We regularly review our processes for developing legislation and Ministers closely monitor the delivery of the legislative programme, taking action where needed to redeploy resources in line with legislative priorities, such as the large amount of legislation that has been required to respond to the coronavirus pandemic.

On the question of whether there are resources in the Welsh Government's draft budget to increase legislative capacity, our work to deliver the legislative programme is an element of the work of the Government as a whole. Consequently, there is not a separate budget allocation for that activity: it is allocated on a portfolio basis.

In relation to the programme for improving the accessibility of Welsh law, during the passage of the Legislation Bill the Explanatory Memorandum set out the indicative costs of the additional staffing that were required to increase drafting and translation capacity, as well as other staff to work on the non-legislative projects.

Since work has begun on preparing the first consolidation Bills and rolling out other accessibility projects, we have established the Legislative Codes Office. Staffing within that team comprises some newly funded posts as well as a redeployment of existing posts.

In terms of Welsh Government's Legal Services' capacity to develop legislation, the rolling recruitment of lawyers has been undertaken over the last two years to seek to minimise risk that vacancies have the potential to cause. Legal Services have also sought secondees to expand their resources when required to support delivery.

We have had extensive learning and development activity for staff working on legislation for many years. Since the beginning of the pandemic, we have needed to redesign these learning activities to offer opportunities through virtual, rather than face-to-face, delivery.

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Mick.Antoniw@llyw.cymru
Correspondence.Mick.Antoniw@gov.Wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

This has, however, made it easier to access training on legislation across Welsh Government regardless, for example, of where in Wales staff are based.

We are proud of our delivery of a significant amount of primary and secondary legislation and we are moving forward with an ambitious Sixth Senedd legislative programme, committing to legislate in areas including Welsh taxes, social partnership and public procurement, agriculture and single use plastics.

I look forward to appearing at the Committee again on 28 February.

Yours sincerely,

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru
Cardiff Bay
Cardiff CF99 1SN

seneddLJC@senedd.wales

28 February 2022

Dear Huw,

Thank you for your letter of 28 January to both me and the First Minister setting out the outcome of the Committee's scrutiny of the Welsh Government's draft budget for 2022-23 as it relates to justice and legislative activities. I am responding on our joint behalf.

At the outset, I would like to thank the Committee for its on-going interest in our resourcing of justice related and legislative activity. The First Minister and I have provided information on the issue to the Committee by letters dated 10 and 17 January and 22 February. I appeared before the Committee on 17 January and I look forward to doing so again on 28 February as the Committee continues its work.

Turning to the recommendations and questions set out in your letter, I can reply as follows:

Recommendation 1: The Welsh Government should explain how it will monitor and evaluate the effectiveness of funding allocated within the Justice Commission in Wales BEL.

Recommendation 2: We would welcome greater clarity and details on what work to develop and publish a justice work programme will be delivered from within the Justice Commission in Wales BEL in 2022-23.

Recommendation 6: The Counsel General should commit to an annual report highlighting progress in delivering the justice work programme and evaluating outcomes against spending in relation to all individual components, highlighting also the contributions of relevant organisations as part of this process.

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Mick.Antoniw@llyw.cymru
Correspondence.Mick.Antoniw@gov.Wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

The Cabinet Sub-Committee on Justice was established to:

- provide strategic leadership for justice functions currently devolved to Wales;
- direct all governmental activity in response to the report of the Commission on Justice in Wales;
- ensure synergy across portfolios to ensure a coordinated approach to justice matters;
- agree Welsh Government positions on justice initiatives arising from the UK Government; and
- lead discussions with the UK Government on devolution of justice.

The Welsh Government's Justice Policy Division supports the Cabinet Sub-Committee in all of these functions, allowing the Sub-Committee to oversee activity across Welsh Government. Within the division, the majority of staff work on activity that contributes directly to the Programme for Government commitment to pursue the case for the devolution of policing and justice. It is this work – following on from the Commission on Justice in Wales – which is funded through the Justice Commission in Wales BEL.

This work includes both the creation and monitoring of the overall work programme, and also leading on the delivery of particular elements of the programme. For example, much of the Welsh Government's activity in seeking to strengthen Wales's legal sector is led by the staff funded from this BEL, such as the work to establish the Law Council of Wales and work that is being done to consider the case for solicitor apprenticeships; but these and other actions to strengthen the sector also require working closely with other parts of Welsh Government responsible for areas such as business development, further and higher education, procurement of legal services and more.

As indicated in my appearance before the Committee, this BEL also includes the staff who are working on proposals for reform of the tribunals, following the report of the Law Commission. Again, this is an important part of our response to the Commission on Justice in Wales and our pursuit of the case for devolution of justice – which, as I said to the Committee, is not just done by talking about devolution, but also by demonstrating our approach and our values through the actions we are taking.

In terms of monitoring and evaluation, the publication in the spring will set out our programme of justice-related activity, building on the initial work programme which the Committee has previously seen. This will provide a basis for both internal and external monitoring of progress. Internal monitoring of progress will be overseen by the Cabinet Sub-Committee, supported by the Justice Policy Division. Individual ministers and their officials will of course be responsible for monitoring and driving progress on individual elements of the overall work programme, with the Minister for Social Justice having a particularly important role as a large part of the activity falls within her portfolio or is closely related to it.

Evaluation of individual elements of the overall programme is ongoing, at the appropriate points – for example, plans are in place to evaluate the Family Drug and Alcohol Court pilot. We will evaluate the effectiveness of the specific funding in the Justice Commission BEL as we monitor progress against the Programme for Government commitment. However, in terms of allowing for external monitoring of progress, I am happy to make the commitment that we will bring forward an annual report setting out progress against the objectives in the programme of activity we plan to bring forward in our spring publication.

Recommendation 3: The Welsh Government should provide more detail about how this £4.2 million is used for that administration and support. In particular, we would welcome information about how much funding is allocated or set aside for improving remote access for citizens, investing in new technology and maintaining and improving physical and built infrastructure.

In the current financial year, the £4.2 million budget for the Welsh Tribunals is allocated between tribunal running costs including the costs associated with hearings (£2.9 million) and staff salaries which support the administration of the six Welsh Tribunals (£1.2 million). The budget allocation does not make specific provision for improvements to remote access for citizens and the physical and built infrastructure.

The President of Welsh Tribunals in his Annual Report for 2020-21 and in evidence to the Committee on 1 November 2021 has reported that the Welsh Tribunals have been able to operate remotely, and to do so successfully, in response to the pandemic. It is to the credit of the President, judicial leads, tribunal members and the staff of the Welsh Tribunals Unit that they have been able to make use of technology to ensure cases have been able to progress in the face of difficult circumstances.

One of the President's priorities, set out in the President's Annual Report, is to consider the way in which the Welsh Tribunals should operate going forward and the balance of how they should do so working remotely and face-to-face.

Recommendation 4: The Welsh Government should work toward disaggregating spending on justice in future budgets. For each BEL identified in the First Minister's letter of 10 January, the Welsh Government should identify relevant funding targeted at justice-related work. We believe this would be beneficial not just for scrutiny, transparency and accountability, but also for the Welsh Government in delivering better justice outcomes. We also see this process as being important in readiness for any future devolution of justice functions, when such an approach would be essential.

We publish significant amounts of information as part of our draft budget but we recognise there is always more we can do to improve transparency, as recognised in our annual Budget Improvement Plan. We also recognise the Committee's point that it is useful to the Welsh Government to be able to understand more fully the volume of its own expenditure which goes towards supporting the delivery of justice. As part of the on-going justice transformation programme, we will explore the ways in which we can improve the level of information we provide about justice expenditure.

Recommendation 5: The justice work programme should contain measurable actions and specific programmes for delivery that are fully costed.

We have noted this recommendation and will bear it in mind in the context of the preparation and future monitoring of our justice publication, referenced above.

Recommendation 7: The Welsh Government should provide a detailed breakdown of funding for advice services and should evaluate outcomes against spending on advice services as part of its annual report on justice.

The Welsh Government's commitment to supporting advice services is being maintained through the Single Advice Fund ("SAF"). We agree with the Committee that it is important to evaluate the effectiveness of spending through this fund, and intend to commission independent research to review its effectiveness as a delivery model. The research will focus on whether the SAF is achieving its key objectives, including if the SAF is:

- encouraging better collaboration amongst providers to improve the efficiency of service planning and delivery;
- promoting early access to advice services to vulnerable groups; and
- ensuring that people accessing advice are given opportunity to develop resilience to future social welfare problems.

This review will also consider findings from the Commission on Justice in Wales, which queried whether the approach of a single fund, founded upon collaborative partnership delivery model, might be a barrier to niche advice providers accessing Welsh Government funding; and it will of course also take into account the impacts of the pandemic. This work is expected to begin in April and report in the autumn so as to inform decisions for future funding, and we also note the Committee's recommendation that the outcome of that evaluation should form part of the Welsh Government's annual report.

Recommendation 8: In order to provide us with some baseline data, it would be helpful if the Welsh Government could provide details, for the current financial year of:

a. the number of FTE staff it employs with a legal role;
b. the number of FTE primary legislative drafting lawyers it employs;
c. the number of FTE departmental lawyers that are employed and of those, how many either draft policy instructions for Bills or draft subordinate legislation;
d. how many FTE staff have been involved in drafting subordinate legislation relating to EU exit and coronavirus regulations;
e. how many other FTE staff, specialist or otherwise, are involved in the preparation of legislative proposals;
f. a view on how the information provided in relation to a to e above compares to previous financial years;
g. any other baseline data that the Welsh Government would deem to be useful.

Recommendation 9: It would be helpful if the Counsel General could set out how much resource is currently allocated to deal with the drafting of legislation relating to EU exit and coronavirus regulations.

As I explained in my letter of 22 February, the work to deliver the legislative programme is an element of the work of the Government as a whole. Consequently, there is not a separate resource allocation for that activity: instead resource is allocated on a portfolio basis. The Government does not keep records of the numbers of all staff or FTEs working on legislation and given that many staff work on legislation as part of a wider role, this would not be a reliable reflection of resources allocated to legislation in any case.

Recommendation 10: In addition to providing the information requested in our letter to the First Minister of 10 December 2021, we would be grateful if the Counsel General could detail the resources he intends allocating and the programmes he will be introducing in the next financial year and subsequent financial years, to ensure that the Welsh Government has sufficient resource to deliver the Welsh Government's legislative programme and to address the challenges he identifies.

I set out in my letter of 22 February the steps the Government is taking to ensure we manage the pressures on our capacity to legislate.

Yours sincerely,

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
–
Legislation, Justice and Constitution Committee

Senedd Cymru
Bae Caerdydd, Caerdydd, CF99 1SN
SeneddDCC@senedd.cymru
senedd.cymru/SeneddDCC
0300 200 6565
–
Welsh Parliament
Cardiff Bay, Cardiff, CF99 1SN
SeneddLJC@senedd.wales
senedd.wales/SeneddLJC
0300 200 6565

Rt Hon Mark Drakeford MS
First Minister of Wales

10 December 2021

Dear Mark

Welsh Government's draft budget proposals for 2022-23

As part of our work to scrutinise the Welsh Government's justice policy and legislative activities, we would be grateful if you could provide us with the following information, to aid our scrutiny of the Welsh Government's draft budget proposals for 2022-23.

Justice

We note that the Welsh Government has re-established the Cabinet Sub-committee on Justice and is pursuing a programme of work on the recommendations of the Commission on Justice in Wales which are within our devolved competence. The Counsel General has indicated to us that a justice work programme will be published in the near future. You also shared a work programme with our predecessor Committee last year, setting out priorities across five workstreams.

Whilst the Counsel General chairs the Cabinet Sub-committee, we are aware that he is not a budget holder and that funding for the delivery of the Welsh Government's justice programme appears to be divided across several government departments. We are therefore seeking information on funding from you.

Could you please provide us with information on:

> Any resources within the draft budget proposals for delivery of the planned justice work programme, in which departmental Main Expenditure Groups (MEG) they reside and the related Spending Programme Area (SPA) and Budget Expenditure Line (BEL) figures.

Any other resources within the draft budget proposals associated with the Welsh Government's justice priorities, including on access to justice; civil and administrative justice; criminal justice (including policing); family justice; and the legal sector. In relation to this information, please could you provide information on within which departmental MEG they reside and the related SPA and BEL figures.

Legislative capacity

In evidence to us, the Counsel General has drawn to our attention the current 'scale of the legislative demands' on the Welsh Government in relation to: its own-legislative work programme, including its programme for improving the accessibility of Welsh law; legislating for Brexit; legislating for Covid; and responding to the UK Government's legislative programme. The Counsel General also drew our attention to the high skilled nature of expertise needed to deliver on these demands. We would therefore welcome information on:

Any resources within the draft budget to increase capacity within the Welsh Government to meet these legislative demands, including recruiting new staff, increasing expertise and retaining existing staff, and potentially buying-in, seconding or otherwise acquiring additional expertise.

Any resources within the draft budget for delivery of the Welsh Government's programme for improving the accessibility of Welsh law.

We would welcome a response from you by 10 January 2022 to ensure we have time to consider the information, and raise any relevant issues, ahead of the planned Plenary debate on the draft budget.

Yours sincerely,

Huw Irranca-Davies

Huw Irranca-Davies
Chair

Statutory Instruments with Clear Reports
14 March 2022

SL(6)164 – The Relaxation of School Reporting Requirements (Wales) (Coronavirus) Regulations 2022

Procedure: Made Negative

These Regulations amend current school reporting requirements in response to the impact on schools as a result of coronavirus.

The Regulations amend:

- The School Governors' Annual Reports (Wales) Regulations 2011 ("the Annual Report Regulations"); and

- The School Information (Wales) Regulations 2011 ("the School Information Regulations") .

The Annual Report Regulations prescribe the information that must be published by a school governing body in an annual report. Regulation 2(2) of these Regulations inserts a new regulation into the Annual Report Regulations which provides that the following information for the 2021-2022 school year is not required to be published in any governors' annual report—

> (a) paragraph 6 of Schedule 2 to the Annual Report Regulations (the summary of secondary school performance),
>
> (b) paragraph 7 of Schedule 2 to the Annual Report Regulations (the numbers of authorised and unauthorised pupil absences), and
>
> (c) paragraph 8(b) of Schedule 2 to the Annual Report Regulations (further information relating to authorised and unauthorised pupils absences).

The School Information Regulations prescribe the information that must be published by local authorities and schools in a school prospectus.

Not all children have attended school throughout the year and many pupils and teachers have worked and studied remotely for periods of time. The Welsh Government considers that this is likely to have a negative impact on the quality of some of the data regulated by the School Information Regulations. As such, the Welsh Government considers that the data on pupil absences is particularly affected and should not be published in a school prospectus. Regulation 3 of these Regulations disapplies the obligation on a school

governing body to include data relating to pupil absences in any school prospectus for the 2021-2022 school year.

Parent Act: Education Act 1996; Education Act 2002

Date Made: 23 February 2022

Date Laid: 25 February 2022

Coming into force date: 01 April 2022

Statutory Instruments with Clear Reports
14 March 2022

SL(6)166 – The Crime and Disorder Act 1998 (Additional Authority) (Wales) Order 2022

Procedure: Affirmative

Section 17(1) of the Crime and Disorder Act 1998 ("the Act") requires certain authorities to have due regard to the likely effect of the exercise of their functions on, and the need to do all that they reasonably can to prevent; crime and disorder, the misuse of drugs, alcohol and other substances, and reoffending in their respective areas.

Section 17(2) of the Act lists the authorities that are liable to comply with section 17(1). This Order amends section 17(2) to add Corporate Joint Committees ("CJCs") established under Part 5 of the Local Government and Elections (Wales) Act 2021 to the list of authorities.

As a result of this Order, CJCs will need to have due regard to the likely effect of the exercise of their functions on, and the need to do all that they reasonably can to prevent; crime and disorder, the misuse of drugs, alcohol and other substances and reoffending in their respective areas.

The Order forms part of the suite of legislation that will underpin all CJCs and put in place the necessary legislative framework for effective administration and governance of a CJC.

Parent Act: Crime and Disorder Act 1998

Date Made:

Date Laid:

Coming into force date: 25 March 2022

Statutory Instruments with Clear Reports
14 March 2022

SL(6)168 – The Corporate Joint Committees (General) (Wales) Regulations 2022

Procedure: Affirmative

These Regulations make a number of provisions in relation to Corporate Joint Committees established under Part 5 of the Local Government and Elections (Wales) Act 2021. These Regulations form part of a package of instruments which underpin the establishment of Corporate Joint Committees and which seek to ensure that Corporate Joint Committees are subject to the same administrative and governance requirements as local government.

Corporate Joint Committees are corporate bodies, established via regulations. There are currently four Corporate Joint Committees established in Wales: the Mid Wales Corporate Joint Committee, the North Wales Corporate Joint Committee, the South West Wales Corporate Joint Committee and the South East Wales Corporate Joint Committee.

This is the third set of Corporate Joint Committee General Regulations. Together these regulations form a package of standalone provision and amendments to legislation that underpins all Corporate Joint Committees and establishes the legislative framework necessary for the effective administration and governance of a Corporate Joint Committee.

The provisions within these Regulations:

- apply Part 3 of the Local Government Act 2000 to Corporate Joint Committees. Under this Part (and further regulations made under it) any member of a Corporate Joint Committee and any person appointed to a sub-committee of the Corporate Joint Committee and entitled to vote on matters to be decided by that sub-committee will be required to comply with the code of conduct adopted by the Corporate Joint Committee. The amendments also provide that allegations of non-compliance with the code of conduct are investigated by the Public Service Ombudsman for Wales and decided by the Adjudication Panel for Wales.
- apply sections 92 (payments in cases of maladministration etc.) and 101 (indemnification of members and officers) of the Local Government Act 2000 to Corporate Joint Committees.
- amend each set of regulations establishing the four existing Corporate Joint Committees so as to make provision about the appointment of substitute members in the event that a council or National Park authority member is unable to act as a member for any reason (including suspension under the Local Government Act 2000).
- make provision about the commercial activities of a Corporate Joint Committee.

- make provision about other financial matters including a requirement for the four existing Corporate Joint Committees to maintain a general fund, functions in respect of specific types of contract, and insurance conferred on Corporate Joint Committees generally.
- make provision about the rights of a Corporate Joint Committee to bring and defend legal proceedings.
- make provision applying protections from personal liability to members and members of staff and conferring powers on a Corporate Joint Committee to indemnify staff.
- make provision about keeping of records by a Corporate Joint Committee and service of notices and documents to and by a Corporate Joint Committee.
- make general provision about staffing such as rights of staff to certain leave and allowances.
- make a number of miscellaneous and consequential provisions which largely extends existing provision in respect of local authorities to Corporate Joint Committees: in particular, provision disqualifying holders of certain paid positions for being appointed as members of Corporate Joint Committees and also provision applying Part 2 of the Local Government (Wales) Measure 2011 (rights to family absence) to members of Corporate Joint Committees.

Parent Act: Local Government and Elections (Wales) Act 2021

Date Made:

Date Laid:

Coming into force date: 06 May 2022

SL(6)163 – The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 6) Regulations 2022

Background and Purpose

These Regulations amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 (the "principal Regulations"), with effect from 28 February 2022, to narrow the scope of regulation 20 of the principal Regulations by providing an exhaustive list of the premises to which the requirement to wear face coverings applies.

The requirement now applies to the indoor public areas of the following, when the public have access to the premises:

- Business premises offering goods or services for sale or hire, including premises listed in paragraphs (a) to (m) of paragraph 39 of Schedule 7 to the principal Regulations (including financial service providers, post offices and shopping centres);
- Premises of veterinary surgeons and animal grooming services;
- Storage and distribution facilities, including delivery drop off points;
- Premises of estate or letting agents, developer sales offices and show homes;
- Premises of close contact services (hair salons and barbers, nail and beauty salons including tanning and electrolysis services, and body piercing and tattooing services);
- Premises used for the provision of takeaway food;
- Premises used for the provision of medical or health services;
- Premises used for the provision of a social care service, including care home services, secure accommodation services, residential family centre services and adult day care services.

The amendments mean that the face covering requirement no longer applies to particular types of premises that are open to the public, such as leisure and entertainment premises, and visitor attractions.

The amendments also clarify that the face covering requirement does not apply to residents of the social care premises listed when the residents are on the premises.

Procedure

Negative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following three points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

We note the Welsh Government's justification for any potential interference with human rights. In particular, we note the following paragraphs in the Explanatory Memorandum:

> *"Whilst the principal Regulations, as amended by these Regulations, engage individual rights under the Human Rights Act 1998 and the European Convention on Human Rights, the Government considers that they are justified for the purpose of preventing the spread of infectious diseases and/or the interference is permitted on the basis that it is in pursuit of a legitimate aim, namely of protecting public health, and are proportionate.*
>
> *Article 5 (right to liberty), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 11 (freedom of assembly and association) and Article 1 of the First Protocol (protection of property) are engaged by the principal Regulations.*
>
> *Each of these is a qualified right, which permits the Welsh Ministers to interfere with the exercise of the rights if necessary in a democratic society in the interests of public safety or for the protection of health. All such restrictions and requirements must be justified on the basis that they are in pursuit of a legitimate aim, namely of protecting public health, and are proportionate to that aim. Any interference with these rights also needs to be balanced with the state's positive obligations under Article 2 (right to life). The adjustment of the requirements under the principal Regulations by these Regulations is a proportionate response to the spread of coronavirus. It balances the need to maintain an appropriate response to the threat posed by coronavirus against the rights of individuals and businesses, in a manner which remains proportionate to the need to control the rate of transmission of the coronavirus, taking into account the scientific evidence."*

2. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

We note there has been no formal consultation on these Regulations. In particular, we note the following paragraph in the Explanatory Memorandum:

> *"Given the ongoing threat arising from coronavirus and the need for a proportionate and prompt public health response, there has been no public consultation in relation to these Regulations. However, engagement has taken place with various stakeholders."*

3. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

We note the breach of the 21-day rule (i.e. the rule that 21 days should pass between the date a "made negative" instrument is laid before the Senedd and the date the instrument comes into force), and the explanation for the breach provided by Mark Drakeford MS, First Minister, in a letter to the Llywydd dated 24 February 2022.

In particular, we note that the letter says:

> *"This is necessary in order to ensure that the restrictions and requirements of the principal Regulations remain proportionate."*

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
7 March 2022

Y Gwir Anrh/Rt Hon Mark Drakeford AS/MS
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

Elin Jones MS
Llywydd
Senedd Cymru
Cardiff Bay
CARDIFF
CF99 1SN

24 February 2022

Dear Elin,

The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 6) Regulations 2022

I have today made these Regulations under sections 45C(1) and (3)(c) and 45P(2) of the Public Health (Control of Disease) Act 1984. I attach a copy of the statutory instrument and I intend to lay this and an accompanying Explanatory Memorandum once the statutory instrument has been registered.

In accordance with section 11A(4) of the Statutory Instruments Act 1946 I am notifying you that this statutory instrument will come into force at on 28 February 2022, less than 21 days after it has been laid. This is necessary in order to ensure that the restrictions and requirements of the principal Regulations remain proportionate.

I am copying this letter to the Minister for Rural Affairs and North Wales, and Trefnydd, Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee, Siwan Davies, Director of Senedd Business, Sian Wilkins, Head of Chamber and Committee Services and Julian Luke, Head of Policy and Legislation Committee Service.

Yours sincerely

Mark Drakeford

MARK DRAKEFORD

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Mark.Drakeford@llyw.cymru
Correspondence.Mark.Drakefordy@gov.wales

SL(6)167 – The Council Tax (Long-Term Empty Dwellings and Dwellings Occupied Periodically) (Wales) Regulations 2022

Background and Purpose

The Council Tax (Long-Term Empty Dwellings and Dwellings Occupied Periodically) (Wales) Regulations 2022 ("the Regulations") are made by the Welsh Ministers in exercise of the powers conferred on them by sections 12A(13)(a), 12B(12) and 113(2) of the Local Government Finance Act 1992 ("the 1992 Act") and come into force on the 1 April 2022.

The Regulations amend sections 12A and 12B of the 1992 Act to provide that, for a financial year beginning on or after 1 April 2023, a billing authority in Wales may determine in relation to its area, that if on any day a dwelling is a long-term empty dwelling or a dwelling occupied periodically, the amount of council tax payable in respect of that dwelling and that day is increased by a percentage of not more than 300 (currently the maximum is 100 percent).

The power to increase the amount levied is discretionary and enables billing authorities to take into account the different circumstances within individual billing authority areas. The decision to charge a premium and the amount of that premium is a matter for each local authority. In making such a decision, local authorities will have regard to a variety of factors including the need bring long-term empty homes back into use to provide safe, secure and affordable homes, and to increase the supply of affordable housing and enhancing the sustainability of local communities.

Procedure

Draft Affirmative

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following three points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) - that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

The very significant increase in the charging authority's discretion from 100 percent to 300 percent is both notable in its own right and also appears to engage Article 1 of the First Protocol ("A1P1") to the European Convention Human Rights. Whilst it is recognised that the State can interfere with a citizen's possessions, in this case by increasing the Council Tax charge on long-term empty dwellings or a dwellings occupied periodically, neither the Explanatory Memorandum or Explanatory Note to the Regulations, nor it appears the original consultation, sets out any specific consideration of the impact on A1P1 rights and whether the scheme implemented by the Regulations is a proportionate means of achieving a legitimate aim in this regard.

2. Standing Order 21.3(ii) - that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Part 5 of the Explanatory Memorandum deals with the consultation undertaken in respect of the Regulations. Paragraphs 5.2 and 5.3 state:

> *"5.2 The consultation received 974 responses, reflecting a wide spectrum of views. Respondents included local authorities, town and community councils, self-catering providers, local businesses, representative bodies, professional bodies/associations and private individuals.*
>
> *5.3 The majority of responses to the consultation did not support an increase in the maximum premium. The consultation yielded limited evidence that stakeholders believe that increasing the maximum percentage could have a positive effect in addressing the issues presented by second homes."*

Taking into account the very high number of responses to the consultation and the fact the majority of those responses did not support the proposal to increase the percentage rate discretion, it is unclear why Option 2 of the Regulatory Impact Assessment was pursued, not least because no clear projection is provided as to the likely increase in revenue to charging authorities. Paragraph 6.26 of the Expandatory Memorandum is noted also:

> *"6.26 A higher maximum could lead to increases in local authority council tax collection and enforcement costs if taxpayers refuse to pay the additional premium. It could also lead to owners seeking ways to avoid the premium. Complaints from council tax payers who consider the premium to be unfair and discriminatory may increase. These factors would have an administrative impact on local authorities. Authorities would need to take such factors into account in deciding whether to apply a higher premium".*

One means by which owners might seek to avoid the premium is to secure properties in neighbouring charging authority areas, which may serve to simply transfer the 'problem of second homes' elsewhere.

3. Standing Order 21.3(i) - that it imposes a charge on the Welsh Consolidated Fund or contains provisions requiring payments to be made to that Fund or any part of the government or to any local or public authority in consideration of any licence or consent

or of any services to be rendered, or prescribes the amount of any such charge or payment

It is noted that the scheme set out in the Regulations will likely result in increased revenue to charging authorities for the provision of services covered by the Council Tax charge, and that the Regulations prescribe, by amendment, the mechanism by which that charge can be increased at the charging authority's discretion.

Welsh Government response

A Welsh Government response is required to Merits reporting points 1 and 2.

Legal Advisers
Legislation, Justice and Constitution Committee
8 March 2022

Agenda Item 5

Statutory Instruments with Clear Reports
14 March 2022 under Standing Order 21.7
SL(6)165 – The Security and Emergency Measures (Water and Sewerage Undertakers and Water Supply Licensees) Direction 2022

Procedure: No Procedure

It appears to the Welsh Ministers in relation to Welsh water and sewerage undertakers and Welsh water supply licensees that it is requisite and expedient in the interest of national security and for the purpose of mitigating the effects of any civil emergency to give them directions under the Water Industry Act 1991.

The same applies to the Secretary of State in relation to English water and sewerage undertakers and English water supply licensees.

Water and sewerage undertakers and water supply licensees are directed to, among other things:

- make, keep under review and revise plans to ensure, during any civil emergency or event threatening national security, the continued exercise of water supply and sewerage functions,
- take steps to ensure they have the capability, capacity and facilities required to implement those plans,
- identify and assess risks to the provision of water supply and sewerage functions, and put in place measures to avoid or mitigate those risks,
- test the effectiveness of security measures, policies and practices to ensure they remain appropriate to manage security risks,
- notify the appropriate authority (i.e. the Welsh Ministers or the Secretary of State) of any emergency or security event affecting water supply and sewerage functions.

Parent Act: Water Industry Act 1991

Date Made:

Date Laid: 28 February 2022

Coming into force date: 01 March 2022

SL(6)126 - The Health Protection (Coronavirus, International Travel and Public Health Information to Travellers) (Wales) (Miscellaneous Amendments) Regulations 2022

Background and Purpose

The International Travel Regulations[1] impose requirements on persons entering Wales after having been abroad. They include requirements for persons arriving in Wales to book and undertake coronavirus tests and to isolate for a period determined in accordance with those Regulations. The requirements imposed by the International Travel Regulations are subject to exceptions, and certain categories of person are exempt from having to comply.

These Regulations amend the International Travel Regulations by:

- Removing the requirement for pre-departure tests for fully vaccinated travellers and all under 18s;
- Removing the requirement to isolate until a day 2 post arrival negative test result is received for fully vaccinated arrivals and all under 18s;
- Amending the requirement for post-arrival tests to be PCRs to allow LFDs to be used as an alternative for fully vaccinated persons and those under-18, and provide that anyone who tests positive on their LFD test must isolate and take a follow-up PCR test;
- Adding 16 countries to the list of recognised vaccination programmes;
- Exempting children under 5 from testing and isolation requirements;
- Making consequential amendments to the Public Health Information Regulations.

The Public Health Information Regulations[2] impose requirements on operators of international passenger services coming from outside the common travel area to an airport, heliport or seaport in Wales to provide passengers with specific public health information. Consequential changes are made to the Public Health Information Regulations to ensure that these Regulations are consistent in the terminology used.

Procedure

Negative.

[1] The Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020 (S.I. 2020/574)
[2] The Health Protection (Coronavirus, Public Health Information for Persons Travelling to Wales etc.) Regulations 2020 (S.I. 2020/595)

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

The following point is identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

Regulation 13(2) inserts a new paragraph 1ZCA into Schedule 1C to the International Travel Regulations.

Paragraph 1ZCA(1)(h) provides:

> *"(h) if they arrange with another person ("X") for X to carry out any element of the single end-to-end testing service on their behalf, the test provider ensures that X complies with the following so far as relevant to the carrying out of that element—*
>
> *(i) paragraph 1ZA(1)(b) to (e) and (h) as applied by paragraph (a) of this sub-paragraph;*
>
> *(ii) paragraph (c) to (g) of this sub-paragraph;*
>
> *(iii) **paragraph 2D(2) and (4)**." **[emphasis added]***

Paragraph 2D of Schedule 1C was revoked by regulation 13(5) of the Health Protection (Coronavirus, International Travel and Public Health Information to Travellers) (Wales) (Amendment) (No. 3) Regulations 2021.[3]

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument:

1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

We note the breach of the 21-day rule (i.e. the rule that 21 days should pass between the date a negative instrument is laid before the Senedd and the date the instrument comes into force), and the explanation for the breach provided by Eluned Morgan MS, Minister for Health and Social Services in a letter to the Llywydd dated 6 January 2022.

[3] S.I. 2021/1342

In particular, we note what the letter says regarding why these regulations breach the 21 day rule:

> *"In accordance with sections 4(1) and 11A(4) of the Statutory Instruments Act 1946 I am notifying you that this statutory instrument has not adhered to the 21 day convention, and that some provisions will come into force before the instrument can be laid. The changes to pre-departure testing, post-arrival testing and isolation requirements, and the consequential amendments to the Public Health Information Regulations, will come into force from 04:00 hours on Friday 7 January; further changes to post-arrival tests will come into force from 04:00 hours on Sunday 9 January and the addition of 16 countries to the list of recognised vaccination programmes will come into force from 04:00 hours on Monday 10 January...*
>
> *... Not adhering to the 21 day convention allows these Regulations to come into force at the earliest opportunity and continue the four nation approach to international travel; in view of the changing evidence on risk in relation to this disease this is considered necessary and justifiable in this case."*

2. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note the Welsh Government's justification for any potential interference with human rights. In particular, we note the following paragraph in the Explanatory Memorandum:

> *"The amendments contained in these Regulations do not change the engagement under the International Travel Regulations of individual rights under the Human Rights Act 1998 and the European Convention on Human Rights; the Government considers that they are justified for the purpose of preventing the spreading of infectious diseases and/or the interference is permitted on the basis that it is in pursuit of a legitimate aim, namely of protecting public health, and are proportionate."*

3. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues or public policy likely to be of interest to the Senedd.

We note that there has been no formal consultation on these Regulations. In particular, we note the following paragraph in the Explanatory Memorandum:

> *"Given the serious and imminent threat arising from coronavirus and the need for an urgent public health response, there has been no public consultation in relation to these Regulations."*

4. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues or public policy likely to be of interest to the Senedd.

The Committee note that no regulatory impact assessment has been prepared for these Regulations and the Explanatory Memorandum states:

"There has been no regulatory impact assessment in relation to these Regulations due to the need to put them in place urgently to deal with a serious and imminent threat to public health."

Welsh Government response

A Welsh Government response is required in relation to the technical reporting point.

Committee Consideration

The Committee considered the instrument at its meeting on 17 January 2022 and reports to the Senedd in line with the reporting points above.

Government Response: The Health Protection (Coronavirus, International Travel and Public Health Information to Travellers) (Wales) Miscellaneous (Amendments) Regulations 2022

Technical Scrutiny point:

The Committee's report on the Health Protection (Coronavirus, International Travel and Public Health Information to Travellers) (Wales) (Miscellaneous Amendments) Regulations 2022 identified a technical scrutiny point in relation to regulation 13(2). Regulation 13(2) inserted a new paragraph, 1ZCA, into Schedule 1C to the Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020 ("the 2020 Regulations") and this newly inserted paragraph contained a minor cross-referencing error. However, the 2020 Regulations, including paragraph 1ZCA of Schedule 1C, have now been revoked by the Health Protection (Coronavirus, International Travel) (Wales) Regulations 2022. As such, the error identified by the technical scrutiny point no longer has any effect.

SL(6)157 – The Food (Withdrawal of Recognition) (Miscellaneous Amendments and Transitional Provisions) (Wales) (EU Exit) Regulations 2022

Background and Purpose

These Regulations amend a number of statutory instruments in relation to food composition following the UK's withdrawal from the EU, in order to ensure compliance with the World Trade Organization's (WTO) Most Favoured Nation rules.

These Regulations remove mutual recognition clauses that allow certain food products that are lawfully marketed in EU Member States, the EEA or the Republic of Turkey to be sold in the UK, even though they may be non-compliant with legal requirements in the UK.

They also amend the Bread and Flour Regulations 1998 to provide exemptions, in relation to those regulations, for bread or unfortified flour produced in Wales that is to be exported to a third country, and for unfortified flour to be produced in Wales or imported into Wales, provided that it is only used in food that is to be exported to a third country.

The Regulations provide for a transitional adjustment period ending at the end of 30 September 2022, during which the removed exemptions will continue to apply.

Procedure

Negative

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

One point is identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Despite the removal of exemptions relating to certain foods brought into Wales from other parts of the United Kingdom, these Regulations will be subject to the overriding provisions

of the United Kingdom Internal Market Act 2020 ("UKIMA"), including the mutual recognition principle for goods. As the Explanatory Memorandum is silent as to the effects of the UKIMA on food composition in Wales, the Welsh Government is asked to explain whether it has considered the effects of the UKIMA and if the requirements of that Act could raise any issues in relation to this subject area.

Welsh Government response

A Welsh Government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 28 January 2022 and reports to the Senedd in line with the reporting point above.

Government Response: ***The Food (Withdrawal of Recognition) (Miscellaneous Amendments and Transitional Provisions) (Wales) (EU Exit) Regulations 2022***

Merits scrutiny point: The purpose of these Regulations is to remove exemptions for relevant food products that are lawfully marketed in EU Member States, the EEA or the Republic of Turkey. The exemptions are no longer appropriate following the withdrawal of the United Kingdom from the European Union.

The Welsh Government confirms that the application of the United Kingdom Internal Market Act 2020 was considered in the preparation of the Regulations. Removal of recognition for goods lawfully marketed in other parts of the United Kingdom ("UK recognition") was not part of the purpose of the Regulations. It was not necessary to preserve the effect of the existing express UK recognition provisions within the amended instruments (with any necessary modifications required to take account of the Protocol on Ireland/Northern Ireland) as the United Kingdom Internal Market Act 2020 will apply to continue UK recognition as of 1 October 2022 (when the transitional provisions cease to have effect).

Lynne Neagle AS/MS
Y Dirprwy Weinidog Iechyd Meddwl a Llesiant
Deputy Minister for Mental Health and Wellbeing

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/LN/3996/21

Russell George MS
Chair
Health and Social Care Committee

SeneddHealth@senedd.wales

Cc
Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitutional Committee
SeneddLJC@senedd.wales

18 February 2022

Dear Russell,

I am pleased to share with the Committee the finalised provisional Food Compositional Standards and Labelling Framework (the Framework), along with the related Concordat.

Food compositional standards and labelling: provisional common framework - GOV.UK (www.gov.uk)

This Framework establishes common expectations around key areas of cooperation in food compositional standards policies in the context of the UK's departure from the EU. All four UK administrations agreed to work together to establish common approaches, known as Common Frameworks, in policy areas that were previously governed by EU law, and which intersect with areas of devolved competence.

Officials in the Food Standards Agency in Wales, together with their counterparts across the UK, have been working jointly to develop this Framework to share with their respective scrutiny Committees for Parliamentary scrutiny.

Yours sincerely

Lynne Neagle AS/MS
Y Dirprwy Weinidog Iechyd Meddwl a Llesiant
Deputy Minister for Mental Health and Wellbeing

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Lynne.Neagle@llyw.cymru
Correspondence.Lynne.Neagle@gov.wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

HOUSE OF LORDS
Common Frameworks Scrutiny Committee

House of Lords
London
SW1A 0PW
Tel: 020 7219 8664
hlcommonframeworks@parliament.uk

4 March 2022

The Rt Hon George Eustice MP
Secretary of State for Environment, Food and Rural Affairs
Department for Environment Food & Rural Affairs
Seacole Building
2 Marsham St
London
SW1P 4DF

Dear George,

Thank you for your response to our letter of 15 February. It clarified many of the issues the Committee were concerned about. We are now writing to provide our final recommendations on the Agricultural Support framework.

Page 25 of the provisional framework states that the PCG would convene every three months, yet Annex B states the PCG will "normally meet every month". Your letter confirmed that the PCG meets monthly, but as the framework becomes more embedded, meetings might transition to taking place every 6-8 weeks.

We therefore recommend that the framework is updated to state that PCG meetings take place monthly, with an option for this to be less frequent as the framework becomes embedded, and that references to it taking place every three months are removed.

The Committee was not clear on who takes on the role of the secretariat for the PCG and MMG. On page 25 we read that "The MMG will be supported by a standing DEFRA secretariat and the PCG will be supported by a rotating secretariat". Yet in Annex B, we read that the PCG will be "supported by a standing DEFRA secretariat". You confirmed that "both the PCG and the MMG will be supported by a standing Defra Secretariat. The Chair of the PCG will rotate among senior officials from Defra and the devolved governments. It is intended that the Chair of the MMG will rotate but the devolved governments have agreed that, for the present time, Defra will chair".

We recommend that the framework is updated to clarify that the PCG and MMG will both be supported by a standing DEFRA Secretariat, and that the framework is updated to include arrangements about the chair of each of these groups.

The Committee was not clear on the relationship between the PCG and MMG. Your letter gave more information about this relationship, particularly on how the MMG advises the PCG. You also provided new information about the meetings of these groups being synchronised.

We recommend that the framework is updated to include the information you provided to us about the relationship between the PCG and MMG, including on how their monthly meetings are synchronised.

The Committee was not clear on reference in the framework to the UK Agriculture Market Policy Group (UKAMPG) in Annex C. No information was provided in the framework about this group. You clarified to us that the UKAMPG was the previous name for the PCG.

We recommend that the framework is updated to remove reference to the UK Agriculture Market Policy Group (UKAMPG).

The Committee was also not clear on a reference on page 22 to the PCG engaging with the proposed 'Farming Conference UK', another group which we could find no information about. You clarified that this refers to what has now become the UK Agriculture Partnership, but that references to specific stakeholder groups are unnecessary.

We recommend the framework is updated to remove reference to Farming Conference UK.

We were not clear on the difference between senior officials who sat on the PCG and SOPB. You told us that "broadly speaking, officials with policy responsibilities for agriculture and future farming attend the PCG while officials attending the Senior Officials Programme Board have responsibilities for the oversight of relationships across a wider range of devolved issues across the Efra portfolio."

We recommend that the framework provides this information on the membership of the PCG and SOPB.

We were concerned that the framework was unclear on how often reviews would take place. You clarified that reviews would be once a year, unless the reviews agreed a three year gap between reviews was appropriate.

We recommend the framework is updated to make it clear that reviews will happen every year until the reviewers agree that a three year period between reviews is satisfactory.

We are disappointed to note the absence in this framework of any commitments on ongoing engagement with Parliament. We note the absence of any commitments in the texts of these frameworks to publish reviews of the frameworks or to update legislatures on the outcomes of reviews. The Government has separately committed to improving transparency in Intergovernmental Relations. Transparency in this area should include regular statements to legislatures on the functioning of these frameworks.

We recommend that the framework should be updated to include a commitment to update the House of Lords, House of Commons and the three

devolved legislatures on the ongoing functioning of these frameworks after the conclusion of the scheduled reviews.

In our previous letter to you, we raised concerns about the impact the Subsidy Control Bill could have on the framework. While we appreciate your response that the Bill is intended to complement the framework, the Committee remain concerned that there is an incompatibility between the Bill and framework. Although you state in your letter that the Secretary of State can simply refer subsidies rather than override them, we remain concerned about what would happen if the CMA took a different decision to one reached through the framework. It appears there is still scope for any proposals made by devolved governments to be overruled. In your letter of 15 February, you state that subsidy schemes would only be referred to ensure compliance with international obligations. We must point out, however, that while the negotiation of international agreements is reserved, as according to the devolution settlements (the Scotland Act 1998,[1] the Northern Ireland Act 1998,[2] and the Government of Wales Act 2006[3]), the implementation of international agreements remains devolved. This suggests there is still a risk that any proposals made by the devolved administrations for areas covered by an international agreement, that they are responsible for implementing, could be undermined by such action. It is essential to the functioning and success of the Union that the powers of the devolved administrations are respected, and we are concerned that this issue could further destabilise the devolution settlements and impede positive cooperation within common frameworks.

We recommend that the Government carefully consider how the Subsidy Control Bill might contradict the aims of common frameworks and impede their successful operation. Decisions made through cooperation between the devolved powers via a common framework should take priority in areas where the Subsidy Control Bill is relevant.

We recommend that the framework is updated to include that reviews should analyse how the framework is interacting with the Subsidy Control Bill. This information should be presented at the regular updates to legislatures we have recommended.

The Committee were disappointed to see that the process for agreeing exclusions from the UK Internal Market Act 2020 was not contained in the framework. While we appreciate that in a recent letter to us you expressed the view that the UK Internal Market Act exclusions process does not need to be provided in the framework, we do not believe this stance is satisfactory. The UK Internal Market Act exclusions process must be set out in relevant frameworks as paragraph 2b of the exclusions process guidance states. Failure to do so jeopardises respecting the autonomy of the devolved administrations within their areas of competence. It should be clearly set out in relevant common frameworks as an essential process agreed for the wider Programme. We are writing to the devolved administrations to seek their views on this matter.

[1] Scotland Act 1998, Schedule 5 Scotland Act 1998 (legislation.gov.uk)

[2] Northern Ireland Act 1998, Section 27 Northern Ireland Act 1998 (legislation.gov.uk)

[3] Government of Wales Act 2006, Section 82 Government of Wales Act 2006 (legislation.gov.uk)

We recommend that the framework is updated to include text setting out the UK Internal Market Act exclusions process.

Yours sincerely,

Baroness Andrews
Chair of the Common Frameworks Scrutiny Committee

Lesley Griffiths AS/MS
Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd
Minister for Rural Affairs and North Wales, and Trefnydd

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/LG/0612/22

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee

Huw.irranca-davies@senedd.wales

3 March 2022

Dear Huw,

The Ivory Prohibitions (Civil Sanctions) Regulations 2022 and The Ivory Act 2018 (Commencement No. 2 and Transitional Provision) Regulations 2022

I am writing to make you aware I am giving consent to the Secretary of State for Environment, Food and Rural Affairs to lay The Ivory Prohibitions (Civil Sanctions) Regulations on 16 March 2022. These regulations will come into force on 6 June 2022.

Agreement was sought by Victoria Prentis MP, Minister for Farming, Fisheries and Food to make these regulations, which will apply to the United Kingdom.

The Ivory Prohibitions (Civil Sanctions) Regulations 2022 ("the Enforcement Regulations") makes detailed provision for the operation of the enforcement processes under the Ivory Act 2018 and will apply to the UK as a whole.

The Ivory Act (Commencement No.2 and Transitional Provision) Regulations 2022) accompanies the Enforcement Regulations. These regulations commence sections of the Act on 6 June, where the prohibition of ivory sales in the UK will commence.

It is normally the policy of the Welsh Government to legislate for Wales in matters of devolved competence. However, as the Welsh Government's position on ivory trade aligns with that of DEFRA and the other UK administrations, I am giving my consent to the proposed legislation which I believe will bring consistency to the introduction of an ivory sales prohibition in the UK.

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Lesley.Griffiths@llyw.cymru
Correspondence.Lesley.Griffiths@gov.wales

Without such consent, Wales would be left out of alignment with other UK administrations in its approach to ivory sale prohibition. This could reduce the positive impacts of banning ivory sales across the UK and maintain demand for products containing ivory, thus contributing to the persisting threat to global elephant populations, which are illegally poached for ivory.

I am copying this letter to the Climate Change, Environment, and Infrastructure Committee, and the Economy, Trade, and Rural Affairs Committee for their information.

Regards,

Lesley Griffiths AS/MS
Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd
Minister for Rural Affairs and North Wales, and Trefnydd

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee

Llyr Gruffydd MS
Chair
Climate Change, Environment and Infrastructure Committee

7 March 2022

Dear Chairs,

I am writing in accordance with the inter-institutional relations agreement to let you know that a virtual meeting of the Interministerial Group on Net Zero, Energy and Climate Change will take place on 9 March. I apologise for the short notice. The meeting was only confirmed today.

I will be representing the Welsh Government. The meeting will focus on the content of the forthcoming consultation on proposals to develop the UK Emissions Trading Scheme.

The UK ETS Authority will publish a joint communique after the consultation is published.

Yours sincerely,

Julie James

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Julie.James@llyw.cymru
Correspondence.Julie.James@gov.Wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**Meeting of the UK-EU Relations Interministerial Group, 17 February 2022**
DATE	**10 March 2022**
BY	**Vaughan Gething, Minister for Economy**

In accordance with the Inter-institutional Relations Agreement, I can report to Members that the first meeting of the UK-EU Relations Interministerial Group (IMG) took place on 17 February 2022. Following postponement of an earlier scheduled meeting that I was due to attend, this one was called at very short notice of around two hours and, as a result, I was not able to participate. This is not an acceptable way to conduct intergovernmental relations, and I expect to see much earlier and more meaningful engagement in relation to future meetings of this IMG.

The meeting was chaired by the Paymaster General, Michael Ellis MP, and attended by Neil Gray MSP, the Scottish Government's Minister for Culture, Europe and International Development; and Junior Minister Gary Middleton MLA from the Northern Ireland Executive. A senior Welsh Government official attended as an observer.

The meeting focused on the agenda for the Withdrawal Agreement Joint Committee which was due to take place on 21 February 2022.

No date has yet been agreed for the next meeting of the IMG.

Y Gwir Anrh/Rt Hon Mark Drakeford AS/MS
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair, Legislation, Justice and Constitution Committee

SeneddLJC@senedd.wales

10 March 2022

Dear Chair,

I am writing in response to your letter of 15 February 2022, in relation to the Trade and Cooperation Agreement.

I welcome the Committee's support for our position that Welsh Ministers should be able to contribute on issues that fall within devolved competence as active participants of the Partnership Council. The Committee will be aware that a new UK-EU Relations Interministerial Group has been established and the UK Government attempted to arrange a first meeting in February. You will, however, have seen the Written Statement published by the Minister for Economy on the regrettable circumstances around that meeting.

The arrangements will need to improve fundamentally in future – to reflect a more respectful approach to working with the devolved governments as agreed in the Intergovernmental Relations Review – if this IMG is to function as intended. If this can be achieved, the main role of this IMG will be to provide a forum for the four governments to discuss issues relating to meetings of the Partnership Council (and the Joint Committee on the Withdrawal Agreement), and I expect that we will use this forum to press further for the full and active opportunity to participate in the Partnership Council. On your specific point about maintaining the four nation approach set out by Lord Frost, we expect the UK Government to abide by its commitments in this regard, notwithstanding the Ministerial changes that have taken place, and we have seen nothing to indicate that the UK Government plans to resile from these commitments.

In relation to your points about the Welsh Government's involvement in the Specialised Committees, and the means by which the Senedd is kept updated, the Welsh Government is committed to continuing to provide information proactively on its intergovernmental meetings in line with the Inter-institutional Relations Agreement. I am happy to explore how we can provide more information about our involvement in these TCA structures on a proportionate and pragmatic basis, while respecting the confidentiality of discussions where

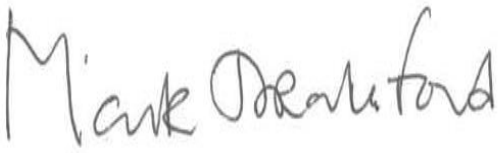
Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Mark.Drakeford@llyw.cymru
Correspondence.Mark.Drakeford@gov.wales

appropriate and the fact that it is only the agreed and published minutes which can provide the formal record of what other parties involved in the meeting said and what decisions were reached. Welsh Government officials will discuss this with counterparts in the Scottish Government, the Northern Ireland Civil Service and the UK Government; and I suggest that officials then meet with your Committee Clerk to update on those discussions.

On the Domestic Advisory Group, the UK Government has told us that officials have been briefing FCDO Ministers on their new EU-related portfolios. They hope to be able to let those bodies that submitted Expressions of Interest (EoIs) know the outcome of their applications in the near future. We do not know which bodies have submitted EoIs, because we understand from the UK Government that a number of EoI submissions did not give permission for their information to be shared outside the UK Government. I will write to the Committee again once more information is available about the Domestic Advisory Group. Less progress has been made regarding the membership of the Civil Society Forum, partly because the EU still has internal processes to complete before membership can be decided.

Yours sincerely,



MARK DRAKEFORD

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

—

Legislation, Justice and Constitution Committee

Senedd Cymru
Bae Caerdydd, Caerdydd, CF99 1SN
SeneddDCC@senedd.cymru
senedd.cymru/SeneddDCC
0300 200 6565

—

Welsh Parliament
Cardiff Bay, Cardiff, CF99 1SN
SeneddLJC@senedd.wales
senedd.wales/SeneddLJC
0300 200 6565

Rt Hon Mark Drakeford MS
First Minister

15 February 2022

Dear Mark

UK-EU Agreements: The Trade and Cooperation Agreement

Thank you for your response, dated 18 January, to my letter of 5 November 2021 in relation to the Trade and Cooperation Agreement (the TCA). We considered the letter at our meeting of 24 January.

We share your disappointment that the UK Government has not responded to the Minister for Economy's request, made in June 2021, for the Welsh Ministers to contribute on issues that fall within devolved competence as active participants of the Partnership Council. We look forward to learning the outcome of your discussions with the Foreign Secretary and ask that the Committee be informed as soon as possible. We would also welcome confirmation on whether the four-nations arrangements for both the TCA and Withdrawal Arrangement, communicated by Lord Frost in May 2021, will continue under the Foreign Secretary, and whether the Welsh Government has requested the arrangements are reviewed to better reflect its requests.

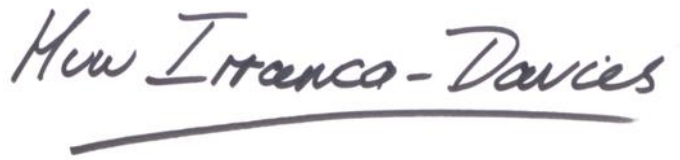
We welcome your commitment to continue to publish written ministerial statements following meetings of the Partnership Council. In our first letter, we also asked how the Welsh Government intends to keep the Senedd informed of its involvement in these meetings and the issues that are discussed. In response, you referred the Committee to the European Commission's website for the minutes of meetings.

We are disappointed by this response. It should not be incumbent upon Members of the Senedd to search records on the European Commission's website to be able to scrutinise the Welsh Government's role in these bodies. Whilst accepting that reporting on each individual meeting may not be proportionate, we ask that you reconsider your response to us, and consider a proportionate but more transparent mechanism for informing the Senedd of Welsh Government attendance at these meetings, the issues discussed and the points made by the Welsh Government in representing Welsh interests. There will be many meetings of these committees that are of considerable importance and interest to stakeholders in Wales and this information should be made readily available or easily accessible to both stakeholders and Members of the Senedd.

We are aware that parliamentary colleagues across the UK share our concerns about the lack of transparency surrounding the operation of TCA governance structures. It would be helpful if all four UK governments could collectively consider this issue and how it might be addressed.

Finally, we welcome the engagement between UK Government and Welsh Government officials in relation to the role of Welsh representation at the Civil Society Forum and the Domestic Advisory Group established under the TCA. We would be grateful to receive confirmation of how many Expressions of Interest were received from Wales as a result of the exercise and when the Welsh Government expects the outcome of the Expressions of Interest process and meeting information to be published.

Yours sincerely,



Huw Irranca-Davies
Chair

Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: RE-679-22

Huw Irranca-Davies MS
Chair, Legislation, Justice and Constitution Committee
Senedd Cymru
Cardiff Bay
CF99 1NA

11 March 2022

Dear Huw,

I am writing to inform you that the first meeting of the Finance Inter-ministerial Standing Committee (F:ISC) will take place on 21 March. This formalises the former Finance Ministers' Quadrilateral under the new Intergovernmental Relations Review arrangements.

The focus of the meeting will be on the forthcoming UK Government Spring Statement including a discussion on government responses to address the cost of living crisis.

I will lead an agenda item on Devolved Government budgeting and communications, which will focus on end of year funding certainty and the budgetary flexibilities required, as outlined in my letter to you of the 11 February 2022.

The agenda also includes an item on the UK Government's Levelling Up White paper and a short item on the establishment of the F:ISC including an Operating Protocol which will set out how it will operate on a practical basis.

I will report to the Committee on the outcome of the meeting.

Yours sincerely,

Rebecca Evans.

Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Correspondence.Rebecca.Evans@gov.wales
Gohebiaeth.Rebecca.Evans@llyw.cymru

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Eluned Morgan AS/MS
Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Llywodraeth Cymru
Welsh Government

Russell George MS
Chair, Health and Social Care Committee

SeneddHealth@senedd.wales

18 February 2022

Dear Russell

Thank you for the Health and Social Care Committee's report laid on 15 February on the Supplementary Legislative Consent Memoranda (Memoranda No. 2 and No. 3) (the SLCMs) on the Health and Care Bill (the Bill).

I note the Committee's comments on the Bill and the SLCMs laid on 17 December 2021 and 28 January 2022 respectively and welcome the Committee's confirmation that it has no objection to the Senedd giving its consent to the inclusion in the Bill of:

- Clauses 122–125 and amendments 231H, 231J, 231L, 313ZA, 313ZB, 313ZE, 313ZJ, 313ZK and 313ZM (Virginity testing and Hymenoplasty);
- Clause 143 (Medical Examiners);
- Amendments 312B, 312C, 312D, 313C and 314ZB (Mandatory Reporting);
- Clauses 88-94 and amendments 231C, 227A, 231A and 231B (Arm's Length Bodies (Transfer of Functions))

Please find my responses to your specific recommendations below.

Recommendation 1 – Clause 135 (Reimbursement to Community Pharmacies)
Before the Senedd is asked whether or not to give its consent to clause 135 (reimbursement to community pharmacies), the Minister for Health and Social Services should provide assurances that: these powers can and will only be used in circumstances where a pandemic or public health emergency has been declared; and that the use of such powers will be accompanied by appropriate and adequate remuneration and reimbursement for pharmacy contractors.

Response
These powers can be used in circumstances other than a pandemic or public health emergency, for example in relation to drugs and medicines where the Welsh Ministers consider a disease to be at risk of becoming a pandemic disease or which are used for vaccinating or immunising people against disease in general.

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Eluned.Morgan@llyw.cymru
Correspondence.Eluned.Morgan@gov.wales

However, the Committee can be reassured clause 135 does not in any way change the existing arrangements for pharmacies to receive remuneration for services provided. The clause relates only to reimbursement of costs incurred by pharmacies in procuring medicinal products for use in vaccination and immunisation. In the situation to which the clause relates pharmacies will have incurred no costs in procuring the medicinal products and as such it would inappropriate for them to be reimbursed costs.

I would further reassure the Committee that there is no intention to circumvent or undermine existing supply chain arrangements. Whilst these powers will primarily be used during a pandemic or public health emergency it would not be appropriate to close down the opportunity to use them in other limited circumstances.

In the last two influenza seasons the Welsh Government in partnership with other UK Governments, has secured additional supply of influenza vaccinations. This approach recognises that in some circumstances governments need to share procurement risks with independent contractors such as pharmacies and GPs. Had these additional supplies not been purchased by the Welsh Government, fewer people would have been vaccinated because orders placed by pharmacies and GPs were insufficient to meet demand. In the absence of these powers it was necessary for the additional stock to be sold into existing supply chain and for pharmacies to purchase them at their own financial risk. The powers contained in clause 135 could therefore be used to reduce financial risk for pharmacies and increase vaccination coverage in any influenza season.

Recommendation 2 - Clause 87: Medicines Information Systems
The Minister for Health and Social Services should set out the anticipated timescales for the development and agreement of the Memorandum of Understanding relating to medicine information systems, and should provide assurance that the MoU will be in place before the provisions come into force.

Response
The Memorandum of Understanding in relation to Medicines Information Systems is being progressed. The UK Government has stated that it will do its best to have the Memorandum in place before the provisions come into effect, but at the very latest in advance of drafting of regulations.

Recommendation 3. - Consequential Amendments (clauses 91, 144 and 149)
Before the Senedd is asked to decide whether to give its consent to the inclusion in the Bill of clauses 91, 144 and 149, the Minister for Health and Social Services should confirm that the UK Minister for Health has made the agreed statement in the House of Commons chamber.

Response
I can confirm that Edward Argar MP, the Minister of State for Health has, through Lord Kamall, made the Despatch Box Statement in relation to clauses 91 and 149, on how these powers might be used. The Statement was made in the House of Lords on 9 February. The Committee will wish to note that as stated in the LCM I laid on 1 September, the UK Government has not identified clause 144 as requiring the legislative consent of the Senedd and as such was not therefore included in the Despatch Box Statement.

Finally I note in relation to Medical Examiners, the Committee has concerns about the increasing use of LCMs as a mechanism for legislating on matters that are devolved to Wales (paragraph 30 refers). I would like to clarify that in relation to the particular case of clause 143 (Medical Examiners) it would not be possible to for the Senedd to make equivalent provision for Wales in this area as the subject matter of Part 1 of the Coroners and Justice Act 2009 ("the 2009 Act"), where this provision will be inserted, is reserved by paragraph 167 of Schedule 7A to the Government of Wales Act 2006. Therefore, the Senedd could not legislate to insert equivalent provision to the new section 18B into the 2009 Act.

I trust this response will be helpful to the Committee in its consideration of the Legislative Consent Memoranda on the Bill.

I am copying this letter to Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee.

Yours sincerely

Eluned Morgan AS/MS
Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Jeremy Miles AS/MS
Gweinidog y Gymraeg ac Addysg
Minister for Education and Welsh Language

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS Chair,
Legislation, Justice and Constitution Committee
Senedd Cymru
SeneddLJC@senedd.wales

8 March 2022

Dear Huw,

I am writing to inform you that on 22 February the UK Government tabled two amendments to the Professional Qualifications Bill.

The UK Government intends to hold House of Commons Report Stage imminently. This unfortunately leaves no opportunity for the Senedd to consider the amendments before Report Stage is completed. This also means the UK Government are proceeding with the Bill without securing legislative consent from the Senedd, or indeed any of the Devolved Governments. This is wholly unacceptable and is a breach of the Sewel convention. Although the 'carve out' amendment is welcome, the tabled amendments do not fully address my concerns.

The amendments will require a further Supplementary Legislative Consent Memorandum (Memorandum No 3) to be laid before the Senedd. I will write to you again to set out my position on the amendments, which are attached below.

Yours sincerely,

Jeremy Miles AS/MS
Gweinidog y Gymraeg ac Addysg
Minister for Education and Welsh Language

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Jeremy.Miles@llyw.cymru
Correspondence.Jeremy.Miles@gov.wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Sub-clause 16 (7)

(7) In Schedule 7B to the Government of Wales Act 2006 (general restrictions on legislative competence of Senedd Cymru) in paragraph 11(6)(b) (exceptions to restrictions relating to Ministers of the Crown)—

(a) omit the "or" at the end of paragraph (vi), and

(b) after paragraph (vii) insert "; or

(viii) the Professional Qualifications Act 2022".

New Clause

"Consultation with devolved authorities

(1) Before making regulations under this Act, the Secretary of State or the Lord Chancellor must consult—

(a) the Welsh Ministers, to the extent that the regulations contain provision which could also be made by the Welsh Ministers by virtue of section 16(2) (ignoring any requirement for the consent of a Minister of the Crown under section 16(5));

(b) the Scottish Ministers, to the extent that the regulations contain provision which could also be made by the Scottish Ministers by virtue of section 16(3);

(c) a Northern Ireland department, to the extent that the regulations contain provision which could also be made by a Northern Ireland department by virtue of section 16(4).

(2) The Northern Ireland department which is to be consulted in accordance with subsection (1)(c) is such Northern Ireland department as the Secretary of State or (as the case may be) the Lord Chancellor considers appropriate having regard to the provision which is to be contained in the regulations concerned.

(3) Before making regulations under this Act in relation to which the Secretary of State or the Lord Chancellor has consulted a devolved authority (or more than one devolved authority) in accordance with subsection (1), the Secretary of State or (as the case may be) the Lord Chancellor must publish a report on the consultation.

(4) But the Secretary of State or (as the case may be) the Lord Chancellor may not publish the report unless either—

(a) the devolved authority concerned (or, if more than one, each of them) has agreed to the description included in the report for the purposes of subsection (5)(a), or

(b) there is no such agreement but the period of 30 days, beginning with the day on which a draft of the report was first sent to the devolved authority concerned (or, if more than one, the last of them), has expired.

(5) The report on the consultation must include—

(a) a description of—

(i) the process undertaken in order to comply with subsection (1), and

(ii) any agreement, objection or other views expressed as part of that process by the devolved authority (or devolved authorities) concerned, and

(b) an explanation of whether and how such views have been taken into account in the regulations (including, in a case where the Secretary of State or (as the case may be) the Lord Chancellor proposes to make the

regulations despite an objection, an explanation of the reasons for doing so).

(6) The duty to consult in subsection (1) does not apply in relation to any revision of the regulations which arises from the consultation; and, for the purposes of subsection (4)(b), the draft report need not be identical to the published report for the period of 30 days to begin.

(7) In this section “devolved authority” means the Scottish Ministers, the Welsh Ministers or a Northern Ireland department.”

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**Welsh Government Response to UK Government Consultation**
DATE	**08 March 2022**
BY	**Jane Hutt MS, Minister for Social Justice & Mick Antoniw MS, Counsel General and Minister for the Constitution**

In December 2021, the UK Government launched a 12 week consultation on proposals to replace the Human Rights Act 1998 with a Bill of Rights. The Welsh Government submitted a formal response https://gov.wales/human-rights-act-reform-modern-bill-rights before the consultation closed on 8 March.

A previous statement outlined our initial concerns about the main proposal, to replace the Human Rights Act 1998 with a "Bill of Rights", as well as many other elements in the consultation document. Subsequent detailed study of the consultation document, combined with extensive engagement with Welsh stakeholders and the other Devolved Governments of the UK has only strengthened these concerns, which are set out in detail in our response.

We also met the Deputy Prime Minister, Dominic Rabb MP, on 10 February, but were in no way reassured. We are co-signatories with Scottish Ministers to a letter sent to Mr Raab on 2 March, which highlights our main shared objections to his proposals.

It has never been more important that the United Kingdom as a whole is seen to be defending universal human rights, both in this country and around the world. The UK should be standing up for human rights at a time when they are increasingly being threatened elsewhere, including by Russia in Ukraine. Instead the UK Government has brought forward proposals which, if carried into law, would weaken the rights of all UK citizens, reduce access to justice and target the most vulnerable people in our society, including disabled people and those in poverty. The proposals also seek to distinguish between "deserving" and "undeserving" people or cases, which strikes at the heart of the principle that human rights should apply equally to everyone.

In our response, as well as setting out these points in detail, we have set out wider concerns about these proposals; we have highlighted how human rights in general and the Human Rights Act and European Convention on Human Rights (ECHR) in

particular have been at the heart of devolution in Wales. Successive Welsh governments have viewed Convention rights as a fundamental cornerstone of devolution. Changing the Human Rights Act 1998 goes to the very heart of the devolution settlement. A space where democratic devolution and human rights have been intertwined for two decades.

The Welsh Government continues to embrace, celebrate and build upon the Convention rights and protections bestowed on each and every person in Wales. This is reflected in our legislation, such as the Well-Being of Future Generations (Wales) Act 2015; the Social Services and Well-being (Wales) Act 2014; and The Rights of Children and Young Persons (Wales) Measure 2011. Furthermore, a wide range of policies and programmes building on these legislative foundations. For example:

- Our Race Equality Action Plan (REAP) – An Anti-Racist Wales is built on the values of anti-racism, and calls for zero tolerance of racism in all its guises.
- Locked Out: Liberating disabled people's lives and rights in Wales beyond COVID-19, builds on our existing Framework for Action on Disability and highlights the impact of the pandemic on disabled people.
- The Access to Elected Office Fund reflects our commitment to increasing diversity across all aspects of public life.
- Wales has a vision to be a Nation of Sanctuary. The Welsh Government is committed to doing all we can to provide a warm welcome to refugees and asylum seekers, strongly supported by all Welsh local authorities.
- The EU Citizens Advice Service has been extended to March 2022.
- Our Community Cohesion Programme has participation in Afghan resettlement and asylum dispersal in recent months.
- The Violence against Women, Domestic Abuse & Sexual Violence (VAWDASV) Strategy aims to make Wales the safest place in Europe to be a woman.

The UK Government's proposals almost entirely overlook the potential impact on this constitutional, legal and policy framework. It is wholly unacceptable that the consultation contains very little on devolution in general, and Wales in particular.

We are calling on the UK Government to change direction while it is still possible to do so, by abandoning the current proposals and by re-committing not just to the retention of the existing Human Rights Act but to guaranteeing full compliance by the United Kingdom with the obligations which it has undertaken to fulfil as a State Party to the European Convention on Human Rights and as a member of the Council of Europe.

Department for Business, Energy & Industrial Strategy

Rt Hon Kwasi Kwarteng MP
Secretary of State
Department for Business, Energy & Industrial Strategy
1 Victoria Street
London
SW1H 0ET

T +44 (0) 20 7215 5000
E enquiries@beis.gov.uk
W www.gov.uk

Huw Irranca-Davies
Chair of the Legislation, Justice and Constitution Committee
Cardiff Bay
Cardiff
CF99 1SN

09 March 2022

Dear Huw

Thank you for your letter of 16 December and for drawing my attention to the second recommendation in the report on the Welsh Government's Legislative Consent Memorandum on the Subsidy Control Bill.

I agree with the recommendation to publish draft regulations and guidance. That is why on 25 January we published some illustrative versions of these: https://www.gov.uk/government/publications/subsidy-control-bill-2021-illustrative-regulations-guidance-and-streamlined-routes.

BEIS ministers and officials will continue their engagement with ministers and officials in your Government as well as the other Devolved Administrations throughout the Bill's passage through Parliament and beyond.

Yours sincerely,

RT HON KWASI KWARTENG MP
Secretary of State for Business, Energy and Industrial Strategy

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
—
Legislation, Justice and Constitution Committee

Senedd Cymru
Bae Caerdydd, Caerdydd, CF99 1SN
SeneddDCC@senedd.cymru
senedd.cymru/SeneddDCC
0300 200 6565
—
Welsh Parliament
Cardiff Bay, Cardiff, CF99 1SN
SeneddLJC@senedd.wales
senedd.wales/SeneddLJC
0300 200 6565

The Rt Hon Kwasi Kwarteng MP
Secretary of State for Business, Energy and Industrial Strategy

17 December 2021

Dear Kwasi

Report on the Welsh Government's Legislative Consent Memorandum on the Subsidy Control Bill

The Senedd's Legislation, Justice and Constitution Committee has been considering the Welsh Government's Legislative Consent Memorandum on the Subsidy Control Bill.

We published our report on the Memorandum earlier this month and would like to take this opportunity to draw your attention to the second recommendation:

> *The UK Government should publish draft regulations and guidance for both UK Parliamentarians and Members of the Senedd to consider the details of the subsidy control regime and to better understand the potential impacts of the Bill.*

We would be grateful for your views on this recommendation and look forward to hearing from you in due course.

I am copying this letter to William Wragg MP, Chair of the House of Commons Public Administration and Constitutional Affairs Committee, The Rt. Hon the Baroness Taylor of Bolton, Chair of the House

of Lords Constitution Committee and The Rt. Hon the Lord Blencathra, Chair of the House of Lords Delegated Powers and Regulatory Reform Committee.

Yours sincerely,

Huw Irranca-Davies
Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.
We welcome correspondence in Welsh or English.

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE **Update on Border Control Posts**

DATE **10 March 2022**

BY **Vaughan Gething MS, Minister for Economy**

Leaving the EU has brought additional pressures to our ports, including the requirement for new infrastructure. I have previously confirmed our commitment to establish permanent and interim arrangements for Holyhead.

Today I am confirming a further step in this process with the appointment of Kier as the contractor for the design of the proposed Border Control Post facility to be situated at plot 9, Parc Cybi. During the design stage of the contract Kier will work with the Welsh Government to produce detailed designs for the facility, which will then allow the cost and timetable to be confirmed.

Construction work on the proposed site will not start until the build stage of the contract is agreed, expected in the summer, and the site will continue to be used as a HGV parking facility until that time. This stage is also subject to the granting of planning permission via a Special Development Order with a decision expected in May. I expect that the BCP will be operational by April 2023.

Turning to Southwest Wales where I previously announced that our preferred location for a BCP to serve both Pembroke Dock and Fishguard, was a site at Johnston. I can confirm now that we have terminated our negotiations for that particular site, following surveys which have revealed a large number of bat species. In addition, the consolidation of border controls facilities onto one plot is no longer a pre-requisite. This expands the range of potential options for the South-west Wales permanent border control post, which may allow provision closer to the two ports, or an alternative site in the Johnston locality or elsewhere.

I have always been clear in my commitment to deliver permanent and interim arrangements at Holyhead. Signing off a build contract was a major part of this commitment, which we have now done. In parallel with this work is the development

of interim arrangements for each of the three ports planned to take effect from 1 July: another priority for us, which will ensure we maintain the flow of imports from the Island of Ireland whilst protecting biosecurity and food safety.

We continue to develop these plans with input from the local authorities, relevant enforcement agencies (including the Animal and Plant Health Agency (APHA)), as well as the ports. We are working through details and practical arrangements for these sites, with all three Welsh ferry ports confirming there is scope for a temporary structure on the port to accommodate checks for some commodities.

Recent extension to staged controls for all movements of goods from the island of Ireland to Great Britain beyond 1 January 2022 continue to raise uncertainty for those that have to make preparations, a point I continue to make to UK Ministers.

My Written Statement on 19 January confirmed that I would consider the permanent BCP arrangements for Pembrokeshire after July and this has not changed. I am not ruling out any options at this stage – including alternative sites at Johnston. The provision of interim arrangements allows more time to consider all the options whilst monitoring changes in trade flows.

Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/RE/4055/21

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru
Cardiff Bay
CF99 1SN

11 March 2022

WELSH TAX ACTS etc. (POWER TO MODIFY) BILL

Dear Huw

Thank you for your recent letter following the Legislation, Justice and Constitution Committee's evidence session on 14 February 2022 in relation to the Welsh Tax Acts etc. (Power to Modify) Bill ("the Bill"). Please see my response to your questions set out below.

I also committed at the evidence session to provide further information in relation to the Welsh Government's intention to exercise the power in the Bill in order to make provision that has retrospective effect. Annex 1 sets out a number of examples of the types of situations where the UK government has introduced legislative changes with retrospective effect. I consider these to be illustrative of the way that the Welsh Ministers will seek to exercise the power should the Senedd approve this Bill.

1. Provisional Collection of Taxes Act 1968

Your 2020 consultation paper highlighted the Provisional Collection of Taxes Act 1968, noting that it enables proposals for tax changes and tax continuations to have immediate provisional legal effect pending the necessary primary legislation receiving Royal Assent. The paper also added that there is no equivalent provision to the 1968 Act in Welsh law. What thought did you give to proposing an equivalent 1968 Act and why did you discount it?

1. The Provisional Collection of Taxes Act 1968 ('PCTA') permits, through resolutions, the tax rates to be changed and imposed (such as the annual re-imposition of income tax). It can also permit significant changes to the rules relating to existing taxes to be made and commenced from a date before the legislation is introduced and approved by the UK Parliament.

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Correspondence.Rebecca.Evans@gov.wales
Gohebiaeth.Rebecca.Evans@llyw.cymru

2. The changes given temporary effect by the PCTA resolution must be included in a Bill that has been read by the House of Commons for the second time within 30 days of the resolution or the resolution will cease to have effect. PCTA resolutions are most commonly encountered during the annual (or otherwise) UK Budgets. However, they have also been made outside those events where a change is announced that requires a resolution to bring those changes into temporary effect followed by a 'special purpose' Bill (as opposed to a Finance Bill) introduced to give permanent effect (subject to UK Parliament approval). Examples of such special purpose Bills include what became the Stamp Duty Land Tax Act 2015 and the Stamp Duty Land Tax (Temporary Relief) Act 2020.

3. The PCTA and its resolutions are most closely associated with the annual Finance Bill cycle. However, I do not consider the timing is right to introduce an annual tax or Finance Bill cycle here in Wales and it therefore follows that it is not currently appropriate to introduce a mechanism which would undertake functions similar to the PCTA.

4. Furthermore, I consider that even if there were an annual Finance Bill and accompanying PCTA mechanism here, we would still need the power provided in the Welsh Tax Acts etc. (Power to Modify) Bill. The Bill enables Welsh Ministers to respond to external events, which will not necessarily coincide with a Welsh Government Finance Bill cycle. For example, the UK Budget, at which changes may occur, is not on a fixed cycle and sometimes occurs more than once in a year (for example following a change of government at a general election or following a one off statement by the Chancellor). We may therefore find ourselves occasionally needing more than one Finance Bill each year in order to replicate any necessary changes to respond to UK Budget changes.

5. The Bill will also enable the Welsh Government to be far more responsive to wider changes (such as court decisions and avoidance activity) than is the case with the UK government where changes are often made only through a Finance Bill, and only effective from the date of the PCTA resolution, or Royal Assent.

6. The Bill will enable us to make changes as close to the date they should apply from as possible, and for those changes to be made in law. This differs from the UK approach where changes to respond to avoidance activity are sometimes made by announcement with legislation to be passed as part of a subsequent Finance Act, meaning there can be many months before the changes that must be applied become law. Or, alternatively the avoidance activity may be permitted to continue until the date of the Budget and the passing of a Provisional Collection of Taxes Act resolution.

7. Until the time is right for Wales to have an annual Finance Bill I do not consider a Welsh Provisional Collection of Taxes Act type mechanism is appropriate – and even when this point is reached, I still consider there will be an ongoing need for this Bill.

2. Scrutiny

In relation to timescales for scrutiny of regulations that would be made under the powers in this Bill, you explained to the Finance Committee that the Welsh Ministers will propose a timescale for either procedure before the vote that includes the "length of time needed to provide suitable scrutiny" (see Finance Committee, RoP [228], 22 December 2021). Isn't the approach here therefore effectively the Welsh Government deciding the level of scrutiny it wishes to be subjected to, potentially when making significant changes to legislation previously passed by the Senedd?

8. For all Welsh regulations, whether they are subject to the draft affirmative or made affirmative procedure, the date on which the vote occurs in the Senedd is proposed by

the Welsh Government. The proposed date for the vote on regulations made using the power in the Welsh Tax Acts etc. (Power to Modify) Bill would be no different.

9. For regulations made using the draft affirmative procedure, that period is whichever is the soonest of 20 Senedd days or the relevant committee reporting. Standing Orders do permit a longer time period than 20 days between laying and the debate where Welsh Ministers feel this to be appropriate.

10. Made affirmative regulations made using powers within the Bill must be approved by the Senedd before 60 days have elapsed. The Welsh Government will recommend a date for the vote that reflects the complexity of the legislation. That may be close to the 60 day limit, or it may be a shorter period where, for example, a very minor change is necessitated to the legislation.

11. It is also, of course, open to the Business Committee to propose alternative dates for the debates when it considers that more, or less, time is required for scrutiny before the vote. The respective 60 and 20 Senedd day requirements provide a flexible mechanism so that we, Ministers and the Senedd, can consider, on a case–by-case basis, what time is appropriate for scrutiny, reflecting the complexity of the regulations and the impact on taxpayers.

12. My intention is not to reduce the period of scrutiny, but rather to emphasise that I am looking to provide longer than, necessarily, the minimum period permitted by Standing Orders, and future Ministers will be advised to follow the same approach.

3. Senedd Lock

Professor Emyr Lewis referred to the Welsh Government's decision to abandon the Senedd lock as the removal of a significant safeguard against potential abuse of broad power. What is your response to that view and, if you disagree, how would you argue differently?
In Plenary on 14 December, you referred to the concept of a Senedd lock potentially setting an "unhelpful precedent" for future made-affirmative powers. It could be argued the reverse is true, and that this Bill sets an unhelpful precedent for the Welsh Ministers proposing to take regulation-making powers in areas that should remain the responsibility of the Senedd. How do you respond to such an argument?

13. I do not agree that the decision to abandon the Senedd lock amounts to the removal of a significant safeguard against potential abuse of the power provided in the Bill. Rather, the scope of the Bill has narrowed considerably from that initially proposed in the policy consultation and therefore, in my view, the justification for the Senedd lock has, accordingly, reduced. The Welsh Tax Acts already contain a significant number of regulation making powers (largely subject to the draft affirmative procedure) which indicates that the Senedd, in scrutinising and passing those Acts, has recognised the importance for the Welsh Ministers to have powers to make such changes. However, I recognise there is greater caution with regard to the provision of a power which may be subject to the made affirmative procedure in urgent circumstances.

14. I have responded to concerns raised by consultees on the broad and open-ended nature of the original proposals for the power, where any changes could be made that the Welsh Ministers considered to be expedient in the public interest. The Bill has been drafted specifically to limit the circumstances in which the power can be used. The introduction of the four purpose tests significantly constrains the use of the power, which can only be used to respond to the specified external events and – for the draft affirmative procedure - only when Welsh Ministers consider it necessary or appropriate in relation to the four purpose tests. The made affirmative procedure is further

constrained and may only be used when considered necessary and in cases of urgency. As such, I consider there are robust and proportionate safeguarding measures in place.

15. I would argue the Senedd has already set a precedent in relation to the made affirmative procedure, by giving the Welsh Ministers powers to make changes to the rates (and where appropriate) the bands that apply to the devolved taxes by made affirmative procedure regulations, without the need for a Senedd lock. The precedent for changes that potentially affect all taxpayers with immediate effect, exercised by made affirmative procedure regulations, has already been provided by the Senedd. The exercise of that power also includes similar protections for taxpayers to those that have been provided by section 5 of the Bill.

16. The Committee should also note that the vote to unlock the power would not present the Senedd with additional opportunity to scrutinise the regulations at that stage. Furthermore, the Committee should note there are also practical issues in relation to how the Senedd lock would operate. For example, the Senedd may need to be recalled during recess to unlock the power. If this were not possible, there would be an inevitable delay in bringing forward the legislation, thereby defeating the purpose of the Bill to make rapid changes to the law. In addition, the disclosure of the vote for the 'release' of the lock, and any information provided to Members before the regulations are made could create an opportunity for forestalling - that is taxpayers may delay or bring forward the timing of a property transaction, or other action for other devolved taxes, to benefit from pre-announced tax changes.

4. Broad use of regulation-making powers

In his written evidence to the Finance Committee, Sir Paul Silk highlighted:

- *two recent reports from House of Lords Committees (Democracy Denied? The urgent need to rebalance power between Parliament and the Executive and Government by Diktat: A call to return power to Parliament) expressing concerns regard the appropriateness of using secondary legislation for significant policy implementation;*
- *the Hansard Society's review of Delegated Legislation and their broad concerns about the balance between what should be in primary and secondary legislation, the potential use of secondary legislation in unexpected ways which the legislature may not have appreciated when granting the enabling powers, the undesirability of Henry VIII powers, the comparatively limited scrutiny of secondary legislation compared to primary legislation and the inability of the legislature to amend secondary legislation.*

What consideration has the Minister given to the views expressed in these reports, and the concerns of the Hansard Society, and what reflections do you have on them in the context of the proposals in this Bill?

17. I recognise that the inclusion of a regulation-making power to amend primary legislation will, and rightly should, raise questions amongst Members and wider stakeholders. I agree that in circumstances where law is made as a result of considered policy development, and not required urgently or in response to external events, it is right that the Senedd should determine who is taxed, in accordance with the constitutional principles set out in the Government of Wales Act 2006. That is the procedure that was followed in bringing the Welsh Tax Acts into force.

18. However, the power within the Bill is not intended to cover the ordinary circumstances of law making. It is intended to afford timely protection to Welsh taxpayers and the Welsh Government's budget, by allowing the Welsh Ministers to make amendments to Senedd legislation for specific purposes and in specific circumstances, subject all the while to Senedd scrutiny. It is important to remember that any tax law made by the Welsh Ministers will require the approval of the Senedd. Although the law will be made by the Welsh Ministers for reasons of necessity, appropriateness, and/or urgency, the Senedd

will have the ultimate sanction over those regulations and the taxpayers are protected in the event that the regulations fail to gain approval by the Senedd.

19. I think the need for this legislation and the current vulnerability to Welsh devolved tax revenues is recognised. Furthermore, this principle has also been accepted by key stakeholders.

20. There are several measures in place which aim to improve the degree of scrutiny, which I hope should help to allay Senedd concern. The regulations must be made either using the draft or made affirmative procedure, ensuring that all the regulations are voted upon by the Senedd – there is no ability to make regulations using this power that are subject to the negative procedure process. As set out in question 2, the Bill also aims to provide appropriate time for detailed scrutiny of the regulations that reflects the complexity of the regulations and the impact on taxpayers.

21. Importantly, the power has also been constrained by the inclusion of four purpose tests to ensure it can only be used in those specified circumstances to respond to external events and activity and only where considered “necessary” or “appropriate”.

22. Also, in contrast to primary legislation, it is possible to challenge the validity of secondary legislation by judicial review, providing an additional safeguard outside the scope of the Bill.

5. Regulation-making powers – procedure

Sir Paul Silk has commented that the made-affirmative approval procedure is “very unusual … historically”. In developing the Bill, did the Minister consider whether regulations relying on any of the four purposes set out in the Bill could or should be excluded from the made-affirmative approval procedure, particularly in circumstances where such regulations have retrospective effect? If not, why not?

23. I do not consider that any of the four purpose tests should be excluded from the made affirmative procedure or be prevented from having retrospective effect The purpose tests have been specifically developed to capture scenarios where Welsh Ministers may need to respond to external circumstances and at pace.

24. Taking each of the purpose tests into consideration:

25. In response to changes to ‘predecessor’ UK taxes (that is, stamp duty land tax or landfill tax) which impact or could impact the amount paid into the Welsh Consolidated Fund – it is clear that we need the ability to respond at pace to such changes and therefore the made affirmative process will, in some circumstances, be appropriate.

26. Similarly, in the case of protecting against avoidance activity in relation to landfill disposals tax and land transaction tax, having the ability to use the made affirmative procedure means that the change can be made with immediate effect. This includes cases where increased clarity in the legislation will put beyond doubt the intended application of the legislative provisions, and potentially benefit taxpayers by stopping the promotion of avoidance opportunities that do not actually exist. Such action has been taken by the UK government to protect tax regimes and taxpayers in the past and I wish to be able to take similar action.

27. For non-compliance with any international obligations it is right that we are prepared for changes to be made - and if such a non-compliance were identified then Welsh Ministers may feel it necessary to introduce a change at pace using the made affirmative

procedure and with retrospective effect. Failure to comply could have reputational risks for the Welsh Government and reflect on Wales more generally, impacting on potential inward investment. Failure may also oblige some taxpayers to file their returns in a manner that is contrary to the international obligations, necessitating amendments at a later date when compliance with the international obligation is reflected in our law (assuming the change is made with retrospective effect).

28. Similarly, where a court or tribunal decision identifies an issue that Welsh Ministers consider could benefit from legislative change, or highlights an area of existing law which could benefit from greater clarification, then it may be necessary for Welsh Ministers to introduce such a change urgently.

29. This Bill seeks to find the appropriate legislative solution for the current situation on our devolution journey. The relationship between the revenues available to the Welsh Government from our devolved taxes and the effect on our Budget of the UK government's changes to the predecessor taxes is particularly illustrative. That relationship has only recently arisen. It is worth remembering that devolution itself is a relatively recent constitutional change, with our devolved taxes only commencing operation four years ago (and in Scotland only seven years ago).

6. Regulation-making powers – changing existing law

In evidence to the Finance Committee, you referred to section 109 of the Finance Act 2003, which provides HM Treasury with powers to make immediate, but temporary changes to Stamp Duty Land Tax (SDLT). However, as you also explained, those powers are subject to a sunset provision which limits their effect for up to a maximum of 18 months. Did you consider including similar sunset provisions applying to regulations made under the power proposed in section 1 of this Bill? If so, why was that approach discounted?

30. I am not convinced that a legislative sunset provision would work in practical terms within the Welsh legislative context. For example, if a sunset clause ending after five years was placed within this Bill, then after that point any regulations made using the enabling power within the Bill would fall away. Such sunset clauses in relation to individual sets of regulations may create uncertainty as that date approaches as to whether the legislation would remain in force or not.

31. There is also a possibility that the removal of the changes introduced by the regulations may lead (due to further changes) to other consequential changes being required so that the legislation continues to operate in a coherent manner.

32. The sunset clause proposal stems from the rules in section 109 Finance Act 2003 that enables changes to be made to most of the SDLT legislation where the Treasury Ministers consider it to be expedient in the public interest. The sunset provisions within the regulations are triggered 18 months after the regulations are made or such shorter period as may be specified in the regulations. The purpose of the sunset provisions is to provide the Treasury Ministers with the opportunity to incorporate the changes made by those regulations into a subsequent Finance Bill. The UK government generally has a Finance Bill annually enabling this to be achieved.

33. We do not currently have an annual Finance Bill in Wales and therefore have no guaranteed legislative vehicle to 'mop up' such sunset provisions and allow them to continue as law. This is why I do not feel such clauses are appropriate at the present time.

34. Furthermore, there is a concern that sunset provisions create uncertainty for taxpayers and their advisers as to whether the legislation subject to the sunset provisions will be permitted to continue after the sunset date passes, or will fall. This was discussed at my second appearance at the Finance Committee[1].

35. It is accepted that all legislation can be changed by further legislation being passed and, within reason, this can happen at any time. However, I would argue that a sunset provision creates greater uncertainty because of the requirement, to legislate to *maintain* the existing effect of that legislation, and to avoid unwanted legislative consequences. Whereas taking no action in relation to legislation with no sunset provisions would have no similar effect.

7. Regulation making powers

Do you consider that the powers within this Bill could be used to change existing regulation making powers or/and associated Senedd approval procedures in the Welsh Tax Acts, even if that is not the policy intention behind the Bill? If not, will the Minister consider amending the Bill to make this clear?

36. I agree that in theory the power in the Bill could be used to change existing regulation making powers or/and associated Senedd approval procedures. However, I consider the possibility to be remote.

I cannot envisage a situation where the power provided by the Bill would be used to change any of the existing regulation making powers or/and Senedd approval procedures. Given that one of the four purpose tests must be met to trigger the use of the power, and the use of that power must be "necessary or appropriate", it is difficult to see how this situation would arise, particularly in relation to the first three purpose tests.

37. In relation to the fourth purpose test, I believe it *may* be possible that a court decision related to the regulation making powers or/and procedures associated with the approval of regulations could impact on our legislation as a result of a 'surprising' decision. As such, it would be advantageous for the power in the Bill to be capable of use in these circumstances, whether that court decision is made in relation to the Welsh Tax Acts, other UK governments' taxes or other regulation making powers or approval procedures to the extent there is a read across to the Welsh Tax Acts. Again, however, in these circumstances any change would still need to pass the necessary or appropriate test before regulations could be made.

38. Annex 1 provides details of examples of the use of retrospective legislation in relation to UK government taxes. I think example 3 is relevant in consideration of the wide and at times surprising impact court decisions can have on the operation of taxes. If a decision impacted on the validity of all or certain regulations made then, in the absence of an ability to respond quickly, this could result in significant ramifications. For example, many taxpayers (especially the very well advised) could lodge claims that tax paid by them, and which they previously believed was correctly paid, should be repaid as the relevant power was not exercised appropriately, or the Senedd approval procedures were in some way lacking. This may seem far-fetched, but, as example 3 shows, such surprising decisions can occur and absent swift and retrospective action significant impacts could arise. I therefore remain of the opinion that the provisions in the Bill remain appropriate in this regard and that, exceptionally, they may need to be used to make changes to the regulation making procedures.

[1] Finance Committee 16/02/2022 - Welsh Parliament (senedd.wales), paragraphs 163-176.

8. Tax Collection and Management (Wales) Act 2016

As drafted, the power proposed in section 1 of the Bill would allow the Welsh Ministers to make regulations modifying any provisions in the Tax Collection and Management (Wales) Act 2016 with the exception of Part 2. The Committee would be grateful if the Minister could explain the particular circumstances in which it is envisaged that regulations made under section 1 may need to modify each of Parts 1 and 3 – 10 of that Act.

39. It is not feasible at this stage to anticipate every potential future circumstance which may give rise to an amendment to the Tax Collection and Management (Wales) Act 2016 (TCMA)[2], however I have been careful to exclude any potential amendment to the operation of the WRA in Part 2, because that is something that quite rightly ought to be reserved to primary legislation. Part 2 of the TCMA sets out the establishment, membership and operation of the Welsh Revenue Authority.

40. The Explanatory Notes[3] to the TCMA set out the purpose of each Part of the Act and I attach a link to that document for the convenience of the Committee. I should re-iterate here that in the event that a particular circumstance did arise, legislative change would only be possible if one of the four purposes tests was triggered.

9. Power to impose retrospective taxes by secondary legislation

Is the Minister aware of any other examples in Welsh or wider UK law where a government has the power to impose retrospective taxes by secondary legislation?

41. Despite the fact there are no comparable examples of such legislation in the UK, there are reasons why such legislation is right for Wales in certain circumstances and I contend that those circumstances are appropriately reflected in the four restrictive purpose tests set out within the Bill. It should also be remembered that we are dealing here with tax legislation whose primary impact relates to money paid or payable to the tax authority, rather than, for example necessary restrictions on peoples activities and movement as was the case with the Covid regulations.

42. Where Ministers exercise the power in this Bill using made affirmative procedure regulations, even where those regulations make changes that will have retrospective effect, Section 5 of the Bill provides protection for a taxpayer to reclaim additional tax paid as a result of the regulations. This is different from other made affirmative procedure regulations, especially the recent Covid regulations, in that the effect of the regulations that fail to receive Senedd approval can be unwound – the tax can be reclaimed meaning that the risk in relation to the made affirmative regulations rests with the Welsh Ministers and not our citizens and businesses.

10. Retrospective regulation-making power

Sir Paul Silk has commented that, in respect of retrospective regulation-making powers, the Senedd may be asked in this Bill to agree to a further ratchet away from best parliamentary practice. What is the Minister's view on this?

43. I can understand Sir Paul's comment and have a degree of sympathy with it. However, I also consider that the Bill has been drafted in a way so to achieve the Welsh

---

[2] Tax Collection and Management Act 2016 is available at: http://www.legislation.gov.uk/anaw/2016/6/contents/enacted

[3] Tax Collection and Management Act2016 Explanatory Notes is available at: https://www.legislation.gov.uk/anaw/2016/6/notes/contents

Government's aim of providing the necessary tool to enable it to address four specific external events that may impact on the operation or revenues of the devolved taxes. The Welsh Government is seeking to provide the right tool, with the right safeguards, for the stage we are at on our devolution journey. The external event that raises greatest concern is the introduction of a significant change to a predecessor tax that will require a response by the Welsh Government. As I have said, the Welsh Government, unlike the UK government, needs to address changes made by that government to its taxes that can impact the budget of Wales.

44. Retrospective regulation making powers, whilst not the norm, have been used numerous times within UK government legislation. Section 10(2) of the Human Rights Act 1998 allows a Minister of the Crown to amend primary legislation via secondary legislation to ensure that that primary legislation is compatible with a Convention right in situations where a court has determined that the primary legislation is incompatible.

45. An example of secondary legislation made using this power is The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (Remedial) Order 2011[4]. That Order amended the 2004 Act retrospectively as a result of a court decision that recognised that immigrants should have equal status regardless of marital status. Further, regulations have been made in England, Scotland and Wales using retrospective provision within section 34(3) of the Fire and Rescue Services Act 2004[5]. This provision allows legislation to be made retrospectively and not just backdated to the date of the announcement.

11. Section 1: General

Can the Minister give any specific examples of situations where the powers (under section 1) would have benefitted Welsh taxpayers since the devolved taxes came into operation in 2018?

46. There have been no specific external events that have yet arisen that the power in the Bill would have been used to address. The power provided by the Bill is being sought at this point to provide the necessary tool to address future anticipated external events.

12. 'Necessary or appropriate'

Section 1 of the Bill, as introduced, provides for the Welsh Ministers to make regulations for any of the four stated purposes if they consider modification to devolved tax legislation to be "necessary or appropriate". What (if any) constraint do you think these words impose on the use of the power? If the Welsh Ministers decide to exercise a power to make regulations, wouldn't the Minister considering the regulations being "appropriate" be a condition that is automatically satisfied?

47. It is my view that the wording used within Section 1 does place sufficient restraints upon the use of the power, whilst also permitting a certain degree of flexibility. Section 1(1) states that the Welsh Ministers must consider the regulations are "necessary or appropriate" before they can be approved. It is my view that the term "necessary" sets a high bar, with the courts giving it a meaning including a degree of compulsion. Case law has determined that "something is necessary not if it is useful, reasonable or desirable but only if there is a pressing need for it".

[4] S.I. 2011/1158
[5] See: Fire and Rescue Services Act 2004 (legislation.gov.uk)

48. This will cover a scenario where the Welsh Ministers consider it necessary to exercise the regulation making power (a high bar) or where they consider it appropriate to do so (where it is suitable or proper in the individual circumstances).

49. I would not say that the "necessary test" is always satisfied when considering which regulations to make, because section 1(1) states that the regulations must either be necessary or appropriate, thereby providing Welsh Ministers with alternative tests to choose from depending upon the circumstances.

50. There may be times that the making of a change would be appropriate, such as if a change was desirable following the making of a first set of regulations to, for example, remove a class of taxpayer unintentionally captured within the changes or where the scrutiny indicates that changes are wanted. Such changes may not be "necessary" but they will, if the Welsh Ministers want to make them, be "appropriate". A further example would be if the Welsh Ministers wanted to make a change to provide a reduction in tax following changes to SDLT – again, such a change may not be "necessary" but may certainly be considered "appropriate" to confer an equal benefit to taxpayers or to protect the tax base.
51. I also re-iterate here that even with the test "necessary or appropriate", the regulations will still be subject to the four purpose tests, which provides a check upon the Welsh Minister's power to legislate.

13. Section 1 – international obligations

One of the purposes for which the Welsh Ministers may make regulations is to ensure the devolved taxes are not imposed in a way that would be incompatible with international obligations. Section 1(4) of the Bill defines international obligations as any UK international obligations other than to observe and implement the Convention rights. What was the rationale for excluding Convention rights from the scope of these powers?

52. The definition of international obligations excludes "obligations to observe and implement the Convention rights" because these are obligations that are already provided for in domestic UK law within The Human Rights Act 1998.

14. International obligations and Landfill Disposals Tax

The Explanatory Memorandum to the Bill (at paragraph 3.17) suggests that the conclusion of a new trade deal or double taxation agreement would be an example of circumstances in which the Welsh Ministers may wish to make changes to the Welsh Tax Acts at short notice to ensure compliance with international obligations. How would the Minister envisage such agreements potentially impacting on landfill disposals tax at short notice?

53. I agree it may not be readily apparent how international obligations may impact our devolved taxes. Evidence has been given previously to the Finance Committee that the UK's membership of the European Union had previously resulted in an obligation to provide charities relief for qualifying EU and EEA charities on the same basis as UK charities. Similar parity of treatment rules in relation to charities or other aspects of LTT may be required as a result of future trade agreements etc.

54. In relation to LDT, whilst a direct example is more difficult to identify, it is worth noting that the definition of 'non-hazardous waste' has the meaning given in Directive 2008/98/EC of the European Parliament and of the Council of 18 November 2008 on waste. This indicates that treaty obligations can impact on areas of landfill policy. Trade agreements may have a lesser impact, but other treaty obligations, perhaps in relation to environmental issues could still impact.

55. As to whether the changes are required at short notice it is worth remembering that the UK government is not always proactive with sharing changes that may arise through its own policy initiatives let alone when, at first blush, the issue (international treaties) appears to fall firmly within reserved matters. I also consider it is better to be able to say 'our legislation does comply with international obligations' than 'our legislation will comply with international obligations'.

15. Section 1 – anti-avoidance purpose

In her evidence to the Finance Committee, Dr Sara Closs-Davies of Bangor University noted that the term "tax avoidance" in the Bill needed to be defined. Why did the Welsh Government choose not to define this, for example a principles-based approach by reference to the existing tax avoidance provisions set out in Part 3A of the Tax Collection and Management (Wales) Act 2016?

What protections are there in relation to the power proposed in section 1 of the Bill for taxpayers who engage in lawful tax planning, particularly given that power could be used to impose tax retrospectively without the full scrutiny of the Senedd that would be afforded to such proposals if there were included in a bill?

56. Tax avoidance is artificial or contrived planning (sometimes based on a 'novel' reading of the legislation) that achieves a result not intended by the Senedd. Whereas tax planning, in line with the intent of the provisions, is a perfectly reasonable response to that legislation.

57. I have provided evidence to the Finance Committee on the meaning of 'tax avoidance' and why I have chosen to not define this term in the Bill and I have summarised these arguments below. HMRC has provided some helpful guidance[6] for their taxpayers on what is avoidance and many of the principles hold true for the devolved taxes.

58. The provision refers to "protecting against tax avoidance" and a similarly broad definition is used in section 12 of the Tax Collection and Management Act to describe WRA's main functions in relation to tax avoidance. The Welsh Ministers and the WRA are trying to address the same thing here in terms of tax avoidance, and so it is appropriate to describe this in the same terms.

59. The definition in the GAAR will apply broadly to tackle artificial arrangements that create a tax advantage that the Senedd did not intend when enacting the relevant legislation. The GAAR has not yet been tested through the courts and so there is the possibility that there are avoidance arrangements that could fall outside of this definition but to which we'd need to respond to quickly. Aligning the definition in the Bill with that in the GAAR would increase the risk to Welsh finances and fairness for all taxpayers, as the GAAR might not be engaged and there would be a limited ability to respond quickly to close the loophole.

60. Whilst I recognise a precise definition of what constitutes avoidance activity may be attractive, it is not possible to provide that degree of certainty. If defined too narrowly, there is a risk that Welsh Ministers might find the ability to make regulations is too restricted. Also those seeking to bend the rules may structure their affairs in a way that just fell outside of a narrower definition, but would still achieve a tax result which was contrary to the intentions of the Senedd when passing the original legislation. I think these points have been acknowledged by tax practitioners, and evidence was provided

[6] Introduction to tax avoidance - GOV.UK (www.gov.uk)

to the Finance Committee which recognised the difficulty of providing a precise definition, with some, broadly, favouring the definition in the Bill.

61. An example, of past avoidance activity in relation to SDLT may help illustrate 'tax avoidance'. Many SDLT schemes were structured to exploit the sub-sale rules. One such scheme sought to allow SDLT to be substantially avoided by a couple buying a home in a way that meant that one spouse contracted to buy the house for the full price, paid 85% of the consideration, but, before the sale was completed, 'subsold' the property to their spouse. The consequence of the sub-sale, it was contended, meant that only the remaining 15% of the consideration attracted a tax charge meaning that those buying homes costing millions paid something closer to the tax paid by a person buying an average priced house. The sub-sale rules, which have now been changed, existed for legitimate reasons, but I would suggest that a couple buying their home in this manner is most definitely avoidance rather than merely 'lawful tax planning'.

62. It is sometimes suggested that Individual Savings Accounts (designed by the UK government to encourage citizens to save and provide for the income and gains within the ISA wrapper to grow without being taxed) are 'tax avoidance'. I think that it stretches and obfuscates the meaning of 'avoidance' to try to compare an ISA with the example provided above. One is clearly outside what a reasonable person would expect to be reasonable behaviour or a reasonable tax outcome, the other is responding in the manner that Parliament and the UK government intended. Similarly, pension saving where tax relief is provided on the contributions made, but with tax paid when payments are made to the pensioner, is also not tax avoidance. Rather both form part of tax planning.

16. Section 1 – scope of anti-avoidance purpose

You previously explained to the Finance Committee that the proposed power in section 1 of the Bill could be used to close down perceived opportunities for tax avoidance before they become widely exploited. In his written evidence to the Finance Committee, Professor Emyr Lewis states that there is nothing in this Bill that would prevent the Welsh Ministers from amending the existing anti-avoidance provisions in the Tax Collection and Management (Wales) Act 2016 to reverse the burden of proof and require a taxpayer to demonstrate that avoidance arrangements are not artificial, instead of the Welsh Revenue Authority as the law currently stands. Do you accept that and, if so, would you consider amending the Bill to exclude the anti-avoidance provisions in the 2016 Act from the scope of the regulation-making powers in this Bill?

63. It is correct that the power in this Bill could technically be used by the Welsh Ministers to amend elements of the GAAR. However, such changes would still need to pass the 'necessary' or 'appropriate' test and be in response to an external event, and in the case of made affirmative regulations they would need to be necessary by reason of urgency.

64. It is difficult to see how the conditions for exercising the power would be met for changes to the GAAR as a result of the avoidance activity it is designed to target. In those instances, the response might include a legislative change using the new power, but that would most likely be an amendment to the actual LTT or LDT provisions themselves – closing a perceived 'loophole' or putting the interpretation beyond doubt. Likewise, it appears unlikely that an amendment to the GAAR provisions themselves would be necessitated as a result of UK budget changes.

65. Where the new power could be used, potentially, is in response to a court decision that found the GAAR legislation to be 'defective' in some manner or supported an interpretation of the GAAR provisions that changed its application beyond what was intended by Senedd, for example taking an unexpected approach to what is meant by

'artificial'. The impact of the decision could make the GAAR less effective, potentially impacting on the WRA's ability to tackle other ongoing avoidance cases.

66. It is also possible that a court decision could render the GAAR 'too' effective, capturing more transactions than intended. In both scenarios, the ability to make a swift amendment to the GAAR itself to enable it to operate effectively as intended is an important safeguard.

67. It is, of course also, worth remembering that the changes made will only be brought into force or given permanent effect, if the Senedd approves the regulations. At this stage, I am open to considering whether it would be appropriate for there to be additional restrictions in regards to the ability to make changes to the GAAR and look forward to seeing the Committees recommendations. Members should be aware though, that in the event that a court decision finds the GAAR to be ineffective the agile and flexible route to making the necessary changes will not be available as a result of such an amendment, and in Wales we could have a period without an effective GAAR to protect our tax base.

17. Welsh Revenue Authority – tax avoidance powers

The Explanatory Memorandum notes that in the case of tax avoidance, the Welsh Revenue Authority already has a range of powers available to it and is actively using them to ensure everyone pays the right amount of tax and no-one gains an unfair advantage. What powers are being referred to and what specific deficiencies in these current powers have been identified that require a further power to "tighten" existing anti-avoidance provisions?

68. The WRA has powers to conduct enquiries into the returns that taxpayers make, to make determinations or assess tax that has not been included in a return if necessary and to impose penalties including where taxpayers file inaccurate tax returns. These powers are largely within the Tax Collection and Management Act (Wales) 2016: for example Part 4 contains the WRA's investigatory powers, and Part 8 contains the rules concerning reviews of and appeals against decisions of the WRA when the taxpayer and the WRA fail to agree. The anti-avoidance rules contained within the Welsh Tax Acts include primarily the General Anti-avoidance Rule in Part 3A of the Tax Collection and Management Act (Wales) 2016, and in relation to LTT, the targeted anti-avoidance rule in section 31 Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017[7].

69. The Welsh Government and WRA are not currently aware of any changes that may be required to the devolved taxes to stop any avoidance activity. For both devolved taxes, there is, sadly, always the risk that there will be individual or mass-marketed avoidance activity that the Welsh Government and WRA will wish to stop with immediate effect. This could be because there is a lacuna or gap in the legislation that facilitates the avoidance activity, or, based on the UK experience, a need for clarity to the legislation to make it clear the law operates in a manner that does not permit the avoidance activity.

70. The experience of the UK government with the predecessor taxes does though indicate that when concerted efforts are made to exploit perceived loopholes for avoidance purposes that small legislative fixes or clarifications can stop the particular avoidance activity dead.

71. Therefore the introduction of this new power is not intended to address current perceived deficiencies or 'loopholes' in the devolved tax legislation, rather it is to provide an additional tool to protect revenues from unexpected attacks in the future.

[7] Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 (legislation.gov.uk)

72. Furthermore, it is worth recalling that the tools available to the WRA enable it to counteract instances of tax avoidance where a tax advantage has already been sought by the taxpayer. The new power introduced by this Bill will enable Welsh Ministers to make legislative changes to close down opportunities for avoidance before taxpayers attempt to claim such an advantage.

73. Finally, the new power could be used where a court decision relating to the use of the WRA's powers either renders them less effective, or even too effective, in a similar way to the GAAR as described above. Again, the new power may be an important means to redress the situation in a timely manner and return us to the position where the WRA's existing powers continue to operate effectively.

18. Welsh Revenue Authority - GAAR as an effective deterrent

In evidence to the Finance Committee on 2 February, the Welsh Revenue Authority told the committee that avoidance isn't a risk it currently sees within the two devolved taxes, that the existing anti avoidance provisions in the Tax Collection and Management (Wales) Act 2016 are an "effective deterrent" and, further, that a scenario in which these proposed powers would have been beneficial to the Welsh Revenue Authority or Welsh taxpayers "has not yet arisen". Does the Minister agree with the Welsh Revenue Authority? If not, why not?

74. I do agree with the WRA's assessment that the GAAR is an effective deterrent and I welcome the robustness of the legislation to date. However, I also recognise this legislation is still relatively new. I take the risk of tax avoidance very seriously and the possibility of circumstances changing in the future, for example, changes may be made to the current devolved taxes, and, of course, new devolved taxes may be created, should not be ignored - things may arise that require us to take action very quickly. This Bill offers an opportunity to further strengthen the use of these already effective powers and I think that should be welcomed.

19. Section 1 – courts and tribunals

Section 1(1)(d) of the Bill would permit the Welsh Ministers to make regulations amending the Welsh Tax Acts for the purpose of "responding to a decision of a court or tribunal that affects, or may affect, the operation of any of the Welsh Tax Acts or regulations made under any of those Acts" (including retrospectively). In evidence to the Finance Committee on 2 February, the Welsh Revenue Authority told the committee that, in relation to its operation of the devolved tax regime, it has not to date needed to respond to the decision of any tribunals. What led the Minister to conclude that this particular regulation-making power is necessary?

75. The WRA have not yet identified an issue that will require a legislative change in relation to a tribunal or higher court decision. There have been only two WRA First-tier tribunal decisions to date, both relating to penalties. Nor have they, or my officials, identified a court decision in relation to any predecessor tax, or other decision, that might necessitate a legislative response by the Welsh Ministers. That is, firstly, because there is often a time lag between the taxpayer's transaction or actions and the case reaching the Tribunal for hearing. For example, the most recently published SDLT case[8] (a Court of Appeal decision in February 2022) relates to two separate transactions that occurred in October 2015 and March 2016 (before the LTT Bill was even introduced). The First Tier Tribunal released their decisions in July and December 2019, and the Upper Tribunal in March 2021. Secondly, many of the SDLT sub-sale cases that were decided before and after our devolved taxes went live relate to legislation that differs from the LTT legislation,

[8] Hyman and another v Revenue and Customs Commissioners - [2022] All ER (D) 89 (Feb)

meaning that there is no need for a response from the Welsh Ministers. It is also worth emphasising that HMRC have had a very strong record of winning SDLT cases; it is when there is a loss that a legislative change is more likely to be needed.

76. In addition, it is still relatively early days for devolved taxation in Wales – just because there has not yet been a need to respond to any court or tribunal cases does not mean that we will not need to do so in the future.

77. In many cases, taxpayers have the right to challenge the WRA's application of devolved tax law in respect of decisions taken relating to their affairs. Taxpayers can request a review of the original decision by the WRA, or they may choose to appeal. Those appeals are heard by the Tax Tribunals and the higher courts. It is possible that the decision of the court will result in the court finding that the law operates in a manner that differs from what the Welsh Government and Senedd intended when drafting and approving the legislation. In such cases it may be desirable for the Welsh Government to amend the legislation so that it operates in the way that was originally intended.

78. This power is also intended to provide clarity where a tribunal finds in favour of a taxpayer and the Welsh Government is content with the law operating in that manner (and vice versa where the Welsh Government wins the case but the clarity of legislation can be improved).

79. As with my earlier response in relation to protecting against tax avoidance, no necessary legislative response has been identified at the present moment in response to a Tribunal or higher court decision. This purpose test is included to ensure that when such a decision is made the Welsh Ministers can respond in an agile manner (see for example Annex 1 that sets out some of the court decisions that did, or might have, necessitated a legislative change (and perhaps retrospectively).

20. Retrospective legislation in response to a court decision

Would you accept Professor Emyr Lewis's view that, if retrospectively legislating in response to a decision of a court is to be permitted at all, it should at least be limited on the face of the Bill so that the Government cannot change the law with effect from a date earlier than the date of its announcement of that change? If not, why not?

80. I am grateful to Professor Lewis for raising this issue and note the concern around the use of the power to make changes that are to apply retrospectively whether in relation to court decisions or to the other purpose tests.

81. I am open to considering further whether it is appropriate to restrict the ability to legislate retrospectively back only as far as the date of a Welsh Government announcement. In particular, I agree this should be given consideration where a change – that is, a monetary cost - may impact negatively on taxpayers. If taken forward, I consider the 'date of the announcement' should be capable of including more than just the publication of the specific legislation, but also include 'warnings' that taxpayers could reasonably take to indicate that action in a specific area of the legislation will be taken. This policy position would of course be published within the policy statement on retrospective legislation. However, as set out in paragraph 86, I also consider that we need to approach the restriction of the power to legislate retrospectively with caution.

82. In addition, I consider any such restriction should still allow the Welsh Ministers to use the power to make changes with retrospective effect further back than the date of

any announcement where that change only reduces the tax charged. This is so that we can make changes to our legislation to reduce our taxpayers liability to pay tax to a date before the announcement, for example if responding to a UK Budget change to make sure that our taxpayers can benefit from the reduction at the same time as taxpayers in England. It will also be desirable to make changes retrospectively where a category of taxpayers may have been inadvertently caught within the charge to tax when that is not the intention. Such a situation may arise where regulations have been made and scrutiny of the regulations, or subsequent events, indicates that a change should be made. By permitting retrospective regulations to be made in these circumstances we would avoid the need to use a Bill to make changes retrospectively at a later date.

83. This need to 'double' legislate (regulations and a Bill) was encountered by The Scottish Government when they introduced changes to the land and buildings transaction tax ('LBTT') additional dwellings supplement ('ADS') (the higher residential rates in LTT). A set of regulations[9] were laid in draft making changes that provided for more transactions to not be subject to the ADS. Those regulations only had effect from the date they were made (29 June 2017) following the vote to approve the making of them. A year later (22 June 2018) a very short Bill[10] received Royal Assent to give the regulations retrospective effect to the date the ADS commenced (1 April 2016). In relation to regulations made using the power provided by this Bill I would like to avoid the need to 'double' legislate, especially where the effect of the regulations is to reduce taxpayers' liability to a devolved tax.

84. Annex 1 sets out a number of examples of the use of retrospective legislation that come from the UK government's experience of tax and the accompanying warnings and announcements. Whilst the first two examples do not relate to a response to a court decision, the third example does.

85. The examples identify issues that we will want to ensure are addressed if any further restrictions on the use of the power are included in the Bill.

86. The third example in Annex 1 demonstrates the potential risk created in relation to how the Welsh Ministers can respond to a court decision when the retrospective change is limited to the date of the announcement. We would not be able to use the power to make changes as HMRC did in response to this type of court decision (and the 'what if' example based on the Pollen and Kings College case[11] for SDLT) as there is no announcement to provide a relevant earlier date. The example demonstrates the good policy result that is achieved by making changes to protect taxpayers, and the tax system more generally, and which we will not be able to use the power provided by the Bill to address. That change was not to address any avoidance activity that the taxpayers had knowingly undertaken aware (or they should have been aware) of a warning that retrospective legislation would be used to stop certain activity. Rather it changed the rules retrospectively for all taxpayers who had not yet made a challenge based on facts similar to those that led to the court's decision. For those who had made such a challenge they could still maintain that position based on the pre-amended legislation. I believe that this retrospective change struck the right balance between the protection of individual taxpayers and the tax system and population as a whole. Furthermore, I consider that the ability to legislate retrospectively in similar circumstances is essential for the Welsh

[9] The Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017 (legislation.gov.uk)
[10] Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018 (legislation.gov.uk)
[11] [2013] EWCA Civ 753-Court of Appeal Judgment Template (pumptax.com)

Government and I would wish for the power to be capable of being used in this manner.

87. There is a wealth of case law that gives governments quite a wide margin of appreciation in terms of retrospective tax legislation. The most obvious challenge in terms of tax would be to Article 1, Protocol 1 of the ECHR, which provides for the right to enjoyment of possessions. In these types of cases, taxpayers have argued that the money that they would have paid in tax is a possession. But overall, in the majority of cases, the courts have given governments a wide appreciation, on the basis that Article 1, Protocol 1 is a qualified right rather than an absolute right. Accordingly, if there is a public interest in the government pursuing a particular policy, then the courts have accepted that. The courts have always considered the balance between the rights of the taxpayer and the public policy that the government is trying to pursue. The first example in Annex 1 sets out clearly the courts approach to these matters.

88. Case law has also established that government legislation which is retrospective is not devoid of reasonable foundation for the simple reason that it is retrospective. Again, there is a balance to be struck between government policy and the individual rights of the taxpayer.

21. Section 2 - Penalties

Section 2(1)(b) of the Bill specifically permits the Welsh Ministers by regulations to impose or extend a liability to a penalty. In what circumstances could the Minister foresee an urgent need to make regulations imposing new, or extending existing, penalties?

89. It is foreseeable that court decisions, for example, could impact on the interpretation of penalty provisions, or the process of applying penalties, in a way which made them less effective or led to unintended consequences. In that respect, I consider it is prudent to retain the ability to make changes to those penalty provisions at speed should the need arise. I do, however, recognise that changes to penalty regimes are relatively rare. Furthermore, for the power in this Bill to be used in this way the situation being addressed would need to meet one of the four purpose tests set out in the Bill, in addition to the Welsh Ministers being satisfied that such amendments are necessary or appropriate.

22. Retrospective effect – Supreme Court approval for special justification

Sir Paul Silk has drawn the Finance Committee's attention to the Supreme Court's approval of the Counsel General's acceptance of "a need for special justification where a statutory provision has retrospective effect". Does the Minister accept this position? How do the provisions in the Bill comply with this principle?

90. I accept that retrospective legislation is not to be made lightly and without a clear justification but I can confirm that, in relation to taxation, the courts have been supportive of the use, of retrospective legislation in certain circumstances. The requirements on the Welsh Ministers to act within the law, and the publication of their policy statement on the use of retrospective legislation help to ensure that the power in the Bill can only be used in a lawful manner. To make regulations that will be found to be ultra vires is not in the interest of the Welsh Government.

91. The Welsh Government when looking to use the power retrospectively must comply with the European Convention on Human Rights and the case law that has

developed on the use of tax legislation retrospectively. As I have said earlier tax provisions generally engage Article 1 Protocol 1 ("A1P1) (Right to enjoyment of property) but that unlike many other policy areas, both the Strasbourg and domestic courts have afforded legislatures a considerable margin of appreciation in this area. That margin of appreciation is given provided that the provisions strike a fair balance between the public interest in collecting taxes, and the rights of individual taxpayers and do not impose an individual and excessive burden on taxpayers.

92. The case of R (on the application of APVCO Ltd and Others) v HM Treasury and HMRC concerned a tax avoidance scheme which was closed down by the UK government using retrospective legislation (for more detail see the first example in the Annex). The claimants' argument was that they were being deprived of the tax (money) they would have to pay as a result of the retrospective legislative changes and that unpaid tax could properly be regarded as a possession within the meaning of Article 1 Protocol 1. The taxpayers were unsuccessful in their judicial review and their appeal to the Court of Appeal. The court ruled that the legislation was lawful, proportionate and compatible with the European Convention on Human Rights (ECHR).

93. Welsh Ministers will need to consider on a case by case basis and by reference to the particular circumstances of any case whether the use of a retrospective provision would be appropriate and justified, by reference to the legislative framework in the Bill and a full consideration of the matter including the approach of the courts to retrospective tax legislation.

I am grateful to the Committee taking the time to allow me to give evidence and for these further questions. If you require any further information from me as you draft your report I will be only too happy to oblige.

Rebecca Evans.

Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government

CC: Chair of the Finance Committee

Annex 1 – Examples of Retrospective Legislation

Example 1 – SDLT changes with warning and then announcement

The first example comes from the stamp duty land tax (SDLT). It demonstrates the linking of retrospective legislation to a clear statement or warning that unspecified action will be taken to address avoidance activity retrospectively. Following the announcement of changes to the operation of the sub-sale rules in his speech on Budget day (21 March 2012) the Chancellor of the Exchequer said:

> "*Let me make this absolutely clear to people. If you buy a property in Britain that is used for residential purposes, then we will expect stamp duty to be paid. That is the clear intention of Parliament. I will not hesitate to move swiftly, without notice and retrospectively if inappropriate ways around these new rules are found. People have been warned.*"

Promoters accordingly adapted the schemes they had been promoting and in Budget 2013, retrospective legislation was introduced to make it clear that two further schemes did not work. Following those changes, the schemes continued to be adapted and on 4 June 2013 a written statement[12] by the Exchequer Secretary stated that amendments would be made to the Finance Bill 2013 to include further retrospective change to make it clear that such schemes were not possible. The legislation would also be imposed retrospectively back to the date of the statement or warning on 21 March 2012[13].

Certain members of the scheme challenged the Government's decision to introduce retrospective legislation, and subsequently appealed to the Court of Appeal[14]. The court found that the UK government had acted lawfully in making retrospective legislation[15]. The lead Appeal Court Judges' decision in dismissing the appeal stated:

> "*For the reasons I have given, I have concluded that neither the appellants' claims that their option agreements were transfers of rights for the purposes of section 45 of the Finance Act 2003, nor the money representing the unpaid SDLT in the appellants' pockets are, in the circumstances of this case, properly to be regarded as "possessions" for the purposes of A1P1 [article 1 protocol 1 of the European Convention on Human Rights]. A1P1 is, therefore not engaged. If it were engaged, I would hold that the legislative changes were, although retrospective, lawful. They were neither unforeseeable nor arbitrary. Moreover, the legislative changes satisfied the proportionality test. The fair balance between the public interest and the protection of the appellants' fundamental rights falls firmly on the side of the public interest in preventing taxpayers taking advantage of abusive tax avoidance schemes after clear warnings have been given that such schemes would not be tolerated and would be tackled with retrospective legislation. Article 6 is also not engaged, since tax proceedings do not relate to the determination of a "civil" right or obligation*."

It is important to note there are effectively two relevant announcements in the first example; that made initially at Budget 2012 (the warning) and those made on publication of the Finance Bill and in June 2013 (the further legislative fix). In addition, the legislation was backdated to the date of the original warning and not the date of the legislative announcement.

---

12 House of Commons Hansard Ministerial Statements for 04 Jun 2013 (pt 0001) (parliament.uk)

13 Finance Act 2013 (legislation.gov.uk)

14 R (on the application of APVCO 19 Ltd) v Revenue and Customs Commissioners [2015] EWCA Civ 648.

15 Microsoft Word - StMatthews Judgments Approved_2_.doc (pumptax.com)

Example 2 – Corporation tax warning and announcement of changes, retrospective to a different date

The second example is taken from corporation tax. On 27 February 2012[16], the Exchequer Secretary to the Treasury issued a written statement that the UK government would introduce legislation to counter arrangements intended to avoid corporation tax on buy-backs of corporate debt. The announcement stated the change would have effect retrospectively to debt purchases that occurred on or after 1 December 2011 (three months before the announcement). The Exchequer Secretary stated:

> "*This is not action that the Government is taking lightly. But the potential tax loss from this scheme and the history of previous abuse in this area, means that the Government believes that this is a circumstance where action to change the legislation with full retrospective effect is justified to ensure that the system is fair for all and that those who seek to benefit from this aggressive avoidance do not get an unfair advantage.*"

The UK government considered that it was complying with its protocol on retrospective legislation and in particular drew attention to the primary user of the scheme having signed The Code of Practice on Taxation for Banks[17] and that written statements were also made in 2010.

This is a case where the application of the retrospective change to close a tax avoidance route went back further than the date of the announcement to legislate in 2012. Based on the UK government's protocol, there were extenuating circumstances in this case that justified setting the date that the legislation applied from to a date before the initial announcement to legislate and the date chosen differed (but was after) the initial written statements in 2010.

Example 3 – no warning and a significant retrospective period as a result of a court decision

The third example arises from the administration of certain taxes and the filing obligations placed on taxpayers. HMRC, and previously the Inland Revenue, oversaw income tax Self-Assessment from 1995 and corporation tax Self-Assessment from 1999. In both regimes taxpayers were required to notify the tax authority of their chargeability to tax. Following that notification the tax authority would issue notices to the taxpayers requiring them to file tax returns. In the event that the tax authority wished to enquire into the taxpayer's return they would issue a notice of enquiry.

The tax authority, and many tax advisers and taxpayers adopted a pragmatic approach leading to 'voluntary' returns being made for a number of reasons. The tax authority accepted these returns as validly made, assessed liabilities, accepted payments, issued repayments (many were made to enable income tax taxpayers who did not normally need to submit returns to claim repayments of tax) and when appropriate opened enquiries, closed those enquiries or reached settlements with taxpayers. Two cases were heard as to whether such voluntary returns were valid returns that could be subject to enquiry. The First Tier Tribunal found in 2016[18], and again in 2018[19], the returns were not valid returns

[16] Written Statements - Hansard - UK Parliament (Tax Measures – 1/3 of the way down the page)
[17] The Code of Practice on Taxation for Banks - GOV.UK (www.gov.uk)
[18] Revell v The Commissioners for HM Revenue and Customs -Microsoft Word - TC04887.doc (tribunals.gov.uk)
[19] Patel & Anor v Revenue and Customs (INCOME TAX/CORPORATION TAX : Assessment/self-assessment) [2018] UKFTT 185 (TC) (05 April 2018) (bailii.org)

because they had not been submitted in response to a notice issued by HMRC. It would also follow therefore that any enquiry notices and closure notices were also invalid. The cases indicated that annually around 350,000- 450,000 such 'voluntary' returns were made annually.

The Tribunal findings meant that, over the years since the self-assessment regimes were introduced, millions of returns were potentially invalidly made which could have serious consequences for taxpayers, HMRC and potentially the government finances. Taxpayers could potentially be found not to have notified their chargeability to tax to HMRC or not filed their returns and the protections from discovery action they had obtained through their 'voluntary' returns would disappear. Any enquiries opened and concluded by HMRC would not be valid potentially opening the door for repayments of tax, which in turn could have, potentially, serious consequences to the UK government's finances.

The UK government took action on 29 October 2018[20], the date of the Budget, when it was announced that changes would be made prospectively and retrospectively from the date of the Budget to put voluntary returns on the same footing as returns made following receipt of a notice to file a return. Legislation was introduced in the Finance Bill and on Royal Assent it became section 87 Finance Act 2019[21]. These changes, introduced by section 87(3), are "treated as always having been in force", that is they were in force, in relation to income tax and capital gains tax from 1995 onwards. Protections were provided to those taxpayers who, before 29 October 2018, had appealed, or commenced judicial review proceedings, on the grounds that a return was not a valid return (because no relevant notice to file a return had been issued). Those taxpayers could continue to make that case. All other taxpayers could no longer mount a challenge based on a voluntary return being invalid.

Committee Members may be interested to note that the same issue does not arise in stamp duty land tax, nor land transaction tax, because there is no notice to file issued by the tax authority. This is, in part, because there is no recurrent obligation to file as is the case with, for example, income tax. A recent SDLT case[22] addressed this issue and it was found that there is nothing in the SDLT legislation that creates the same difficulty as 'voluntary' returns did for the income tax and corporation tax regimes. For landfill disposals tax, whilst there can be a recurrent obligation to file (for example by the landfill site operators) the obligation can also arise on a one off basis too. The rules therefore provide filing obligations for both registered and unregistered people who have carried out "taxable operations" to file a return (with no notice issued by the WRA).

However, although this specific issue is unlikely to arise for current devolved taxes, the intention is to provide an example of the type of 'surprising' court decision that can overturn long established prevailing practice or understanding of the law and require action to address the consequences of that court decision. In this case the law was changed without any prior notice and with retrospective effect from a date many years earlier, albeit with protections for certain taxpayers.

For our devolved taxes it is worth considering what the impact would have been had the courts found in favour of the arguments advanced by the appellants in *The Pollen Estate Trustee Company Limited and King's College London v The Commissioners for Her Majesty's Revenue and Customs* in relation to identification of the relevant chargeable interest[23]. Had the appellants' arguments found favour there would have been a very significant undermining of the tax regime as each purchase of a property would be split into

[20] Income Tax, Capital Gains Tax and Corporation Tax: voluntary tax returns - GOV.UK (www.gov.uk)
[21] Finance Act 2019 (legislation.gov.uk)
[22] TC 08327.pdf (tribunals.gov.uk)
[23] [2013] EWCA Civ 753-Court of Appeal Judgment Template (pumptax.com)

the respective undivided shares, and tax calculated separately, for each beneficial owner. The Appeal Court decided that the intention of the legislation was to relieve charities from tax when purchasing property, and that included when buying jointly with non-charities, and therefore ‘partial’ relief should be available to the extent that a charity is a joint purchaser acquiring an interest in the property. Prospective amendments to the SDLT legislation followed to provide specifically for partial charities relief (with similar rules also provided in LTT).

Looking at this SDLT case and the third example above, it is possible to see that had the appellants ‘splitting’ argument succeeded, the UK government may have considered amending the legislation retrospectively to ensure that it operated from 2003 onwards as was intended. Again, a similar protection for those advancing similar grounds for appeal may have been provided as was the case in the third example above. The Welsh Ministers may, in such ‘surprising’ decisions also choose to take similar action to protect the tax base and ensure that large scale repayment of previously paid tax (on a generally prevailing basis) did not arise. Equally, this SDLT case is also illustrative of how it is also advantageous, for a clarity of law purpose, to make amendments to legislation following a court decision to reflect, or otherwise address, the decisions of the courts – the changing of the law to provide clearly for partial charity relief.

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
–
Legislation, Justice and Constitution Committee

Senedd Cymru
Bae Caerdydd, Caerdydd, CF99 1SN
SeneddDCC@senedd.cymru
senedd.cymru/SeneddDCC
0300 200 6565
–
Welsh Parliament
Cardiff Bay, Cardiff, CF99 1SN
SeneddLJC@senedd.wales
senedd.wales/SeneddLJC
0300 200 6565

Rebecca Evans MS
Minister for Finance and Local Government

24 February 2022

Dear Rebecca

Welsh Tax Acts etc. (Power to Modify) Bill

Thank you for giving evidence to the Committee on 14 February 2022 on the Welsh Tax Acts etc. (Power to Modify) Bill. As I indicated during the session, there are some other issues we would like to explore with you, as well as some we were not available to cover in the time available. I therefore look forward to receiving a response to the questions below by 11 March 2022.

Provisional Collection of Taxes Act 1968

1. Your **2020 consultation paper** highlighted the *Provisional Collection of Taxes Act 1968*, noting that it enables proposals for tax changes and tax continuations to have immediate provisional legal effect pending the necessary primary legislation receiving Royal Assent. The paper also added that there is no equivalent provision to the 1968 Act in Welsh law. What thought did you give to proposing an equivalent 1968 Act and why did you discount it?

Scrutiny

2. In relation to timescales for scrutiny of regulations that would be made under the powers in this Bill, you explained to the Finance Committee that the Welsh Ministers will propose a timescale for either procedure before the vote that includes the "length of time needed to provide suitable scrutiny" (see Finance Committee, RoP [228], 22 December 2021). Isn't the approach here therefore effectively the Welsh Government deciding the level of scrutiny it wishes to be

subjected to, potentially when making significant changes to legislation previously passed by the Senedd?

Senedd Lock

3. Professor Emyr Lewis referred to the Welsh Government's decision to abandon the Senedd lock as the removal of a significant safeguard against potential abuse of broad power. What is your response to that view and, if you disagree, how would you argue differently?

4. In Plenary on 14 December, you referred to the concept of a Senedd lock potentially setting an "unhelpful precedent" for future made-affirmative powers. It could be argued the reverse is true, and that this Bill sets an unhelpful precedent for the Welsh Ministers proposing to take regulation-making powers in areas that should remain the responsibility of the Senedd. How do you respond to such an argument?

Regulation-making powers – broad use

5. In his written evidence to the Finance Committee, Sir Paul Silk highlighted:

   - two recent reports from House of Lords Committees (Democracy Denied? The urgent need to rebalance power between Parliament and the Executive and Government by Diktat: A call to return power to Parliament) expressing concerns regard the appropriateness of using secondary legislation for significant policy implementation;

   - the Hansard Society's review of Delegated Legislation and their broad concerns about the balance between what should be in primary and secondary legislation, the potential use of secondary legislation in unexpected ways which the legislature may not have appreciated when granting the enabling powers, the undesirability of Henry VIII powers, the comparatively limited scrutiny of secondary legislation compared to primary legislation and the inability of the legislature to amend secondary legislation.

   What consideration has the Minister given to the views expressed in these reports, and the concerns of the Hansard Society, and what reflections do you have on them in the context of the proposals in this Bill?

Regulation-making powers – procedure

6. Sir Paul Silk has commented that the made-affirmative approval procedure is "very unusual … historically". In developing the Bill, did the Minister consider whether regulations relying on any of the four purposes set out in the Bill could or should be excluded from the made-affirmative approval procedure, particularly in circumstances where such regulations have retrospective effect? If not, why not?

Regulation-making powers – changing existing law

7. In evidence to the Finance Committee, your referred to section 109 of the *Finance Act 2003*, which provides HM Treasury with powers to make immediate, but temporary changes to Stamp Duty Land Tax (SDLT). However, as you also explained, those powers are subject to a sunset provision which limits their effect for up to a maximum of 18 months. Did you consider including similar sunset provisions applying to regulations made under the power proposed in section 1 of this Bill? If so, why was that approach discounted?

8. Do you consider that the powers within this Bill could be used to change existing regulation-making powers or/and associated Senedd approval procedures in the Welsh Tax Acts, even if that is not the policy intention behind the Bill? If not, will the Minister consider amending the Bill to make this clear?

9. As drafted, the power proposed in section 1 of the Bill would allow the Welsh Ministers to make regulations modifying any provisions in the *Tax Collection and Management (Wales) Act 2016* with the exception of Part 2. The Committee would be grateful if the Minister could explain the particular circumstances in which it is envisaged that regulations made under section 1 may need to modify each of Parts 1 and 3 – 10 of that Act.

10. Is the Minister aware of any other examples in Welsh or wider UK law where a government has the power to impose retrospective taxes by secondary legislation?

11. Sir Paul Silk has commented that, in respect of retrospective regulation-making powers, the Senedd may be asked in this Bill to agree to a further ratchet away from best parliamentary practice. What is the Minister's view on this?

Section 1: general

12. Can the Minister give any specific examples of situations where the powers (under section 1) would have benefitted Welsh taxpayers since the devolved taxes came into operation in 2018?

13. Section 1 of the Bill, as introduced, provides for the Welsh Ministers to make regulations for any of the four stated purposes if they consider modification to devolved tax legislation to be "necessary or appropriate". What (if any) constraint do you think these words impose on the use of the power? If the Welsh Ministers decide to exercise a power to make regulations, wouldn't the Minister considering the regulations being "appropriate" be a condition that is automatically satisfied?

Section 1 – international obligations

14. One of the purposes for which the Welsh Ministers may make regulations is to ensure the devolved taxes are not imposed in a way that would be incompatible with international obligations. Section 1(4) of the Bill defines international obligations as any UK international obligations other than to observe and implement the Convention rights. What was the rationale for excluding Convention rights from the scope of these powers?

15. The Explanatory Memorandum to the Bill (at paragraph 3.17) suggests that the conclusion of a new trade deal or double taxation agreement would be an example of circumstances in which the Welsh Ministers may wish to make changes to the Welsh Tax Acts at short notice to ensure compliance with international obligations. How would the Minister envisage such agreements potentially impacting on landfill disposals tax at short notice?

Section 1 – anti-avoidance purpose

16. In her evidence to the Finance Committee, Dr Sara Closs-Davies of Bangor University noted that the term "tax avoidance" in the Bill needed to be defined. Why did the Welsh Government choose not to define this, for example a principles-based approach by reference to the existing tax avoidance provisions set out in Part 3A of the *Tax Collection and Management (Wales) Act 2016*?

17. What protections are there in relation to the power proposed in section 1 of the Bill for taxpayers who engage in lawful tax planning, particularly given that power could be used to impose tax retrospectively without the full scrutiny of the Senedd that would be afforded to such proposals if there were included in a bill?

18. You previously explained to the Finance Committee that the proposed power in section 1 of the Bill could be used to close down perceived opportunities for tax avoidance before they become widely exploited. In his written evidence to the Finance Committee, Professor Emyr Lewis states that there is nothing in this Bill that would prevent the Welsh Ministers from amending the existing anti-avoidance provisions in the *Tax Collection and Management (Wales) Act 2016* to reverse the burden of proof and require a taxpayer to demonstrate that avoidance arrangements are not artificial, instead of the Welsh Revenue Authority as the law currently stands. Do you accept that and, if so, would you consider amending the Bill to exclude the anti-avoidance provisions in the 2016 Act from the scope of the regulation-making powers in this Bill?

19. The Explanatory Memorandum notes that in the case of tax avoidance, the Welsh Revenue Authority already has a range of powers available to it and is actively using them to ensure everyone pays the right amount of tax and no-one gains an unfair advantage. What powers are

being referred to and what specific deficiencies in these current powers have been identified that require a further power to "tighten" existing anti-avoidance provisions?

20. In evidence to the Finance Committee on 2 February, the Welsh Revenue Authority told the committee that avoidance isn't a risk it currently sees within the two devolved taxes, that the existing anti avoidance provisions in the *Tax Collection and Management (Wales) Act 2016* are an "effective deterrent" and, further, that a scenario in which these proposed powers would have been beneficial to the Welsh Revenue Authority or Welsh taxpayers "has not yet arisen". Does the Minister agree with the Welsh Revenue Authority? If not, why not?

Section 1 – courts and tribunals

21. Section 1(1)(d) of the Bill would permit the Welsh Ministers to make regulations amending the Welsh Tax Acts for the purpose of "responding to a decision of a court or tribunal that affects, or may affect, the operation of any of the Welsh Tax Acts or regulations made under any of those Acts" (including retrospectively). In evidence to the Finance Committee on 2 February, the Welsh Revenue Authority told the committee that, in relation to its operation of the devolved tax regime, it has not to date needed to respond to the decision of any tribunals. What led the Minister to conclude that this particular regulation-making power is necessary?

22. Would you accept Professor Emyr Lewis's view that, if retrospectively legislating in response to a decision of a court is to be permitted at all, it should at least be limited on the face of the Bill so that the Government cannot change the law with effect from a date earlier than the date of its announcement of that change? If not, why not?

Section 2

23. Section 2(1)(b) of the Bill specifically permits the Welsh Ministers by regulations to impose or extend a liability to a penalty. In what circumstances could the Minister foresee an urgent need to make regulations imposing new, or extending existing, penalties?

24. Sir Paul Silk has drawn the Finance Committee's attention to the Supreme Court's approval of the Counsel General's acceptance of "a need for special justification where a statutory provision has retrospective effect"[1]. Does the Minister accept this position? How do the provisions in the Bill comply with this principle?

[1] Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales [2015] UKSC 3, paragraph 53

Yours sincerely,

Huw Irranca-Davies
Chair

Document is Restricted

Document is Restricted