

## Agenda – Finance Committee

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Meeting Venue:	For further information contact:
Video Conference via Zoom	Owain Roberts
Meeting date: 11 February 2022	Committee Clerk
Meeting time: 10.30	0300 200 6388
	<a href="mailto:SeneddFinance@senedd.wales">SeneddFinance@senedd.wales</a>

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In accordance with Standing Order 34.19, the Chair has determined that the public are excluded from the Committee's meeting in order to protect public health. This meeting will be broadcast live on [www.senedd.tv](http://www.senedd.tv)

### Private pre-meeting – Informal (10.15–10.30)

- 1 Introductions, apologies, substitutions and declarations of interest  
(10.30)
- 2 Paper(s) to note  
(10.30) (Pages 1 – 6)
  - Minutes of the meeting held on 28 January
  - Minutes of the meeting held on 2 February
- 2.1 PTN 1 – Update from the Senedd Commission on Committee recommendations made in its report on the Scrutiny of the Senedd Commission Draft Budget 2022–2023 – 2 February 2022  
(Pages 7 – 13)
- 2.2 PTN 2 – Response from the Public Services Ombudsman for Wales to the Committee's report on the Ombudsman's Annual Report and Accounts 2020–21; and Estimate 2022–23 – 7 February 2022  
(Pages 14 – 21)

**2.3 PTN 3 – Letter from the Minister for Education and Welsh Language to the Chair of the Children, Young People and Education Committee: Tertiary Education and Research (Wales) Bill – Revised Statement of Policy Intent – 4 February 2022**

(Pages 22 – 33)

**2.4 PTN 4 – Letter from the Minister for Finance and Local Government: Further information provided by the Minister following the budget scrutiny session on 21 January 2022 – 8 February 2022**

(Pages 34 – 35)

**3 Welsh Tax Acts etc. (Power to Modify) Bill: Evidence session 5**

(10.30–11.30)

(Pages 36 – 67)

Sir Paul Silk

Professor Emyr Lewis, Aberystwyth Law School, Aberystwyth University

**Supporting documents:**

FIN(6)–06–22 P1 – Sir Paul Silk

FIN(6)–06–22 P2 – Professor Emyr Lewis

Research Service Brief

**4 Motion under Standing Order 17.42 (ix) to resolve to exclude the public from the remainder of this meeting.**

**5 Welsh Tax Acts etc. (Power to Modify) Bill: Consideration of evidence**

(11.30–11.45)

## Concise Minutes – Finance Committee

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Meeting Venue:

Video Conference via Zoom

Meeting date: Friday, 28 January 2022

Meeting time: 09.15 – 10.40

**Remote, private**

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### Attendance

Category	Names
Members of the Senedd:	Peredur Owen Griffiths MS (Chair) Peter Fox MS Mike Hedges MS Rhianon Passmore MS
Witnesses:	
Committee Staff:	Owain Roberts (Clerk) Leanne Hatcher (Second Clerk) Georgina Owen (Second Clerk) Mike Lewis (Deputy Clerk) Martin Jennings (Researcher) Owen Holzinger (Researcher)

### 1 Introductions, apologies, substitutions and declarations of interest

1.1 The Chair welcomed Members to the virtual meeting of the Finance Committee.



## **2 Scrutiny of the Welsh Government Draft Budget 2022–23: Consideration of draft report**

2.1 The Committee agreed the draft report with minor changes.

## **3 Audit Wales Fee Scheme**

3.1 The Committee approved the Audit Wales Fee Scheme 2022–23, under Standing Orders 18.10(x) in accordance with section 24(7) of the Public Audit (Wales) Act 2013.

# Concise Minutes – Finance Committee

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Meeting Venue:

Hybrid – Committee room 4 Ty Hywel  
and video conference via Zoom

Meeting date: Wednesday, 2 February  
2022

Meeting time: 09.31 – 12.30

This meeting can be viewed

on [Senedd TV](#) at:

<http://senedd.tv/en/12607>

## Hybrid

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### Attendance

Category	Names
Members of the Senedd:	Peredur Owen Griffiths MS (Chair) Peter Fox MS Mike Hedges MS Rhianon Passmore MS
Witnesses:	John Cullinane, Chartered Institute of Taxation Lakshmi Narain, Chartered Institute of Taxation Frank Haskew, Institute of Chartered Accountants in England and Wales Glenn Collins, Association of Chartered Certified Accountants UK Richard Lloyd-Bithell, Chartered Institute of Public Finance and Accountancy Dyfed Alsop, Welsh Revenue Authority Sam Cairns, Welsh Revenue Authority Dave Matthews, Welsh Revenue Authority



Committee Staff:	<p>Owain Roberts (Clerk)</p> <p>Leanne Hatcher (Second Clerk)</p> <p>Georgina Owen (Second Clerk)</p> <p>Mike Lewis (Deputy Clerk)</p> <p>Christian Tipples (Researcher)</p> <p>Owen Holzinger (Researcher)</p> <p>Ben Harris (Legal Adviser)</p> <p>Charlotte Barbour (Expert Adviser)</p>
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**Private pre-meeting – Informal (09.15–09.30)**

**1 Introductions, apologies, substitutions and declarations of interest**

1.1 The Chair welcomed Members to the hybrid meeting of the Finance Committee.

**2 Paper(s) to note**

2.1. The papers were noted.

- 2.1 PTN 1 – Letter from the Minister for Finance and Local Government: Finance Ministers' Quadrilateral meeting – 21 January 2022
- 2.2 PTN 2 – Letter from the Minister for Finance and Local Government on the Tax Bill: Welsh Tax Acts etc. (Power to Modify) Bill – 24 January 2022
- 2.3 PTN 3 – Letter from the Minister for Finance and Local Government: financial transactions capital – 26 January 2022
- 2.4 PTN 4 – National Audit Office report: Administration of Welsh rates of income tax 2020–21 – January 2022

### **3 Welsh Tax Acts etc. (Power to Modify) Bill: Evidence session 2**

3.1 The Committee took evidence from John Cullinane, Director of Public Policy, Chartered Institute of Taxation; and Lakshmi Narain, Chair of the Chartered Institute of Taxation's Welsh Technical Committee on the Welsh Tax Acts etc. (Power to Modify) Bill.

**BREAK (10.20–10.30)**

### **4 Welsh Tax Acts etc. (Power to Modify) Bill: Evidence session 3**

4.1 The Committee took evidence from Frank Haskew, Head of Tax, Institute of Chartered Accountants in England and Wales; Richard Lloyd-Bithell, Senior Policy and Technical Manager, Chartered Institute of Public Finance and Accountancy; and Glenn Collins, Head of Policy, Technical and Strategic Engagement, Association of Chartered Certified Accountants UK on the Welsh Tax Acts etc. (Power to Modify) Bill.

**BREAK (11.30–11.40)**

### **5 Welsh Tax Acts etc. (Power to Modify) Bill: Evidence session 4**

5.1 The Committee took evidence from Dyfed Alsop, Chief Executive, Welsh Revenue Authority; Sam Cairns, Chief Operating Officer, Welsh Revenue Authority; and Dave

Matthews, Head of Policy, Welsh Revenue Authority on the Welsh Tax Acts etc. (Power to Modify) Bill.

**6 Motion under Standing Order 17.42 (ix) to resolve to exclude the public from the remainder of this meeting.**

6.1 The motion was agreed.

**7 Welsh Tax Acts etc. (Power to Modify) Bill: Consideration of evidence**

7.1 The Committee considered the evidence.

**8 Tertiary Education and Research (Wales) Bill: Consideration of draft report**

8.1 The Committee agreed the report with minor changes.

Peredur Owen Griffiths MS  
Chair of Finance Committee  
Senedd Cymru  
Tŷ Hywel  
Cardiff Bay  
CF99 1SN

2 February 2022

Dear Peredur

Further to my letter dated 8 November 2021 responding to your committee's **Report on the Scrutiny of the Senedd Commission Draft Budget 2022-2023**, I'm pleased to be able to provide an update on a number of the recommendations raised in the report. This update, on three of the Committee's recommendations (recommendations 4, 5 and 7), is detailed in **Annex 1**.

I would again like to thank the Committee for its scrutiny and to thank you for sharing the Committee's praise for the Commission's approach to outreach and engagement work during the Plenary debate on the budget. As noted in my previous letter we will provide the Finance Committee with regular reports on engagement activities to enable it to assess its value for money.

If there is any further information your Committee would like to have, please do not hesitate to let me know.

Yours sincerely



Ken Skates MS

cc Senedd Commissioners, Manon Antoniazzi, Nia Morgan

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



## Annex 1

### Finance Committee Recommendations - Update

Recommendation 4. The Committee recommends that the Commission provides as much information as possible to the Committee on any additional costs that will feature in the budget for 2023-24 and beyond as soon as the Commission's goals, objectives and priorities for the Sixth Senedd are agreed.

At its December 2021 meeting, the Commission approved its Strategic Goals for the Sixth Senedd. I attach the "Commission on a page" infographic for information in **Annex 2**. The Corporate delivery plan is to be worked on now the Commission have agreed their strategic goals.

We welcome the opportunity to share any additional costs that will feature in the budget for 2023-24 with the Committee. Any additional costs will be driven by these new goals.

The Commission has yet to commence work on its Budget Strategy for 2023-24. The Commission's focus will be to adhere to the Committee's Statement of Principles.

In line with the Statement of Principles, the Commission's budget will be set to provide the minimum level of resources required to meet the anticipated level of demand, to ensure the Senedd can deliver its business and will not assume an increase in funding from one year to the next.

At this stage, additional costs specifically associated with the new strategic goals are in the process of being forecast. If the revised strategic goals result in a greater than inflationary budget increase (excluding the pay award) then full details will be provided within the 2023-24 budget document or sooner, if available.

The following may result in additional costs that cannot be absorbed within the current operational budget.

- Ensuring that the Senedd, its committees and Members can carry out their duties effectively may require investment, for example, to support additional committees, to respond to complex constitutional change, to improve business systems or to access additional capacity or specialist expertise.
- Any significant reshaping of the business timetable, to increase capacity for Senedd business, is likely to have implications for a range of services, staffing and estate/ICT investment.
- The need to respond to changing UK Security Threat Levels and the threat of a successful cyber security attack.
- Wellbeing support in the face of continuing workload pressures.
- Members' and committee appetite to drive the Commission's engagement strategy.



- Post pandemic agile futures means doing things differently, not necessarily more costly, but responding to requests for hybrid, flexible working methods from Members, groups and Commission staff and transforming the basis on which we deliver many of our services may involve financial investment.

In addition, if, during this Senedd, it becomes clear that the Commission needs to plan for any increase in the size of the Senedd, its budgetary strategy would need to be significantly reworked.

**Recommendation 5. The Committee recommends that the Commission continues to provide periodical reports during the rest of the 2021-22 financial year on in-year costs and savings related to the impact of COVID-19.**

The following tables provide an early snapshot of the financial implications of COVID-19, during 2021-22. This information provides an interim update of the impact of Covid-19 on the 2021-22 outturn and a final detailed update for 2021-22 will be provided, following the external audit for this financial year. These figures are provisional and are forecast figures as at 31 December 2021.

### **Impact on the provision for accrued annual leave and staff wellbeing**

As highlighted in a previous letter to the Committee, International Accounting Standard (IAS) 19 - Employee Benefits requires the Commission to accrue for the cost of any unused leave entitlement accrued by Commission staff at 31 March in each financial year.

The provision as at 31 March 2020 was around £800k (representing 6.9 days of annual leave and 2 days of flexible leave accrued by each member of Commission staff). By 31 March 2021 this provision was around £1.3 million (an extra provision of £0.5m), as a result of certain staff not being able to take leave and others who have not wanted to take leave during the pandemic in 2020-21.

This continues to be actively addressed to ensure the wellbeing of staff, however where we could have expected this provision to reverse, this has not yet been the case. An additional £100k to £250k provision may be required by 31 March 2022. A supplementary budget is not required for this additional provision during 2021-22 as it is anticipated that this can be funded from the greater than anticipated level of staff vacancies seen during 2021-22 - as noted below.

### **Impact of increased vacancies, turnover and capacity constraints.**

The uncertainty of the pandemic has resulted, during the past 18 months, in a reduced turnover of staff. Naturally as the pandemic has continued, the Commission is once again experiencing a return to more normal levels. This increase, combined with a number of other factors, including:

- specific posts temporarily frozen as a result of reduced services during covid which can now be released for recruitment,



- posts temporarily frozen pending the election and resulting Commission strategy, and
- new additional posts created to support the new capacity pressures arising from hybrid ways of working and new Committee structures,

has led to an increased level of vacancies to be filled..

### **Impact on Service Area Budgets – general expenditure**

The impact of the COVID-19 pandemic on the general day-to-day expenditure of the Commission has again been varied during 2020-21 and the tables below provide an indication of where lower than anticipated expenditure has occurred and the impact on the project fund.

**Table 1 - Reduced costs or savings against Service Budgets**

<b>Savings against Budget</b>	<b>2021-22</b>	<b>£</b>
Staff travel Costs	111,000	
Reduced Utility costs	87,000	
Police and Security Costs	83,000	
MS related Commission expenditure*	57,000	
External translation costs	83,000	
Education and Events	49,000	
Postage	25,000	
Hospitality	23,000	
<b>Total</b>	<b>518,000</b>	

\*includes MS international travel and engagement costs, which are funded from the Commission's operational budget.



## Impact on the Commission Project Fund

**Table 2 – Estimated Project Fund expenditure 2020-21**

	<b>Budget</b>	<b>Actual</b>
Engagement and Outreach activities	£200,000	£50,000
Legislative Workbench	£240,000	£240,000
EFM Project Expenditure	£245,000	£380,820
- Additional EFM expenditure - Security/Safety/Covid related		£243,463
- Additional EFM expenditure - Sustainability		£230,000
ICT Project Expenditure	£275,000	£297,039
- Additional ICT expenditure - including covid related items		£391,826
Items delayed from 2020-21 due to Covid		£55,439
<b>Total</b>	<b>£960,000</b>	<b>£1,888,587</b>

The additional expenditure from the project fund has been, in part, funded by the reduced expenditure on service area budgets, highlighted in table 1 and, in part, from funding freed from a higher than anticipated level of vacant posts.

The Commission budget anticipates a prudent level of vacancies on average throughout the year.

During 2021-22 the number of vacancies has, on average, exceeded this estimate for reasons outlined above. This funding has been reallocated from the staffing budget to fund the additional demands on the project fund, as a result of the pandemic during 2021-22 and the potential increase in the provision for accrued annual leave.

**Recommendation 7.** The Committee recommends that the Commission provides updates on how the new ways of working and requirements for office space by the Welsh Government, as well as any proposals for Senedd reform, are impacting on the Commission's estate plans and needs for office space, particularly where this may have resource implications.

The Commission, at its 13 December 2021 and 31 January 2022 meetings, discussed a number of factors pertinent to the development of the Senedd Commission Estate Strategy.

These factors included long-term office accommodation needs for Members and staff, a more flexible and agile use of accommodation, the implications of Senedd Reform, the Senedd's regional presence and the Welsh Government's developing accommodation strategy.

Commissioners provided feedback on the strategic considerations outlined and requested additional information in some areas. This additional information is being collected and will be considered again by Commissioners to form the Commission's



Estate Strategy for the Sixth Senedd and beyond. A further update can be provided to the Committee later in 2022.



## Annex 2 – Commission on a page

### Welsh Parliament Senedd Commission

#### Purpose of the Welsh Parliament

The Welsh Parliament is the democratically elected body that represents the interests of Wales and its people. Commonly known as the Senedd, it makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

#### Purpose of the Senedd Commission

The Senedd Commission serves the Senedd to help facilitate its long-term success as a strong, accessible, inclusive and forward looking democratic institution and legislature that delivers effectively for the people of Wales.

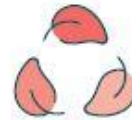
#### Senedd Commission Strategic Goals for the Sixth Senedd



To provide outstanding parliamentary support



To have citizens at the heart of all we do



To use resources sustainably

#### Priorities for the Senedd Commission for the Sixth Senedd

- Providing support for Members across the range of business, and adapting to Members' needs.
- Responding to, and facilitating constitutional change, including strengthening interinstitutional networks and learning.
- Maintaining a good reputation and developing sustainable services.
- Listening to citizens and showing how we act on what they tell us; that we are their voice.
- Encouraging and inspiring citizens to be involved in our deliberations online and in person.
- Establishing the Senedd as the focal point of Welsh public life.
- Putting sustainability at the heart of all that we do.
- Building and developing a skilled, committed and diverse workforce, equipped with the technology and facilities to perform their roles.
- Effective planning and financial and project management, so we can respond quickly and flexibly to meet the needs of the Senedd.

#### Our Values #OneTeam



**RESPECT:**  
We are inclusive, kind, and value each other's contributions in delivering excellent services.



**PASSION:**  
We are purposeful in our support of democracy and pull together to make a difference for the people of Wales



**PRIDE:**  
We embrace innovation and celebrate our achievements together as a team

- Providing assurance through appropriate governance and evidencing value for money.
- Providing a safe and healthy environment to work and engage.



## Agenda Item 2.2

Our ref: NB/CV/mm

Ask for: Nick Bennett



Date: 7 February 2022



Peredur Owen Griffiths MS  
Chair of Finance Committee  
Senedd Cymru

Dear Peredur

I refer to the Committee's recent scrutiny of my Annual Report & Accounts and my Estimate for 2022/23. I am pleased to attach my response to each of the Committee's recommendations. I hope that these detailed responses are helpful but would be very happy to discuss them further with the Committee Chair and/or the Committee.

As I near the end of my term of office, I am reflecting on the last seven years or so. I am very proud of what has been achieved, but also immensely grateful to the Senedd and to successive Finance Committees for their vital support. Key achievements during my tenure are:

- Published **51 public interest reports**.
- Considered over **50,000 enquiries and complaints**, helping to address individual injustices and make recommendations for improvement.
- Published **5 Thematic reports** (Ending Groundhog Day – Lessons in Poor Complaint Handling; Out of Hours-Time to Care; Home Safe and Sound: Effective Hospital Discharge; Justice Mislaid – Lost Records and Lost Opportunities; At Your Service: A Good Practice Guide).
- Completed the first wider **Own Initiative Investigation** - Homelessness Reviewed: an open door to positive change.
- Introduced **Oral complaints**, with more than 150 so far this year.
- **Transitioned seamlessly to all staff working at home** when the pandemic struck, facilitated by investment in IT systems to allow paperless working.
- Focused on **supporting improvement in complaints handling** by public bodies in Wales, with Improvement Officers and now my complaints standards team.

Page 1 of 2

Ombwdsmon Gwasanaethau Cyhoeddus Cymru / Public Services Ombudsman for Wales, 1 Ffordd yr Hen Gae, Pencoed CF35 5LJ

[www.ombwdsmon.cymru](http://www.ombwdsmon.cymru) / [www.ombudsman.wales](http://www.ombudsman.wales)

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Bydd pob galwad yn cael ei recordio ar gyfer dibenion hyfforddi a chyfeirio / All calls are recorded for training and reference purposes

Rydym yn hapus i dderbyn ac ymateb i ohebiaeth yn Gymraeg. Ni fydd hyn yn arwain at oedi. Mae ein holl ddogfennau ar gael yn Gymraeg ac yn Saesneg  
We are happy to accept and respond to correspondence in Welsh. This will not lead to a delay. All our documents are available in both Welsh and English

- Provided **training to 4,000 public body staff** on complaints handling.
- Increased awareness of the office from 35% in 2012 to 48%.

All of these achievements reflect the support and engagement of the Finance Committee, and I wanted to put on record my gratitude for the work of the Committee and its predecessors over the last seven years. The Committee's support for investment in IT and for the additional powers under the 2019 Act have, along with support for core funding of the service, been central to these achievements.

In my previous correspondence I indicated that I would be delighted to meet the Chair and talk more about the work of the office. As my term of office concludes and as my successor has now been appointed, it would be more appropriate to meet Michelle, who would, I am sure, also welcome that opportunity.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nick Bennett', with a stylized flourish at the end.

**Nick Bennett**  
Ombudsman

## **Senedd Cymru Finance Committee Annual Scrutiny of the Public Services Ombudsman for Wales**

### **Response of Public Services Ombudsman for Wales - February 2022**

#### **Introduction**

The Senedd Finance Committee considered the Annual Report and Accounts and the initial Public Services Ombudsman for Wales (PSOW) Estimate 2022-23 on 13 October 2021. The Committee subsequently indicated that it would agree an increase in budget only if it did not exceed that sought by the Senedd Commission. We prepared and submitted a revised Estimate reflecting this.

On 22 November the Committee laid its report on the revised Estimate and the Annual Report and Accounts for 2020/21. The Committee's report made 12 recommendations, and this paper considers and responds to each of them.

**Recommendation 1. The Committee recommends the Ombudsman ensures that the statistics about caseload are presented clearly and consistently and that data labels are included in graphs and infographics so that the information used to inform the assumptions underpinning the request for resources is more clearly presented.**

#### **Agreed**

Our intention in both the Estimate submission and the Annual Report and Accounts is to show sufficient detail to be meaningful, but also to keep presentation as clear and simple as possible. We will work to achieve this balance and set out more clearly the basis for any forecasts and assumptions in our Estimates submission.

**Recommendation 2. The Committee reiterates a previous recommendation that the Ombudsman should revisit the Key Performance Indicators for the next financial year to ensure they are sufficiently ambitious and seek continual improvement in the delivery of the Ombudsman's work.**

#### **Agreed**

Our new Corporate Plan for the years 2022/23 to 2024/25 will be prepared by my successor from April 2022. As part of that, our Key Performance Indicators and associated targets, will be reviewed and revised. In setting new and ambitious targets, we will take account both of the budget / resources available and of the current and projected future caseload demands on our service.

We recognise the value of all complainants having their complaints considered by a member of staff. However, we also recognise that the current demands on our service are not ones we can meet within our existing budgets and with our current approach to service delivery. We are therefore exploring the scope for more digitisation (including on-line automated screening) to reduce the number of complaints requiring initial manual consideration. Resource constraints mean that we will also look at 'raising the bar' so that less-serious complaints are discouraged and, if received, no longer investigated.

**Recommendation 3. The Committee reiterates a previous recommendation that the Ombudsman should report unit cost per case in cash and real terms, including sufficient information to ascertain the basis for the calculation, such as which costs are included, and the reference year adopted for the trend data.**

**Agreed**

The unit costs we include in our Annual Report & Accounts are adjusted to a constant price base to facilitate meaningful year-on year comparison. However, in our Estimates submission to the Finance Committee, we will ensure that we include unit costs in both real terms and cash terms. For the real terms unit costs, we will use the latest inflation figures and state the month and year used.

Whilst projecting future workload is not an exact science, we will state our core assumptions and the reasons for them.

**Recommendation 4. The Committee recommends that the Ombudsman provides further information about the proposed new methodology for calculating the unit cost and explains why it will be a more effective measure of performance than the existing approach.**

**Agreed**

The principles we have used in developing our unit costs are that:

- Costs included in the calculation should be those related to the activity for which units are counted (so the audited cost of complaints handling activity is used instead of the total budget).
- Costs should be presented at a constant price base, so that changes shown relate to cost or volume changes rather than inflation.
- Values shown should be at **current** prices as that is more meaningful than some arbitrary previous year.
- The units used in the calculation of unit costs should reflect, as far as possible, the work undertaken in the period in question (so that the number of enquiries/complaints **closed** is considered a more appropriate basis for unit costs than enquiries/complaints **received**).

The Annual Report and Accounts included an explanation of the approach to unit costs (p85). We will revisit the explanation in our next Annual Report & Accounts, with the Committee's concerns in mind, and will ensure that the explanation is clear.

The Committee may also be reassured to know that our external auditors have audited our unit costs and made no adverse comment on the approach that we are using.

**Recommendation 5. The Committee recommends that the Ombudsman undertakes a full staff survey in 2022 with a particular focus on staff wellbeing to ensure that the impact of the pandemic on the organisation is understood and that lessons are being learnt to improve work practices**

**Agreed**

Our main staff survey is undertaken every two years. It was undertaken in 2020 and will be undertaken again in 2022.

In the period between our main staff surveys we have undertaken a Chwarae Teg FairPlay Employer survey of all staff, as well as surveys to ascertain how well staff were managing during the pandemic and to gather information on attitudes to returning to the office. We have also received very positive assurance from our internal auditors, who undertook audits of our wellbeing arrangements (August 2020) and of the support that we provide to staff whilst working remotely (June 2021).

**Recommendation 6. The Committee recommends that the Ombudsman continues to quantify the cost of the new powers in the Public Services Ombudsman (Wales) Act 2019 and data about them in the Annual Report.**

**Agreed**

This information was included in the 2020/21 Annual Report and Accounts, and we plan to include it every year.

**Recommendation 7. The Committee recommends that the Ombudsman provides evidence on the cost avoidance benefits arising from the Public Services Ombudsman (Wales) Act 2019 in future Annual Report and Accounts and Estimates. This should include additional evidence on efficiencies and improvements arising from the legislation, as part of future disclosures.**

**Agreed**

I share the Committee's interest in, and wish to focus on, the impact and effectiveness of the 2019 Act. I have been working to collect and consider data now to support this and the future post-legislative scrutiny of the Act. I am mindful of the social justice motivation for the Act, as well as the financial consequences of its implementation, and both will be included in the analysis.

There are some challenges in both data collection and analysis, however, as the impact of our work will depend partly on whether, and to what extent, public bodies in Wales act on the training we provide to their staff and implement the recommendations for public service delivery improvement that we make. It also remains challenging to identify the numbers of enquiries and complaints that would have been received without the additional powers under the 2019 Act.

Since the Senedd's intentions, in approving the Act, included securing improved access to justice, it is important that an assessment of this outcome is also included in our analysis, though it does not have a direct financial value. Our complaints standards work aims to encourage public bodies to recognise complaints as complaints, and to treat them as such. This will mean that in some cases the recorded number of complaints will probably increase, but so too will justice for complainants.

My use of own initiative powers to extend the investigation of a single complaint has, for example, already identified and addressed service failures in prostate cancer care so that they could be remedied, reducing or preventing harm to 8 patients. Similarly, our Own Initiative investigation and report on homelessness will result in positive change affecting many people facing homelessness in the future.

These are very real benefits of the 2019 Act but not necessarily ones that are easy to quantify. We will seek to capture both qualitative and quantitative benefits.

**Recommendation 8. The Committee recommends that the Ombudsman ensures that resources to support own-initiative investigations are not prioritised at the expense of dealing with the Ombudsman’s caseload.**

As the Committee will appreciate, the statutory independence of the Ombudsman means that decisions on the number and scale of Own Initiative investigations are a matter for the Ombudsman, following consideration of appropriate data, comments and views.

Own Initiative investigations from 1 April 2022 onwards are a matter for my successor, but I will certainly draw this recommendation to her attention as part of our handover discussions. The Committee’s views will, I am sure, be included in her considerations.

**Recommendation 9. The Committee notes the detail in the revised “Public Services Ombudsman for Wales: Estimate 2022-23” and considers the Estimate acceptable. Subject to the comments and recommendations in this report, the Committee supports the overall request for resource.**

I and my colleagues appreciate and are grateful for this support.

**Recommendation 10. The Committee recommends that the Ombudsman must clearly demonstrate how the statement of principles are adhered to when formulating future budgets beyond 2022-23, and that, in particular, the Ombudsman should not assume an increase in funding from one year to the next.**

#### **Agreed**

Our Estimate submission for 2022/23 sought to meet all the principles and referenced them explicitly in the document. In future submissions, the office will continue to take account of the budget principles, efficiencies and economies, as well as demands, caseload and inflationary pressures. Where an increase is sought, this will be clearly explained and evidenced. We will review the presentation next year to make sure that we more clearly demonstrate adherence to the Statement of Principles.

The Statement of Principles makes clear that there should be no assumption that budgets will increase in line with the Welsh Block. We have certainly not assumed such increases during my term of office. In that context, it is interesting to note that the Welsh Block (TME) increased by 52% from 2015 to April 2021, whilst the Ombudsman’s budget has increased by 26%. Had the Ombudsman’s budget increased in line with the Welsh Block, our budget for the current year would be more than £1m greater than it is.

**Recommendation 11. In line with the statement of principles, the Committee recommends that the Ombudsman should fund in-year pressures by making in-year savings and efficiencies, rather than through supplementary budgets.**

I certainly accept and agree the principle that in-year pressures should be contained within approved resources wherever possible. However, it would be impossible for me to commit **never** to seek additional in-year resources via a supplementary budget submission.

To illustrate the approach I have adopted, I have looked back at previous supplementary budget submissions during my tenure. Over the last seven years I have used the Supplementary Budget process only in respect of extraordinary/one-off events. I have always looked to manage within the budget allocated and do not make Supplementary

Budget submissions lightly. The occasions I have made Supplementary Budget submissions have been<sup>1</sup>:

- To meet the costs of a High Court challenge to decisions of the Adjudication Panel for Wales in a high-profile Code of Conduct case – 2015/16 and 2017/18
- Capital fit out costs for accommodation at Bocam Park following changes to accommodation and a new lease agreement – 2015/16
- To vary the budget between revenue and capital at nil net cost – 2018/19
- To return cash to the Welsh Consolidated Fund – this related to pensions, with cash returned in 2017/18 and in 2020/21, totalling £1.3 million

The overall net effect of Supplementary Budget submissions during my tenure has been a net repayment to the Welsh Consolidated Fund of just under £1 million (cash).

As the Committee will be aware, I have no ability to carry resources from one period to the next, no reserves and no borrowing powers. 80% of my annual costs are staff costs, and after taking account of other committed and fixed costs such as rent, IT contracts, non-domestic rates, energy costs, there is less than 8% of the budget remaining to cover other costs such as printing and stationery, clinical advice, translation, training, postage, outreach and publicity.

To make savings in-year is therefore problematic, with significant savings possible only by reducing staff numbers. Redundancies made to try to balance the budget would themselves be likely to generate supplementary budget submissions to meet in-year redundancy costs.

The Committee's recommendation therefore prompts a review of our current approach. To date we have not included any contingency sums in our Estimate, on the basis that significant unexpected or exceptional costs would be dealt with through Supplementary Budget submissions. However, in light of the Committee's recommendation, I will suggest to my successor that consideration should be given to including a contingency sum in future budgets, as this would reduce the likelihood of a supplementary budget being required in future. This might, however, be a matter for discussion as, even with a contingency, it would not be possible to guarantee that no Supplementary Budget would ever be needed. The inclusion of a significant contingency in the budget might also result in unspent budget being returned at the year-end, unnecessarily reducing in-year resources available for the rest of the Welsh budget.

**Recommendation 12. The Committee recommends that the Ombudsman provides an update bi-annually on the efficiency savings made in-year.**

It would not be appropriate for me to commit my successor to this. I will, however, draw her attention to this recommendation so that she can engage further with the Committee.

I welcome scrutiny of the office's use of public monies, and I confirm my commitment to securing value for money and efficiency in service delivery. I am conscious that the Ombudsman's budget makes up only around 0.2% of the overall Welsh budget, and I would wish to avoid introducing additional reporting requirements that could be disproportionately resource consuming. I note that the last Finance Committee concluded, in the context of the

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<sup>1</sup> The Supplementary Budget process was also used, as we were requested to do, for sector-wide changes to employer pension contributions and for the costs of new powers once the 2019 Public Services Ombudsman (Wales) Act received Royal Assent and commencement dates were set

requirement that the Auditor General produces an Interim Report each year, that this requirement should be removed.

Under the new oversight arrangements, the Senedd Finance Committee considers the Estimates submission (produced around the middle of the year) and the Annual Report and Accounts (produced after the year-end and looking back on the completed year). The Estimates submission also includes an update on the current year. This therefore already gives the Finance Committee the opportunity to explore efficiencies achieved in the completed year, an update on the current year and efficiencies anticipated in the Estimate for the forthcoming year. I would hope that this would provide the Committee with the information it requires, without the need for (and costs of) additional reporting.

I note that the Committee has focussed particularly on cash-releasing savings. As indicated above, a large proportion of the costs of the Ombudsman's office are effectively fixed, and 80% of costs relate to staff, and so the potential for generating in-year cash-releasing savings is extremely limited.

Efficiency savings on the other hand, by increasing productivity, are vital and should not be under-valued. The Finance Committee's welcome support during my tenure has allowed staff numbers to increase, particularly to resource the additional powers under the 2019 Act. However, my office is dealing with 48% more complaints and enquiries now than it did when I took up office whilst the budget has increased in real terms by 21% (much of which actually relates to the additional powers under the 2019 Act). The fact that the budget has not increased proportionately is itself a sign of the substantial efficiencies of the last seven years or so. We will consider how best to show these efficiencies, as well as seeking cash savings in variable costs, in future budget submissions.

# Agenda Item 2.3

Gweinidog y Gymraeg ac Addysg  
Minister for Education and Welsh Language



Llywodraeth Cymru  
Welsh Government

Jayne Bryant MS  
Chair  
Children, Young People and Education Committee  
Senedd Cymru  
Ty Hywel  
Cardiff Bay  
Cardiff  
CF99 1NA

4 February 2022

Dear Jayne,

## Tertiary Education and Research (Wales) Bill

Thank you for your letter of 13 January following my attendance at Committee to give evidence on the Tertiary Education and Research (Wales) Bill ('the Bill'). Your letter raised a number of questions to which I have responded in the Annex to this letter.

I will write again shortly with further detail in respect of my intended plans for the implementation of the Bill.

Following my attendance at the Legislation, Justice and Constitution Committee in December, the Committee wrote to me querying an omission in the Statement of Policy Intent. In response to this query I asked my officials to update the statement and the revised version is included with this letter. This revised version also correct two minor errors.

This letter has been copied to the Legislation, Justice and Constitution Committee and the Finance Committee.

I would like to take this opportunity to thank the Committee again for the valuable input to the Bill.

Yours sincerely,

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

Bae Caerdydd • Cardiff Bay  
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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

## Annex

1. **The Council of Deans has requested further clarity “about whether the Commission will fund pre-registration healthcare programmes and how this will link with funding from NHS Wales and HEIW”. The Council also asks for more information on how the Commission will fund healthcare research in Wales; and how pre-registration healthcare professional apprenticeship programmes will be funded**
  - 1.1 These are matters for the Commission itself to determine once it is established. The public investment in healthcare education and training programmes is currently made through a variety of funding streams and programmes including funding from Welsh Government, NHS Bursaries, student tuition fees as well as HEFCW’s teaching funding. It will be for the Commission to decide whether or not it continues with HEFCW’s current system or adopts a different approach.
2. **The Open University in Wales has expressed concerns about lifelong learning provision being framed specifically in terms of further education in the Bill. The OU seeks clarify on this point, writing: “We do not believe that it is the Welsh Government’s intention to limit these funding mechanisms to further education providers but would welcome clarification that our understanding is correct”.**
  - 2.1 Section 2 of the Bill requires the Commission to promote lifelong learning across all tertiary education. This duty includes the promotion of opportunities for lifelong learning at a variety of levels, subjects, settings and modes of study.
  - 2.2 We are committed to the benefits of further expanding lifelong learning opportunities across further and higher education. The reforms to student financing and HEFCW funding following the Diamond Review enabled significant expansion of lifelong learning opportunities in higher education. Student numbers at the Open University in Wales have more than doubled between 2017/18 and 2020/21.
  - 2.3 Whilst student finance will remain a matter for the Welsh Ministers after the Commission is established, we presently anticipate that the Commission may make similar grant funding arrangements for part-time courses of higher education to those currently made by HEFCW, subject to the provisions of sections 85 to 89 (and other relevant provisions) of the Bill; we are interested in the views of the sector in what further steps can be taken to facilitate lifelong learning in higher education.
  - 2.4 The new duty in Section 91 of the Bill - which provides that the Commission must secure proper facilities for relevant further education and training for eligible adults aged over 19 - is therefore only one of several ways we expect the new Commission to drive forward our commitment to lifelong learning.
3. **NPTC Group has asked for clarity regarding the effect of S67 and S68 in the Bill. They write: “Further explanation is [...] required regarding how this [power] interacts alongside the role of WG as Principal Regulator of the FE institutions as exempt charities”**
  - 3.1 The Bill does not impact on the interface between the Welsh Ministers’ powers of intervention in respect of further education institutions in Wales and their role as Principal Regulator for charitable purposes. Under current arrangements, section 57

of the Further and Higher Education Act 1992 (the 1992 Act) provides the Welsh Ministers with powers to intervene in the conduct of an institution in the further education sector in Wales. The Bill will repeal the powers in the 1992 Act and broadly restate them under sections 67 and 68. Currently, the Welsh Ministers also perform the role of Principal Regulator for further education corporations in Wales (and institutions administered by or in connection with them), and for St David's Catholic College (and institutions administered by or in connection with it) as exempt charities (exempt by virtue of section 22 and paragraph 7 of Schedule 3 to the Charities Act 2011 ("the 2011 Act")). "Principal Regulator" is defined in section 25 of the 2011 Act, and regulations made by the Minister for the Cabinet Office in 2013 appointed the Welsh Ministers to the role in respect of exempt charities in the further education sector in Wales. The Bill does not change these arrangements.

3.2 However, Committee may wish to note that the Welsh Government proposes to review the role of the Principal Regulator going forward, subject to the successful passage of the Bill and the establishment of the Commission. In particular, consideration will be given to whether this role should more appropriately lie with the Commission given its responsibility for the regulatory oversight of tertiary education providers in Wales that are institutions within the further education sector. The Welsh Government will engage with all relevant stakeholders as part of its consideration of this matter. However, any appointment to the role of Principal Regulator must be by regulations made by the Minister for the Cabinet Office.

**4. The Equality and Human Rights Commission write: "it is unclear how and whether the EIA relates to the breadth of the Bill and the scope of its measures". The Committee would be grateful if the Minister can clarify this point for the EHRC**

4.1 In response to the comments raised by the Equality and Human Rights Commission, I would like to confirm that, once established the Commission will be a listed body under the Equality Act 2010.

4.2 I have asked my officials to consider the EHRC's evidence specifically and look at what we need to do to improve the document to ensure we have demonstrated publicly our thorough assessment of the impacts of the policy. Following that assessment and, if appropriate, any additional investigations, I shall re-publish the amended Equality Impact Assessment ahead of Stage 2.

4.3 Discussion with stakeholders has been frequent and is ongoing since the policy was first considered, and the EIA can be updated to reflect the breadth and scope of that engagement, at the various consultations and learner voice events through to day-to-day interaction with stakeholders and student groups.

**5. The Charity Commission has asked for clarity on the following point: "Under clause 25(4)(b)(i) of the Bill, the Welsh Ministers may, by regulation, specify further initial registration conditions relating to the charitable or other status of tertiary education providers. It would be helpful to have clarity as to what conditions may be imposed in practice".**

5.1 Section 25(3) of the Bill enables the Welsh Ministers, by way of regulations, to specify further initial registration conditions in addition to those set out on the face of the Bill. Different conditions may be specified for different categories of registration. The list

provided at section 25 (4)(b) indicates the kind of conditions that may be specified in such regulations which include:

- the charitable or other status of tertiary education providers;
- the information provided to prospective students about a provider, its courses, and its terms and conditions of contracts with students;
- complaints procedures of providers.

5.2 The above examples are not exhaustive. Additionally, not all of the above matters may be appropriate initial conditions of registration for all the categories on the proposed register.

5.3 The Statement of Policy Intent accompanying the Bill sets out the Welsh Government's initial policy intentions for subordinate legislation. It is presently intended that the categories of registration to be prescribed in regulations to be made under section 23(2) of the Bill will be informed by engagement and consultation with stakeholders. The current policy proposal is to prescribe two categories of registration namely:

- **Higher Education Providers (Core)** – It is intended that providers registered in this category would benefit from automatic higher education course designation for Welsh Government student fee and maintenance support at the higher fee level, currently £9000 per year. Student support regulations are made under the Teaching and Higher Education Act 1998. Providers registered in this category would be subject to a fee limit registration condition and would also be eligible to receive higher education grant funding from the Commission.
- **Higher Education Providers (Alternative)** – It is intended that providers registered in this category would benefit from automatic higher education course designation for Welsh Government student fee and maintenance support at the lower fee level, currently £6165 per year. Providers registered in this category would not be subject to a fee limit condition nor would they be eligible to receive higher education grant funding from the Commission.

5.4 It is presently intended that regulations to be made under section 25(3) of the Bill will provide a further initial condition of registration for the proposed “Core” registration category that requires providers to be a charity. This would be consistent with the Higher Education (Wales) Act 2015 (“the 2015 Act”), which provides that a “regulated institution” (an institution which has an approved fee and access plan) must be (inter alia) a charity. The Welsh Government will consult on its policy proposals for subordinate legislation in due course.

## **6. Universities Wales asks for clarity on why the Commission is obliged to have regard to the ‘distinctive characteristic’ of providers when funding under some headings but not others, for instance when funding research and innovation**

6.1 This is an area where I am considering bringing forward an amendment with a view to ensuring there is consistency within the Bill in respect of the duty of the Commission to have regard to the ‘distinctive characteristic’ of providers when funding research and innovation.

## On the matter of Additional Learning Needs:

### 7. The Children's Commissioner has requested further details be provided that would "support the Commission to more effectively fulfil [the activity listed in para 3.276 of the EM]" in relation to learners with ALN.

7.1 The Commission will have a statutory duty to secure the proper and reasonable facilities for the further education and training of learners in Wales and to fund such provision including funding to meet the needs of young people with Additional Learning Needs (ALN). In providing funding to secure such facilities it must consider whether the needs of people with ALN are being met. In supporting learners with ALN the Commission will be required to have regard to:

- **the different abilities and aptitudes of different persons** – this includes those learners with ALN;
- **the education and training required** to ensure that:
  - employees and potential employees are available who are able to deliver additional learning provision in Welsh; and
  - that facilities are available for assessing through the medium of Welsh whether persons have ALN
- **facilities whose provision the Commission thinks might reasonably be secured by other persons** including provision secured by local authorities under Part 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (ALNET Act 2018).
- the needs of persons with additional learning needs; and
- the desirability of facilities being available which would assist the discharge of duties under the ALNET Act 2018.

7.2 Additionally, the Commission will be required to consider the further education and training needs of the ALN workforce. Specifically the capacity to undertake assessments and provide additional learning needs support through the medium of Welsh. Overall, this means integrating consideration of ALN into the Commission's further education planning and funding decisions from the outset rather than after other funding decisions have been made. In funding provision the Commission will be able to impose terms and conditions on funding including regulatory requirements in respect of the needs of persons with ALN.

7.3 It will be a matter for the Commission to decide funding allocations and in doing so it will need to have regard to the achievement of objectives in its approved strategic plan and comply with any terms and conditions the Welsh Ministers attach to their funding to the Commission.

- 8. Natspec asks how the Bill will require providers to be accountable for meeting the needs of students with ALN; and draws the Committee’s attention to “a need to ensure young people with complex ALN who require a placement at a specialist further education college are not excluded from the protections offered by the Commission”. The Committee would appreciate more information on these points.**
- 8.1 The primary legislation governing support for individual learners’ ALN and the statutory requirements placed on local authorities are clearly specified in the ALNET Act 2018. The Act makes provision for supporting children and young people with ALN while they are in school and, if they are over compulsory school age, while they are in further education. The Commission has a duty to fund provision for ALN at a population level but is not required to fund all ALN provision for post-16 learners. Local authorities would be responsible under the ALNET Act for securing specialist ALN provision for individual young people aged 16 – 25 with complex needs in private specialist colleges where they are required to maintain Individual Development Plans for them. Local authorities are best placed to consider and make arrangements to meet individual learners’ needs in these circumstances at a local level.
- 8.2 The Welsh Government is yet to announce the detail of how and when implementation of the ALN Act will commence for young people who are post-16, including the details and timing of how and when responsibility and funding for securing post-16 specialist provision will be transferred from Welsh Ministers to Local Authorities.
- 8.3 The Bill makes explicit reference to provision secured by local authorities under the ALNET Act 2018 in the context of the Commission taking account of the facilities that might be secured by others. The Commission will make an assessment of the sufficiency of facilities for additional learning needs provision at a general population level and not on a personalised individual learner basis. We will consider the terms of the Bill and supporting documentation to establish whether any amendments are needed to clarify the position in respect of specialist additional learning needs institutions or the requirements and relationship with the ALNET Act 2018 further.
- 9. Estyn has told us that: “we feel the Bill as introduced is not clear about the Commission’s role in funding [high need and ALN] learners to have appropriate provision”. They seek clarity regarding: “why or how learners with high needs could be funded differently according to the type of provision they need and may have differing quality experiences according to which provider they attend”.**
- 9.1 As discussed in Committee, the Commission has a duty to fund provision for ALN at a population level, but is not required to fund specialist provision identified for individual learners with high level or complex needs.
- 9.2 The ALNET Act is currently being implemented on a phased basis for particular cohorts of children and young people. Once the Act is commenced for a particular cohort, Local authorities will have a duty under the Act for considering the needs of those young people. Where a young person’s needs cannot be met by mainstream provision, Local Authorities have a duty to secure specialist provision as appropriate and in line with the requirements placed on local authorities to maintain Individual Development Plans.

- 9.3 Alongside the inspection of post 16 provision, including ALN, in mainstream schools and FE Colleges Estyn has a statutory responsibility to inspect provision in independent specialist FE colleges. The Chief Inspector is required to inspect and report on the quality of the further education and training being provided, the standards achieved by learners and whether the financial resources made available to specialist colleges to support learners' needs are managed efficiently and provide value for money.
- 9.4 It is expected that under the new ALN arrangements that local authorities would take into account Estyn's inspection outcomes of independent specialist colleges when making arrangements for individual learners complex needs.

**Following discussion of the evidence, we would welcome some further information on:**

**10. Your thinking on the development of the national strategic body for adult community learning.**

- 10.1 Policy considerations have moved forward since a national body for adult learning was considered in 2019, not least with the introduction of the bill. As we have discussed, the Commission will be responsible for planning and funding across the sector including adult and lifelong learning.
- 10.2 To support my commitment to increase the number of adults learning in Wales, I have agreed a Terms of Reference for an External Reference Group to take forward a programme of national co-ordination with key stakeholders from the sector. I expect to receive an outline of the programme in March and will report back to the committee once I have considered it.

**11. How ALN provision will work for learners in practice and how this Bill will interact with other pieces of relevant legislation such as the 2018 Additional Learning Needs Act**

- 11.1 The statutory requirements on how provision for learners with ALN will work in practice is set out in the ALNET Act 2018, supporting regulations, guidance and Code. In drafting the Tertiary Education and Research Bill we have looked closely at the interface between the ALNET Act 2018 and the planning and funding functions of the Commission recognising the policy importance of meeting the needs of learners with ALN.

**12. Why you believe 6th forms should be included in the Commission's remit, and if so, clarity as to why some of the provisions around learner protection and learner voice do not cover 6th forms**

Commission's Remit

- 12.1 We have taken a considered and balanced decision to include maintained school sixth forms within the remit of the Commission and believe that this approach will enable it to have clear, strategic oversight of all post-16 provision to inform policy on those areas that affect 16-19 year old learners wherever they choose to learn, study or train. I believe that this approach ensures that we are able to continue to deliver a mixed economy model of 16 – 19 provision across Wales offering diversity of choice for

learners, establishing parity and equal status of academic and vocational qualifications while valuing the benefits and merits of the different provision available. It offers a unique opportunity to adopt a coherent approach to planning and funding 16 – 19 provision, monitoring the delivery, availability and quality of courses, while facilitating collaborative working and improving accessibility.

12.2 The Committee may wish to note that the provisions in the Bill will not directly affect local authorities or schools in their day to day school organisation, or amend the legislation governing the arrangements for local school governance. These remain as now to ensure the integrity of the broader school structure is maintained.

#### Provisions around learner protection, learner voice and complaints procedures

12.3 The aim of a mandatory Learner Engagement Code (LEC) is to recognise and strengthen the existing arrangements in place across the breadth of the post 16 sector actively monitoring adherence to the LEC and ensuring that learners' voices are heard regardless of their course, location, level and mode of study. It will become mandatory for school sixth forms to have a LEC in place to ensure all our young learners are represented fairly and consistently. The Code will complement the existing arrangements in place at a school level, including the school council arrangements.

12.4 We are seeking to avoid duplication and ensure we are not placing additional administrative burden on schools and local authorities in managing different arrangements for learners at pre 16 and post 16 in a maintained school setting. It is also our intention to avoid potential confusion for learners and their parents which may arise as a result of different learner protection and complaints procedures operating within a school. Therefore, with the exception of making the Learner Engagement Code mandatory for school sixth forms, we have not extended the provisions in Part 5 of the Bill governing learner protection and the learner complaints procedures and schemes to maintained schools.

12.5 A learner protection plan will set out a tertiary education provider's arrangements for protecting the interests of a learner in the event of their course ceasing to be provided and for supporting a learner who wishes to transfer to another course. Learner protection plans would be in a format appropriate to the individual provider and its structures. Support and arrangements for learner protection at school and at a local authority level are already well established for the transfer of data about learners when they move from one setting to another, whether due to a school or course closure, a change in personal circumstances or learner preference.

12.6 While robust learner complaint arrangements, underpinned by legislation, are already in place in schools I am of the view that it would be beneficial for the Commission to broaden consultation with local authorities and school sixth forms in relation to learners aged 16 - 19 to encourage more active participation in the delivery and quality of their learning experience and to share good practice.

12.7 Provision has been included in the Bill to enable Welsh Ministers to specify by regulations a registered institution, other than a registered institution in receipt of financial resources from the Commission, as a qualifying institution for the purposes of the student complaint scheme currently operated by the Office of the Independent Adjudicator (OIA).

12.8 It is intended that providers that are registered with the Commission or receive funding from the Commission, for the purpose of higher education, further education or apprenticeships will be specified as qualifying institutions for the purposes of the OIA complaints scheme. It is recognised that all higher education providers and some further education providers in Wales that deliver higher education are currently qualifying institutions and it is envisaged that where further education providers are already members of the scheme, access to the scheme will be extended to their further education learners.

12.9 Welsh Ministers will not be able to specify that local authorities in relation to maintained school sixth form provision are qualifying providers and will not be part of the OIA scheme.

12.10 This balanced, proportionate and practicable approach will enable the Commission to support learners' interests ensuring that learner voice is at the centre of the reforms and a fundamental principle that applies across all post 16 provision.

### **13. Comparative information on composition and differing types of Board membership in similar organisations to the Commission**

13.1 Welsh Revenue Authority (WRA), Qualifications Wales, the Education Workforce Council and Citizen Voice Body for Health and Social Care (CVB), are each established by statute, with a Board or Council making the key decisions.

#### Citizen Voice Body for Health and Social Care

- The statutory framework of the CVB, as set out in the Health and Social Care (Quality and Engagement) (Wales) Act 2020, provides for the appointment of one non-voting associate member who is a member of the Body's staff, and a member of a trade union recognised by the Body.

#### WRA

- The WRA Board includes:
  - one or two members of staff appointed to the Board by the Chief Executive;
  - one member of staff appointed to the Board following a ballot of staff members
  - there is no requirement in the legislation for staff members to be members of recognised trade unions

#### Qualifications Wales

- Qualifications Wales' board comprises the Chair, Chief Executive and eight to ten ordinary members. No provision is made for representation of staff, trade unions or other key interested parties on the Board.

#### Education Workforce Council

- The Education Workforce Council comprises of 14 members with all appointed by the Welsh Ministers.

- In respect of seven of the members the Welsh Ministers must seek nominations from the below bodies and appoint those members from the nominations received. The Welsh Ministers must, as far as possible, ensure that four of the members are from nominations made from bodies listed in the left-hand column

<p>National Education Union. National Association of Schoolmasters Union of Women Teachers (Cymru). Association of School and College Leaders. Professional Association of Teachers. National Association of Head Teachers in Wales. Undeb Cenedlaethol Athrawon Cymru. University and College Union. UNISON. GMB. Unite the Union. Aspect Group of Prospect Union. Wales TUC.</p>	<p>Colleges Wales. Y Coleg Cymraeg Cenedlaethol. Association of Directors of Education in Wales. Welsh Local Government Association. Confederation of School Governors Associations in Wales. The Church in Wales. The Catholic Education Service. Higher Education Wales. Universities Council for the Education of Teachers. Welsh Independent Schools Council. Wales Association of SACREs. Association of Directors of Social Services Cymru. Federation of Small Businesses. Wales Council for Voluntary Action. Council for Wales of Voluntary Youth Services Cyngor Cymreig y Gwasanaethau Ieuenctid Gwirfoddol. Wales Principal Youth Officers' Group. National Training Federation for Wales Ltd. Education Training Standards Wales.</p>
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#### **14. Further information on the latest position on the power to dissolve Higher Education Corporations**

14.1 As I explained when I attended the Committee last month it is my intention to bring forward an amendment in respect of the power to dissolve Higher Education Corporations and work is continuing in this respect.

#### **15. Further information on the issues arising from the petition on the postgraduate STEM bursary**

15.1 The Bill makes provision for the Commission to fund certain categories of providers who are registered with the Commission, for the purpose of supporting higher education provided by or on behalf of such providers.

15.2 The categories of registered providers eligible to receive funding from the Commission will be specified in regulations. The register will ensure that matters of critical public interest are monitored in tertiary education institutions and that there are appropriate protections for Welsh public money, including student support and grants made by the Commission.

15.3 The benefits derived from registration are intended to be commensurate with the regulatory requirements. The Statement of Policy Intent accompanying the Bill sets out my intention for providers who register in the proposed “core” category to be eligible to receive higher education funding from the Commission.

15.4 It will be for individual providers to determine whether to seek registration with the Commission and to consider which category of registration they wish to apply for.

15.5 Our current policy intention is that providers in Wales seeking to be designated for the purposes of Welsh Government student support, or seeking eligibility for higher education and research grant funding, will need to register with the Commission to access these sources of funding.

**16. Further information on how the Bill can support academic freedom for individual academics, as opposed to the broader protections within the Bill for institutional academic freedom**

16.1 Section 16 provides that in exercising their functions under the Bill, the Commission and the Welsh Ministers have regard to the academic freedom within the law of academic staff at tertiary education providers in Wales that provide higher education to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions, without jeopardising their jobs or privileges.

16.2 Those concerned in the government of higher and further education institutions in Wales (and in certain higher and further education institutions in England) are also under a duty to “take such steps as are reasonably practicable” to ensure that freedom of speech is secured for members, staff, students and visiting speakers, under section 43 of the Education (No. 2) Act 1986.

16.3 We strongly believe in and support the principles of academic freedom and free speech across the education system, and are generally assured that such principles are well upheld in our universities and colleges. Section 16 of the Bill underlines and reaffirms this commitment.

**17. Further information on how the Coleg Cymraeg Cenedlaethol, Commission and other associated bodies will work together in relation to their roles in relation to Welsh medium provision**

17.1 Provision included in the Bill will enable the Commission to have the flexibility to work innovatively and effectively with the Coleg Cymraeg Cenedlaethol and other relevant bodies such as the National Centre for Learning Welsh to support the development of Welsh medium tertiary education. Both the Coleg and the National Centre have important and distinct roles to play in the achievement of the Welsh Government’s Cymraeg 2050 vision, supporting the development of Welsh medium tertiary education and language acquisition. The Cymraeg 2050 Work Programme from 2021 to 2026 includes a commitment to further expand the role of the Coleg and to develop proposals to place it on a statutory footing.

17.2 The Commission will be responsible for strategic planning and funding across the whole of the tertiary education sector and research and innovation sector in Wales. It will be vital for the Commission to engage with the Coleg and make use of the Coleg’s established expertise to plan strategically to positively promote and increase Welsh-

medium tertiary education, as specifically noted in the explanatory memorandum accompanying the Bill. The expectation is that responsibilities for taking forward areas of work will be determined reflecting the remit and respective expertise of each organisation to avoid duplication of effort and maximise the impact of interventions. It is envisaged that strategic planning documents will be aligned where appropriate and robust arrangements should be put in place to measure the impact of interventions on increasing opportunities to learn through the medium of Welsh across the tertiary education sector.

17.3 Further detail on the envisaged relationship between the Commission and the Coleg will be included in our implementation plan. The Commission and the Coleg will determine how best to deliver their respective functions. It should be noted that the Coleg has developed an effective working relationship with HEFCW over several years which has been codified in a memorandum of understanding.

## **18. Whether consent has been granted for section 128**

18.1 My officials continue to engage with the UK Government and we anticipated receiving consent shortly.

# Agenda Item 2.4

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



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref RExxxx

Peredur Owen Griffiths MS  
Chair, Finance Committee  
Senedd Cymru  
Cardiff Bay  
CF99 1SN

8 February 2022

Dear Peredur,

I am writing to provide further information on a few issues that were raised during our recent scrutiny session on the Draft budget.

## Budget Improvement and Impact Advisory Group

We would be happy to provide further details on the Budget Improvement and Impact Advisory Group once these details are formalised. I am also aware our officials have more broadly discussed the role of the group and how we can best work together on the important area of improving budget and tax processes as outlined in the Budget Improvement Plan and I look forward to further engagement on this matter.

## Financial Transactions

A summary of our £1.7bn Financial Transactions capital investments has already recently been provided and copied to the Finance Committee in response to questions raised by Mike Hedges AM during Business Questions as well as during the Finance Committee scrutiny of the draft budget.

## Digital Skills and Infrastructure

Digital Infrastructure investment provided for in the draft budgets supports the delivery of improved digital infrastructure throughout Wales.

The investment into this infrastructure supports the delivery of the Welsh Government's Digital Strategy which allows businesses to benefit from fast and reliable digital connectivity supporting them to gain new customers, sell their products, drive efficiency and innovate.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Capital commitments in 2022/23 to support digital infrastructure include funding to support the delivery of improved digital infrastructure, including Next Generation Access Broadband Wales; Local Broadband Fund; Access Broadband Cymru; and Trunk Road Fibre Improvement.

It should be noted however that as telecommunications policy is not devolved to Wales investment in this area is first and foremost a matter for the UK Government and UK budgets.

Business Wales provides businesses and entrepreneurs with a single point of contact for business information, advice and support from the public, private and voluntary sectors, and can be accessed digitally via <http://businesswales.gov.wales> and social media channels; the 03000 6 03000 helpline; and a network of offices located across Wales.

Business Wales provides a range of general business advice, information and signposting as well as specialist strands of advice such as equality & diversity; resource efficiency; international trade; skills; procurement; and mentoring. In addition to the Skills Gateway and Farming Connect.


Business Wales provision includes digital advice and support to businesses pan-wales through the Superfast Business Wales programme <https://businesswales.gov.wales/superfastbusinesswales/> which delivers online webinars on a range of digital topics followed up with 1-2-1 support from a team of digital advisors and a wealth of online material to support businesses digital adoption.

Business Wales offers a combination of online, telephone, 1-2-many and 1-2-1 business support which is tailored according to client need and the different regions of Wales, dependant on local requirements.

The Development Bank of Wales (DBW) helps Welsh businesses get the finance they need to start up, strengthen and grow and provides loans from £1k up to £10m as well as mezzanine, and equity funding; and helps businesses find the right finance partner to leverage in private finance with its own gap finance when necessary. The DBW has the objective of providing greater levels of funding to SMEs and improving the integration of the provision of advice and support to businesses, by working closely with Business Wales.

There was also an action to provide an update on health boards' integrated medium-term plans. This information will be available in early April, so we will arrange for the Committee to be updated then.

Yours sincerely,



**Rebecca Evans AS/MS**

Y Gweinidog Cyllid a Llywodraeth Leol  
Minister for Finance and Local Government

# Agenda Item 3

## FINANCE COMMITTEE – WELSH TAX ACTS (POWER TO MODIFY) BILL

### MEMORANDUM FROM PAUL SILK

1. I have been invited to submit a short memorandum to the Committee to inform its consideration of the Welsh Tax Acts (Power to Modify) Bill.
2. The request to submit evidence comes, as I understand it, for two reasons: that I chaired the UK Government-appointed Commission on Devolution to Wales that in 2012 recommended the devolution of certain taxation powers to Wales; and that I have a long-standing professional interest in parliamentary procedure – as a former Clerk of the then National Assembly for Wales, a clerk in the House of Commons, a former president of the Study of Parliament Group and currently a consultant working with parliaments world-wide.
3. As a citizen in Wales, I continue strongly to support the devolution of taxation powers to the Senedd. Taxation powers empower the Welsh Government and the Senedd but also give them greater responsibility. However, I am in no sense an expert on taxation policy or on the complicated relationship between the devolved taxes and their predecessor taxes in England. I cannot therefore offer the Committee any informed opinion on the circumstances in which the powers proposed to be given by the Bill may need to be used.
4. It is, however, undoubtedly the case that changes to predecessor taxes in England may be taken at short notice, can come into immediate effect and could be extensive. These factors can up-end fiscal planning in Wales if the block grant adjustment increases in consequence of the English changes. Unfortunately we have seen decisions taken in London without consulting Cardiff on many matters that have direct consequences for Welsh Government responsibilities. I can therefore understand the desire by the Welsh Government to be able to respond rapidly and (a word that they use frequently in the context of this Bill) with agility.
5. My concerns about the Bill arise from two considerations: a general concern about the growth in the use of secondary (or “delegated”) legislation, and a particular concern about retrospectivity.
6. The Welsh Government is by no means exceptional in its use of secondary legislation. In the United Kingdom as a whole we have moved a long way from Lord Chief Justice Hewart’s view in 1929 that the use of secondary legislation was part of what he called “the new despotism”. However, there has been a recognition in the Westminster Parliament that the limits of what secondary legislation should cover are being reached, and often exceeded. Two recent Reports from House of Lords Committees pull no punches: *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* from the Delegated Powers and

Regulatory Reform Committee<sup>1</sup> and *Government by Diktat: a call to return power to Parliament* from the Secondary Legislation Scrutiny Committee.<sup>2</sup> The Legislation, Justice and Constitution Committee in the Senedd has also expressed its concerns about the use of delegated law-making powers for Ministers in Cardiff.<sup>3</sup>

7. The Hansard Society for Parliamentary Government<sup>4</sup> has responded to these concerns by launching a major review of Delegated Legislation.<sup>5</sup> Though this Review only covers Westminster law-making, many of the concerns that the Society identifies apply equally to legislation made by the Welsh Government. Applicable in Wales – and of relevance to the Bill before the Committee – are concerns about the blurring of the boundary between what should go in primary legislation and what should go in delegated legislation; the way in which secondary powers can be used in the future in unexpected ways that the legislature did not anticipate at the time it granted them; the undesirability of powers that enable Ministers to amend or repeal primary legislation by secondary legislation; the truncated consideration of secondary legislation by the legislature (just a 15 minute debate in plenary in the Senedd is usual); and the inability of the legislature to amend secondary legislation.
8. Legislatures should remain sceptical and vigilant when Governments propose any enhancement of their own powers to make legislation without full scrutiny by the legislature. Governments naturally want as few obstacles in their way and will often favour secondary legislative routes if possible. It is the job of the legislature to ensure that appropriate checks are kept in place and that it does not surrender its legislative role. The Welsh Government’s Explanatory Memorandum on the Welsh Tax Acts (Power to Modify) Bill<sup>6</sup> refers to “the balance between providing the Welsh Ministers with ability to respond to external events in a flexible and agile way, and the importance of Senedd scrutiny of Welsh Ministers’ actions”. In my view, the balance is a different one: I would prefer to see the sentence instead reading “the balance between providing the Welsh Ministers with ability to respond to external events in a flexible and agile way, and the Senedd’s legislative supremacy”. The Senedd has in many ways been an exemplary legislature, and I hope that it will be so in its control of secondary legislation.
9. The purposes in clause 1(1) of the Bill do constrain Ministers, and the powers under the Bill are more limited than the powers proposed in the original consultation document (albeit that a Senedd “lock” was proposed in that consultation document). It is particularly welcome that there is a reassurance that the regulation-making power will not be used to make “routine policy changes”. However, Ministers still will have power to make secondary legislation by regulations that impose landfill disposals tax or land transaction tax, or that modify or impose penalties. The power to make law imposing a tax is one that would normally be reserved for primary

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<sup>1</sup> 12<sup>th</sup> Report, Session 2021-2

<sup>2</sup> 20<sup>th</sup> Report, Session 2021-2

<sup>3</sup> <https://research.senedd.wales/research-articles/legislative-consent-in-the-sixth-senedd-the-story-so-far/>

<sup>4</sup> I declare an interest as a Trustee of the Society

<sup>5</sup> <https://www.hansardsociety.org.uk/projects/delegated-legislation-review#what-is-the-problem>

<sup>6</sup> Para 3.18

legislation.<sup>7</sup> I suggest that the Committee try to imagine the most extreme scenarios in which the powers proposed in the Bill might be used, and only agree to those powers if the Committee is satisfied that secondary legislation is appropriate in those scenarios.

10. The hoops through which secondary legislation must go to pass the Senedd are, of course, a check on its use. The procedure under Clause 4(2)(a) – the affirmative procedure – does at least ensure Senedd approval before Regulations are made. The option Ministers have to dispense with that prior approval in urgent cases (Clause 4(2)(b)) is one that should be used wholly exceptionally – made affirmatives are a “very unusual procedure historically”.<sup>8</sup> It is welcome that the Welsh Government has said that the affirmative procedure will be used “where possible” – but this formulation still allows the Government considerable latitude.
11. A particularly controversial aspect of the Bill is that it allows a provision in regulations made under it to have retrospective effect, as long as that provision does not retrospectively impose or extend a liability to a penalty. Retrospectivity in any legislation, including primary legislation, has always rightly been regarded with great caution, not least because a cardinal principle of law (as reflected in section 1(2)(d) of the Legislation (Wales) Act 2019) is that law should be certain in its effect.<sup>9</sup> Citizens cannot be certain about the law that applies to their actions if that law does not apply at the time they act, but is retrospective.
12. Welsh Ministers will be required by the Bill to make a policy statement on their use of retrospectivity, and a draft of that policy statement has been laid before the Senedd. This draft statement is welcome and seems perfectly reasonable, but it still allows a degree of discretion to Ministers that might be thought undesirable in the case of any retrospective legislation, and particularly in taxation legislation. For example, the draft statement several times uses the words “likely” and “possible” – these envisage that there may also be *unlikely* circumstances where procedures proposed are not, in fact, possible. Once again, the Committee might want to contemplate the most extreme circumstances in which the power could be used.

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<sup>7</sup> See, for example, the controversy about the proposal in 2015 to make changes to tax credits by delegated legislation. That the use of secondary legislation in these circumstances remains unusual seems to me to be confirmed by a recent HMRC Policy Paper (<https://www.gov.uk/government/publications/power-to-make-temporary-modifications-of-taxation-of-employment-income/power-to-make-temporary-modifications-of-taxation-of-employment-income>) – see Detailed Proposal – Current Law

<sup>8</sup> Evidence of First Parliamentary Counsel to House of Lords Secondary Legislation Scrutiny Committee, 20 April 2021, Q7

<sup>9</sup> The fact that retrospective legislation is very unusual is evidenced by the requirement (in the case of Westminster legislation) that the Law Officers are consulted before it is introduced. This is paralleled in Wales by a requirement to consult the Counsel General on any proposal to introduce secondary legislation with retrospective effect. In the case of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, the Supreme Court quoted with approval the Counsel General’s acceptance of “a need for special justification where a statutory provision has retrospective effect” – UKSC [2015] 3 para 53.

13. The issue of retrospective taxation legislation has long been particularly contentious. A very useful study of Westminster practice on retrospective tax legislation (where practice has relaxed over time but where it remains unusual and controversial) was published by the House of Commons Library in 2020.<sup>10</sup> However, the proposal in respect of retrospectivity in the Welsh Tax Acts (Power to Modify) Bill goes one stage further than has happened at Westminster: I am not aware of any provision in Westminster legislation that gives Ministers power to impose taxation or modify or impose penalties in respect of taxation retrospectively *by secondary legislation*. In respect of retrospectivity, the Senedd may thus be being asked in this Bill to agree to a further ratchet away from best parliamentary practice.
14. The Committee may in particular want to press the Welsh Government as to whether the "urgent" procedure could ever be justified where the regulations are to have retrospective effect, and to propose that such regulations should always be by way of draft affirmative procedure.
15. In conclusion, I suggest that the Committee should satisfy itself that the Welsh Tax Acts (Power to Modify) Bill does nothing that will diminish the accountability of Ministers to the Senedd, or the constitutional supremacy of the Senedd in legislation on devolved matters, or the certainty necessary for the rule of law. The Committee may feel that primary legislation passed expeditiously is preferable to the secondary route for which the Bill provides.
16. More generally, it may also want to satisfy itself that this Bill will not be a precedent for future legislation that would allow the Welsh Government to change the law through delegated powers in areas other than taxation following, say, new international treaty obligations, court decisions or actions of the UK Government – and particularly not to give itself the ability to do so retrospectively.

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<sup>10</sup> <https://commonslibrary.parliament.uk/research-briefings/sn04369/>

## **Professor Emyr Lewis, Aberystwyth Law School**

### **Getting the balance right? The constitutional implications of the Welsh Tax Acts etc. (Power to Modify) Bill**

The Welsh Tax Acts etc. (Power to Modify) Bill is perhaps one of the more boringly-named prospective pieces of primary legislation to have been introduced by the Welsh Government, but in its three and a quarter pages it raises some fundamental questions about constitutional power, the rule of law and democracy in Wales. If it becomes an Act, it will give the Welsh Government far-reaching powers to change tax law in Wales, including making retrospective changes, with reduced Senedd scrutiny.

The substance of the Bill is about the details of tax law. There are however broader principles at stake about where the line is drawn in Wales between (on the one hand) Senedd control over what laws are made, how far they go and how they are scrutinised, and (on the other) empowering the Government by giving it the flexibility to amend Senedd Acts in the interest of speed or efficiency.

#### **Taxation, the constitution and the separation of powers**

The question of who has the power to impose a tax on the people is one of the core issues which has shaped the UK's constitutional arrangements and in particular the separation of powers. The Bill of Rights of 1689 created a clear dividing line by providing that it was illegal for the government to raise taxes except to the extent that Parliament had granted it the power to do so. In other words, the power to decide whether and to what extent people should be taxed lay with the representatives of the people (or at any rate in those days the people eligible to return MPs), not those of the Crown.

If we fast-forward to twenty-first century Wales, we find this principle reflected in the provisions about taxation in Wales' constitutional arrangements, as set out in the Government of Wales Act 2006, as it has been amended. Under that Act, it is the Welsh Parliament, Senedd Cymru, which has the power to decide whether and to what extent people should be subject to devolved taxes. That Act of the UK Parliament does not give any powers to the Welsh Government (aka Welsh Ministers) to make such a decision.

#### **The aim of the Bill, delegated legislation and Henry VIII clauses**

The aim of the Bill is fairly simply stated: if it becomes law, it will give the Welsh Ministers the power to amend three Acts of Senedd Cymru, together referred to as the Welsh Tax Acts<sup>1</sup>. Between them, these Acts put a framework in place for collecting and managing devolved taxes (including setting up the Welsh Revenue Authority) and deal in detail with two of those taxes, namely the Land Transaction Tax (LTT) and the Landfill Disposals Tax (LDT).

In other words, the Senedd (the legislature) would give the power to the Welsh Government (the executive) to make its own laws which would change legislation made by the Senedd itself.

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<sup>1</sup> The Tax Collection and Management (Wales) Act 2016; the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 and the Landfill Disposals Tax (Wales) Act 2017.

It is of course very common for legislatures to delegate to the executive the power to make laws. Indeed, for the past two years, our daily lives have been governed in minute detail through such laws made by the Welsh Government using powers granted to them by UK Acts of Parliament (enabling Acts). This has been necessary in order to deal with the urgent need to take steps to protect public health because of the coronavirus pandemic. These laws have included ones that temporarily amended Acts of the UK Parliament and Acts of the Senedd in order to enable essential services such as education and health to continue. This could be done because the Enabling Acts included specific provisions giving government ministers the power to amend primary legislation.

Such powers given to Ministers to amend primary legislation (sometimes referred to as Henry VIII powers) require particular attention when it comes to scrutinising Bills. The danger is of what Sir Jack Beatson has called ‘a shift by stealth in the balance of constitutional power towards the executive at the expense of the legislature’.<sup>2</sup> This is not only a question of determining whether an Act is necessary or desirable as a matter of policy, and then whether the provisions proposed are appropriate in order to achieve that policy. Neither is it only a question of whether it is appropriate to delegate law-making powers. There is also the core question of whether, as a matter of principle, the legislature should allow its own primary legislation to be amended by Ministers. In other words, where does the boundary lie between the territory where the legislature exercises its sovereign power (for want of a better phrase) over its own laws on an exclusive basis, and the territory where the executive can also exercise power?

This question was addressed to a certain extent following the Welsh Government’s original policy consultation about the Bill, which proposed ‘an extremely broad power that was intended to be used where Welsh Ministers considered it expedient in the public interest’ as the Finance Minister Rebecca Evans MS put it in her evidence to the Senedd’s Finance Committee.<sup>3</sup> Ms Evans added: ‘the consultation process itself did raise concerns on the broad and open-ended nature of this power’<sup>4</sup>. In response to those concerns, the Government has, in the Bill, restricted the scope of the power to four sets of circumstances. In doing so, however, the Government has also removed a significant safeguard against potential abuse of broad power, namely what was termed the ‘Senedd lock’. Under the arrangement proposed, the broad power could only be used if the Senedd resolved to authorise its use as a preliminary matter.

### **The purposes and procedure for exercising Henry VIII powers under the Bill**

Under the Bill as introduced, the Welsh Ministers would have the power under section 1 to amend the Welsh Tax Acts (and any regulations made under them) if they considered that the modifications were necessary or appropriate for or in connection with:

- (a) ensuring that LTT or LDT is not imposed where to do so would be incompatible with any international obligations;

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<sup>2</sup> Jack Beatson, *The Rule of Law and the Separation of Powers* (Hart 2021) 71

<sup>3</sup> The proposed power was modelled on a rather narrower power in Section 109 of the Finance Act 2003 which gave the UK Treasury the power to amend the part of that Act which relates to SDLT “in its application to land transactions of any description”. Regulations made using that power lapse if not approved by UK Parliament before the end of 28 days. There is no express power to legislate retrospectively.

<sup>4</sup> A transcript of the evidence session can be found here:

<https://record.assembly.wales/Committee/12539#A69208>

(b) protecting against tax avoidance in relation to LTT or LDT;

(c) responding to a change to a predecessor tax that affects, or may affect, the amounts paid into the Welsh Consolidated Fund under section 118(1) of the Government of Wales Act 2006;

(d) 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.

These changes to the Welsh Tax Acts would be made by Regulations approved by a resolution of the Senedd, save that Welsh Ministers will have the power to make the Regulations without approval if they are of the opinion that, by reason of urgency, it is necessary to do so (Clause 4(2)) using the so-called 'made affirmative' procedure. Under that procedure, Regulations made will lapse unless approved by the Senedd within 60 days, and they will (in effect) be treated as if they had not been made (clause 5).

There are some things which the Welsh Ministers cannot do using these powers, including changing the rates of LTT and LDT.

### **The power to make regulations with retrospective effect**

A striking aspect of the Bill is that clause 2(1)(c) enables the Welsh Ministers to make Regulations which have retrospective effect. In other words, they can change the law in the past as well as the future. While they can do this (at least in theory) to impose a retrospective liability to pay tax, they cannot do so in order to impose a retrospective penalty on someone. Retrospective laws are problematic. It is a fundamental component of the Rule of Law that the law should be certain. If the law can be changed retrospectively, then it means that something which was lawful at the time it was done can be made unlawful, and someone can suffer consequences which they would not have expected to suffer. That makes for uncertainty in the law.

Applied to the field of taxation, the principle of certainty means that people should be able to ascertain clearly at any moment in time what tax they must pay, how much they must pay and when they must pay it. If the rules can be changed after the event so that, at that moment in time, people were in fact obliged to pay more tax, or to pay it sooner than they did, then that makes the law uncertain. This does not necessarily mean that all use of retrospective legislation is invalid - it may or may not be depending on the circumstances and who made it<sup>5</sup> - and carefully handled it can be a useful tool to deal with aggressive tax avoidance posing significant risk to public funds. The potential for unfairness and oppressive behaviour however makes it another area where the closest democratic scrutiny is essential, as is the utmost clarity about the kind of circumstances in which it will be used.

### **A review of the Clause 1 'purposes'**

What of the four purposes for which the Bill would empower Welsh Ministers to amend the Welsh Tax Acts? Does it make sense for the Welsh Ministers to have the power to legislate for those

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<sup>5</sup> So for instance in a case involving Stamp Duty Land Tax, the Court of Appeal held that it was not contrary to Article 1 of the First Protocol to the European Convention on human rights in the circumstances of the case for an Act of Parliament to close a *potential* tax loophole with retrospective effect (R (on the application of APVCO Limited and others v Her Majesty's Treasury [2015] EWCA Civ 648)

purposes? Are they sufficiently precisely drafted? Is there a case for allowing these powers to be exercised retrospectively? These questions are now considered in respect of each purpose in turn.

**(a) ensuring that LTT or LDT is not imposed where to do so would be incompatible with any international obligations;**

This is the most straightforward of the purposes. Section 116A(3) of the Government of Wales Act 2006 states 'A devolved tax may not be imposed where to do so would be incompatible with any international obligations.'

It makes sense to enable the Welsh Tax Acts to be amended swiftly if the reason for the incompatibility with international obligations lies in those Acts. It also makes sense that the power should be capable of being exercised retrospectively. While the Welsh coffers would have to pay back any tax collected, it would have been an unlawfully imposed tax in the first place. Nobody will lose out.

**(b) protecting against tax avoidance in relation to LTT or LDT;**

Tax avoidance is not unlawful. It involves doing or arranging things in such a way as to minimise the impact of tax. In posher terms, it is tax planning. It frequently involves taking advantage of so-called 'loopholes' in taxation law, and has a bad name because of the industry that has grown around putting elaborate and frequently artificial schemes in place which largely benefit very rich people and corporations, giving rise to a battle of wits between legislators and tax advisers.

Part 3A of the Tax Collection and Management (Wales) Act 2016 (a Wales Tax Act) already contains a broad general anti-avoidance rule. This applies where someone enters into an arrangement for the main or sole purpose of obtaining a tax advantage, and that arrangement is an artificial one when measured by reference to certain statutory criteria. In such a case, the Welsh Revenue Authority (WRA) can start a process which can lead to tax adjustments against the taxpayer. If the matter comes to be determined before a court or tribunal, it is for the WRA to prove both that there is an artificial tax avoidance arrangement, and that the adjustments are reasonable (Section 81H).

This type of broad rule makes it more difficult for taxpayers to avoid paying tax through finding loopholes in the law, because even if there is a loophole, it must be one whose use stands up to scrutiny when the artificiality criteria are applied to it. If it does stand up to scrutiny, it is not artificial and while there may have been tax avoidance, there can be no adjustment.

In her evidence to the Finance Committee Rebecca Evans justified this particular purpose in a way which suggests that the aim is to enable ministers to nip prospective avoidance activity in the bud by closing potential loopholes quickly, so that questions of artificiality do not even arise.

If the purpose were drafted as simply a loophole-closing provision, that would be fine (assuming that it is agreed to be in principle acceptable to enable Ministers by regulations to close loopholes in primary legislation), but the drafting is much broader than that. It enables

any amendments to be made to protect against tax avoidance. There is nothing in the Bill, for instance, which would prevent Ministers from amending Section 81H so that the burden of proof is reversed, requiring the taxpayer to demonstrate that an arrangement is not artificial and that an adjustment is not reasonable. Another possibility is that the power could be used to amend the definition of artificiality. It is suggested that these are issues which would be better dealt with by the Senedd.

If the power to legislate for this purpose is capable of being used retrospectively, then it could in theory impose a liability to tax where none was otherwise payable. Leaving aside the question of whether it is appropriate for such an outcome to be in the hands of Ministers rather than the Senedd, there is also the possibility (as the Minister in her evidence has correctly identified) that this could give rise to issues of compatibility with Article 1 of Protocol 1 of the Convention Rights.

Paragraph 3.26 of the Explanatory Memorandum helpfully explains:

*where liabilities are increased by retrospection, and taxpayers could have reasonably expected retrospective changes to be introduced, the Welsh Ministers may make regulations that increase a taxpayer's liability. For example, where tax avoidance is identified, Ministers may announce that the scheme will be closed down through future regulations from the date of that announcement.*

Such clear signalling of future legislative intent by announcement makes the retrospective effect of regulations less unfair, since citizens will know that they continue at their peril with any avoidance arrangements. The Act does not, however, place any such condition or constraint on the use of the power to legislate retrospectively.

**(c) responding to a change to a predecessor tax that affects, or may affect, the amounts paid into the Welsh Consolidated Fund under section 118(1) of the Government of Wales Act 2006**

The Welsh Consolidated Fund is the money that pays for the devolved governance of Wales. Its main component is the annual block grant received from the UK Government. Under the arrangements agreed between the UK and Welsh Governments, the block grant is adjusted if the UK Government changes an UK government tax which is the equivalent of a devolved tax. So if the UK Government increases the rate of SDLT (the equivalent to LTT), the block grant is reduced, and vice versa.<sup>6</sup> Where the block grant is reduced in this way, the Welsh Government needs to find the additional revenue or cut its spending. The straightforward way of finding the additional revenue is by making an equivalent change to the devolved tax.

The example frequently cited by the Welsh Government (see for instance the Explanatory Memorandum and the July 2020 consultation document 'Tax Devolution in Wales – Enabling changes to the Welsh Tax Acts') is when the UK Government introduced a higher rate of Stamp Duty Land Tax for additional residential properties (2<sup>nd</sup>, 3<sup>rd</sup> etc. homes). It was able to do this with immediate effect by securing a resolution of the House of Commons under the Provisional Collection of Taxes Act 1968, pending the relevant provisions being included in an

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<sup>6</sup> See paragraphs 25 to 33 of the December 2016 agreement between the Welsh Government and the United Kingdom Government on the Welsh Government's fiscal framework

Act of Parliament. This would have led to a large negative block grant adjustment. To deal with this, the Welsh Government had to amend the Bill dealing with LTT which was going through the Senedd and introduce a similar higher rate of tax for second homes (etc.) in Wales. Had it not done so, there would have been a large block grant adjustment and no compensating tax revenue to compensate for it.

The policy need for a mechanism that enables quick action in these sorts of circumstances is clear. It is also clear that it makes sense for the change to have effect from the same date as the UK change, and if that date is in the past for the legislation to be retrospective to that extent.

What is curious about this example, however, is that it involved introducing a new rate of tax. The Bill would prevent the regulation-making powers from being used to increase bands and rates of tax, but not it seems from being used to introduce new rates for special categories in special circumstances. A decision to do so is arguably a significant policy decision which would need Senedd approval up front rather than after the event. It is not clear why the problem could not be dealt with by legislating for a Senedd resolution to have a similar effect to a resolution of the House of Commons under the Provisional Collection of Taxes Act 1968. With suitable inter-governmental liaison, it should be possible for the resolution to be passed on the same day as a corresponding resolution is passed in Westminster.<sup>7</sup>

**(d) 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.**

As in the case of the anti-avoidance purpose, this is a very broadly drawn provision. It allows the Welsh Ministers to change the Welsh Tax Acts in response to an external challenge to the way in which they operate. The difference in this case, however, is that the amendment will not be made in order to forestall the use of a loophole, but rather to respond to a decision of a court of law, including undoing the effect of that decision. It is not uncommon for the law to be changed in response to a decision of a court. Where the law in question is primary legislation, that would normally be done by further primary legislation, unless the power to do so is given to the executive, such as for example under section 10 of the Human Rights Act 1998.

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<sup>7</sup> In support of giving the Welsh Ministers the power to amend tax legislation including with retrospective effect, the Explanatory Memorandum states that the UK Government already has such powers under the Provisional Collection of Taxes Act 1968 (see paras 7.8 and 8.34). The Minister also referred to this Act several times in her evidence to the Committee. It is questionable however, whether this is an appropriate comparison to what the Bill envisages. The mechanism in the Act is a power of the House of Commons, not of the UK Government, and is a piece of legal glue enabling changes announced by the Chancellor of the Exchequer to come into force quickly. It also ensures that taxes do not lapse. It does not give the Chancellor or any other Minister the power to make changes to primary legislation through regulations, let alone ones which have retrospective effect. In other words, it respects the primacy of Parliament over legislation relating to tax.

The difficulty with this purpose in the Bill is that it is so very broad. It could in theory apply to any provision in the Welsh Tax Acts, apart from those that set up and govern the WRA.<sup>8</sup> (Interestingly, unlike the other purposes for which the power to amend can be used it is not confined to instances relating to LTT and DLT, so could be used in connection with other devolved taxes in future.)

The Explanatory Memorandum states at para 3.3, in respect of all the purposes for which regulations can be made:

*The regulation making power will not be used to achieve routine policy changes to the devolved taxes. For such changes the Welsh Government will use powers that already exist in the Welsh Tax Acts or, where necessary, will introduce primary legislation. It is clear that the more significant the change is, the greater the need to make those changes in consultation with Welsh citizens and interested stakeholder groups, and in all cases with appropriate Senedd scrutiny.*

The difficulty is that, as in the case of the anti-avoidance provision, the drafting of the Bill does not reflect this approach. Rather it gives the Welsh Ministers the power, should they choose to do so, to achieve routine policy changes, significant or otherwise, and to overturn decisions made in a court of law. In other words, the power to decide who legislates about what, who makes the decision whether a matter should be dealt with by primary or secondary legislation, lies with the Government. Unlike the proposals in the original policy consultation, there will be no up-front ‘Senedd lock’ that would act as a constraint to prevent the powers being used too broadly and would ensure that the decision about who legislates in such a case is made by the Senedd.

The use of the power to legislate retrospectively in this case presents serious potential challenges to the Rule of Law. Once a court or tribunal has made its decision, then that is the law. If the law is changed so that it is different in future, all well and good, but to change the law retrospectively could have the effect in certain cases of depriving the citizen of an effective remedy. What would be the point of challenging or defending proceedings brought in connection with devolved taxes if the Welsh Ministers were capable through regulations of not only overturning the court’s decision for the future, but also invalidating that decision by changing the law in the past? Such an assault on the Rule of Law is unlikely to be regarded by the Courts as reasonable. Since these regulations would be secondary legislation, they would (unlike Acts of the Senedd itself) be open to challenge by judicial review on the grounds that they are unreasonable. Rather than leave it chance, however, it would be preferable (if legislating retrospectively for this purpose is to be permitted at all) that it were made clear on the fact of the Act that this cannot be done with effect from a date which is before the date of the Government announcing that it will change the law in the light of the relevant court or tribunal decision.

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<sup>8</sup> It may be worth noting that clause 3(2) prohibits amendment of regulations made under certain provisions of the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 and Landfill Disposals Tax (Wales) Act 2017, but does not prevent the amendment of those provisions themselves.

## **Draft Statement of Policy on retrospective legislation**

Clause 3 of the Bill requires the Welsh Ministers to publish a statement of their policy with respect to the exercise of the power to make regulations retrospective. Such a statement is of course helpful as a counterbalance to the uncertainty which the possibility of retrospective legislation creates. If the government were to make regulations with retrospective effect in a manner which is contrary to the policy statement, then those regulations would be at risk of being struck down by a court.

A draft policy statement was published when the Bill was introduced. The document is called 'Statement of policy with respect to the exercise of the power to make retrospective legislation within the Welsh Tax Acts etc. (Power to Modify) Act 20XX', but the draft statement contains several statements of intent by the Government which appear to be general in nature, rather than confined to retrospective legislation.

Part 2 of the document is the only part of the document which is clearly intended to come within the ambit of clause 3, since it is headed 'The Statement – Retrospective Legislation'.

This states that the power will be used in exceptional circumstances only, with consideration given on a case-by-case basis and sets out a non-exhaustive list of examples of situations where the Welsh Ministers might consider making regulations with retrospective effect.

Two of these examples are related to the purpose of responding to a change made by UK government that has immediate effect. It is understandable why it would be beneficial, if a corresponding change were to be made in Wales, for it to take effect from the same day as the UK change (but see the observations above).

Another is 'where avoidance needs to be halted', but there is no wording equivalent to the passage from the Explanatory Memorandum quoted above which limits retrospective effect back to the date of an announcement.

Another is where a 'court decision means the legislation may not be interpreted as intended by the Senedd when it was enacted'. This bald statement offers no real justification for retrospective effect. It is also a rather odd formulation. In interpreting legislation, courts establish the intent of the legislator. In cases of this sort, by definition, there is no 'intent' of the Senedd other than what a court determines. If the Senedd thinks that the court has got it wrong, it can change the law to reflect what it really 'intended'. It seems peculiar that the government should be able to substitute its view of the Senedd's intent for that of a court, and to do so retrospectively.

The other parts of the draft statutory statement of policy cover broader issues and make more general declarations of intent. They include the following which echoes the statement quoted from the Explanatory Memorandum above

*The regulation making powers will not be used to achieve routine policy changes to the devolved taxes. For such changes the Welsh Government will use powers that already exist in the Welsh Tax Acts or, where necessary, primary legislation.*

This may give some comfort to those who fear that the statutory purposes are too broadly drafted, but it should be emphasised that this is just a policy statement. It is not law, and like all policy statements is capable of being changed.

The Government has also published a separate document called 'Policy intent for subordinate legislation to be made under this Bill' which is intended to assist the Committee during the scrutiny of

the Bill. While it covers similar ground to part two of the draft statutory statement of policy described above, it does not fully align with it.

### **But doesn't the Senedd get to vote anyway?**

It may be objected that it does not matter that changes to the law will be made by Welsh Ministers, because to have full effect they must be approved by the Senedd, either before they are made, or in an emergency within 60 days.

That is factually correct, but the end point of that reasoning is that there is no need for any laws to be made by the Senedd, so long as the Senedd has power of approval over secondary legislation. It is unlikely that such a laid-back approach would find favour with most Senedd members.

As has been powerfully pointed out by many members of the House of Lords who participated in this month's debate about so-called 'skeleton bills', the better the scrutiny, the better the legislation, and delegated legislation usually receives far less scrutiny and democratic attention than do Acts. This is also an argument that the Welsh Government has itself advanced (or at least approved of) in the context of expanding the size of the Senedd.

The principal purpose of proceeding by way of regulations rather than an Act of the Senedd appears to be the need to move quickly. The Senedd standing orders do allow the Government to introduce emergency Bills and provide a fast-track procedure for them. The Minister in evidence suggested that using that procedure would mean less Senedd scrutiny than proceeding by way of regulations. That is correct in the case of urgent regulations which come into force before they are laid before the Senedd, and which are subject to the 'made affirmative' procedure, but it is not clear why that should be so for regulations which require Senedd approval before they come into force.

### **Getting the balance right**

It is a question of finding the right balance in relation to where the boundaries of the executive's legislative powers should lie and what should be the preserve of the legislature, of defining them clearly and of ensuring that safeguards are in place to prevent regulatory creep beyond those boundaries.

The following are suggested safeguards that might help in the case of this Act (some of these are suggested as alternatives):

- remove the ability to legislate retrospectively in the case of anti-avoidance or in response to a court or tribunal decisions, respecting the primacy of the Senedd
- reintroduce the Senedd Lock (so respecting democratic primacy over the decision about who gets to legislate), either in all cases, or at least in the case of the broadly-defined powers and/or where the use of retrospective powers would impose an additional burden or liability on citizens
- define more narrowly the types of change that may be made under the anti-avoidance purpose
- set out legally binding limits on the use of the power to legislate retrospectively – e.g. in the case of anti-avoidance, no further back than the date on which the Government announced in the Senedd its intention to legislate; in the case of responding to a UK Government tax change, no further back than the effective date of that change.

- consider the possibility of a ‘provisional resolution’ mechanism as an alternative to, or in conjunction with, the use of secondary legislation.

**To sum up, the Bill is a rather mixed bag.**

On the one hand, the case for empowering the executive to act has been clearly made out in relation to compliance with international law and to the impact on the block grant of changes to predecessor UK taxes. In both cases, the statutory purposes seem sufficiently precisely drafted to avoid unintended broader use of the delegated power to legislate. In both cases, the need for retrospective effect is clear, but in the case of responding to UK tax changes it is less clear why an alternative method of achieving such changes simultaneously and which respects the Senedd’s primacy over taxation could not be introduced, paving the way for primary legislation in due course.

On the other hand, the case for empowering the executive to act has not been so clearly made out in relation to the anti-avoidance purpose or to the purpose of responding to a court or tribunal decision. In each case, the scope of the purpose as drafted is very broad and encroaches on territory which may be regarded as more properly that of the Senedd than of the Government. In the case of the anti-avoidance purpose, its scope is potentially far greater than that suggested by the Government. There are no clear constraints in the Bill on the use of the power retrospectively for these purposes. The potential impact on the rule of law of retrospective use is significant. The breadth of these purposes as drafted suggests that they may be being sought as ‘just in case’ powers, which goes against the grain of the apparent principle that it is the representatives of the people rather than those of the Crown who decide whether and to what extent people should be taxed.

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