------------------------ Public Document Pack ------------------------

Agenda - Legislation, Justice and Constitution Committee

Meeting Venue:
Hybrid - Committee room 4 Ty Hywel and video conference via Zoom
Meeting date: 9 May 2022
Meeting time: 13.30

For further information contact:
P Gareth Williams
Committee Clerk
0300 200 6565
SeneddLJC@senedd.wales

1 Introductions, apologies, substitutions and declarations of interest

(13.30)

2 Evidence session with the Law Council of Wales - matters in relation to justice in Wales

(13.30 - 14.30) (Pages 1 - 13)

Lord Lloyd-Jones, President of the Law Council of Wales

Professor Emyr Lewis, Vice President of the Law Council of Wales

Dr Nerys Llewelyn Jones, member of the Executive Committee of the Law Council of Wales

Attached Documents:

LJC(6)-13-22 - Paper 1 - Briefing

Break

(14.30 - 14.40)

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

(14.40 - 14.45) (Pages 14 - 15)

Attached Documents:

LJC(6)-13-22 - Paper 2 - Statutory instruments with clear reports

Made Negative Resolution Instruments

Senedd Cymru
Welsh Parliament

3.1 SL(6)197 – The Regulated Services (Annual Returns) (Wales) (Amendment) (Coronavirus) Regulations 2022

3.2 SL(6)199 – The Education (Student Finance) (Miscellaneous Amendments) (No. 2) (Wales) Regulations 2022

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

(14.45 – 14.50)

Made Negative Resolution Instruments

4.1 SL(6)190 – The Agricultural Wages (Wales) Order 2022

(Pages 16 – 18)

Order

Explanatory Memorandum

Attached Documents:

LJC(6)-13-22 – Paper 3 – Draft report

5 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3 – previously considered

(14.50 – 14.55)

5.1 SL(6)175 – The Renting Homes (Deposit Schemes) (Required Information) (Wales) Regulations 2022

(Pages 19 – 21)

Attached Documents:

LJC(6)-13-22 – Paper 4 – Report

LJC(6)-13-22 – Paper 5 – Welsh Government response

5.2 SL(6)178 - The Renting Homes (Safeguarding Property in Abandoned Dwellings) (Wales) Regulations 2022

(Pages 22 - 25)

Attached Documents:
LJC(6)-13-22 - Paper 6 - Report
LJC(6)-13-22 - Paper 7 - Welsh Government response

6 Inter-Institutional Relations Agreement

(14.55 - 15.05)

6.1 Correspondence from the Minister for Rural Affairs and North Wales, and Trefnydd: The Animal Welfare (Miscellaneous Amendments) Regulations 2022

(Pages 26 - 29)

Attached Documents:
LJC(6)-13-22 - Paper 8 - Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 27 April 2022
LJC(6)-13-22 - Paper 9 - Letter from the Minister for Rural Affairs and North Wales, and Trefnydd to the Economy, Trade, and Rural Affairs Committee, 27 April 2022

6.2 Correspondence from the Minister for Rural Affairs and North Wales, and Trefnydd: The Common Agricultural Policy (Cross Compliance Exemptions and Transitional Regulation) (Amendment) (EU Exit) Regulations 2022

(Pages 30 - 31)

Attached Documents:
LJC(6)-13-22 - Paper 10 - Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 27 April 2022

6.3 Written Statement and correspondence from the Minister for Minister for Finance and Local Government: The Public Procurement (International Trade Agreements) (Amendment) Regulations 2022

(Pages 32 - 35)

Attached Documents:

LJC(6)-13-22 – Paper 11 – Letter from the Minister for Finance and Local Government, 3 May 2022

LJC(6)-13-22 – Paper 12 – Written statement by the Minister for Finance and Local Government, 27 April 2022

6.4 Written Statement and correspondence from the Deputy Minister for Climate Change: The Phytosanitary Conditions (Amendment) (No. 2) Regulations 2022

(Pages 36 - 41)

Attached Documents:

LJC(6)-13-22 – Paper 13 – Letter from the Deputy Minister for Climate Change, 4 May 2022

LJC(6)-13-22 – Paper 14 – Written Statement by the Deputy Minister for Climate Change, 29 April 2022

LJC(6)-13-22 – Paper 15 – Letter from the Deputy Minister for Climate Change, 25 April 2022

7 Papers to note

(15.05 - 15.15)

7.1 Correspondence from the Minister for Economy: Sixth Protocol to the Convention on the Construction and Operation of a Very High Neutron Flux Reactor (UK-France-Germany)

(Pages 42 - 43)

Attached Documents:

LJC(6)-13-22 – Paper 16 – Letter from the Minister for Economy, 25 April 2022

LJC(6)-13-22 – Paper 17 – Letter to the First Minister, 23 March 2022

7.2 Correspondence from the Counsel General and Minister for the Constitution: Welsh Government guidance on 'Common Legislative Solutions: a guide to tackling recurring policy issues in legislation'

(Pages 44 - 155)

Attached Documents:

LJC(6)-13-22 – Paper 18 – Letter from the Counsel General and Minister for the Constitution, 26 April 2022

LJC(6)-13-22 – Paper 19 – Letter to the Counsel General and Minister for the Constitution, 25 March 2022

7.3 Correspondence from the Deputy Minister for Arts and Sport, and Chief Whip: Cultural Objects (Protection from Seizure) Bill

(Pages 156 – 164)

Attached Documents:

LJC(6)-13-22 – Paper 20 – Letter from the Deputy Minister for Arts and Sport, and Chief Whip, 25 April 2022

7.4 Written Statement by the Minister for Economy: Update on Border Controls

(Page 165)

Attached Documents:

LJC(6)-13-22 – Paper 21 – Written Statement by the Minister for Economy, 28 April 2022

7.5 Correspondence from the Counsel General and Minister for the Constitution: Update on Flexible Voting Pilots

(Pages 166 – 170)

Attached Documents:

LJC(6)-13-22 – Paper 22 – Letter from the Counsel General and Minister for the Constitution, 3 May 2022

LJC(6)-13-22 – Paper 23 – Letter to the Minister for Finance and Local Government, 1 April 2022

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

(15.15)

9 Evidence session with the Law Council of Wales - Consideration of evidence

(15.15 - 15.30)

10 Monitoring Report

(15.30 - 15.40) (Pages 171 - 184)

Attached Documents:

LJC(6)-13-22 - Paper 24 - Draft monitoring report

11 Retained EU law

(15.40 - 16.00) (Pages 185 - 230)

Attached Documents:

LJC(6)-13-22 - Paper 25 - Legal advice note

LJC(6)-13-22 - Paper 26 - Paper by Professor Jo Hunt, Cardiff University: Managing regulatory divergence between Wales and the rest of the UK post-Brexit

LJC(6)-13-22 - Paper 27 - Paper by Professor Catherine Barnard, University of Cambridge: Level Playing Field Provision in the Trade and Cooperation Agreement: an introductory guide

12 Forward work programme

(16.00 - 16.20) (To Follow)

Attached Documents:

LJC(6)-13-22 - Paper 28 - Briefing

By virtue of paragraph(s) vi of Standing Order 17.42

Agenda Item 2

Document is Restricted

Agenda Item 3

Statistical Instruments with Clear Reports

09 May 2022

SL(6)197 – The Regulated Services (Annual Returns) (Wales) (Amendment) (Coronavirus) Regulations 2022

Procedure: Made Negative

These Regulations are made by the Welsh Ministers using powers under the Regulation and Inspection of Social Care (Wales) Act ("the Act"). The Act provides the statutory framework for the regulation and inspection of social care services and the regulation of the social care workforce in Wales.

The purpose of the Amendment Regulations 2022 is to delay, until 31 October 2022, the requirement for providers of regulated services to submit an annual return in respect of each of the financial years 2018-19, 2019-20, 2020-21 and 2021-22, during which they have been registered under the 2016 Act, to the Welsh Ministers (in practice, Care Inspectorate Wales). They also have the effect of reducing the content required for the 2021-22 annual returns, in line with requirements for previous years.

Regulated services include care home, secure accommodation, residential family centre, adoption, fostering, adult placement, regulated advocacy and domiciliary support services.

Parent Act: The Regulation and Inspection of Social Care (Wales) Act 2016

Date Made: 25 April 2022

Date Laid: 27 April 2022

Coming into force date: 20 May 2022

Senedd Cymru
Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
—
Welsh Parliament
Legislation, Justice and Constitution Committee

Statutory Instruments with Clear Reports
09 May 2022

SL(6)199 – The Education (Student Finance) (Miscellaneous Amendments) (No. 2) (Wales) Regulations 2022

Procedure: Made Negative

The Education (Student Finance) (Miscellaneous Amendments) (No. 2) (Wales) Regulations 2022 ("the Regulations") amend:

- the Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015 (SI 2015/1484) ("the 2015 Regulations"), and
- the Education (Student Support) (Wales) Regulations 2018 (SI 2018/191) ("the 2018 Regulations").

The Welsh Ministers make regulations to provide the basis for the system of financial support for students ordinarily resident in Wales who are taking designated courses of higher education in the UK, and other students studying in Wales.

The 2015 Regulations prescribe the qualifying courses and qualifying persons for the purposes of section 5 of the Higher Education (Wales) Act 2015 which sets out that fee and access plans must specify (or provide for the determination of) fee limits in relation to qualifying courses each academic year. Fee limits are the maximum amount which a qualifying person will have to pay an institution for undertaking a qualifying course.

According the the Explanatory Memorandum, the Regulations amend the 2015 Regulations "*to reflect correct policy that Irish Citizens are qualifying persons under the 2015 Regulations if they are an Irish citizen on the first day of an academic year*".

The 2018 Regulations provide for financial support for students taking designated higher education courses which begin on or after 1 August 2018.

The Regulations amend the 2018 Regulations to correct an issue identified by the Legislation, Justice and Constitution Committee in its report of 14 February 2022. Schedule 4 of the 2018 Regulations makes reference to an "eligible student" but should make reference to an "eligible postgraduate student".

Parent Act: Teaching and Higher Education Act 1998 and Higher Education (Wales) Act 2015

Date Made: 25 April 2022

Date Laid: 27 April 2022

Coming into force date: 25 May 2022

Senedd Cymru
Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
—
Welsh Parliament
Legislation, Justice and Constitution Committee

SL(6)190 – The Agricultural Wages (Wales) Order 2022

Background and Purpose

The Agricultural Wages (Wales) Order 2022 ("the 2022 Order") makes provision about the minimum rates of remuneration and other terms and conditions of employment for agricultural workers.

The 2022 Order revokes and replaces the Agricultural Wages (Wales) Order 2020 ("the 2020 Order") with changes which includes a new grading structure, and minimum hourly rates of pay, for agricultural workers.

Procedure

Negative.

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

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(iv) - that it appears to have retrospective effect where the authorising enactment does not give express authority for this

The Order was made on 31 March 2022 and comes into force on 22 April 2022. However, the provisions of the Order apply retrospectively, from 1 April 2021. The Agricultural Sector (Wales) Act 2014 does not appear to provide express authority for this. The Welsh Government's Explanatory Memorandum states as follows:

> *The provisions within the Order are intended to apply retrospectively to 1 April 2021. The Panel were of the view this would recompense those agricultural workers who had expected an increase in their hourly wage from 1 April 2021, as was proposed in the Panel's targeted consultation of autumn 2020.*

The Welsh Government's position is that the retrospective application of the provisions of the Order has been included to increase the wages of workers who had expected an increase in April 2021. However, there is no explanation in the Explanatory Memorandum for the delay between the Panel submitting a revised draft Order on 21 December 2021, and the making and laying of the Order (on 31 March and 1 April 2022 respectively). A second public consultation had taken place prior to the submission of the revised draft, in October-

November 2021. Some three months elapsed between the submission of the revised draft, and the making of the Order.

In respect of the retrospective application of the Order, the Explanatory Memorandum states as follows:

> *The intention of the Panel was to have the new Order in force on 1 April 2021, to coincide with increases to the National Living Wage (NLW) and National Minimum Wage (NMW) and avoid a transitional period during which the NLW/NMW would override the Agricultural Minimum Wage (AMW) levels. However, the scale and nature of the changes necessitated referral back to the Panel for clarification of a number of policy and legal matters. In response, the Panel made changes to their draft proposals. Some of these changes were sufficiently different so as to require a second public consultation. This took place between 20 October and 19 November 21. The Panel subsequently submitted a revised draft Order on 21 December 2021 and requested that the Order be made with retrospective effect to recompense those agricultural workers who had expected an increase in their hourly wage from 1 April 2021, as was proposed in the Panel's targeted consultation of autumn 2020.*
>
> *Following careful consideration, Welsh Ministers approved the draft Order and request for retrospective effect. At present, agricultural workers' wages in Wales are subject to the minimum rates specified by the Agricultural Wages (Wales) Order 2020, except for minimum rates in the Order which fall below the NMW and NLW.*

2. Standing Order 21.2(v) - that for any particular reason its form or meaning needs further explanation.

Section 3 of the Agricultural Sector (Wales) Act 2014 concerns agricultural wages orders. Section 3(5) provides that *"no minimum rate of remuneration may be specified in an order under this section which is less than the national minimum wage"*. The Order was made on 31 March 2022, came into force on 22 April 2022, but took effect from 1 April 2021. On 1 April 2022, the National Minimum, Wage and National Living Wage were increased. The minimum rates of pay specified in Schedule 1 to the Order are in some cases lower than the national minimum wage rates from 1 April 2022, although they are equal to or higher than the national minimum wage rates applicable on 1 April 2021. The Explanatory Memorandum accompanying the Order does not explain the rationale upon which the Welsh Government considers that section 3(5) of the Act has been complied with, as the Order specifies minimum rates of remuneration which are less than the national minimum wage from 1 April 2022. Further information would be helpful to understand the Welsh Government's position.

Merits Scrutiny

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

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

The Order introduces a new grading structure for agricultural workers. The minimum rates of pay for agricultural workers, by grade, are set out in Schedule 1 to the Order. These take effect from 1 April 2021. The National Living Wage, and National Minimum Wage have been increased with effect from 1 April 2022. These increases in some cases are higher than the minimum rates provided for by the Order. In some cases, this has the result of removing or lessening the impact of the graded pay rates, which reward more experienced or qualified workers. For example, a Grade A4 Agricultural Development worker aged 23 or over according to Schedule 1 to the Order would receive £8.91 per hour. However, from 1 April 2022, the National Living Wage (NLW) would uplift this amount to £9.50 an hour. A 23+ year old Grade B4 agricultural worker would receive a minimum of £9.19, again uplifted to £9.50 an hour. A 23+ year old Grade C Agricultural worker would also receive the NLW rate of £9.50, as their Schedule 1 minimum pay of £9.47 is also uplifted. As such, there is no present pecuniary reward to a worker in this age category to being a Grade C4, as opposed to an A4 worker. This appears to act as a disincentive to progression in the short term. Some agricultural workers may be on a higher rate of pay if they are protected by the protection of pay provisions in article 15, following the introduction of the new grading structure. The Explanatory Memorandum does not explain when a further Order is intended to be made. As such, it is difficult to ascertain when this issue may be ameliorated.

Welsh Government response

A Welsh Government response is required in respect of points 1-3, above.

Legal Advisers
Legislation, Justice and Constitution Committee
3 May 2022

SL(6)175 – The Renting Homes (Deposit Schemes) (Required Information) (Wales) Regulations 2022

Background and Purpose

Landlords frequently require tenants to pay a deposit as security in case of, for example, any potential damage to the property caused by the tenant. However, the deposit does not belong to the landlord and so any deposit paid must be properly protected. All deposits must be protected by the landlord through an authorised deposit scheme.

These Regulations require landlords to provide certain information about the deposit scheme to tenants in writing, including:

- details of the scheme administrator such as name, address, telephone number and email address;
- where the deposit is being held;
- how the deposit will be repaid at the end of the contract;
- what deductions can reasonably be taken from it by a landlord to cover, for example, unpaid rent or damage; and
- the procedure for settling any disputes that may arise between the two parties in relation to the deposit.

Procedure

Negative.

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

Technical Scrutiny

The following two points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

Regulation 3(1)(b) refers to "any information supplied by the scheme administrator to the landlord which explains the operation of sections 45 to 47 of, and Schedule 5 to, the Act". However, it is unclear whether scheme administrators will be under a duty to supply such information to landlords in the first place.

We would be grateful for clarity as to whether scheme administrators will be subject to such a duty.

2. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

Regulations 3(1)(c) and 3(1)(e) refer to amounts being "paid or repaid" to contract-holders. However, in the context of deposits, it is unclear what the difference is between "paying" amounts to contract-holders and "repaying" amounts to contract-holders.

Does it depend on who paid the deposit in the first place, i.e.

- if the deposit was paid by the contract-holder, it will be repaid to the contract-holder, but
- if the deposit was paid by someone on behalf of the contract-holder, then the deposit will be paid (and not repaid) to the contract-holder?

While the 2016 Act expressly refers both to a deposit paid by a contract-holder and a deposit paid by someone on behalf of a contract-holder, that distinction is not clear in the Regulations.

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Welsh Government response

A Welsh Government response is required.

Committee Consideration

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

Government Response: The Renting Homes (Deposit Schemes) (Required Information) (Wales) Regulations 2022

Technical Scrutiny point 1:

The Welsh Government have included provision that where a landlord is provided with any information by the Scheme provider which explains the operation of sections 45 to 47 of, and Schedule 5 to, the Act (i.e. deposit schemes) it must be shared with the contract-holder. The Regulations, consequently, make clear that where any relevant information is received by the landlord, it must be shared with the contract-holder. A level of discretion will be required on part of the landlord in that they will only be required to pass on information which helps to explain the relevant provisions of the Act.

The Welsh Government do not consider it necessary, at this stage, to place a duty on scheme administrators to provide specific information, as a landlord is only under an obligation to pass on any relevant information that is provided by the scheme administrator. The operation of these provisions in practice will be kept under review by the Welsh Government.

Technical Scrutiny point 2:

As the Committee have identified, the Regulations make use of the word "paid" and "repaid", in order to reflect the fact that the Regulations and the Act (including the Act's Explanatory Notes) acknowledge that a deposit may be paid by a person who is not the contract-holder. If the original deposit payment was made by the contract-holder it will be *repaid* to them, where the payment was made by a person on the behalf of the contract-holder that payment will be *paid* to the contract-holder.

The Welsh Government do not consider that the provision is unclear or that the situations require further distinction. The Welsh Government will approach scheme administrators in Wales to determine whether this distinction is also reflected in their guidance.

SL(6)178 – The Renting Homes (Safeguarding Property in Abandoned Dwellings) (Wales) Regulations 2022

Background and Purpose

These Regulations make provision regarding how property (other than the landlord's property) left in an abandoned dwelling must be dealt with. In general, they place a duty on a landlord to safeguard property left in the abandoned dwelling for four weeks from the day on which the contract has ended. The Regulations also make provision regarding the disposal of such property by a landlord.

Procedure

Negative.

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

Technical Scrutiny

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

Merits Scrutiny

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

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

The Regulations set out what must happen to property that is in a dwelling that has been abandoned by a contract-holder. How does the Welsh Government envisage the Regulations should apply where the property is a pet / animal? Should the Regulations make express provision for such circumstances, rather than treat pets / animals in the same way as other forms of property?

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

Where a landlord exercises the right to dispose of property in accordance with regulation 3(3) or regulation 3(4) by selling the property, can the Welsh Government clarify how title in the

property transfers from the original owner of the property (whether that is the contract-holder or a third party) to the buyer of the property?

Further, what safeguards are in place for, and what remedies are available to, a third party who loses possessions because the possessions have been disposed of by a landlord in accordance with the Regulations?

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

Under regulation 5, a landlord may apply any proceeds of a disposal (i.e. a disposal under regulation 3(3) or regulation 3(4)) towards expenses incurred by the landlord in complying with the Regulations. Further, if there is any remainder, the landlord may apply the remainder towards any rent arrears due under the occupation contract.

Did the Welsh Government give consideration to allowing (or even requiring) a landlord to apply any remainder towards other amounts that may be due from the contract-holder apart from rent arrears?

Welsh Government response

A Welsh Government response is required.

Committee Consideration

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

Government Response: The Renting Homes (Safeguarding Property in Abandoned Dwellings) (Wales) Regulations 2022

Merit Scrutiny point 1:

This issue was raised during the consultation exercise held in relation to the Regulations and guidance, with some respondents suggesting an exception to the requirement to safeguard property be made in relation to pets. The Welsh Government responded to that point as follows: "*The Regulations outline the landlord's obligations to safeguard 'property'*[1]*. In practice, if the landlord believes a pet is still in an abandoned property, an alternative solution would need to be found immediately. It may for instance involve contacting next of kin or the RSPCA to find out whether or not they would be able to take care of the animal(s)*". In relation to the Regulations themselves, the Welsh Government considers that the addition of the exception in regulation 3(4)(b) (which provides that the landlord need not wait for the prescribed period where adequate safeguarding would "involve unreasonable expense or inconvenience") is sufficient to enable the landlord to deal with any pet/animal left at the property. The Welsh Government will add this clarification to the guidance document *Possession of abandoned dwellings and safeguarding of property* so that expectations are clear on this matter.

Merit Scrutiny point 2:

A landlord that comes into possession of property (formerly belonging to the contract-holder) which has been left in an abandoned dwelling is often referred to as an "involuntary bailee". The Torts (Interference with Goods) Act 1977 (the 1977 Act) enables the bailee, provided that certain conditions have been met, to sell the relevant property.
These Regulations strike a balance between the interests of the landlord and the contract-holder when it comes to safeguarding property which remains in the dwelling following abandonment. They provide that a notice must be served, a time limit must be observed and that the landlord must safeguard a contract-holder's property during that notice period (subject to the exceptions made by the Regulations). The Regulations make the necessary provision to ensure that the relevant property is dealt with in accordance with the 1977 Act.

In the relevant circumstances, title in the abandoned property transfers from the original owner (whether that is the contract-holder or a third party) to the buyer of the property pursuant to section 12(6) of the 1977 Act.

[1] The requirements do not apply to property which is 'perishable', or property which would involve 'unreasonable expense or inconvenience' to safeguard: landlords may dispose of such property 'at such time and in such manner' as they see fit.

In terms of additional safeguards which are in place, we would draw the Committee's attention to section 220(4) of the Act which requires the landlord to undertake such inquiries as are necessary to satisfy the landlord that the contract-holder has in fact abandoned the dwelling.

Furthermore, under section 222 of the Act, a contract-holder may, for up to six months after the day the contract was ended by the landlord, challenge the repossession of the dwelling by the landlord on several grounds including the landlord's failure to serve the proper notice.

The Welsh Government guidance in relation to these Regulations will also recommend that landlords, seeking to make use of the provisions of these Regulations, make a comprehensive inventory, with photographic evidence, of any property that they propose to deal with under these Regulations. The Welsh Government would point out that, in most cases of abandonment, the property to be dealt with pursuant to these Regulations is likely to be of very limited resale value.

Merit Scrutiny point 3:

The Welsh Government did consider such an approach, but discounted it as we concluded that adding examples of further costs or expenses to those already included (i.e. removal/storage costs and rent arrears) was unnecessary. In situations of abandonment in practice, the sums received from the permitted disposals are extremely unlikely to be greater than the permitted expenses that the landlord is likely to be owed. The Welsh Government concluded, consequently, that no further provision was needed.

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

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA-LG-0037-22

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

huw.Irranca-Davies@senedd.wales

27 April 2022

Dear Huw,

The Animal Welfare (Miscellaneous Amendments) Regulations 2022

I wish to inform the Committee I am giving consent to the Secretary of State for Environment, Food and Rural Affairs to lay The Animal Welfare (Miscellaneous Amendments) Regulations 2022 on 19 May 2022. The Regulations are scheduled to come into force the day after they are laid.

The Regulations make minor technical amendments to retained direct EU law relating to animal welfare in transport and official controls, to ensure that it operates effectively following the withdrawal of the United Kingdom from the European Union. The Regulations involve no transfer of European Commission functions

The Regulations amend:

- Council Regulation (EC) No 1/2005 on the protection of animals during transport and related operations; and
- Regulation (EU) 2017/625 of the European Parliament and of the Council on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products.

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.

The amendments are summarised below:

- **Role and definition of the Competent Authority:** A mandatory requirement for the competent authority to recover the costs of any enforcement action(s) it undertakes in relation to official control functions. The Welsh Ministers are the competent authority for certain official control functions. The power to recover costs has been changed to a discretionary action, so that it is not always necessary to take action. This allows for situations whereby the recovery of costs would be impractical, uneconomic, or not otherwise in the public interest. Other minor drafting changes have been made.

- **Removal of references to EU institutions and recording systems:** References to EU "member states" have been replaced with "Great Britain". A requirement for a UK competent authority to provide details of intended long journeys via an EU information exchange system has been removed. References to a system of national contact points and mutual assistance scheme used by EU member states have been removed. A requirement to provide an annual report on inspections carried out under these regulations, to the EU Commission, has been removed. An errant reference to an EU oversight committee, whose functions were removed from these regulations by a previous instrument, has been removed.

- **Penalties:** A requirement to lay down rules on penalties for infringements by the 5 July 2006, has been removed. This is no longer required, as rules on penalties and infringements to these regulations were laid by that deadline and are currently in force.

- **Updating references to outdated legislation:** References to other regulations in the context of training for competent authority staff, other veterinary legislation, and animal welfare inspections for animals destined for slaughter, have been updated to refer to current legislation appropriate for those subjects.

It is normally the policy of the Welsh Government to legislate for Wales in matters of devolved competence. However, in certain circumstances there are benefits to working collaboratively with the UK Government where there is a clear rationale for doing so. I am giving my consent to these Regulations, which make corrections in relation to, and on behalf of, Wales for reasons of efficiency and expediency, and to ensure consistency and coherence of the statute book. The amendments have been considered fully and there is no divergence in policy. Our position on the protection of animals during transport is consistent with that of the UK Government.

I am copying this letter to the Economy, Trade, and Rural Affairs Committee.

Regards,

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

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

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA-LG-0037-22

Paul Davies MS
Chair
Economy, Trade and Rural Affairs Committee

Paul.Davies@senedd.wales

27 April 2022

Dear Paul,

The Animal Welfare (Miscellaneous Amendments) Regulations 2022

I wish to inform the Committee I am giving consent to the Secretary of State for Environment, Food and Rural Affairs to lay The Animal Welfare (Miscellaneous Amendments) Regulations 2022 on 19 May 2022. The Regulations are scheduled to come into force the day after they are laid.

The Regulations make minor technical amendments to retained direct EU law relating to animal welfare in transport and official controls, to ensure that it operates effectively following the withdrawal of the United Kingdom from the European Union. The Regulations involve no transfer of European Commission functions

The Regulations amend:

- Council Regulation (EC) No 1/2005 on the protection of animals during transport and related operations; and

- Regulation (EU) 2017/625 of the European Parliament and of the Council on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products.

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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.

The amendments are summarised below:

- **Role and definition of the Competent Authority:** A mandatory requirement for the competent authority to recover the costs of any enforcement action(s) it undertakes in relation to official control functions. The Welsh Ministers are the competent authority for certain official control functions. The power to recover costs has been changed to a discretionary action, so that it is not always necessary to take action. This allows for situations whereby the recovery of costs would be impractical, uneconomic, or not otherwise in the public interest. Other minor drafting changes have been made.

- **Removal of references to EU institutions and recording systems:** References to EU “member states” have been replaced with “Great Britain”. A requirement for a UK competent authority to provide details of intended long journeys via an EU information exchange system has been removed. References to a system of national contact points and mutual assistance scheme used by EU member states have been removed. A requirement to provide an annual report on inspections carried out under these regulations, to the EU Commission, has been removed. An errant reference to an EU oversight committee, whose functions were removed from these regulations by a previous instrument, has been removed.

- **Penalties:** A requirement to lay down rules on penalties for infringements by the 5 July 2006, has been removed. This is no longer required, as rules on penalties and infringements to these regulations were laid by that deadline and are currently in force.

- **Updating references to outdated legislation:** References to other regulations in the context of training for competent authority staff, other veterinary legislation, and animal welfare inspections for animals destined for slaughter, have been updated to refer to current legislation appropriate for those subjects.

It is normally the policy of the Welsh Government to legislate for Wales in matters of devolved competence. However, in certain circumstances there are benefits to working collaboratively with the UK Government where there is a clear rationale for doing so. I am giving my consent to these Regulations, which make corrections in relation to, and on behalf of, Wales for reasons of efficiency and expediency, and to ensure consistency and coherence of the statute book. The amendments have been considered fully and there is no divergence in policy. Our position on the protection of animals during transport is consistent with that of the UK Government.

I am copying this letter to the Legislation, Justice and Constitution Committee.

Regards,

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

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

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: LG/0237/22

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

Huw.Irranca-Davies@senedd.wales

27 April 2022

Dear Huw,

I am writing to inform you of my consent being granted for a Statutory Instrument being made by the UK Government which contains elements within the competence of Welsh Ministers.

The Common Agricultural Policy (Cross Compliance Exemptions and Transitional Regulation) (Amendment) (EU Exit) Regulations 2022 (henceforth the Regulations) will amend Regulation (EU) 1308/2013 to alter the effect of the amendments made by Regulation (EU) 2020/2220, insofar as they concern Article 55 on apiculture programmes and Article 167a on olive oil marketing rules. As there were no practical changes made during the period in which Regulation (EU) 2020/2220 applied in Wales, no monitoring of the delivery of this SI will be required.

I am agreeing, in this case, to give consent to Victoria Prentis, the Minister for Farming, Fisheries and Food, to make provision to remedy the failure of retained EU law to operate effectively in Wales. This is through the powers granted in section 8 of the European Union (Withdrawal) Act 2018. The Welsh Ministers are the Appropriate Authority for REUL 1308/2013 in relation to Wales, but the Secretary of State can legislate in relation to Wales with the consent of the Welsh Ministers.

The period for which I am giving consent is limited to the passage of the Regulations. These regulations do not have a practical impact over a period of time, they only make retained EU law operable in Wales. As such, no review mechanism is needed and longer-term constitutional arrangements will not be affected.

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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.

We anticipate the Regulations being the last of the corrective SIs which relate to the Common Organisation of the Markets in Agricultural Produce. Their policy rationale is, therefore, to maintain the operability of retained EU legislation in Wales. This SI applies to Wales with regards to apiculture programmes and olive oil marketing rules because of the small impact of these two aspects of the legislation, and the expediency of working on a UK-wide basis to correct inoperable retained EU legislation.

Wales' interests remain protected with the passage of the Regulations, as Welsh Ministers retain the option of amending them in future on a Wales-only basis.

Welsh Government officials discussed and refined the Regulations over a period of weeks with counterparts in DEFRA, the Scottish Government and DAERA. The UK Government continue to recognise the areas in which the Regulations apply to Wales as within the competence of Welsh Ministers. DEFRA officials have been aware of the need to seek the consent of Welsh Ministers for these Regulations, insofar as they apply to Wales, throughout their development.

Regards,

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

Rebecca Evans AS/MS
Y Gweinidog Cyllid a'r Trefnydd
Minister for Finance and Trefnydd

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/RE/0044/22

Huw Irranca-Davies MS
Chair of the Legislation, Justice and Constitution Committee
Senedd Cymru
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By Email: SeneddLJC@senedd.wales

03 May 2022

Dear Huw,

The Public Procurement (International Trade Agreements) (Amendment) Regulations 2022.

Policy Overview of the SI

The above titled SI is necessary for procurement legislation (detailed below) to be amended so as to effect in domestic legislation implementation of the United Kingdom's (UK) procurement obligations covered by the Free Trade Agreement between the UK and Iceland, Liechtenstein and Norway (the EFTA Agreement).

The Law which is being amended:

- The Public Contracts Regulations 2015
- The Concession Contracts Regulations 2016
- The Utilities Contracts Regulations 2016

together referred to as the 'Domestic Procurement Regulations'

The purpose of the amendments

The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (the EU Exit SI) made under the European Union (Withdrawal) Act 2018 preserved the UK's procurement

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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.

obligations contained in existing international agreements, for 12 months from the end of the Implementation Period.
The EFTA Agreement was laid before UK Parliament on 16 July 2021, and the scrutiny period ended on 26 October 2021. As such, the procurement obligations covered by the EFTA Agreement need to be implemented into Domestic Procurement Regulations.
In relation to Wales, the amended legislation will ensure that international procurement obligations under the EFTA Agreement are appropriately implemented within the Domestic Procurement Regulations, and consequently allow authorities across Wales to comply with the same.

Why consent was given

Section 2 of the Trade Act 2021, which is being relied upon for the current SI, provides the Welsh Ministers with regulation making powers, subject to the restrictions contained in the Act. However, exercising these powers in this instance is not recommended for the reasons set out below.

It is normally our policy that where powers lie with the Welsh Ministers, it is the responsibility of the Welsh Ministers to legislate for Wales. However, the purpose of the SI is to make technical amendments to existing procurement legislation to ensure that international procurement obligations are implemented fully across the UK. Therefore, on this occasion I consider it is appropriate for the UK Government to legislate in this devolved area. Legislating at pace is also important in order to mitigate the risk of a gap in Domestic Procurement Regulations being compliant with our international obligations; if Domestic Procurement Regulations remain unaligned to international obligations then this would open the risk of legal challenge against the UK from a third country.

There is no policy divergence between the Welsh Government and the UK Government and the substance of the amendments are not, in my view, controversial. Further, although the Domestic Procurement Regulations being amended extends to Wales, there is no equivalent legislation made by the Welsh Ministers in this area. Updating Domestic Procurement Regulations in alignment with England and in one piece of legislation is logical so as to ensure that the current constancy of positon is maintained.

The SI will have no impact on the Welsh Ministers' executive competence, or on the Senedd's legislative competence.

As such, I have given my consent to the Minister for Brexit Opportunities and Government Efficiency to make this SI in relation to Wales, which the UK Government has requested in line with the UK Government's non-statutory commitments to ensure the powers in the Trade Act 2021 are not normally used to legislate in areas of devolved competence without the consent of the relevant devolved governments, and not without first consulting them. I have laid a Written Statement, which can be found at:
Eich cyf (senedd.wales).

The SI is subject to the affirmative procedure, and was laid before the UK Parliament on 25 April 2022.

I have written in similar terms to the Chair of the Economy, Trade, and Rural Affairs Committee, Paul Davies MS.
Yours sincerely,

Rebecca Evans AS/MS
Y Gweinidog Cyllid a'r Trefnydd
Minister for Finance and Trefnydd

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**The Public Procurement (International Trade Agreements) (Amendment) Regulations 2022.**
DATE	**27 April 2022**
BY	**Rebecca Evans MS, Minister for Finance and Trefnydd**

Members of the Senedd will wish to be aware that we are giving consent to the Secretary of State exercising a subordinate legislation-making power in a devolved area in relation to Wales.

Agreement was sought by Jacob Rees-Mogg MP, Minister for Brexit Opportunities and Government Efficiency to make a Statutory Instrument titled The Public Procurement (International Trade Agreements) (Amendment) Regulations 2022.

The above titled SI will be made by the Secretary of State in exercise of powers conferred by sections 2(1) and (2), 4(1)(c) and (d), and 5(1) of the Trade Act 2021.

The SI amends;

- The Public Contracts Regulations 2015
- The Concession Contracts Regulations 2016
- The Utilities Contracts Regulations 2016

As to effect domestic implementation of the United Kingdom's (UK) procurement obligations covered by the Free Trade Agreement between the UK and Iceland, Liechtenstein and Norway (EFTA Agreement).

The Statutory Instrument can be found here:
https://www.legislation.gov.uk/ukdsi/2022/9780348234534

Lee Waters AS/MS
Y Dirprwy Weinidog Newid Hinsawdd
Deputy Minister for Climate Change

Llywodraeth Cymru
Welsh Government

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

4 May 2022

Dear Huw,

I refer to my letter to you of 25 April 2022. I am writing to inform the Committee I have given my consent to the Secretary of State to lay The Phytosanitary Conditions (Amendment) Regulations 2022 in relation to Wales. I have laid a Written Statement which can be found at: ws-ld15105-e.pdf (senedd.wales)

The Regulations intersect with devolved policy and will apply to Wales. The provisions could be made by Welsh Ministers in exercise of our own powers. The Regulations extend to England, Scotland and Wales.

The Regulations were made in exercise of the powers conferred by Article 41(3) of Regulation (EU) 2016/2031 of the European Parliament and of the Council on protective measures against pests of plants. The Statutory Instrument (SI) is subject to the negative procedure and was laid before Parliament on 28 April 2022 with a commencement date of 29 April 2022.

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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.

I have written similarly to Llyr Gruffydd MS, the Chair of the Climate Change, Environment, and Infrastructure Committee.

Yours sincerely

Lee Waters AS/MS
Y Dirprwy Weinidog Newid Hinsawdd
Deputy Minister for Climate Change

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**The Phytosanitary Conditions (Amendment) (No. 2) Regulations 2022**
DATE	**29 April 2022**
BY	**Lee Waters AS/MS** **Y Dirprwy Weinidog Newid Hinsawdd** **Deputy Minister for Climate Change**

Members of the Senedd will wish to be aware that we are giving consent to the Secretary of State exercising a subordinate legislation-making power in a devolved area in relation to Wales.

Agreement was sought by Victoria Prentis MP, Minister of State for Farming, Fisheries and Food, to make a Statutory Instrument (SI) titled The Phytosanitary Conditions (Amendment) (No. 2) Regulations 2022 to apply in relation to Great Britain.

The above titled SI will be made by the Secretary of State in exercise of powers conferred by Article 41(3) of Regulation (EU) 2016/2031 of the European Parliament and of the Council on protective measures against pests of plants on official controls and other official activities.

The SI amends Regulation EU Legislation (Regulation (EU) 2016/2031), which amends Commission Implementing Regulation (EU) 2019/2072 (the Phytosanitary Conditions Regulation) establishing uniform conditions for the implementation of Regulation (EU) 2016/2031 of the European Parliament and the Council, as regards protective measures against pests of plants.

The amendments make amendments to secondary legislation. They update import requirements to prevent the introduction of the plant pest Thaumetopoea pityocampa in Great Britain via the import of the hosts of this pest: Cedrus Trew and Pinus L.

The regulations were laid before Parliament on 28 April 2022 to come into force on 29 April 2022.

Any impact the SI may have on the Senedd's legislative competence and/or the Welsh Ministers' executive competence

Previous Phytosanitary Conditions Amendments put in place previous corrections required to the regulatory regime for plant health. These broadened the executive competence of the Welsh Ministers by conferring functions on them (in their capacity as the 'Competent Authority' for Wales) without encumbrance. The Minister will wish to note that the Regulations do not transfer any functions to the Secretary of State.

The purpose of the amendments

The Regulations update GB-wide import requirements to restrict where the host trees of the pest *Thaumetopoea pityocampa* can be imported from. Specifically, these regulations remove the option for the host plants of this pest to be imported accompanied by an official statement that they have been produced in nurseries which have been found free from the pest, on the basis of official inspections and surveys carried out at appropriate times. Now these trees must be imported from a country or area that is designated pest-free, or from a place where they have been grown in a fully sealed environment. The regulations also broaden the scope of the remaining special requirements for import to all plants (other than seeds) of Cedrus Trew and Pinus L originating from any third country, irrespective of whether they are plants for planting or cut trees and foliage.

The Regulations and accompanying Explanatory Memorandum, setting out the detail of the provenance, purpose and effect of the amendments is available here: http://www.legislation.gov.uk/id/uksi/2022/484

Why consent has been given

Consent has been given for the UK Government to make these corrections in relation to, and on behalf of, Wales for reasons of efficiency, expediency and to protect biosecurity by updating import requirements to mitigate the risk of accidentally introducing the pest. The amendments have been considered fully and there is no divergence in policy.

Lee Waters AS/MS
Y Dirprwy Weinidog Newid Hinsawdd
Deputy Minister for Climate Change

Llywodraeth Cymru
Welsh Government

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

25 April 2022

Dear Huw,

I am writing to inform the Committee of the intention to consent to the UK Government making and laying The Phytosanitary Conditions (Amendment) (No. 2) Regulations 2022 by 28 April 2022.

I have received a letter from Victoria Prentis MP, Minister of State for Farming, Fisheries and Food, asking for consent to these Regulations. The Regulations intersect with devolved policy and will apply to Wales. The provisions could be made by Welsh Ministers in exercise of our own powers. The Regulation will extend to England, Scotland and Wales.

The Regulations will be made exercise of the powers conferred by Article 41(3) of Regulation (EU) 2016/2031 of the European Parliament and of the Council on protective measures against pests of plants.

The amendments will tighten import rules relating to the trees *Cedrus Trew* and *Pinus L* and their cut foliage. These trees are known to host the pest *Thaumetopoea pityocampa* (PPM) and the pest has been detected on recent imports of these trees from France. These stricter Regulations mean that trees and cut foliage will only be imported from countries or geographical areas that are pest-free, whereas previously trees could be imported from nurseries if they had been declared pest-free. These stricter requirements will decrease the risk that pests are accidentally introduced.

Welsh Government officials have been working closely with UK Government officials to manage the recent interception of imported trees carrying PPM nests. Officials have also been involved in the development of legislative options and have seen draft versions of the proposed Statutory Instrument (SI).

The SI is subject to the negative procedure and is due to be laid before Parliament on 28 April 2022 with a commencement date of 29 April 2022. This will minimise the risk that this pest is accidentally introduced into GB through import of trees and foliage.

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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.

Although the Welsh Government's general principle is that the law relating to devolved matters should be made and amended in Wales, on this occasion, it is considered appropriate for the substance of the amendments to apply to Wales. This is because there is no policy divergence between the Welsh and UK Government in this matter. This ensures a coherent and consistent statute book with the regulations being accessible in a single instrument. In addition, there is an urgent need to introduce this legislation, to protect biosecurity in Wales. I consider that legislating separately for Wales would be neither the most appropriate way to give effect to the necessary changes, especially given the urgent nature of the Regulations, nor a prudent use of Welsh Government resources given other important priorities.

These Regulations do not have implications for the Programme for Government. Preventing the entry of plant pests and diseases supports the majority of well-being goals in the Well-being of Future Generations (Wales) Act and will have a direct, positive contribution to the "a healthier Wales" and a 'resilient Wales' goals, together with associated impacts on the goals of "a prosperous Wales" and "a globally responsible Wales".

I have written similarly to Llyr Gruffydd MS, the Chair of the Climate Change, Environment and Infrastructure Committee.

Lee Waters AS/MS
Y Dirprwy Weinidog Newid Hinsawdd
Deputy Minister for Climate Change

Agenda Item 7.1

Vaughan Gething AS/MS
Gweinidog yr Economi
Minister for Economy

Llywodraeth Cymru
Welsh Government

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

25 April 2022

Dear Huw,

Thank you for your letter of 23 March to the First Minister, asking about any consultation with the Welsh Government on the latest agreement on the Very High Neutron Flux Reactor programme. It has been passed to me for reply.

My officials have enquired and not found anyone in the Welsh Government who has been consulted on this renewal proposal. Consequently, it has not been considered.

Yours sincerely,

Vaughan Gething AS/MS
Gweinidog yr Economi
Minister for Economy

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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.

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

—

Legislation, Justice and Constitution Committee

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Rt Hon Mark Drakeford MS
First Minister of Wales

23 March 2022

Dear Mark

Sixth Protocol to the Convention on the Construction and Operation of a Very High Neutron Flux Reactor (UK-France-Germany)

At our meeting of 14 March 2022 we considered the international agreement between the UK, France and Germany, Sixth Protocol to the Convention on the Construction and Operation of a Very High Neutron Flux Reactor.

As you will be aware, the agreement will extend existing arrangements between the UK, France and Germany in running the Institut Laue–Langevin (ILL), a world-leading research facility for scientific research using neutrons, situated in Grenoble, France, by 10 years from 2024 to 2033.

During our consideration of this agreement we agreed to write to you to seek clarification on whether the Welsh Government was consulted in the development of the agreement; and its assessment of the impact, if any, on Wales's research, development and innovation sectors.

We would be grateful to receive your response by 20 April 2022.

Yours sincerely,

Huw Irranca-Davies
Chair

Senedd Cymru
Welsh Parliament

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

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
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26 April 2022

Dear Huw,

I am writing to inform the Legislation, Justice and Constitution Committee of our intent to publish a second edition of '*Common Legislative Solutions: a guide to tackling recurring policy issues in legislation*'. I enclose a copy, for the Committee's information.

This guidance is produced by the Office of the Legislative Counsel to help those developing policy for Bills. It does this by providing information about how similar, recurring policy issues have been dealt with before. The aim is to inform decision making on policy issues as well as minimising unnecessary inconsistencies in similar legislative issues.

The guidance was first published in 2019 and the second edition now addresses four new legislative solutions: appeals, civil sanctions, criminal offences and giving notice.

Under each legislative solution examples of previous potentially relevant legislative solutions are provided. More importantly, however, the guidance sets out what matters and potential problems need to be addressed in order to successfully develop policy for legislation.

In line with the approach taken for the original publication, we will be publishing the new edition online to increase understanding of the law-making process and as part of '*The Future of Welsh Law: a Programme for 2021 -2026*'.

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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.

I would be grateful if you could draw this to the attention of the Legislation, Justice and Constitution Committee.

Yours sincerely,

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

The future of Welsh law

COMMON LEGISLATIVE SOLUTIONS:
a guide to tackling recurring policy issues in legislation

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Mae'r ddogfen yma hefyd ar gael yn Gymraeg / This document is also available in Welsh

Foreword – First Legislative Counsel

As the legislative drafting office for the Welsh Government, the Office of the Legislative Counsel aims to produce clear, effective, and accessible law for Wales, in Welsh and in English. Producing new law is a complex undertaking which requires analysis and understanding of difficult issues. For this reason, laws benefit from input from those with different expertise and perspectives: policy, legal, linguistic and practical.

To assist the law-making process we hope to share some of the knowledge we have developed as drafters since full law making powers were conferred on Senedd Cymru. So this guidance proposes potential solutions to commonly occurring legislative problems, and its aim is to help those who develop, scrutinise, and use legislation to understand how best to address them.

Pack Page 48

The genesis of this guidance is in work undertaken by the National Archives to research patterns which occur in legislation: in other words, common legislative solutions to policy questions or problems which occur frequently. So where legislation is being developed on recurring areas, we hope that this guidance will act as a useful tool to enable the best possible quality of Bill instructions to be provided to counsel – allowing us to produce clear legislation more efficiently and effectively for Ministers.

The guidance has been produced in collaboration between members of each of the four legislative drafting offices in the UK, who have consulted officials across all four governments in refining it. It represents an excellent example of civil service collaboration, exemplifying principles of mutual respect and cooperation in the carrying out of one of our most essential public functions, the creation of good law.

The Welsh Government is committed to a long term programme to make the law in Wales more accessible. This is primarily to be done by consolidating legislation into codes of law on particular subjects and improving the way legislation is published and explained. In addition, however, we aim to make legislation easier to read and understand. This guidance helps us achieve our goal by explaining how and why we address certain problems in legislation, and by seeking to minimise unnecessary inconsistencies in the way they are addressed.

We welcome any suggestions and feedback on this guidance from all those who take an interest in legislation as we work to continuously improve the quality and accessibility of Wales's law.

Dylan Hughes

1 Introduction

This Chapter contains a brief overview of the process of making policy for legislation, and explains how the detailed guidance in the following Chapters fits with that process.

Developing policy for legislation

A traditional model for developing policy for legislation is as follows:

- identify what the issue or "problem" is
- think of possible solutions and the advantages and disadvantages of each solution
- analyse the possible solutions and their advantages and disadvantages, and select the most promising solution
- if a legislative solution is chosen, work up the proposed solution in sufficient detail so that draft legislation could be produced
- test the worked-up solution against a range of factual scenarios to see whether the solution would have the desired effect in those scenarios.

In the course of doing this, policy makers will of course need to work out what the existing legislative landscape is, and how that affects, and is affected by, the proposed solution.

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Some policy issues that arise are novel or unique, and as such may require creative thinking and entirely novel solutions. Similarly, sometimes what is wanted is a new solution to a commonly occurring problem.

But there are some commonly occurring policy issues that are dealt with by adopting a commonly occurring legislative solution. That is what this guidance is concerned with.

For these cases, it is possible to identify issues that may need to be addressed, when working up and instructing on the proposed solution. That is what we have done for a number of legislative solutions.

The aim of the detailed guidance is to stimulate thinking, increase awareness of possible options, improve the quality of instructions, and improve the efficiency of the policy-making and instructing processes, by articulating matters that may need to be addressed.

Please note, however:

- The detailed guidance in the following Chapters sets out matters that may need to be considered. Some of these matters are likely to arise in all or most cases, but other matters may arise only sometimes or even rarely. So please don't assume that the instructions necessarily need to address all the issues identified in the detailed guidance.
- Depending on the policy, it may of course be the case that something not mentioned in the detailed guidance is wanted – whether in addition to the matters mentioned there or instead of some of those matters.
- Above all, it must be emphasised that although the detailed guidance aims to assist policy makers and instructors, it is not intended to constrain thinking and is not a substitute for working out what is really wanted from a policy perspective.

We hope that this detailed guidance will also help policy makers to understand the level of meticulous analysis that is required when preparing instructions for legislation on other topics.

Format of following Chapters

Each Chapter deals with a particular legislative solution, and is in the following format:

Description of the solution

This high level description is intended to assist policy makers in selecting the correct solution for the policy issue they wish to address.

Where there is a section on related solutions, the aim is to draw the policy maker's attention to alternative policy solutions.

Elements of the solution

This section consists of a series of questions that the instructor may or will need to address, in order to enable the drafter to produce a draft.

Examples of the solution

This section lists examples of the solution, so that policy makers, instructors and drafters can easily locate examples of the solution.

These examples show the policy and drafting choices that have been made in other contexts. Again, the aim is to show examples that reflect a range of policy choices that have been made, not to constrain thinking.

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Additional solutions to be added in future

We hope to expand this guidance over time, to include detailed guidance on other legislative solutions, including:

- publishing documents
- guidance (including codes of conduct and codes of practice)
- information sharing
- reorganisation of public bodies (including merger and dissolution)
- ombudsmen
- subordinate legislation.

Any suggestions as to other legislative solutions that might be covered would be welcome.

Chapter 2: Establishing a statutory corporation

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2 Establishing a statutory corporation

This legislative solution establishes a body or office to exercise statutory functions, where it has been decided that those functions should be exercised by a new public authority, rather than by Ministers[1], an existing public authority or a voluntary or private sector body.

Description of the legislative solution

The reasons for establishing a new body or office as a statutory corporation, rather than in another form such as an unincorporated association, generally relate to the fact that a statutory corporation has its own legal personality distinct from that of the individual members or office-holder. It can therefore enter into legal relations and hold property, and continues to exist despite changes in the membership of the body or holder of the office. Executive and regulatory agencies are commonly statutory corporations with their own staff and budgets, whereas advisory bodies and tribunals are not usually statutory corporations.

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In England, Wales or Northern Ireland, a statutory corporation may be a body corporate (i.e. a body with a number of members) or a corporation sole (i.e. an office held by a single individual). Scots law does not have the concept of a "corporation sole," but legislation may provide that an office constitutes a "distinct juristic person" from the individual holding it, which is intended to achieve a similar effect to creating a corporation sole.

Instead of creating a body or office directly, an Act may delegate the power to establish it (for example, by giving Ministers the power to establish it through subordinate legislation).

Related legislative solutions

Designation: an alternative to establishing a new statutory corporation may be to designate an existing person or body to exercise particular functions.

Collaboration: it may be appropriate to require the newly created statutory corporation and other bodies to work together in exercising their functions.

Elements of the legislative solution

1. Name and status of the statutory corporation

1.1 What will be the name of the body or office (including, where appropriate, the name in Welsh, Gaelic etc. as well as English)?

1.2 Should the body or office have Crown status, either generally or for particular purposes? The main effects of a body having Crown status are that it is not bound by legislation that does not bind the Crown, and that its staff are Crown servants. Most statutory corporations (and most other public bodies) are not Crown bodies.

2. Positions to which appointments are made

2.1 In the case of a body corporate:

- How many members should there be? It is more usual to set a maximum and minimum number of members than to legislate for a specific number.
- Should there be different types of member (such as executive and non-executive members, or professional and lay members)? Must there be members of every type?
- Should all members be appointed to the body, or should any of them be members automatically by virtue of holding another office (such as the relevant Auditor General[2])?

[1] References to Ministers should be read as including Northern Ireland Departments.

[2] These are the (UK) Comptroller and Auditor General, the Comptroller and Auditor General for Northern Ireland, the Auditor General for Scotland and the Auditor General for Wales.

- Should there have to be a chair? And a deputy chair? Should they be appointed directly to those positions, or chosen from the members of the body?

2.2 In the case of an individual office:

- Should there be one or more deputies to the office-holder? Should a deputy be a separate office-holder, or a member of staff designated for the purpose?
- In which circumstances should the corporation's functions be exercised by a deputy (for example, if the office is vacant or the office-holder is unable to act)?

3. Appointment of members or office-holder

3.1 Who should appoint the office-holder and any deputy, or the chair and members of the body? Appointments might, for example, be made by Ministers, the legislature, the Queen, other members or staff of the statutory corporation, or by another body.

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3.2 Should appointments have to be made on the recommendation or nomination of another body, or be approved by another body (such as Ministers or the legislature)?

3.3 Should any criteria have to be applied in making appointments, or should there be any qualifications for appointment (such as particular skills or experience)? Should any matters disqualify people for appointment (such as membership of the legislature or a local authority)?

3.4 Should the appointment process be subject to external oversight? (Where appointments are made by Ministers, this is likely to require an amendment to the relevant public appointments legislation: see the Annex.)

3.5 Should membership of the statutory corporation disqualify a person from membership of the House of Commons or devolved legislature? (This may require an amendment to the relevant disqualification legislation: see the Annex.)

3.6 For what period should a person be appointed? An Act may fix the term of office, or give the person making the appointment power to fix it, perhaps subject to a maximum.

3.7 Should a person be eligible to be re-appointed at the end of the period of appointment? Should there be any restriction on the number of times a person may be re-appointed?

3.8 Who should set the terms of appointment (insofar as they are not set by the legislation)?

4. Termination of appointment

4.1 Should a person be able to resign from office, and if so how (e.g. notice to Ministers or the chair)?

4.2 Should it be possible to suspend or dismiss a person from office? Who should be able to suspend or dismiss a person, and on what grounds? The grounds should reflect the nature and functions of the body or office.

4.3 Should the Act set the grounds and procedure for dismissal, or give the person making the appointment the power to deal with them in the appointment letter?

4.4 Where an Act specifies grounds for dismissal, the general ground of unfitness, unwillingness or inability to act seems to be universal. Other more specific grounds that may be mentioned include:

- unauthorised absence from meetings of a body for a period (often 6 months)
- conviction for a criminal offence
- insolvency or indebtedness.

4.5 If insolvency is to be a ground for dismissal, which types of insolvency proceedings or arrangements should give rise to the power to dismiss?

4.6 Should any events (such as election to the legislature) automatically terminate a person's appointment?

5. Conflicts of interest

5.1 Is anything needed to prevent or regulate conflicts between the personal interests of members or office-holders and the performance of their functions?

5.2 Should it be sufficient to rely on the person who makes appointments to consider potential conflicts of interest in the appointment process?

5.3 Should a prejudicial conflict of interest be a ground for dismissal?

5.4 Alternatively, should members be required to declare conflicts of interest (e.g. at meetings of the body) and prohibited from taking part in decisions in which they have an interest? Or should the corporation just be required to make arrangements for dealing with conflicts of interest?

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5.5 Should the body be required to keep and publish a register of members' interests? (This is the norm for Scottish devolved bodies but less common elsewhere.) If so, which interests must be registered? When does the duty to register them arise?

6. Effect of vacancy or other defect on validity of acts

6.1 Who should exercise the functions of an individual office-holder if the office (and any post of deputy) is vacant or if the office-holder (and any deputy) cannot act because of a conflict of interest? Should there be provision for Ministers to appoint another person to act?

6.2 If the position of chair of a body corporate is vacant, or if the body has fewer members than it is required to have, should the body still be able to act? Or should anything done by the body be invalid?

6.3 If the appointment of a member is procedurally defective, or was made in breach of any eligibility rules, should a decision in which the member participates be valid?

6.4 Should a decision be valid if it is made in breach of rules relating to conflicts of interest?

7. Payments to members

7.1 What sort of payments (if any) should the statutory corporation make to its members? Should they receive remuneration (such as a salary or fees) for performing their duties? Should they receive payments in respect of expenses they incur, or other allowances?

7.2 Should the statutory corporation have a power or a duty to pay remuneration or allowances? Should Ministers be able to require it to pay them? Should the amount of the payments be set by Ministers, or by the corporation with the approval of Ministers?

7.3 Should other payments be possible, such as compensation for loss of office? Is such compensation paid by Ministers, or by the statutory corporation with their approval? Must there be special circumstances to justify paying compensation?

7.4 Should the corporation make pension arrangements for its members? Should it have a power or duty to do so? Should it be free to choose whether to operate its own pension scheme, make payments into another scheme, or provide pensions in some other way? Should its pension arrangements require Ministerial approval?

7.5 Should members be entitled to join the GB or NI civil service pension scheme? (This may require an amendment to the relevant legislation: see the Annex.)

8. General powers

8.1 A statutory corporation will have the power to do things that are incidental to the exercise of its functions. Examples may include holding land and other property, making contracts, participating in companies, co-operating with others, receiving assistance in performing the corporation's functions, and bringing legal proceedings.

8.2 Should any of the corporation's general powers be restricted? For example, should it be allowed to invest money only in certain ways, or require Ministerial approval to dispose of property or form a company? Should it be prevented from doing any things that might otherwise be regarded as incidental to its functions?

8.3 Should the corporation be able to provide assistance to others for purposes that go beyond its own aims and functions? Should it have the power to give assistance to other bodies for the performance of the functions of those other bodies?

8.4 Should the corporation have a duty to do anything that it might otherwise have an incidental power to do? For example, should it be required to consult other public authorities, share information with them, or co-operate with them?

8.5 If the corporation is expected to share information with others, is it necessary to remove or qualify any restrictions that might otherwise prevent it from doing so?

8.6 In Northern Ireland, legislation establishing a body corporate usually applies section 19 of the Interpretation Act (Northern Ireland) 1954, which contains a number of general provisions about the powers and procedures of statutory corporations.

9. Procedure

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9.1 Should the corporation be free to make its own rules regulating its decision-making procedure, including the quorum for meetings? Should it be required to make rules or standing orders? Should the rules be approved, or even made, by Ministers?

9.2 Do any aspects of the corporation's procedures need to be specified or regulated by the legislation? For example, are special rules needed about quorum, to ensure that different categories of member are represented at meetings?

10. Committees

10.1 Is the corporation likely to establish committees? Should it be required to establish particular types of committee (e.g. regional committees, advisory committees)?

10.2 Should there be requirements relating to the membership of any of its committees?

10.3 Is a committee, or the corporation itself, likely to establish sub-committees? Should there be any membership restrictions for sub-committees?

10.4 Should people who are not members of the body be eligible for appointment to its committees? Should people who are not members of a committee be eligible for appointment to its sub-committees? If non-members are appointed:

- Should there be a limit on how many non-members can be appointed?
- Can a committee or sub-committee consist entirely of non-members?
- On what terms should non-members be appointed? Can they be paid?
- Are non-members entitled to vote at committee or sub-committee meetings?

11. Staff

11.1 Will the statutory corporation need staff? Will it employ its own staff? Will it be staffed by civil servants provided by the sponsoring department or administration? Will staff be seconded to the statutory corporation from other organisations?

11.2 Should the corporation be required to have a chief executive (or any other posts)? Should the chief executive be appointed by the corporation itself? Should the appointment have to be approved by Ministers? Should the first appointment be made by Ministers?

11.3 Should the corporation be free to determine the terms and conditions on which staff are employed (including their remuneration), or should the terms and conditions be approved or set by Ministers?

11.4 Should the corporation have a power to make pension arrangements for staff, or a duty to do so? Should it be free to decide whether to operate its own pension scheme, make payments into another scheme, or provide pensions in some other way? Should its pension arrangements require Ministerial approval?

11.5 Should staff be entitled to join the principal civil service pension scheme? (That follows automatically where people employed by the corporation are civil servants; otherwise it may be necessary to amend the relevant legislation: see the Annex.)

11.6 Should the statutory corporation be exempt from the obligation to have employer's liability insurance in respect of injury or disease suffered by its employees?

12. Delegation

12.1 Should the statutory corporation have the power (or be under a duty) to delegate the exercise of any of its functions? The corporation might, for example, have the power to delegate functions to:

- committees or sub-committees
- individual members of the corporation
- members of staff.

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12.2 Where there is a power to delegate to a committee or sub-committee, should it only permit delegation to a committee or sub-committee that meets certain membership requirements (or other requirements)? Should a power to delegate to members of the corporation or its staff be limited to particular types of member?

12.3 Should any functions be excluded from a general power to delegate, so that they must be exercised by the corporation itself, for example because of their importance?

12.4 Should the statutory corporation retain the power to exercise a function it has delegated? Or can only the delegate exercise the delegated function?

12.5 Should a committee be able to sub-delegate functions that have been delegated to it, for example to a sub-committee or an individual member of the committee?

12.6 Should any other delegation between parts of the statutory corporation be possible?

13. Execution and authentication of documents

13.1 If the corporation has a seal for executing deeds (which is generally only needed for land transactions), should there be any requirement for the use of the seal to be accompanied by the signature of particular members or employees of the corporation? Should this be left to the corporation to decide for itself?

13.2 Should there be a presumption that a document has been properly signed and sealed, so that there is no need to prove its authenticity (in the few cases where that would be required by the law of England & Wales or Northern Ireland)?

13.3 In Scotland, provision about these issues is not required, as they are addressed by the Requirements of Writing (Scotland) Act 1995; in Northern Ireland, section 19(1)(c) of the Interpretation Act (Northern Ireland) Act 1954 may be sufficient.

14. Money

14.1 Should the statutory corporation receive payments (or "grants") from Ministers? (This would not be appropriate for a Scottish body that is to form part of the Scottish Administration.) Should it be possible for the payments to be made subject to conditions (including conditions that could mean the money has to be repaid)?

14.2 Should the statutory corporation have the power to borrow money? Should it be able to borrow from any lender, or only from Ministers? Should there be any limit on how much it can borrow? Should borrowing require the approval of Ministers?

14.3 Might Ministers provide any other forms of financial assistance (such as guarantees or indemnities)?

14.4 Should the corporation be able to accept gifts, even if the property is likely to be held for the long term and money may need to be spent to maintain it?

14.5 Should the statutory corporation be able to charge fees for providing services or carrying out any of its functions? Should it be free to decide how much to charge, or should the fees require the approval of Ministers or be set by them?

14.6 Should the corporation be required to pay any sums that it receives to Ministers or into the relevant Consolidated Fund?

14.7 Should the corporation have the power to make grants, lend money or give other financial assistance? Should it be able to give assistance subject to conditions?

14.8 Should there be any restrictions on its powers to give financial assistance, such as requirements that assistance is only given for particular purposes or on particular terms, or a requirement to obtain the agreement of Ministers?

15. Plans, estimates and reports

15.1 Should the statutory corporation be required to produce an estimate of income and expenditure for each financial year (other than its first financial year)?

15.2 Should it be required to prepare a plan for each financial year, or for a longer period, setting out how it proposes to carry out its activities during the period? Occasionally both annual and longer-term plans are required, or annual plans are required to include financial estimates.

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15.3 Should the statutory corporation be required to make annual reports on how it has exercised its functions during each financial year?

15.4 If any of these documents are required:

- When must the statutory corporation prepare the document? Consider which period the first estimate, plan or report must cover, and when it must be prepared.
- Are there any specific matters that an estimate, plan or report must deal with, or any criteria or standards that it must apply?
- Should there be any requirement to consult in preparing the document?
- Should the document be submitted to Ministers? Should there be a requirement to lay it before the relevant legislature (by the corporation or Ministers), or for it to be published?

15.5 In the case of an estimate or plan:

- Should the document require the approval of Ministers? Should they be able to modify it?
- Should the corporation be required to exercise its functions in accordance with its plan? Should Ministers be required to provide funding in accordance with a plan or estimate?

16. Accounts and audit

16.1 If there are accounting and audit requirements, they should appear in the legislation establishing the statutory corporation. (But for Scottish bodies, rely on sections 19, 21 and 22 of the Public Finance and Accountability (Scotland) Act 2000 if they apply.)

16.2 The usual form of accounting provision requires the corporation to keep proper accounts and accounting records, and to prepare a statement of accounts for each financial year in accordance with directions given by Ministers (or HM Treasury).

16.3 Are special rules needed about the appointment, identity or responsibilities of the corporation's accounting officer? For example, is it necessary to require that the accounts are signed by the statutory office-holder, or to enable Ministers to appoint the accounting officer or specify the officer's responsibilities?

16.4 The standard features of audit provisions are:

- The accounts must be submitted to the relevant Auditor General.
- The Auditor General must examine, certify and report on the accounts.
- The certified accounts and report must be laid before the relevant legislature.

16.5 Consider:

- whether the accounts should be submitted to the relevant Auditor by the statutory corporation itself or by Ministers
- whether to specify a date by which the accounts must be submitted (31 August and 30 November are common) or give Ministers the power to do so

- whether the certified accounts and report should be laid before the relevant legislature by the Auditor or by Ministers
- whether to specify a period within which the certified accounts and report must be laid (4 months from submission of the accounts is common).

16.6 Occasionally statutory corporations are required to establish audit committees. If an audit committee is to be required, what functions and membership should it have?

16.7 Should the relevant Auditor General have the power to carry out examinations into the economy, efficiency and effectiveness with which the statutory corporation is using or has used its resources? If so:

- Does the power need to exclude any questioning of the policies pursued by the corporation?
- Should there be a duty to consult anyone before exercising the power?
- Should the Auditor have a duty or only a power to make a report of the results of the examination?
- Should reports be published, or made to Ministers or the relevant legislature?

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16.8 Accounts usually relate to financial years running from 1 April to 31 March, but where a corporation is established on a date other than 1 April it will be necessary to determine what its first accounting period should be.

17. Control by Ministers or legislature

17.1 Should Ministers have a general power to give directions to the statutory corporation in relation to the exercise of its functions? Should there be exceptions?

17.2 Should the corporation be required to comply with requests from Ministers to give them information or advice?

17.3 Should the corporation be under a general duty to have regard to Ministerial guidance when exercising its functions?

17.4 Should there be any procedure for giving directions or issuing guidance (such as a requirement to consult the corporation)? Must they be published?

17.5 Alternatively, does the nature of the body or office mean that it must not be subject to the direction or control of Ministers?

17.6 In that case, should it be subject to any special form of oversight by the legislature instead?

18. Other legislation relating to duties and scrutiny of public bodies

18.1 Should freedom of information legislation apply to the corporation, so that there is a general right of access to information it holds?

18.2 Should the records of the statutory corporation be public records that must be managed and made available in accordance with public records legislation?

18.3 Should the corporation be subject to investigation by an Ombudsman where there is a complaint of maladministration?

18.4 Should the corporation be required to comply with public sector equality legislation?

18.5 Should the corporation be subject to review or investigation by other Commissioners concerned with children, older people, etc.?

(The Annex lists the legislation dealing with these issues.)

19. Reorganisation of existing public bodies

19.1 Is the new statutory corporation intended to replace one or more existing bodies, in whole or in part?

19.2 Should the new corporation take on any or all of the functions that are currently exercised by an existing body? Which functions should be transferred to it?

19.3 Should the new corporation be put into the position of the existing body, so that it can continue anything that the existing body was doing at the time of transfer? (Should that be the case where existing functions are not being transferred but the new corporation is being given functions similar to those of a predecessor body?)

19.4 Should the new corporation assume any or all of an existing body's property, rights and liabilities?

19.5 Should Ministers have the power to determine which property, rights and liabilities are transferred? The usual method for doing this is by making a transfer scheme. Consider whether there are particular issues that the scheme may or must include.

19.6 Should any transfer include property, rights or liabilities that could not otherwise be transferred (for example because their transfer requires someone's consent)? Should it include criminal liabilities, or rights and liabilities that have not yet arisen?

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19.7 Will staff be transferred from an existing body to the new statutory corporation? Legal advice will be needed on whether TUPE will apply to the transfer of staff, so that contracts of employment are continued[3]. If TUPE does not apply, it will be necessary to make equivalent provision if the policy requires there to be continuity of employment[4].

19.8 Should staff transferred from an existing body be entitled to continue as active members of their existing pension scheme?

19.9 Might the new corporation need a right of access to property or information held by an existing body, or vice versa? Might ownership of property need to be shared?

19.10 Should any property, rights or liabilities of an existing body be transferred to a person other than the new corporation, such as Ministers?

19.11 If an existing body is being wound up, consider what provision needs to be made about its final annual report and accounts. Who should be required to prepare them (for example, the successor body or Ministers)? What procedure should apply to their preparation and to the audit of the final accounts?

20. Power to dissolve the new statutory corporation

20.1 Should there be a power for Ministers to bring the corporation's existence to an end? This may be appropriate where:

- the statutory corporation is intended to perform a fixed set of tasks or to have a limited lifespan
- circumstances can be envisaged in which the corporation would no longer need to exist, for example because it had achieved its aims
- a group of authorities is being established which may need to be reorganised in future.

20.2 A power to use subordinate legislation to dissolve a body established by primary legislation may be controversial.

[3] TUPE refers to the Transfer of Undertakings (Protection of Employment) Regulations 2006, which make provision about the treatment of staff where certain businesses and services are transferred from one employer to another.

[4] See in particular the policies and guidance in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector (revised December 2013) and Welsh Government Code of Practice on Workforce Matters (revised June 2014).

Examples of the legislative solution in Acts

Acts of the UK Parliament

- *Parliamentary Buildings (Restoration and Renewal) Act 2019* (www.legislation.gov.uk/ukpga/2019/27/contents), section 2 and Schedule 1 (Parliamentary Works Sponsor Body)
- *Financial Guidance and Claims Act 2018* (www.legislation.gov.uk/ukpga/2018/10/contents), sections 1 to 5 and Schedule 1 (single financial guidance body)
- *Higher Education and Research Act 2017* (www.legislation.gov.uk/ukpga/2017/29/contents), sections 1 and 2 and Schedule 1 (the Office for Students) and sections 91 and 92 and Schedule 9 (United Kingdom Research and Innovation)
- *Children and Social Work Act 2017* (www.legislation.gov.uk/ukpga/2017/16/contents), section 36 and Schedule 3 (Social Work England)
- *Energy Act 2016* (www.legislation.gov.uk/ukpga/2016/20/contents) (Oil and Gas Authority)
- *Enterprise Act 2016* (www.legislation.gov.uk/ukpga/2016/12/contents), Part 1 (Small Business Commissioner) and Part 4 (Institute for Apprenticeships)
- *Small Business, Enterprise and Employment Act 2015* (www.legislation.gov.uk/ukpga/2015/26/contents), section 41 and Schedule 1 (Pubs Code Adjudicator)
- *Care Act 2014* (www.legislation.gov.uk/ukpga/2014/23/contents), Part 5 (Health Education England, Health Research Authority)
- *Defence Reform Act 2014* (www.legislation.gov.uk/ukpga/2014/20/contents), section 13 and Schedule 4 (Single Source Regulations Office)

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Acts of Senedd Cymru

- *Health and Social Care (Quality and Engagement) (Wales) Act 2020* (www.legislation.gov.uk/asc/2020/1/contents), Part 4 (Citizen Voice Body for Health and Social Care)
- *Public Services Ombudsman (Wales) Act 2019* (www.legislation.gov.uk/anaw/2019/3/contents)
- *Tax Collection and Management (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/6/contents), Part 2 (Welsh Revenue Authority)
- *Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/contents), Part 3 (Social Care Wales)
- *Qualifications Wales Act 2015* (www.legislation.gov.uk/anaw/2015/5/contents)
- *Well-being of Future Generations (Wales) Act 2015* (www.legislation.gov.uk/anaw/2015/2/contents), Part 3 (Future Generations Commissioner for Wales)
- *Education (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/5/contents), Part 2 (Education Workforce Council)

Acts of the Scottish Parliament

- *Consumer Scotland Act 2020* (www.legislation.gov.uk/asp/2020/11/contents)
- *Scottish Biometrics Commissioner Act 2020* (www.legislation.gov.uk/asp/2020/8/contents)
- *South of Scotland Enterprise Act 2019* (www.legislation.gov.uk/asp/2019/9/contents)
- *Social Security (Scotland) Act 2018* (www.legislation.gov.uk/asp/2018/9/contents), Part 1 (Scottish Commission on Social Security)
- *Child Poverty (Scotland) Act 2017* (www.legislation.gov.uk/asp/2017/6/contents) (Poverty and Inequality Commission)
- *Land Reform (Scotland) Act 2016* (www.legislation.gov.uk/asp/2016/18/contents), Part 2 (Scottish Land Commission)
- *Scottish Fiscal Commission Act 2016* (www.legislation.gov.uk/asp/2016/17/contents)
- *Community Justice (Scotland) Act 2016* (www.legislation.gov.uk/asp/2016/10/contents) (Community Justice Scotland)
- *Food (Scotland) Act 2015* (www.legislation.gov.uk/asp/2015/1/contents), Part 1 (Food Standards Scotland)

Acts of the Northern Ireland Assembly

- *Justice Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/21/contents), Part 2 (Prison Ombudsman for Northern Ireland)
- *Legal Complaints and Regulation Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/14/contents), Part 1 (Legal Services Oversight Commissioner for Northern Ireland)
- *Public Services Ombudsman Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/4/contents) (Northern Ireland Public Services Ombudsman)
- *Education Act (Northern Ireland) 2014* (www.legislation.gov.uk/nia/2014/12/contents) (Education Authority)

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Annex: other legislation about public bodies

The legislation mentioned below lists the public bodies or categories of body to which it applies, and may therefore need to be amended to apply to a new statutory corporation. Check the legislation in question to see how it describes the types of body it applies to.

Oversight of appointments

- Oversight by Commissioner for Public Appointments of appointments by Ministers of the Crown or the Welsh Ministers: Public Appointments Order in Council 2015
- Oversight by Commissioner for Public Appointments for Northern Ireland of appointments by NI Departments: Commissioner for Public Appointments (Northern Ireland) Order 1995
- Oversight by Commissioner for Ethical Standards in Public Life in Scotland of appointments by the Scottish Ministers: Public Appointments and Public Bodies etc. (Scotland) Act 2003

(If appointments to a body are to be monitored by the UK or NI Commissioner, the body should be listed in the next Order in Council replacing or amending the current Order.)

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Disqualification from membership of legislature

- House of Commons: House of Commons Disqualification Act 1975
- Northern Ireland Assembly: Northern Ireland Assembly Disqualification Act 1975
- Senedd Cymru: section 16 of the Government of Wales Act 2006 (if members or employees are to be disqualified, this should be done by amending Part 2 of Schedule 1A to the 2006 Act or by Order in Council under section 16, depending on whether they are to be disqualified from standing for election or only from taking up office if elected)
- Scottish Parliament: Order in Council under section 15 of Scotland Act 1998

Civil service pensions

- UK: Superannuation Act 1972 and Public Service Pensions Act 2013
- NI: Superannuation (Northern Ireland) Order 1972 and Public Service Pensions Act (Northern Ireland) 2014

Freedom of information

- UK, England, Wales and NI public authorities: Freedom of Information Act 2000
- Scottish public authorities: Freedom of Information (Scotland) Act 2002

Public records

- Records of UK Government departments and sponsored bodies: Public Records Act 1958
- Welsh public records: Government of Wales Act 2006, sections 146-8 (but until an order is made under section 147, the Public Records Act 1958 applies)
- Records of Scottish public bodies: Public Records (Scotland) Act 2011
- NI records: Public Records Act (Northern Ireland) 1923

Ombudsmen

- UK Government departments and other bodies exercising non-devolved functions: Parliamentary Commissioner Act 1967
- Wales: Public Services Ombudsman (Wales) Act 2019
- Scotland: Scottish Public Services Ombudsman Act 2002
- NI: Public Services Ombudsman Act (Northern Ireland) 2016

Public sector equality legislation

- GB: Equality Act 2010, Part 11 (general public sector equality duty and specific duties imposed by a Minister of the Crown, the Welsh Ministers or the Scottish Ministers)
- NI: Northern Ireland Act 1998, sections 75 and 76 (general public sector equality duty and prohibition on religious discrimination)

Reviews and investigations by other Commissioners

Wales:

- Review by Children's Commissioner for Wales of the effect of a body's exercise of its functions on children: Care Standards Act 2000, Part 5
- Review by Older People's Commissioner for Wales of the effect of a body's exercise of its functions on older people: Commissioner for Older People (Wales) Act 2006
- Potential for body to be required to comply with Welsh language standards enforced by the Welsh Language Commissioner: Welsh Language (Wales) Measure 2011
- Duty of public bodies to carry out sustainable development, subject to examination by the Auditor General for Wales and review by the Future Generations Commissioner for Wales: Well-being of Future Generations (Wales) Act 2015

Scotland:

- Requirement for body to produce code of conduct for members, and power for the Commissioner for Ethical Standards in Public Life in Scotland to investigate alleged breaches of the code: Ethical Standards in Public Life etc. (Scotland) Act 2000

Northern Ireland:

- Review by Northern Ireland Commissioner for Children and Young People of arrangements made by authorities and investigation of complaints that they have infringed the rights or adversely affected the interests of a child or young person: Commissioner for Children and Young People (Northern Ireland) Order 2003
- Review by Commissioner for Older People in Northern Ireland of arrangements made by authorities and investigation of complaints that they have adversely affected the interests of an older person: Commissioner for Older People Act (Northern Ireland) 2011

3 Strategies

This legislative solution is about requiring a person to formulate strategy in relation to a particular objective.

Description of legislative solution

The objective to which a strategy relates might be the achievement of a particular goal or task, or the tackling of a particular problem or challenge.

Why have a strategy?

Whether to address a problem by way of a legislating for a strategy is, ultimately, a policy question. There might be many reasons for proceeding in this way. To give direction or focus to activity in a particular area? To get various agencies to pull together? To drive activity in relation to a new social value or goal? To make transparent the way in which a person is working? To deliver a degree of "soft" accountability, in the sense of there being a document which gives rise to political accountability even if there are no legal sanctions for non-delivery?

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Considering these questions is central both to determining whether a strategy is the right policy choice and if so, what the content of the provision needs to be.

Strategy provisions are popular, but do give rise to an ongoing administrative burden. This burden may be difficult to lift even if, many years later, the issues with which the strategy is concerned are very much diminished in importance.

Elements of the legislative solution

1. Duty to formulate a strategy

1.1 Basic idea: requirement for a person to formulate a strategy in relation to an objective.

1.2 Need to describe the objective: i.e. what is it that is to be achieved, or helped to be achieved, by the strategy? May be quite specific (e.g. meeting a target) or more general (e.g. achieving a certain goal or furthering a certain longer term aim).

1.3 Need to describe the goal of the strategy in relation to the objective, e.g.:

- achieving it
- helping to achieve it.

1.4 Need to say who is to formulate the strategy. If more than one person, need to say how, legally, they are to work in relation to the formulation of the strategy.

1.5 Need to say whose action is to be regulated by the strategy.

1.6 Need to describe the content of the strategy, e.g.:

- how the objective will be achieved or furthered
- what action is intended in pursuance of achieving the objective
- how progress is to be measured.

1.7 Need to describe whose action it is which is to be the subject of the strategy: the person formulating the strategy or someone else? Both?

1.8 What period is the strategy to be for:

- Fixed period, e.g. 3 or 5 years?
- Indeterminate?

1.9 The answer here may depend on the nature of the strategy.

2. Format of the strategy

2.1 How is the strategy to be embodied:

- Simple requirement to have a strategy?
- Or a requirement to embody the strategy in a document?

2.2 If the strategy is to be set out in a document, should the document be made public in any way (e.g. published, sent to particular persons, laid before the legislature)?

3. Formulation of the strategy

3.1 How is the strategy to be formulated?

3.2 Requirement to consult particular people? If so, is consultation general or on a draft of the strategy?

3.3 Requirement to have regard to particular issues, needs or information?

3.4 If not prepared by Ministers, requirement to involve them? Sometimes strategy must be submitted in draft for Ministerial approval. If so, should Ministers be able to amend? What is to happen if Ministers reject?

3.5 Requirement to obtain agreement of persons subject to the strategy before including material about them?

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4. Legal consequences of the strategy

4.1 Is there to be any legal consequence in relation to the strategy?

- Not always essential. The existence of the strategy gives rise to a degree of political accountability.

4.2 Sometimes legal consequences are imposed in relation to the achievement of the objective of the strategy, e.g.:

- requirement to, or to endeavour to, achieve it
- reporting on progress in achieving it.

4.3 In such cases, it is probably unnecessary to create legal consequences in relation to the strategy as well.

4.4 Alternatively, may (but as noted above do not need to) create legal consequences in relation to the strategy, e.g.:

- May go so far as a requirement on some person to “follow” or “act in accordance with” the strategy.
- Alternative options include a requirement on some person to “have regard to” the strategy.

4.5 Choices here depend on the nature of the objective, e.g. —

- In the case of a specific objective such as the meeting of a target, it may be more appropriate to create legal consequences in relation to the objective. For example, the objective might be to eradicate carbon emissions. It is the failure to do so that matters here, not the failure to follow the strategy.
- If the objective is more uncertain such as “promotion” of some social issue, may be more appropriate to create legal consequences in relation to the strategy. For example, there might be an obligation to have a strategy promoting low carbon living. It is the following of the strategy (or having regard to it) which is important.

4.6 Obligations may be placed on the person whose strategy it is, or on other persons.

4.7 Ministers may be given powers to direct persons to take steps to implement the strategy.

5. Changing the strategy

5.1 What scope should there be for changing the strategy?

- None?
- Free to revise at will?
- Requirement to review or act on particular information to revise?
- Requirement to review may be ongoing (i.e. “to keep under review”) or to be done at or before the expiry of set intervals.

5.2 What should the procedure be for changing the strategy?

- Usually corresponds with the requirements for preparing the strategy in the first place.
- Sometimes relaxed where the proposed changes will not materially alter the strategy.

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5.3 If the strategy is changed, should there be any requirements to make the change public?

- Usually corresponds with the requirements for making the strategy public in the first place.
- Sometimes those requirements are relaxed where the proposed changes will not materially alter the strategy.

Related issues

A strategy as described above is about action in pursuance of a particular objective. It can in a narrow sense be distinguished from an obligation to identify the objective itself. Often that objective is stated in the legislation. However, it is perfectly possible for obligations to be put on a person both to identify objectives and to articulate the action to be taken in pursuance of their achievement. Whether in such a case it is right to describe the resulting document as a “strategy” is a moot point, but there are certainly examples of such obligations comprising both elements being called strategies. Drafters can advise on the best language to use in individual cases.

A strategy can also be distinguished from an obligation for a person to set out how they will carry out particular functions without any link to the achievement of particular objectives. Such obligations are, perhaps, further away from a strategy itself and might be more properly be encapsulated in a “plan”. Again, however, the best language to use is a matter where drafters can advise.

However these related forms of obligation are characterised and described, many of the elements described above will apply in relation to them.

Examples of the legislative solution

- *Scottish Biometrics Commissioner Act 2020* (www.legislation.gov.uk/asp/2020/8/contents), section 28
- *Scottish National Investment Bank Act 2020* (www.legislation.gov.uk/asp/2020/3/contents), sections 13 and 15
- *Parliamentary Buildings (Restoration and Renewal) Act 2019* (www.legislation.gov.uk/ukpga/2019/27/contents), section 5
- *Transport (Scotland) Act 2019* (www.legislation.gov.uk/asp/2019/17/contents), Part 1 (National Transport Strategy)
- *Fuel Poverty (Targets, Definition and Strategy) (Scotland) Act 2019* (www.legislation.gov.uk/asp/2019/10/contents), section 6
- *Scottish Crown Estate Act 2019* (www.legislation.gov.uk/asp/2019/1/contents), section 22
- *Legislation (Wales) Act 2019* (www.legislation.gov.uk/anaw/2019/4/contents), section 2
- *Islands (Scotland) Act 2018* (www.legislation.gov.uk/asp/2018/12/contents), section 3
- *Social Security (Scotland) Act 2018* (www.legislation.gov.uk/asp/2018/9/contents), section 8
- *Forestry and Land Management (Scotland) Act 2018* (www.legislation.gov.uk/asp/2018/8/contents), sections 3 to 7
- *Higher Education and Research Act 2017* (www.legislation.gov.uk/ukpga/2017/29/contents), sections 99 and 100
- *Child Poverty (Scotland) Act 2017* (www.legislation.gov.uk/asp/2017/6/contents), section 3 (delivery plan)
- *Public Health (Wales) Act 2017* (www.legislation.gov.uk/anaw/2017/2/contents), Parts 2 and 8
- *Immigration Act 2016* (www.legislation.gov.uk/ukpga/2016/19/contents), sections 2 and 5
- *Carers (Scotland) Act 2016* (www.legislation.gov.uk/asp/2016/9/contents), Part 5
- *Modern Slavery Act 2015* (www.legislation.gov.uk/ukpga/2015/30/contents), section 42
- *Infrastructure Act 2015* (www.legislation.gov.uk/ukpga/2015/7/contents), section 3 and Schedule 2
- *Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015* (www.legislation.gov.uk/anaw/2015/3/contents), sections 3 to 8, 12 and 13
- *Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015* (www.legislation.gov.uk/nia/2015/2/contents)
- *Housing (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/7/contents), sections 50 and 52

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4 Collaboration

This solution is designed to impose specific duties on two or more parties to work with each other if certain criteria are satisfied.

Description of the legislative solution

This may involve a party delegating functions to another body, a party exercising functions on behalf of another body, a party assisting another body with its functions, a body co-ordinating functions for another body or two parties jointly exercising functions. Other activities are possible.

The purpose of such collaborative arrangements may be to increase efficiency, although different purposes may be specified.

This solution forms part of a category of legislative solutions that relate to cooperation and joint working. See below for a description of some of these other solutions.

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Related legislative solutions

This solution forms part of a category of legislative solutions that relate to bodies working together. These include:

- **The general cooperation solution**, which is where bodies are put under a general duty to cooperate with each other.
- **The joint working solution**, which is usually somewhere between the general cooperation solution and the collaboration solution in terms of how intense the duty is.
- **The asymmetric duty solution**, which is where a body is simply required to provide another body with help or resources. This is done using simple duties but can achieve the same effect of a collaboration (such as efficiencies etc).

Elements of the legislative solution

1. Define collaboration arrangements

1.1 What kind of collaboration arrangements are envisaged?

- For example, the parties might only be required to assist in the exercise of the other parties' functions. This is relatively light touch.
- However, many collaborations involve either:
  - the parties discharging functions jointly, or
  - one party discharging functions on behalf of another party.
- In addition, the focus of the collaboration may be on 'back office' functions or on operational functions (a collaboration would usually stop short of a full merger).

1.2 Each form of collaboration has different implications, which need to be considered. For instance, if one party should be able to discharge the functions of another party, the following points need to be considered:

- Who should be responsible for the exercise of the functions?
- Are powers of delegation required to effect the collaboration?
- Should the party that is exercising the functions be able to charge a fee for providing the service?
- Should the arrangement be symmetrical (each party being able to exercise the other's functions) or asymmetrical (one party being able to exercise the functions of another, but not the other way round)?

2. Is legislation needed?

2.1 Depending on the kind of collaboration that is intended, there is the question of whether legislation is needed to achieve this. Legal advice will be needed to answer this question.

3. Identify parties

3.1 Who is to be the subject of the collaboration arrangements? For instance, two or more categories of public bodies could be involved. This is a basic requirement.

3.2 Should it be possible for additional, non-specified parties to be involved in the arrangements? For instance, it might be desirable to allow a contractor to be party to the arrangements if the contractor might actually perform the functions involved. This allows for more flexibility.

4. Identify functions

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4.1 What functions should be subject to the collaboration agreement?

- Will it be all or some of the functions of the parties involved?
- If it is only some of the functions, is the dividing line between those functions and the body's other functions sufficiently clear?

4.2 Is there a need to distinguish between "operational" and "back-office" functions? In some cases, the objective is to allow back-office functions to be merged without impacting operational functions. A particular example is collaboration between the emergency services.

5. Define purpose

5.1 Should the purpose of entering into the collaboration arrangements be defined? For instance, the collaboration could be for the purposes of:

- making the exercise of the parties' functions more efficient
- making the exercise of the parties' functions more effective, or
- promoting the uptake of a particular service or product provided by the parties.

5.2 If a purpose is defined, this can be used as a relevant consideration for the parties. For instance, if a party is considering whether to enter into collaboration arrangements the body might be required to take into account whether the arrangements would be in the interests of efficiency or effectiveness.

6. Process of entering into collaboration arrangements

6.1 Should the parties be required to consider on an ongoing basis whether they should enter into collaboration arrangements with each other? This may be useful if there is a concern that the parties would not otherwise consider entering into such arrangements.

6.2 Should there be a procedure for how arrangements might be arrived at? Here is an example of a possible procedure:

- Party A could consider that it is in the interests of its effectiveness to collaborate with Party B.
- Party A notifies Party B of this.
- Party B considers whether it would be in the interests of its own effectiveness to collaborate with Party A.
- If Party B concludes that it would be, Party A and Party B must enter into collaboration arrangements.

6.3 What is to be the mechanism for parties to agree on:

- the functions that will be subject of the arrangements, and
- how they are to be exercised (whether jointly or by one party on behalf of another)?

6.4 Should there be a requirement to consult, and if so who should be consulted and how should they be consulted? Depending on the bodies involved, it may be desirable to have consultation requirements so that stakeholders' views are taken into account.

6.5 Should it be possible for collaboration to be imposed on parties by way of a direction from Ministers (or a Northern Ireland department)? This may be needed if it is considered that the parties might not otherwise work together.

7. Restrictions

7.1 Should there be any exceptions to the requirement to collaborate? For instance, it may be that one of the parties has a particularly sensitive function that should not be subject to the arrangements.

7.2 Do special considerations need to be taken into account when considering whether to collaborate? Again, a party may have sensitive functions that should be given particular regard before collaborating.

7.3 Are special consultation requirements required for any of the parties? For instance, some bodies are overseen by others and it might be appropriate for that party to consult the overseer before entering into arrangements (for instance, some police forces are overseen by police and crime commissioners or by policing boards).

8. Effect of collaboration arrangements

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8.1 Consider whether the functions that are the subject of the collaboration agreement are to be exercised on the basis of the parties' current powers, or whether new powers are required. For instance, it may be that some of the parties do not have sufficient powers to delegate functions.

- It may be that the policy is to ensure that the parties simply have sufficient powers to give effect to the collaboration. If so, it may be that a general power is needed to allow the parties to do anything "necessary or expedient" in relation to the collaboration. However, if the policy is not to give any significant new powers to the parties, such a power may need to be qualified by reference to any other legal restrictions imposed on the parties.

8.2 If Party A is exercising the functions of Party B under the collaboration arrangements, should Party B still be able to exercise those functions? Or should Party B be unable to exercise those functions?

8.3 Should a duty to take all reasonable steps to give effect to the collaboration be imposed on the parties? It may be thought that the parties need to be further encouraged to collaborate once the arrangements are in place.

9. Additional matters to consider

9.1 The following issues will need to be considered:

- Payments: Should the parties be allowed to make payments to each other in pursuance of the collaboration agreement? This is particularly relevant in cases where a body is exercising the functions of another body.
- Formal requirements: Is the collaboration to be contained in a document? Should it be published? Should Ministers (or a Northern Ireland department) be informed?
- Sanction: Should there be an explicit sanction for any failure to comply with any of duties relevant to entering into collaboration arrangements? An alternative is to rely on judicial review if the only parties to the agreement are public bodies.
- Ending collaboration: How, and in what circumstances, is (or may) the collaboration to be brought to an end? An example might be a time limit, although another option would be to allow the parties to withdraw from the arrangements if it no longer serves its purpose (such as efficiency).
- Variation: Consider how, and in what circumstances, the parties can vary their collaboration arrangements.
- Information sharing: Consider whether any information sharing powers are required, and if so whether anything needs to be said about the use of shared information.

NB: legal advice may be required about information sharing and data protection.

- Guidance: Should there be a power or duty to provide guidance about collaboration arrangements for the parties?
- Devolution: If the collaboration will involve bodies across jurisdictions, are there any special considerations? For instance, are technical provisions required to make this work? Legal advice will be needed on this point.
- Dispute resolution: Is a mechanism needed to address situations where a collaboration breaks down or is threatening to break down?
- Scrutiny/accountability: Is there a need to have a mechanism that allows for scrutiny of the collaboration? For instance, a reporting requirement on the parties might assist with this.

Examples of the legislative solution

- *Transport (Scotland) Act 2019* (www.legislation.gov.uk/asp/2019/17/contents), section 36 (amends the Transport (Scotland) Act 2001 re partnership plans and schemes)
- *Public Services Ombudsman (Wales) Act 2019* (www.legislation.gov.uk/anaw/2019/3/contents), Part 6
- *Policing and Crime Act 2017* (www.legislation.gov.uk/ukpga/2017/3/contents), Part 1, Chapter 1 (collaboration of emergency services)
- *Investigatory Powers Act 2016* (www.legislation.gov.uk/ukpga/2016/25/contents), sections 78 to 80
- *Environment (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/3/contents), sections 14, 15 and 46
- *Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/contents), Part 9
- *Public Bodies (Joint Working) (Scotland) Act 2014* (www.legislation.gov.uk/asp/2014/9/contents)
- *Social Services and Well-being (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/4/contents), sections 12 and 160 and Part 9
- *Local Government Act (Northern Ireland) 2014* (www.legislation.gov.uk/nia/2014/8/contents), sections 7(1)(b) and 9, together with Local Government Act (Northern Ireland) 1972, Section 104
- *Schools Standards and Organisation (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/1/contents), sections 5 and 12
- *Education (Wales) Measure 2011* (www.legislation.gov.uk/mwa/2011/7/contents), section 3 (duty of education body to collaborate)
- *Education and Inspections Act 2006* (www.legislation.gov.uk/ukpga/2006/40/contents), section 166
- *Civil Contingencies Act 2004* (www.legislation.gov.uk/ukpga/2004/36/contents), sections 15, 15A and 15B (cross-border collaboration)
- *Education Act 2002* (www.legislation.gov.uk/ukpga/2002/32/contents), section 26 (collaboration between schools)
- *Learning and Skills Act 2000* (www.legislation.gov.uk/ukpga/2000/21/contents), section 33K (delivery of local curriculum entitlements: joint working)
- *Police (Northern Ireland) Act 2000* (www.legislation.gov.uk/ukpga/2000/32/contents), section 56 (rare example of collaboration with a named body outside the UK)
- *Police Act 1996* (www.legislation.gov.uk/ukpga/1996/16/contents), sections 22A to 23I (collaboration agreements)

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5 Designation of bodies

This legislative solution allows a body to be identified to perform certain, often specialist, functions. For example, a higher education regulator might want the assessment of the standards of higher education providers to be conducted by a specialist assessment body.

Description of legislative solution

This solution provides some flexibility about who performs a function, and can ensure that functions are performed independently and by experts.

The solution may restrict the kind of bodies that can be designated. In many cases, the body must be either representative of a sector or otherwise suitable to be designated to perform the functions. The terms of the designation need to be considered.

NB: In some statutes, the language of “recognition” is used instead of “designation”.

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Related legislative solutions

The **statutory corporation** solution could be used to establish a body or person, which could become designated under this solution.

Elements of the legislative solution

1. Identify functions to be designated

1.1 What are the functions that the designated body will be required to perform?

- Are they functions that the body already exercises?
- Or are they functions that the body will need to exercise in addition to its current functions?
  - If so, will further powers be required?

1.2 In some cases, the designated functions will be existing Ministerial functions[5] and the policy is that an external body would be better placed to perform those functions.

1.3 In other cases, the policy will be that new functions should be performed by a body – if so, the new functions will need to be identified.

2. Identify type of body

2.1 Should the designated body be a public body or a private body (perhaps performing public functions)? If it is a private body, there may be implications in terms of how to enforce any duties (such as through the use of injunctions).

2.2 Should the body be a body corporate? This may not be necessary and depending on the designated functions, they could be performed by an individual or an unincorporated association.

2.3 Should the body be based in the UK? It may create inflexibility to specify this.

3. Process of establishing a designation

3.1 The process of establishing which body should be designated, and which functions it should perform, is important. However, the legislation may be more or less detailed depending on the policy and the circumstances.

3.2 A less elaborate way of designating a body is to simply leave it to the discretion of a Minister or whichever relevant authority has the power to designate. Secondary legislation could also be used. However, who does the designation should be identified.

3.3 A more elaborate way of designating a body could be as follows. This assumes that an authority (such as a regulator) has the power to designate.

[5] In NI, references to Ministers are to be read as references to an NI department.

- Before recommending a designation, the authority conducts a consultation with relevant stakeholders.
- Having consulted, the authority decides whether to recommend the body to perform the functions.
- The authority notifies the body (and Ministers if desired) of its decision.
- The body is then designated (subject to the agreement of Ministers if desired). A parliamentary procedure might be used, such as notifying Parliament or using secondary legislation.

3.4 In each of these steps, the powers could be duties.

4. Suitability of the designated body

4.1 It is usual for a body to be designated only if it is suitable. Whether that is defined or implied is a policy question.

4.2 If suitability is defined, the following points could be considered:

- Should there be a requirement for the body to be representative of the sector? If so, what is wanted in this regard?
- Should there be a requirement that the body is capable of performing the designated functions properly? If so, what is wanted in this regard?
- To the extent that the above issues are matters of opinion, who is to judge whether the criteria are met?
- Has the body agreed or applied to perform the designated functions?

5. Effect of designation

5.1 Where there is a designation in place, the following things should be considered:

- If the designated body is performing functions of another body, should that other body be able to continue to exercise those functions?
- Are there any additional duties, such as reporting or information sharing duties, that should apply to the designated body?
- Are there any functions that the designated body should be prevented from performing whilst the designation is in place? This could address conflict of interest points.
- Also, if there is no designated body, who is to exercise the functions?

6. Oversight and withdrawal

6.1 Linked to the effect of the designation, oversight of the designated body needs to be addressed. The following should be considered:

- Should the designated body provide information to the authority which made the designation or anyone else?
- Should the designated body provide an annual report?
  - If so, what associated requirements are there? For example, the timing of the report and how it should be published.
- Should the authority be required to conduct reviews of the designated body every few years?
  - If so, what associated requirements are there? For example, the timing of the review and how it should be published.
- Should the authority be required to inform anyone if it has concerns about the performance of the designated body?
- Should the authority be able to give directions to the designated body?

6.2 This leads to a consideration of the circumstances when the designation should be withdrawn. These circumstances might include:

- where the designated body is under-performing
- where the designated body and the authority agree
- when a specified time limit for the designation has run out.

7. Financial matters

7.1 Should it be possible to pay the designated body for performing the designated functions?

7.2 Should the designated body be able to charge fees for its services?

Examples of the legislative solution

- *Higher Education and Research Act 2017* (www.legislation.gov.uk/ukpga/2017/29/contents), sections 27 and 66 (body designated to exercise assessment functions)
- *Policing and Crime Act 2017* (www.legislation.gov.uk/ukpga/2017/3/contents), sections 25 to 27 (inserted sections 29A to 29C into the Police Reform Act 2002, allowing a designated body to make super-complaints)
- *Environment (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/3/contents), section 44 (advisory body)
- *Insolvency (Northern Ireland) Order 1989 Articles 350 and 350A*, as substituted/inserted by Insolvency (Amendment) Act (Northern Ireland) 2016 (www.legislation.gov.uk/nia/2016/2/contents), section 14
- *Small Business, Enterprise and Employment Act 2015* (www.legislation.gov.uk/ukpga/2015/26/contents), sections 144 to 146 (regulator of insolvency practitioners)
- *Regulatory Reform (Scotland) Act 2014* (www.legislation.gov.uk/asp/2014/3/contents), Part 2
- *Housing (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/7/contents), section 3 (licensing authority – choice of designating a single authority for Wales, or different authorities for different areas in Wales)
- *Financial Services (Banking Reform) Act 2013* (www.legislation.gov.uk/ukpga/2013/33/contents), section 68 (designated representative body to make complaints)
- *Financial Services Act 2012* (www.legislation.gov.uk/ukpga/2012/21/contents), section 43 (designated consumer bodies to make super-complaints). See section 234C of the Financial Services and Markets Act 2000, inserted by section 43 of the 2012 Act
- *Higher Education Act 2004* (www.legislation.gov.uk/ukpga/2004/8/contents), sections 13–18 (operator of student complaints scheme)
- *Communications Act 2003* (www.legislation.gov.uk/ukpga/2003/21/contents), sections 368B and 368D (appropriate regulatory authority)
- *Enterprise Act 2002* (www.legislation.gov.uk/ukpga/2002/40/contents), *section 11* (designated consumer body to make super-complaints to the CMA)

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6 Licensing schemes

This legislative solution involves making the doing of an otherwise lawful activity unlawful, unless done in pursuance of (and in accordance with) a licence. It is, therefore, a tool used to regulate and monitor a particular activity – or in other words to decide how it should be done.

Description of legislative solution

The power to grant licences may be conferred on a part of government or on another body or person.

Licensing regimes range from the very simple (e.g. a dog licence or a TV licence) to the complex (e.g. planning permission or the licensing of the supply of electricity).

Related legislative solutions

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Notification regime

A close relation of this legislative solution is a notification regime, i.e. a regime that requires a person to notify a regulator of the person's intention to do a particular kind of activity, with the regulator having certain powers in relation to the doing of the activity. An example of this is to be found in Part 2 of the Communications Act 2003 (which regulates certain providers of electronic communications services etc).

Registration regime

Another close relation is a registration regime, i.e. a regime that provides that a person may do an activity only if the person's name appears on a register kept by an authority.

In substantive terms, in comparison to a licence there are usually fewer (or no) grounds for refusing an application to register, and little or no discretion about doing so. But complex registration regimes may provide for qualifications for registration, for conditions to be imposed and for registrants to be removed from the register if certain conditions are met (e.g. registration of doctors by the General Medical Council). In such cases, the difference between "licensing" and "registration" may be minimal.

Elements of the legislative solution

1. Activity to be regulated

1.1 What is the activity that is to be subject to the licensing regime?

- NB: there is an important link here to the issue of enforcement, considered below – doing the activity without a licence is almost invariably criminalised, so the activity must be defined with sufficient clarity to form the basis of an offence.

1.2 Should there be any exceptions, i.e. any persons who may do the activity without a licence or any other cases in which the activity may be done without a licence?

- For example, if the activity is something that may be done by a public authority, should the public authority require a licence? Does anything need to be said about this in order to achieve the right result?[6]

2. The licensing authority

2.1 What body or other person is to grant licences?

2.2 Is there a single body for the regime or a number of local bodies e.g. councils (or a mixture of the two)?

[6] Different interpretative rules for Westminster legislation and devolved legislation mean that silence about public authorities may, for any that are Crown bodies, produce different results.

2.3 If local bodies are to issue licences: are the licences in respect of each body's area only, or do they have effect generally? If the latter, what are the implications for enforcement? Can local bodies act together and issue a joint licence or parallel local licences?

3. Applications for licences

3.1 Who may apply for a licence (anyone, or only certain kinds of person)?

3.2 Should a licence authorise only the legal person to whom the licence is granted, or should it also authorise the activities of others? If the latter, does anything need to be said about this in order to achieve the right result?

- For example, should a licence granted to a company authorise employees and/or agents of the company? Or if the licence relates to activity on land, should a licence granted to the owner of the land authorise the activity on the land, regardless of who does it?

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3.3 Should it be possible to grant a licence jointly to two or more people (where this makes sense in terms of the activity to be regulated)?

- For example, if the licence relates to activity on land or in a building, what is to happen where the land or building is jointly owned?

3.4 Are there to be any restrictions on the circumstances in which applications may be made?

4. Grant or refusal of application for licence

4.1 Should there be a discretion to grant a licence, or a duty to grant one (except in certain cases)?

- If a discretion, do any conditions need to be met in order for a licence to be granted? Are they matters of fact or opinion?
- If a duty, what are the cases where there is no duty to grant? Are they cases where there is a duty to refuse the application, or is there still a discretion to grant a licence?

4.2 What kinds of activity should a licence actually authorise, and to what extent should the activity be authorised?

For example, should a licence authorise:

- the whole range of the regulated activity,
- a certain sub-set of that activity (e.g. driving only certain types of vehicle, or entering into only certain kinds of credit agreement), or a particular example of the activity (e.g. a licence for a particular vehicle or for particular premises to be used as a house in multiple occupation)?

4.3 What should the duration of a licence be?

4.4 May conditions be imposed on the doing of the activity?

If so:

- What kinds of conditions?
- Should all the permitted conditions be set out in the legislation (so that the person granting the licence can or must choose between them), or should there be a wider discretion to impose conditions of their own devising (if so provide some examples of conditions)?
- Should a condition be able to confer a discretion on a person (e.g. by referring to things approved or specified by the person)?
- Should there be "standard" conditions which must be included in the licence, or are automatically included unless the authority decides otherwise?

4.5 What is the procedure for applications?

In particular:

- Should the applicant be entitled to prior notice of an intended refusal? Or to a hearing where it is proposed to refuse the application?
- Should the licensing authority be permitted or required to consult others about granting a licence?

See section 12 below for points to consider if third parties may have an interest.

5. Amendment of licences

5.1 Should amendments of licences be possible? If so, consider the following.

5.2 Should the licensee (i.e. the licence holder) be able to make an application for amendment?

5.3 Should the licensing authority be able to amend the licence on its own initiative?

5.4 Should someone other than the licensee or the licensing authority be capable of applying for it to be amended?

5.5 In relation to any application to amend:

- Should there be any restrictions on making applications?
- Should any conditions need to be met in order for the licence to be amended?
- Should the power to amend be unlimited or may the licence be amended only in certain ways and/or in certain circumstances?
- What is the procedure for considering applications for amendment of licences (see the questions above about the procedure for applications for licences)?

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5.6 Similar questions arise about the making of amendments by the licensing authority on its own initiative. Additional questions (as regards procedure) in such a case are:

- Should there be a requirement to give the licensee notice of a proposed amendment?
- Should there be a requirement to give the licensee an opportunity to make representations about the proposed amendment?

6. Transfer of licences

6.1 Should it be possible for a licence to be transferred from one person to another?

If so:

- Should it be possible for an application to be made for the transfer of the licence?
- Should there be any restrictions on making such applications?
- Should any conditions be met in order for the licence to be transferred?
- See the questions above about the procedure for considering applications for licences.

6.2 Does anything need to be said about situations where a person's property transfers by operation of law, e.g. the insolvency or death/dissolution of the licensee?

7. Suspension/revocation/surrender of licences

7.1 Should the licensing authority be able to suspend the licence?

If so:

- Should it be able to do so only on certain grounds (if so what are they)?
- Should there be any restrictions on the period for which a licence may be suspended (if so, can the period be extended and if so how)?
- What is the procedure for suspending the licence? In particular, does notice of a proposed suspension need to be given and does the licensee need to be given the opportunity to make representations about the suspension or proposed suspension?
- Should a suspension be capable of being lifted (other than at the end of any fixed period of suspension), and if so how?
- What should the effect of suspension be (e.g. should the licence be treated as not existing for all purposes, or if fees are payable from time to time should they still be payable)?

7.2 Should the licensing authority be able to revoke the licence?

If so:

- Should it be able to do so only on certain grounds (if so what are they)?
- What is the procedure for revoking the licence? In particular, should there be a requirement to give notice of a proposed revocation and should the licensee be given the opportunity to make representations about the proposed revocation?
- Is any transitional provision needed in the event of a revocation (e.g. regarding activity which is already underway when the licence is revoked and cannot easily be stopped)?

7.3 Should partial suspension or revocation be possible?

- If partial revocation is to be possible, consider the potential for overlap between that and the amendment of a licence by the licensing authority of its own initiative.

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7.4 Would compensation need to be paid where a licence is revoked or suspended?

7.5 Should the licensee be able to surrender the licence? If so:

- Are there to be any restrictions on this?
- What is the procedure for surrendering a licence?
- If there is a licence fee, is the licensee entitled to a pro rata refund?

8. Renewal of licences

8.1 If a licence is valid for a particular period, can it be renewed?

8.2 If so, in what respects (if any) should the process of renewal differ from the process of applying for a licence?

8.3 Does anything need to be said about the continuation of the licence while the renewal application is being processed (or is the idea that any renewal should occur before the end of the period for which the licence is valid)?

9. Fees

9.1 Are fees payable? If so, the following issues arise.

9.2 Are they payable in respect of applications and/or appeals?

9.3 Are they payable in respect of licences? If so, is there a one-off charge or is a fee payable in respect of each period (e.g. each year), so long as the licence is in force?

9.4 How are the fees to be set?

- If in primary legislation, should there be a power to amend?
- If in subordinate legislation, what procedure?
- If less formally: should there be constraints on the power? Should there be a duty to (a) consult before setting the fee (b) publish the licensing authority's fee-setting policy (c) publish the amount of the fee?

9.5 Should it be possible to set different fees for different cases (if so, provide examples)?

9.6 What are the consequences of not paying a fee (e.g. if an annual fee is payable, should the licence be suspended or revoked? If so, should this occur automatically, or be a ground for suspension/revocation?)

9.7 Are there any restrictions in other legislation as regards the amount of the fee, and if so does anything need to be said about this?

10. Appeals

10.1 Is there to be a right of appeal against any decision? If so, see the legislative solution on **appeals against administrative decisions**.

11. Applications and appeals: contents, form etc

11.1 What requirements are wanted as to the contents and form of applications and appeals, and the way in which they must be made?

11.2 Should applicants be required to provide copies of documents?

11.3 What provision is to be in primary legislation, what in subordinate legislation, and what requirements are to be imposed more informally (e.g. by the giving of a general direction)?

11.4 Should the licensing body be able to require an applicant to provide further information/documents? If so, should failure to comply entitle the licensing body not to proceed with the application and/or to refuse it?

11.5 Should the licensing authority be required to process applications within a time-limit? If so how is that requirement to be enforced?

12. Applications and appeals: interests of third parties

12.1 Do third parties have an interest in whether the licence is granted and/or any licence conditions?

- Compare, for example, a TV licence with a licence to incinerate waste on a commercial basis.

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12.2 If third parties may have an interest, consider:

- whether, and how, particular interested parties or the public at large should be informed when applications and/or appeals are made (eg should there be a duty to publish notice of the application/appeal)
- whether interested parties should be given the opportunity to make representations in relation to any application or appeal
- whether any interested party should be able to appeal against the grant of a licence (or in respect of the conditions of a licence).

12.3 See also the questions above about the licensing authority consulting others and the legislative solution on **appeals against administrative decisions**.

13. Enforcement

13.1 How is the prohibition on undertaking the activity without a licence to be enforced?

13.2 Are any powers of entry, search or inspection required? (See the legislative solution on **powers of entry, inspection, search and seizure**.)

13.3 Are any powers of arrest or detention required?

13.4 Should there be a (criminal) offence? (See the **criminal offences** legislative solution.) If so, should it be an offence simply to undertake the activity without a licence, or would acting in that way be a ground for issuing an enforcement notice or compliance notice (breach of which would be an offence)? (See the **civil sanctions** legislative solution.)

13.5 If there is to be an offence, is the policy to allow fixed penalty notices? (See the **fixed penalty notices** legislative solution.)

13.6 An alternative is a civil monetary penalty regime (See the **civil sanctions** legislative solution.)

13.7 If the authority is to have power to impose conditions as part of the licence, how should those conditions be enforced? (Offence? Ground for revoking the licence?)

14. Publicity

14.1 Is anything wanted to enable the public to know whether a person has a licence (e.g. a requirement to display the licence at a place of business or to state the licence number in business documentation)?

14.2 Is there to be a register of licences, and if so what is it to contain and who may have access to it?

15. Objectives/guidance

15.1 Is there a desire to set out objectives that guide the whole system? If so, should they be set out in primary or subordinate legislation, or issued more informally?

15.2 Should someone have a power or duty to issue guidance as regards the operation of the licensing system? If so, should there be a duty to consult before issuing guidance? Is a duty to publish guidance required?

Examples of the legislative solution

- *Transport (Scotland) Act 2019* (www.legislation.gov.uk/asp/2019/17/contents), Part 7 (workplace parking licensing schemes)
- *Space Industry Act 2018* (www.legislation.gov.uk/ukpga/2018/5/contents), sections 3 and 8 to 15 and Schedule 1 (spaceflight activities)
- *Islands (Scotland) Act 2018* (www.legislation.gov.uk/asp/2018/12/contents), sections 24 and 25 (marine area licensing)
- *Public Health (Wales) Act 2017* (www.legislation.gov.uk/anaw/2017/2/contents), Part 4 (licensing of persons who carry out acupuncture, body piercing etc)
- *Houses in Multiple Occupation Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/22/contents), Parts 2 and 3
- *Air Weapons and Licensing (Scotland) Act 2015* (www.legislation.gov.uk/asp/2015/10/contents), Part 1 (certificates for air weapons) and Part 3 (taxis etc, metal dealers etc)
- *Housing (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/7/contents), Part 1 (private sector housing: system of registration and licensing)
- *Licensing of Pavement Cafés Act (Northern Ireland) 2014* (www.legislation.gov.uk/nia/2014/9/contents)
- *Scrap Metal Dealers Act 2013* (www.legislation.gov.uk/ukpga/2013/10/contents)
- *Mobile Homes (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/6/contents), Part 2
- *Health and Social Care Act 2012* (www.legislation.gov.uk/ukpga/2012/7/contents), Chapter 3 of Part 3 (health service providers)
- *Marine and Coastal Access Act 2009* (www.legislation.gov.uk/ukpga/2009/23/contents), Part 4 (marine licensing)
- *Energy Act 2008* (www.legislation.gov.uk/ukpga/2008/32/contents), Chapters 2 and 3 of Part 1 (gas)
- *Taxis Act (Northern Ireland) 2008* (www.legislation.gov.uk/nia/2008/4/contents) (drivers, vehicles and operators)
- *Wireless Telegraphy Act 2006* (www.legislation.gov.uk/ukpga/2006/36/contents), Part 2
- *Gambling Act 2005* (www.legislation.gov.uk/ukpga/2005/19/contents)
- *Licensing (Scotland) Act 2005* (www.legislation.gov.uk/asp/2005/16/contents) (alcohol)
- *Human Tissue Act 2004* (www.legislation.gov.uk/ukpga/2004/30/contents), section 16 and Schedule 3 (post-mortems etc)
- *Gangmasters (Licensing) Act 2004* (www.legislation.gov.uk/ukpga/2004/11/contents)
- *Licensing Act 2003* (www.legislation.gov.uk/ukpga/2003/17/contents) (alcohol etc)

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7 Powers of entry, inspection, search and seizure

This solution confers, and regulates, the power to enter premises and to inspect or search them, possibly seizing and removing items found there. Such powers are usually – but not always – exercised for the purpose of finding out whether a criminal offence has been committed.

Description of the legislative solution

The power to enter premises may be conferred on constables or on other public officials (such as employees of a Department, a local authority or a statutory body).

The Home Office Code of Practice on Powers of Entry (www.gov.uk/government/publications/powers-of-entry-code-of-practice) issued under sections 47 to 53 of the Protection of Freedoms Act 2012 gives further information and guidance regarding "non-devolved" powers of entry (see section 47 of the Act for detail about what "non-devolved" means there). 'Relevant persons' as defined in those sections must have regard to the guidance.

Elements of the legislative solution

1 Are new powers of entry needed?

1.1 Two initial issues are:

- What is the purpose of any proposed new power (for example, to investigate an offence or to facilitate the exercise of some other function)?
- Is a new power necessary? It may be that existing powers are sufficient to meet the policy intention.

1.2 The following powers of entry are of general application:

- In England and Wales, and probably in Northern Ireland, a power exists at common law for constables to enter premises to deal with or prevent a breach of the peace. In Scotland the police have some powers of entry at common law when (a) they are in close pursuit of someone who they believe has committed, or is about to commit, a serious crime; (b) they detect a disturbance; or (c) they hear cries for help or of distress.
- In England and Wales and Northern Ireland, a power for constables with a warrant to enter premises in connection with the investigation of indictable offences: see section 8 of the Police and Criminal Evidence Act 1984 ("the PACE Act") and Article 10 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the PACE Order").
- In England and Wales and Northern Ireland, a power for constables without a warrant to enter premises for a number of specified purposes, mostly to do with arresting persons for certain offences or recapturing persons unlawfully at large (see section 17 of the PACE Act and Article 19 of the PACE Order).
- In England and Wales and Northern Ireland, a power for constables without a warrant to enter any premises occupied or controlled by a person who is under arrest for an indictable offence, if the constable has reasonable grounds for suspecting that there is evidence there that relates to that offence or another indictable offence (see section 18 of the PACE Act and Article 20 of the PACE Order).
- In England and Wales and Northern Ireland, where a person has been arrested for an indictable offence, a power for constables without a warrant to enter any premises in which the person was when, or immediately before, being arrested, for the purpose of searching for evidence relating to the offence (see section 32 of the PACE Act and Article 34 of the PACE Order).

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1.3 In each case it will need to be decided, in the light of the existing common law and statutory powers (whether or not listed above), whether new provision is necessary. Where a common law power already exists, that power could be replaced by a statutory power if it were considered desirable to do so (for example, in the interests of clarity or of updating the law), even though it is not strictly necessary.

1.4 Note also that sections 15 and 16 of the PACE Act and Articles 17 and 18 of the PACE Order provide various procedural safeguards for the operation of entry-and-search powers by constables under warrants (whether under that Act or Order or under other legislation). Where a new power is conferred on constables, some of the questions considered below will be answered by those sections/Articles. (Note that "constable", in England and Wales and Northern Ireland, is not confined to police constables; for Northern Ireland, see section 43A of the Interpretation Act (NI) 1954.)

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1.5 Schedule 5 to the Consumer Rights Act 2015 contains a generic set of investigatory powers for the enforcement of offences that may be committed by (broadly speaking) traders or those providing a business service to the public (such as estate agents). The powers are available to the enforcing authorities responsible for enforcing those offences – for example, district councils in England or Northern Ireland, or local weights and measures authorities in Great Britain. New provision may not be necessary if it is appropriate to rely on those powers (or, perhaps, those powers could be varied or supplemented in certain respects as required).

1.6 There are other instances where legislation already provides for a set of investigatory powers in certain kinds of cases – an example is section 108 of the Environment Act 1995 in relation to pollution control.

2. If a new power of entry is needed, how will it be exercisable: only with a warrant, or without one?

2.1 Some powers of entry are exercisable only if a warrant is obtained. Others are exercisable without this requirement. If a new power is to be conferred, should it be exercisable only by warrant?

- It is almost unheard of for a power to enter private dwellings to be exercisable without a warrant.
- The following factors may tilt the policy balance in favour of requiring a warrant:
  - powers of seizure may be exercised on entry
  - the purpose of the entry is to allow a search to be carried out to ascertain whether an offence has been committed
  - force may be used to effect entry
  - the powers are exercisable by persons other than constables or other law enforcement officers.
- Sometimes a power is split into two, so that it is exercisable in some circumstances only with a warrant and in other circumstances without. See the splits between sections 239 and 240 of the Housing Act 2004 and between sections 62A and 62D of the Animal Health Act 1981 (on the one hand) and sections 62B and 62E of that Act (on the other).

2.2 Whether the power is to be exercisable with or without a warrant, what conditions (substantive and procedural) will need to be fulfilled before exercising the power?

- If a warrant is to be required, the following matters will need to be resolved:
  - the grounds for the issue of the warrant (that is, the grounds for entry)
  - who issues the warrant
  - who may apply for the warrant
  - who may execute the warrant (that is, who may exercise the power)
  - the form and contents of the application
  - the contents of the warrant.

It will be necessary to specify most or all of these in the statute.

- Where it is decided that the power of entry is to be exercisable without a warrant, the relevant statute will need to specify:
  - the grounds for the exercise of the power of entry
  - who may exercise the power.

2.3 In order to provide appropriate safeguards in the absence of a judicial warrant, powers exercisable without warrant are usually also subject to one or more other conditions prior to their exercise, such as:

- authorisation by a senior official (a safeguard falling short of judicial approval)
- the giving of notice to the owner or occupier of the premises.

2.4 All of these matters are dealt with below under separate headings.

3. Questions arising on warrant powers

3.1 What are the grounds for the issue of the warrant to be?

- The choice of grounds for the issue of a warrant will depend on the policy.
- It is often the case that two different types of ground are set out, and that both need to be satisfied.
- The first type of ground relates to why entry is required at all. It might be that there are reasonable grounds for suspecting that there has been a breach of a requirement and that there is material evidence on the premises, or that an offence is being committed on the premises. Or entry might be required in order to inspect or investigate some activity or state of affairs on the premises even if no wrongdoing is suspected.
- The second type of ground relates to why a warrant (with the element of coercion which accompanies it) is justified. Commonly these are: that entry has been requested and has been refused, or is likely to be refused if it is requested; that the owner or occupier cannot be found; that requesting entry would defeat the purpose of the entry (such as by giving the occupier the opportunity to destroy evidence).
- The usual test is that the person issuing the warrant must be "satisfied" that the grounds exist. Often there is an explicit test of reasonableness. It might be that the issuer must be satisfied that entry is "reasonably required" for one or more of the listed purposes. Or it might be that there are reasonable grounds for believing that a state of affairs exists.

3.2 Who is to issue the warrant?

- In the vast majority of cases, the warrant is to be issued by (and the application is to be made to): in England and Wales, a justice of the peace; in Scotland, a sheriff, summary sheriff[7] or justice of the peace; in Northern Ireland, a lay magistrate.
- In some exceptional cases, the power to issue a warrant is vested in a more senior judge.

3.3 Who may apply for the warrant and to whom is it issued?

- Should the statute specify who is to make an application for a warrant? The person who exercises the power of entry may or may not be the same as the person who makes the application for the warrant. Some statutes make clear that the applicant and the executor may be different individuals, as when a warrant applied for by one official of a statutory body may be executed by any other official of it.
- Some statutes specify the person to whom the warrant is to be issued, but not the person who is to execute it. In the absence of any indication to the contrary, the implication in such cases is probably that the warrant must be executed by the person to whom it is issued (and no-one else). But it is better to leave no doubt. See further below under *"...who will be able to exercise the power?"*.

[7] Many statutes conferred this function on a stipendiary magistrate. This office has now been replaced by that of summary sheriff: see sections 5 and 128 and Schedule 5 of the Courts Reform (Scotland) Act 2014.

3.4 What are the form and content of the application for a warrant?

- Should the legislation spell out in any more detail what the application must contain? In particular, will the application be required to be supported by particular material or by evidence of a particular kind?
- It is the usual – but not universal – practice to specify some formal requirements as to how the application is to be supported:
  - For England and Wales, this is usually by "information in writing", by "information [given] on oath", or by "sworn information in writing".
  - For Scotland, all the above expressions are used, as well as "evidence on oath".
  - For Northern Ireland, it is by "complaint on oath", by "complaint in writing" or by "a complaint in writing [and] substantiated on oath".

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3.5 What information should the warrant contain?

- Should the legislation spell out what is to be contained in the warrant (such as the name of the applicant, the date of issue, the premises to be searched and the articles sought)?

3.6 How long should the warrant to be valid for? Will it authorise entry on more than one occasion?

- Should there be a period within which entry must be effected (i.e. how long is the warrant to be valid for)? Many provisions require that a warrant must be executed within one month. Some provide for it to remain valid for three months. Occasionally, statutes provide that a warrant is to remain in force until it is executed.
- Does the warrant permit entry on more than one occasion? The law on this point is not entirely clear, but from a drafting point of view, it seems that the only safe course is to assume that the result of silence will be that only one entry is permitted. If the policy is that more than one entry is to be possible under a single warrant, clear words to that effect will be needed.

4. Questions arising on powers exercisable without warrant

4.1 What are the grounds for exercising the power to be?

- Even where a power is exercisable without warrant, setting out some grounds for its exercise is an essential element. These will often be similar to those discussed above (under the equivalent heading for warrant-based powers), except of course they will not be expressed as matters of which the issuer of the warrant must be satisfied. Instead, they will be expressed either as objective criteria or as matters of which the person exercising the power must be satisfied.

4.2 Should authorisation by a senior official be necessary?

- Should the person seeking to exercise the power be required to obtain prior authorisation of a senior official in his or her organisation? This requirement is sometimes added as a safeguard against the improper use of the power.

4.3 Should notice to the owner or occupier be necessary?

- Should the legislation require advance notice of the exercise of the power to be given to the owner and/or to the occupier of the premises? This is an important safeguard, but in some cases the giving of notice may defeat the purpose of the exercise of the power. Notice is more likely to be required where the power is exercisable in relation to a private dwelling.
- Where notice is required, the legislation ought to indicate how much notice must be given. The appropriate length of the notice period will differ according to the circumstances. Should it be specified, or is "reasonable" notice sufficient?

5. Further questions arising in either case

5.1 Who should be able to exercise the power?

- A statute will need to state:

- for a power exercisable by warrant, who is authorised to execute the warrant
- for a power exercisable without warrant, who may exercise a power of entry.

- Should the power be conferred on an artificial person (such as a body corporate)? If so, it must be remembered that the power of entry must ultimately be exercised by an individual. The most prudent course may be to require that the warrant be issued to an "officer" or "member [of staff]" of the body, or even that the warrant is to be issued to an individual named in it. If it is to be issued to an officer (or member of staff), can it be any officer (or member of staff) or must they be specified or authorised to perform this function on behalf of the body? If so, who should be able to authorise this? Should the legislation provide that the exercise of the power can be delegated to someone else (e.g. if the warrant is issued in the name of the body, or to an officer but does not name him/her, can it be executed by another officer)?
- Where an entry-and-search warrant is issued to a constable, the default position is that the warrant may be executed by any constable (not just the constable to whom it is issued): see section 16(1) of the PACE Act and Article 18(1) of the PACE Order. Where a new power exercisable by warrant is to be conferred on a constable in England and Wales or Northern Ireland, should this default position be changed?

5.2 Should the person authorised to exercise the power be able to take other persons?

- Should it be possible for other persons to accompany the person exercising the power of entry? In the absence of express provision, it is unlikely that a power to take accompanying persons would be implied unless their presence is a necessary part of exercising the power or is otherwise clearly envisaged by the power.
- If accompanying persons are to be permitted, what is their role to be? How much detail should be spelled out about this? In particular, should accompanying persons be required to be persons of a particular type (e.g. constables or particular types of inspector), or can they be anyone the person exercising the power thinks appropriate? Where the power is to be exercisable by warrant, should it be the case that the person exercising the power can bring other people with them only if authorised to do so by the warrant (and should the warrant have to name the person, or type of person, who can accompany them)?

5.3 What property (premises) should the power extend to?

- If the power is to be exercisable in relation to "premises", does anything need to be said about the meaning of that word in the particular context? Particular attention may need to be given to whether to include vehicles or vessels.
- In particular, are there to be any special rules in relation to private dwellings (or other particular kinds of premises relevant to the context)? Should the power cover Crown property?
- In the case of a warrant, should it be for specified premises or should it (exceptionally) be for "all premises" (see section 8(1A) of the PACE Act and Article 10(1A) of the PACE Order)?
- Should there be any geographical limitations on the power of entry (e.g. is a power conferred on a local authority only to be exercisable in relation to premises in the area of the authority)?

5.4 At what time of day should the power be exercisable?

- Should the power be exercisable at any time? Or only at a reasonable hour? Or at a reasonable hour unless it appears that the purpose of the entry may be frustrated if it is exercised at a reasonable hour?

5.5 Should there be a duty to produce the warrant or other evidence of the authority for exercising the power?

- In the case of a power exercisable by warrant, should there be a duty to produce the warrant or a copy of it and/or other documentation to the occupier of the premises? If so, is that duty to arise only when production is requested (or, to the contrary, even in the absence of a request)?
- In the case of power exercisable without a warrant, should there be a requirement to show documentation (such as written authority to exercise the power, or identification)? If so, should this duty arise only when production is requested?

5.6 Should it be permitted to use force in the exercise of the power?

- Should anything be said about the use of force (bearing in mind that the law is unclear about whether force is permitted in the absence of words to that effect)?
- In the case of warrants, should the use of force be authorised only if this is mentioned in the warrant? Or should the use of force be authorised (by words in the statute) on the basis of a warrant which is silent about it?

5.7 Should there be an express power to permit the taking of equipment onto the premises?

- What equipment might be necessary or desirable for the purpose for which the entry is required?
- Does anything need to be said to permit the bringing of that equipment onto the premises? (This is only likely to be necessary if the power of entry may entail the use of substantial equipment which would significantly interfere with the occupier's rights over and above what would ordinarily be involved in such an entry.)

5.8 Should there be any associated powers, such as the power to require the occupier to produce documents or other items, or to require an explanation of matters, or to permit the seizure of property?

Is express provision needed about any of the following:

- A power to inspect/examine/measure/sample any "items" or "things".
- A power to inspect and take copies of or extracts from "documents" (or "records", if that adds anything).
- A power to "seize" (and "remove"? and "retain"?) items or things.
- A power to require others to provide an explanation of documents (or anything else).
- A power to require others to provide assistance.
- How any of the above powers operate in relation to computers and IT equipment (including the possible need for a power to require the information to be rendered into visible and legible form, and made capable of being taken away).

5.9 If there is a power to search for or to seize material, should any particular material be excluded from the exercise of that power?

- For example, should the power exclude material which is (in England and Wales or Northern Ireland) subject to legal professional privilege or (in Scotland) material in respect of which a claim to confidentiality of communications could be maintained?

5.10 If it should be possible to seize property, what is to happen to it?

- A power to seize items is almost invariably accompanied by some provision about what is to happen to them afterwards.
- Property seized by the police is governed, in England and Wales and Northern Ireland, by section 22 of the PACE Act and Article 24 of the PACE Order and by the Police (Property) Act 1897 and, in Scotland, by the common law (see also section 31 of the Victims and Witnesses (Scotland) Act 2014).
- Where property is seized by persons other than the police, express provision is usually made reproducing at least some of the effect of section 22 of the PACE Act and Article 24 of the PACE Order.
- One possibility is provision that "anything that has been seized or taken away under [this power] may be retained for so long as is necessary in all the circumstances".
- Other provisions expressly refer to use as evidence at a trial for a relevant offence and/or forensic examination or for investigation in connection with a relevant offence.
- This is frequently combined with a qualification where the item itself is not needed, for example "no item may be retained for [those purposes] if a photograph or a copy would be sufficient for [them]".
- Alternatively, there may be a qualified duty to return items.
- Occasionally, there is a power to destroy things that have been seized (e.g. perishable goods), although care must be taken here to ensure compatibility with ECHR rights.

5.11 Should there be an obligation to re-secure the premises against trespassers?

- Should the legislation include provision requiring unoccupied premises to be left "as effectively secured against trespassers [or unauthorised entry] as when the person exercising the power found them" (or other words to similar effect)?
- The inclusion of this obligation may be taken as an indication that force may be used in the exercise of the power (since if no force is required to enter a property, it is not secure against trespassers). If the policy is that force may not be used to exercise a particular power, then this provision should be included with caution (if at all).
- Almost invariably, the obligation is imposed only when the premises are empty at the time of entry. (This suggests that its purpose is to prevent further entry by unauthorised persons rather than to compensate the property owner for damage to the property.)

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5.12 Should there be a sanction for obstructing exercise of the power of entry (or associated powers)?

- What sanction, if any, should the occupier of premises face for obstructing the exercise of a power of entry or failing to comply with requirements associated with such a power? This will need to be considered alongside the question of whether force may be used in the exercise of the power (because if force is not permitted, the sanction for obstruction may be the only means of ensuring that the power is effective).
- Where the power of entry is conferred on a constable, no special provision is needed: it is an offence in all UK jurisdictions to wilfully obstruct a constable in the execution of his or her duty, or a person assisting a constable in the execution of his or her duty.
- Some powers conferred on persons other than constables contain provisions making it an offence to obstruct those persons in the exercise of the power.
- A number of statutory provisions confer on someone entering premises the power to require persons on the premises to assist them in various ways. In such cases, it will be necessary to consider whether any general sanction for "obstructing" the exercise of a power should apply to a refusal to provide the assistance requested and, if not, whether there should be a separate sanction for failing to provide the requested assistance.

5.13 Should anything be said about the effect of failure by the person exercising a power to comply with any requirements concerning its exercise?

- Entry to premises which is not authorised by a warrant or a statutory provision (or by the consent of the owner/occupier) will be unlawful and actionable in trespass.
- But what if, where an entry is apparently authorised by a warrant or statute, there is a breach of one or more of the statutory requirements – for example, if the procedure for applying for a warrant is not followed correctly, or evidence of authorisation is not produced to the occupier? Should this render the whole exercise of the power unlawful?
- It cannot be predicted with confidence how the courts will approach legislation which is silent on the point, so it may be that making express provision as to the consequences of the breach of any requirements would lead to greater certainty. But care needs to be taken with the width of any express provision which validates something that would otherwise be irregular.

5.14 Does anything else need to be said?

For example, about:

- The making and keeping of records relating to the entry.
- The return of the warrant to the court that issued it. Some provisions require the warrant to be returned to the issuing court when it is has expired or has been executed, although the purpose of this type of provision is not entirely clear.
- Compensation where land or property is damaged in the course of exercising the power (perhaps unless the damage results from actions of the owner or occupier).

Examples of the legislative solution

- *Birmingham Commonwealth Games Act 2020* (www.legislation.gov.uk/ukpga/2020/10/contents), section 20 and Schedule 3 (applying and modifying Schedule 5 to the Consumer Rights Act 2015)
- *Referendums (Scotland) Act 2020* (www.legislation.gov.uk/asp/2020/2/contents), Schedule 4 (investigatory powers of Electoral Commission – mainly regarding documents and information)
- *UEFA European Championships (Scotland) Act 2020* (www.legislation.gov.uk/asp/2020/1/contents), sections 17 to 29
- *Wild Animals and Circuses (Wales) Act 2020* (www.legislation.gov.uk/asc/2020/2/contents), the Schedule
- *Wild Animals in Circuses Act 2019* (www.legislation.gov.uk/ukpga/2019/24/contents), the Schedule
- *Offensive Weapons Act 2019* (www.legislation.gov.uk/ukpga/2019/17/contents), section 64 (applying Schedule 5 to the Consumer Rights Act 2015)
- *Tenant Fees Act 2019* (www.legislation.gov.uk/ukpga/2019/4/contents), sections 6, 7 and 26(9) and (10) (applying Schedule 5 to the Consumer Rights Act 2015)
- *Counter-Terrorism and Border Security Act 2019* (www.legislation.gov.uk/ukpga/2019/3/contents), section 13 (inserted section 56A into the Counter-Terrorism Act 2008) and Schedule 3, Part 1
- *Transport (Scotland) Act 2019* (www.legislation.gov.uk/asp/2019/17/contents), sections 85 to 88, and section 110 (inserted sections 18A to 18F into the Transport (Scotland) Act 2005)
- *Ivory Act 2018* (www.legislation.gov.uk/ukpga/2018/30/contents), sections 14 to 33 and Schedule 2
- *Data Protection Act 2018* (www.legislation.gov.uk/ukpga/2018/12/contents), Schedule 15
- *Wild Animals in Travelling Circuses (Scotland) Act 2018* (www.legislation.gov.uk/asp/2018/3/contents), Schedule 1
- *Public Health (Minimum Price for Alcohol) (Wales) Act 2018* (www.legislation.gov.uk/anaw/2018/5/contents), sections 13 to 20
- *Higher Education and Research Act 2017* (www.legislation.gov.uk/ukpga/2017/29/contents), section 61 and Schedule 5
- *Cultural Property (Armed Conflicts) Act 2017* (www.legislation.gov.uk/ukpga/2017/6/contents), sections 23 to 27
- *Public Health (Wales) Act 2017* (www.legislation.gov.uk/anaw/2017/2/contents) Part 3 to 5
- *Housing and Planning Act 2016* (www.legislation.gov.uk/ukpga/2016/22/contents), Part 7
- *Psychoactive Substances Act 2016* (www.legislation.gov.uk/ukpga/2016/2/contents), sections 36 to 54 and Schedule 3
- *Tax Collection and Management (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/6/contents), Part 4, Chapters 4 and 5
- *Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/contents), Part 1, Chapter 3
- *Houses in Multiple Occupation Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/22/contents), sections 78 to 80
- *Consumer Rights Act 2015* (www.legislation.gov.uk/ukpga/2015/15/contents), Schedule 5
- *Revenue Scotland and Tax Powers Act 2014* (www.legislation.gov.uk/asp/2014/16/contents), Part 7
- *Housing (Scotland) Act 2014* (www.legislation.gov.uk/asp/2014/14/contents), sections 53 to 56

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8 Criminal offences

This legislative solution creates a criminal offence to penalise a particular activity or a failure to do something.

Description of the legislative solution

The solution involves making a particular act, omission or course of conduct punishable in a criminal court.

The policy intention may be:

- to discourage certain conduct by making it punishable as a criminal offence;
- to encourage certain conduct by providing that failure to do it is punishable as a criminal offence.

A provision creating a criminal offence has four key components:

- a precise description of the prohibited conduct (an act, omission or course of conduct, which may also include a description of the state of mind of the person doing it);
- a statement that the prohibited conduct is an offence;
- a statement of the punishment for committing the offence;
- a statement about the court in which the offence may be tried (mode of trial).

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It may also have a fifth component: a defence. A defence describes the circumstances in which a person is not guilty of the offence despite having undertaken the prohibited conduct.

Rather than create an entirely new offence the policy might be to modify an existing offence or add further elements to it, for example by modifying the penalty or providing for different or additional powers for a court on a person's conviction.

This version of this solution is aimed specifically at officials in the Welsh Government, and reflects the limited extent to which the criminal justice system is devolved in Wales.

Legislative competence and the European Convention on Human Rights

An Act of the Senedd can create a new criminal offence, modify an existing offence, specify the penalty and provide powers for its enforcement. However, the Senedd does not have the legislative competence to make general provision about the investigation of crime, criminal proceedings or sentencing nor can it modify the general rules of law that apply universally to offences in England and Wales.

To be within competence an Act of the Senedd must also be compatible with the European Convention on Human Rights. Proposals for new offences may engage various Articles of the Convention, particularly in relation to Articles 6 (right to a fair hearing) and 7 (no punishment without law).

Lawyers can advise on whether the offences and associated provisions proposed are within legislative competence.

Impact on justice system

Amending an existing criminal offence or creating a new criminal offence is likely to have impacts on the justice system. Not only will it affect the persons accused of the offence, it will also affect the bodies likely to investigate it, the persons likely to defend and prosecute it, the courts likely to hear it and those responsible for overseeing sentences. So it is necessary to consider the likely impact of the offence provision and associated costs, and consult accordingly.

Related legislative solutions

Before deciding that a new offence is the appropriate solution, consider whether a civil enforcement option (for example, civil monetary penalties) might be a more cost effective and speedier alternative to deal with the conduct that the proposed offence is intended to address. See the **civil sanctions** legislative solution.

Consider also the **licensing** legislative solution. Providing that an activity may only be undertaken in accordance with a licence can be seen as an alternative to making that activity an offence, in that it involves regulating the activity rather than prohibiting it outright; but a licensing regime will require a means of enforcement where activities are carried on without a licence or in breach of a licence, which may involve creating criminal offences or providing for other sanctions (such as civil sanctions).

A new criminal offence may also be supplemented by other legislative solutions: see the solutions about **fixed penalty notices** and **powers of entry, inspection, search and seizure**.

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Elements of the legislative solution

1. The enforcement strategy

1.1 How is the offence intended to fit within the overall strategy for dealing with the behaviour that is to be criminalised?

1.2 Is the offence intended to fit alongside a statutory power to require a person to do something or stop doing something (for example a power to issue a notice, with an offence to deal with breach of that notice)?

1.3 Is the intention to have a civil sanction regime for some instances of the prohibited behaviour, with the behaviour only to be prosecutable as a criminal offence in certain circumstances, for example, when the behaviour is repeated or serious? (Note that provision may be needed to avoid the imposition of both a civil and a criminal penalty for the same conduct.)

1.4 Is the behaviour to be punishable by a criminal offence, but the person can avoid criminal liability by paying a penalty?

2. Is a new criminal offence needed?

2.1 A new criminal offence should be created only where it is a proportionate and necessary response to the problem identified.

2.2 Consider what common law or statutory offences already exist to penalise the conduct. Is there an existing offence which deals with the conduct, or with elements of the conduct?

2.3 A new offence prohibiting conduct that is already an offence should be avoided. If an existing offence covers the same kind of behaviour but is not quite what is wanted, why is it thought to be inadequate? For example, there are a number of existing general offences which make it an offence to make false statements:

- section 2 of the Fraud Act 2006 (www.legislation.gov.uk/ukpga/2006/35/contents) (dishonestly making a false representation), section 3 of that Act (dishonestly failing to disclose information), or section 11 of that Act (obtaining services dishonestly);
- section 3 of the Forgery and Counterfeiting Act 1981 (www.legislation.gov.uk/ukpga/1981/45/contents) (using an instrument which is false, with the intention of inducing somebody to accept it as genuine);
- section 17 of the Theft Act 1968 (www.legislation.gov.uk/ukpga/1968/60/contents) (dishonestly falsifying a document required for an accounting purpose);
- section 5 of the Perjury Act 1911 (knowingly and wilfully making a false statement in a document required to be made under an Act of Parliament). There are also legislative competence considerations if it is proposed to create or modify an offence which overlaps with an offence under the Perjury Act 1911.

2.4 And why is a new offence the preferred solution? Would amending an existing offence achieve the policy aim? Or amending the penalty for an existing offence?

3. What behaviour is to be criminalised?

3.1 Exactly what kind of conduct do you plan to criminalise?
The conduct that constitutes an offence must be described with precision. Any uncertainty in the description of the conduct risks injustice: people need to be able to know how to regulate their behaviour to avoid committing an offence; defendants need to be able to understand the nature of the offence with which they are charged; and investigators, prosecutors and courts need to be clear about the conduct that amounts to an offence.

3.2 Think about the circumstances in which the offence would be committed:

- if the offence is a one-off act, is the conduct that amounts to an offence relatively easy to identify?
- if the offence consists of not doing something (for example, not complying with a statutory requirement), when does that inaction constitute the commission of an offence? Does the conduct only become a criminal offence after the expiration of a period of time, for example a period given to comply with a requirement in a notice?
- if the offence consists of a course of conduct, at which point does the conduct become an offence? Does the conduct only become an offence after a specified number of incidents of it?

3.3 Is the offence also intended to capture people who do not themselves carry out the harmful acts in question but are involved in some other way, such as people who "cause or permit" a harmful act to happen?

3.4 Where the offence relates to compliance with requirements or prohibitions, is any breach intended to constitute an offence? If the offence is to be reserved for "serious" or "persistent" breaches, when does the breach become a criminal offence?

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4. What mental element (if any) is necessary to commit the offence?

4.1 Is a particular state of mind necessary for the offence to be committed? Consider each element of the conduct that constitutes the offence and determine what state of mind should relate to each element. For example:

- the person has knowledge of a particular matter;
- the person believes or suspects a particular matter;
- the person intends to achieve a certain result;
- the person is reckless as to whether a certain result is achieved.

4.2 An offence may have an objective or subjective mental element or a combination of both, for example:

- by reference to what a reasonable person would have done;
- by reference to what the suspect knew or ought to have known.

4.3 The mental element might require an element of fault rather than a state of mind, for example an inadvertent taking of an unjustifiable risk or failure to take "reasonable steps".

4.4 Some provisions qualify an offence by making it a defence for the person charged to show that they lacked or could not have been expected to have knowledge about a particular element of the conduct. In such cases the mental element appears in the defence rather than forming a constituent part of the offence. Is that what is wanted? (See paragraph 9 for more on defences)

4.5 Legislation tends to contain commonly used and established terms for the mental elements of offences, for example, "knowingly", "dishonestly", "recklessly", or "intentionally". A body of case law has developed on the interpretation of these terms and if used in a new offence are likely to be interpreted in the light of those cases. Lawyers should be able to advise on this.

4.6 Is it the intention that the offence contains no mental element (that is, it is committed regardless of what a person knows or thinks they were doing)? This may sometimes be appropriate for technical or regulatory offences[8], offences with relatively minor penalties, or offences where public safety is at risk.

5. Who is to be capable of committing the offence?

5.1 Is any person to be capable of committing the offence? Or just certain categories of people (for example, holders of a licence, where the offence consists of doing something in breach of the conditions of the licence, or a person who cares for a child or a vulnerable person)? Are there certain categories of people that cannot commit the offence?

5.2 Can the offence be committed by a person under the age of 18? If so, what is the minimum age? (The minimum age of criminal responsibility in England and Wales is 10 years old.)

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5.3 Are companies, partnerships and unincorporated associations to be capable of committing the offence, or just individuals? If the offence can be committed by a corporation, it is usual to provide for the criminal liability of directors and other senior officers of the corporation, so that they can be prosecuted as well as the corporation.

5.4 If the offence can be committed by a partnership or an unincorporated body, express provision will usually be required to make that clear. If individual partners, or senior members of the unincorporated association, are to be liable for the offence in addition to the partnership, express provision will also be required.

6. Where may the offence be committed?

6.1 Is it to be possible to commit the offence outside Wales? Senedd Cymru cannot legislate “otherwise than in relation to Wales” (subject to a limited exception for certain ancillary provisions), so if an offence created by an Act of Senedd Cymru is to be capable of being committed outside Wales it will be necessary to consider how to ensure that the offence relates to Wales.

6.2 Where there are a number of elements that constitute the offending behaviour, it may be necessary to require some or all of them to take place in Wales in order to make the necessary connection.[9] There may be more than one way in which a sufficient relationship with Wales could be established. Since this is a question of legislative competence, legal advice will be required to identify the available options.

7. Secondary liability

7.1 When a new offence is created, nothing further needs to be said to make it possible to commit the offence as an accessory and no additional penalty is required.

7.2 Where an offence is committed, a person may be guilty of the offence as a principal offender or as an accessory. An accessory is a person who “aids, abets, counsels or procures” the commission of the offence, intended to aid, abet, counsel or procure, and had knowledge of the essential elements of the offence.

7.3 Is the possibility of committing the offence as an accessory to be excluded? If so, again, express provision will be required.

[8] A regulatory offence generally involves a breach of a duty imposed in a specialised area of activity. Examples of the activities include farming, animal welfare, food safety, waste disposal, education, or the governance of professions.

[9] See for example section 2 of the Public Health (Minimum Price for Alcohol) (Wales) Act 2018 (www.legislation.gov.uk/anaw/2018/5/section/2), under which the offence is to supply alcohol from premises in Wales, or to authorise the supply of alcohol from premises in Wales, at a selling price below the applicable minimum price for the alcohol. Subsection (4) provides that “it is immaterial for the purposes of subsection (1)(b) whether the authorisation takes place in Wales or elsewhere”.

8. Attempts

8.1 Is it to be possible to commit the offence where the conduct that amounts to an offence is attempted but not carried through or completed?

8.2 When creating a new either way offence or indictable only offence, as a general rule, it will not be necessary to create another offence of attempting to commit that offence.

8.3 If the offence is to be a summary offence, express provision will be required. (See paragraph 10 below for the meaning of "summary", "either way" and "indictable only" offences.)

9. Are there to be any exceptions or defences?

9.1 Is a defence wanted for the offence? This should be described with as much precision as the offence itself. For example, where the offence is to breach a particular duty it may be a defence for the person charged with the offence to show that they took reasonable steps to avoid breaching it. Common defences include that the person:

- did not know a particular fact, or did not suspect a particular state of affairs;
- took all reasonable precautions;
- exercised due diligence.

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9.2 Alternatively, a more specific defence may be wanted that is unique to the offence.

9.3 Note that defences that are generally available in the criminal law (such as duress or self-defence) will also apply to a new offence where appropriate.

9.4 Is there to be some kind of exception which provides that in certain circumstances the offence is not committed?

9.5 If there is to be a defence or exception to the offence, who will have to prove that in court? The prosecution or the defence? Legal advice will need to be sought for any provision that suggests that the defendant is required to prove their innocence.

10. In which court is the offence to be tried? (Mode of trial)

10.1 When creating a new criminal offence a decision will have to be made on the type of court in which the offence is to be tried (the mode of trial). The options are to create:

- a "summary offence", an offence capable only of being tried in the magistrates' courts (with certain limited exceptions), sometimes called a "summary only" offence or an offence "triable summarily";
- an "indictable only" offence, an offence capable only of being tried in the Crown Court (with certain limited exceptions);
- an "offence triable either way", an offence capable of being tried either in the magistrates' court or the Crown court, also called an "either way offence" or "an offence triable either on indictment or summarily".

10.2 An indictment is the document containing charges against the defendant for trial in the Crown court. The term "indictable offence", means an offence which, if committed by an adult, is triable only in the Crown court or an offence triable either way (see the table in Schedule 1 to the Legislation (Wales) Act 2019 and paragraph 1 of Schedule 1 to the Interpretation Act 1978).

10.3 Key considerations for deciding the mode of trial for the offence include:

- the desired maximum penalty for the offence (do the relevant courts have the power to impose it? See paragraphs 12 and 13);
- the seriousness of the offence (summary only offences are usually considered to be less serious, either way offences are the more serious offences, and indictable only offences are the most serious (such as murder) and for that reason are very rare);
- the complexity of the offence, the need for complex expert evidence or the likelihood of a long trial (this could tip the balance in favour of an either way or indictable offence);
- the availability of jury trial for the offence (only available for either way and indictable only offences).

11. Penalty for the offence – general

11.1 The desired penalty must be proportionate to the offence and should be consistent with similar offences. The most common penalty for an offence under an Act of Senedd Cymru is a fine. Imprisonment should be reserved for only the most serious wrongdoing.

11.2 The Sentencing Code in Parts 2 to 13 of the Sentencing Act 2020 contains provisions about sentences and orders generally available to a court when dealing with someone who is convicted of an offence. Note that certain kinds of disposals – for example, community orders, or suspended sentences – are available to a court under the Code, without it being necessary to make specific provision for them when creating a new offence.

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12. Fines

12.1 If the offence is to be punishable by a fine, is that an unlimited fine or is there to be a maximum level of fine that may be imposed on a person committing the offence?

12.2 If the offence is to be a summary offence and a maximum level of fine is wanted, the fine can be described as not exceeding level 1, 2, 3, or 4 on the standard scale of fines (see section 122 of the Sentencing Code for the maximum amount of each level). The court still has discretion in determining the appropriate amount of the penalty for the particular case up to the maximum amount for each level (and is unlikely to impose that maximum amount).

12.3 If the offence is to be an either-way offence are there to be any differences between the fine that may be imposed following conviction in the magistrates' court and the fine that may be imposed following conviction in the Crown court? Fine "levels" do not apply to either way offences sentenced in the magistrates' or Crown court but a penalty provision may refer to a sum not exceeding a particular amount. (It might be prudent to supplement such a provision with a mechanism to adjust the amount in the future.)

12.4 Infrequently, the policy may require a power to impose daily or periodic penalties in the case of the offence continuing (for example, an additional penalty for each day following conviction on which the offence continues).

13. Imprisonment

13.1 Is the offence to be punishable by imprisonment? If so, the offence should specify the maximum term available to the court when sentencing.

13.2 For a summary or either way offence sentenced in the magistrates' court, is the maximum term for the offence to be the maximum term which that court can impose for any one offence (currently 6 months)? Or is it to be a shorter maximum term, for example, three months?

13.3 If the offence is to be triable either way, what should be the difference between the maximum period of imprisonment that may be imposed for the offence if sentenced by the magistrates' court and the maximum period of imprisonment that may be imposed if sentenced by the Crown court?

14. Relevant factors for sentencing; particular sentencing options; effect of conviction

14.1 Does the offence need to be added to any existing provision in the general criminal law so that the court must treat certain matters as aggravating factors when sentencing for the offence? See for example, as regards England and Wales, sections 67 and 71 of the Sentencing Code (www.legislation.gov.uk/ukpga/2020/17/group/SECOND/part/4/chapter/3/crossheading/aggravating-factors/enacted)(offences committed against emergency workers and drugs offences committed near schools).

14.2 Is it to be possible to deprive the offender of certain property on conviction (forfeiture, deprivation, destruction orders)? If so, can this be done under the existing law or is a separate power necessary? See section 153 of the Sentencing Code and sections 160 and 161 of the Sentencing Code (www.legislation.gov.uk/ukpga/2020/17/section/153/enacted).

14.3 Should it be possible to impose a confiscation order under the Proceeds of Crime Act 2002 if a person is convicted of the new offence (https://www.legislation.gov.uk/ukpga/2002/29/contents)? If so, should the offence be a "lifestyle offence"? In that Act, see section 75 and Schedule 2 (England and Wales).

14.4 Should conviction of the offence lead to the offender being disqualified from doing something? For example, disqualification as a company director (see sections 2 and 5 of the Company Directors Disqualification Act 1986 (www.legislation.gov.uk/ukpga/1986/46/contents)), disqualification from holding certain positions, disqualification from keeping animals.

14.5 Should conviction of the offence prevent the offender obtaining certain kinds of licence or result in the offender losing an existing licence? See, for example, the consequences under the Licensing Act 2003 (www.legislation.gov.uk/ukpga/2003/17/contents) of being convicted of an offence listed in Schedule 4 to that Act; see in particular sections 113 and 129.

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15. How is the offence to be enforced?

15.1 Consider how the police, or another enforcement authority (such as a local authority), will obtain the information required to monitor and investigate whether an offence is being committed. Are additional powers needed to require information from certain individuals or bodies?

15.2 Consider powers of arrest, powers of entry, powers to search persons or property or to seize property (see **powers of entry, inspection, search and seizure** legislative solution). Do the police, or other enforcement authority, have the necessary powers to enforce the offence? Will legislation need to provide for new powers of enforcement, or the modification of existing powers?

15.3 Are additional offences required if information or documents are not produced?

15.4 Where relevant, consider whether special provision is needed to enable cross-border enforcement, or enforcement at sea or in the air.

16. Evidence

16.1 Are any special provisions required in relation to evidence to be used to prove certain facts or certain elements of the offence in court? Some tax enactments, for example, require the court to treat the amount in a certificate prepared by the tax authority as conclusive evidence of the amount owed, unless the contrary is proved.

16.2 If provision of this nature is wanted, who issues the certificate? Precisely what facts will the certificate be evidence of? Is the certificate just something the court is allowed to treat as evidence of something, or should the court be required to treat it as sufficient evidence unless there is evidence to the contrary, or even to treat it as conclusive proof of the facts in question?

16.3 Is a provision wanted to require the court to assume certain matters, or to presume certain matters if specified evidence is produced? A presumption may be conclusive, or it may be capable of being rebutted by evidence.

16.4 Are there certain facts that are not to be judiciable in the criminal court (for example, matters that only a civil court or other tribunal can determine)?

17. Prosecuting the offence

17.1 Who is expected to prosecute the offence? In England and Wales the Crown Prosecution Service have the power to prosecute most offences but the policy may be for the offence to be prosecuted by another prosecuting authority, for example local authorities, the Welsh Ministers, the Counsel General or a specified statutory authority.

17.2 If the policy is for a particular prosecuting authority to prosecute the offence, is additional provision necessary to enable this to happen? For example, provision enabling the transfer of information, or some adjustment to the authority's power to prosecute, or who can present the case at court.

17.3 Is additional provision required to enable the prosecutor to offer an alternative to prosecution in respect of the offence? For example, where an offence is committed by a corporate body, a partnership or an unincorporated association, should it be possible for the prosecutor to enter into a deferred prosecution agreement with that body in respect of the offence? See Schedule 17 to the Crime and Courts Act 2013 (www.legislation.gov.uk/ukpga/2013/22/schedule/17).

17.4 Are any consents required before a prosecution for the offence can take place? In rare cases, it may be desired to impose a requirement for the Director of Public Prosecutions, or the Counsel General to consent to the prosecution.

17.5 Note that the creation of a new offence does not guarantee that a person will be charged or prosecuted for that offence where the person undertakes the prohibited conduct in the future. Investigators and prosecutors have discretion in the decision about the appropriate charge and whether or not a person is prosecuted for an offence. When exercising that discretion in respect of Welsh Government prosecutions, prosecutors are required to apply the Welsh Prosecution Code, the Crown Prosecution service apply the Code for Crown Prosecutors, and other enforcement authorities apply enforcement policies containing similar principles.

18. Extending the time limit to bring a prosecution

18.1 Under section 127 of the Magistrates' Courts Act 1980 (www.legislation.gov.uk/ukpga/1980/43/section/127) the time-limit for bringing a prosecution for a summary only offence is 6 months from the date of the commission of the offence. Is a longer time-limit wanted, for example, to allow time for civil sanctions to be attempted first, or for a complex investigation to be conducted?

18.2 Are there to be any safeguards built into the time limit to ensure that cases are not delayed unnecessarily? For example, some provisions allow proceedings for the offence to be brought "within the period of 6 months beginning with the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to the prosecutor's knowledge" but also state that "proceedings cannot be commenced more than 2 years after the date on which the offence was committed".

18.3 There is no general statutory time-limit for either-way offences or indictable only offences.

19. A power for subordinate legislation to create a criminal offence

19.1 Rather than providing for a criminal offence in an Act, is the policy for an Act to create a power for regulations to create the offence? This is likely to be an exceptional case.

19.2 If the offence is to be set out in regulations justification will be needed because the offence would be unlikely to receive the same level of Senedd scrutiny.

19.3 A power in an Act for regulations to create an offence should, at least, specify the maximum penalties that regulations may impose for the offence and state the mode of trial for the offence. The Act should also describe as tightly as possible the kind of behaviour to be criminalised in an offence that may be created by the regulations.

19.4 Exceptionally, if there is particular justification for such an approach, it may be appropriate to provide in an Act that regulations may impose requirements or prohibitions, and to state in the Act that breach of those requirements or prohibitions is to be an offence (see for example section 33(1)(c) of the Health and Safety at Work etc Act 1974 (www.legislation.gov.uk/ukpga/1974/37/section/33)).

19.5 Note that legislation creating criminal liability should be as accessible as possible and locating different elements of the offence in different enactments might not achieve that aim.

Examples of the legislative solution

There are a great number of examples of criminal offences in primary and secondary legislation. The following examples taken from Senedd Acts and Assembly Measures are intended as illustrations of common offence provisions.

Offences – the behaviour to be criminalised (paragraph 3)

Offence consisting of an omission:

- *section 6(6) Public Health (Wales) Act 2017* (www.legislation.gov.uk/anaw/2017/2/section/6) (failure to take reasonable steps to cause a person smoking to stop smoking)
- *section 43 Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/section/43) (failure to comply with a registration condition

Offence committed by a course of conduct:

- *sections 2A and 7(3) of the Protection from Harassment Act 1997* (www.legislation.gov.uk/ukpga/1997/40/crossheading/england-and-wales) (stalking – requires two incidents before "a course of conduct" amounts to an offence)

Offence reserved for repeated breach:

- *section 12(1) of the Tenant Fees Act 2019* (www.legislation.gov.uk/ukpga/2019/4/contents) (monetary penalty may be imposed for the first breach)

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The mental element of the offence (paragraph 4)

Offence requiring knowledge or recklessness:

- *section 12 Renting Homes (Fees etc.) (Wales) Act 2019* (www.legislation.gov.uk/anaw/2019/2/section/12)

Offence requiring intention:

- *section 44 Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/section/44) (intent to deceive)
- *section 161C Social Services and Well-being (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/4/section/161C) (to intentionally obstruct)

Offence with combination of different mental elements for different constituents of the offence:

- *section 16 Historic Environment (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/4/section/16)

Persons who can commit the offence (paragraph 5)

Providing that only a particular person or category of person may commit an offence:

- *section 18 Mobile Homes (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/6/section/18) (owner of land who has been served with a compliance notice which has become operative commits an offence)
- *section 1(1) Wild Animals and Circuses (Wales) Act 2020* (www.legislation.gov.uk/asc/2020/2/section/1) (operator of travelling circus)

Offences committed by a body corporate or partnership (paragraph 5)

- *section 19 Food Hygiene Rating (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/2/section/19)
- *section 120 Public Health (Wales) Act 2017* (www.legislation.gov.uk/anaw/2017/2/section/120)

Exceptions to the offence (paragraph 5 and 9)

Providing that a person does not commit the offence where certain circumstances apply

- *section 114 Tax Collection and Management (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/6/section/114) (destruction or disposal of document after production of document in compliance with notice)

Offence of doing something without reasonable excuse or without consent

- *section 9 Food Hygiene Rating (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/2/section/9) (failure to display hygiene sticker without reasonable excuse)
- *section 79 Additional Learning Needs and Education Tribunal (Wales) Act 2018* (www.legislation.gov.uk/anaw/2018/2/section/79) (failing without reasonable excuse to comply with a requirement regarding disclosure of document)

Defences (paragraph 9)

- *section 2 Public Health (Minimum Price for Alcohol) (Wales) Act 2018* (www.legislation.gov.uk/anaw/2018/5/section/2) (taking reasonable steps and exercising due diligence to avoid committing the offence)
- *section 20 Tax Collection and Management (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/6/section/20) (reasonable belief)
- *section 125D(2) Social Services and Well-being (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/4/section/125D) (did not know and had no reason to suspect)
- *section 5 of the Public Health (Wales) Act 2017* (www.legislation.gov.uk/anaw/2017/2/section/5) (did not know and could not reasonably have been expected to know…)
- *section 115 Tax Collection and Management (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/6/section/115) (reasonable excuse)

Absolute offence with no defence (paragraph 9)

Strict liability offence:

- *section 1 of the Wild Animals in Circuses Act 2019* (www.legislation.gov.uk/ukpga/2019/24/section/1)
- *section 3 Renting Homes (Fees etc.) (Wales) Act 2019* (www.legislation.gov.uk/anaw/2019/2/section/3)

Mode of trial and penalties (paragraphs 10, 11, 12 and 13)

The mode of trial is usually indicated as part of the penalty provision.

- *section 39(3) Housing (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/7/section/39) (summary offence, unlimited fine)
- *section 24(3) Public Health (Wales) Act 2017* (www.legislation.gov.uk/anaw/2017/2/section/24) (summary offence, maximum level 3 fine)
- *section 39(6) Children and Families (Wales) Measure 2010* (www.legislation.gov.uk/mwa/2010/1/section/39) (summary offence, fine or imprisonment or both)*
- *section 114(6) Tax Collection and Management (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/6/section/114) (either-way offence, fine on summary conviction, fine or imprisonment on indictment)
- *section 51 Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/section/51) (either way offence summary conviction= fine or term of imprisonment for a term not exceeding 6 months, on conviction on indictment , fine or imprisonment for a term not exceeding 2 years or both)

* note that new offences must not refer to a "level 5 " fine, "statutory maximum" or "prescribed sum", these concepts were abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Powers of court following conviction (paragraph 14)

- *section 18 Mobile Homes (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/6/section/18) (power to revoke the licence for a caravan site on conviction for a second offence)

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Prosecuting an offence (paragraph 15, 17, 18)

Consent required before prosecution:

- *section 12 Human Transplantation (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/5/section/12) (Director of Public Prosecutions)
- *section 55 Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/section/55) (Counsel General)

Enforcement of the offence:

- *section 10 Public Health (Minimum Price for Alcohol) (Wales) Act 2018* (www.legislation.gov.uk/anaw/2018/5/section/10) (local authorities: power to prosecute and to investigate offences)

Extension of time-limits for summary offences:

- *section 13 Red Meat Industry (Wales) Measure 2010* (www.legislation.gov.uk/mwa/2010/3/section/13) (6 months from date of prosecutor's decision on sufficiency of evidence, no more than 2 years after commission of the offence)
- *section 55 Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/section/55) (12 months from prosecutor's decision, no more than 3 years after commission of offence)

Proving matters at court – certificates & statutory presumptions (paragraph 16)

- *section 29 Housing (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/7/section/29) (certificate that person has not paid a fixed penalty)
- *section 3 of the Food Safety Act 1990* (www.legislation.gov.uk/ukpga/1990/16/section/3) (presumption that food commonly used for human consumption found in premises used for the preparation of such food is intended for human consumption)

Conferring a power to create offences by regulations (paragraph 19)

- *section 94B Social Services and Well-being (Wales) Act 2014* (www.legislation.gov.uk/anaw/2014/4/section/94B)

9 Fixed penalty notices

This solution authorises a person to issue a fixed penalty notice (FPN). A FPN gives the recipient the opportunity to discharge any liability to conviction for an offence by paying a fixed sum of money within a set period.

Description of the legislative solution

The power to issue FPNs tends to be conferred in respect of lower level offending. The issuing of a notice is an alternative to prosecuting the offender.

A classic example is the giving of a FPN for a minor traffic offence.

The power may be conferred when the offence in question is created, or at a later time.

This solution is not concerned with notices which impose a civil liability on a recipient who is not alleged to have committed an offence (even though those notices are sometimes called fixed penalty notices).

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Related legislative solutions

Civil monetary penalties

Another policy option is to create a scheme for civil monetary penalties: see the **civil sanctions** legislative solution.

Almost always, a person on whom a civil monetary penalty is imposed has a right of appeal against it, and that is a key feature that distinguishes those penalties from the notices dealt with in this legislative solution, where the alternative to paying the fixed penalty is prosecution and 'having your day in court'.

Sometimes notices imposing civil monetary penalties have been called fixed penalty notices, which can be confusing.

Criminal offences

As regards the underlying offence, see the **criminal offences** legislative solution.

Scotland – fiscal fines

In Scotland, the power of a procurator fiscal to issue a fine may suffice (i.e. may mean that a power to give a FPN is not needed) – an advantage is that a system for the collection of the penalty money is in place. Whether issuing a FPN or a fiscal fine, the usual standards for prosecution would apply.

Elements of the legislative solution

1. In respect of what offences should FPNs be capable of being given?

2. What test should be applied for the giving of an FPN?

2.1 A commonly used formulation is that the giver of the notice has "reason to believe" that a person has committed an offence.

2.2 Alternatives include "reasonable grounds for believing" that the person has committed an offence, and it appearing that there are "grounds for instituting...proceedings for an offence".

3. Who may give an FPN?

3.1 This will usually be those responsible for enforcing the legislation. So, for ordinary criminal offences it might be a "constable", while for regulatory offences it might be an authorised officer of the body – department, local authority etc – responsible for enforcing the regulatory scheme.

3.2 If referring to an "authorised officer", what is to be the method of authorisation?

4. What provision is to be made about the form and contents of FPNs?

4.1 The form and contents of FPNs could be set out in primary legislation, there could be a power to make subordinate legislation about these matters, or a mixture of both.

4.2 As regards contents, the provisions commonly provide that the notice must state the offence and give particulars of the circumstances alleged to constitute the offence, and must contain most or all of the following information:

- the amount of the penalty,
- the period for payment of the penalty,
- the consequences of not paying the penalty,
- the person to whom and the address at which payment must be made,
- the method of payment.

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5. How should the amount of the fixed penalty be determined?

5.1 How should the amount of the penalty be determined?

- Is an amount to be specified?
- Or is there to be a formula for calculating the amount of the fixed penalty?
- Or is legislation to set the maximum amount (and the minimum amount?), leaving the giver of the notice a discretion as to the amount of the penalty?
- If there is to be discretion as to the amount of the penalty, should there be a power to issue guidance as to the exercise of the discretion, with the giver of the notice being required to have regard to the guidance?

5.2 If an amount (whether the amount of the penalty, or the maximum or minimum amount) is to be specified, should it be specified in primary legislation (if so should there be a power to substitute a new amount) or, alternatively, should it be specified in subordinate legislation?

6. Duration of the period for paying the penalty ("the notice period")

6.1 Should there be a fixed notice period, or is there to be a minimum period (with the FPN to specify the actual period)?

6.2 Should the duration (or minimum duration) of the notice period be set out in primary or subordinate legislation?

7. Discount for early payment

7.1 Should there be a discount for early payment of the fixed penalty?

7.2 If so, the questions above about the amount of the payment and duration of the period arise here too, ie how is the reduced amount, and the period for which the reduced amount is payable, to be determined?

8. What should be the effect of giving an FPN?

8.1 The usual effect of giving an FPN is that a person may not be prosecuted for the offence in the period for making the payment, and may not be prosecuted at all if payment is made within that period (subject to the notice being withdrawn, as to which see below). Is this what is wanted, or is something different wanted?

8.2 In some cases, an FPN has the further effect of imposing a penalty on the recipient if the person fails to pay the fixed penalty within the period for payment and also fails to indicate that the person wishes to be tried for the offence (e.g. Road Traffic Offenders Act 1988 s.55) – see section 11, below.

8.3 Some examples of the solution provide that the recipient of the FPN may be prosecuted within the period for payment. They also provide that in such cases the notice is treated as withdrawn. Is this wanted and, if so, what happens if the person has already paid the fixed penalty? Is there any need for this provision (as a similar result could be achieved by withdrawing the FPN and then prosecuting)?

9. What provision should be made about payment of the fixed penalty?

9.1 To whom should any payment of a fixed penalty be made?

9.2 Should anything be said about the way in which payments should be made (e.g. requiring or permitting payments to be made in particular ways)?

9.3 Should anything be said about when payments made in a particular way are to be treated as paid? (For example, it is common to provide that payments made by post are treated as paid when they would be delivered in the normal course of post.)

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10. Withdrawal of fixed penalty notices

10.1 Should it be possible to withdraw an FPN? This might be wanted for cases where the recipient of the FPN should be prosecuted, as well as for cases where the recipient has not committed the offence.

10.2 If it should be possible to withdraw an FPN, are there any limits on the withdrawal of a notice and what are the consequences of a notice being withdrawn? (For example, may the recipient of the FPN be prosecuted, or does the bar on prosecution continue despite the withdrawal? Does any payment that has been made need to be repaid? NB a provision as to repayment may do double duty, as it indicates that an FPN may be withdrawn despite payment of the fixed penalty.)

10.3 If, unusually, it is to be possible to prosecute the recipient of an FPN in the notice period (without having withdrawn the FPN, and without the recipient having given a notice of the kind mentioned immediately below), it would make sense to provide that the FPN is treated as withdrawn by the commencement of a prosecution.

11. Notice of intention not to pay the fixed penalty, representations, appeals etc

11.1 Should provision be made about the giving of a notice, by the recipient of the FPN, indicating that he or she does not intend to pay the fixed penalty (or asks to be tried for the offence to which the FPN relates)?

11.2 What is the effect of such a notice? Is it simply that proceedings in respect of the offence may be brought even if the notice period has not ended? If so, is there any purpose in providing for the giving of such notices (given that it is possible to withdraw the FPN or wait until the end of the notice period in any event)?

11.3 Is there any consequence of not giving such a notice? As mentioned at paragraph 8.2 above, in some cases failure to give such a notice will result in a penalty being imposed. If this is what is wanted, indicate what penalty is to be imposed and how it is to be enforced.

11.4 Some examples provide for the possibility of representations to be made in respect of the FPN or, occasionally, for appeals against the giving of the FPN. If any of this might be wanted, consider carefully what the purpose of the additional machinery is (and if providing for appeals, see the legislative solution on **appeals against administrative decisions**). It is always open to a recipient of an FPN to state that he or she is not guilty, and to invite the matter to be tested by prosecuting in the normal way. Another thing to bear in mind is any time limits for summary prosecutions – representations and appeals will take time.

12. Evidential matters

12.1 The usual practice is to provide for a signed certificate stating that payment has, or has not, been received to be evidence (or in Scotland sufficient evidence) of the facts stated. If this is wanted, state who must sign the certificate.

13. Duty to give name and address?

13.1 Should a person be required to give his or her name and address, for the purposes of being given an FPN?

13.2 If so, should failure to provide the information be an offence (and, if so, what are the ingredients of the offence, the maximum penalty and the mode of trial)?

14. Guidance on giving of FPNs

14.1 Should there be a power or duty to give guidance as regards the giving of FPNs?

14.2 If so, should anything be said about the giving of the guidance (e.g. persons who must be consulted first)? Should there be a duty to publish the guidance?

14.3 Alternatives include a requirement to publish an enforcement policy. Such a policy would set out the circumstances in which a fixed penalty notice is likely to be given, and those in which prosecution is likely to be the preferred response to the offending.

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15. Report on FPNs that have been given?

15.1 Should there be a duty to produce a report, at intervals, giving details of FPNs that have been given? If this is wanted, provide details of who must make the report, whether the report must be published or given to another person, and the periods in respect of which a report must be made.

16. Use of fixed penalty receipts

16.1 What is wanted as regards the use of fixed penalty receipts?

16.2 Can the person to whom payments in respect of FPNs are made keep the monies, or must that person pay the monies to Ministers (or an NI department) or into the relevant Consolidated Fund?

16.3 If the monies may be retained, can they be used as the person considers appropriate, or only for particular purposes or functions?

16.4 If there are to be restrictions on the use of the monies, what else is wanted in connection with this (e.g. do accounts need to be kept, and published or provided to another person, to ensure that the restrictions are complied with)?

17. Notices and payments sent electronically

17.1 Should the FPN scheme provide for notices and/or payments to be sent electronically? (this issue may arise in a number of places above)

Examples of the legislative solution

- *Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, SI 2020/1045* (www.legislation.gov.uk/uksi/2020/1045/contents) regulation 12 – an SI, but included here as a recent example of the use of FPNs, with high penalties. See also *Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020, SI 2020/1609* (www.legislation.gov.uk/wsi/2020/1609/contents) Part 8 Chapter 2.
- *Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020* (www.legislation.gov.uk/asp/2020/14/contents), sections 2, 6 and 13 (inserting provisions into the Animal Health and Welfare (Scotland) Act 2006 allowing Scottish Ministers to make regulations providing for FPNs in relation to certain offences)
- *City of London Corporation (Open Spaces) Act 2018* (www.legislation.gov.uk/ukla/2018/1/contents/enacted), section 11
- *Public Health (Minimum Price for Alcohol) (Wales) Act 2018* (www.legislation.gov.uk/anaw/2018/5/contents), section 9
- *Public Health (Wales) Act 2017* (www.legislation.gov.uk/anaw/2017/2/contents) sections 27 and 2949 and Schedule 1
- *Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016* (www.legislation.gov.uk/asp/2016/3/contents) Schedule (FPN, provision for hearing to make representations about whether FPN should be withdrawn, provision for enforcement of unpaid FPN). NB this started out as a Member's Bill
- *Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/contents) section 52
- *Food Hygiene Rating Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/3/contents) section 11 and the Schedule (FPNs by council)
- *Food (Scotland) Act 2015* (www.legislation.gov.uk/asp/2015/1/contents) Part 3 (enforcement authority FPNs)
- *Anti-Social Behaviour, Crime and Policing Act 2014* (www.legislation.gov.uk/ukpga/2014/12/contents), sections 52 and 68 (FPNs by authorised officer or constable)
- *Food Hygiene Rating (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/2/contents) sections 21 and 22 and the Schedule (council FPNs)
- *Local Government Byelaws (Wales) Act 2012* (www.legislation.gov.uk/anaw/2012/2/contents) (council FPNs)
- *Planning Act (Northern Ireland) 2011* (www.legislation.gov.uk/nia/2011/25/contents) sections 153-155 (council FPNs)
- *Marine and Coastal Access Act 2009* (www.legislation.gov.uk/ukpga/2009/23/contents), section 294 (power for an order to confer power on an enforcement authority to issue FPNs in relation to sea fishing offences)
- *Climate Change (Scotland) Act 2009* (www.legislation.gov.uk/asp/2009/12/contents) section 88A and Schedule 1A (enforcement authority FPNs; representations about FPNs)
- *Transport for London Act 2008* (www.legislation.gov.uk/ukla/2008/1/contents/enacted), sections 17 to 21 and Schedules 1 and 2 (FPNs by authorised officer)
- *Aquaculture and Fisheries (Scotland) Act 2007* (www.legislation.gov.uk/asp/2007/12/contents) Part 4 (FPNs by persons appointed by Scottish Ministers)
- *Wireless Telegraphy Act 2006* (www.legislation.gov.uk/ukpga/2006/36/contents) Schedule 4 (FPNs by OFCOM or procurator fiscal)
- *Health Act 2006* (www.legislation.gov.uk/ukpga/2006/28/contents), section 9 and Schedule 1 (FPNs by enforcement authorities)
- *Anti-social Behaviour Act 2003* (www.legislation.gov.uk/ukpga/2003/38/contents), sections 43-47 (local authority FPNs)

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10 Civil sanctions

This solution enables a person other than a court to impose civil sanctions, such as monetary penalties and notices requiring the recipient to do something or stop doing something.

Description of the legislative solution

The aim of a civil sanction is to control behaviour in some way, but without criminalising it.

The kind of civil sanctions that may be wanted, and their relationship (if any) with criminal offences, will of course depend on the context and purpose of the policy. What is the aim of the policy? It might, for example, be:

- to try to ensure compliance with a regulatory regime;
- to stop ongoing conduct that is causing harm or damage;
- to penalise behaviour of a certain kind.

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There is a spectrum of sanctions, ranging from those that aim to ensure that a person does something or stops doing something, and those that are more punitive in nature, notably a civil monetary penalty.

This solution primarily considers the following formal civil enforcement tools:

- Monetary penalties;
- Statutory notices requiring the recipient to do something, or stop doing something (these might be called enforcement notices, improvement notices, compliance notices, stop notices, or have some similar label);
- Statutory notices or orders requiring the recipient to take specified steps to restore the position that existed before conduct that has caused harm or damage occurred (these might for example be called remediation notices or restitution orders);
- Undertakings (agreements) reached between a person and a regulatory authority as to certain actions that need to be taken (usually called enforcement undertakings or enforcement obligations).

The power to impose civil sanctions is frequently conferred on a public body operating as a regulator of a particular sector, or on Ministers, government departments or local authorities. This solution usually involves granting considerable discretionary powers to enforcement authorities, and so it is essential to ensure that the powers are targeted, transparent and proportionate.

Note in particular that civil monetary penalties can be substantial, and are often far higher than fines imposed by the criminal courts following successful prosecution of a criminal offence. So it is especially important to consider the appropriateness of such civil sanctions and to build in safeguards (such as the right of appeal). This is discussed further below.

Relationship with criminal offences

It may be that civil sanctions are all that is required to deliver the policy. Or it may be that a civil sanctions regime is to form part of a broader enforcement strategy that also includes criminal offences. See the **criminal offences** legislative solution.

Underpinning criminal offence: frequently, a criminal offence already exists in respect of certain conduct, and the policy is to make a civil sanction available as an alternative sanction for the same conduct.

Where there is an existing criminal offence, or a new underpinning offence is created, the policy might be (for example):

- for civil sanctions to be available as an alternative to the criminal proceedings for the same conduct;
- for the imposition of a monetary penalty for a first or less serious breach, with criminal proceedings reserved for more serious or repeated breaches;
- for a fixed penalty notice enforcement approach (see the **fixed penalty notices** legislative solution).

Part 3 of the Regulatory Enforcement and Sanctions Act 2008 (www.legislation.gov.uk/ukpga/2008/13/part/3) allows a Minister of the Crown or the Welsh Ministers to make an order providing that a particular regulatory authority (such as the Environment Agency) has the power to impose monetary penalties, stop notices and other civil sanctions as an alternative to criminal prosecution for the same conduct.

No underpinning criminal offence: it may be the policy to allow civil sanctions in respect of conduct which does **not** constitute a criminal offence (for example, conduct which constitutes a breach of a licence, a breach of a statutory prohibition, or a failure to comply with a statutory requirement).

Back-up criminal offence to ensure that civil sanctions "have teeth": an example of this is where an enforcement notice may be given in respect of particular conduct, but a breach of the enforcement notice is to be a criminal offence.

Other kinds of civil sanctions, and related legislative solutions

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There are some further categories of civil enforcement tools to consider.

One possibility is to provide for tools that prevent a person carrying on an activity, or place restrictions on them doing so (for example, suspending or revoking a licence or imposing further conditions on a licence-holder, or disqualifying an individual from being a director of a company, or from practising as a health professional). See, in particular, the **licensing** legislative solution.

There is the option of using disclosure and publicity as a means of encouraging compliance. That may involve taking a power to publicise companies that have breached requirements. Alternatively, legislation may require an authority to publish the compliance records of all operators (that might be an effective way of enforcing voluntary standards).

Statutory notices may be used to require a person to provide specified information to an authority (often called information notices).

Legislation might provide for orders or notices that prevent certain (otherwise lawful) behaviour: see the **preventative orders** legislative solution.

And legislation might provide for the seizure (and disposal) of goods or confiscation of assets.

See also paragraph 14 of the **criminal offences** legislative solution (particular sentencing options).

Consideration should also be given to the legislative solution about **powers of entry, inspection, search and seizure**, to allow investigation and enforcement of civil sanctions.

Impact on justice system

A civil sanctions regime is likely to have impacts on the justice system, for example where provision is made for:

- a right for a person receiving a civil sanction to appeal to a court or tribunal against it (see paragraph 9 below);
- a right for a regulatory body to apply to a court for enforcement of a statutory notice or order (see paragraph 5.1 below).

So it is necessary to consider the impact and associated costs and consult accordingly.

Elements of the legislative solution

1. What kind, or kinds, of civil sanctions are wanted?

1.1 What kind of behaviour is to be encouraged, required, prevented or penalised?

1.2 What enforcement tools are already available for the targeted behaviour? Is it necessary to devise a new enforcement regime, or would it be better to build on or revise an existing scheme?

1.3 Is the conduct in question already a criminal offence? Is the policy to repeal the offence and rely only on new civil sanctions? Or should the offence be retained in addition to the new civil sanctions?

1.4 Is the conduct in question a breach of a statutory provision (though not an offence)?

1.5 The policy may be to allow just one kind of sanction – frequently, a monetary penalty – or it may be to allow a menu of different kinds of sanctions with different aims.

1.6 Consider whether it is possible to adopt the civil sanctions described in *Part 3 of the Regulatory Enforcement and Sanctions Act 2008* (www.legislation.gov.uk/ukpga/2008/13/part/3). There are limitations: an order may be made only in the case of certain pre-existing criminal offences[10], and the legislation is of limited application as regards Scotland and Northern Ireland (see sections 56 and 57)[11].

1.7 Should the civil sanctions be consistent with the sanctions described in the Regulatory Enforcement and Sanctions Act 2008?

1.8 If several kinds of sanctions are to be available, consider the relationship between them (for example, should it be possible for a person to be given a monetary penalty for conduct that has already given rise to the person being given a stop notice?).

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1.9 Where underpinning criminal offences exist, is provision needed to achieve the result that a person cannot be subject to both a civil and a criminal penalty for the same conduct? This will depend on the kind of civil sanctions involved.

2. Who may impose a civil sanction? Who is the sanction to be imposed on?

2.1 Which enforcement authority or authorities are to have power to impose the sanction(s) (for example, local authorities, a Northern Ireland Department, a regulatory authority such as OFCOM or the Scottish Environment Protection Agency)?

2.2 Would it be appropriate for different enforcers to enforce different provisions? Is any provision needed about different enforcement authorities cooperating, providing assistance or sharing information? Or, perhaps, provision to allow one enforcement authority to delegate the lead enforcement role to another in certain circumstances?

2.3 Powers are usually given to authorities, rather than to authorised officers of authorities.

2.4 Can a civil sanction be imposed on particular people only (for example, people carrying on particular types of business, or holding particular types of licence)?

3. Grounds for imposing a civil sanction, and standard of proof

3.1 What, exactly, is the behaviour that gives grounds for imposing a civil sanction?

3.2 What standard of proof is to be applied in deciding whether the grounds for the civil sanction are made out?

- Where the civil sanction is a severe one, for example a substantial monetary penalty, it may be appropriate for the criminal standard- beyond reasonable doubt – ought to apply.
- Where a civil sanction is being imposed as an alternative to a criminal prosecution consider the standard proof that is to apply- there are examples of requring the authority imposing the sanctions to have reasonable suspicion that an offence has been committed or that a requirement is not being complied with, or simply that an authority is satisfied that there has been a failure of a specified kind.

3.3 The standard of proof will need to be considered for each kind of civil sanction, and may differ according to the sanction.

4. Power to issue enforcement notices, stop notices, remediation notices etc or agree undertakings

4.1 Where it is proposed to give a person a formal notice of some kind imposing a sanction, does the person have to be given warning first (this is sometimes called a notice of intent)? What are the time-limits for giving such a warning notice? What details must the notice contain? Can the requirement to give a warning notice be

[10] In addition, section 62 of RESA 2008 allows civil sanctions to be imposed when creating new offences in subordinate legislation under certain Acts specified in Schedule 7 to RESA 2008.

[11] Note also that in 2012, a UK Government Written Ministerial Statement indicated that powers under RESA 2008 to impose fixed monetary penalties, variable monetary penalties and restoration notices should only be conferred if the sanctions are to be imposed on undertakings with more than 250 employees.

dispensed with in an emergency? Should the recipient of the notice be able to make representations about the proposed sanction?

4.2 What details must the formal enforcement notice, or other kind of notice imposing a sanction, contain? For example, what steps must be taken by the recipient (the relevant step might be to refrain from doing something, rather than doing something)? Within what time period? It is usual to require the notice to specify the breach or non-compliance that has given grounds for serving the notice, to give details of any appeal rights (see paragraph 9 below), to specify the consequences of non-compliance with the notice, and to state the deadline for compliance.

4.3 What are the limits on what the authority may require the recipient to do? Should the legislation state the kinds of steps that the enforcement authority may require the recipient to take or the purposes for which it may require steps to be taken? For example, must the steps be taken to comply with a requirement that has been breached, to make good harm that has been done, or something else? Can the steps include paying money to anyone else?

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4.4 Should it be possible for the enforcement authority to vary or cancel a notice? Could a recipient of a notice apply to have it varied or cancelled? See paragraph 9 of the **giving notice** legislative solution.

4.5 Where a stop notice is wanted, should provision be made for it to cease to have effect at the end of a specified period (a temporary stop notice)? Should there be provision for compensation of a person receiving a stop notice or a temporary stop notice (where, for example, the notice is overturned on appeal)?

4.6 How should notices be given to a person? Consider electronic service. See the **giving notice** legislative solution, in particular paragraphs 5 and 11.

4.7 An alternative to a notice system – or an additional enforcement tool – might be to provide that an enforcement authority may accept undertakings from a person about their future behaviour.

5. Enforcement of notices and undertakings

5.1 What should be the means of securing compliance with an enforcement notice or an enforcement undertaking? This might be:

- providing that it is an offence to fail to comply (see the **criminal offences** legislative solution);
- providing that a civil monetary penalty could be imposed for failure to comply;
- providing that a person has a duty to comply with the notice or undertaking and that that duty is enforceable by the enforcement authority in civil proceedings for an injunction or (in Scotland) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988;
- providing that, if the notice is not complied with, the enforcement authority may apply to a court for an order of a particular kind specified in the legislation.

5.2 Another possibility is to allow a remediation/restitution notice or order to be imposed for failure to comply with an enforcement notice or stop notice, requiring the recipient to restore the position to what it was before the harmful conduct occurred, within a specified time, at the recipient's expense.

5.3 An alternative is to provide a power for the enforcement authority to conduct the remedial works itself, and to recover the costs of doing so from the person responsible for the breach.

5.4 If the costs of remediation could be substantial, is the person responsible likely to be able to pay for it? If not, should there be a scheme whereby operators enter into financial arrangements for the purpose of meeting prospective liabilities arising from the need for remediation works?

6. Power to impose civil monetary penalties

6.1 Where a person may be prosecuted for an offence or be liable for a penalty for the same behaviour, who is to decide which enforcement option to take, and on what grounds should they decide? Should criteria be specified in the legislation?

6.2 Should the legislation specify the criteria that an enforcement authority must take into account in deciding whether to impose a penalty? Are there to be particular cases stated in the legislation in which an authority is not able to impose a penalty?

6.3 Are the amounts of penalties to be fixed in legislation (known as fixed penalties), or can the enforcement authority decide what amount to impose (known as variable penalties)? What is the level of penalty that may be imposed? Should the levels differ depending on the conduct in question?

6.4 If the enforcement authority can determine the amount of the penalty, should the legislation specify criteria that must be taken into account in deciding the level of penalty? What is the maximum level that may be imposed? Where different amounts of penalties may be imposed depending on certain criteria, even if the amounts and criteria are left to be specified by subordinate legislation (see paragraph 10 below), the primary legislation should still specify the maximum amounts that may be imposed.

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6.5 Occasionally it may be appropriate to provide for penalties to be payable at a daily rate for repeat or enduring failure to comply.

6.6 Should it be possible for the enforcement authority to vary or cancel a penalty? If there is a power to vary a penalty that has already been imposed, should it only be a power to reduce it and not to increase it? Should this be possible even if the penalty has been paid (in which case, should it be refunded)?

7. Procedure for imposing civil monetary penalties

7.1 Should a warning or notice of intent be required before a civil monetary penalty may be imposed? What are the time-limits for giving the notice? What details must the notice contain?

7.2 It is usual to require such a notice and for it to state the reason that the enforcement authority proposes to impose a penalty, the amount of the penalty, and information about making representations (see next point).

7.3 If a notice of intent is to be given to a person, there is then almost invariably provision allowing the person to make representations about the proposed sanction. What are the time-limits for doing that? Who would consider the representations?

7.4 Should the recipient be given an opportunity to discharge their liability to pay the full penalty by payment of a smaller sum specified in the notice of intent, or by offering an undertaking? Within what time-limits?

7.5 What details must a notice imposing a monetary penalty contain? It is usual to require details about the reason (grounds) for imposing the penalty, how to pay it, the period within which it must be paid, the consequences of failing to pay it, and any appeal rights (see paragraph 9 below).

8. Payment of civil monetary penalties

8.1 What is the deadline for paying the penalty?

8.2 Should there be a discount for penalties paid early? How early must they be paid to take advantage of the discount?

8.3 Does late payment incur interest charges, or additional penalties?

8.4 What should happen where a civil monetary penalty is not paid?

- The usual position would be that the penalty would be recoverable as a civil debt (in other words, ordinary court proceedings to recover the debt would be required).
- It may be useful for provision to be made enabling the debt to be recoverable, on the order of a court, as if it were payable under a court order: that means that the debt may be recovered by means of an easier and quicker court procedure. A quicker civil court procedure may involve less opportunity for the recipent of the sanction to dispute it, so the ability to appeal the sanction will be relevant to this deicsion.

8.5 Is there any reason to depart from the usual position that receipts from civil monetary penalties should be paid into the relevant Consolidated Fund?

9. Appeals

9.1 Is there to be a right of appeal to a court or tribunal (or other independent decision-maker) against a civil sanction that has been imposed (for example, an appeal to the First-tier Tribunal, or (in Scotland) a sheriff)?

9.2 You will need advice from lawyers about whether article 6 of the ECHR requires appeal rights in a particular case. Monetary penalties are very likely to require rights of appeal.

9.3 If there are to be appeal rights, see the legislative solution on **appeals against administrative decisions**.

10. Is a power to make further provision by subordinate legislation needed?

10.1 If the power to impose civil sanctions is conferred by primary legislation, is it necessary to create a power for subordinate legislation to make further provision (transitional, consequential, supplementary) about the civil sanctions?

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10.2 It may be that the primary legislation sets out a basic framework (types of sanctions available, grounds for imposing them and so on) with subordinate legislation needed to fill in the details or vary the amounts. It is best to include as many details as possible in the primary legislation.

10.3 Where civil sanctions relate to a number of offences, prohibitions or requirements, one approach might be to provide a power for subordinate legislation to specify the offences, prohibitions or requirements in question.

10.4 Another option is for primary legislation to confer a power for subordinate legislation to give powers to an enforcing authority to impose civil sanctions. With that approach, it is likely that the powers that the regulations might allow an enforcing authority to exercise would need to be set out in the primary legislation in considerable detail, so it would still be important to consider the matters in this legislative solution.

11. Further considerations

11.1 Consider whether any provision is needed about the following matters.

11.2 Are there principles or other requirements that an enforcement authority must apply or follow when using its powers to impose civil sanctions? If so, should they be set out in legislation?

11.3 Or should the authority be required to develop and publish its own principles or policies (guidance) for using the powers? If so, does any particular process need to be followed (for example, as to consultation, publication or laying before the legislature)?

11.4 Should an enforcement authority be required to publish a report about how it has used its powers to impose civil sanctions? In particular, where an authority has power to impose monetary penalties, it might be required to publish a record of penalties imposed, with details of the parties and the types of non-compliance involved.

11.5 Should an enforcement authority be able to recover its costs in connection with civil sanctions? Can all costs be covered (for example, legal or other costs as well as the costs of an investigation)? How is the requirement to pay the costs to be imposed? How long does a person have to pay? Is there any right to challenge the amount of the costs or appeal against a notice requiring them to be paid?

12. Investigation or monitoring for the purposes of civil sanctions

12.1 Just as for a criminal offence, it will be necessary to obtain information and gather evidence in order to discover whether a rule is being breached or there is failure to comply with a requirement. Does the authority able to impose the civil sanction have the necessary powers? Consider powers of entry, inspection and search (see the **powers of entry, inspection, search and seizure** legislative solution, especially paragraph 1 and paragraphs 5.8 to 5.10). Will legislation need to provide for new powers, or the modification of existing powers?

12.2 Consider how the police, or the enforcement authority with powers to impose the sanctions, will obtain the information required to monitor whether it would be appropriate to impose a civil sanction. Are inspection powers needed, or powers to obtain information from certain kinds of individuals or bodies?

12.3 In the regulatory context, the powers listed in *section 108 of the Environment Act 1995* (www.legislation.gov.uk/ukpga/1995/25/section/108) may provide a useful checklist.

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Examples of the legislative solution

Enforcement notices, stop notices, enforcement undertakings etc

- *Schedule 5 to the Referendums (Scotland) Act 2020* (www.legislation.gov.uk/asp/2020/2/schedule/5) (the Electoral Commission may give stop notices or require enforcement undertakings if reasonably suspecting an offence (it may also impose fixed or variable monetary penalties, on a higher standard of proof))
- *Part 6 of the Data Protection Act 2018* (www.legislation.gov.uk/ukpga/2018/12/part/6) (the Information Commissioner may give an enforcement notice in relation to various information breaches – see in particular sections 149 and 150; there is also provision for information notices and assessment notices)
- *Schedule 1, Parts 2 and 3, of the Ivory Act 2018* (www.legislation.gov.uk/ukpga/2018/30/schedule/1) (the Secretary of State may give a stop notice or require an enforcement undertaking as an alternative to criminal prosecution for conduct constituting an offence under the Act)
- *Forestry and Land Management (Scotland) Act 2018* (www.legislation.gov.uk/asp/2018/8/part/4/chapter/8), Chapter 8 of Part 4 (the Scottish Ministers may give a stop notice or remedial notice; see also the "step-in power" in section 59 allowing the Scottish Ministers to enter land and take action if a person fails to comply with a remedial notice)
- *Schedule 1 to the Investigatory Powers Act 2016* (www.legislation.gov.uk/ukpga/2016/25/schedule/1), paragraphs 3 and 10 (enforcement obligations that may be contained in a monetary penalty notice – an unusual hybrid)
- *Chapter 1 of Part 1 of the Immigration Act 2016* (www.legislation.gov.uk/ukpga/2016/19/part/1/chapter/1), sections 14 to 16 (an enforcement authority may accept labour market enforcement undertakings from a person the authority believes to have committed certain offences under other Acts)
- *Psychoactive Substances Act 2016* (www.legislation.gov.uk/ukpga/2016/2/contents), sections 13 and 15 (an enforcing officer or local authority may give a prohibition notice if they reasonably believe that a person is carrying on an activity constituting an offence under the Act); see also section 14 (premises notices)
- *Part 1 of the Ancient Monuments and Archaeological Areas Act 1979* (www.legislation.gov.uk/ukpga/1979/46/part/I), sections 9ZC to 9ZL, inserted by the Historic Environment (Wales) Act 2016, allow the Welsh Ministers to give a scheduled monument enforcement notice or a temporary stop notice
- *Reservoirs Act (Northern Ireland) 2015* (www.legislation.gov.uk/nia/2015/8/part/6), sections 67 and 71 (the Department of Agriculture, Environment and Rural Affairs may give an enforcement notice requiring reservoir managers to comply with statutory duties; there is also provision for stop notices and enforcement undertakings)
- *Schedule 8 to the Energy Act 2013* (www.legislation.gov.uk/ukpga/2013/32/schedule/8/part/2) (inspectors of the Office for Nuclear Regulation may give an improvement notice or prohibition notice)
- *Caravan Sites and Control of Development Act 1960* (www.legislation.gov.uk/ukpga/Eliz2/8-9/62/part/I/crossheading/licensing-of-caravan-sites), section 9A, inserted by the Mobile Homes Act 2013 (local authority may issue a compliance notice in relation to licensing breaches); and, similarly, *Part 2 of the Mobile Homes (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/6/part/2) (see in particular section 17)
- *Health and Social Care Act 2012* (www.legislation.gov.uk/ukpga/2012/7/contents), sections 105 to 107 and Schedule 11 (Monitor may impose compliance or restoration requirements or accept enforcement undertakings)

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- *Chapter 9 of Part 1 of the Reservoirs (Scotland) Act 2011* (www.legislation.gov.uk/asp/2011/9/part/1/chapter/9) (the Scottish Environment Protection Agency may give an enforcement notice under section 65 or 69 in relation to failure to comply with various duties under the Act, or give a stop notice under section 73)
- *Part 5 of the Planning Act (Northern Ireland) 2011* (www.legislation.gov.uk/nia/2011/25/part/5) (a district council and the Department of the Environment may give an enforcement notice in relation to various planning breaches – see in particular sections 138 and 139; there is also provision for stop notices and planning contravention notices)
- *section 24 of the Forestry Act (Northern Ireland) 2010* (www.legislation.gov.uk/nia/2010/10/section/24) (the Department of Agriculture, Environment and Rural Affairs may give an enforcement notice in relation to breaches of a felling licence condition; there is also provision for a restocking notice under section 22)
- *Marine and Coastal Access Act 2009* (www.legislation.gov.uk/ukpga/2009/23/contents), sections 90 to 92 (compliance notices and remediation notices in relation to licensing breaches), sections 102 to 105 (stop notices and emergency safety notices)
- *Part 3 of the Regulatory Enforcement and Sanctions Act 2008* (www.legislation.gov.uk/ukpga/2008/13/part/3) (powers for a Minister by order to confer power on certain regulators to give compliance notices, restoration notices, stop notices or enforcement undertakings in respect of certain pre-existing offences)
- *Chapter 2 of Part 1 of the Pensions Act 2008* (www.legislation.gov.uk/ukpga/2008/30/part/1/chapter/2) (the Pensions Regulator may give compliance notices, third party compliance notices and unpaid contributions notices for breach of certain duties in the Act – see sections 35 to 37 and 43)
- *section 37 of the Taxis Act (Northern Ireland) 2008* (www.legislation.gov.uk/nia/2008/4/section/37) (the Department of the Environment may give an enforcement notice in relation to breaches of duties imposed under the Act)
- *section 32 of the Equality Act 2006* (www.legislation.gov.uk/ukpga/2006/3/section/32) (the Commission for Equality and Human Rights may give a notice to comply with the public sector equality duty under the Act)
- *Part 4A of the Communications Act 2003* (www.legislation.gov.uk/ukpga/2003/21/part/4A) (OFCOM may give enforcement notifications where it determines that a person has breached a provision of the Act – see in particular section 368I)
- *Chapter 4 of Part 3 of the Enterprise Act 2002* (www.legislation.gov.uk/ukpga/2002/40/part/3/chapter/4) (the Competition Commission may accept enforcement undertakings and make enforcement orders – see in particular sections 82 and 84 and Schedules 8 and 10)
- *Schedule 19C to the Political Parties, Elections and Referendums Act 2000* (www.legislation.gov.uk/ukpga/2000/41/schedule/19C) (the Electoral Commission may impose discretionary requirements if satisfied beyond reasonable doubt that a person has committed an offence under the Act or contravened a restriction or requirement under the Act, may impose a stop notice where the Commission reasonably believes the person is carrying on an activity constituting such an offence or contravention, and may accept enforcement undertakings if the Commission has reasonable grounds to suspect such an offence or contravention – see Parts 2, 3 and 4 of Schedule 19C)

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Monetary penalties

- *Schedule 5 to the Referendums (Scotland) Act 2020* (www.legislation.gov.uk/asp/2020/2/schedule/5) (fixed and variable monetary penalties, as well as other civil sanctions; the Electoral Commission may impose penalties if it is satisfied beyond reasonable doubt that an offence has been committed)
- *Part 3 of the Non-Domestic Rates (Scotland) Act 2020* (www.legislation.gov.uk/asp/2020/4/part/3) (monetary penalties for breach of requirements to provide information)
- *Tenant Fees Act 2019* (www.legislation.gov.uk/ukpga/2019/4/contents), section 8 and Schedule 3 (a local weights and measures authority or district council in England may impose a monetary penalty if satisfied beyond reasonable doubt that a person has breached a provision of the Act or committed an offence under the Act)
- *Transport (Scotland) Act 2019* (www.legislation.gov.uk/asp/2019/17/contents), sections 6, 7 and 27, and 58 (penalty charges payable to local authorities for driving in breach of the rules in a low emission zone, and for parking infractions)
- *Part 6 of the Data Protection Act 2018* (www.legislation.gov.uk/ukpga/2018/12/part/6) (the Information Commissioner may impose a monetary penalty for breaches of the Act or for breaches of an information notice, assessment notice or enforcement notice): see in particular section 155 and Schedule 16
- *Schedule 1, Part 1, of the Ivory Act 2018* (www.legislation.gov.uk/ukpga/2018/30/schedule/1) (the Secretary of State may impose a monetary penalty if satisfied beyond reasonable doubt that a person has committed an offence under the Act)
- *Part 8 of the Policing and Crime Act 2017* (www.legislation.gov.uk/ukpga/2017/3/part/8) (the Treasury may impose a monetary penalty if satisfied on the balance of probabilities that a person has breached certain prohibitions etc – see sections 146 to 149)
- *Higher Education and Research Act 2017* (www.legislation.gov.uk/ukpga/2017/29/contents), section 15 and Schedule 3 (the Office for Students may impose a monetary penalty for breach of registration conditions by education providers)
- *Investigatory Powers Act 2016* (www.legislation.gov.uk/ukpga/2016/25/contents), section 7 and Schedule 1 (the Investigatory Powers Commissioner may impose a monetary penalty in certain circumstances where the Commissioner does not consider that the person has committed an offence under the Act)
- *sections 46A to 46D of the Environmental Protection Act 1990* (www.legislation.gov.uk/ukpga/1990/43/part/II/crossheading/collection-disposal-or-treatment-of-controlled-waste), inserted by the Deregulation Act 2015: a waste collection authority in England may impose a monetary penalty for household waste breaches. This regime replaced, for England, the previous criminal offence for such breaches (see section 46(6), which was the previous offence, now applying only in relation to Scotland and Wales)
- *Chapter 1 of Part 3 of the Immigration Act 2014* (www.legislation.gov.uk/ukpga/2014/22/part/3/chapter/1), sections 23 to 31 (the Secretary of State may impose a monetary penalty on a landlord or landlord's agent for contravention of a provision of the Act)
- *Part 2 of the Mobile Homes (Wales) Act 2013* (www.legislation.gov.uk/anaw/2013/6/part/2), sections 15 and 16 (a local authority may impose a (low) fixed monetary penalty in respect of licensing breaches. Note that this is called a "fixed penalty notice" and, unusually, seems to be the enforcement method of first resort, to be followed up, if not paid, by a compliance notice)
- *Health and Social Care Act 2012* (www.legislation.gov.uk/ukpga/2012/7/contents), section 105 and Schedule 11 (Monitor may impose a variable monetary penalty if satisfied as to breach of licensing requirements; also, paragraph 5 of Schedule 11 allows Monitor to impose a monetary penalty if a compliance requirement or restoration requirement is breached)

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- *Marine (Scotland) Act 2010* (www.legislation.gov.uk/asp/2010/5/part/4/crossheading/civil-sanctions), sections 46 to 50 and Schedule 2 (marine licensing: fixed and variable monetary penalties where the Scottish Ministers are satisfied beyond reasonable doubt that an offence has been committed)
- *Part 3 of the Regulatory Enforcement and Sanctions Act 2008* (www.legislation.gov.uk/ukpga/2008/13/part/3) (powers for a Minister by order to confer power on certain regulators to impose fixed or variable monetary penalties in respect of certain pre-existing offences)
- *Chapter 2 of Part 1 of the Pensions Act 2008* (www.legislation.gov.uk/ukpga/2008/30/part/1/chapter/2) (the Pensions Regulator may impose monetary penalties: see in particular sections 40, 41, 42 and 44. Note that a notice of a penalty under section 40 is called a "fixed penalty notice"[12], presumably to distinguish this from "escalating" monetary penalties under section 41)
- *Part 4A of the Communications Act 2003* (www.legislation.gov.uk/ukpga/2003/21/part/4A) (OFCOM may impose a monetary penalty where it determines that a person has breached a provision of the Act – see in particular sections 368I and 368J)
- *Schedule 19C to the Political Parties, Elections and Referendums Act 2000* (www.legislation.gov.uk/ukpga/2000/41/schedule/19C) (the Electoral Commission may impose a fixed or variable monetary penalty if satisfied beyond reasonable doubt that a person has committed an offence under the Act or contravened a restriction or requirement under the Act – see Parts 1 and 2 of Schedule 19C)
- *Chapter 3 of Part 1 of the Competition Act 1998* (www.legislation.gov.uk/ukpga/1998/41/part/I/chapter/III) (the Competition and Markets Authority may impose a monetary penalty on finding an intentional or negligent competition infringement – see in particular section 36; and may impose a monetary penalty for breach of requirement to provide information etc – see in particular section 40A)
- *Article 10 of the Pensions (Northern Ireland) Order 1995* (www.legislation.gov.uk/nisi/1995/3213/article/10) (monetary penalties in relation to pensions)
- *Broadcasting Act 1990* (www.legislation.gov.uk/ukpga/1990/42/contents), sections 18 and 19 (OFCOM must impose a monetary penalty when revoking a Channel 3 licence – simple provision)

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Examples relating to some particular points on civil sanctions

Enforcement of notices, undertakings etc:

- *paragraph 9 of Schedule 1 to the Ivory Act 2018* (www.legislation.gov.uk/ukpga/2018/30/schedule/1) (failure to comply with a stop notice is an offence)
- *section 155(1)(b) of the Data Protection Act 2018* (www.legislation.gov.uk/ukpga/2018/12/section/155) (the Information Commissioner may impose a monetary penalty for failure to comply with an information, assessment or enforcement notice)
- *paragraph 10 of Schedule 1 to the Investigatory Powers Act 2016* (www.legislation.gov.uk/ukpga/2016/25/schedule/1) (failure to comply with enforcement obligations is enforceable in civil proceedings for injunction etc)
- *section 18 of the Psychoactive Substances Act 2016* (www.legislation.gov.uk/ukpga/2016/2/contents) (where a prohibition notice is breached, the enforcing authority may apply to a court for a prohibition order)
- *Chapter 4 of Part 3 of the Enterprise Act 2002* (www.legislation.gov.uk/ukpga/2002/40/part/3/chapter/4), section 94 (failure to comply with enforcement undertakings or enforcement orders is enforceable in civil proceedings for injunction etc; also – unusually – provides for a private right to damages (section 94(4))

[12] See footnote 3. A similar notice in the *Pension Schemes Act 2017* (www.legislation.gov.uk/ukpga/2017/17/contents) is also called a "fixed penalty notice" (see sections 17 and 18 of that Act).

- *Chapter 3 of Part 1 of the Competition Act 1998* (www.legislation.gov.uk/ukpga/1998/41/part/I/chapter/III), section 31E (the Competition and Markets Authority may apply to a court for enforcement of competition commitments)

Provision about compensation for a stop notice:

- *section 47 of the Forestry and Land Management (Scotland) Act 2018* (www.legislation.gov.uk/asp/2018/8/section/47) (temporary stop notice)
- *section 75 of the Reservoirs (Scotland) Act 2011* (www.legislation.gov.uk/asp/2011/9/part/1/chapter/9)
- *section 9ZL of the Ancient Monuments and Archaeological Areas Act 1979* (www.legislation.gov.uk/ukpga/1979/46/part/I) (inserted by the Historic Environment (Wales) Act 2016) (temporary stop notice)

Enforcing payment of monetary penalties:

- *Schedule 3 to the Tenant Fees Act 2019* (www.legislation.gov.uk/ukpga/2019/4/schedule/3), paragraph 7
- *Schedule 16 to the Data Protection Act 2018* (www.legislation.gov.uk/ukpga/2018/12/schedule/16), paragraph 9
- *paragraph 9 of Schedule 1 to the Investigatory Powers Act 2016* (www.legislation.gov.uk/ukpga/2016/25/schedule/1)
- *section 31 of the Immigration Act 2014* (www.legislation.gov.uk/ukpga/2014/22/part/3/chapter/1)
- *section 42 of the Pensions Act 2008* (www.legislation.gov.uk/ukpga/2008/30/section/42)

Interest charges for late payment of penalty:

- *paragraph 4 of Schedule 3 to the Higher Education and Research Act 2017* (www.legislation.gov.uk/ukpga/2017/29/schedule/3)
- *section 218 of the Revenue Scotland and Tax Powers Act 2014* (www.legislation.gov.uk/asp/2011/9/part/1/chapter/9)

Provision for enforcement authority to recover its costs:

- *Schedule 1, Part 4, of the Ivory Act 2018* (www.legislation.gov.uk/ukpga/2018/30/schedule/1)
- *section 9C of the Caravan Sites and Control of Development Act 1960* (www.legislation.gov.uk/ukpga/Eliz2/8-9/62/section/9C) (inserted by the Mobile Homes Act 2013; see also section 9I)
- *section 88 of the Reservoirs (Scotland) Act 2011* (www.legislation.gov.uk/asp/2011/9/part/1/chapter/9)

Preventing liability for several civil sanctions, or for a criminal offence and a civil sanction:

- *sections 8(4) and 12(4) of the Tenant Fees Act 2019* (www.legislation.gov.uk/ukpga/2019/4/contents)
- *paragraph 20 of Schedule 2 to the Sanctions and Anti-Money Laundering Act 2018* (www.legislation.gov.uk/ukpga/2018/13/schedule/2)
- *paragraphs 4, 10(2) and 19 of Schedule 1 to the Ivory Act 2018* (www.legislation.gov.uk/ukpga/2018/30/schedule/1)
- *Schedule 19C to the Political Parties, Elections and Referendums Act 2000* (www.legislation.gov.uk/ukpga/2000/41/schedule/19C), paragraphs 4 and 22

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Requirement for enforcement authority to publish guidance about its use of enforcement powers:

- *paragraph 26 of Schedule 5 to the Referendums (Scotland) Act 2020* (www.legislation.gov.uk/asp/2020/2/schedule/5/part/5/crossheading/guidance-as-to-enforcement)
- *sections 160 and 161 of the Data Protection Act 2018* (www.legislation.gov.uk/ukpga/2018/12/part/6)
- *paragraph 21 of Schedule 1 of the Ivory Act 2018* (www.legislation.gov.uk/ukpga/2018/30/schedule/1)
- *paragraph 11 of Schedule 1 to the Investigatory Powers Act 2016* (www.legislation.gov.uk/ukpga/2016/25/schedule/1)
- *Schedule 19C to the Political Parties, Elections and Referendums Act 2000, paragraph 25* (www.legislation.gov.uk/ukpga/2000/41/schedule/19C)

Powers to make regulations about civil sanctions

Power for regulations (or order) to expand on civil sanctions created by an Act:

- *section 149(8) and (9) of the Data Protection Act 2018* (www.legislation.gov.uk/ukpga/2018/12/part/6)
- *Schedule 1, Part 5, of the Ivory Act 2018* (www.legislation.gov.uk/ukpga/2018/30/schedule/1)
- *Schedule 19C to the Political Parties, Elections and Referendums Act 2000* (www.legislation.gov.uk/ukpga/2000/41/schedule/19C), paragraphs 16 to 19

Power for regulations to change the amount of monetary penalties:

- *section 9 of the Tenant Fees Act 2019* (www.legislation.gov.uk/ukpga/2019/4/contents)

Power for regulations (or order) to allow the imposition of civil sanctions relating to offences created by an Act:

- *section 59 of the Space Industry Act 2018* (www.legislation.gov.uk/ukpga/2018/5/section/59) (regulations may allow a regulator to impose the kinds of civil sanctions described in Part 3 of the Regulatory Enforcement and Sanctions Act 2008, relating to offences created by the Space Industry Act)
- *sections 83 and 86 of the Reservoirs Act (Northern Ireland) 2015* (www.legislation.gov.uk/nia/2015/8/part/6/crossheading/other-civil-enforcement-measures) (the Department of Agriculture, Environment and Rural Affairs may make regulations allowing the imposition of fixed or variable monetary penalties where satisfied beyond reasonable doubt that a reservoir manager has committed an offence under the Act)
- *sections 35 and 36 of the Marine Act (Northern Ireland) 2013* (www.legislation.gov.uk/nia/2013/10/part/3/crossheading/fixed-monetary-penalties) (an order may allow the Department of the Environment to impose a fixed monetary penalty where satisfied beyond reasonable doubt that a person has committed an offence under the Act. See also Schedule 2 – there is a lot of detail here about what provision such an order would have to make)
- *sections 93 to 96 of the Marine and Coastal Access Act 2009* (www.legislation.gov.uk/ukpga/2009/23/contents) (an order may allow an enforcement authority to impose fixed or variable monetary penalties relating to licensing offences under the Act. See also Schedule 7 – there is a lot of detail here about what provision such an order would have to make)

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Power for subordinate legislation to allow the imposition of civil sanctions in the Regulatory Enforcement and Sanctions Act 2008, relating to offences created by the subordinate legislation:

- *see section 62 of the Regulatory Enforcement and Sanctions Act 2008* (www.legislation.gov.uk/ukpga/2008/13/part/3), and Schedule 7 to that Act

Power for regulations to create civil sanctions where there is no criminal offence:

- *Climate Change Act 2008, Schedule 6, Part 2* (www.legislation.gov.uk/ukpga/2008/27/schedule/6) and *Environment (Wales) Act 2016, Schedule 1* (www.legislation.gov.uk/anaw/2016/3/schedule/1) (regulations may provide for fixed monetary penalties and discretionary requirements for breaches of regulations relating to charging for carrier bags)
- *Learner Travel (Wales) Measure 2008, Schedule A1* (www.legislation.gov.uk/mwa/2008/2/schedule/A1) (regulations may provide for fixed monetary penalties, discretionary requirements, stop notices and enforcement undertakings in respect of breaches of regulations relating to the use of vehicles for learner transport)
- *Part 6 of the Traffic Management Act 2004* (www.legislation.gov.uk/ukpga/2004/18/part/6) (penalty charges, see in particular sections 72, 78, 80, 82 and Schedule 9; the enforcing authorities may set the level of charges, and the regulations may create criminal offences).

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11 Preventative orders

This solution protects the public from harm through civil orders or notices, targeted against individuals, that prevent or prohibit certain identified kinds of activity from occurring or recurring. Such activity may otherwise be perfectly lawful in itself. A civil preventative order may have the advantage of providing more flexibility than criminal prosecution.

Description of legislative solution

The power to issue the order may be conferred on central or local government, on the civil or criminal courts, or on another legal person.

Related legislative solutions

In the consideration of how to approach the problem that the proposed legislation is aimed at, this solution might be viewed as almost the mirror image of **licensing**: the latter involves prohibiting everyone from undertaking an activity, then licensing to permit it in individual cases (licences being applied for voluntarily); whereas preventative orders stop individuals undertaking an activity which might generally be lawful (orders being imposed on a person involuntarily). From a technical perspective, it can be seen that the typical procedures surrounding preventative orders involves many of the same considerations as for licensing: e.g. application, variation, renewal, discharge, appeal, and enforcement through the creation of an offence of non-compliance.

There is also a clear link with criminal offences in general. Civil preventative orders such as ASBOs, trafficking and exploitation prevention orders and dog control notices may be seen as an alternative for policy-makers to the creation of a criminal offence for the same kind of harmful activity. So although usually they are civil orders, they may appear to have a criminal “feel” to them, in restricting or prohibiting certain kinds of behaviour. They are also often used in criminal courts after conviction for relevant offences (for example sexual offences). See the **criminal offences** legislative solution.

The crucial difference is one of timing: preventative orders represent an attempt to act before the harmful activity actually occurs, rather than punish it after the fact, by restricting an individual from doing something that may enable them to cause harm of a particular kind. This may be a key factor when considering which legislative solution is chosen for the particular policy problem.

Elements of the legislative solution

1. Activity to be regulated

1.1 What is the harmful activity that is to be the subject of the preventative order?

1.2 What triggers should there be for an application for the order?

- For example, conviction and sentencing for a relevant offence (and/or acquittal on the grounds of mental disorder or other relevant court finding) or a freestanding application after certain factual criteria are met, or both.

2. Procedure for applications for preventative order

2.1 Who may apply for a preventative order? Who hears the application?

- This will ultimately depend on the gravity of the harm which the order seeks to prevent.

2.2 What is the process to be for applying for an order?

- For example, should any pre-application consultation be needed?

2.3 Should the applicant be entitled to a hearing? Should the person who is to be subject to the order be entitled to a hearing?

- If so, what rules of evidence should apply? For example, who should bear the burden of proof, and to what standard of proof – civil or criminal?

2.4 Should there be a requirement to give notice of the application to the person who is to be subject to the order and/or to any other interested persons – and if so, to whom?

2.5 Should there be an opportunity for the person who is to be subject to the order and/or any other interested persons to make representations on the order?

- Natural justice would usually require some form of due process for the person(s) affected by the order – a strong justification would be needed for a lack of provision on this or else ECHR issues are likely to arise.

2.6 Consider also any impact on existing court rules – and whether new rules are needed – as a result of the procedures proposed for the order.

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3. Grant or refusal of application for preventative order

3.1 Is there to be a discretion to grant the order, or a duty to grant one?

3.2 If a discretion, what criteria must the decision-maker use to assess the application? Are these criteria matters of fact or opinion? Should the criteria apply to each requirement or prohibition in the order, or to the order as a whole?

3.3 If a duty, are there exceptions where the duty to grant the order does not arise? Are these cases where there is a straightforward duty to refuse the application, or should there be a residual discretion to grant the order?

4. Content and form of preventative order

4.1 What form is the order to take and what should the order contain on its face?

4.2 Is the principal requirement preventing or prohibiting the harmful activity unconditionally or is the activity to be allowed subject to meeting specified conditions?

4.3 If the activity is to be allowed subject to conditions, what conditions may be imposed? Should all the permitted conditions be set out in the legislation, or should there be a wider discretion to impose conditions? Should there be default conditions which must be included?

4.4 May the order specify particular positive steps the person subject to the order must take to prevent the harmful activity (e.g. muzzling a dangerous dog, reporting at a police station)? Or particular examples of activity (e.g. playing music excessively loudly, foreign travel) that the person is prohibited from undertaking?

4.5 What ancillary requirements should (or may) the order contain?

- One common example would be a duty on the person subject to the order to notify the relevant authority of changes in name or address.

4.6 What should be the permitted duration of an order? Are the minimum and/or maximum periods prescribed? Can they be extended?

- Orders of indefinite length may raise ECHR issues, particularly if regulating behaviour that would otherwise be lawful.
- A situation can arise, on the sentencing of an offender in separate criminal proceedings, where a preventative order already exists, having been imposed by the civil courts – and the criminal court would examine whether the existing order should be varied. Therefore consider whether there should be extension of the order on conviction for another offence (see also paragraph 7.8 below).

4.7 What other particular details (if known) must be included in the order?

- For example: the date of service and effect; the name and address of the person subject to the order; the reasons for service of the order; and information for the person subject to the order on further procedures e.g. on appeal, variation, discharge and on non-compliance with the order constituting an offence (if applicable).

4.8 What provision on content and form is to be in primary legislation, and what details can be left to subordinate legislation? If subordinate legislation is chosen, what parliamentary procedure is deemed appropriate?

5. Variation, renewal and discharge of preventative order

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5.1 Should it be possible for a preventative order to be varied, renewed or discharged?

5.2 If so, should the original applicant (e.g. if a public authority) be able to vary, renew or discharge the order of its own motion? Or should it have to make an application to do so?

5.3 If the original applicant can vary etc of its own motion, what is the procedure for doing so? Should notice be given to the person subject to the order and any other interested persons? Are they to have an opportunity to make representations?

- Again, ECHR issues are likely to arise without adequate provision of due process here.

5.4 Who would hear an application to vary, renew or discharge?

- In Scotland the strong preference of the Courts Service, for resourcing reasons, is that such applications should go back to the court of first instance.

5.5 Who else should be able to apply to vary, renew or discharge – e.g. the person subject to the order? Should there be any restrictions on doing so – for example a time limit, or only specific grounds being available?

5.6 What criteria need to be met in order for the order to be varied, renewed or discharged?

5.7 How does the procedure for applying for variation, renewal or discharge differ (if at all) from the procedure for the main application?

5.8 What should be the status of the original order while the variation/renewal/discharge application is being processed – should it be suspended or should it continue in force?

6. Appeals

6.1 What rights of appeal should there be against decisions concerning the preventative order?

- Appeal rights may be particularly important if, for instance, there is no opportunity to make oral representations on the initial application. The question of what is adequate due process may be measured cumulatively.
- For detailed questions to consider in relation to appeals, see the legislative solution on **appeals against administrative decisions**. The questions set out in that solution will be relevant even if the power to make the preventative order is conferred on a court rather than an administrative body.

6.2 Should there be explicit double jeopardy provision?

- That is, where an application is made and dismissed, or the grant of an order successfully appealed, a rule that there can be no repeat application made for another order against the same person unless there is a change of circumstances. An absence of double jeopardy restrictions may raise ECHR issues (see control orders under the Prevention of Terrorism Act 2005 as an example).

7. Enforcement

7.1 How should the preventative order be enforced? Are there to be general duties on government or other persons e.g. to monitor compliance with orders?

7.2 Is it necessary for the preventative order to be enforceable throughout the UK? For instance, in Scotland, the need for subordinate legislation under section 104 of the Scotland Act 1998 will need to be considered at the same time as the primary legislation is instructed.

7.3 Is there to be a discrete offence of breach of the order? If so, see the **criminal offences** legislative solution.

7.4 Are any post-conviction orders to be available? For example, disqualification from ownership of dangerous dogs (see also paragraph 10.2 below on last-resort alternative options).

7.5 What is the status of the original order after prosecution/conviction for breach?

7.6 As an alternative or additional approach to creating a discrete offence of breach of the order, are there to be specific consequences for the person subject to the order if separate offences are committed while the order is in force – e.g. the existence of the order serving to aggravate the sentence for those separate offences?

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7.7 Are the police or other persons to be given particular powers of entry, search, arrest or detention in order to be able to enforce compliance with the order? (See the legislative solution on **powers of entry, inspection, search and seizure**.)

8. Interim orders

8.1 Should it be possible to make an application for an interim preventative order?

8.2 If so, who may apply for an interim order? To whom is the application to be made?

8.3 When should the application for the interim order be capable of being made? Only at the same time as the main application is made, or separately?

8.4 What are the criteria to be used by the decision-maker to assess the interim application?

8.5 How are these criteria to be different to the assessment of the main application? For example, is a broader or a narrower discretion to be given to the decision-maker?

8.6 What is the procedure for applying for an interim order? How does it differ (if at all) from the procedure for the main application? Should there be a requirement to give notice to those affected and an opportunity for them to make representations? See paragraph 2.5 above on this.

8.7 When should the interim order come into effect and for what duration? For example, for a fixed period or until determination of the main application (or until any first appeal has been determined or withdrawn, or the time for appealing has expired without an appeal being made)?

9. Register of orders

9.1 Is there to be a register or database containing the preventative orders in force?

9.2 If so, who is to maintain and manage it?

9.3 What information should it contain?

9.4 Who should be able to access it? Should fees be payable for access?

9.5 Should the information contained in it be capable of being shared with other bodies and persons?

- If so, the interaction with the Data Protection Act 2018 – and related ECHR issues – would need careful consideration.

10. Miscellaneous issues

10.1 Are there to be any mechanisms for monitoring the implementation of the preventative orders? This may be a particular issue where the orders are perceived as being highly restrictive (e.g. control orders). Such mechanisms might include, for example–

- the preparation and laying before Parliament of a report on the orders; the appointment of a person to review the operation of the legislation; or
- a “sunset clause” making the legislation expire after a fixed period of time.

10.2 Should there be a last-resort or alternative option available if it appears that a preventative order is, or would be, ineffective or inappropriate? For example, an application for a dog’s destruction where a dog control notice has failed or is likely to fail.

10.3 Can one kind of order lead on to another kind? For instance, the Antisocial Behaviour etc. (Scotland) Act 2004 allows a sheriff, if imposing an ASBO on a child, to make a linked parenting order against the child’s parent, and to refer the case to a children’s hearing.

10.4 Also of note in the 2004 Act is the requirement for the sheriff to explain the ASBO’s terms in ordinary language when making it: something that might be considered in particular for orders that can be made against children.

Examples of the legislative solution

- *Sentencing Act 2020* (www.legislation.gov.uk/ukpga/2020/17/contents), Part 11 ("behaviour orders" which may be imposed on a person who has been convicted of an offence – criminal behaviour orders, sexual harm prevention orders, restraining orders, parenting orders and binding over)
- *Prohibition of Female Genital Mutilation (Scotland) Act 2005, sections 5A to 5R – inserted by the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020* (www.legislation.gov.uk/asp/2020/9/contents), section 1 (female genital mutilation protection orders)
- *Offensive Weapons Act 2019* (www.legislation.gov.uk/ukpga/2019/17/contents), Part 2 (knife crime prevention orders)
- *Housing and Planning Act 2016* (www.legislation.gov.uk/ukpga/2016/22/contents), Chapter 2 of Part 2 (banning orders for rogue landlords and property agents)
- *Abusive Behaviour and Sexual Harm (Scotland) Act 2016* (www.legislation.gov.uk/asp/2016/22/contents) Part 2 (sexual harm prevention orders and sexual risk orders)
- *Modern Slavery Act 2015* (www.legislation.gov.uk/ukpga/2015/30/contents), Part 2 – (slavery and trafficking prevention and risk orders)
- *Counter-Terrorism and Security Act 2015* (www.legislation.gov.uk/ukpga/2015/6/contents), Chapter 2 of Part 1 (temporary exclusion orders for persons suspected of involvement in terrorism)
- *Human Trafficking and Exploitation (Scotland) Act 2015* (www.legislation.gov.uk/asp/2015/12/contents), Part 4 (trafficking and exploitation prevention and risk orders)
- *Anti-social Behaviour, Crime and Policing Act 2014* (www.legislation.gov.uk/ukpga/2014/12/contents) Parts 1, (replaced ASBOs in England and Wales with injunctions), Part 2, (criminal behaviour orders, Part 4 (community protection notices and public space protection orders
- *Terrorism Prevention and Investigation Measures Act 2011* (www.legislation.gov.uk/ukpga/2011/23/contents) (replaced control orders with terrorism prevention and investigation measures)
- *Control of Dogs (Scotland) Act 2010* (www.legislation.gov.uk/asp/2010/9/contents) (dog control notices)
- *Serious Crime Act 2007* (www.legislation.gov.uk/ukpga/2007/27/contents), Part 1– introduced (serious crime prevention orders)
- *Antisocial Behaviour etc. (Scotland) Act 2004* (www.legislation.gov.uk/asp/2004/8/contents), Part 2 – (introduced new kind of ASBOs for Scotland)
- *Anti-social Behaviour (Northern Ireland) Order 2004* (www.legislation.gov.uk/nisi/2004/1988/contents) (ASBOs)

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12 Giving notice

This solution is concerned with giving notice as part of a legislative scheme.

Description of the legislative solution

The relevance of a number of the issues outlined below will vary according to the reason for giving notice. There are many reasons for requiring notice to be given, for example it may be necessary to:

- give information to a particular person for a particular purpose,
- give a person a warning,
- inform a person of a decision, the reasons for the decision and the consequences of the decision,
- advise a person of one's intentions,
- prohibit a person from doing something,
- require or permit a person to do something,
- appoint or designate a person to a particular role,
- initiate a process or a particular step in a process.

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The giving of a notice may therefore enable a person to respond to a proposal and make representations about it, or it may enable a person to prepare for forthcoming changes.

This solution is concerned with the issues that may arise when considering what provision is required for giving notice. The issues don't arise in every case, and how much needs to be said will depend on the context. So, for example, there won't be a need for much detail where the person giving the notice and the person receiving it are known to each other, where the information that needs to be contained in the notice is straightforward or where the notice doesn't have an impact on the rights of individuals. Although this note refers to notices, these issues may also apply to giving or serving other documents and information.

Related legislative solutions

Provision about notices may be included in almost any legislative scheme. For example, a **licensing** regime may include various requirements to give notices. See also the legislative solutions about **fixed penalty notices, civil sanctions** and **powers of entry, inspection, search and seizure**.

Elements of the legislative solution

1. Form of notice

1.1 What form should the notice take?

1.2 The form that a notice is to take will sometimes be obvious from the context but in other cases it may be necessary to specify the form. Alternatively the recipient of the notice could be given the power to specify its form. If nothing is said, and the context does not require a particular form, then it will be for the person giving notice to choose its form.

1.3 If the form is to be specified:

- Should the notice be given in writing, or could it be given orally or in some other way? Is the aim only to ensure that information is provided, or also to ensure that it is provided in a permanent form?
- If the notice has to be given in writing, can it be an electronic document or communication, or does a paper "hard copy" have to be provided?
- Should the notice be produced using a standard form or template?

2. Content of notice

2.1 What should be included in the notice?

2.2 For example, a notice could be required to set out:

- the date of its issue or the date on which it has effect,
- the reasons for giving it,
- an explanation of its effect or the consequences of not complying with it,
- information as to how and when to make representations,
- an explanation of any rights of appeal or review,
- information about time limits.

2.3 Is anything else needed to accompany the notice (such as other documents)?

2.4 Might the information that must or may be contained in the notice need to be changed from time to time?

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3. Conditions to be satisfied before notice can be given

3.1 Should the legislation set out any conditions to be satisfied before the notice can be given?

3.2 For example:

- a person could be required to obtain the agreement of a third party before giving notice,
- a person could be required to consult before giving notice,
- a person could be required to be satisfied as to the existence of particular state of affairs before giving notice,
- a person could be required to be satisfied that giving notice will contribute to a particular purpose or aim.

3.3 If there are to be conditions, should the notice be required to be given within a specified period of the conditions being satisfied?

4. To whom should notice be given?

4.1 Notice may need to be given to a particular person, to a group of persons, to persons in a particular area or to the world at large. The recipient (and how to give notice) will depend on why notice is being given.

4.2 As a general rule, those with an interest in a process or proposed decision, should be made aware of it. The extent to which a person's interests may be affected should determine whether or not they should be given a notice.

4.3 Should service on a person acting on behalf of a person with an interest in the notice be permitted, such as on a person's solicitor?

5. How should notice be given?

5.1 If notice is to be given to specific people, how should it be given?

5.2 It may not be necessary for the legislation to specify the manner of giving notice as this may be clear from the context or the policy may be not to specify any particular manner. Or in the case of legislation to which section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 or section 24 of the Interpretation Act (Northern Ireland) 1954 applies[13], it may be that nothing different from, or additional to, what is provided for in those sections is wanted. Those sections set out the methods of service that are allowed where legislation authorises or requires a document to be served on a person. These will apply unless there is a contrary intention.

5.3 If certain ways of giving notice are to be set out in the legislation, should giving notice be permitted only by the methods that are set out, or should the methods that are set out be examples of what may be many possible ways of giving notice?

[13] See section 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 as to its application (generally section 26 applies to Acts of the Scottish Parliament and a Scottish instrument (as defined in section 1(4) of that Act)). See sections 1 and 2 of the Interpretation Act (Northern Ireland) 1954 as to its application (generally section 24 applies to an Act of the Northern Ireland Assembly (or an Act of the Parliament of Northern Ireland) and an instrument made under such an Act, or where another statute, such as a Northern Ireland Order in Council, provides that it is to apply).

5.4 Where there is more than one potential recipient, could service on just one be sufficient, or is service on all necessary (or on all those who are known to the person giving the notice)?

5.5 The manner of giving notice could be allowed to be specified administratively.

5.6 Possible ways of giving notice include: sending by post; delivering to an address; electronic service; service in person; affixing to premises; any other method agreed by the parties.

Sending by post

5.7 Depending on the legislation in question, provisions of the different Interpretation Acts apply to service by post[14]. Section 7 of the Interpretation Act 1978 and sections 13 and 14 of the Legislation (Wales) Act 2019 apply[15] if service by post is permitted (whether expressly or not) or required. They contain default provisions about what steps must be taken to serve the document and about when it is assumed to arrive. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010[16] and section 24 of the Interpretation Act (Northern Ireland) 1954[17] contain similar provision. Is something additional to, or different from, what is said in those Acts wanted? For example, if something different is wanted about the time at which service is treated as having been effected, provision will be needed for this.

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5.8 Should service by post in a particular way be required (such as by first class post, by recorded delivery or by registered post[18])?

5.9 Should something be said about the address to which a notice can be sent or delivered? For example a company may have a number of different addresses, or a person may have two homes. Unless the context makes it clear which address a notice should be sent to, it may be necessary to specify which one should be used.

5.10 Is it necessary to make provision about service on different kinds of bodies (such as bodies corporate, partnerships and local authorities)? If so, what address should be used for the different types of bodies? What address should be used for an unincorporated association?

5.11 Note that section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 contains provision about a person's proper address and section 24 of the Interpretation Act (Northern Ireland) 1954 refers to a person's usual or last known place of abode or business. Where these apply, consider whether anything different or additional is wanted.

Service where there is no address

5.12 Should provision be made about how to give notice to persons unknown or to the world at large, or to a person who has no address or whose address is not known? Giving notice by publishing it somewhere or by displaying it on land are possible ways of doing this[19].

[14] Generally section 7 of the Interpretation Act 1978 applies to Acts of the UK Parliament and subordinate legislation made under those Acts, and sections 13 and 14 of the Legislation (Wales) Act 2019 apply to Acts of Senedd Cymru that receive Royal Assent on or after 1 January 2020, and Welsh subordinate instruments (as defined in section 3(2) of that Act). See footnote 2 above as to application of section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 and section 24 of the Interpretation Act (Northern Ireland) 1954.

[15] These provide that service is effected where a letter is properly addressed, pre-paid and posted, and is treated as being served "at the time at which the letter would be delivered in the ordinary course of post" (Interpretation Act 1978, section 7), or 'on the day on which the letter containing the documents would arrive in the ordinary course of post' (Legislation (Wales) Act 2019, section 14).

[16] A document sent by a registered post service or by recorded delivery is to be taken to have been received 48 hours after it is sent.

[17] Service of a document "may be effected by prepaying, registering and posting an envelope addressed to the person on whom the document is to be served at his usual or last known place of abode or business and containing such document; and, unless the contrary is proved, the document shall be deemed to have been served at the time at which such envelope would have been delivered in the ordinary course of post". See also the Recorded Delivery Service Act (Northern Ireland) 1963 which means that section 24(1) of the 1954 Act also applies to documents sent by recorded delivery.

[18] Note that Part 1 of Schedule 8 to the Postal Services Act 2000 means that references to post, registered post, recorded delivery, first class post are not limited to the postal system of the Post Office.

[19] For Northern Ireland, see section 24(2)(e) of the Interpretation Act (Northern Ireland) 1954 which contains provision about service when the name or address of the intended recipient cannot be ascertained.

Personal service

5.13 If service in person is permitted, how should this to be applied to persons other than individuals? For example personal service on a body corporate could be on one of its officers, personal service on a partnership could be on a partner, and personal service on a governing body could be on one of its members.

5.14 A notice is often required to be given in person when entering premises, when taking things away from premises or when bringing things on to premises. In these cases, consider to whom the notice should be given. It may not always be possible to identify the owner, occupier, manager or lessee of the premises. Should giving notice to any person on the premises be sufficient? If no person is present, should the notice be capable of being given by being left in a prominent place?

5.15 Should leaving the notice with another person suffice? Section 24(2) of the Interpretation Act (Northern Ireland) 1954 allows service on a person to be effected by leaving a document for the intended recipient with some person apparently over the age of sixteen at the intended recipient's usual or last known place of abode or business.

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Affixing to premises

5.16 Where a notice relates to premises, to land or to a monument or other structure or place, or to a vehicle, should the notice be given by being displayed on the site or vehicle or close to it? For example at a school or hospital entrance, or on the land where something has been seized. And how should any such notice be displayed? For example, prominently or in a place accessible to the public.

Electronic service

5.17 If electronic service is allowed or required (though requirements to serve electronically are rare), should a particular type of electronic communication be used (for example, e-mail)? This could be specified or left to the parties to agree.

5.18 Consider whether any conditions should be applied before electronic service can take place. These could include things like requiring the recipient to signify consent in advance. Such a requirement may be needed only when the recipient is a private body or an individual.

If consent is to be required, should it be to all notices or specific ones, and is there any information that needs to be given when signifying consent?

5.19 Should provision be made about what address to use for electronic service?

5.20 It may be that electronic service should not be allowed, or that some notices should not be capable of being given electronically. Legislation sometimes prevents fixed penalty notices, for example, from being served electronically.

5.21 Are there any technical requirements that should apply if a notice is served electronically? For example that the notice must be in a particular format, must be legible, must be capable of being retained by the recipient, or that the text must be capable of being used.

5.22 Note that the Legislation (Wales) Act 2019 and the Interpretation and Legislative Reform (Scotland) Act 2010 both contain provisions about electronic service[20]. Where these apply, consider whether anything different or additional is wanted.

[20] Sections 13 and 14 of the Legislation (Wales) Act 2019 provide that service is effected if an electronic communication is properly addressed and is sent in an electronic form which is capable of being accessed and retained by the recipient. Service is deemed effective on the day the document is sent. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 permits service by electronic communication where there is prior agreement.

5.23 Where electronic service is to be the default, consider whether to allow an intended recipient to indicate a wish to receive a notice in some other way.

6. Publication

6.1 Should the notice be published? If the notice is to the public at large, publication is likely to be needed. It may also be needed in order to advise others that a notice has been given to specific people.

6.2 Publication could be online, in newspapers, in the Gazettes[21] or in whatever way the person giving the notice considers appropriate. A copy of a notice could be required to be displayed where those affected by it are likely to see it. Consider whether hard copies of the notice should be made available.

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6.3 Where a public body issues notices, should there be a requirement to publish all its notices? If so, where should they be published, when and how? Should only those in force be published? Should publication only on a website be sufficient? Should there be a requirement to supply copies of the notice, and if so to whom? Should the notices be made available for inspection? Should charging for copies be permitted?

6.4 Should a notice be required to be published for a particular period?

6.5 If notices generally have to be published, should it be possible to decide not to publish a notice or to withhold parts of a notice in certain circumstances? This might be wanted, for example, in order to protect trade secrets, for purposes related to national security or for reasons related to personal safety. Might it be necessary to require that certain notices are not published, for those or other reasons?

7. Timing

7.1 Consider whether time limits should be imposed (for example, on giving notices, for publishing notices, for doing things after notice has been given or for the time during which a notice has effect). Should any time limits run from a particular day (including that day) or from a particular time of day? Should they end on a particular day? Should the time limits run from the time the notice is sent or received? Should time limits (expressed in days) include only working days?

7.2 How should any time limits apply where there is more than one potential recipient of a notice?

8. Exceptions to a requirement to give notice?

8.1 Are there circumstances in which the requirement to give notice should not apply? For example, a requirement to give advance notice of an intention to exercise a power to enter premises to seize documents or goods may, in some cases, defeat the purposes of the exercise of that power.

8.2 Should waiver of a requirement to give notice be allowed or precluded?

9. Amendment or withdrawal of a notice

9.1 Should a notice be capable of being amended or withdrawn? If so consider:

- whether there should be a limit on when this can be done,
- what should be the effect of amendment or withdrawal,
- whether any procedure for giving the notice, and any conditions to be satisfied, should apply in the same way to amending or withdrawing the notice,
- whether there should be a requirement to notify anyone,
- whether amendment or withdrawal should be permitted on application only,
- the date from which a variation or withdrawal should be effective.

[21] The Gazettes are official journals of record and contain certain statutory notices. The three Gazettes are - the London Gazette (for notices relating to England and Wales), the Belfast Gazette and the Edinburgh Gazette.

10. Appeals and reviews

10.1 Should it be possible to appeal against the notice or apply for a review of the notice? This is likely to be relevant where a notice imposes requirements or prohibitions.

10.2 If there is to be a right of appeal, see the legislative solution on **appeals against administrative decisions**.

11. Failure to comply with requirements in relation to the giving of a notice

11.1 What should be the effect of a failure to comply with requirements in relation to the giving of a notice? A failure might consist, for example, of:

- a notice not being given in time,
- a notice not being in the proper form,
- a notice not containing the required information,
- the conditions to be met before giving notice not being met fully.

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11.2 Should a notice that fails to comply with any of the requirements that apply to it be invalid? Or should there be cases where a notice is valid despite a failure to comply?

11.3 Legislation often does not specify the consequences of failing to comply, but if no provision is made then the effect of non-compliance will depend on the nature of the failure and its effect, and may have to be determined by the courts.

11.4 If a particular result is wanted in all cases, such as a particular failure invalidating the notice, this may need to be specified.

12. Regulations

12.1 In certain circumstances it may be appropriate for matters relating to notices to be dealt with in regulations, for example, details relating to the form or content of a notice, the manner of giving a notice, how to publish, time limits, amending or withdrawing a notice, etc.

Examples of the legislative solution

Many statutes contain provision about notices. Below are some examples of provision on notices that may be useful.

Form of notice:

Scotland

- *Private Housing (Tenancies) (Scotland) Act 2016, section 49* (www.legislation.gov.uk/asp/2016/19/section/49) (requirements of notice of termination by tenant)
- *Land Reform (Scotland) Act 2016, section 114(3)* (www.legislation.gov.uk/asp/2016/18/section/114) (content of amnesty notice for improvements by tenant of agricultural holding)

Wales

- *Renting Homes (Wales) Act 2016, section 236(3)* (www.legislation.gov.uk/anaw/2016/1/contents) (regulation making power to set out form of notice), section 236(4) (permits the giving of notice in electronic form subject to conditions)

Northern Ireland

- *Houses in Multiple Occupation Act (Northern Ireland) 2016, section 27* (www.legislation.gov.uk/nia/2016/22/contents) (council power to specify form of notice)
- *Road Traffic (Amendment) Act (Northern Ireland) 2016, section 9* (www.legislation.gov.uk/nia/2016/11/contents), inserted Article 59B (form of notice determined by the Department), inserted Article 59C (specifying what notice must contain)
- *Special Educational Needs and Disability Act (Northern Ireland) 2016, section 8* (www.legislation.gov.uk/en/nia/2016/8) (information to be provided in notice), section 10 (regulation-making power about giving notice)
- *Justice Act (Northern Ireland) 2015, section 17* (www.legislation.gov.uk/nia/2015/9/section/17) (what notice must contain)

Conditions to be met before notice can be given:

Scotland

- *Domestic Abuse (Protection) Scotland Act 2021, section 4* (www.legislation.gov.uk/asp/2021/16/section/4) (domestic abuse protection notices)
- *High Hedges (Scotland) Act 2011, section 8(3)* (www.legislation.gov.uk/asp/2013/6/section/8) (date on which high hedge notice takes effect)

Wales

- *Tax Collection and Management (Wales) Act 2016, section 94* (www.legislation.gov.uk/anaw/2016/6/section/94) (time limits on giving notice after conditions met)
- *School Standards and Organisation (Wales) Act 2013, section 32C(3)* (www.legislation.gov.uk/anaw/2013/1/section/32) (conditions to be met before notice can be given)

How to give notice:

UK

- *Data Protection Act 2018, section 141* (www.legislation.gov.uk/ukpga/2018/12/section/141) (how notice may be given to individuals, bodies corporate, bodies unincorporate and partnerships in Scotland)
- *Cultural Property (Armed Conflicts) Act 2017, section 25(2)* (www.legislation.gov.uk/ukpga/2017/6/section/25/enacted) (how notice must be given and how to give notice to a person with no address in the United Kingdom or whose address is unknown)
- *Digital Economy Act 2017, section 28* (www.legislation.gov.uk/ukpga/2017/30/section/28) (a person's proper address for notices)
- *Psychoactive Substances Act 2016, section 16* (www.legislation.gov.uk/ukpga/2016/2/section/16) (how notice may be given, including personal delivery), *section 46(3)* (notice when item seized from premises to be left in a prominent place if not reasonably practicable to give to an affected person)
- *Health and Social Care Act 2012, section 148* (www.legislation.gov.uk/ukpga/2012/7/section/148) (when notice sent by registered post or recorded delivery, or by an electronic communication taken to have been received)
- *Companies Act 2006, section 1168 and Schedules 4 and 5* (www.legislation.gov.uk/ukpga/2006/46/contents) (detailed provision on sending documents to a company)
- *National Health Service Act 2006, Schedule A1, paragraph 5(3)(b)* (www.legislation.gov.uk/ukpga/2006/41/schedule/A1) (notice may be delivered in person or sent by first class post)
- *Communication Act 2003, Schedule 3A, paragraph 91* (www.legislation.gov.uk/ukpga/2003/21/schedule/3A) (requirement to send notice by registered post or recorded delivery)
- *Acquisition of Land Act 1981, section 6(4)* (www.legislation.gov.uk/ukpga/1981/67/section/6) (if not practicable to ascertain name or address of an owner, lessee, tenant or occupier, document may be served by delivering it to a person on the land or leaving it on or near the land)

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Scotland

- *Private Housing (Tenancies) (Scotland) Act 2016, section 62* (www.legislation.gov.uk/asp/2016/19/section/62) (meaning of notice to leave and stated eviction ground)

Wales

- *Regulation and Inspection of Social Care (Wales) Act 2016, section 84* (www.legislation.gov.uk/anaw/2016/2/section/84) (general provision as to how to give notice)
- *Renting Homes (Wales) Act 2016, section 237(4)* (www.legislation.gov.uk/anaw/2016/1/section/237) (technical requirements for electronic service)
- *Tax Collection and Management (Wales) Act 2016, section 103(5)* (www.legislation.gov.uk/anaw/2016/6/section/103) (how notice of inspection of premises to be given)

Northern Ireland

- *Road Traffic (Amendment) Act (Northern Ireland) 2016, section 9, inserted Article 59B* (www.legislation.gov.uk/nia/2016/11/section/9) (disapplying the reference to "registering" in section 24 of the Interpretation Act (NI) 1954, notice valid despite being returned as undelivered)

- *Welfare Reform Act (Northern Ireland) 2007, section 57(2)(a)* (www.legislation.gov.uk/nia/2007/2/section/57) (disapplying the reference to “registering” in section 24 of the Interpretation Act (NI) 1954)
- *Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010, section 58(4)* (www.legislation.gov.uk/nia/2010/2/contents) (disapplying the reference to “registering” in section 24 of the Interpretation Act (NI) 1954)
- *Planning Act (Northern Ireland) 2011, section 239* (www.legislation.gov.uk/nia/2011/25/section/239) (enabling electronic service)
- *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021* (www.legislation.gov.uk/nia/2021/2/section/7)

Publication of notices:

Scotland

- *Forestry and Land Management (Scotland) Act 2018, section 45(6)* (www.legislation.gov.uk/asp/2018/8/2019-04-01) (display of temporary stop notice on land to which notice relates)

Wales

- *Public Services Ombudsman (Wales) Act 2019, section 56* (www.legislation.gov.uk/anaw/2019/3/section/56) (publication of notices)

Northern Ireland

- *Public Services Ombudsman Act (Northern Ireland) 2016, section 44* (www.legislation.gov.uk/nia/2016/4/section/44) (publication of notices)
- *Insolvency (Amendment) Act (Northern Ireland) 2016, sections 16 and 17* (www.legislation.gov.uk/nia/2016/2/section/16) (publication of notices)
- *Licensing of Pavement Cafés Act (Northern Ireland) 2014, section 11* (www.legislation.gov.uk/nia/2014/9/section/11/2014-05-12) (publication of notices)

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Timing:

Scotland

- *High Hedges (Scotland) Act 2011, section 8(3)* (www.legislation.gov.uk/asp/2013/6/section/8) (date on which high hedge notice takes effect)
- *Land Registration etc. (Scotland) Act 2011, section 58* (www.legislation.gov.uk/asp/2012/5/section/58) (period of effect of advance notice)

Wales

- *Additional Learning Needs and Education Tribunal (Wales) Act 2018, section 23(5)* (www.legislation.gov.uk/anaw/2018/2/section/23) (time periods when notice required to be given to more than one person)

Northern Ireland

- *Reservoirs Act (Northern Ireland) 2015* (www.legislation.gov.uk/nia/2015/8/contents), sections 7 and 15 – (timing of notice)
- *Work and Families Act (Northern Ireland) 2015, section 12* (www.legislation.gov.uk/nia/2015/1/section/12) (regulation-making power for timing of notice)

Appeals and reviews:

Scotland

- *High Hedges (Scotland) Act 2011, section 12* (www.legislation.gov.uk/asp/2013/6/section/12) (appeals against decisions relating to high hedge notices)

Wales

- *Public Health (Wales) Act 2017, section 81(9)* (www.legislation.gov.uk/anaw/2017/2/section/81) (bringing of appeal does not suspend effect of notice)
- *Tax Collection and Management (Wales) Act 2016, section 95(2)* (www.legislation.gov.uk/anaw/2016/6/section/95) (requirement to comply with notice within specified period not to apply where request for review or appeal made)
- *Mobile Homes (Wales) Act 2013, section 24* (www.legislation.gov.uk/anaw/2013/6/section/24) (notice operative if no appeal brought within period for appealing, etc.)
- *Ancient Monuments and Archaeological Areas Act 1979, section 9ZE(4)* (www.legislation.gov.uk/ukpga/1979/46/section/9ZE) (notice of no effect until appeal finally determined or withdrawn)
- *Sea Fisheries (Shellfish) Act 1967, section 5C(4)* (www.legislation.gov.uk/ukpga/1967/83/section/5C) (tribunal may suspend notice or variation of a notice pending determination of appeal)

Northern Ireland

- *Licensing of Pavement Cafés Act (Northern Ireland) 2014, section 19* (www.legislation.gov.uk/nia/2014/9/section/19) (notice may provide for revocation, etc. to take effect on date notice is served if necessary in public interest)

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Failure to comply with requirements:

UK

- *Financial Services and Markets Act 2000, section 252(3)* (www.legislation.gov.uk/ukpga/2000/8/section/252) (to be valid warning notice must be received within certain period)
- *Town and Country Planning Act 1990, section 184(8)* (www.legislation.gov.uk/ukpga/1990/8/section/184) (stop notice not invalid if enforcement notice to which it relates not served as required)

Wales

- *Renting Homes (Wales) Act 2016, section 236(3)* (www.legislation.gov.uk/en/anaw/2016/1/section/236) (unless regulations provide otherwise, a notice or document not in the prescribed form is of no effect)
- *Tax Collection and Management (Wales) Act 2016, section 190(1B)* (www.legislation.gov.uk/anaw/2016/6/section/190) (if mistake or omission in notice such that its effect not reasonably ascertainable, notice to be treated as not having been issued)

13 Appeals against administrative decisions

This legislative solution provides a right for a person to appeal against a decision that has been made under a statutory scheme, such as a decision of a public authority to grant or refuse a licence, issue a notice or make an order. An appeal is usually made to a court or tribunal, but sometimes to a Minister, department or other person who is independent of the original decision-maker.

Description of the legislative solution

This legislative solution is concerned with appeals against administrative decisions, not with appeals against criminal convictions or against other judgments of the courts in criminal or civil proceedings.

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A right of appeal may be an important means of ensuring that a process is fair and compatible with procedural obligations arising under the European Convention on Human Rights. Lawyers will be able to provide advice as to when an appeal procedure may be required. In general, an appeal is more likely to be needed if a decision has a significant effect on a person's rights (e.g. their liberty, privacy, property or ability to carry on a business). Considerations of fairness and ECHR compatibility will also be relevant to the detailed questions in this legislative solution about the nature of the appeal.

Whether a right of appeal is required, and the nature of any appeal that is provided, will be affected by the adequacy of any other procedural safeguards in the decision-making process, because the question of fairness may be assessed by considering the process as a whole. An appeal may be particularly important if there is no chance for people to make representations before a decision is taken or confirmed.

A new right of appeal is likely to have impacts on the wider justice system, so it will be necessary to consider the impacts and associated costs and to consult accordingly.

A right to require the original decision-maker to review or reconsider its decision, or a system of alternative dispute resolution, may sometimes be provided instead of (or in addition to) a right of appeal. And in some cases the possibility of bringing a claim for judicial review of the original decision may be sufficient so that no provision for a right of appeal is necessary (although appeals may cover a wider range of grounds than can be raised in judicial review proceedings).

This legislative solution uses the following terms:

- appellant – a person who is appealing against a decision;
- appellate body – the tribunal, or other body or person, that receives and decides appeals.

Elements of the legislative solution

1. Which decisions can be appealed against?

1.1 Should there always be a right to appeal against decisions of the type in question, or should the right only arise if the decision has certain effects? For example, there might be a right to appeal against an order or notice only if it imposes particular types of restriction or obligation.

1.2 In the case of a decision that is made in response to an application, such as a decision whether to grant a licence, should the right of appeal attach only to certain types of decision that can be taken on the application? For example, should there be an appeal against a refusal of an application, but not against the granting of a licence? Should it be possible to appeal against the terms on which a licence is granted?

1.3 In cases involving applications, should the right of appeal depend on a decision being made, or should it also be possible to appeal against a failure to determine the application within a certain time?

2. Who can bring an appeal?

2.1 Should the right of appeal only be available to the person to whom the decision is addressed, such as an applicant whose application is refused or a person on whom a sanction is imposed?

2.2 Should other people who are directly or indirectly affected by a decision have a right of appeal? For example, if a decision has the effect of prohibiting an activity, should there be a right of appeal for anyone who has been carrying on that activity or intends to do so? What about people who are adversely affected by the fact that others can no longer carry on the activity?

2.3 Should other third parties have a right to appeal? For example, should a person who objects to the granting of a licence be able to appeal against the decision to grant it? Should such a right of appeal depend on the person having an interest that is affected by the granting of the licence, and if so, what kind of interest and what effect on it are required?

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3. On what grounds can an appeal be brought?

3.1 Should there to be any limits on the grounds on which appeals can be brought? Legislation may confer a right to appeal against a decision without specifying any limitations, but in some cases the grounds on which appeals may be brought are specified. For example, the grounds for appealing against a notice requiring compliance with a statutory requirement might include:

- that there has been no breach of the requirement in question;
- that any breach that has occurred has not had detrimental effects;
- that someone else was responsible for any breach that took place;
- that the steps required by the notice, or the deadline for taking them, are impossible or unreasonable;
- that the notice was not properly issued or served, or the notice or the procedure followed was defective in some other way.

3.2 In some cases, an appeal may only be brought on the ground that the decision was wrong as a matter of law, or on the grounds that can be raised on a claim for judicial review. For example, it may be appropriate to limit the grounds of appeal in this way if the original decision is made after factual evidence has been considered at a hearing or inquiry, or if it is a Ministerial decision in which policy considerations are likely to play a large part.

3.3 If the grounds of appeal are to be listed, care needs to be taken that potentially valid grounds are not inadvertently excluded. Note also that the grounds on which appeals may be brought will affect the procedures that are appropriate for dealing with appeals and the powers that the appellate body will need when it decides an appeal (see sections 6 and 8 below).

4. To whom must an appeal be made? And who is to determine the appeal?

4.1 Is there an existing tribunal, court or other body that is suitable to deal with the appeal (e.g. because it already deals with similar types of appeal or has relevant expertise)? If existing courts or tribunals are to be used, at what level in the court or tribunal system should appeals be considered (e.g. the county court or the High Court, or in Scotland the sheriff court or the Court of Session; the First-tier Tribunal or the Upper Tribunal)?

4.2 If appeals are to be made to Ministers[22], should Ministers deal with appeals themselves, or should they be required to appoint another person to deal with them? Should the role of an appointed person be to decide the appeal or just to report to Ministers so that they can decide? Should Ministers have the power to remove and replace appointed persons, or to take over the handling of particular appeals from them? Should there be any limit on who they can appoint?

[22] References to “Ministers” here mean the Secretary of State or another Minister of the Crown, the Scottish Ministers, the Welsh Ministers, or a Northern Ireland Department (as appropriate).

4.3 If no existing arrangements are suitable, should a new body or tribunal be created to deal with the appeals in question? Or should individuals or panels be appointed to deal with appeals on a case-by-case basis? If new arrangements are being created, what provision will be required for the establishment and administration of the new system? This might include provision about:

- the appointment of members of the appellate body (including any chair or presiding member);
- eligibility and qualifications for appointment to the appellate body;
- different categories of member (e.g. legal or professional members and lay members);
- duration and conditions of appointment;
- removal and resignation of members;
- remuneration and pensions of members;
- responsibility for funding the appellate body and providing administrative support (including staff);
- public accountability of the body (for example a duty to produce an annual report).

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4.4 The decision about who should receive and decide appeals may be influenced by a number of factors, including:

- who makes the original decisions that are appealed against;
- the expected number of appeals and nature of the issues they will raise (including any evidence that will need to be considered);
- whether using a particular appellate body will ensure fairness and ECHR compatibility;
- cost, efficiency and convenience (which may count in favour of using an existing appellate body rather than establishing a new one);
- relevant policies of the administration or legislature in question (e.g. policies that new appeals should be made to a particular tribunal).

5. Time limits and other requirements for bringing and responding to appeals

5.1 What rules should there be about how and when appeals can be brought, and about responding to appeals? If the appeal is to be made to an existing court or tribunal, there are likely to be general rules for proceedings in that court of tribunal that will apply by default to new proceedings that are added to its jurisdiction. In that case, consider whether there is already sufficient provision about bringing and responding to appeals in the existing rules, and whether any additional or different provision that is needed could be made under existing powers.

5.2 Should there be an automatic right of appeal, or should a person have to take other steps before exercising a right of appeal, such as requesting a review of the decision in question? Should an appellant require the permission of the appellate body to bring an appeal? A permission requirement might, for example, be used to determine whether a third party has a sufficient interest to appeal against a decision (see paragraph 2.3 above).

5.3 How much time should be allowed for bringing an appeal? Should it have to be brought within a particular period (e.g. a specified number of days) calculated by reference to when the decision is made or notice of it is given? Should an appeal have to be brought before something else has happened (e.g. before the decision has taken effect)?

5.4 Should the appellate body have the power to allow an appeal out of time, and should the power depend on particular conditions being met (such as the appellant showing a reasonable excuse for delay)?

5.5 Are there requirements relating to the way in which an appeal is to e initiated? Must a particular procedure or form be used, or must a notice of appeal contain particular information (e.g. the grounds on which the appeal is being brought)? Should any other information or documentation have to be provided when bringing an appeal (e.g. a copy of the original decision)? See also the **giving notice** legislative solution.

5.6 Should an appellant be required to pay a fee for bringing an appeal? If so, how will fees be set?

5.7 Should the original decision-maker be required to respond to the appeal? How much time should it be allowed for doing so? What must the response contain? Should the original decision-maker be required to provide any other documents or information?

5.8 If the intention is to set out the procedure for bringing an appeal or responding to it in subordinate legislation, what types of provision should it be possible to make about the procedure?

6. Procedures for dealing with appeals

6.1 What powers and procedures will the appellate body require for dealing with an appeal? If an existing appellate body is to deal with the appeal, are the powers and procedures of that body adequate or will they need amending to cater for the new rights of appeal?

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6.2 What case management powers should the appellate body have?

6.3 Should the appellate body be given powers to make interim orders before the appeal is decided? The nature of any powers will depend on the subject-matter of the appeal, but could potentially include matters such as requiring undertakings or payments into court, or prohibiting steps that would undermine the proceedings.

6.4 Should an appellant be free to withdraw an appeal, or should this require the agreement of the appellate body?

6.5 Will anyone other than the appellant and the original decision-maker be able to take part in the appeal? Will a person who wishes to intervene in the appeal require the permission of the appellate body? How and when should an application to intervene be made?

6.6 How should appeals be determined? Should there be a hearing in person or virtually, or will the appellate body be able to make decisions on the basis of written submissions alone? Should a party to the appeal be able to insist on a hearing?

6.7 If an appeal is to be determined at a hearing, who should be able to appear at the hearing? May parties be legally represented at hearings? Should experts or other witnesses be allowed to give evidence?

6.8 If the appellate body is to consider evidence, what types of evidence will it need to consider? Will it need powers to require witnesses to give evidence or produce information or documents? Will oral evidence have to be given on oath (or by affirmation)? Should there be any limits on the types of witness or evidence that can be called? Should witnesses be entitled to allowances for attendance? Should failure to comply with a requirement to give evidence be a criminal offence? (See the **criminal offences** legislative solution.)

6.9 Should appeal proceedings take place in public? Will the appellate body need powers to share information with certain persons for the purposes of the appeal? Will it need to handle sensitive evidence or vulnerable witnesses? Does it need powers to exclude public access to any of the evidence it receives (e.g. on grounds relating to national security, commercial sensitivity or personal safety), or to facilitate the giving of evidence by vulnerable people? Should there be powers to order that parties are not named, or to restrict the reporting or broadcasting of proceedings?

6.10 Is provision needed about service of documents issued by the appellate body and sent by the parties (including electronic service of documents)? See the **giving notice** legislative solution.

6.11 If the intention is to set out the procedure for dealing with appeals in subordinate legislation, what types of provision should it be possible to make about the procedure?

7. Effect of a pending appeal on the original decision and on other legal proceedings

7.1 What status should the original decision have during the period in which an appeal could be brought or while an appeal is being considered?

7.2 Should the decision only take effect once the period for appealing has expired without an appeal being brought, or any appeal has been dismissed or withdrawn? Or should it be possible for the decision to take effect despite the fact that an appeal is pending or could still be brought (and then continue in effect unless the appellate body overturns or amends it)?

7.3 If the original decision can take effect despite the fact that an appeal is pending or could be brought, should the appellate body have the power to suspend the effect of the decision until the appeal has been determined or withdrawn? Should it be able to do so on its own initiative or only on the application of the appellant?

7.4 These questions need to be considered especially carefully in the case of a decision to revoke a licence or impose a prohibition if the consequence of the revocation or prohibition is that a business cannot continue in operation.

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7.5 Should the decision-maker be able to withdraw or amend its decision while an appeal is ongoing? (Or in the case of an appeal against a failure to make a decision, should it be able to make a decision for the first time?) What effect should doing so have on the appeal proceedings?

7.6 If the subject matter of the appeal could be relevant to a matter in issue in a criminal prosecution or other legal proceedings, is provision needed to deal with the relationship between the appeal and those other proceedings? For example, should a criminal court be required to adjourn proceedings until the appeal has been determined?

8. Powers of appellate body when deciding appeal

8.1 What powers should the appellate body have when it decides the appeal? Should it only be able to confirm or set aside the original decision? Should it also be able to vary the original decision or correct errors in it? Should it be able to remit the matter to the original decision-maker for a fresh decision? Should it have the power to substitute its own decision, and if so, should it have to follow any requirements or procedures that apply to the original decision?

8.2 Should there be any limits on when the appellate body can exercise certain powers, or requirements for it to exercise those powers in particular circumstances? For example, it might have the power to set aside the original decision only if it is satisfied that there has been an error of law or fact, or it might be required to set the decision aside if it is satisfied that there has been such an error.

8.3 Should the appellate body determine the appeal only by reference to the circumstances at the time when the original decision was made, or should it be able to take account of a change in circumstances?

8.4 Should the appellate body have additional powers to give effect to a decision in favour of an appellant? Should it have the power to order the original decision-maker or anyone else to take action of any kind? If the effect of the original decision was not suspended pending the determination of the appeal, should the appellate body be able to award compensation to a person who has suffered loss as a result of the original decision? If so, should compensation carry interest?

8.5 Should the appellate body be able to award a party its costs of bringing or defending an appeal? Should any entitlement to costs depend on unreasonable conduct by the other party? An existing appellate body may already have powers to award costs.

8.6 Should the appellate body be required to publish or record the outcome in a particular way?

8.7 If the appeal is to an existing court or tribunal, some of these questions may already be addressed generally by the legislation that established it. And where there is provision for an appeal to a court under certain Northern Ireland legislation, section 22 of the Interpretation Act (Northern Ireland) 1954 makes general provision about the powers of the court in dealing with the appeal (including powers to remit cases and award costs).

9. Further appeals

9.1 Should a further appeal against the decision of the appellate body be possible, or should its decision be final?

9.2 If there is a further right of appeal, to whom will further appeals be made?

9.3 On what grounds will a further appeal be available? The possible grounds for bringing a second appeal are generally narrower than for the original appeal, and are often limited to points of law (as opposed to findings of fact or the exercise of discretion).

9.4 The answers to these questions may be governed by the decision about who deals with the original appeal; for example, if the original appeal is to the First-tier Tribunal, the default position is that a further appeal will lie to the Upper Tribunal on a point of law.

9.5 The considerations in sections 5 to 8 are also relevant to second appeals (although existing court or tribunal rules may already deal with some or all of those matters).

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10. Effect of appeals on future exercise of powers

10.1 Should the fact that a decision has been successfully appealed prevent another decision of the same kind being taken in relation to the same circumstances? This may be particularly relevant to enforcement action and orders imposing requirements or prohibitions. An absence of restrictions on repeated attempts to impose the same measures may raise ECHR issues.

Examples of the legislative solution

Provisions conferring rights of appeal

UK

- *Air Traffic Management and Unmanned Aircraft Act 2021* (www.legislation.gov.uk/ukpga/2021/12/contents), Schedule 1 and Part 2 of Schedule 2
- *Historical Institutional Abuse (Northern Ireland) Act 2019* (www.legislation.gov.uk/ukpga/2019/31/contents), section 16
- *Data Protection Act 2018* (www.legislation.gov.uk/ukpga/2018/12/contents), sections 162-164, Schedule 5
- *Space Industry Act 2018* (www.legislation.gov.uk/ukpga/2018/5/contents), Schedule 10, Parts 2-5
- *Energy Act 2016* (www.legislation.gov.uk/ukpga/2016/20/contents), sections 26, 36, 50-52, 58

Scotland

- *Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021* (www.legislation.gov.uk/asp/2021/15/contents), section 54 (review of redress payment determinations)
- *Social Security (Scotland) Act 2018* (www.legislation.gov.uk/asp/2018/9/contents), section 46 (appeal against Scottish Ministers' determination of entitlement)
- *Private Housing (Tenancies) (Scotland) Act 2016* (www.legislation.gov.uk/asp/2016/19/contents), section 28 (appeal to First-Tier Tribunal)

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Wales

- *Additional Learning Needs and Education Tribunal (Wales) Act 2018* (www.legislation.gov.uk/anaw/2018/2/contents), Part 2, Chapter 4
- *Public Health (Wales) Act 2017* (www.legislation.gov.uk/anaw/2017/2/contents), section 81 and Schedule 3, paragraphs 18-20
- *Tax Collection and Management (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/6/contents), Part 8
- *Environment (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/4/contents), section 73
- *Regulation and Inspection of Social Care (Wales) Act 2016* (www.legislation.gov.uk/anaw/2016/2/contents), sections 24, 26, 101-104, 145, 158
- *Qualifications Wales Act 2015* (www.legislation.gov.uk/anaw/2015/5/contents), sections 39, 42

Northern Ireland

- *Houses in Multiple Occupation Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/22/contents), section 67 to 69
- *Mental Capacity Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/18/contents), sections 246 to 248
- *Special Educational Needs and Disability Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/8/contents), sections 8 to 10, 13 and 14
- *Food Hygiene Rating Act (Northern Ireland) 2016* (www.legislation.gov.uk/nia/2016/3/contents), section 3
- *Local Government Act (Northern Ireland) 2014* (www.legislation.gov.uk/nia/2014/8/contents), section 60
- *Planning Act (Northern Ireland) 2011* (www.legislation.gov.uk/nia/2011/25/contents), sections 58 to 60, 78, 115, 143 to 145, 159, 165 and 173

Provisions establishing tribunals or other appellate bodies

UK

- *Data Protection Act 2018* (www.legislation.gov.uk/ukpga/2018/12/contents), Schedule 5, paragraph 4 (accreditation appeal panels)
- *Space Industry Act 2018* (www.legislation.gov.uk/ukpga/2018/5/contents), Schedule 10, Part 1 (spaceflight appeal panels)
- *Tribunals, Courts and Enforcement Act 2007* (www.legislation.gov.uk/ukpga/2007/15/contents), Part 1 (First-tier Tribunal and Upper Tribunal)
- *Enterprise Act 2002* (www.legislation.gov.uk/ukpga/2002/40/contents), section 12 and Schedule 2 (Competition Appeal Tribunal)

Scotland

- *Tribunals (Scotland) Act 2014* (www.legislation.gov.uk/asp/2014/10/contents), Part 1 (Scottish Tribunals)
- *Mental Health (Care and Treatment) (Scotland) Act 2003* (www.legislation.gov.uk/asp/2003/13/contents), section 21 and Schedule 2 (Mental Health Tribunal for Scotland)

Wales

- *Additional Learning Needs and Education Tribunal (Wales) Act 2018* (www.legislation.gov.uk/anaw/2018/2/contents), Part 3 (Education Tribunal for Wales)
- *Welsh Language (Wales) Measure 2011* (www.legislation.gov.uk/mwa/2011/1/contents), Part 7 (Welsh Language Tribunal)

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Northern Ireland

- *Planning Act (Northern Ireland) 2011* (www.legislation.gov.uk/nia/2011/25/contents), Part 9 (Planning Appeals Commission)
- *Charities Act (Northern Ireland) 2008* (www.legislation.gov.uk/nia/2008/12/contents), Part 3 (Charity Tribunal for Northern Ireland)
- *Special Educational Needs and Disability (Northern Ireland) Order 2005* (www.legislation.gov.uk/nisi/2005/1117/contents), Articles 21 to 24 (Special Educational Needs and Disability Tribunal for Northern Ireland)
- *Traffic Management (Northern Ireland) Order 2005* (www.legislation.gov.uk/nisi/2005/1964/contents), Articles 29 to 31 (traffic adjudicators)

Provisions about the conduct of appeals

UK

- *Space Industry (Appeals) Regulations 2021* (www.legislation.gov.uk/uksi/2021/816/contents/made)
- *Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) Regulations 2020* (www.legislation.gov.uk/uksi/2020/1087/contents/made), Schedule 5
- *Appeals to Traffic Commissioners (Procedure) (England) Regulations 2019* (www.legislation.gov.uk/uksi/2019/1264/contents/made)
- The First-tier Tribunal and Upper Tribunal each consist of a number of Chambers, with different sets of procedural rules for proceedings in different Chambers. These include:
    - *Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013* (www.legislation.gov.uk/uksi/2013/1169/contents)
    - *Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* (www.legislation.gov.uk/uksi/2009/1976/made)
    - *Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (www.legislation.gov.uk/uksi/2009/273/made)
    - *Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010* (www.legislation.gov.uk/uksi/2010/2600/made)
    - *Tribunal Procedure (Upper Tribunal) Rules 2008* (www.legislation.gov.uk/uksi/2008/2698/contents/made)

Up-to-date versions of the procedure rules for the First-tier Tribunal and Upper Tribunal are published on www.gov.uk

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Scotland

- *Valuation Appeal Committee (Procedure in Civil Penalty Appeals) (Scotland) Regulations 2020* (www.legislation.gov.uk/ssi/2020/382/contents/made)
- *Asset Transfer Request (Appeals) (Scotland) Regulations 2016* (www.legislation.gov.uk/ssi/2016/359/contents/made)
- The First-tier Tribunal for Scotland consists of a number of Chambers, with different sets of procedural rules for proceedings in different Chambers, and the Upper Tribunal for Scotland also has different rules for different types of appeal. The instruments containing the rules include:
    - *First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018* (www.legislation.gov.uk/ssi/2018/273/contents)
    - *First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* (www.legislation.gov.uk/ssi/2017/328/contents)
    - *First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2017* (www.legislation.gov.uk/ssi/2017/366/contents/made)
    - *Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018* (www.legislation.gov.uk/ssi/2018/274/contents/made)
    - *Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016* (www.legislation.gov.uk/ssi/2016/232/contents/made)

Wales

- *Education Tribunal for Wales Regulations 2021* (www.legislation.gov.uk/wsi/2021/406/contents/made)
- *Town and Country Planning (Referred Applications and Appeals Procedure) (Wales) Regulations 2017* (www.legislation.gov.uk/wsi/2017/544/contents/made)
- *Residential Property Tribunal Procedures and Fees (Wales) Regulations 2016* (www.legislation.gov.uk/wsi/2016/1110/contents/made)
- *Welsh Language Tribunal Rules 2015* (www.legislation.gov.uk/wsi/2015/1028/contents/made)

Northern Ireland

- *Historical Institutional Abuse Redress Board (Applications and Appeals) Rules (Northern Ireland) 2020* (www.legislation.gov.uk/nisr/2020/50/contents/made)
- *Charity Tribunal Rules (Northern Ireland) 2010* (www.legislation.gov.uk/nisr/2010/77/contents/made)
- *Traffic Management (Proceedings before Adjudicators) Regulations (Northern Ireland) 2006* (www.legislation.gov.uk/nisr/2006/421/contents/made)
- *The Deregulation (Model Appeal Provisions) Order (Northern Ireland) 1997* (www.legislation.gov.uk/nisr/1997/269/contents/made) sets out model provisions for appeals against enforcement action. Some Northern Ireland subordinate legislation which confers a right of appeal applies those rules – e.g. *Genetically Modified Organisms (Contained Use) Regulations (Northern Ireland) 2015* (www.legislation.gov.uk/nisr/2015/339/contents/made), regulation 31.

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Legislation, Justice and Constitution Committee

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Mick Antoniw MS
Counsel General and Minister for the Constitution

25 March 2022

Dear Mick

The outcome of the Intergovernmental Relations Review, the Welsh Government's response to the UK Government's legislative programme, and the Welsh Government's capacity to legislate: request for further information following the evidence session on 14 March 2022

We would like to thank you and your officials for giving evidence to us on 14 March 2022.

I mentioned at the close of the session that there were a number of questions that it was not possible to cover during the time we had with you. Furthermore, there are some matters which we did discuss during the session and which we would like to pursue further with you.

Please see the Annex for a full list of questions. We would be grateful to receive a response by 19 April.

In addition, thank you for the update you provided on the Welsh Government's response to date to the Court of Appeal's judgment on the legal challenge to the *United Kingdom Internal Market Act 2020*. We would be grateful if you would continue to keep us informed on any developments.

More broadly, we look forward to being kept updated about the implementation of the Intergovernmental Relations Review as per our Inter-Institutional Relations Agreement.

Yours sincerely,

Huw Irranca-Davies
Chair

Annex

Intergovernmental relations

1. You indicated that you hoped to discuss the implementation of the Intergovernmental Relations Review and the “situation in respect of UK legislation” at the first meeting of the Interministerial Standing Committee (IMSC) this month. You will have seen our letter to the First Minister (dated 22 March) and our request to be kept updated on progress following the first meeting. What are your priorities and expectations for the work of the IMSC?

2. How do you think the IMSC should approach oversight of the UK internal market and common frameworks? In particular:

- What consideration should the IMSC give to the reporting of the Office for the Internal Market?
- How will the IMSC ensure that discussions on balancing the opportunities and risks of regulatory divergence are open to parliaments and stakeholders?
- What is your response to the recent recommendation of the Scottish Parliament’s Constitution, Europe, External Affairs and Culture Committee that there should be agreement between the Scottish Government and Scottish Parliament that, as a minimum, there should be to no dilution of public consultation or of parliamentary scrutiny as a result of common frameworks and intergovernmental working?

3. We discussed the establishment of the Intergovernmental Relations Secretariat. Could you set out your expectations for what the size and grade composition of the secretariat should be? Given the key role of the secretariat to the functioning of the new tiers of intergovernmental working and, not least, the dispute resolution processes, we would be grateful too if you could keep us updated on the establishment of the secretariat.

4. As discussed during the session, we were concerned to note the statement made by the Minister for Economy on 10 March that the first meeting of the UK-EU Relations Interministerial Group (IMG) was called with only two hours’ notice. You expressed a hope that these were “early teething troubles”. How will the Welsh Government seek to ensure future meetings of IMGs are called with reasonable notice?

5. Can you set out how the Interministerial Group for the TCA will interact and communicate with forums established by the TCA? For example, will it coordinate its meeting schedule to align with TCA meetings?

6. We discussed whether the new intergovernmental structures provide for sufficient Welsh Government involvement in international policy. Can you set out your understanding of

how the IMSC and the various interministerial groups will work together to provide four-government oversight of international policy?

7. We discussed the new intergovernmental dispute resolution process. Could you confirm whether the Welsh Government has, or will have, internal criteria for deciding how and when to seek escalation of matters through the new intergovernmental dispute resolution process? If such criteria exist, please can you provide us with the details?

8. We briefly discussed the UK Government's intention to proceed with the Professional Qualifications Bill despite legislative consent not being given by the Senedd and the Scottish Parliament. As noted by the Minister for Education and Welsh Language in his letter to us on 8 March, and as you acknowledged during the meeting, this is a breach of the legislative consent convention. It was not clear from the session whether you consider this matter, or any similar matter in the future, would be taken through the new dispute resolution processes by the Welsh Government. We would welcome clarity on this point.

9. You described the revised dispute resolution process as a "massive improvement" and "groundbreaking". How will you monitor how well new intergovernmental processes are working, and what action will you take if you feel they are not being followed?

Making laws for Wales

10. In a letter to us on 17 January 2022, you set out that there is a need to balance "defend[ing] the current devolution settlement so far as possible and the principle that we should legislate ourselves here in Wales, with opportunities that may arise to improve the law for citizens of Wales." How does the Welsh Government weigh up the conflicts between these factors?

11. How is the Welsh Government's decision to seek consent for UK bills in devolved areas such as leasehold reform and building safety compatible with the Welsh Government's principle that primary legislation in devolved areas should be enacted by the Senedd?

12. Can you clarify the statement you made in Plenary on 15 February 2022 that the number of legislative consent memoranda is not "within the choice of the Welsh Government"?

13. The Minister for Education and Welsh Language sought an amendment to the Professional Qualifications Bill to the effect that the powers in that Bill cannot be used by UK Ministers to make regulations that amend the *Government of Wales Act 2006*. In contrast, the Minister for Health and Social Services has not pursued a similar amendment to an equivalent enabling power in the Health and Care Bill. What are your views on the two opposing approaches, and which of these approaches is compatible with the Welsh Government's principles for UK bills?

14. What steps is the Welsh Government taking to move forward with reform of the legislative consent process as set out in Proposition 5 of Reforming our Union: Shared governance in the UK?

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25 April 2022

Dear Huw,

Thank you for your letter of 25 March 2022 regarding the Cultural Objects (Protection from Seizure) Bill. I am happy to give the Legislation, Justice and Constitution Committee more information regarding the Bill and the eventual removal of the application of the provisions for Wales.

This Private Members' Bill by Mel Stride MP, and sponsored by the Department for Digital, Culture, Media and Sport (DCMS), contains provisions which amend an existing Act (the Tribunals, Courts and Enforcement Act 2007), and as introduced, contained provisions falling within the devolved competence of the Senedd and included a concurrent power. As a Private Members' Bill, the Parliamentary timetable for the Bill was less structured and it progressed at pace.

The concurrent power would have affected the Senedd's powers to make legislation in this area in the future, due to the fact that Minister of the Crown consent would be required to remove the concurrent function. The power can be considered to be practically necessary to ensure an object on loan from abroad is protected from seizure in specific circumstances, and that the authority best placed to exercise the power can do so. However as you know, the Welsh Government's position, as set out in the *Guidance on principles on concurrent powers in UK Bills*, emphasises a presumption against making new concurrent powers in devolved areas. Therefore, in line with the Welsh Government's policy approach, my officials asked the UK Government officials for an amendment to the Bill, so that it included a provision which would provide a carve out from the application of paragraph 11(1)(a) of Schedule 7B to the Government of Wales Act 2006.

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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.

I have provided a full, detailed outline of the timeline of discussions between myself, my officials and our counterparts in UK Government and DCMS (see appendix A). This timeline demonstrates our significant efforts to ensure an outcome where Wales was included in the Bill, and the devolution settlement protected. The discussions held between officials were not minuted, but I have attached the formal correspondence between myself and Mel Stride MP (appendix B and C).

You mentioned, the new intergovernmental machinery. Welsh Ministers will give further thought to managing the escalation of disagreements as disputes through the new intergovernmental relations machinery. There are no current plans to escalate any disagreement as a dispute. Of course, this would be a big step to take and should only be taken as a last resort, when all attempts to avoid this action have been exhausted.

I am copying this letter to Elin Jones MS, Y Llywydd, Delyth Jewell MS, Chair of the Culture, Communications, Welsh Language, Sport and International Relations Committee and Mick Antoniw MS, Counsel General and Minister for the Constitution.

Yours sincerely,

Dawn Bowden AS/MS
Dirprwy Weinidog y Celfyddydau a Chwaraeon, a’r Prif Chwip
Deputy Minister for Arts and Sport, and Chief Whip

Appendix A - Timeline of key communication regarding Cultural Property (Protection from Seizure) Bill

Date	Activity Description
10 August 2021	Letter received from UK Government Minister of State for Digital and Culture. Provides an introduction to the Bill and a draft copy of proposed legislation.
17 August 2021	Officials from Welsh Government Culture Division meet with DCMS. Receive high level explanation of Bill's content and how its provisions are proposed to work in practice.
19 October 2021 & 1 November 2021	Officials from Welsh Government Culture Division correspond with DCMS to explore the concurrent power specifically.
17 November 2021	Bill passed Commons Committee Stage with no amendments.
2 December 2021	Officials from Welsh Government Culture Division correspond with DCMS to request a carve out is inserted into the Bill.
3 December 2021	DCMS respond requesting an explanation of why Welsh Government believe there are strong reasons for a carve out being necessary, and how the existing policy would suffer without it.
8 December 2021	Welsh Government officials respond to DCMS, confirming rationale for requesting the carve out: to ensure that the Bill works in the way intended and ensuring the protection of cultural objects, while ensuing the devolved competence of the Senedd is not limited.
10 December 2021	Legislative Consent Memorandum (LCM) laid in relation to the provisions of the Bill which fall within the legislative competence of the Senedd, but Deputy Minister reserves the decision on recommending consent to the concurrent power provision following the outcome of discussions with UK Government. https://senedd.wales/media/lmokqhx3/lcm-ld14761-e.pdf https://senedd.cymru/media/io1jugod/lcm-ld14761-w.pdf
22 December 2021	DCMS respond to Welsh Government officials reply of 8 December. This response, agreed by DCMS, the Wales Office and the Cabinet Office, sets out that UK Government consider a carve out unnecessary and why UK Government did not believe the proposals would limit the competence of the Senedd. The reasons cited however, focussed around the practicalities of ensuring any object is protected throughout the UK and that the purpose of giving each national authority the power to grant UK-wide protection is one of convenience, so that each national authority does not need to exercise the power separately, and to ensure that there are no gaps in protection if the object is travelling through the UK. The response does not address the issue of Senedd competence.

10 January 2022	Welsh Government officials meet with DCMS to reiterate that the purpose of the carve out would be to maintain the status quo in relation to the Welsh devolution settlement. Welsh Government officials emphasise that the carve out would not remove the concurrent power or prevent the powers in the Bill being used to protect an object in the way intended. Instead, a carve out would ensure that legislative competence is protected as has occurred with other carve-outs (for example the Environment Act 2021). DCMS officials inform Welsh Government officials that the UK Government Minister of Arts had decided either Welsh Government agrees to the Bill proceeding as it is currently drafted, or the Bill will be amended to remove Wales from the Bill. DCMS asked for clarification of Welsh Government's stance by 17 January so it had time to redraft the Bill to remove Wales, in preparation for the Bill's Report stage in the House of Commons on 28 January.
11 January 2022	Deputy Minister attends four nations Culture Ministers' meeting. Lord Parkinson raised the Private Members' Bill on cultural objects. Deputy Minister reiterates Welsh Government stance that it supports the general policy of the Bill but that an appropriate carve outs are required to protected legislative competence, again citing recent examples.
17 January 2022	Deputy Minister for Arts and Sport and Chief Whip briefs First Minister.
17 January 2022	Deputy Minister Deputy Minister for Arts and Sport and Chief Whip Letter to Mel Stride MP (see appendix B), copied to Lord Parkinson of Whitley Bay, Parliamentary Under Secretary of State (Minister for Arts), the Rt Hon Simon Hart MP, Secretary of State for Wales and the Rt Hon Steve Barclay MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, to reiterate the Deputy Minister's request that an amendment is made to the Bill to include a carve out from the application of paragraph 11(1)(a) of Schedule 7B to the Government of Wales Act 2006.
19 January 2022	Reply received from Mel Stride MP (see appendix C) to the Deputy Minister for Arts and Sport and Chief Whip. Informs that the application of the Bill to Wales will be removed if the Welsh Government does not recommend the Senedd agrees to the Bill as drafted.
20 January 2022	Officials update to First Minister.
24 January 2022	Welsh Government Deputy Director Culture corresponds with DCMS Deputy Director Museums and Cultural Property, requesting, that the

	Bill is not amended before its third reading in the Commons. This would ensure that all possible solutions are explored and the resulting Ministers' decisions could then be incorporated in a final amendment when the Bill is in the House of Lords.
24 January 2022	DCMS Deputy Director responds with the belief that it would not be possible to do as suggested, as the timescales in the Bill's progression through the parliamentary process would not enable any amendments made in the Lords to go back to the Commons prior to the end of the current Parliamentary session.
24 January 2022	DCMS Director for Arts, Heritage and Tourism corresponds with Welsh Government Director, Culture, Sport and Tourism. Reiterates that the choice remains either to remain with the current drafting or be removed.
25 January 2022	Welsh Government Director, Culture, Sport and Tourism responds to DCMS Director for Arts, Heritage and Tourism, emphasising that the Bill as drafted contravenes Welsh Government's principles on concurrent powers and is why a carve out was necessary as with similar recent Bills. He argues that this more broadly highlights the need for devolved governments to be included in the drafting stages of any UK-wide Bill to advise and tease out such issues sooner, which would have been especially helpful in regard to this Bill, given its tight timescales to take through the Parliamentary process.
25 January 2022	Deputy Minister for Arts and Sport and Chief Whip letter to Mel Stride MP (see appendix D), copied to Lord Parkinson of Whitley Bay, Parliamentary Under Secretary of State (Minister for Arts), the Rt Hon Simon Hart MP, Secretary of State for Wales and the Rt Hon Steve Barclay MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office. Deputy Minister reiterates need for a carve out and expresses her disappointment that an amendment would be tabled to remove Wales from the Bill, but not to insert a carve out.
28 January 2022	Third Reading and Report Stage in the House of Commons. Wales and Northern Ireland removed from the Bill's provisions.
28 January 2022	Letter from Mel Stride MP to Deputy Minister for Arts and Sport and Chief Whip (see appendix E) confirming an amendment had been tabled to remove Wales from the Bill.

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25 January 2022

Dear Mel Stride,

Thank you for your email, received 19 January, confirming your stance regarding the Cultural Objects (Protection from Seizure) Bill.

I would be willing to meet with you and the Parliamentary Under Secretary of State (Minister for Arts) to discuss this matter urgently.

I am naturally disappointed by the refusal to include such an amendment, and am surprised that there is a willingness to amend the Bill to remove Wales, but not to amend the Bill to add the carve out. This is especially surprising as several recent Bills have included this carve out. I also note your concern of the risk to the timely progression of the Bill. I would argue that amending the Bill to remove Wales would pose a greater risk to its substance and progression, as it would in all likelihood lead to an amendment being tabled by MPs or Members of the House of Lords to ensure Wales is included in the territorial extent of the Bill.

I reiterate the Welsh Government's stance. If the Bill does include a concurrent function we wish Wales to be included in an amended Cultural Objects (Protection from Seizure) Bill that includes the required carve out from the application of paragraph 11(1)(a) of Schedule 7B to the Government of Wales Act 2006.

That said and given that we appear to have reached an impasse so far on this matter have revisited the proposed amendments to consider further whether there is any alternative solution. In light of this I am aware that there have been further discussions over the last few days between my officials and DCMS officials questioning whether the proposed amendments as currently drafted do in fact create a concurrent function. It is r

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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.

arguable that the proposed amendments have not created a concurrent function of the nature that you describe but instead creates a number of complementary geographically based functions vested in Ministers of the 4 governments within the UK. This is a complex area. If correct this might offer a solution in that a technical amendment to proposed subsection (4C) to remove the reference to concurrence and to make it clear that subsection (4C) only has effect to make it clear that the respective relevant authorities' functions can be exercised simultaneously in respect of the same object at the same time might allow us to break this impasse.

Whilst I understand the desire is not to table amendments to the Bill in the Lords my principal focus is to ensure that the Bill properly reflects and respects the devolution settlement.

I am copying this letter to Lord Parkinson of Whitley Bay, Parliamentary Under Secretary of State (Minister for Arts), the Rt Hon Simon Hart MP, Secretary of State for Wales and the Rt Hon Steve Barclay MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office.

Yours sincerely,

Dawn Bowden AS/MS
Dirprwy Weinidog y Celfyddydau a Chwaraeon, a'r Prif Chwip
Deputy Minister for Arts and Sport, and Chief Whip

CC
Lord Parkinson of Whitley Bay, Parliamentary Under Secretary of State (Minister for Arts)
The Rt Hon Simon Hart MP, Secretary of State for Wales
The Rt Hon Steve Barclay MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office

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Dirprwy Weinidog y Celfyddydau a Chwaraeon, a'r Prif Chwip
Deputy Minister for Arts and Sport, and Chief Whip

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA-DB-0087-22

Mel Stride MP
House of Commons
London
SW1A 0AA

mel.stride.mp@parliament.uk

17 January 2022

Dear Mel Stride,

I write regarding the Cultural Objects (Protection from Seizure) Bill. My officials have been in contact with those in DCMS regarding our request for an amendment to the Bill. I am copying Lord Parkinson of Whitley Bay, Parliamentary Under Secretary of State (Minister for Arts) who is aware of the following points as they were raised at a meeting of the four nations' culture ministers on 11 January.

The Bill contains a concurrent power at the proposed new subsection (4C)(b).

I acknowledge that overall the Bill's provisions are sensible, important and address recognised weaknesses in the current scheme. Ensuring that the provisions in the Bill apply to Wales will safeguard parity of cultural access to international loans for the public across all four nations of the UK. It is not our intention to depart from the arrangements proposed.

As currently drafted, the concurrent power affects the Senedd's powers to make legislation in this devolved area in the future.

Our position on concurrent powers is that there is a presumption against making new concurrent powers in devolved areas. If concurrent powers are created, then a carve out should apply so that no consent would be required to remove them.

I request that an amendment is made to the Bill, so that it includes a provision which would provide a carve out from the application of paragraph 11(1)(a) of Schedule 7B to the Government of Wales Act 2006.

A carve out would be created by including a provision in the Bill which amends paragraph 11(6) of Schedule 7B of the Government of Wales Act 2006. Numerous Acts of Parliament include carve outs and an example can be found in section 141(3) of the Environment Act 2021. A carve out would ensure Wales and Scotland are treated with parity in relation to the Bill.

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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.

I recognise that in the scenarios covered by the Cultural Objects (Protection from Seizure) Bill, the concurrency would ensure the protection of objects while in the UK; however, the carve out would allow this while ensuring the devolved competence of the Senedd is not limited.

I strongly advise, in order for the Senedd to consider agreeing its consent to provision falling within its legislative competence being included in the Bill, a carve out is necessary.

I am copying this letter to Lord Parkinson of Whitley Bay, Parliamentary Under Secretary of State (Minister for Arts), the Rt Hon Simon Hart MP, Secretary of State for Wales and the Rt Hon Steve Barclay MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office.

Yours sincerely,

Dawn Bowden AS/MS
Dirprwy Weinidog y Celfyddydau a Chwaraeon, a'r Prif Chwip
Deputy Minister for Arts and Sport, and Chief Whip

CC
Lord Parkinson of Whitley Bay, Parliamentary Under Secretary of State (Minister for Arts)
The Rt Hon Simon Hart MP, Secretary of State for Wales
The Rt Hon Steve Barclay MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**Update on Border Controls**
DATE	**28 April 2022**
BY	**Vaughan Gething MS, Minister for Economy**

I made a statement to the Senedd in January about UK Government's plans for documentary, identity and physical checks on goods at border control posts from 1 July 2022, and how we planned to implement those in Wales.

Last night, I attended a meeting with UK and Devolved Government ministers, called at very short notice, at which we were informed that the UK Government would be making an announcement today to suspend the introduction of further border controls until the end of 2023. The UK Government expect a technology solution to be introduced at that point.

At this stage, I have no further detail, other than to refer members to the statement made in Westminster.

This announcement raises a number of questions, about biosecurity but also for exporters, which my officials will be pursuing urgently. I intend to make a further statement as soon as possible.

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

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies
Chair
Legislation, Justice and Constitution Committee
Welsh Parliament
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SeneddLJC@senedd.wales

03 May 22

Dear Huw,

Thank you for your letter about the electoral pilots taking place during the local government elections in May 2022. I am responding as Minister for the Constitution and I am happy to provide the additional information requested by the Committee.

What support will be provided to the relevant local authorities to enable the pilots to be successful?

The pilots were developed by the four pilot authorities in collaboration with the Welsh Government, and with input from the Electoral Commission and the wider electoral community. Welsh Government coordinated the preparation of the necessary legislative and software changes, additional training, guidance and checklists to enable the Elections Teams deliver the pilots successfully. The pilots were funded by Welsh Government – the estimated costs are £1,451,322 which includes funding for staffing, venue hire and investment in Electoral Management Systems.

How they will be implemented in practice?

Local Authorities are delivering the pilots alongside the main election. All four include an advance voting centre (AVC), which are polling stations for the purposes of advance voting and operate in a very similar way. Bridgend also have advance voting in wards with low turn-out, in a familiar polling station model. The key difference is in the use of electronic devices in AVCs and some polling stations to facilitate administration. The electronic device links to the electronic register where the voter is identified, allocated the correct ballot papers, marked off the register, assigned a number on the corresponding number list and directed to a booth to cast their vote as normal. Administrators have been given additional training on the new software and processes.

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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.

How they will be monitored?

A governance structure was put in place at the start of the Programme to monitor delivery. A Programme Board of Welsh Government officials and the senior sponsor from the pilot authorities was responsible for strategic monitoring. A Stakeholder Reference Group with representatives from key stakeholders including the Electoral Commission, Welsh Electoral Coordination Board, the Association of Electoral Administrators, One Voice Wales and the Welsh Local Government Association provided expertise and support during the design phase. Regular meetings with electoral administrators and software providers took place to monitor progress and mitigate risks in relation to technical and operational delivery.

How they will be evaluated following the elections?

The Electoral Commission is required by law to evaluate every electoral pilot scheme undertaken in England and Wales. The Commission are carrying out online surveys and interviews with voters and electoral administrators as part of the evaluation of the pilots in Wales. They will aim to publish their report within three months of the election and we will take account of their findings in determining the next steps in delivering our Programme for Government commitment to reform local government elections to reduce the democratic deficit.

An overview of the pilots are included in Annex A for information.

Yours sincerely,

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

Overview of Electoral Pilots Annex A

1. Electoral Pilots are taking place in four local authorities across Wales during the local government elections in May 2022. The pilots programme is looking to do new things, in new ways. The purpose of the schemes is to see if we can make it easier for people to vote by offering flexibility on when and where you can vote. The scheme will bring the ballot box closer to people's day to day lives.

2. The local authorities are:

- **Blaenau Gwent** – the centrally-located Ebbw Vale Learning Zone will be used as an advance polling station for all residents of the county, including students of the college. Advance voting will be available **on Tuesday 3 and Wednesday 4 May 22, opening between 8 a.m. and 4 p.m**.

- **Bridgend** - polling stations in certain low turnout wards will be open for advance voting on **Tuesday 3 and Wednesday 4 May 22, opening between 7 a.m. and 9 p.m**. These wards are:
  - Brackla East and Coychurch Lower,
  - Brackla East Central,
  - Brackla West,
  - Brackla West Central,
  - Cornelly,
  - Pyle, Kenfig Hill and Cefn Cribwr, and
  - St Bride's Minor and Ynysawdre.

  A new polling station is also being created at Cynffig Comprehensive School for registered students. This will be open between **8:30 a.m. and 4:30 p.m. on Tuesday 3 May 2022**

- **Caerphilly** – the council offices at Ystrad Mynach will be used as an advance polling station for all residents of the county. Advance voting will be available on **Saturday 30 April and Sunday 1 May opening between 10 a.m. and 4 p.m**.

- **Torfaen –** the council offices at Pontypool will be used as an advance polling station for all residents of the county Advance voting will be available on **Saturday 30 April and Sunday 1 May opening between 10 a.m. and 4 p.m**.

3. The advance voting centres (AVC) are polling stations like any other and all the same rules that apply to a polling station on normal Election Day will apply. Everything is the same unless something has been explicitly changed in the Orders that underpin the pilots. This includes rules around canvassing, the tellers outside of the polling station and how polling agents can interact with voters. This will be enforced as normal by the polling clerks within the AVC.

4. There are however a few things that may be different in an AVC. In the centrally located AVC, there may be multiple polling areas to funnel voters to their specific ward.

5. The use of electronic devices in AVCs and polling stations is new, they will speed up the administrative process, for voters and officials alike, whilst ensuring the security of the voting process is maintained. It is likely that there will be a QR code on the polling card that the voter could present to the polling clerk on entering the AVC (voters can still attend a polling station or an AVC without their polling card). This will be scanned and will link to the electronic register where the voter will be identified and then given the correct ballot papers. They will be marked off the register, assigned a number on the

corresponding number list and they will be asked to make their way to a booth to cast their vote as normal.

6. As the register and the corresponding number list (CNL) will be kept electronically, there may be a difference in the process for sealing documents. At the close of advance voting day one (AV1), these documents will not be sealed as they will used on advance voting day two (AV2). At the close of AV2 the documents will be printed and sealed. This may take place at the AVC, or at another location that the Presiding Officer considers appropriate. The PO must give polling agents advance notice of the intention to seal the CNL at another location and give them the opportunity to be present.

7. The ballot boxes in the AVC may be used over the two days that the AVC will be open. As a result, the process for sealing the ballot box at the close of AV1 may be different to normal. It is expected that the letterbox opening at the top of the ballot box will be sealed (with security tags and any seal of agents present) and the boxes kept securely overnight in their civic centres. The numbers will be recorded on a ballot box record sheet. The ballot boxes would then be brought back to the AVC for AV2 and the seals at the letterbox opening (and any seals of agents) removed and the ballot box would be open for the whole of AV2. Again, at the close of AV2 the letterbox opening would be sealed using the security tags (and any agent's seals) and again the numbers recorded as such.

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Legislation, Justice and Constitution Committee

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Rebecca Evans MS
Minister for Finance and Local Government

1 April 2022

Dear Rebecca,

Electoral pilots in the forthcoming local government elections

Thank you for your letter dated 23 March which outlined the legislation you have made to enable electoral pilots during the local government elections in May 2022.

We would be grateful to receive further information about these pilots, specifically:

- what support will provided to the relevant local authorities to enable the pilots to be successful;
- how they will be implemented in practice;
- how they will be monitored; and
- how they will be evaluated following the elections.

I am copying this letter to the Chair of the Local Government and Housing Committee and the Chair of the Llywydd's Committee.

Yours sincerely,

Huw Irranca-Davies
Chair

Senedd Cymru
Welsh Parliament

By virtue of paragraph(s) vi of Standing Order 17.42

Agenda Item 10

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Document is Restricted

MANAGING REGULATORY DIVERGENCE BETWEEN WALES AND THE REST OF THE UK POST-BREXIT

Report for Senedd Cymru/Welsh Parliament, Professor Jo Hunt, Cardiff University School of Law and Politics, Wales Governance Centre

April 2022

Introduction:

This report considers the legal and policy constraints on the exercise of competence by Senedd Cymru and the Welsh Government post-Brexit, in the fields formerly covered by EU law. The scope of devolved powers has been impacted by the process of withdrawal from the EU. Brexit has marked the end to the primacy of EU law in the UK order,[1] and an end to its role as a check on what Senedd Cymru and Welsh Ministers can lawfully do.[2] With certain exceptions,[3] the body of EU law operating at a domestic level during the period of EU membership is carried forward and redesignated EU retained law, and a distinctive status afforded to this law.[4] For a time-limited period, any 'deficiencies' in retained EU law can be amended using delegated powers under the **EU (Withdrawal) Act 2018**.[5] More substantive policy changes[6] can be introduced through either primary or secondary legislative powers, though for some forms of direct retained EU law, there are restrictions on the secondary legislative powers that can be used. The starting point is nevertheless now one of the Welsh Ministers and Senedd Cymru having competence to determine policy in those devolved areas previously covered by EU law. That competence is however limited both de facto and de jure through a range of constraints. The sources and extent of these constraints are considered below. In turn, they include those written into the **Government of Wales Act**, marking a re-settlement of

[1] Except for the continued supremacy of EU retained law over pre, but not post-exit domestic law, see s. 5(2) EU (Withdrawal) Act 2018. New, post-Implementation Completion Day domestic legislative enactments may therefore overturn existing retained EU law provisions.
[2] Previously, GOWA 2006 s. 108 made EU law a constraint on Senedd competence, and s. 80 a constraint on Ministers' powers.
[3] Exclusions include the EU Charter of Fundamental Rights.
[4] In addition to its (limited) supremacy, retained EU law is distinctive in that there are limitations on the powers of courts (below the Court of Appeal) to diverge from case law authorities (both UK and Court of Justice of the EU) dating from the UK's membership. Additionally, retained EU law which derives from directly applicable regulations, and were recognised in UK law on that basis rather than having been transposed into UK primary or secondary law, is referred to as 'direct' retained EU law, and is neither primary not secondary legislation. This law then has a unique status in UK law (see section 7 EU (Withdrawal) Act 2018.
[5] Section 8, EU (Withdrawal) Act, 2018. These correcting powers run for two years from the end of the Implementation Period, until 31 December 2022, and are extended to the devolved governments under Schedule 2 of the Act.
[6] As has been reported by inter alia Public Law Project's SIFT Project, the 'deficiency correcting' powers under s. 8 EU (Withdrawal) Act have been used to effect substantive policy change (see A. Sinclair and J. Tomlinson 'Plus ca change? Brexit and the Flaws of the Delegated Legislation System' https://publiclawproject.org.uk/content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf), though this is arguably goes beyond the scope of the correcting powers.

devolved powers (flowing from both the **EU (Withdrawal) Act 2018** and the **UK Internal Market Act 2020**); international law commitments entered into by the UK; and political commitments made to cooperate through the Common Frameworks process. Post-Brexit primary and secondary legislation in a range of policy fields has also bitten into powers of Welsh Ministers, impacting on their capacity to make decisions for Wales. Perhaps as a result of the urgency with which some of this legislation has been passed, there are inconsistencies and incompatibilities between these post-Brexit legal provisions, resulting in a profoundly complex governance terrain.

Retained EU law and Regulatory Alignment:

HM Government has undertaken a range of activities to scope out how best to use its regulatory autonomy having left the European Union. These include the work of the Sir Iain Duncan-Smith chaired Taskforce on Innovation, Growth and Regulatory Reform (TIGRR), reporting in June 2021, and the establishment of the Brexit Opportunities Unit, under the direction of Jacob Rees-Mogg. Areas identified by TIGRR where the UK may develop different policies from those of the EU include financial services, data protection, AI, and transport technologies (including autonomous vehicles). More generally, in September 2021, HM Government announced a review into both the substance and the status of retained EU law, and the intention 'eventually to amend, replace, or repeal all the retained EU law that is not right for the UK'.[7] Subsequently, the **Brexit Freedoms Bill** has been announced as a vehicle to make it easier to 'amend or remove 'outdated' EU retained law'. HM Government presents this as part of a drive it says will 'cut £1billion of red tape for UK businesses'. The Bill advocates a 'proportionate, rather than precautionary' approach to regulation – marking a potential break with the approach to regulation adopted by the EU. This raises the prospect of regulatory divergence developing between UK and EU. The extent of any legal constraints on such divergence is considered below (ii), however, it is recognised that whatever policy objectives lie behind adopting different policies from the EU, any resulting divergence can, as the OECD recognises, result in costs to businesses, which may hinder trade. These include information costs (involved in scoping the relevant regulatory regimes), specification costs (the costs of complying with different product regulations) and conformity assessment costs (ensuring that necessary proof of compliance with standards is obtained).[8]

In areas falling within devolved competence, the choice for Welsh Government includes moving in alignment with any new Westminster rules, maintaining alignment with the retained EU rules, aligning with any newly adopted EU rules, or indeed, setting a different standard for Wales. Emerging active regulatory divergence between the UK and EU[9] has to date been seen in the fields of agriculture and the

[7] Lord Frost, Statement to the House of Lords, 16 September 2021.

[8] OECD, *International Regulatory Co-operation and Trade: Understanding the Trade Costs of Regulatory Divergence and the Remedies*, 2017, pp. 16-17.

[9] The think-tank UK in a Changing Europe are operating a regulatory divergence tracker, which categorises UK/devolved action as 'active divergence' where new laws replace/amend EU retained law; 'passive divergence' where the EU legislates but the UK/devolved law does not follow suit, and

environment, including on agricultural subsidies (where there will be internal variation in schemes across the UK),[10] and genome editing of food crops, where England is set to remove such genome editing that could occur naturally or through conventional breeding from the scope of GMO regulation.[11] This has already been done for field trials of such crops.[12] Whilst there is an expectation for UK divergence which is deregulatory in comparison with EU standards, this is not reflected in all regulatory activity – see the more stringent rules banning the export of livestock for slaughter under Westminster legislation, the **Animal Welfare (Kept Animals) Bill**. In 2021, Welsh Government sought and obtained legislative consent for the UK Bill to operate for Wales, welcoming it as a timely opportunity to progress the law, and for ensuring 'absolute clarity for enforcement agencies, the Courts and the public'.[13]

As well as determining whether to follow new UK legislation which diverges from retained EU law, the devolved legislatures need also be aware that retained law may itself no longer reflect the current EU law position on an issue, as existing EU law is revised or replaced by the EU legislative bodies. Within areas of devolved competence, the issue of whether or not to align with this new EU rule can then arise. Northern Ireland is required to align with EU law on a range of market and related matters under the NI Protocol[14] with over 300 EU acts identified as applying to NI at the point at which the Protocol entered into force. Unlike retained EU law, this list of EU measures is not static, and modifications, as well as new EU law in affected areas will apply for Northern Ireland. For example, the applicable regulations on organic products applicable to Northern Irish producers is the revised Regulation 2018/848, whilst the rest of the UK continues to operate the retained EU law provisions which reflected the earlier regulatory regime[15]. Under the Protocol, planned new (rather than amending) legislation within scope should be notified to the UK through the relevant Joint Consultative Working Group, and the adopted legislation shared with the Withdrawal Agreement Joint Committee, which will add it to the list of measures applying to Northern Ireland. Not accepting such new laws can ultimately result in the EU taking remedial measures. Scrutiny of EU measures within the scope of the Protocol is undertaken by the Commons European Scrutiny Committee, and the Protocol Sub-Committee of the House of Lords European Affairs Committee, along with the relevant committees of the Northern Ireland Assembly. The Protocol sub-committee has called for greater detail in the explanatory

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'procedural divergence' in the case of new systems required to replace those previously managed through EU agencies and institutions.

[10] There are distinctive policy approaches emerging, with at one end the public money for public goods model (for England- see Agriculture Act 2020,) and at the other, a model which incorporates payments on the basis of area of land farmed, designed more as income support (see Scotland) https://www.instituteforgovernment.org.uk/explainers/agriculture-subsidies-after-brexit

[11] DEFRA (2021), Genetic technologies regulation: Government response.

[12] The GMO (Deliberate Release) (Amendment) (England) Regulations 2022, laid 20 January 2022.

[13] LCM, Animal Welfare (Kept Animals) Bill, June 2021, para 137. A Supplementary LCM was laid in January 2022 (and subsequently revised and resubmitted) to reflect amendments made to the Bill by the house of Commons in November 2021.

[14] Including customs, technical regulations, vat and excise, state aid, single market in electricity, NI Protocol, Articles 5-10.

[15] Council Regulation 834/2007 and Commission Implementing Regulation 889/2009, retained under the EU (Withdrawal) Act provisions, and subsequently subject to amendments, most recently for Wales by the Organic Production and Control (Amendment) (EU Exit) Regulations (last amended October 2020).

memoranda (EM) that accompany proposals for amending/replacement EU laws, which are deposited by the UK Government; as well as the automatic lodging of EM relating to new EU regulations. In particular, they have asked for the routine inclusion of information about the response of the different governments of the UK to the proposal, as well as whether the measure will result in regulatory divergence, and if so, what steps the UK Government is taking to address any divergence.[16]

The Scotland Government has an official policy of dynamic alignment with EU law.[17] The **UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021** section 1(1) confers a power on Scottish Ministers to make regulations to align Scots law with EU law. 'Keeping pace' is seen as a means of advancing standards across key policy areas,[18] as well as a mechanism to facilitate a future independent Scotland rejoining the EU. The policy of alignment is dependent on an assessment of what is appropriate – both in terms of substance (whether to align) and how (which instruments to use). On the former, the impact of any constraints on Scotland's law-making powers will be a factor in the assessment. On the latter, the Act's powers are presented as a fall-back, with the preference being for primary legislative powers to be used, or as an alternative, existing secondary powers covering the relevant subject area.[19] Despite the policy commitment to align, and new EU measures within devolved competence, no use has yet been made of the keeping pace powers for Scotland. The scrutiny challenges faced by the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee are reflected in a letter from the Committee's convenor to the Cabinet Secretary, which included inter alia clarification on the extent to which the Scottish Ministers could provide committees with information about developments in EU law.[20]

Wales' own continuity legislation, **the Law Derived from the European Union (Wales) Act 2018**, was repealed as part of the 2018 Intergovernmental Agreement. This IGA broke the impasse over the then Withdrawal Bill, which had initially proposed to restrict the devolved governments and parliaments from exercising any law-making powers over EU retained law until a subsequent UK Ministerial decision to release restrictions on competence. The absence of Scottish-type continuity legislation is not an impediment to alignment, as Senedd Cymru holds primary law-making powers, and the Ministers a range of secondary powers in specific policy sectors, in line with devolved competence. The First Minister, in a letter to EU President Von der Leyen following the coming into force of the Trade and Cooperation Agreement in January 2021 recognised that Welsh Government and the EU have 'shared policy goals' on many issues 'such as sustainability, the environment and biodiversity, climate, innovation and regional development, equality, and social affairs, amongst others.... In particular, we share the EU's ambition for the progressive development of social and environmental standards,

[16] House of Lords European Affairs Committee, Sub-Committee on the Protocol on Ireland/Northern Ireland, Scrutiny of EU Legislative Proposals within the scope of the Protocol on Ireland/Northern Ireland, HL Paper 177, 22 March 2022.
[17] Scottish Government, 2021 Programme for Government.
[18] UK Withdrawal from the EU (Continuity) (Scotland) Act 2021, Section 2.
[19] Draft Statement of Policy by the Scottish Ministers in Exercise of the Power in Section 1 of the UK Withdrawal from the EU (Continuity) (Scotland) Act 2021, 29 October 2021.
[20] Letter from the Convener to the Cabinet Secretary for Constitution, External Affairs and Culture, 22 September 2021.

and look forward to developing policies in these areas that will align with those of the EU'.[21] It is not though official Welsh government policy to align. The reasons given by the then Counsel General and Minister for Brexit against Wales having replacement Continuity legislation included that it was not necessary for Ministers to take such powers, nor would it be supported by the Welsh Parliament, and also that space should be given to the Common Frameworks programme, which should provide opportunity for managed divergence.[22]

There are thus multiple permutations of regulatory alignment and divergence for Wales with retained and new EU law, and with the other legislatures of the UK. As the Office for the Internal Market acknowledges in its initial report, there are 'democratic, policy and practical reasons for governments to adopt different regulatory regimes'.[23] The adoption of common regulatory regimes may nonetheless be preferable for reasons of greater effectiveness in achieving broader policy objectives, or for minimising the disruptions to trade within and beyond the UK. The determination of Wales' regulatory choices will be influenced *inter alia* by its policy objectives, and the degree to which different legal constraints might inhibit the achievement of those objectives. These constraints are now addressed in turn.

Constraints arising from Amendments to the Government of Wales Act 2006 - Constitutional Re-settlement of Devolved Powers:

Senedd Cymru's powers to legislate are governed by the provisions of the **Government of Wales Act 2006** and its Schedules 7A and 7B, whilst Welsh Government Ministers' powers are broadly (though not exactly) coterminous with devolved legislative competence.[24] Acts of Parliament relating to the UK's withdrawal have made changes to each of these elements – the scope of legislative and Ministerial competence has been redefined, a new field of reservations has been added to Schedule 7A, and new protected enactments (UK Acts of Parliament which may not be modified by Senedd Cymru) included in Schedule 7B.

The **EU (Withdrawal) Act 2018** has introduced the concept of retained EU law into domestic law, replacing the previous constraint over legislative competence which operated to render any legislative act adopted contrary to EU law 'not law'. Only such EU retained law which would have been subject to 'freezing' regulations adopted by UK Ministers under powers in section 12 **EU (Withdrawal) Act** would limit the competence of the Senedd (sections 108A and 109A **Government of Wales Act 2006**) and Welsh Ministers (s80(8)). These powers were never used, and

[21] Letter from First Minister Mark Drakeford to EU Commission President Ursula von der Leyen, 20 January 2021.
[22] Statement by the Counsel General and Brexit Minister: Legislation related to leaving the EU, Plenary, 25 February 2020.
[23] Office for the Internal Market, Overview of the Internal Market, 22 March 2022, OIM 6, at para 11.
[24] Unlike Scotland, (Scotland Act, s. 53) there is no general transfer of functions within the scope of devolved competence to Welsh Ministers. This is achieved in a more piecemeal way for Wales, through transfer of functions orders, Acts of Parliament, Senedd Acts, etc.

in January 2022, the UK Government laid a statutory instrument to repeal section 12 powers.[25]

The powers had been created to place retained EU law in a holding pattern whilst agreement was reached on the areas that would require common frameworks. The **EU (Withdrawal) Act** is now listed as a protected enactment under Schedule 7B. Also now listed as a protected enactment is the **UK Internal Market Act 2020**. The Act impacts on competence in both direct and indirect ways. Directly, it categorises the area of subsidy control as a reserved competence into the devolution statutes[26]. There had been dispute between the governments as to whether or not this field was previously devolved. New powers are also taken for UK Government Ministers to provide financial assistance for economic development, infrastructure and cultural activities, across the UK as a whole, or any part of it.[27]

Indirectly, it impacts on competence through its measures designed to reduce the significance of any policy divergence across the UK for internal trade in goods and services (and by extension, for international trade). In so doing, it has the potential to reduce the effectiveness of local regulatory choices in meeting specific policy objectives, particularly in light of the intra-UK trade flows, with England as a net exporter to other parts of the UK, which are all net importers.[28] Whilst existing regulatory divergence (at the point at which UKIMA 2020 came into force) is respected, 'substantive change' will engage the Act, and the operation of its market access principles.[29]These principles are two-fold. First, the mutual recognition principle is designed to ensure that products which comply with the regulatory standards dealing with the physical characteristics, composition, presentation or mode of production in effect in their originating part of the UK[30] will have access to the market in any other part of the UK, regardless of the different regulatory standards which might apply. Legislation adopted for Wales by Senedd Cymru or Welsh Ministers will be disapplied for products coming from other parts of the UK if different standards apply there. The possible exceptions from this rule are very limited, covering local regulatory responses to serious threats to human, plant or animal health posed by pest, disease, or unsafe food or feed, or certain rules relating to fertilisers and pesticides. The mutual recognition rule also applies to certain rules affecting the provision of services, specifically authorisation requirements, where the permission of a regulator must be granted to the service provider.[31] Exclusions from these provisions are more widely drawn, and currently include audiovisual services,

[25] The EU (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc) Regulations, UK SI 2022 No 357.
[26] Section 52 UKIMA 2020, with consequent amendments to the Schedules to GOWA 2006, the Northern Ireland Act 1998 and Scotland Act 1998.
[27] UKIMA 2020 s. 50. These now exist alongside the powers of Welsh Ministers in GOWA 2006, though the funding initiatives replacing EU schemes including the Shared Prosperity Fund and the Levelling Up Fund are bypassing the devolved governments, and have implications for the achievement of the Welsh Government's strategic objectives reflected in its Framework for Regional Investment in Wales.
[28] Office of the Internal Market, Overview of the UK Internal Market, March 2022, para 3.15.
[29] Sections 4(4), 9(2), 17(5) UKIMA 2020.
[30] This will be where something is made or where it is imported into (s. 2(1)).
[31] Section 19, which applies to rules except for legitimate responses to a public health emergency.

healthcare services, social services and transport services.[32] The mutual recognition principle also applies to professional qualifications obtained in the UK, with the exception of the legal profession and school teaching.[33]

The second market access principle is non-discrimination. For goods, this will engage regulations governing the manner of sale (including where and when goods are sold, their price, and other terms of sale),[34] and these will be disapplied if they place the incoming goods at a disadvantage compared to local goods. For services, the non-discrimination rule applies to regulatory requirements that would preclude the provision of services if they were not complied with (other than authorisation by a regulator). The Act applies to both directly discriminatory regulations, and indirectly discriminatory measures - where the regulation draws no explicit distinction between products on the basis of where they are produced or where the service provider is located, but where there is an adverse impact on trade nonetheless. In these cases, the local regulation can continue to apply to incoming goods or services where that regulation pursues a legitimate aim, stated to cover the protection of the life and health of humans, animals and plants, and the protection of public safety and security (and additionally, for services, the efficient administration of justice).[35] The range of service sectors excluded from the non-discrimination principle is wider than that operating for authorisation requirements subject to the mutual recognition principle.[36]

Both market access principles may be excluded where common frameworks have been agreed[37] – though that exclusion does not operate automatically.[38] The potential hollowing-out effect of the **UKIMA 2020** market access provisions on the effectiveness of local regulation has been frequently highlighted, **UKIMA 2020** being less accommodating of local regulatory variation than the previous EU system of rules it replaces.[39] Legal challenge to the Act has been brought by Welsh Government on the grounds that it effectively cuts down devolved competence by implication, rather than expressly, (and prospectively, by secondary legislation), which is arguably beyond the constitutional limits of what might be done in relation to a piece of ‘constitutional’ legislation, such as the **Government of Wales Act 2006**. In January 2022, the Court of Appeal confirmed the decision of the High Court to refuse the Welsh Government permission to bring judicial review on the grounds of prematurity, requiring a specific Senedd Bill to be at issue for judicial review to be brought. An appeal to the Supreme Court has been lodged. Unless and until the

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[32] Schedule 2 Part 1 UKIMA 2020.
[33] Sections 24, 27 UKIMA 2020.
[34] Section 6-8 UKIMA 2020.
[35] Section 8(6) (goods) and s. 21(7) (services) UKIMA 2020.
[36] Schedule 2 Part 2 UKIMA 2020.
[37] By the Secretary of State, using powers in Schedule 1 UKIMA 2020, (as per s. 10 (3) UKIMA 2020) for goods and Schedule 2 (as per s. 18(4) UKIMA 2020) for services.
[38] Cabinet Office, Process for considering UK Internal Market Act exclusions in Common Framework areas, 10 December 2021.
[39] K.A. Armstrong, ‘The Governance of Economic Unionism after the United Kingdom Internal Market Act’, forthcoming *Modern Law Review*, early view 1 November 2021; S. Weatherill, ‘Comparative Internal Market Law: The UK and the EU’ *Yearbook of European Law*, Volume 40, 2021, Pages 431–474; M. Dougan, J. Hunt, N. McEwen, A. McHarg, ‘Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020’, forthcoming *Law Quarterly Review*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4018581

Supreme Court finds in favour of the Welsh Government, law-makers in Wales will need to consider the scope of any possible exception to the application of the **UKIMA 2020**, or pursue, through the process for agreement for an exception for divergence otherwise agreed under the Common Frameworks process.[40]

International Legal Commitments binding Welsh law makers:

As stated in **Government of Wales Act 2006**, Schedule 7A, 'international relations, regulation of international trade and international development assistance and co-operation are reserved matters'. The negotiation and agreement of new international agreements is thus a matter for the UK Government, with the Westminster Parliament having a role – albeit a limited one - in ratifying those agreements.[41] Formal acknowledgement of the role for the involvement of devolved governments and parliaments is even more limited, despite them being required to comply with international obligations, and having the power to introduce implementing legislation within devolved competence. As the House of Commons research briefing observes, '…devolved countries' interests may be different from or even opposed to those of the UK Government, and their legislatures are responsible for passing any implementing legislation needed in their areas of competence. Despite this, there is no legal requirement for the UK Government to consult the devolved administrations or legislatures on treaties'.[42] The degree of engagement depends on the accommodation the UK Government is prepared to make[43], and a variegated picture has developed, with more constructive relations being reported with the Department for International Trade on Rest of the World negotiations, as opposed to the work of the Cabinet Office in negotiating the new EU/UK relationship.[44] In any event, the commitments entered into by the UK may bind the devolved governments and legislatures to particular courses of action, or close down particular regulatory choices.

The UK, as a member of the World Trade Organisation (WTO) is bound by commitments in agreements reached under its auspices, including those on sanitary and phytosanitary (SPS) measures, technical barriers to trade, and on subsidies. The SPS agreement concerns the application of food safety and animal and plant health regulations. Countries are permitted to set their own standards, but these should be based on science, and applied only to the extent necessary to protect human, animal or plant life or health. The TBT agreement meanwhile covers other

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[40] See further the discussion below on Common Frameworks.

[41] Constitutional Reform and Governance Act 2010. There have been ministerial commitments for greater Parliamentary involvement in post-Brexit trade agreements, but these fall short of the powers exercised by the European Parliament when the UKs international trade deals were negotiated through the EU governance system, see House of Commons Research Service, 'How Parliament Treats Treaties', Briefing Paper Number 9247, 1 June 2021, https://researchbriefings.files.parliament.uk/documents/CBP-9247/CBP-9247.pdf.

[42] *Ibid*, para. 6.

[43] The 2012 Devolution Memorandum of Understanding and supplementary agreement includes a concordat on International Relations, which foresees the devolved administrations being involved through eg information exchange, consultation, and their ministers and officials being part of negotiating teams. The MoU is expected to be updated in light of recent developments in IGR.

[44] Inter-institutional relations agreement between the National Assembly for Wales and the Welsh Government: annual report 2019 to 2020, 2 February 2021.

technical regulations which may impact on trade. These should not discriminate, nor create unnecessary obstacles to trade. SPS and TBT Agreements do not themselves set product or production process regulatory standards – but principles about how these should operate. Where there are relevant international standards, these should form the basis for their SPS/technical regulations.[45] Where regulatory action is proposed consideration should be given to whether such measures are in compliance with these WTO provisions. These are not new obligations, though EU membership layered additional regulatory requirements over this regime (along with particularly effective mechanisms of enforcement). As mentioned above, the UK Government's review of retained EU law has raised the prospect of a shift domestically away from a precautionary approach to regulation (at least outside the field of environmental protection), which reflects the EU approach, to one which is more 'science' based. The long-running EU-US trade dispute over the EU's ban on hormone-treated beef involved at various stages an assessment that the ban went beyond what was scientifically justifiable, and in breach of the SPS Agreement. Moves away from a precautionary approach *may* however generate issues between the EU and the UK under the terms of the Trade and Cooperation Agreement (TCA).

The TCA contains non-regression duties, under which the labour and social standards, environmental and climate change standards, and subsidies control should not be weakened by either side from their position at the end of the transition period, on 31 December 2020. This is to give effect to the commitment to open and fair competition between the parties. Whilst this does not demand regulatory alignment, a divergence from EU standards may trigger rebalancing measures (eg tariffs) and the TCA's dispute resolution procedure, should it have a material impact on trade or investment. The TCA also obligates parties to continued respect for standards in various international legal instruments – which include environmental measures which commit to a precautionary and preventative approach.[46]

Following the end of transition period, the UK has begun to independently adopt new international trade agreements. As noted by the Trade and Agriculture Commission (TAC), the independent advisory board established to inform the UK government's trade policies, 'the UK does not require imported products to meet UK environmental or animal welfare standards'.[47] The TAC proposes an approach to new trade agreements which marries liberalisation with the safeguarding of standards. Concerns have been expressed from some quarters that new FTAs might put pressure on the UKs continued regulatory standards,[48] The opportunities for Wales to diverge, and require higher local standards to be met by imports would be limited through the operation of the mutual recognition principle in **UKIMA 2020,** or the powers of the Secretary of State to ensure compliance with international obligations.[49]

Common Frameworks:

[45] Eg, World Organisation for Animal Health (OIE) standards.
[46] Article 393 Trade and Cooperation Agreement.
[47] Trade Advisory Committee, Final Report, March 2021, at para 6.2.
[48] As explained by Institute for Government, rather than new (lower) regulatory standards being fixed in FTAs, these are more likely to be seen in side-deals which will result in apparently autonomous changes in domestic regulation, IFG, Trade and Regulation after Brexit, March 2020.
[49] Section 82 Government of Wales Act 2006.

Marking a more collaborative approach to the management of internal policy divergence than seen in the top-down **UKIMA 2020**, Common Frameworks are agreed ways of intergovernmental working in areas of devolved competence which were previously covered by EU law. The principles underpinning this approach were first set out in the 2017 Joint Ministerial Committee (EU Negotiations) communique, the first of these being that frameworks will be established 'where they are necessary in order to: enable the functioning of the UK internal market, while acknowledging policy divergence'. Respect for devolved competence is built into the frameworks, which should, 'maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules'.[50] Whilst the intention was to have established the frameworks ahead of the end of the transition period, work on the frameworks has overrun.

The original catalogue of policy issues which would require a framework has been successively refined,[51] so that there are now expected to be twenty six common frameworks applying to Wales. The terminology has also been revised, with the previously termed 'legislative frameworks' now described as being 'with associated primary legislation'. These are the Emissions Trading Scheme; Agricultural Support; and Fisheries Management and Support frameworks. The relevant primary legislation is accompanied by a framework agreement, setting out how governance will operate, and how disputes will be resolved. The remaining frameworks are described as operating with 'no associated primary legislation', underpinned by secondary legislation – usually EU retained law, which through 'consistent fixes'… creates 'a unified body of law'.[52] Examples include the frameworks on Food Compositional Standards and Labelling, and on Animal Health and Welfare. This categorisation between those with and without associated primary legislation is not clear cut, as there are other frameworks incorporating elements of primary legislation – eg the provisional Fertilisers Framework, and those where primary legislation has been introduced– eg the Mutual Recognition of Professional Qualifications. In the case of the vast majority of policy areas at the intersection of devolved competence and EU law, no framework is deemed necessary, either due to the possibility of divergence being minimal, or, because there are sufficient intergovernmental mechanisms already in place, or, where divergence may be expected, it will have little impact for internal or international trade.

The original communique foresaw frameworks as setting out 'a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued'. As they

[50] Joint Ministerial Committee (EN) Communique, 16 October 2017.

[51] The Frameworks team in UK Government is now based in the Department of Levelling Up, Housing and Communities. The Government has published an analysis of the policy sectors to be governed through the frameworks process annually since 2018. The most recent Frameworks Analysis 2021: Breakdown of areas previously governed by EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland, November 2021; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031808/UK_Common_Frameworks_Analysis_2021.pdf

[52] Frameworks Analysis 2021: Breakdown of areas previously governed by EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland, November 2021.

have evolved, it is clear that frameworks are more properly seen as mechanisms for governance, rather than policy outputs. A common form of words used in the Framework Agreements is that ‘Where one or more of UK Government, the Scottish Government or the Welsh Governments propose to change rules in a way that has policy or regulatory implications for the rest of the UK, or where rules in Northern Ireland change in alignment with the EU, the Framework is intended to provide governance structures and consensus-based processes for considering and managing the impact of these changes’.[53]

The Framework outline agreements indicate the international legal commitments that will need to be accommodated. They can indicate politically agreed parameters for divergence – so in the case of the Animal Health and Welfare Framework, for example, such divergence must not change baseline standards in a manner harmful to biosecurity or welfare. Proposals for regulatory change should be assessed for their impact on internal and international trade. If divergence is not considered acceptable by one or more Parties, the dispute resolution mechanism can be engaged.

To the extent that a particular framework provides scope for agreed policy divergence, there are concerns about the way in which the **UKIMA 2020** market access principles may subsequently undermine that divergence. Agreement was reached in December 2021 on a process for exclusion of agreed policy divergence between the governments. However, this exclusion is not automatic. It relies on the relevant Secretary of State laying a draft statutory instrument, which requires the approval of both Houses of the UK Parliament. Consent should be sought from the devolved Governments, though the making of the SI does not depend on consent being given.[54] The House of Lords Common Frameworks Scrutiny Committee has been pushing for the mechanism to be formally incorporated into each framework agreement, as outlined in the procedure, but this has not been done. The Committee has argued that ‘failure to do so jeopardises respecting the autonomy of the devolved administrations within their areas of competence’.[55] On the basis of very limited experience to date, the exclusion process has the potential to be protracted, and lacking transparency, as seen with the Scottish request for an exclusion from the Resources and Waste Common Framework to enable them to pursue bans on a range of single use plastic products.

The House of Lords Common Frameworks Scrutiny Committee also shares the concerns which have been expressed by the devolved Governments about the potential for agreed frameworks to be undermined by legislation other than **UKIMA 2020**. The intersection between the **Subsidy Control Bill** and the Common Frameworks for Agriculture Support and Fisheries Support has been highlighted.

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[53] See eg. the Outline Framework Agreements for Agricultural Support; Animal Health and Welfare; Plant Health; Air Quality.
[54] Sections 10 and 18 UKIMA 2020.
[55] This point has been reiterated in correspondence to Ministers, eg. letter from Baroness Andrews, Chair Common Frameworks Scrutiny Committee to Secretary of State for Environment, Food and Rural Affairs, George Eustice, 23 March 2022
https://committees.parliament.uk/publications/9441/documents/161305/default/

Whilst these measures are described by UK Government as 'complementary',[56] the potential for contradiction between these policies, and the problematic implications for devolved government decision making has been raised the Common Frameworks Scrutiny Committee.[57]

Primary and Secondary Sectoral Legislation:

In our 2019 Review of the Implications of Brexit-Related UK Legislation for Devolved Competence,[58] we noted a number of emerging trends in post-Brexit legislation. These included defining issues as outside devolved competence where they intersected with the international relations reservation, and also the inclusion in primary legislation of regulation-making powers for UK Ministers in devolved areas, which create the potential for the future use of these powers to restrict policy options open to the devolved law-making bodies. This latter trend of including UK Ministerial powers over devolved matters is very much apparent in the primary legislation that has been introduced subsequently, and on a number of occasions, legislative consent has not been granted to UK bills. Recent examples include the **Professional Qualifications Bill** (concurrent powers, which can be used with the consultation of the Welsh Ministers). The **Subsidy Control Bill** is an example of UK legislation on a (previously disputed) reserved matter, which impacts on non-reserved matters (including economic development), which may restrict the future policy options open to Welsh Ministers in these areas, though the regime is being constructed effectively unilaterally.

Finally, in relation to secondary legislation, very extensive use has been made of the **EU (Withdrawal) Act 2018** section 8 regulation-making powers, in the adoption of amendments to retained EU law. These EU (Exit) Statutory Instruments perform a range of functions, including, transferring functions from EU agencies to UK ones (including, to UK Ministers, with powers to act in devolved areas). In this amended form, they comprise the legislative basis of the majority of Common Frameworks. The majority of the Exit SIs adopted which apply to devolved areas of competence were made by UK Ministers, rather than Welsh Ministers. The Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks provides that UK Ministers will not normally pass SIs in devolved areas using powers under the Withdrawal Act without Welsh Ministerial consent.[59] Senedd scrutiny of these consent decisions operates under standing order 30C. As Taylor and Wilson have observed in relation to the operation of these powers for Scotland, 'some of these UK Exit SIs could have significant implications for the devolution settlement in terms of the future exercise of powers to make secondary legislation by the UK and/or Scottish Governments and changes in future

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[56] Letter from Lord Callanan, Minister for Business, Energy and Corporate Responsibility to Baroness Andrews, Chair Common Frameworks Scrutiny Committee, 18 February 2022, https://committees.parliament.uk/publications/9056/documents/159216/default/

[57] Letter of 23 March 2022 to Secretary of State DEFRA, Supra, note 55.

[58] T.Mullen and J. Hunt, https://archive2021.parliament.scot/S5_Finance/General%20Documents/201908_Paper_by_Prof_Tom_Mullen_and_Prof_Jo_Hunt.pdf

[59] Senedd Scrutiny of Welsh Ministerial consent operates under Standing Order 30C. Where regulations also amend primary legislation, a SI Consent Memorandum is required.

policy direction in Scotland'.[60] Comparable concerns might be raised from a Welsh perspective. The example of Geographical Indications is pertinent here. GIs are signs used on products to identify their quality or other such characteristics related to its geographical origin. The domestic replacement for the EU regime of GI protection was initially formed through a UK SI – the **Agricultural Products, Food and Drink (Amendment Etc.) (EU Exit) Regulations 2020**. Consent was given for it by Welsh Ministers for the reasons of 'efficiency, expediency and due to the technical nature, that there was no divergence in policy, and to enable the statute book to remain functional. However, the issue of whether GIs are within reserved or devolved competence remains an issue of dispute between the governments. Accepting UK legislation, though a pragmatic response, may be seen to strengthen the claim to it being an area where the UK Ministers have overriding decision making powers.

Conclusion:

The UK's exit from the EU, and from EU legal regimes, has created a host of legal and political points of contestation between the governments of the UK. As the UK took its first steps to deal with the consequences of the vote in favour of leaving the EU, the then Secretary of State for Exiting the European Union declared 'what is clear is that the outcome of this process will be a significant increase in the decision-making power of each devolved administration'.[61] Through this process however, devolved competence has been impacted in a range of direct and indirect ways. Given the speed at which some of the key legislative provisions have been adopted, the interconnections between instruments and powers have not been effectively mapped, leading to inconsistencies and the potential for disputes to arise. The test is now to see how effective the new common frameworks, and more broadly the renewed IGR mechanisms will prove in managing those disputes.

[60] Spice Briefing, Brexit Statutory Instruments: Impact on the Devolved Settlement and Future Policy Direction, SB-21-52, 18 August 2021, https://sp-bpr-en-prod-cdnep.azureedge.net/published/2021/8/19/e0175834-506d-4e58-b9dd-a57604f819dd/SB%2021-52.pdf

[61] Legislating for the United Kingdom's Withdrawal from the EU, Cm 9447, March 2017, p.8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf

Level Playing Field Provision in the TCA: an introductory guide

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1. Introduction

The UK-EU Trade and Cooperation Agreement level playing field (LPF) provisions aim to ensure open and fair competition in a manner conducive to sustainable development. They establish a system which permits divergence and alignment between the UK and EU. In the UK, these provisions cut across both reserved and devolved areas, such as trade, investment, environment and climate.

Since the Senedd has taken steps to ensure that UK-EU arrangements are considered in detail by relevant Committees this paper is intended to provide an early understanding of the operation and consequences of the LPF provisions. It would also provide an opportunity to better identify potential consequences of future UK-EU and Wales-EU divergence and alignment for Wales.

This paper provides an overview of the scope for UK-EU divergence with a view to:

- seeing how alignment and divergence might develop in the context of the Trade and Cooperation Agreement
- Setting out how alignment and divergence between the devolved nations/Wales and the EU could develop
- Explain the consequences of divergence, including non-regression and rebalancing measures
- Identifying areas within, or that impact, devolved competence

2. Divergence and alignment

2.1 What is it?

When the UK left the EU at the end of the transition period on 31 December 2020, UK law was fully aligned (i.e. in conformity with EU law). That alignment was maintained by the passing of the EU (Withdrawal) Act 2018 (EUWA) to ensure continuity of the UK's legal system before and after Brexit. This meant that all EU law (except the Charter of Fundamental Rights), together with principles of interpretation of that law (known as 'general principles of law'), and the pre-Brexit case law of the Court of Justice, was converted into UK law on 31 December 2020 (known as 'Implementation Period Completion Day' (IPCD)) as 'retained EU Law' (REUL).[1] The Act also provided for the supremacy of EU law over pre-Brexit UK law. So an EU Treaty provision, such as tArticle 157 TFEU on equal pay, trumps conflicting provisions of, for example, the Equality Act 2010. However, s. 8 EUWA gave the government powers to amend that REUL to deal with 'deficiencies' created by the UK leaving the EU. This has led to hundreds of Statutory Instruments being passed.

More significantly, since 31 December 2020, the UK is no longer obliged to comply with EU law. The UK entered a Free Trade Agreement, the Trade and Cooperation Agreement (TCA), which is deliberately 'thin', and so has not required alignment with EU rules. In certain fields, such as social and environmental matters, it expressly allows each side to set its own policies.

The ability for the UK to be able to set its own rules was seen by Leave advocates as a major benefit of Brexit. A Brexit Opportunities Unit was set up inside government and the Taskforce for

[1] https://ukandeu.ac.uk/reul-lord-frost/

Innovation, Growth and Regulatory Reform[2] made recommendations for 'how the UK can take advantage of our newfound regulatory freedoms and stimulate growth, innovation and competition across the economy, as we seize opportunities outside the EU'.[3] Lord Frost, then Brexit Minister, has since made the case for radical change. He said he intended to:[4]

> …review comprehensively the substantive content of Retained EU law. Now some of that is already under way - for example our plans to reform the procurement rules that we inherited from the EU, or the plan announced last autumn by my RHF the Chancellor to review much financial services legislation. But we are going to make this a comprehensive exercise and I want to be clear: our intention is eventually to amend, to replace, or to repeal all that retained EU law that is not right for the UK.

However, progress has not been as fast as he would have liked. He resigned from his Cabinet post in December 2021, and on the first anniversary of Brexit there were a number of articles in the press lamenting the failure to take up the regulatory opportunities Brexit offered.[5]

There are six main legal/policy reasons why divergence has not happened as far and as fast as some members of the Vote Leave coalition would like:

(1) In the areas covered by **the LPF provisions,** if divergence means a (material) impact on trade or investment (see section 3 below), the EU may retaliate.
(2) **Manufacturers' wishes**: there are some areas where manufacturers do not want divergence. Chemicals is one of them: 'the industry is virtually unanimous that there would be no benefits from this. This is not surprising given that incumbent firms have invested heavily to meet current standards, but is similar to industry views in other sectors that have high trade volumes between the UK and the EU and closely integrated supply chains'.[6]
(3) **The Brussels effect**: given the size and influence of the EU, it sets standards which end up applying across the globe because manufacturers want to comply with one set of standards not a plethora of divergent national standards. As Anu Bradford puts it, 'Few Americans are aware that EU regulations determine the makeup they apply in the morning, the cereal they eat for breakfast, the software they use on their computer, and the privacy settings they adjust on their Facebook page. And that's just before 8:30 AM. The EU also sets the rules governing the interoffice phone directory they use to call a co-worker. EU regulations dictate what kind of air conditioners Americans use to cool their homes and why their children no longer find soft plastic toys in their McDonald's Happy Meals.' [7]
(4) WTO law. Under the Technical Barriers to Trade Agreement (TBT) and Sanitary and Phytosanitary (SPS) agreement there is an obligation on Members (including the UK) to harmonise standards in accordance with international norms such as those set by the Codex

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[2] https://www.gov.uk/government/publications/taskforce-on-innovation-growth-and-regulatory-reform-independent-report
[3] https://www.gov.uk/government/news/search-for-head-of-the-new-brexit-opportunities-unit-begins
[4] https://www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021'
[5] See eg M. Howe QC, 'We are not making enough of our Brexit freedoms – no wonder voters are angry https://www.telegraph.co.uk/news/2021/12/19/not-making-enough-brexit-freedoms-no-wonder-voters-angry/; B. Marlowe, 'Time is running out to prove Brexit is not a historic failure. It's been five years since the referendum. 2022 is the year reality needs to match the hype' https://www.telegraph.co.uk/business/2022/01/04/time-running-prove-brexit-not-historic-failure/
[6] D. Bailey, 'Manufacturing and Brexit' https://ukandeu.ac.uk/wp-content/uploads/2020/06/Manufacturing-and-Brexit.pdf
[7] https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1275&context=faculty_scholarship.

Alimentarius. States can depart from those norms but they must have a good scientific reason for doing so.

(5) Northern Ireland Protocol (NIP): in areas covered by the NIP, there is a legal obligation on dynamic regulatory alignment with the EU.[8] The more the regulatory divergence in GB in respect of goods, the more difference there is between GB and NI law which means, at least in principle, more checks on the East-West border.

(6) **Scotland:** in its UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 Scotland is committed to maintaining alignment with EU law. Section 1 gives the Scottish Ministers the discretionary power to continue to keep devolved law in line with EU law following IPCD. Section 2 sets out that the purpose of section 1(1), amongst other things, is to contribute towards maintaining and advancing standards in certain specified areas, namely: environmental protection; animal health and welfare; plant health; equality, non-discrimination and human rights; and social protection. When using the power under section 1(1), the Scottish Ministers must have due regard to this purpose.[9]

All of this has meant that it has proved more difficult to come up a list of post Brexit regulatory opportunities. The FT reports:[10]

> Senior Whitehall insiders said the hurry to bring together a convincing list of initiatives from across government departments to highlight the opportunities of Brexit had been a struggle.

The Prime Minister published a 100-page 'benefits of Brexit' paper on 31 January 2022 highlighting plans for future deregulation, including areas such as gene editing of crops, artificial intelligence and data.[11]

2.2 Different approaches to divergence

Divergence can take a variety of forms: [12]

- **Active**: new UK or devolved law replacing or amending EU rules.
- **Passive**: where the EU legislates and the UK (or some part of it) does not follow.
- **Procedural**: where the UK (or some part) of it has to introduce new systems to manage regulation post-Brexit.

In the second and most recent divergence tracker produced by UK in a Changing Europe, 21 cases of divergence are identified, all but four of which are 'active', meaning new UK law from EU rules (rather than the EU developing new legislation). Does this reflect the UK stepping up the pace of its divergence agenda this autumn? Not necessarily. They say: 'There has certainly been a rhetorical step-change, with Lord Frost talking up the benefits of divergence in three separate speeches, presenting it is a political imperative to remove all EU law which is not right for the UK and liberalise regulations in order to free up innovation, productivity and growth.' They continue:

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[8] For a summary on the level of divergence, see L Whitten, Dynamic Regulatory Alignment and the Protocol on Ireland/Northern Ireland: One Year Reviewhttps://drive.google.com/file/d/1cqy_iMRNSAUoEh8VFADgvexDPvdHYn1t/view

[9] https://www.legislation.gov.uk/asp/2021/4/pdfs/aspen_20210004_en.pdf

[10] P. Foster and G. Parker, 'Benefits of Brexit' paper to set out plans for future deregulation' https://www.ft.com/content/c00ab524-4320-4036-b8f4-813cfd491bd5.

[11] https://www.gov.uk/government/publications/the-benefits-of-brexit

[12] https://ukandeu.ac.uk/wp-content/uploads/2021/12/Divergence-tracker-2-website-final.pdf. For criticism, see https://brexittime.com/2022/01/28/%ef%bf%bcwhat-do-we-really-mean-by-regulatory-divergence-after-brexit/

Yet this tracker shows that the ambitious rhetoric around divergence is so far not matched by reality. Two of the biggest recent policy announcements have been the Net Zero Strategy and the Autumn Budget but, as the tracker highlights …, the UK has made minimal use of its regulatory freedom from the EU in these areas. Similarly, the ability to strike new trade deals and develop a new sanctions policy, much vaunted by Brexit supporters, have to date had a relatively limited impact ….

In fact, what we are seeing most in this edition is the consequences of previously-agreed divergence catching up with the government. The most significant cases date back to the signing of the Trade and Cooperation Agreement (the ending of free movement, rules of origin requirements for goods), highlighting how divergence is a piecemeal process: long after a decision to diverge is made, the government is still having to develop policy and programmes to manage the consequences. The significance of divergence is often not felt until these are in place.

3. The limits on divergence: The LPF provisions

3.1 What is LPF?

The LPF provisions were a key element of the TCA negotiations and they were among the last provisions to be agreed. Essentially they are intended to stop the UK becoming 'Singapore on Thames', in other words preventing the UK using its new found regulatory freedom to reduce standards but still enjoy (relatively) good market access to the EU. The Commission's explanation for LPF is found in Box 1.[13]

[13] For further details, see https://commonslibrary.parliament.uk/research-briefings/cbp-9190/

Box 1 Commission's explanation of LPF[1]

Given their geographic proximity and economic interdependence, the EU and the UK agreed to robust commitments to ensure a level playing field for open and fair competition and to contribute to sustainable development.

The nature of these commitments reflects the scope and the depth of the wide-ranging and ambitious economic partnership, including in particular the absence of tariffs and quotas for trade in all goods, comprehensive market access commitments and rules on services and investment, as well as very high level of openness for government procurement. The agreement also foresees unprecedented cooperation on energy and dedicated titles on aviation and road transport, all of which require appropriate level playing field guarantees.

These commitments will prevent distortions to trade and investment, today and tomorrow, and will contribute to sustainable development.

More specifically, these provisions mean that:

- The current high standards applicable in the areas of labour and social standards, environment, and climate cannot be lowered in a manner affecting trade or investment between the Parties.
- Robust and comprehensive rules will prevent distortions created by subsidies, anti-competitive practices, or discriminatory and abusive behaviour by state-owned enterprises.
- Specific standards and rules and the joint political declaration in the area of taxation will contribute towards tax transparency, and will counter tax avoidance and harmful tax regimes and practices.
- A wide-ranging set of commitments building on the EU's most ambitious precedents will ensure that trade supports sustainable development, including through cooperation at the international level.

The LPF provisions cover six areas (see fig 1) with some areas (subsidy control, labour and social standards and the environment and climate attracting the most onerous dispute resolution mechanism (DRM). In order to understand the significance of the LPF provisions in those areas we start by looking at the standard DRM (section 3.2) before looking at the LPF provision in the field of employment and social provisions (section 3.3).

Competition Policy

- Each side has its own policy, incl enforcement; coop between comp authorities
- Title 1 of Part Six n/a

Subsidy control

- Each side has its own policy, incl independent body and role for domestic courts
- Reciprocal mechanism allowing parties to take rapid action (tariffs eg fish); measures can be challenged before AT (Art. 374)

State owned enterprises

- WTO provisions apply, OECD guidance

Taxation

- Maintenance of good standards (transparency, fair tax competition)
- Not subject to dispute settlement

Labour and social standards

- Non-regression in a manner affecting trade and investment
- Domestic system of enforcement
- Not subject to DRM mechanism; own system of panel of experts; temporary remedies available (Art. 410.3)
- Rebalancing (Art. 411)

Environment and climate

- Non-regression in a manner affecting trade and investment
- Specific detail on eg greenhouse gases and carbon pricing
- Domestic system of enforcement
- Not subject to DRM mechanism; own system of panel of expert; temporary remedies available (Art. 410.3)
- Rebalancing (Art. 411.4)

Fig 1 LPF areas in the TCA

3.2 Standard Dispute Resolution Mechanism

In order to understand the consequences of non-compliance with the LPF provisions we first need to consider the standard dispute resolution mechanism in Part Six of the TCA. In summary, the standard procedure has three stages: (1) political: consultation; (2) judicial: arbitration; and (3)

compliance (see fig. 2). The first stage requires formal consultations between the two sides. If this fails, the matter can go to an arbitration tribunal; if this AT finds against, say, the UK the UK must put matters right, failing which the EU can retaliate against the UK (usually imposing tariffs on UK goods), usually in the same sector but cross-retaliation is permissible (tariffs in different sectors).[14]

[14] http://eulawanalysis.blogspot.com/2021/01/analysis-4-of-brexit-deal-dispute.html

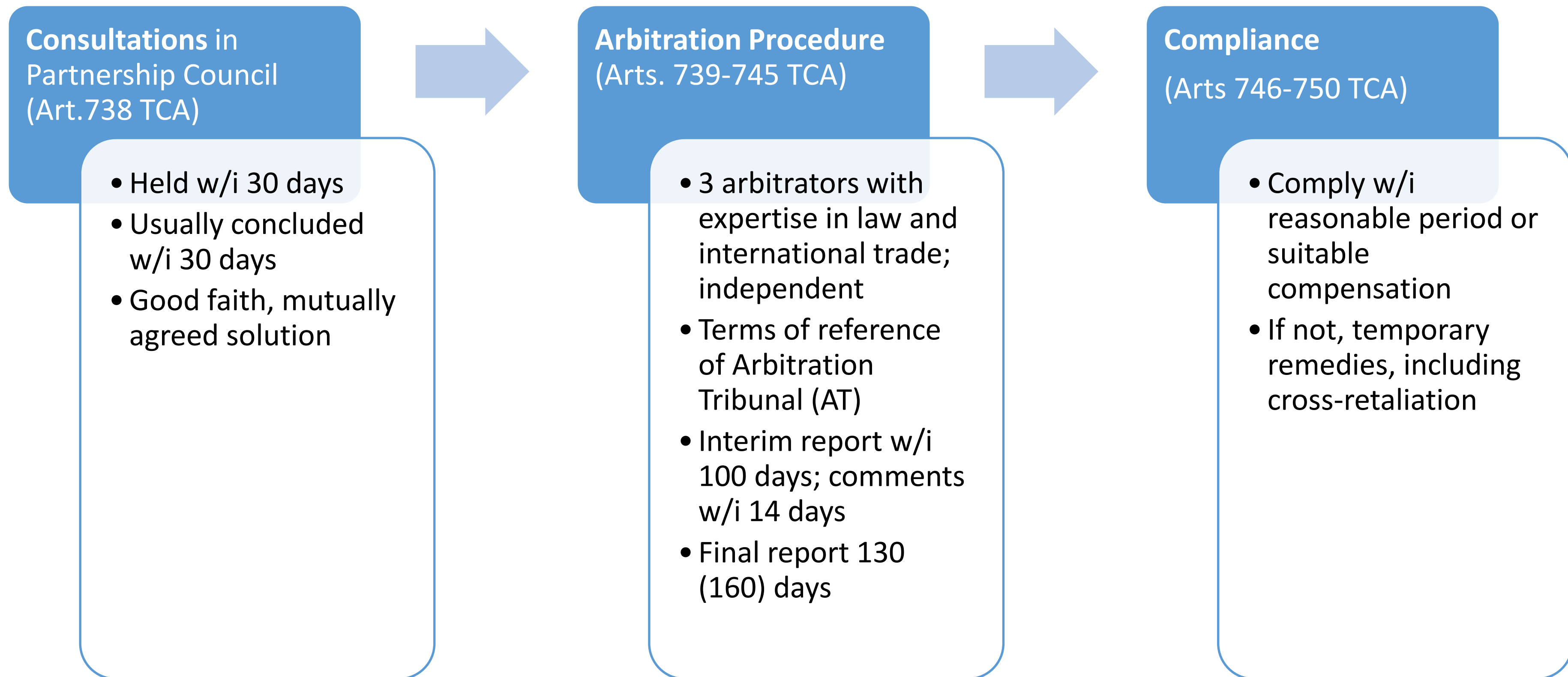

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Fig. 2 Standard DRM under the TCA

3.3 Example: the case of labour and social standards

(a) Introduction

There was particular concern on the EU side that Brexit would pave the way for serious deregulation in the labour law field, as many Brexiters had advocated. There was a real fear that the UK would remove the protections under, for example, the Working Time Directive 2003/88[15] and the Agency Workers Directive 2008/104[16] (see fig 3). These initial concerns seemed to have been borne out by the review of employment law initiated by Ashok Sharma in 2020, that the current Business Secretary, Kwasi Kwarteng, found waiting for him when he took over BEIS in January 2021. It is striking that one of the first moves Kwasi Kwarteng made was to put an end to any such review (fig 4). It is not clear whether this was done for domestic reasons or because of concerns about this prompting the EU to trigger the TCA LPF provisions.

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Fig.3

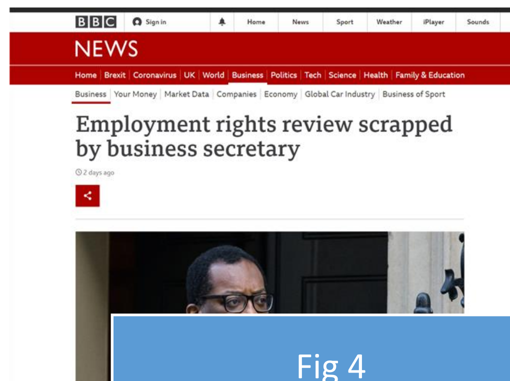
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Fig 4

(b) Changes and their effects

Let's assume, however, the UK government had gone ahead and decided to change UK employment law. How might this have fitted into the LPF provisions?

The first point to note is that both sides are free to regulate in the field of labour and social protection. Article 387(1) TCA provides:

> The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter, to determine the labour and social levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter.

Indeed, the EU has put forward some key pieces of legislation since 2021 including its important proposal on Platform Work.[17] However, regulation *may* have the consequence of triggering one of the three LPF provisions (see fig 5):

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[15] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0088
[16] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0104
[17] file:///C:/Users/csb24/AppData/Local/Temp/COM_2021_762_1_EN_ACT.pdf

(1) Non-regression: departure from *existing* EU employment rules;
(2) Other instruments for trade and sustainable development;
(3) Rebalancing measures: concerning *future* divergence

We shall look at these in turn:

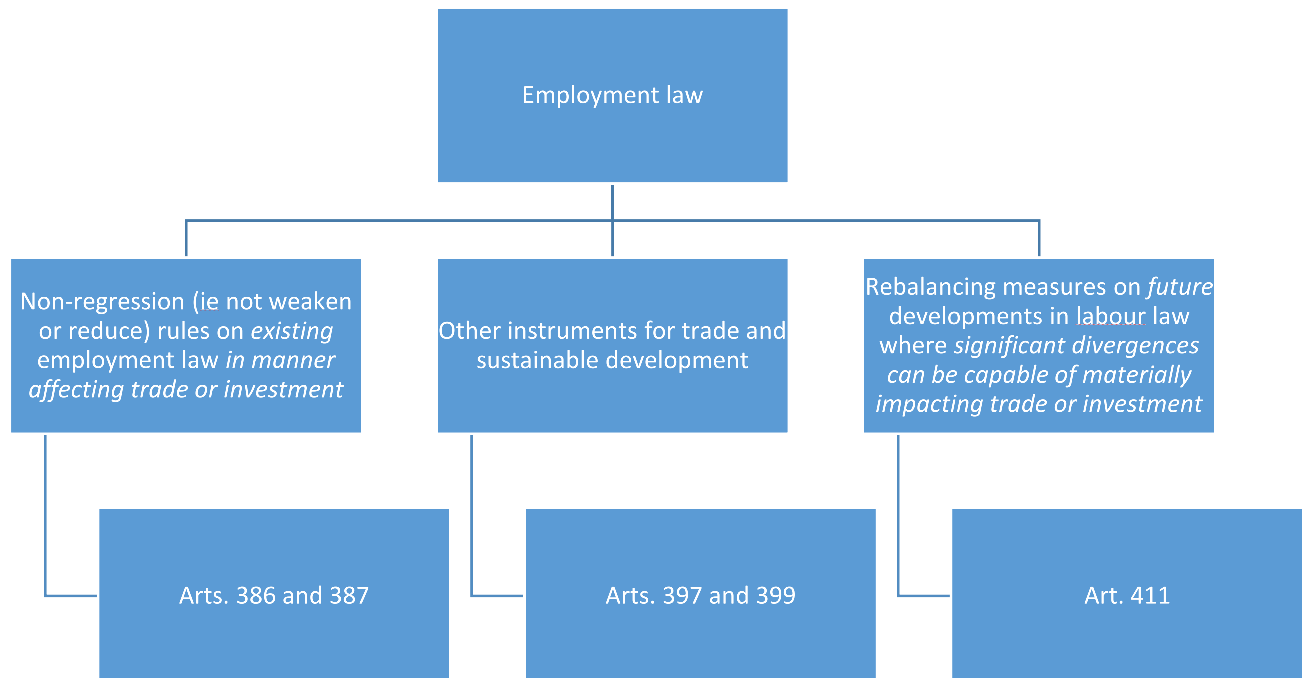

Fig 5 The conditions and remedies for the employment LPF provisions

Non regression procedures

As we have seen, Article 387(1) TCA recognises that both sides have freedom to regulate in the field of labour and social protection. The crucial provisions is Article 387(2) which provides that:

> A Party shall not *weaken or reduce, in a manner affecting trade or investment between the Parties*, its labour and social levels of protection below the levels in place at the end of the transition period, including by *failing to effectively enforce its law and standards*. (emphasis added)

In respect of the point about domestic enforcement in the second part of Article 387(2) TCA, Article 388 TCA provides:

> each Party shall have in place and maintain a system for effective domestic enforcement and, in particular, an effective system of labour inspections in accordance with its international commitments relating to working conditions and the protection of workers;

> ensure that administrative and judicial proceedings are available that allow public authorities and individuals with standing to bring timely actions against violations of the labour law and social standards; and provide for appropriate and effective remedies, including interim relief, as well as proportionate and dissuasive sanctions. …

There is no comprehensive system of labour inspectorate in the UK. The role currently falls to various government agencies (eg Gangmasters, Licensing and Abuse Authority (GLAA), HMRC, HSE) but only within their limited jurisdiction. Article 387(3) TCA recognises that 'each Party retains the right to exercise reasonable discretion and to make *bona fide* decisions regarding the allocation of labour enforcement resources with respect to other labour law determined to have higher priority, provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter.'

In respect of the first part of Article 387(2) TCA, non-regression, the provision applies only in the following policy areas: 'fundamental rights at work' (likely to include ILO Declaration on Fundamental Principles and Rights at Work, which includes: freedom of association and the right to collective bargaining (such as the right to join and form trade unions); the elimination of forced labour; the abolition of child labour; and the prohibition of discrimination in employment and occupation)), 'occupational health and safety standards', 'fair working conditions and employment standards' (likely to include working time and agency work), 'information and consultation rights at the company level', and 'restructuring of undertakings' (Art 386(1) TCA).

However, it is not any change in the areas listed in Article 386(1) TCA which triggers the provision; the non-regression provisions apply only where a reduction in the level of protection affects the flow of trade or investment between the UK and the EU (Art 387(2) TCA). As to the potential meaning of the phrase 'in a manner affecting trade', see Box 2. This raises the question as to what happens when 'salami-slicing' occurs i.e. where only minor changes are made each time an amendment is passed such as reducing the recording obligation in respect of working time, even stopping the right to take paid leave at the end of a lengthy period of sick leave. Would these changes 'affect trade or investment between the Parties'.

Assuming the threshold has been met, then the TCA dispute resolution process can be invoked. Like the standard DRM (see fig 2), there are three stages: (1) consultation; (2) panel of experts; (3) compliance. However, the second stage replaces the Arbitration Tribunal with a special panel of experts. The remedies they can order at first sight look weak but in fact the reference to Articles 749 and 750 TCA (Art 410(2)) means that the range of remedies found in the standard DRM can apply to non-regression LPF provision, including retaliation and cross retaliation (see fig 2 above)

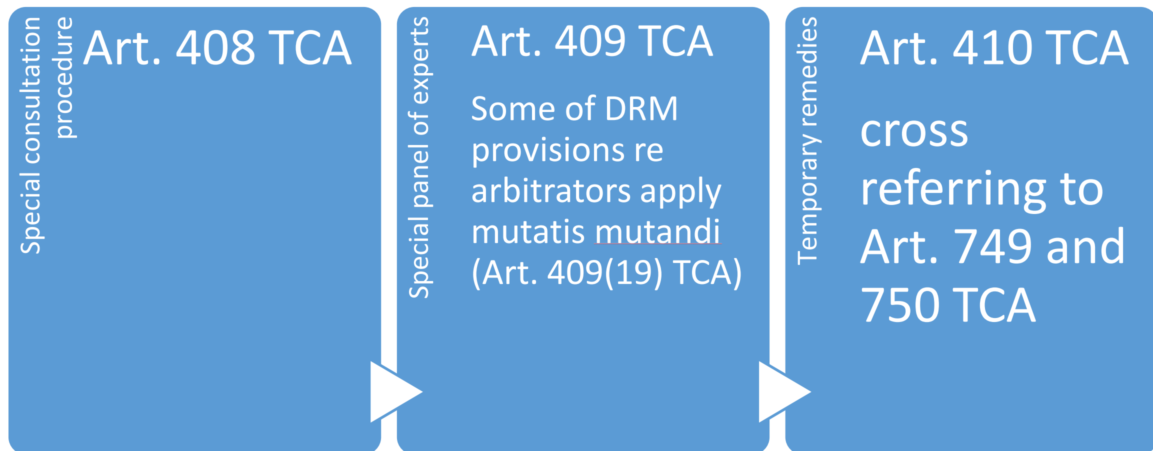

Fig 6 Remedies provisions for breach of the non-regression clause.

Box 2 Potential meanings of ‘in a manner affecting trade’

Marley, ‘What does the UK-EU deal mean for workers' rights, https://www.ippr.org/research/publications/uk-eu-deal-workers-rights

First, one of the key reference points for understanding the phrase ‘in a manner affecting trade or investment’ comes from the 2018 US-Guatemala dispute over labour rights. In this dispute, the US accused Guatemala of failing to enforce its labour laws, as required under the Dominic Republic – Central American Free Trade Agreement (CAFTA-DR). The labour chapter in CAFTA-DR states that “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”. The US alleged that Guatemala was not living up to this commitment and following consultations a formal arbitration panel was convened (Arbitral panel report 2017).

The arbitration panel assessed in particular how to interpret the phrase “in a manner affecting trade between the Parties”, which is a similar formulation to the phrasing in the UK-EU TCA. It concluded that in the context of CAFTA-DR the phrase meant that an employer or employers engaged in trade between the parties had been conferred a competitive advantage (ibid). In order to prove a competitive advantage, the panel argued that the following factors would need to be considered:

> *(a) Are the employers which are violating labour laws exporting to the other countries in the agreement, or are they competing with importers from the other countries in the agreement?*
>
> *(b) What are the impacts of the failure to enforce labour laws (eg what the impacts on labour costs)?*
>
> *(c) Are the impacts sufficient to have an impact on competitiveness (ie are they not “too brief, too localized, or too small”)?*

Based on this panel’s interpretation, this indicates that there is a relatively high bar for demonstrating a link to trade or investment in similar labour clauses. If the same approach is applied to the non-regression clause in the TCA, then the EU would have to demonstrate that any lowering of labour protections is sufficient to confer a competitive advantage. That is, the EU would need to show that the lowering of labour protections had an impact on businesses in direct competition with counterparts in the EU and that it gave the businesses a meaningful competitive advantage – for instance, by demonstrating that the change had reduced the businesses’ labour costs.

However, a more recent report from a panel of experts on a dispute between the EU and South Korea points to an alternative approach to interpreting the trade/investment link in labour clauses. This panel report was the conclusion of a dispute over the labour provisions in the EU-Korea FTA, including a provision to respect, promote and realise the four ILO fundamental principles and rights at work and to make ‘continued and sustained efforts’ to ratify the fundamental ILO conventions (similar to the TCA provisions discussed above). The EU alleged that South Korea had failed to uphold this provision. For its part, South Korea responded that this matter was out of scope of the agreement because the trade and sustainability chapter states that ‘this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labour’ (Report of the panel of experts 2021).

In its assessment, the panel of experts rejected South Korea’s argument that the labour provisions in question only related to ‘trade-related’ matters. The panel argued that the ILO provisions in the agreement were universal in nature and so to limit their scope to only trade-related matters would

be inappropriate. Moreover, the panel also noted separately that, because the EU-Korea FTA highlighted that fundamental labour rights were integral to their ambitions for trade and sustainability, "national measures implementing such rights are therefore inherently related to trade as it is conceived in the EU-Korea FTA" (ibid).

While the EU-Korea panel does not directly contradict the CAFTA-DR panel decision – because they are interpreting different provisions in different agreements – there appears to be a tension between the approaches of the two panels. In the case of the CAFTA-DR panel, there is a clear emphasis on the primacy of trade – the labour clause is only relevant when there is a clear link with trade which can be demonstrated with robust evidence. On the other hand, the EU-Korea panel prioritises fundamental rights, suggesting that any breach of a provision on core labour rights is automatically relevant to trade.

Rebalancing

Processes like those on non-regression discussed above are found in other trade agreements (see eg Article 23.1- 23.11 EU-Canada CETA[18]), albeit with less rigorous enforcement mechanisms. The striking addition to the TCA is the provision on rebalancing. Article 411(1) provides:

> The Parties recognise the right of each Party to determine its future policies and priorities with respect to labour and social, environmental or climate protection, or with respect to subsidy control, in a manner consistent with each Party's international commitments, including those under this Agreement. At the same time, the Parties acknowledge *that significant divergences in these areas can be capable of impacting trade or investment* between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement. (emphasis added)

Thus Article 411(1) recognises (1) the right of each party to legislate but notes (2) that significant divergences in these areas can be capable of 'impacting trade and investment'. Article 411(2) TCA goes on to say that: 'If *material* impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation.' See Box 2 for a discussion of 'impacts on trade'. Note in the case of Article 411 TCA the threshold is higher ('material' impacts) than for non-regression.

Article 411(2) TCA then says that 'Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation.' It adds that 'Priority shall be given to such measures as will least disturb the functioning of this Agreement. A Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility.'

[18] https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

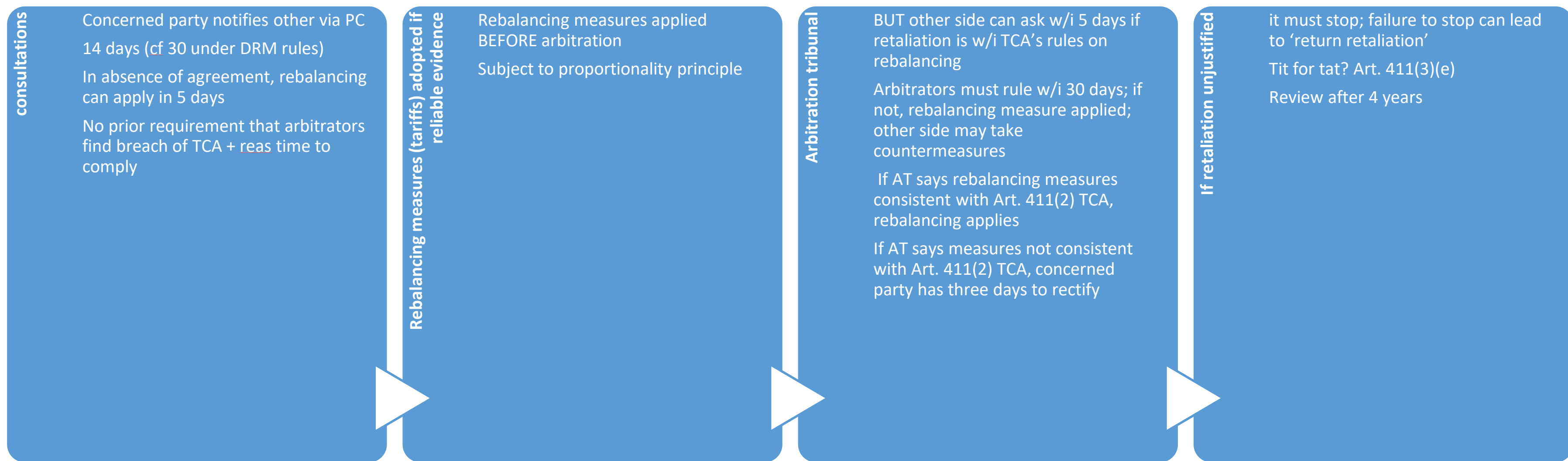

Fig 7 Rebalancing mechanism

If engaged, the rebalancing mechanism is quick and fairly brutal. Unlike the standard DRM (fig 2) and the non-regression DRM (fig 6), the rebalancing mechanism (fig 7) allows the complaining party to get the retaliation in first (see second column). In other words, there is no three stage process (consultation, arbitration/special panel, compliance) but only a two stage process (brief consultation, and then straight to retaliation) unless the complained about party (e.g. the UK, the 'notified party') asks for the establishment of an Arbitration Tribunal (AT). If the AT finds the retaliation by, say, the EU (the 'concerned party') is unlawful then the party doing the retaliation (the EU) must stop. Failure to stop means the UK can cross-retaliate (tit-for-tat). There are special fast track procedures (Art. 760). For example, there are only two days, instead of ten, to decide on composition of tribunal.

In assessing this new procedure, the UKTPO notes that rebalancing is a 'defensive version of dynamic alignment: defensive in that rather than ongoing cooperation and harmonisation, it provides another means for each side to coerce the other'.[19] For the Commission, what is described as '**unilateral rebalancing measures**' in the case of significant divergences in the areas of labour and social, environment or climate protection, or of subsidy control, 'allows for the future-proofing of level playing field provisions to maintain open and fair competition over time'.

If rebalancing measures have been taken frequently or for more than 12 months, each party can seek a review of the trade and other economic parts of the Agreement to ensure an appropriate balance between the commitments in the Agreement on a durable basis. In this case, the Parties could negotiate and amend relevant parts of the Agreement. Any trade or economic part of the Agreement, including aviation, that would remain in place or be renegotiated would retain appropriate level playing field commitments.

Other instruments for trade and sustainable development

In comparison to rebalancing, the third and final limb of the LPF provisions concerns 'other instruments for trade and sustainable development'. Article 397 TCA refers to various international instruments such as the 1992 Rio Declaration on Environment and development and the 2008 ILO Declaration on Social Justice. Article 399 TCA contains a number of commitments to promotion of trade in a way that is conducive to decent work for all. Unlike non-regression and rebalancing, there is no enforcement mechanism.

(c) When might the EU take action?

Some breaches are likely to be considered more serious than others. The IPPR provide a helpful summary of when they think the EU is more likely to take action under the non-regression or the LPF provisions. They suggest the following:[20]

- An act of divergence **involving the lowering of protections** (i.e. deregulation) is more likely to raise problems in the context of the level playing field, compared to 'passive divergence' as a result of the UK not keeping pace with EU rules. This is because the labour non-regression clause in the TCA does not require such a significant impact on trade or investment compared with the rebalancing clause.

- An act of divergence **disregarding fundamental ILO rights and principles** is more likely to see the EU successfully taking action against the UK. This is because the EU could rely on the

[19] https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-governance-state-subsidies-and-the-level-playing-field/
[20] https://www.ippr.org/research/publications/uk-eu-deal-workers-rights

provisions on multilateral standards in the TCA to contest the UK's actions. These provisions do not require a trade or investment link. The EU is likely to also be particularly concerned about any threat to fundamental labour rights and principles. However, if the EU and the UK were to engage in a dispute related to the commitments to multilateral standards in the TCA, there would be no scope to enact sanctions. This could make it harder to enforce these provisions.

- An act of divergence which is of a **sufficiently large scale** – in terms of its impact, its geographical scope, and the length of time it is in place – is more likely to face difficulties. In particular, the repeal of major EU-derived legislation (on e.g. holiday pay, rest breaks or occupational health and safety) will in all likelihood be more problematic than targeted modifications of legislation or temporary derogations. This is because if the divergence is significant the EU is both more likely to take notice and respond and more likely to be able to demonstrate an impact on trade or investment to a panel of experts. (See for instance paragraph 193 of the panel report for the US-Guatemala dispute, which notes that "effects may in some cases be too brief, too localized or too small to confer a competitive advantage".)

- An act of divergence **directly affecting a tradeable sector** (or sectors) is more likely to elicit a respond from the EU. (Tradeable sectors typically include industries such as agriculture and manufacturing.) The reason for this is that on the face of it there is more likely to be a stronger case for demonstrating an impact on trade. This aligns with the approach of the panel in the US-Guatemala dispute.

- An act of divergence which **demonstrably lowers labour costs** is particularly likely to lead to the EU successfully taking action under the terms of the TCA. Following the logic of the panel decision in the US-Guatemala dispute, if the EU is able to evidence how divergence has had a real-world impact on competition through reduced labour costs, then its case is likely to be far stronger in the event of a formal dispute. To take a hypothetical example, if the UK government reduced statutory annual leave entitlements and it could be demonstrated that employers had subsequently lowered their labour costs by cutting back on annual leave, then this could be used to make the case that the UK's reduction in labour protections had conferred a competitive advantage on its employers, thereby breaching the non-regression commitment in the TCA.

- An act of divergence which **relates to EU-derived legislation** is more likely to attract the attention of the EU. While the non-regression clause does not explicitly refer to EU standards, it is to be expected that the EU will focus its attention on any efforts to weaken EU-derived protections, as opposed to purely national measures such as the minimum wage. This is because the EU is unlikely to respond in relation to a policy measure which the UK could have implemented as an EU member, given the original purpose of the level playing field was to guard against the risks of the UK having an unfair competitive advantage once it withdrew from the EU. Similarly, the EU is less likely to take action over issues that pre-exist Brexit (for instance, the poor resourcing of the UK's labour inspectorates) or over matters where EU member state themselves are also in breach (eg as Ewing 2021 argues, both the UK and the EU are in breach of ILO Convention 87 on freedom of association and the right to organise).

4. Other domestic limits on divergence

So far, we have focused on the TCA limits on divergence. There are, of course, domestic limits too for the devolved nations. The first and foremost is the Internal Market Act 2020. This Act is premised

on market access principles. It will be recalled that the basic idea is that in the field of goods, goods lawfully produced in Wales should be capable of being sold in England. There are few exceptions to this basic principle (see fig 8)

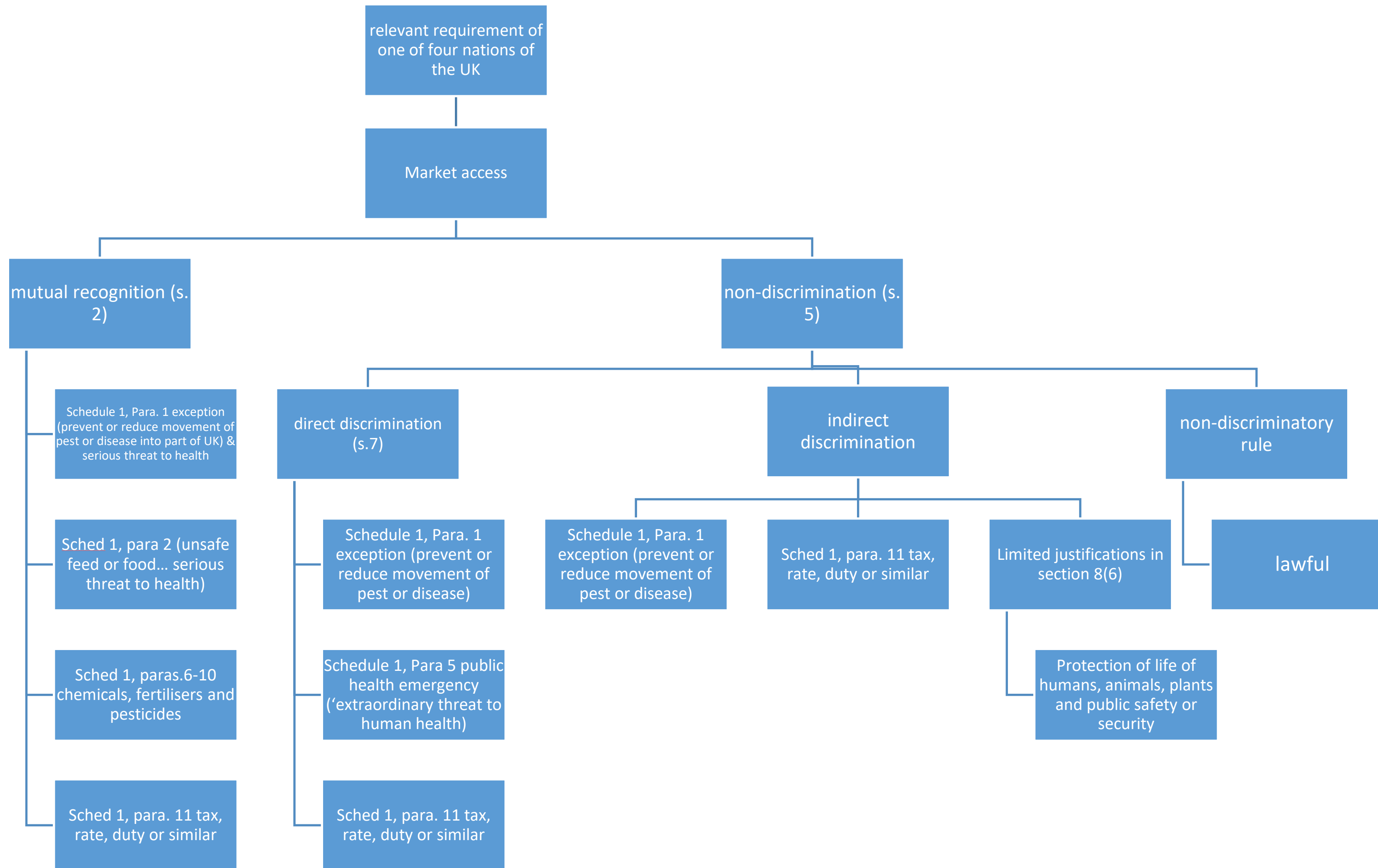

Fig 8 Internal Market Act 2020: Part I on goods

So this would suggest that if Wales wanted to engage in regulatory divergence, this would be possible. Only if, say, England thought Welsh goods constituted a serious threat to health, due to pest or disease or unsafe food or feed could England refuse to admit those goods.

Conversely, if goods are made to a lower standard in England, then under the same mutual recognition principle, English goods must be admitted to the Welsh market. If those English goods are cheaper than Welsh goods then it is likely that the English goods will be bought by consumers both in England and Wales, in preference to the Welsh goods, threatening the viability of Welsh companies. In other words, the market access principles may create an economic constraint on divergence in practice. As Armstrong put it, 'Given the size of both the Scottish and Welsh markets relative to the market in England, there has been an evident anxiety that the rules set for the English market could in practice end up being the basis for the sale of goods or provisions of services in Scotland and Wales to the detriment of the exercise of devolved regulatory competence.' This is referred to in the jargon as 'competitive federalism' but with competition in its most negative form based on lowering of standards. It was for this reason that Scottish Parliament and the Senedd withheld their legislative consent over the implications of the legislation for the exercise of devolved competence.[21]

The IMA 2020 was nevertheless passed. Although certain areas of regulatory policy, like data and consumer protection, product standards and product safety (but not food or pesticides) are reserved, 'the impact of the Act on devolved competences is likely to be felt instead around issues of human, animal and plant health, environmental protection and food standards and safety'.[22]

As fig. 8 shows, there are exceptions to the general principles of market access in Schedule 1 for goods and Schedule 2 for services. The Act gives power to the Secretary of State to make changes to these schedules by regulations subject to the affirmative procedure (s.10 IMA 2020 reproduced in the Annex). The Minister can also make changes to the narrow list of justifications available to justify indirect discrimination. The consent of the devolved governments must be sought prior to any exercise of the powers to amend the schedules or the list of legitimate aims. If consent is not obtained within a month, the regulations can nonetheless still be made. So far, no such regulations have been made – so the basic principle of competitive federalism applies with few brakes that can be deployed by the Welsh government.

An attempt to manage the effects of competitive federalism in a more cooperative way was through the adoption of common frameworks (CF).[23] Lord Hope tried to ensure that any divergences which result from the CF programme would be protected from the market access principles. This was rejected by the government but the government did agree to make regulations to amend the schedules to the Act to give effect to agreements that emerge from common frameworks.[24] As s.10 IMA 2020 requires, UK ministers need to seek the consent of devolved ministers when exercising

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[21] https://ukconstitutionallaw.org/2020/12/18/kenneth-armstrong-governing-with-or-without-consent-the-united-kingdom-internal-market-act-2020/

[22] Ibid.

[23] K. A. Armstrong, 'From the Shadow of Hierarchy to the Shadow of Competition – Common Frameworks and the Disciplining of Divergence', U.K. Const. L. Blog (15th December 2021) (available at https://ukconstitutionallaw.org/)

[24] Sections 10(2) and 18(3) of the Act which allows the Secretary of State, by regulations, to amend Schedule 1 (goods) and Schedule 2 (services) to exclude the outcome of a 'common framework agreement' from the scope of application of the market access principles.

their powers to amend the Schedules. In a Ministerial statement, Neil O'Brien MP noted that a process for agreeing such exclusions in areas of policy divergence within a Common Framework has been developed by the UK Government and the Devolved Administrations. A copy has been placed in the Libraries of both Houses.[25] He said that 'where agreement to such an exclusion is reached within a Common Framework, the relevant department and minister will seek that approval by laying a draft statutory instrument before Parliament in accordance with the UK Internal Market Act'.[26] What is not clear from this cryptic statement is what happens if the relevant minister fails to lay a draft SI. As Armstrong concludes:[27]

> Any new initiative, for example, on single-use plastics or in combatting microplastics – including any use of the Scottish Government's power to 'keep pace' with future EU environmental policy developments – would fall within the scope of the Resources and Waste Common Framework. We will then see both the effects of the UK Internal Market Act and the procedure for excluding agreements arising from Common Frameworks in action.

5. Conclusions

It is possible for regulatory divergence to occur. In the Senedd wishes to diverge any improvement of UK standards will not trigger the LPF provisions which would, in any case be brought against the UK not the Welsh government. A lowering of standards would potentially cause more difficulty. The same would apply equally in respect of environmental policy and climate change.

In respect of divergence in respect of human, animal and plant health, and food standards and safety it is likely that the IMA 2020 will provide for greater constraint than any provisions of the TCA.

[25] https://www.gov.uk/government/publications/process-for-considering-ukim-act-exclusions-in-common-framework-areas/process-for-considering-uk-internal-market-act-exclusions-in-common-framework-areas
[26] https://questions-statements.parliament.uk/written-statements/detail/2021-12-09/hcws459
[27] https://ukconstitutionallaw.org/2021/12/15/kenneth-a-armstrong-from-the-shadow-of-hierarchy-to-the-shadow-of-competition-common-frameworks-and-the-disciplining-of-divergence/.

Annex I: S. 10 and 18 IMA 2020

10Further exclusions from market access principles

(1)Schedule 1 contains provision excluding the application of the United Kingdom market access principles in certain cases.

(2)The Secretary of State may by regulations amend that Schedule.

(3)The power under subsection (2) may, for example, be exercised to give effect to an agreement that—

(a)forms part of a common framework agreement, and

(b)provides that certain cases, matters, requirements or provision should be excluded from the application of the market access principles.

(4)A “common framework agreement” is a consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day.

(5)References in this section to devolved or transferred matters include reference to corresponding matters in England.

(6)When determining whether a matter is a devolved or transferred matter for the purposes of this section, the following provisions are to be ignored—

(a)section 30A of the Scotland Act 1998;

(b)section 109A of the Government of Wales Act 2006;

(c)section 6A of the Northern Ireland Act 1998.

(7)In making regulations under subsection (2), the Secretary of State must have regard to the importance of facilitating the access to the market within Great Britain of qualifying Northern Ireland goods.

(8)Regulations under subsection (2) are subject to affirmative resolution procedure.

(9)Before making regulations under subsection (2), the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.

(10)If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, the Secretary of State may make the regulations without that consent.

(11)If regulations are made in reliance on subsection (10), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned.

(12)In this section—

“devolved administrations” means—

(a) the Scottish Ministers,

(b) the Welsh Ministers, and

(c) a Northern Ireland department;

“qualifying Northern Ireland goods” has the same meaning as in section 47.

18Services: exclusions

(1)Schedule 2 contains—

(a)a list of services specified in the first column of the table in Part 1 of that Schedule, to which section 19 (mutual recognition) does not apply;

(b)a list of services specified in the first column of the table in Part 2 of that Schedule, to which sections 20 and 21 (non-discrimination) do not apply;

(c)a list of authorisation requirements in Part 3 of that Schedule, to which section 19 does not apply;

(d)a list of regulatory requirements in Part 4 of that Schedule, to which sections 20 and 21 do not apply.

(2)The Secretary of State must keep Schedule 2 under review, and may by regulations—

(a)remove entries in the tables in Part 1 or Part 2 of that Schedule or entries in the lists in Part 3 or Part 4 of that Schedule;

(b)amend entries in those tables or lists;

(c)add entries to those tables or lists.

(3)The power under subsection (2) may, for example, be exercised to give effect to an agreement that—

(a)forms part of a common framework agreement, and

(b)provides that certain cases, matters, requirements or provision should be excluded from the application of this Part.

(4)A “common framework agreement” is a consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day.

(5)References in this section to devolved or transferred matters include reference to corresponding matters in England.

(6)When determining whether a matter is a devolved or transferred matter for the purposes of this section, the following provisions are to be ignored—

(a)section 30A of the Scotland Act 1998;

(b)section 109A of the Government of Wales Act 2006;

(c)section 6A of the Northern Ireland Act 1998.

(7)Regulations under subsection (2) are subject to affirmative resolution procedure.

(8)Before making regulations under subsection (2), the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.

(9)If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, the Secretary of State may make the regulations without that consent.

(10)If regulations are made in reliance on subsection (9), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned.

(11)In this section “devolved administrations” means—

(a)the Scottish Ministers,

(b)the Welsh Ministers, and

(c)a Northern Ireland department.