Agenda – Legislation, Justice and Constitution Committee

Meeting Venue:
Videoconference via Zoom
Meeting date: 27 February 2023
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 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3

(13.30 – 13.35)

Made Negative Resolution Instruments

2.1 SL(6)321 – The Education (Student Finance) (Miscellaneous Amendments) (Wales) Regulations 2023

(Pages 1 – 3)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-07-23 – Paper 1 – Draft report

2.2 SL(6)322 – The Countryside and Rights of Way Act 2000 (Review of Maps) (Amendment) (Wales) Regulations 2023

(Pages 4 – 5)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-07-23 - Paper 2 - Draft report

Affirmative Resolution Instruments

2.3 SL(6)323 - The Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations 2023

(Pages 6 - 7)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)07-23 - Paper 3 - Draft report

Composite Negative Resolution Instruments

2.4 SL(6)324 - The Education (Student Loans) (Repayment) (Amendment) Regulations 2023

(Pages 8 - 10)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-07-23 - Paper 4 - Draft report

LJC(6)-07-23 - Paper 5 - Written Statement by the Minister for Education and Welsh Language, 8 February 2023

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

(13.35 - 13.40)

3.1 SL(6)312 - The Government of Wales Act 2006 (Budget Motions and Designated Bodies) (Amendment) Order 2023

(Pages 11 - 16)

Attached Documents:

LJC(6)-07-23 - Paper 6 - Report

LJC(6)-07-23 - Paper 7 - Letter from the Minister for Finance and Local

Government, 15 February 2023

LJC(6)-07-23 - Paper 8 - Letter to the Minister for Finance and Local Government, 3 February 2023

4 Inter-Institutional Relations Agreement

(13.40 - 13.45)

4.1 Correspondence from the Minister for Finance and Local Government: Finance: Interministerial Standing Committee Meeting

(Pages 17 - 18)

Attached Documents:

LJC(6)-07-23 - Paper 9 - Letter from the Minister for Finance and Local Government, 21 February 2023

4.2 Written Statement and correspondence from the Minister for Rural Affairs and North Wales, and Trefnydd: Approved Country Lists (Animals and Animal Products) (Amendment) Regulations 2023

(Pages 19 - 21)

Attached Documents:

LJC(6)-07-23 - Paper 10 - Written Statement by the Minister for Rural Affairs and North Wales, and Trefnydd, 22 February 2023

LJC(6)-07-23 - Paper 11 - Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 21 February 2023

5 Papers to note

(13.45 - 13.50)

5.1 Correspondence from the Counsel General and Minister for the Constitution: Correcting Welsh Statutory Instruments

(Pages 22 - 27)

Attached Documents:

LJC(6)-07-23 - Paper 12 - Letter from the Counsel General and Minister for the Constitution, 15 February 2023

LJC(6)-07-23 - Paper 13 - Letter to the Counsel General and Minister for the Constitution, 6 February 2023

5.2 Correspondence from the Minister for Finance and Local Government: Supplementary Legislative Consent Memorandum on the UK Infrastructure Bank Bill

(Page 28)

Attached Documents:

LJC(6)-07-23 - Paper 14 - Letter from the Minister for Finance and Local Government, 15 February 2023

5.3 Written Statement by the Counsel General and Minister for the Constitution: Report on the implementation of Law Commission proposals

(Page 29)

Attached Documents:

LJC(6)-07-23 - Paper 15 - Written Statement by the Counsel General and Minister for the Constitution, 15 February 2023

5.4 Correspondence from the Counsel General and Minister for the Constitution: Retained EU Law (Revocation and Reform) Bill

(Pages 30 - 41)

Attached Documents:

LJC(6)-07-23 - Paper 16 - Letter from the Counsel General and Minister for the Constitution, 16 February 2023

5.5 Correspondence from the Minister for Economy: Legislative Consent Memoranda on the Online Safety Bill

(Page 42)

Attached Documents:

LJC(6)-07-23 - Paper 17 - Letter from the Minister for Economy, 20 February 2023

5.6 Correspondence from Families First in Education Wales: Home schooling

(Pages 43 - 92)

Attached Documents:

LJC(6)-07-23 - Paper 18 - Letter from Families First in Education Wales, 21 February 2023

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

(13.50)

7 Draft submission to the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee: How is Devolution Changing Post-EU? Inquiry

(13.50 - 14.00) (To Follow)

Attached Documents:

LJC(6)-07-23 - Paper 19 - Draft submission

8 Supplementary Legislative Consent Memorandum (Memorandum No. 5) on the Procurement Bill: Legal Advice Note

(14.00 - 14.15) (Pages 93 - 117)

Attached Documents:

LJC(6)-07-23 - Paper 20 - Legal Advice Note

LJC(6)-07-23 - Paper 21 - Letter from the Minister for Finance and Local Government, 8 February 2023

LJC(6)-07-23 - Paper 22 - Letter to the Minister for Finance and Local Government, 26 January 2023

9 Supplementary Legislative Consent Memorandum (Memorandum No. 5) on the Social Housing (Regulation) Bill: Draft report

(14.15 - 14.30) (Pages 118 - 130)

Attached Documents:

LJC(6)-07-23 - Paper 23 - Legal Advice Note

LJC(6)-07-23 - Paper 24 - Draft report

10 Legislative Consent Memoranda on the Economic Crime and Corporate Transparency Bill: Draft report

(14.30 - 14.40) (To Follow)

Attached Documents:

LJC(6)-07-23 - Paper 25 - Draft report

SL(6)321 – The Education (Student Finance) (Miscellaneous Amendments) (Wales) Regulations 2023

Background and Purpose

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

These Regulations amend existing student support regulations to:

- increase the amounts of undergraduate and postgraduate support;
- increase the maximum amount of doctoral loan instalment payable annually;
- enable more part-time students to apply for Grants for Dependants, and increase the income disregards used to calculate financial entitlement;
- make family members of certain persons settled in the UK eligible for certain elements of support;
- make certain persons from specified British Overseas Territories and EU Overseas Territories eligible for certain elements of support; and
- make technical amendments to the Education (European University Institute) (Wales) Regulations 2014 by omitting redundant provisions.

Some elements of support are increased by reference to projected increases in the National Living Wage for 2023, while others are increased by reference to RPIX (a measure of inflation with excludes mortgages interest payments).

The application of any increases in financial support under these Regulations differ depending on numerous factors such as: course start date, whether full or part time students and whether undergraduate or postgraduate students.

A detailed overview of the amendments to student support under these Regulations is set out in paragraphs 4.1-4.24 of the Explanatory Memorandum ("EM").

The estimated additional financial costs of increased financial support under these Regulations is contained in the Regulatory Impact Assessment section of the EM, and relevant extracts are summarised below in the Merits Scrutiny section of this report.

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

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

A Regulatory Impact Assessment has been undertaken for these Regulations which is contained in Part 2 of the EM.

Paragraph 6.7 of the EM states that the implications of not making these Regulations include:

- *"the value of student support will decrease, leaving students to bear the entire cost of this reduction at a time when the cost of living has increased;*
- *the Programme for Government objective to fund childcare for more families where parents are in education and training or on the edge of work will not be met; [and]*
- *there would be no comparability between family members of UK nationals and of other persons settled in the UK […].*

The costs and benefits of making the Regulations are set out in paragraphs 6.9 – 6.14 of the EM. Specifically, it states:

> *"The annual support uplifts for the 2023/24 academic year are estimated to cost an additional £80m.*
>
> […]
>
> *The changes to [Grants for Dependents] to increase the income disregards and reduce intensity of study requirements are estimated to cost an additional £652,000 in the academic year 2023/24.*
>
> […]

The amendment to make provision for family members of other persons with settled status in the UK will have a minor cost implication but as numbers are likely to be very low, any costs are considered to be minimal.

The amendment to make provision for UK nationals resident in the BOTs territories and EU nationals resident in the EOTs territories to be eligible for undergraduate tuition fee support and postgraduate support is thought to have a minor cost implication as numbers are likely to be low."

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
20 February 2023

SL(6)322 – The Countryside and Rights of Way Act 2000 (Review of Maps) (Amendment) (Wales) Regulations 2023

Background and Purpose

These Regulations amend section 10(2) of the Countryside and Rights of Way Act 2000 ("the Act") in relation to Wales.

Section 10(2) of the Act prescribes the time periods within which the Natural Resources Body for Wales (as the appropriate countryside body in relation to Wales) must conduct initial and subsequent reviews of maps issued by it in conclusive form under section 9 of the Act.

These Regulations amend section 10(2)(b)(ii) of the Act in order to extend the maximum interval between subsequent reviews following a first review, from 10 years after the previous review, to 15 years.

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 point is 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**

We do not believe it is necessary to cite section 45(1) of the Countryside and Rights of Way Act 2000 in the preamble, as it provides the definition of "regulations" rather than any enabling power.

Could the Welsh Government provide an explanation?

Merits Scrutiny

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

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

We note the reasons provided by the Welsh Government for extending the subsequent review period. In particular, we note the following paragraphs in the Explanatory Memorandum:

> *"As part of its Access Reform Programme, the Welsh Government is considering proposals to move from a decadal review to a continuous review process. This SI changes the period for subsequent mapping reviews from 10 years to 15 years, which means the next review will be due in 2029. This avoids NRW expending unnecessary time and resources on a review process that is currently being considered for further reform, to introduce a continual review process."*
>
> *"NRW has advised that it does not have the resources and expertise to undertake these two tasks simultaneously (reviewing the current open access map under current statutory deadlines and moving to a continuous review process). Consequently, NRW requested that Welsh Government use the powers provided by CRoW section 10(3) to set a new date of 2029 for completion of the next review of the open access mapping."*

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

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

> *"As the Regulations provide a limited amendment, affecting a small number of individuals and does not reflect a major change in the Welsh Government's policy, a formal public consultation did not take place. There was, however, engagement with NRW who is directly affected by the amendment."*

Welsh Government response

A Welsh Government response is required in relation to point one.

Legal Advisers
Legislation, Justice and Constitution Committee
22 February 2023

SL(6)323 – The Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations 2023

Background and Purpose

These Regulations are intended to reform the Non-Domestic Rating (NDR) appeals system in Wales. The system is administered by two independent organisations, each responsible for different stages of the process. The Valuation Office Agency (VOA) is responsible for the valuation and listing of hereditaments for NDR, including the consideration of proposals from ratepayers who believe their valuation should be changed. The Valuation Tribunal for Wales (VTW) is responsible for appeals, when agreement is not reached between a ratepayer and the VOA in relation to a proposed change to a valuation.

These Regulations implement a new process for ratepayers to engage with the VOA, underpinned by its digital platform, and a small number of additional changes to the arrangements for appeals to the VTW. The changes aim to improve the efficiency of the system for ratepayers and public bodies by reducing speculative and unsuccessful appeals. They also act as an enabler for the broader policy aim of delivering more frequent NDR revaluations, ensuring ratepayers' bills more accurately reflect the prevailing economic conditions and, in turn, reducing the likelihood of an appeal being submitted.

Procedure

Draft affirmative.

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

Technical Scrutiny

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

Merits Scrutiny

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

1. Standing Order 21.3(i) – that it imposes a charge on the Welsh Consolidated Fund or contains provisions requiring payments to be made to that Fund or any part of the government or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment.

We note that, under regulation 17(2), any sum received by the Valuation Officer by way of a 'Part 2 penalty' must be paid into the Welsh Consolidated Fund.

A ‘Part 2 penalty’ is a financial penalty (£200) imposed on a person under regulation 16 for providing a Valuation Officer with false information.

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
21 February 2023

SL(6)324 – The Education (Student Loans) (Repayment) (Amendment) Regulations 2023

Background and Purpose

The Education (Student Loans) (Repayment) (Amendment) Regulations 2023 ("these Regulations") amend the Education (Student Loans) (Repayment) Regulations 2009 (S.I. 2009/470) ("the Principal Regulations"), which make provision for the repayment of income contingent student loans in England and Wales.

Regulation 2 makes provision for a temporary reduction of the interest rate on undergraduate loans specified in regulation 21A, and in respect of postgraduate degree loans specified in regulation 21B, of the Principal Regulations.

The interest rate is set at 6.9% for the period beginning with 1 March 2023 and ending with 31 May 2023. After that date, the interest rate will revert to the original rate specified in the Principal Regulations.

Procedure

Composite Negative

The Regulations were made by both the Welsh Ministers and the Secretary of State, before being laid before both the Senedd and the United Kingdom Parliament.

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. The United Kingdom Parliament can also annul the Regulations, in accordance with the rules for annulment that apply to the United Kingdom Parliament.

Technical Scrutiny

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

1. Standing Order 21.2(ix) – that it is not made or to be made in both English and Welsh

These Regulations have been made as a composite instrument, meaning the Regulations have been: (a) made by both the Welsh Ministers and the Secretary of State, and (b) laid before both the Senedd and the United Kingdom Parliament. As a result, the Regulations have been made in English only.

The Explanatory Memorandum explains that:

"This composite statutory instrument will be subject to UK Parliamentary scrutiny, it is not considered reasonably practicable for this instrument to be made or laid bilingually. Therefore, the 2023 Regulations are made in English only."

Merits Scrutiny

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

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

We note there has been no formal consultation on these Regulations and that no explanation has been provided in this regard. However, we note also the technical nature of these Regulations and the fact that they will reduce the repayment burden for the specified period on those who have undertaken relevant courses of study.

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

We are pleased to note that the relevant exemptions from the *Welsh Ministers' regulatory impact assessment code for subordinate legislation*, together with supporting detail, have been set out in Part 2 of the Explanatory Memorandum to justify not undertaking a Regulatory Impact Assessment in relation to these Regulations. It is hoped this practice will be adopted for all future Explanatory Memoranda generally where an RIA is not undertaken.

However, we note also that a Regulatory Impact Assessment was carried out in relation to the Education (Student Loans) (Repayment) (Amendment) (No. 2) Regulations 2022 ("the 2022 Regulations"), which appear to have relied on identical financial data (see paragraph 4.3 of the Explanatory Memorandum to the 2022 Regulations and paragraph 4.2 of the Explanatory Memorandum to these Regulations). In view of this it is unclear why that Regulatory Impact Assessment was not reproduced or referred back to for the purpose of these Regulations.

Welsh Government response

A Welsh Government response is required in relation to reporting point 3.

Legal Advisers
Legislation, Justice and Constitution Committee
21 February 2023

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE **Student loan interest rates**

DATE **08 February 2023**

BY **Jeremy Miles MS, Minister for Education and Welsh Language**

The Welsh Government must ensure that interest rates on student loans do not exceed the prevailing market rate.

We have acted several times in the past two years to cap the rate on student loans to protect students. Most recently, I made an announcement on 9 November 2022 to confirm a cap at 6.5% for another three months from 1 December 2022. These caps were also announced by UK Government for English students.

As interest rates remain high, the rate on loans taken out by undergraduate students since 2012, and by postgraduate students, will be capped at 6.9% between 1 March 2023 and 31 May 2023. Further rate caps may be applied if the prevailing market rate continues to be below student loan interest rates after that date.

Changes to interest rates do not affect monthly student loan repayments, which are charged as a fixed proportion of income. Loan repayments are income contingent. Students repay their loan only if they earn above a threshold, and remaining debts are written off after thirty years.

Living costs should never be a barrier to studying at university, which is why the Welsh Government provides the most generous living costs grants in the UK. Welsh students have less to repay on average than their English peers. The Welsh Government also provides a debt write-off of up to £1,500 for each borrower entering repayment, a scheme unique in the UK.

SL(6)312 – The Government of Wales Act 2006 (Budget Motions and Designated Bodies) (Amendment) Order 2023

Background and Purpose

The Government of Wales Act 2006 (Budget Motions and Designated Bodies) (Amendment) Order 2023 ("this Order") amends the Government of Wales Act 2006 (Budget Motions and Designated Bodies) Order 2018 (the "2018 Order"), which designates bodies in relation to the Welsh Ministers. The effect of the this Order is to insert four further bodies into the list of designated bodies contained within the Schedule to the 2018 Order. The purpose of such designation is so that information relating to the resources expected to be used by such bodies can be included within a Budget motion.

The Welsh Ministers have consulted with HM Treasury on the bodies to be designated within this Order, in accordance with the Government of Wales Act 2006.

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

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

In article 2(2), "**Her** Majesty's Chief Inspector of Education and Training in Wales" is inserted in the list of designated bodies in the Schedule to the 2018 Order.

Following the death of the Queen and her succession by Charles III it is appears that "**His** Majesty's Chief Inspector of Education and Training in Wales" should be inserted instead.

Although the legal name "Her Majesty's Chief Inspector of Education and Training in Wales" was given to the role by section 73(1) of the Education and Skills Act 2000, section 10 of the Interpretation Act 1978 notes "In any Act a reference to the Sovereign reigning at the time of the passing of the Act is to be construed, unless the contrary intention appears, as a reference to the Sovereign for the time being."

Furthermore, Owen Evans is described as "His Majesty's Chief Inspector of Education and Training in Wales" on Estyn's website.

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

In article 2(2), in the Welsh language version, the bodies have not been listed correctly in alphabetical order. "Cy**ng**or y Gweithlu Addysg" should come before "Cy**m**wysterau Cymru" because the letter "ng" comes before the letter "m" in the Welsh alphabet. As a result the description of the amendment which notes that the bodies are to be inserted at the "appropriate place" is unclear.

Merits Scrutiny

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

Welsh Government response

Technical Scrutiny point 1:

The statutory name of the body, namely "Her Majesty's Chief Inspector of Education and Training in Wales", as provided for in section 73(1) of the Learning and Skills Act 2000, is correctly inserted to the list of designated bodies in the Schedule to the Government of Wales Act 2006 (Budget Motions and Designated Bodies) Order 2018. Under sections 10 and 23 of the Interpretation Act 1978, the reference to this statutory body is construed as "His Majesty's Chief Inspector of Education and Training in Wales".

Technical Scrutiny point 2:

Article 2(2) of the Order uses the plural "at the appropriate places insert" and "yn y lleoedd priodol mewnosoder". As the Schedule to the 2018 Order is an alphabetical list, the four bodies listed within the 2023 Order will be inserted alphabetically into the 2018 Order, regardless of their appearance within the 2023 Order. The insertion is therefore clear.

Committee Consideration

The Committee considered the instrument and Government response at its meeting on 30 January 2023 and reports to the Senedd in line with the reporting points above.

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

Llywodraeth Cymru
Welsh Government

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

15 February 2023

Dear Huw,

The Government of Wales Act 2006 (Budget Motions and Designated Bodies) (Amendment) Order 2023 ("the 2023 Order")

Thank you for considering the Welsh Government's response to the draft reporting points at the Committee's meeting on 30 January 2023 and your subsequent letter.

In relation to the first technical reporting point, footnote (3) on page 3 of the 2023 Order refers the reader to the statutory name given to the body. Given this cited provision refers to "Her Majesty", the Welsh Government considered the preferable drafting approach, in the context of this instrument at that particular time, was to refer to the body's name as established in section 73(1) of the Learning and Skills Act 2000. The Welsh Government may, however, take a different approach in future instruments when referring to the Sovereign, depending upon the context of the legislation concerned.

You asked about the Welsh Government or UK Government's plans to amend existing legislation to ensure accuracy and accessibility. References to "Her Majesty" are accurate as a result of section 10 of the 1978 Act and section 11 of the Legislation (Wales) Act 2019. The Welsh Government will consider the desirability of amending specific references depending on context when legislating in the future. We are not aware of the UK Government's plans on this matter.

The second technical reporting point has been considered by the team in Welsh Government responsible for applying amendments to the published Welsh texts on legislation.gov.uk, the SI Registrar and the Publishing Editor at The National Archives. They have confirmed that, based on the instruction to insert the bodies "in the appropriate places", the bodies will be inserted in the 2018 Order in alphabetical order.

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We trust this clarifies the Welsh Government's position.

Yours sincerely,

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

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

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Rebecca Evans MS
Minister for Finance and Local Government

3 February 2023

Dear Rebecca

The Government of Wales Act 2006 (Budget Motions and Designated Bodies) (Amendment) Order 2023

We considered The Government of Wales Act 2006 (Budget Motions and Designated Bodies) (Amendment) Order 2023, and the Welsh Government's response to our draft reporting points, at our meeting on 30 January 2023. Our report was laid before the Senedd after the meeting.

While I thank you for your timely response to the points we have raised in our report, we have further questions which we wish to raise with you.

Our first technical reporting point notes that, in article 2(2) of the Order, "Her Majesty's Chief Inspector of Education and Training in Wales" is inserted in the list of designated bodies in the Schedule to the 2018 Order. Following the death of Her Majesty Queen Elizabeth II and her succession by Charles III, and in accordance with section 10 of the *Interpretation Act 1978* (the 1978 Act), we believed it necessary that "His Majesty's Chief Inspector of Education and Training in Wales" should be inserted instead.

The response we have received rejects this view and suggests that, in accordance with sections 10 and 23 of the 1978 Act, the reference to this statutory body is construed as "His Majesty's Chief Inspector of Education and Training in Wales".

In our view, it cannot be correct to continue to refer to the body as 'Her Majesty's' when the sovereign is now a king. While the 1978 Act ensures that existing legislation will continue to operate when there's a change of monarch, we do not think it should be used as justification for continuing to use a factually inaccurate term when making new legislation (or amending existing legislation).

1. We would be grateful if you would provide further clarity on why this new Order should not refer to the current monarch.

2. Furthermore, if the Welsh Government's position is accepted as correct, for how long do you intend to continue using "Her Majesty" in new legislation?

3. When will the Welsh Government (or the UK Government if relevant) begin the process of amending the names of the relevant bodies to ensure that the legislation is accurate and accessible in future?

Our second technical reporting point noted that, in article 2(2) in the Welsh language version of the Order, the bodies have not been listed correctly in alphabetical order. "Cyngor y Gweithlu Addysg" should come before "Cymwysterau Cymru" because the letter "ng" comes before the letter "m" in the Welsh alphabet. As a result, we consider that the description of the amendment which notes that the bodies are to be inserted at the "appropriate place" is unclear.

Again, this view has been rejected. In response, we have been told that article 2(2) of the Order uses the plural "at the appropriate places insert" and "yn y lleoedd priodol mewnosoder" and, as the Schedule to the 2018 Order is an alphabetical list, the four bodies listed within the 2023 Order will be inserted alphabetically into the 2018 Order, regardless of their appearance within the 2023 Order.

4. We would welcome your views on why you consider it reasonable to expect the reader to identify the error in this Order, which relates to letters in the middle of two words, and then insert the terms into the correct places in the 2018 Order.

I would be grateful to receive a response by 23 February 2023.

Yours sincerely,

Huw Irranca-Davies
Chair

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

Llywodraeth Cymru
Welsh Government

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

21 February 2023

Dear Huw,

Further to my recent letter advising you of the Finance: Interministerial Standing Committee Meeting, on 9 February at St Andrew's House, Edinburgh, I would like to briefly report on the discussions. A communique was also published following the meeting: Finance: Interministerial Standing Committee – February 2023 - GOV.UK (www.gov.uk)

Joining me in attendance were The Rt Hon John Glen MP, Chief Secretary to the Treasury (CST), John Swinney MSP, Deputy First Minister and Cabinet Secretary for Covid Recovery (Scottish Government) (Chair). Officials from the Northern Ireland Executive also attended virtually, to observe.

The first part of the meeting focussed on UK economic and fiscal plans where I highlighted the challenges the UK supplementary estimates process presents for the Welsh Government budget and outlined the Welsh Government priorities for the UK Government Spring Budget.

Building on previous discussions around the provision of greater funding certainty and flexibility for devolved governments, and possible adjustments to the current process that will enable me to plan my budget more effectively, I requested the CST continue to look at this issue and I have subsequently followed up my request in a letter.

During the discussions on budgetary pressures, I conveyed the Welsh Government priorities for the forthcoming UK Spring Budget, asking the UK Government to provide the necessary support to protect public services and respond to the inflationary, pay and other cost pressures.

The Prime Minister has identified reducing NHS waiting lists as one of his priorities, and I asked for more clarity on what will be done in the Spring Budget to achieve this, noting that the NHS will be marking 75 years of service in July.

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I raised a number of practical suggestions which could support people with the ongoing cost of living crisis, including changes to the deductions policy for Universal Credit claimants. In relation to energy prices, I raised concerns with the level of support for public services, third sector and swimming pools and highlighted that, following the reduction in household energy support, almost half of all households in Wales will now face fuel poverty. I asked the UK Government if more could be done on windfall taxes on energy profits, to ensure reliefs are achieving their intended purposes and any loopholes closed, to help generate additional funding that could be used to support those struggling to meet energy costs.

Finally, I highlighted the challenges the timing of the UK Government Spring Budget presents for Wales, as it will be announced the week following the final passage of our Budget through the Senedd (in order to enable local authorities to set their budgets by the statutory deadline).

The second part of the meeting focussed on EU Replacement Funding, under which I outlined the impact UK Government decisions on replacement EU funding have had on Wales and the financial shortfall of £1.1 billion, providing illustrative examples of the severe impact this loss of funding is having in Wales. I secured agreement from UK and devolved governments to share information on the calculations underpinning the value of replacement EU structural funds and to explore further approaches to work together and ensure greater alignment with devolved government priorities.

Finally, I made the group aware of the recently published interim report by the Independent Commission on the Constitutional Future of Wales, drawing out a number of points that support our case for additional budgetary flexibilities.

The Welsh Government will host the next meeting, in June, which I will Chair.

Yours sincerely,

Rebecca Evans.

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

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**The Approved Country Lists (Animals and Animal Products) (Amendment) Regulations 2023**
DATE	**22 February 2023**
BY	**Lesley Griffiths MS, Minister for Rural Affairs and North Wales, and Trefnydd**

Members of the Senedd will wish to be aware that I have given consent to the Secretary of State for Environment, Food and Rural Affairs to exercise a subordinate legislation-making power in a devolved area in relation to Wales.

The above titled Statutory Instrument (SI) was laid before the UK Parliament by the Secretary of State on 28 February 2023 in exercise of powers conferred by regulations 6, 7 and 9 of the Trade in Animals and Animal Products (Legislative Functions) and Veterinary Surgeons (Amendment) (EU Exit) Regulations 2019.

These Regulations correct errors in the lists of animals and animal products so that Switzerland and Iceland are legally approved to export to Great Britain. The errors meant that Switzerland and Iceland lacked the required legal basis to export certain commodities to Wales for which they should be approved. These errors were rectified to ensure that trade from Switzerland and Iceland could continue without disruption. The Regulations also removed a transit approval for Russia that had been redundant since the end of the Transition Period. None of these corrections were changes in policy but were required to maintain the status quo.

Impact the instrument may have on the Senedd's legislative competence and/or the Welsh Ministers' executive competence:

The Regulations do not diminish or undermine the powers of Welsh Ministers in any way, and they do not create, amend or remove any functions conferred on the Welsh Ministers.

I would like to reassure the Senedd 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 in working collaboratively with the UK Government where there is a clear rationale for doing so. On this occasion, I have given my consent to these Regulations for reasons of efficiency and expediency in future policy change and adherence to international obligations, cross-government coordination and consistency.

The Regulations were laid before the UK Parliament on 28 February 2023 and come into force on 21 March 2023.

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

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21st February 2023

Dear Huw,

The Approved Country Lists (Animals and Animal Products) (Amendment) Regulations 2023

I wish to inform the Committee that I am giving consent to the Secretary of State for Environment, Food and Rural Affairs to make the Approved Country Lists (Animals and Animal Products) (Amendment) Regulations 2023.

The Regulations will be made under powers conferred by regulations 6, 7 and 9 of the Trade in Animals and Animal Products (Legislative Functions) and Veterinary Surgeons (Amendment) (EU Exit) Regulations 2019.

The purpose of the Regulations is to correct errors in the lists of animals and animal products so that Switzerland and Iceland are legally approved to export to Great Britain. The errors mean that Switzerland and Iceland currently lack the appropriate legal basis to export certain commodities to Wales for which they should be approved. These errors must be rectified to ensure that trade from Switzerland and Iceland can continue without disruption. It also removes a transit approval for Russia that had been redundant since the end of the Transition Period. None of these corrections are changes in policy and they are required to maintain the status quo.

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I would like to reassure this Committee 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 in working collaboratively with the UK Government where there is a clear rationale for doing so. On this occasion, therefore, I am giving my consent to these Regulations for reasons of efficiency and expediency, and cross-government coordination and consistency.

The Regulations will be laid before the UK Parliament on 28 February 2023 using the negative procedure, and will come into force on 21 March 2023.

I have also written to the Chair of the Economy, Trade, and Rural Affairs Committee, Paul Davies MS.

Regards,

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

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

Llywodraeth Cymru
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Legislation, Justice & Constitution Committee
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15 February 2023

Dear Huw,

CORRECTING WELSH STATUTORY INSTRUMENTS

Thank you for your further letter on this matter of 6 February 2023. You have asked me to clarify some points in my letter of 18 January, and to comment on correspondence sent by the Minister for Rural Affairs and North Wales, and Trefnydd and the Deputy Minister for Mental Health and Wellbeing on 26 January 2023.

Letter of 18 January (from Counsel General)

1. The circumstances in which correction slips may be used are extremely limited, as I set out in my original letter. They are also well established. The existence and use of correction slips applies not only to Welsh Statutory Instruments but also UK Statutory Instruments, Scottish Statutory Instruments and in relation to Statutory Rules of Northern Ireland. They can also be used in relation to Acts of the Senedd, UK Parliament, Scottish Parliament and Measures of the Northern Ireland Assembly (in each case by the legislatures themselves). Recent examples of correction slips being used for Acts of the Senedd include one last month for the Renting Homes (Wales) Act 2016 and one in November for the Tertiary Education and Research Act (Wales) Act 2022.

2. Given their very limited nature and the constraints on their use, I was very surprised by your suggestion that they amount to a “potential democratic deficit”. I am very clear that they are not. Their purpose is to help to ensure that readers of legislation are not troubled by very minor technical errors.

3. The purpose of the references in my letter to *Statutory Instrument Practice* and the Special Report of the Joint Committee on Statutory Instruments was to make clear our understanding of the very minor nature of the errors that can be dealt with by correction

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slip. The particular nature of bilingual legislation is not addressed by SIP, which as I have explained does not provide guidance on Welsh SIs. It is a matter highly relevant to our own considerations and one which I am satisfied the SI Registrar also fully understands.

4. The SI Registrar is very aware that the Welsh and English texts of Welsh legislation have equal status, and understands the importance of ensuring that errors relating to either text are corrected appropriately. The registration team in The National Archives work closely with the Welsh Government to ensure not only that corrections in both languages are appropriate, but that correction slips accurately express the rectification in both languages.

5. We will seek to ensure the specific term “correction prior to making” or “correction prior to publication” are used in Government responses where appropriate.

6. The reference in my letter to a Minister bringing matters to the attention of Members, either in Committee or during the debate, was to make clear that matters could be brought to the attention of Members in the debate – even if they had not already been raised in Committee correspondence.

Letter of 26 January (from Minister and Deputy Minister)

7. In relation to the points raised in paragraphs 5 and 6 of your letter, legislation prepared by the Welsh Government undergoes robust quality assurance. This includes the application of approved and tested approaches and checks. As noted in the response to question 4 of your letter of 26 January 2023, the volume and complexity of legislation required in relation to the UK’s withdrawal from the EU has been unprecedented.

8. The Welsh Government does not knowingly lay defective legislation before the Senedd. It is important to draw a clear distinction between legislation that contains minor errors, where the policy intention is clear and the effect of the legislation is not threatened, and legislation that is defective as a whole and does not operate as intended. Errors can occur when complex legislation is being produced in high numbers and under significant time pressures – and it is very unfortunate when these are only identified after an instrument is laid. In circumstances like this, the Welsh Government considers the options available to rectify the errors. The approach taken will depend on how minor or serious the errors are, and the impact the errors have on the instrument as a whole.

9. You then raise a more general point regarding the transparency and accessibility of correcting on registration, which I believe I have addressed in my correspondence of 18 January and is dealt with in *Statutory Instrument Practice*. I am satisfied that the accessibility of the legislation, and ensuring it is correct for the end user, is the most important factor here.

10. Correction slips can be made at any time, even well after an instrument has been made, either because the error is spotted some time later or because the capacity and resources of the SI Registrar mean they (rightly) have to prioritise the registration and publication of new legislation. Correcting prior to publication where it can be achieved avoids any delay and ensures, as the Minister and Deputy Minister explained in their letter, that the published version of an instrument is corrected prior to it coming into force. And in the case of draft affirmative instruments, a reader is able to compare the version approved by the Senedd with the King’s Printer version that is available to download on legislation.gov.uk or to purchase.

I am copying this letter to the Minister for Rural Affairs and North Wales, and Trefnydd, and to the Deputy Minister for Mental Health and Wellbeing.

Yours sincerely,

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

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
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Mick Antoniw MS
Counsel General and Minister for Constitution

06 February 2023

Dear Mick

Corrections to Welsh statutory instruments

Thank you for your letter of 18 January 2023, in which you respond to the questions set out in my letter to you on 21 December 2022.

We considered your responses to our questions at our meeting on 23 January 2023 and, overall, we believe they are helpful and informative, not least because such explanations are now in the public domain.

At our meeting on 30 January 2023, we also considered a letter dated 26 January 2023 from the Minister for Rural Affairs and North Wales, and Trefnydd and the Deputy Minister for Mental Health and Wellbeing in response to our letter of 16 January 2023 on two sets of regulations which, in part, prompted us to write to you on 21 December.

In respect of both letters, there are some matters on which we would be grateful to receive further clarity, as set out below.

Letter of 18 January 2023

1) In paragraph 4 you state "A correction slip is used when the SI has been registered and published, and was a process designed very much with the printed SI in mind. Correction slips are issued with every new sale of a printed SI that is purchased (and also sent to known purchasers of the SI); they are also published alongside the digital versions of the (corrected) SI on legislation.gov.uk." Do you consider that there remains a potential democratic deficit in the executive or the SI Registrar making unilateral changes to legislation approved by a legislature?

2) It remains unclear to us how the criteria set out in the National Archives' Statutory Instruments Practice (SIP) and the Special Report of the Joint Committee on Statutory Instruments on Transparency and Accountability in Subordinate Legislation are applied when considering errors in bilingual, as opposed to monolingual, legislation. The Welsh and English texts have equal status, and so different or additional principles of interpretation may be engaged when considering whether an error has a "substantive" effect. Please can you confirm whether the particular nature of bilingual legislation is taken into account when applying the criteria? Also, are you aware if the SI Registrar has Welsh-language expertise, or do they rely on a statement from the Welsh Government that an error relating to Welsh-language text is within the appropriate criteria?

3) In paragraph 6 you note that 'correction on making' and 'correction on publication' are terms of convenience used by the Welsh Government but are not entirely accurate descriptions of the point at which corrections are made. We would welcome a commitment that, in government responses to our reports on statutory instruments, accurate terms will be used consistently and correctly in the future, so that it is clear how any errors are to be corrected.

4) In paragraph 11 you state "In general terms, if the error is one which could be remedied by correction slip then we would prefer to deal with that as a correction on (i.e. prior to) making. If it is a very minor matter, but not one which would necessarily be suitable for a correction slip, then it still may be the case that we would seek to deal with this as a matter on (i.e. prior to) making. The Minister can bring these matters to the attention of Members either in correspondence with the Committee or during the debate on the instrument." We would welcome a commitment that any such matters will always be brought to the attention of the Senedd during the debate, regardless of whether the matter has already been discussed in correspondence with my Committee, because it is important that what is being voting on is made clear to all Senedd Members and to the public.

On a general point, we note paragraphs 11 to 13 and the approach you advocate, including that your "preferred approach" is to correct the draft instrument and re-lay it before the Senedd. For the avoidance of doubt, our view remains that the Senedd should not be put in a position in which it is expected to vote on a defective instrument.

Letter of 26 January 2023

5) In question 4 of our letter to the Minister and the Deputy Minister we asked for clarity on what steps have been (or will be) put in place to ensure that a request to approve knowingly defective regulations is not put before the Senedd in the future. We do not consider it a sufficient answer to simply make reference to the Welsh Government's usual drafting policy, particularly when that policy did not catch the defects in those two sets of Regulations. We would be grateful therefore if you could address the key point which is to provide clarity on what steps the Welsh Government ***has (or will) put in place*** to ensure that a request to approve knowingly defective regulations is not put before the Senedd in the future.

6) Again as regards the response we received to question 4, please can you provide a commitment that, as regards statutory instruments arising from the Retained EU Law (Revocation and Reform) Bill (should it receive Royal Assent) the Welsh Government will not knowingly place defective instruments before the Senedd for approval.

7) As regards the response to question 6 of our letter to the Minister and the Deputy Minister, we note that, contrary to the information originally provided by Welsh Government in response to our report and during the plenary debate, corrections to two errors in the Food Regulations were made as part of the registration process which eliminated the need for the production of a correction slip. We are concerned that such an approach appears neither transparent nor accessible. This concern applies equally to the process of correction before making. Please can you explain how a reader of legislation will know that changes to the regulations were made, however minor they are considered to be by the Welsh Government, following approval by the Senedd? As mentioned in my previous letter, we have also written to the SI Registrar to seek further information about their role in these processes. We are awaiting a response.

I would be grateful to receive a response by 23 February 2023.

I am copying this letter to the Minister for Rural Affairs and North Wales, and Trefnydd and the Deputy Minister for Mental Health and Wellbeing.

Yours sincerely,

Huw Irranca-Davies
Chair

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

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/RE/0330/23

Huw Irranca-Davies MS
Chair of the Legislation, Justice and Constitution Committee
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15 February 2023

Dear Huw,

Thank you for your detailed report which was published on 16 January 2023. I reiterate my thanks to the Legislation, Justice and Constitution Committee for its diligent work on the UK Infrastructure Bank Bill.

I am pleased that the Committee agrees with Welsh Government that all the clauses listed in the Memorandum fall within the legislative competence of the Senedd as per Conclusion 1 of your Report.

I note that your Report reiterates your concerns relating to intergovernmental working. As outlined in my previous correspondence, although progress was at times slow due primarily to events occurring in Westminster, formal dispute resolution would have amounted to an unnecessary escalation. Through constructive dialogue, I and my officials were able to achieve a number of concessions, ensuring that we could recommend that the Senedd provided consent.

You will be aware that a debate was held on 17 January 2023. I am pleased that the Senedd consented to the Legislative Consent Motion.

Yours sincerely,

Rebecca Evans.

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

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Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**Report on the implementation of Law Commission proposals**
DATE	**15 February 2023**
BY	**Mick Antoniw MS, Counsel General and Minister for the Constitution**

I am pleased to lay before the Senedd today, the eighth annual report on the Welsh Government's implementation of Law Commission proposals.

Under Section 3C of the Law Commissions Act 1965, as inserted by Section 25 of the Wales Act 2014, the Welsh Ministers are required to report annually on the extent to which Law Commission proposals relating to Welsh devolved matters have been implemented.

This report covers the period from 15 February 2022 to 14 February 2023 and provides Members with an update about a number of areas that relate to Law Commission proposals as well as information on current and future Law Commission projects.

This report provides updates on the progress made over the last twelve months on a range of issues that have been the subject of Law Commission recommendations. We have introduced legislation relating to wildlife within the Agriculture (Wales) Bill and are committed to delivering a Planning Consolidation Bill, working closely with the Law Commission on its production, and a Bill in relation to Coal Tip Safety in Wales during this Senedd term. We continue to make progress in taking forward Law Commission proposals in relation to taxi and private hire services, leasehold and commonhold reform and devolved Welsh tribunals.

This update and the progress noted demonstrates the importance the Welsh Government places on Law Commission proposals.

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

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16 February 2023

Dear Huw,

Retained EU (Revocation and Reform) Law Bill

You will recall that the Welsh Government has very serious concerns about this Bill, as set out in the Legislative Consent Memorandum of 3 November and my most recent letter of 19 January to the Committee. For information I attach a letter that I have sent today to certain members of the House of Lords, setting out amendments that might mitigate some of our concerns on the Bill, at least to an extent. Of course, the Bill would remain very problematic even with such changes, as its essential motivation and construct are flawed.

I hope that sharing this letter is of use, and I would welcome an early meeting with you as Chair, after the half term recess, to discuss latest developments on this fast-moving issue.

Yours sincerely,

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

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Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: CG/PO/54/2023

16 February 2023

Dear Baroness Bloomfield of Hinton Waldrist,

In the meeting last month relating to the Welsh Government's position on UK Bills, to which you were invited, I indicated that the Welsh Government has very serious concerns on many aspects of the UK Government's Retained EU Law (Revocation and Reform) Bill.

The concerns are significantly about the jeopardising of fundamental protections across the UK in fields such as the environment, employment, food standards, animal welfare and consumer issues. They also relate to fundamental constitutional matters around respect for the devolution settlement, the functioning of the statute book, and conferring powers in devolved areas on UK Government Ministers without the consent of devolved Ministers and legislatures.

The Welsh Government set out our concerns in the Legislative Consent Memorandum submitted to the Senedd on 3 November 2022[1], with a recommendation that the Senedd withholds its consent for the Bill. We know that our concerns are shared by many businesses, trade unions, voluntary sector organisations, environmental NGOs, legal commentators, and academics.

As I mentioned during the discussion in January, our concerns in relation to this Bill are also shared by the Scottish Government. In this context you may have seen that the Scottish Government has published a number of potential amendments to the Bill that seek to mitigate some of its worst impacts[2]. In the context of our mutual concerns on the Bill, we have – with the agreement of the Scottish Government – extended these potential amendments to also cover Wales. A copy of the amendments is annexed to this letter. I hope that sharing these is of use ahead of the forthcoming stages of scrutiny of the Bill in the House of Lords. We would welcome your assistance in seeking changes of this nature to the Bill, which would at least go some way to addressing our concerns with the Bill.

I should note that the attached amendments do not cover specific points raised in relation to the Law Officers, because the role of the Lord Advocate in Scotland is significantly different

[1] LEGISLATIVE CONSENT MEMORANDUM (senedd.wales)
[2] https://www.gov.scot/publications/retained-eu-law-bill-letter-to-uk-gov-february-2023/

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from that of the Counsel General in Wales, and so amendments would need to be cast differently as regards Wales. However, we continue to believe that the proposed powers for UK Law Officers should be broadened such that all matters, even those which are reserved but that have an effect in devolved areas, can be referred.

I have also attached a note outlining our concerns more broadly on the UK Government's legislative programme and the Sewel Convention, updating on the discussions at the meeting in January. This includes our position on specific UK Government Bills where the Senedd has refused legislative consent, or where the Welsh Government is not able to recommend that the Senedd gives consent, to the Bill as currently drafted.

I remain deeply grateful for your interest in the constitutional and devolution implications of the UK Government's legislative programme, and I thank you in advance for any assistance that you might be able to provide in relation to the UK Government's Retained EU Law (Revocation and Reform) Bill, and the other Bills referred to in the accompanying note.

Yours sincerely,

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

Retained EU Law (Revocation and Reform) Bill – Devolution Related Amendments[1]

The amendments set out below illustrate how some of the serious concerns on the Retained EU Law (Revocation and Reform) Bill and its effect on devolution could be mitigated, at least to some extent.

The amendments cover four broad areas:

- The Sunset of Retained EU Law: within which four potential options are outlined:
  - Option 1: Remove the sunset in clause 1 from the Bill entirely (Amendments 2, 3 and 4);
  - Option 2: Remove devolved areas from the sunset in clause 1 from the Bill (Amendment 1);
  - Option 3: Keep the sunset but move it to a later date and enable the Scottish or Welsh Ministers to extend it in respect of their devolved areas (Amendments 5, 6, 7 and 9); and
  - Option 4: Enable the Scottish and Welsh Ministers to extend the sunset date in clause 1 (Amendment 8).

- Powers conferred on UK Ministers in Devolved Areas: ensuring UK Ministers can use concurrent powers in devolved areas only with the consent of the Scottish or Welsh Ministers respectively (Amendment 10);

- Scope of powers: addressing concerns that Ministers would have powers to make wholescale changes by secondary legislation to subject areas currently governed by retained EU law (Amendment 11); and

- Consequential amendment powers: Conferring equivalent consequential amendment powers on the Scottish and Welsh Ministers as the Bill provides for UK Ministers (Amendments 18 and 19).

Potential Amendments to the Retained EU Law (Revocation and Reform) Bill

LORD SPONSOR **1**

Clause 1, page 1, line 6, at end insert—

"(1A) Subsection (1) does not apply to an instrument, or a provision of an instrument, that—

(a) would be within the legislative competence of the Scottish Parliament if it were contained in an Act of the Scottish Parliament,

(b) could be made in subordinate legislation by the Scottish Ministers, the First Minister or the Lord Advocate acting alone.

[1] There are no amendments numbered 12 to 17 in this document in order to ensure alignment with the numbering in the equivalent amendments which have been proposed in relation to Scotland.

(c) would be within the legislative competence of Senedd Cymru if it were contained in an Act of Senedd Cymru (ignoring any requirement for consent of a Minister of the Crown imposed under Schedule 7B to the Government of Wales Act 2006), or

(d) could be made in subordinate legislation by the Welsh Ministers acting alone."

Explanatory statement

This amendment restricts the automatic revocation or "sunsetting" of EU-derived subordinate legislation and retained direct EU legislation under clause 1 of the Bill so that it does not apply to legislation that is within Scottish or Welsh legislative or executive competence.

———

LORD SPONSOR **2**

Leave out Clause 1

Explanatory statement

This amendment, together with amendment 3, leaves out the automatic revocation or "sunsetting" of EU-derived subordinate legislation and retained direct EU legislation.

———

LORD SPONSOR **3**

Leave out Clause 2

Explanatory statement

This amendment, together with amendment 2, leaves out the automatic revocation or "sunsetting" of EU-derived subordinate legislation and retained direct EU legislation.

———

LORD SPONSOR **4**

Leave out Clause 3

Explanatory statement

This amendment leaves out the automatic repeal or "sunsetting" of EU rights, powers liabilities etc retained under section 4 of the European Union (Withdrawal) Act 2018.

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LORD SPONSOR **5**

Clause 1, page 1, line 4, leave out "2023" and insert "2026"

Explanatory statement

This amendment, together with amendment 6, changes the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation would take effect to the end of 2026.

___

LORD SPONSOR **6**

Clause 2, page 2, line 12, leave out "2023" and insert "2026"

Explanatory statement

This amendment, together with amendment 5, changes the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation would take effect to the end of 2026.

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LORD SPONSOR **7**

Clause 2, page 2, line 19, leave out "2026" and insert "2029"

Explanatory statement

This amendment changes the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation may be extended to, up to a final deadline of 23 June 2029.

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LORD SPONSOR **8**

To move the following clause—

"Extension of sunset under section 1 by Scottish or Welsh Ministers

(1) The Scottish Ministers may by regulations provide that section 1, as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b), has effect as if the reference in section 1(1) to the end of 2023 were a reference to a later specified time.

(2) The Welsh Ministers may by regulations provide that section 1, as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b), has effect as if the reference in section 1(1) to the end of 2023 were a reference to a later specified time.

(3) In subsections (1) and (2) "specified" means specified in the regulations.

(4) Regulations under subsection (1) or (2) may not specify a time later than the end of 23 June 2026."

Explanatory statement

This amendment would give the Scottish Ministers and the Welsh Ministers a power to extend the sunset date for devolved retained EU law, equivalent to that conferred on a Minister of the Crown by Clause 2 of the Bill. It confers powers on the Scottish Ministers and the Welsh Ministers to modify the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation may take effect, to a date no later than 23 June 2026. As a result of Schedule 3 this power is exercisable only within devolved competence.

———

LORD SPONSOR **9**

To move the following clause—

"Extension of sunset under section 1 by Scottish or Welsh Ministers

(1) The Scottish Ministers may by regulations provide that section 1, as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b), has effect as if the reference in section 1(1) to the end of 2026 were a reference to a later specified time.

(2) The Welsh Ministers may by regulations provide that section 1, as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b), has

effect as if the reference in section 1(1) to the end of 2023 were a reference to a later specified time.

(3) In subsections (1) and (2) "specified" means specified in the regulations.

(4) Regulations under subsection (1) or (2) may not specify a time later than the end of 23 June 2029."

Explanatory statement

This amendment is similar to amendment 8 except that it permits the extension of the sunset to 2029 rather than 2026. It confers powers on the Scottish Ministers and the Welsh Ministers to modify the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation may take effect, to a date no later than 23 June 2029. As a result of Schedule 3 this power is exercisable only within devolved competence.

———

LORD SPONSOR **10**

Schedule 4, page 39, line 38, at end insert—

"Consent of Scottish Ministers or Welsh Ministers

[] A Minister of the Crown must obtain the consent of the Scottish Ministers before making regulations to which this Part of this Schedule applies, if the regulations contain a provision that—

(a) would be within the legislative competence of the Scottish Parliament if it were contained in an Act of the Scottish Parliament, or

(b) could be made in subordinate legislation by the Scottish Ministers, the First Minister or the Lord Advocate acting alone.

[ ] A Minister of the Crown must obtain the consent of the Welsh Ministers before making regulations to which this Part of this Schedule applies, if the regulations contain a provision that—

(a) would be within the legislative competence of Senedd Cymru if it were contained in an Act of Senedd Cymru (ignoring any requirement for consent of a Minister of the Crown imposed under Schedule 7B to the Government of Wales Act 2006), or

(b) could be made in subordinate legislation by the Welsh Ministers acting alone."

Explanatory statement

This amendment modifies the powers which are conferred on Ministers of the Crown in devolved areas so that they may only be exercised with the consent of the Scottish Ministers and the Welsh Ministers.

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LORD SPONSOR **11**

Leave out Clause 15

Explanatory statement

This amendment leaves out clause 15 of the Bill, on powers to revoke and replace secondary retained EU law, in its entirety.

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LORD SPONSOR **18**

Clause 6, page 4, line 34, at end insert—

"(6A) The Scottish Ministers may by regulations make provision amending an enactment in consequence of the name of a thing being changed by subsection (1) (including by virtue of regulations under section 19).

() The Welsh Ministers may by regulations make provision amending an enactment in consequence of the name of a thing being changed by subsection (1) (including by virtue of regulations under section 19)."

Explanatory statement

This amendment would give the Scottish Ministers and the Welsh Ministers a power to make regulations to amend legislation in consequence of the change in terminology from "retained EU law" to "assimilated law" made by clause 6. This would be equivalent to the existing power for Ministers of the Crown in clause 19 read in conjunction with clause 6(6).

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LORD SPONSOR **19**

Clause 22, page 23, line 39, at end insert—

"() The Scottish Ministers may by regulations make such transitional, transitory or saving provision as they consider appropriate in connection with—

(a) the coming into force of any provision of this Act,

(b) the revocation of anything by section 1, or

(c) anything ceasing to be recognised or available in domestic law (and, accordingly, ceasing to be enforced, allowed or followed) as a result of section 3."

( ) The Welsh Ministers may by regulations make such transitional, transitory or saving provision as they consider appropriate in connection with—

(a) the coming into force of any provision of this Act,

(b) the revocation of anything by section 1, or

(c) anything ceasing to be recognised or available in domestic law (and, accordingly, ceasing to be enforced, allowed or followed) as a result of section 3."

Explanatory statement

This amendment would give the Scottish or Welsh Ministers a power to make transitional, transitory or saving provision in consequence of the coming into force of the Bill: including in consequence of the revocation of retained EU law provided for in clause 1 of the Bill, and any gaps in domestic law within the Scottish or Welsh Ministers' devolved competencies that occur as a result. This would be equivalent to the power for UK Ministers in clause 22(4) of the Bill.

Overview of Welsh Government positions on UK Primary Legislation

1. **The UK Government's legislative programme is significant for the Welsh Government and for Wales**:

    a. Bills on non-devolved matters often apply to Wales and in many cases have a significant impact on our economy or the wellbeing of people in Wales.

    b. Bills relating to devolved matters necessarily impact very directly in Wales and, as a matter of constitutional principle, also require the consent of the Senedd in line with the Sewel Convention (that is, that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Senedd).

2. The Welsh Government has serious concerns about UK Government's adherence to principles of devolution and its compliance with the Sewel Convention and with effective inter-governmental working.

3. **Effective engagement** by UK Government with Welsh Government is one of the biggest obstacles to the smooth operation of the current legislative consent process. Whilst there have been some positive experiences, the position generally is one of poor engagement. This places significant constraints on our ability to consider legislation in a timely manner, as well as the ability of the Senedd to scrutinise legislation. Whilst there have been some improvements more recently by UK Government, the lack of engagement prior to the introduction of the Strikes (Minimum Service Levels) Bill is an unfortunately familiar example.

4. The number of occasions where the UK Government did not respect the **Sewel Convention** in recent Parliamentary sessions is unacceptable and completely unjustified by circumstances. We believe that the Sewel Convention needs codification. At the very least, UK Government should set out the decision-making process they go through when they come to a decision to that a situation is 'not normal'.

5. **In this current session, several specific Bills give cause for concern.** The Senedd has refused consent to the Northern Ireland Protocol Bill, the Genetic Technology (Precision Breeding) Bill, and the Trade (Australia and New Zealand) Bill. Whilst the Senedd has not yet voted and these are ongoing issues, Welsh Government has also currently recommended consent be withheld in relation to the Levelling-up and Regeneration Bill and the Retained EU Law Bill. Our detailed position in relation to each of those Bills can be found in the relevant legislative consent memoranda. We have not yet laid a memorandum for the Bill of Rights but have similarly set out our public opposition to the Bill. We have laid a Legislative Consent Memorandum for the Strikes (Minimum Service Levels) Bill and recommended consent be withheld.

6. At the briefing session on 9 January, I set out an overview of my concerns relating to **the Retained EU Law Bill** the main aspects of which are set out in the letter to which this is an annex, and the Legislative Consent Memorandum referred to therein.

7. **Concurrent powers** – that is, powers which confer the ability to make secondary legislation on both Welsh Ministers and UK Ministers – should not be created in devolved areas. They do not reflect, or respect devolution – they give UK Government powers to act in areas which Parliament has determined are devolved. As a result, they fundamentally change the devolution settlement and the Senedd's legislative competence. However, as seen in the Retained EU Law Bill amongst other Bills, the UK Government have demonstrated a worrying trend in their reliance on concurrent powers. In limited circumstances, concurrent powers might be acceptable; but that is only the case if the ability of a UK Minister to exercise the power in Wales is subject to the consent of the Welsh Ministers.

Access to Welsh Government and Senedd detailed positions on UK Bills

8. The Senedd's website hosts a 'legislative consent' page([1]) containing the Welsh Government's legislative consent memoranda, and Senedd Committee reports relating to UK Bills. Our legislative consent memoranda include commentary on whether Bills make appropriate provision for Wales, and as such provide detailed information on areas of concern and engagement between Welsh Government and UK Government. Members may find this information useful when seeking to take part in debates, raising questions and scrutinising the impact of UK Government Bills on Wales.

([1]) https://senedd.wales/senedd-business/legislative-consent/

Vaughan Gething AS/MS
Gweinidog yr Economi
Minister for Economy

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: VG/0061/23

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

20 February 2023

Dear Huw,

Many thanks to you and the Legislation, Justice and Constitution Committee members for considering the Supplementary Legislative Consent Memoranda (Memoranda No. 3 and No. 4) in respect of the UK Government's Online Safety Bill.

I welcome the report published by the Committee on 27 January noting that members agree with the Welsh Government's assessment that clauses 157, 160, and 165, and Schedule 14 of the Bill, as amended at Commons Report stage, include provision which fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.1(i).

Yours sincerely,

Vaughan Gething AS/MS
Gweinidog yr Economi
Minister for Economy

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Email: correspondence@familiesfirst.wales

Date: 21 February 2023

To: SeneddLJC@senedd.wales
& huw.Irranca-Davies@senedd.wales

Huw Irranca-Davies MS
Chair: Legislation, Justice and Constitution Committee
Welsh Parliament, Cardiff Bay, CF99 1SN

Dear Mr Irranca-Davies,

We write to you as Chair of the Legislation, Justice and Constitution Committee, having noticed a reference in the minutes of your meeting on 9 January to "Correspondence from the Minister for Education and the Welsh Language in relation to home schooling." (7.1)

Families First in Education Wales advocates to preserve the freedom of families to make choices in the best interests of their individual children. We fully appreciate, as you pointed out in your letter to Education Otherwise published in the same papers pack, that your Committee cannot consider subordinate legislation until it is laid before the Senedd.

Consequently, at this stage we are writing not to request any other action than that you place the attached documents on file so that your Committee can refer to them when considering both the new statutory guidance for elective home education and the proposals for local authority databases of every child in their areas. The first matter was consulted on in 2019, with a consultation on the second being postponed until 2020, and then extended due to the Covid-19 lockdowns. In June that year Kirsty Williams MS, then Minister for Education, announced that neither proposal would be taken forward during the term of that administration.

The current Government revived the proposals, but in May last year the Minister informed the Chair of the CYPE Committee that there would be a delay in putting them before Senedd. He originally hoped that this would have been done in June, but by that point expressed the intention that they would be tabled in September. Importantly he added, "However, it is not expected to impact on the timescale for the implementation of the proposals in April 2023." At the time of writing nothing has been laid before Senedd, yet as recently as 7th February his department has been writing to home educating families stating that the implementation date remains this April. Whilst we understand that secondary legislation does not require the same level of scrutiny as primary bills, it would seem that there is now very little time available for your committee and members of Senedd to give any meaningful thought to these proposals if they are indeed to be implemented this spring.

In response to the 2019 consultation, Protecting Home Education Wales [PHEW] crowdfunded a legal opinion from David Wolfe QC, which they included in their submission. This was raised at a meeting of the Petitions Committee on 4 February 2020, and Michelle Brown MS commented, "I would dearly like to understand from Welsh Government why they don't seem to be giving that [the QC's opinion] the attention that I think they should be giving it, given the issues that it's raised." In the event, as you know, lockdowns disrupted the Senedd's programme of work and consequently this matter was taken no further by CYPEC.

PHEW also responded to the 2020 consultation, again including crowdfunded comment from Wolfe QC. At no point since then has the Department for Education commented on the important points raised in either of these submissions, therefore at present it is not possible to be confident that the Welsh Government has given them the attention they should have done. The first was raised as recently as 9 December by Laura Anne Jones MS, who asked in a Written Question (WQ86963) "What assessment has the Welsh Government made of the legal advice David Wolfe QC provided on the elective home education proposals in response to the

consultation on new home education guidance in Wales?" The Minister's reply was only that they "have been considered by my officials."

In October 21, being concerned that the then Children's Commissioner was not accurately applying the UNCRC in regard to electively home educated children, Families First in Education Wales provided the Minister with a submission to rebut her arguments. The author of the rebuttal is a pro-bono legal advisor who is providing assistance to us. They are a solicitor specialising in human rights law employed by an international advocacy charity, and if you had any questions when the proposals come before your Committee, they would be happy to meet with you. Even though we have met with the Minister's officials since providing this rebuttal, there has been no response from his department specific to the important matters it raises.

Lacking clear assurance that informed observations on the legality of the proposals have been properly engaged with by the Minister, we are attaching copies of each of them, in order that your Committee might have them to hand whenever the relevant secondary legislation is presented to Parliament. We are doing this in the hope that the Committee will properly scrutinise the proposals to ascertain as far as possible that they have each been properly engaged with by the Department to ensure that they conform with existing Welsh, UK and international legislation.

When you acknowledge this correspondence, we would very much appreciate it if you can confirm that this is within the remit of your Committee, and that you will scrutinise the proposals fully when they are published in Senedd. If you are able to do so, not only will it reassure our team, but also many home educating children and their families from across Wales who are concerned about the nature of these proposals.

We look forward to hearing from you.

Yours sincerely,

The FFiEW Team

Families First in Education Wales

Accompanying documents

1] Protecting Home Education Wales Submission to 2019 consultation on new EHE guidance and handbook - this includes David Wolfe QC's legal opinion

2] Protecting Home Education Wales Submission to 2020 consultation on local authority databases of all children containing David Wolfe QC's comments on the proposals

3] Families First in Education Wales submission to the Minister for Education seeking to rebut the Children's Commissioners use of the UNCRC - October 2021

A Submission to Rebut the Children's Commissioner's use of UNCRC

submitted by

Families First in Education - Wales

to

Jeremy Miles MS,
Minister for Education

October 2021

Contents:

Families First in Education Wales

Website: familiesfirst.wales

Email: correspondence@familiesfirst.wales

Date: 6 October 21

To: Jeremy Miles - Minister for Education

Dear Mr Miles,

We are writing to submit to you **the enclosed rebuttal** of the unjustifiable use of the UNCRC by the Children's Commissioner for Wales in her February 2021 "Review of the Welsh Government's exercise of its functions." We also seek the opportunity to liaise with you to ensure that the home educating community is represented and treated as fairly and honourably as any other community within our society.

The Welsh Government states that it seeks to encourage, promote and celebrate diversity in Wales, advocating for a pluralistic and tolerant society.[1] Any such society has to have a diverse and pluralistic approach to education.

As home educators in Wales, we embrace this approach. A register of home educators is completely at odds with a tolerant and pluralistic society.[2] One would certainly never envisage mandatory registers for people on the grounds of their religious, political or philosophical beliefs or because of sexuality.

A tolerant society protects the clear legal principle of "innocent until proven guilty," by adopting a reactive stance to the investigation of any potential crime or infringement of the law. One does not take action against subgroups of the community without evidence, "just in case" there *might* be a risk of harm to individuals or the community; the authorities only act if there are reasonable grounds to believe there *is* risk of harm, and any measures taken have to be reasonable and proportionate.

Evidence would be required that home educated children were at significantly increased risk of harm, such as abuse and neglect, in order to justify registration. There is no such evidence. Indeed, research has shown that home educated children are statistically at significantly *less* risk of abuse and neglect within the home than their school educated peers.[3]

Furthermore, home educated children are not at risk from the considerable rates of peer and adult- mediated sexual, physical and emotional abuse which the Welsh Government are starting to acknowledge occur so frequently in school-based education.[4] The concept of alleged "visibility" cannot possibly be taken as a safeguarding gain when schoolchildren are "seen" and a register taken on a daily basis, and yet so many of them still suffer from abuse and neglect

We would welcome further opportunity to familiarise you with our experiences of the wonderful diversity of educational approaches being used by home educators. We look forward to a change of narrative in future, accompanied by a more constructive dialogue between the Government and home educators here in Wales.

Families First in Education Wales

References

1] Curriculum for Wales guidance - page 42, "Diversity" paragraphs 1 & 2
https://hwb.gov.wales/api/storage/afca43eb-5c50-4846-9c2d-0d56fbffba09/curriculum-for-wales-guidance-120320.pdf

2] Forcing homeschooling parents to sign up to register 'risks treating them like sex offenders'
https://www.dailymail.co.uk/femail/article-9783345/Forcing-homeschooling-parents-sign-register-risks-treating-like-sex-offenders.html

3] Home Education and the Safeguarding Myth: Analysing the Facts Behind the Rhetoric
https://www.educationotherwise.org/home-education-and-the-safeguarding-myth-analysing-the-facts-behind-the-rhetoric

4] Inspectors to visit schools as part of sexual harassment review - Wales Online
https://www.walesonline.co.uk/news/education/sexual-harassment-schools-wales-review-21571540

The Welsh Children's Commissioner is wrong to recommend that the home education model should be limited

A Summary

The UK has historically given home educators a large degree of freedom in choosing the method and manner of their child's education. Yet in February, the Welsh Children's Commissioner called[1] for the Welsh government to do more to reform home education policy and enact the Dylan Seabridge Child Practice Review recommendations.[2] Central to this was the recommendation that children's voices and wishes should be heard and recorded by local authorities on an annual basis. As a 'critical friend' to the Welsh Government, the Commissioner advised that the United Nations Convention on the Rights of the Child (CRC) demanded a stronger State-led child focus on home educated children. She urged policy makers to increase the supervision of home educated children, even when parents are not suspected of inflicting harm.

In pushing this recommendation, the Commissioner urged the Senedd to reverse the presumption that parents look after the best interests of their children and provide a suitable education when they home educate - unless there's evidence to the contrary. She also assumed that the local authority should be the primary arbiter of children's views and that these are more important than parental views.

Yet, home educators should take heart. The Commissioner's legal arguments were weak.

First, the report's recommendation goes against the legal presumption that parents *do* act in the best interests of their children when home educating. Under section 7 of the Education Act 1996, it is parents' sole responsibility to ensure that children receive efficient full-time education suitable to their age, ability, aptitude, and specifical educational needs – "*by regular attendance at school or otherwise*". This judgement call lies within the sole hands of parents. The assumption underwriting this is that parents have the primary responsibility to determine the method of education that is most suitable to their child. Without risk of harm or poor education, local authorities should not intervene. The Education Act 1996 gives local authorities powers to address these issues[3] if they arise. This is also written into the Welsh government's statutory guidance.[4]

Secondly, neither the CRC nor any other international legal text relevant to the UK assumes that government employees should intervene in private educational provision. Parents are legally recognised as primarily responsible for the 'upbringing and development' of their children, and the family stands as "*the fundamental group unit of society and the natural environment for the well-being of all its members, particularly children*."[5] The family is entitled to "*protection and assistance*" if they require it; yet, the State must respect parents' 'rights and duties' without undue interference or intrusion. A child's right to be cared for (primarily and predominantly) falls within the scope of parental oversight in international law.

Even when individual European countries have imposed outright bans on home education, there has been UN pressure to reinstate the model. For example, the UN Special Rapporteur on the Right to Education has directly advised Germany[6] (which has banned home education since 1919) to reverse the ban and allow parents to formally teach their children within the home.

Third, the Commissioner's assumption that the CRC requires public bodies to talk to home educated children under the 'right to be heard' is incorrect. This claim ignores at least two fundamental human

rights that the UK is obliged to honour: the right to a private and family life, and the right to privacy. It is also not true to the plain meaning of the CRC text.

Article 8 of the European Convention on Human Rights (ECHR, which is directly applicable in UK) provides: "*There shall be no interference by a public authority with...this right except such as is in accordance with the law and is necessary in a democratic society*". The European Court has held that this right, when applied to the topic of safeguarding, means that countries cannot presume that the interests of the child are different to those of their parents unless there's clear and compelling evidence of harm. Yet, the recommendation for children to be interviewed outside their parents' consent, and absent of any threat of risk to the child, introduces a "preventative" measure; it tries to introduce public authority interference in legitimate private activities without justification. This could infringe Article 8 and could create complications between the Senedd and Westminster. The current legal challenge[7] to Holyrood's law making regarding the CRC should give the Senedd caution here.

The right to privacy is also a core human right. The CRC provides "*no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence*". Underlying this, *"the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection*". This means that children's physical and mental immaturity places parents as their privacy shields until they can appreciate their evolving capacities. As children are forming their own private views, parents should inform, guide and nurture development. Any intrusion on a child's privacy when overseen by parents, such as by local authority interviews in the absence of harm or blatantly negligent educational provision, could disproportionately interfere with this principle.

Moreover, the Commissioner has misunderstood the context of the 'right to be heard' as a legal right within her report. The right was included in the CRC *primarily* for countries to acknowledge and encourage the voice of the child in 'judicial or administrative proceedings' on matters impacting them – including relating to health, living conditions, education, or protection. Whilst the UN Committee on the Rights of the Child[8] has also acknowledge that the 'right to be heard' should *additionally* be relevant to school and education, it has advised that the right does not include views about the type or method of education provided to the children. Instead, the guidance highlights situations of "*authoritarianism, discrimination, disrespect and violence which characterize the reality of many schools and classrooms*", where a child's voice should be heard and listened to. It encourages governments to build opportunities for children to speak about their negative experiences for the "*elimination of discrimination, prevention of bullying and disciplinary measures*" and also to participate in decision-making processes such as class councils, student councils and student representation boards to discuss school policies and codes of behaviour. This is a far cry from the Commissioner's recommendations.

Therefore, the Welsh Children's Commissioner will need to provide a more robust and legally persuasive case for the limitation of parental freedoms in home education if she wants to be successful in changing the law. Home educating families should continue to hold the Senedd to account to make sure that any proposed legislation is in compliance with national and international obligations.

[1] https://www.childcomwales.org.uk/wp-content/uploads/2021/02/ReviewofWG_FINAL_ENG.pdf

[2] https://www.whatdotheyknow.com/request/452376/response/1084174/attach/2/CYSUR%202%202015%20CPR%20Report%20080716.pdf?cookie_passthrough=1

[3] https://www.legislation.gov.uk/ukpga/1996/56/section/437

[4] https://gov.wales/sites/default/files/publications/2020-09/statutory-guidance-help-prevent-children-young-people-missing-education.pdf

[5] https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

[6] https://www.refworld.org/docid/4623826d2.html

[7] https://www.bbc.co.uk/news/uk-scotland-scotland-politics-56725145

[8] https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf

The Children's Commissioner for Wales is wrong to recommend that the home education model should be more heavily restricted

(a) Introduction

1. ***Families First in Education*** represents the voices of home educators throughout Wales. We are a network of home educators and interested parties from a variety of backgrounds across Wales who are united by a desire to protect the rights and freedoms of parents to educate with autonomy and in a child's best interests.

2. We urge the Minister for Education to recognize that the UK has historically given home educators a large degree of freedom in choosing the method and manner of their child's education.

3. In February, the Children's Commissioner for Wales called for the Welsh government to reform home education policy and enact the Dylan Seabridge Child Practice Review recommendations[1]; namely, that children's voices should be heard and recorded by local authorities (LAs) on an annual basis. As a 'critical friend' to the Welsh government, the Commissioner urged greater consideration of child rights in the review and updating of policy and legislation. She suggested that the United Nations Convention on the Rights of the Child (CRC) required the government to introduce a stronger public authority-led child focus on home educated children. In short, she urged policy makers to increase LA supervision of home educated children.

4. We consider it likely that home education will be an agenda item for the Senedd in the forthcoming parliamentary season and the recommendations of the Children's Commissioner will guide discussions.

5. We urge the Minister for Education to carefully review the Commissioner's recommendations to see that they have not been sufficiently substantiated. The Commissioner's legal arguments were not persuasive, and her safeguarding arguments were weak. The Commissioner also did not prove that CRC's 'the right to be heard' would have prevented Dylan Seabridge's death, since he was not an 'invisible' child to the Authorities. In short, these unsubstantiated concerns are misdirected at the expense of parents who are turned into the objects of suspicion when in reality they have often made significant sacrifices to raise children according to what they believe best for them as is their right in international and domestic law.

6. Therefore, there is no justifiable need for the Senedd to reform the current home education model in Wales.

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1 Children's Commissioner for Wales, A review of the Welsh Government's exercise of its functions (February 2021)

(b) The Welsh Commissioner's legal arguments are not persuasive

7. Although neither a lawyer nor legal professional by background, Ms Holland made several legal claims and demands. Her main claim was that the UK's ratification of the CRC required the Welsh government to reform the long-standing tradition of parents taking the primary decisions for their children in private arrangements for home education.

8. This claim should not be accepted by the Welsh government without thorough legal analysis and scrutiny, for the following reasons:

i. **International law affirms that parents, not the State, have the primary responsibility for deciding the manner and method of their child's education**

9. International law strongly protects the rights of children to receive an education. Article 28 of the CRC says that State parties should ensure that primary education is compulsory and available free to all, and that secondary education should be promoted and accessible to all.

10. However, neither the CRC, nor any other international legal text that the UK has ratified, demands that a child's education must be primarily provided for by the State under the assumption that it can provide a 'better' education than parents. Instead, parents are recognised as responsible for the 'upbringing and development' of their children, and the family stands as "*the fundamental group unit of society and the natural environment for the well-being of all its members, particularly children*"[2]. The family is entitled to "*protection and assistance*" if they require it; yet, public authorities must respect parents' 'rights and duties' without undue interference or intrusion (Articles 5 and 14). A child's right to be cared for (primarily and predominantly) falls within the scope of parental oversight in the CRC.

11. Indeed, the United Nations Committee on the Rights of the Child (made up of independent experts who monitor the implementation of the CRC) has confirmed via General Comments that the CRC's right to education does not specify that education should be provided centrally or that this is a better model[3]. Moreover, Article 29 of the CRC provides that State parties agree that a child's education shall be directed to the development of respect for the child's parents; a textual reading of the Convention text shows that the drafters were keen to affirm that parental views in education are *de facto* good for children. The right to education should not be construed in a way which limits the liberties of individuals to establish and direct educational institutions. Namely, the rights of individuals to design and manage the methods of educational provision should not be limited.

2 Preamble to the United Nations Convention on the Rights of the Child (1989)

3 See United Nations Human Rights Office of the High Commissioner, Committee on the Rights of the Child, General Comment No. 12 on the 'right of the child to be heard' CRC/C/GC/12 (1 July 2009)

12. Other international legal texts also have a high regard for the natural family in decision making about children. Various texts affirm the primacy of parents in directing the personal and educational development of their children. The role of the State is secondary – intervening when parental primacy is inadequate or harmful. The Universal Declaration of Human Rights, the cornerstone document of the human rights movement, provides, "[parents] *have a prior right to choose the kind of education that shall be given to their children*"[4] because they "*have the primary responsibility for the upbringing and development of the child*"[5]. States also need to respect the "*liberty of parents…to ensure the religious and moral education of their children*"[6]; and respect the rights and duties of the parents to direct the child "*in a manner consistent with their evolving capacities"*[7].

13. The European Convention on Human Rights (ECHR) also protects parental rights and primacy. It protects the rights of men and women to found a family (Article 12) and the integrity of family and private life against arbitrary State interference (Article 8).

14. Standing as perhaps the strongest international legal text for parental rights, Article 2 of Protocol 1 to the ECHR provides:

> "*In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions*".

15. This Article gives parents the right to choose not just the religious education of their children, but also the broad education of their children in general terms. In reviewing this Article, the European Court of Human Rights has held that "respect" means more than simply "acknowledge" or "take into account"[8] – it has a deeper meaning and application. Moreover, it has affirmed the principle of 'pluralism' in education, considering that multiple forms and methods of education are valuable to children and wider society. This includes a parents' choice to home educate.

16. From caselaw, the Court has held that *how* individual States organise their education systems in respect to the method and suitability of education sits under their 'margin of appreciation'. In other words, the European Court has left the details about *what* education looks like to each individual country.

17. Even in the rare instances when individual European countries have imposed outright bans on home education, there has been UN pressure to reinstate the model. For example, the

4 Article 26 of the Universal Declaration of Human Rights (1948)

5 Article 18 of the United Nations Convention on the Rights of the Child (1989)

6 Article 18 of the International Covenant on Civil and Political Rights (1966)

7 Article 14 of the United Nations Convention on the Rights of the Child (1989)

8 European Court of Human Rights, Campbell v The United Kingdom, Application no. 13590/88 (25 March 1992)

UN Special Rapporteur on the Right to Education has directly advised Germany (which has banned home education since 1919) to reverse the ban and allow parents to formally teach their children within the home[9]. Moreover, even where the European Court of Human Rights has refused to strike down country prohibitions against home education, it has never said that is right for the country in question to retain the prohibition.

ii. Interference in the home education model could be incompatible with other human rights

18. The Children's Commissioner for Wales used Article 4 of the CRC ("*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention*") as her linchpin for reform of the home education model. She argued that this Article placed a duty on the government to more fully realise child rights, and specifically to do so by upholding the child's 'right to be heard' under Article 12 of the CRC[10].

19. However, this claim ignores at least two fundamental and enshrined human rights: the right to a private and family life, and the right to privacy.

20. Both Article 12 of the Universal Declaration on Human Rights and Article 8 of the ECHR protect the right to private and family life. Article 8 of the ECHR provides:

> *"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society"*

21. Any interference with this fundamental right legally needs to be narrow and strictly defined.

22. Caselaw of the European Court of Human Rights on the topic of safeguarding has affirmed that national laws cannot presume, absent clear and compelling evidence of harm to a child, that the interests of the child are different to those of their parents[11]. If a State is to withdraw an aspect of parental authority, it must do so only in limited circumstances: a high threshold should be reached. Yet, the Welsh Commissioner's calls for LAs to interview home educated children annually outside their parents' consent, and absent of any threat of risk to the child, introduces a "preventative" measure; it tries to introduce interference in legitimate private activities without justification. This could infringe Article 8 of the ECHR as well as the presumption that parents act in their child's best interests. Absent any compelling evidence of serious harm, this presumption should not be legally open to LAs.

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9 United Nations Human Rights Council, Fourth Session, Report of the Special Rapporteur on the right to education, Vernor Munoz Mission to Germany 13-21 February 2006, A/HRC/4/29/Add.3 (9 March 2007)

10 Article 12 of the United Nations Convention on the Rights of the Child (1989):
(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

11 For example, Fifth Section Wunderlich v Germany (Application no. 18925/15, 10 January 2019)

23. The right to privacy is also found in the CRC and other texts such as the Univeral Declation of Human Rights and the International Covenant on Civil and Political Rights. In the CRC, the right is mentioned twice; once in relation to privacy in criminal proceedings, and once as "*No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation*" (Article 16). This Article was drafted because "*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection*" (as provided in the Preamble). The CRC calls for parents to protect their child's evolving capacities in both Article 5 and Article 14. While children have the right to form religious beliefs, the CRC upholds the rights of parents to inform, guide and nurture development as the child matures.

24. Any intrusion on a child's privacy as overseen by parents, such as by LA interviews in the absence of compelling evidence of serious harm, could disproportionately interfere with important aspects of parental rights.

iii. The CRC 'right to be heard' does not require home educated children to be annually interviewed by Local Authorities

25. By reiterating the core Seabridge Child Protection Review Panel's recommendation that home educated children need to have their voices heard and wishes recorded annually (allegedly derived from Article 12 CRC), the Children's Commissioner indicated that children would be better protected from harm if LAs could listen to their views, annually. Implicitly, she argued that within a new, formal child-public authority relationship, children should be able to "*express a view about their educational experiences*" (outside their parents' earshot), which would avoid the safeguarding risks associated with home education and provide greater oversight to the "*well-being and education of children*".

26. But, in pushing this recommendation for reform, she urged the Welsh government to reverse the presumption that parents look after the best interests of their children and provide a suitable education when they home educate, unless evidence is shown to the contrary. In doing so, she implicitly argued that LAs should look after the best interests of children in education, unless parents can demonstrate suitability and children can affirm a preference to remain educated in the home.

27. Yet, this recommendation goes against the legal and social presumption that parents *do* act in the best interests of their children when home educating. Under section 7 of the Education Act 1996, it is parents' sole responsibility to ensure that children receive efficient full-time education suitable to their age, ability, aptitude, and specifical educational needs – "*by regular attendance at school or otherwise*"[12]. This judgement call lies within the sole hands of parents, and permission from a government employee does not need to be sought if a child is home educated from the outset. The assumption underwriting the law here is that parents have the primary

12 Section 7 of the Education Act 1996

responsibility to determine whether formal schooling or home education is most suitable to their child.

28. Without risk of harm or poor education, LAs should not intervene. The Education Act 1996 gives LAs powers to address these issues if they arise[13]. This is also written into the Welsh government's statutory guidance[14].

29. In other words, and since safeguarding risks to 'hidden' or 'isolated' home educated children are so incredibly rare, the proposal will achieve a far more wide-reaching consequence than just looking out for children like Dylan Seabridge. The proposal elevates child views about home education *above* the legitimate decision of parents to home educate, and it places the LA as the arbiter of such views (even though the CRC is silent on this). The 'right to be heard' in the home education context tries to give children the right to opt-out of the model if they dislike it, in turn alienating them from their natural family.

30. However, this is contrary to the Department for Education's (DfE) home education guidance (2019). The DfE advises that while Article 12 of the CRC requires countries to give *due weight* to the views of children (according to the age and maturity of the child), it does not override the decision-making authority of parents to decide whether home education is preferred to school education. A child's negative attitude to home education as a method of educational provision, for example, "*should not bear on the Authority's conclusions as to suitability*"[15]; it should – at most – be a reason to discuss the child's feelings with the parent. DfE guidance for parents also affirms that on the topic of child views, "T*his does not give children authority over parents, and a decision to educate a child at home is a matter for you as parents*"[16]. Therefore, the DfE does not place the voice of the child, nor the intervention of public authorities, above parental primacy to decide that home education is most suitable for the child.

31. The DfE has further advised that s.17(4) of the Children Act, which puts a duty on public authorities to take a child's wishes and feelings into account as far as is reasonably practicable, does not "*place an obligation on Local Authorities to ascertain the child's wishes about elective home education, as that is not a service provided by the Local Authority*"[17]. Since home education is a service provided by parents, the LA does not have an obligation vis-à-vis the CRC to listen to child views about home education when legitimate and independent safeguarding risks are not material.

13 Section 437 of the Education Act 1996

14 Welsh Government, Statutory guidance to help prevent children and young people from missing education, circular no: 002/2017 (March 2017)

15 Department for Education, Elective home education: Departmental guidance for local authorities (April 2019), at 10.1

16 Department for Education, Elective home education: Departmental guidance for parents (April 2019), at 2.13

17 Section 17(4) of the Children Act 1989

32. Adding international weight to this interpretation of Article 12 of the CRC, the UN Committee on the Rights of the Child General Comment on the 'right of the child to be heard' (2009) affirms that the a State's duty under Article 12 is to allow children to, in particular, be "*given the right to be heard in any judicial or administrative proceedings affecting him or her*". The Comment has quoted the legal analysis of the Commission on Human Rights on Article 12, which assessed that the child's right to be heard "in all matters affecting the child" applies to "*matters under consideration…includ[ing] children in the social processes of their community and society*"[18]. The primary contextual application of Article 12 is for the State to acknowledge and encourage the voice of the child in *court or judicial proceedings* on matters impacting them – including relating to health, living conditions, education, or protection.

33. Whilst the General Comment goes on to acknowledge that there are other settings in which the 'right to be heard' should be implemented domestically, including in relation to education and school, it does not include views about the type or method of education provided to the children. Instead, the non-binding guidance highlights situations of "*authoritarianism, discrimination, disrespect and violence which characterize the reality of many schools and classrooms*", where a child's voice should be heard and listened to. It encourages States to build opportunities for children to speak about their negative experiences for the "*elimination of discrimination, prevention of bullying and disciplinary measures*"[19] and also to participate in decision-making processes such as class councils, student councils and student representation boards to discuss school policies and codes of behaviour.

34. It is therefore inappropriate for the Children's Commissioner to quote the 'right to be heard' in the context of home education without a thorough legal analysis of Article 12 of the CRC and supporting comments by human rights bodies, and consideration of the "prior right" of parents.

iv. Domestic law remains directly effective in Wales; the CRC is not

35. The UK ratified the CRC in 1991 with it coming into force in 1992. The Welsh Senedd additionally passed the Rights of Children and Young Persons (Wales) Measure 2011 which outlines that Welsh Ministers must have *due regard* to the CRC and its Protocols when exercising any of their functions. This law goes farther than England in outlining a Children's Scheme and Child Rights Impact Assessments for legislation and policy proposals. However, this legislation does not enable children to seek redress from the courts if a public authority has breached the Agreement's principles; the CRC has no direct legal effect. The CRC in Wales is therefore a policy intention but does not make the CRC domestically legally binding.

18 United Nations Committee on the Rights of the Child, General Comment No. 12 on the 'right of the child to be heard' CRC/C/GC/12 (1 July 2009), at 27

19 Ibid. at 109

36. This is different to the ECHR which does have direct legal effect via the Human Rights Act 1998. As explained above, Convention rights do not limit home education or require LA checks upon home educated children. Indeed, the ECHR strongly protects parental rights and responsibility, and the European Court of Human Rights has generally left the matter of home education to each individual State to decide upon.

37. Moreover, UK domestic law cannot be overridden without repeal of statute. Section 436(a) of the Education Act 1996 places the duty on LAs to make arrangements to identify children out of school not receiving suitable education, but not to seek out and interview any home educated children. DfE non-statutory guidance for LAs explains this by advising them to have arrangements for finding out whether education in the home is suitable which "*are proportionate and do not seek to exert more oversight than is actually needed where parents are successfully [home educating]. Often, having in place a system which is based on a presumption that it will be parents who initiate contact with the authority if necessary will yield good results when the parents are known to be providing good education*"[20]. Regarding 'suitability' of education, the law provides no specifics, and DfE non-statutory guidance for parents affirms that parents have discretion in how they direct education to the age and aptitudes of children.

38. Therefore, the Senedd should be careful not to use provisions of the CRC to overrule domestic legislation without first repealing primary legislation and undertaking a thorough analysis of whether the human rights regime requires reform. Without doing so, the Senedd could run the risk of infringing their devolved powers with Westminster. The current legal challenge about some Holyrood bills, including the Scottish parliament's domestic adoption of the CRC, should create caution to the Senedd. Moreover, the Scottish lessons learned through the 'Named Person Scheme' litigation, which led to the abolition of a scheme that tried to wedge a State-shaped gap between children and parents when there was no wrongdoing or harm, should be remembered. As poignantly noted by the Supreme Court Justices:

> "*The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world.*"
>
> and
>
> "*Within limits, families must be left to bring up their children in their own way.*"[21]

(c) The Welsh Commissioner's safeguarding claims are unsubstantiated

39. Apart from the legal arguments being misguided, Ms Holland's assertions that home educated children face greater safeguarding risks than in full time school is simply inaccurate. With sole reference to the tragic Seabridge case of parental neglect, she assumed that home educated children are naturally at risk. Her implicit argument was that children are safer within

20 Department for Education, Elective Home Education: Departmental guidance for local authorities (2019), at 5.2

21 The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, at 73

the hands of the LA or schools than the hands of parents. This is unsubstantiated, and the Senedd should be cautious to legislate for increased LA powers to interfere with private and family life.

i. There is little evidence that children are 'hidden' from Local Authorities

40. As awful as the Dylan Seabridge case was, and despite being so frequently cited as the classic example of abuse, it was a rare case of parental neglect. The family lived in a remote and secluded community, and they remained isolated from mainstream universal services such as healthcare appointments. This is not to say the LA did not know of the children – they did, since the mother was identified by her employer as a potentially vulnerable adult. Discussions with the Authority were not recorded here – and the Concise Child Practice Review cites this as an error[22]. There were potential opportunities to intervene before Dylan tragically died. He was not 'invisible'.

ii. There is little evidence to show that children face safeguarding risks when home educated

41. The Commissioner has failed to provide evidence that home educated children needed greater surveillance to protect them from abuse and harm Independent research actually shows that home educated children are even half as likely to be subject to Child Protection Plans as children referred in school-based education. Indeed, FOI research from Wales has revealed that "*home educated children, although more likely to be scrutinised by social services than their schooled peers, are less likely to be at risk than all children in Wales*"[23].

42. Moreover, research that has emerged in mainstream media over the past few months has testified to the sex abuse scandals prevalent in many independent and state schools where abuse happens *in* school– reported by the Guardian, Times and Telegraph. The majority of perpetrators have been male teachers or other educational staff who have groomed and manipulated pupils. It is simply untrue to claim that children at home face greater risk than under the supervision of school employees.

43. There is also a lack of evidence that LA processes are inadequate to protect children who are home educated. The DfE has maintained that "*there is no proven correlation between home education and safeguarding risk*"[24].

22 See the Child Practice Review Report, CYSUR Mid and West Wales Safeguarding Children Board, Concise Child Practice Review Re. CYSUR 2/2015

23 See the research of Wendy Charles-Warner, Home Education and the Safeguarding Myth: Analysing the Facts Behind the Rhetoric (February 2015)

24 Department for Education, Elective home education: Departmental guidance for local authorities (April 2019) at 7.3

(d) Summary

44. Any proposals to drastically alter the parental primacy over children in education and increase public body interference in the home must be seriously weighed against domestic and international legal obligations. While the CRC places the child at the forefront of political decision-making, it does not invent new obligations for LAs to act in the 'best interests of children' when there are no justifiable reasons to intervene in parental primacy and responsibility. This extends to home education. There is no *de facto* 'right to be heard' by public authority employees absent evidence of serious harm.

45. Moreover, in both domestic and ECHR law, the UK is required to respect the right of parents to home educate their children in accordance with their values and beliefs.

46. While parents have a right to home educate their children as they see fit and in accordance with their values and education philosophy, LAs have a statutory duty to oversee the safeguarding of children in cases of perceived harm or inadequate educational provision when this has become evident.

47. While children are not *de facto* safer being home educated than being in school, the evidence suggests that placing a child in school is not a protective factor for their safety. Moreover, since home educated children are already twice as likely to be monitored by Social Services, they are already receiving a greater degree of oversight than school educated children

48. It is feared that if more intrusive powers were given to LAs to enter into family home life by questioning children at least annually about their education preferences and methods of education in the home, then these powers would be used to a greater extent than intended, in order to be risk adverse. There is no justified and legal reason to increase the power of LAs and to make them the arbiter of the 'right to be heard' or a child's 'best interests'.

49. If the Senedd wishes to reform the home education landscape to expand LA powers to interview children who are not at risk, it would need to produce substantiated evidence that such reforms would be economically viable; beneficial to the deployment of LA statutory duties; compatible with the prior right of parents to direct the education of their children, and fully accountable to Parliament. A full Public Sector Equality Duty impact assessment would also need to be done under the Equality Act to analyse and evaluate the implications for intervening into private and family life.

Internet links embedded in above text:

Para.	Embedded Links:
3	https://www.childcomwales.org.uk/wp-content/uploads/2021/02/ReviewofWG_FINAL_ENG.pdf
	http://safeguardingboard.wales/wp-content/uploads/sites/8/2018/06/20160708-CYSUR-2-2015-CPR-Report.pdf
10	https://www.ohchr.org/en/professionalinterest/pages/crc.aspx
11	https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx
12	https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23977&LangID=E
	https://archive.crin.org/en/home/rights/convention/articles/article-18-parental-responsibilities.html
	https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx#:%7E:text=freedoms%20of%20others.-,4.,conformity%20with%20their%20own%20convictions
	https://archive.crin.org/en/home/rights/convention/articles/article-14-freedom-thought-conscience-and-religion.html
15	https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}
17	https://www.refworld.org/docid/4623826d2.html
22	https://laweuro.com/?p=188
28	https://www.legislation.gov.uk/ukpga/1996/56/section/437
	https://gov.wales/sites/default/files/publications/2020-09/statutory-guidance-help-prevent-children-young-people-missing-education.pdf
30	https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791527/Elective_home_education_gudiance_for_LAv2.0.pdf
	https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791528/EHE_guidance_for_parentsafterconsultationv2.2.pdf
31	https://www.legislation.gov.uk/ukpga/1989/41/section/17
32	https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf
35	https://www.legislation.gov.uk/mwa/2011/2
36	https://www.legislation.gov.uk/ukpga/1998/42/contents
37	https://www.legislation.gov.uk/ukpga/2006/40/section/4
	https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791527/Elective_home_education_gudiance_for_LAv2.0.pdf
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38	https://www.bbc.co.uk/news/uk-scotland-scotland-politics-56725145
	https://www.supremecourt.uk/cases/uksc-2015-0216.html
39	https://www.bbc.co.uk/news/uk-wales-31039895
40	http://safeguardingboard.wales/wp-content/uploads/sites/8/2018/06/20160708-CYSUR-2-2015-CPR-Report.pdf
41	http://www.home-education.org.uk/articles/article-safeguarding-myth.pdf
42	https://www.theguardian.com/uk-news/2020/dec/17/child-sexual-abuse-in-schools-often-an-open-secret-says-inquiry
	https://www.thetimes.co.uk/article/schools-cover-up-sexual-abuse-by-pupils-htqjjx05s
	https://www.telegraph.co.uk/news/2021/03/31/schools-have-duty-face-sexual-assault-claims-will-need-support
43	https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791527/Elective_home_education_gudiance_for_LAv2.0.pdf

The Draft Children Act 2004 Database (Wales) Regulations 2020 and the Draft Education (Information about Children in Independent Schools) (Wales) Regulations 2020 Consultation

Consultation response form

Your name:

Organisation (if applicable): **Protecting Home Education Wales**

e-mail/telephone number:
protectinghewales@gmail.com

Your address: Cardiff

Responses should be returned by **22 April 2020** to:

Learner Support Team
Support for Learners
Education and Public Services Directorate
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: WELLBEINGshare@gov.wales

Question 1 – The draft regulations require local health boards and independent schools to disclose to local authorities (LAs) the information listed in Schedule 1 to the regulations. This will assist the LA in identifying children of compulsory school age in their locality currently not known to them.

i) Do you think that the information requested is reasonable and proportionate? What are the reasons for your answer?

No, the information requested is neither reasonable nor proportionate. Question 1 i) is misleading. How can we say or even assess whether the information requested is reasonable and/or proportionate when the draft regulations are not telling us how or for what purpose such information will be used?

The draft regulations do not state what the information will be used for and on that basis the disclosure of such information is unreasonable and disproportionate and if the draft regulations are enacted as proposed they will be unlawful. In this regard, we refer to the legal opinion we obtained from David Wolfe QC (a renowned education law and human rights lawyer) which is attached.

The draft regulation does not specify what the purpose of the database is and it is not clear (it is not stated) what local authorities can or have to do with such information. The regulations do not say how the data will be used.

In addition, Section 29(1) of the Children Act 2004 states that the purposes of a database can only be arrangements under section 25 or 28 of the 2004 Act or under section 175 of the Education Act 2002, but the draft regulations does not say which of those arrangements the purpose of the database is. **The Welsh Government is hereby asked to please explain exactly which of the three and on exactly what basis and for exactly what purpose the database is being established.**

As stated in the legal opinion, the draft regulations need to comply with the Human Rights Act 1998 and in particular its Article 8 which enshrines the right to respect for private and family life. Article 8 is one of the **human rights and fundamental freedoms** recognised and protected by the European Convention on Human Rights.

That means that the draft regulations must be justified and must be proportionate to the justification. The draft regulations should not go further than is necessary to achieve a legitimate aim, but David Wolfe's view is that they go well beyond it, which means they are not proportionate and therefore would not be legal.

By way of example, David Wolfe says that "regulation 9 is drafted extremely widely. First off, it allows people employed in relation to the 9(2) functions to access the information, without then saying they can only use it for those functions." "On the face of the draft, they could then use the information for other purposes."

David Wolfe also says that the draft regulation 9(2) is very widely cast, and notably so given that the regulations themselves don't say whether they relate to arrangements under section 25 or 28 of the 2004 Act or section 175 EA 2002 which, is a requisite for section 29(1) to apply. The justification given in the consultation document relates to identifying children not on a school roll and not receiving suitable education. But the regulation 9(2) list goes far beyond that. There is a good argument that the wider list **is not and cannot be justified by the claimed purpose and so would be unlawfully wide**.

Regulation 5 requires the local health board to disclose to each local authority personal data of children. This is too broad and should be limited to the local authority of the area of the residence of the child rather than all local authorities in Wales.

Regulation 8 concerning the provisions for retaining data goes well beyond what could be justified. How, for example, might it be necessary to keep the data on a 22 year old in relation to issues around section 436A?

Finally, this question is also misleading because it suggests that LAs have a duty to know the identity of children not known to them. LAs do not have such legal duty. Please see response to questions 2 and 3.

The Welsh Government should be reminded that the State, including LAs, are institutions which reason of existence is the service of their citizens.

ii) If you do not think that the information requested is reasonable and proportionate, what would you propose is the best way(s) for LAs to meet their duty to identify children of compulsory school age to ensure they are receiving a suitable education?

This question 1 ii) is misleading. LAs do not have a duty to identify children of compulsory school age to ensure they are receiving a suitable education. Their duty, as set out in section 436A of Education Act 1996, is in relation to children in their area who are of compulsory school age but not registered pupils at a school, and not receiving suitable education otherwise than at a school. In other words, it is not LAs' duty to ensure children are receiving suitable education but to identify the children that are not.

It is primarily the parent's prerogative and duty to ensure their children receive suitable education. This is recognised in Article 26(3) of the Universal Declaration of Human Rights which states that "parents have a prior right to choose the kind of education that shall be given to their children." and Article 2 of the First Protocol of the European Convention on Human Rights which says: "*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching,* ***the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.***" (emphasis added).

This duty to educate your children is part of what is called "parental responsibility" in the Children Act 1989. A local authority would only acquire parental responsibility if named in the care order for a child pursuant to section 33 of the Children Act 1989. Thus the suggestion that it is the LAs duty to ensure that children are receiving a suitable education is incorrect and totally inappropriate.

Question 2 – Currently there is a situation where LAs are responsible for children in their area that they do not know about. Under section 436A of the Education Act 1996 LAs must make arrangements to enable them to establish (so far as it is possible to do so) the identities of children in their area who are of compulsory school age but i) are not registered pupils at school, and ii) are not receiving a suitable education otherwise than at school. Do you think the database will help LAs, as far as it is possible to do so, to identify children not currently known to them and/or children missing education in their area? What is the reason for your answer?

The database will not help LAs as the draft regulations that set up the database are unlawful as, among other things, they breach Article 8 of the European Convention on Human Rights. Please see our reply to Question 1 above.

In addition question 2 is misleading as it first quotes section 436A of the Education Act and then wrongly suggests that LAs have a duty *"to identify children not currently known to them".* Section 436A does not impose such duty and LAs do not have such duty in any event. There is no such duty.

Thus, a database that is set up for the purpose of fulfilling such inexistent duty would be unlawful.

Question 3 – Without a database, what reliable and consistent alternative method would enable the LA to identify a child they have no prior knowledge of?

Question 3 is misleading. LAs have no duty to identify a child they have no prior knowledge of. Therefore, it would be unlawful to impose a method to enable LAs to do so. In a democratic society the rule is that the State (including LAs) can only do what they are empowered to do so by the law; everything they purport to do outside the law would be ultra vires and therefore unlawful.

The justification for the database given in the consultation document relates to identifying children not on a school roll and not receiving suitable education. However, LAs already know where those children are and that is clear from the numerous emails and letters LAs have been sending to parents and on many occasions unlawfully demanding those parents complete a form explaining the education arrangements and/or meet with LAs' officials.

It is therefore not clear why LAs are seeking to obtain further powers encroaching on the parents' and children's human rights and fundamental freedoms.

Question 4 – The draft Children Act 2004 Education Database (Wales) Regulations 2020 propose local health boards disclose the information in Schedule 1 to LAs annually. Do you agree with an annual return? If not, how often do you think this information should be provided to LAs and when would the most appropriate time be?

We do not agree with any such disclosure at any time. As stated previously if the draft regulations are enacted as proposed they would be unlawful and we cannot agree to a disclosure in breach of a basic human right such as the right to privacy enshrined in Article 8 of the European Convention on Human Rights.

Question 5 – The Draft Education (Information about Children in Independent Schools) (Wales) Regulations 2020 propose independent schools disclose the information in Schedule 1 to LAs annually. Do you agree with an annual return? If not how often do you think this information should be provided to LAs and when would the most appropriate time be?

See reply to Question 4.

Question 6 – What would be the implications of a more frequent data return in terms of technical, administrative and resource implications on:

i) local health boards

n/a

ii) independent schools

n/a

iii) LAs

n/a

iv) other.

There should not be more frequent or any data returns. As said if the draft regulations are enacted as proposed they would be unlawful.

Question 7 – Who, within the LA, would need access to the database in order to carry out their functions?

There is no legal justification for a database and the proposed database would be unlawful.

Question 8 – Do you think anything in the draft regulations could have a disproportionate impact on those with protected characteristics, and if so, what?

Yes, we do. As stated previously, the draft regulations are very broadly drafted to the extent that potentially the information could be used and/or shared for any purpose whatsoever and that would render them unlawful.

On that basis, the draft regulations could lead to abuse and have a disproportionate impact, not only on those with protected characteristics, but any person whose personal data is entered into the proposed database.

Question 9 – Does this proposal allow for the LA to meet their section 436A duty to make arrangements to identify children in their area who are of compulsory school age and not receiving a suitable education?

No, it does not. As aforesaid, if the draft regulations are enacted as proposed they would be unlawful, thus no LA would be able to rely on such regulations to meet their duty.

Question 10 – In order to identify the effectiveness of the database the Welsh Government will request from LAs an annual return on the number of children identified using the database not currently known to LAs. When would be the most appropriate and reasonable time to request this?

As stated previously, if the draft regulations are enacted as proposed they would be unlawful, thus the question of effectiveness of the database does not come into play.

Question 11 – Do you think a voluntary database of all statutory school-age children ordinarily resident within an LA area would assist LAs to meet their section 436A duty?

A voluntary database that is respectful of the parents' and children's right to privacy and the parent's right to educate and that is conducive to a good working relationship with the LAs would certainly be preferable to a compulsory database. It is doubtful that a compulsory database would achieve the best results for the children's education or to a good working relationship with the LAs. The LAs would have to ensure that parents or children are not coerced or harassed in any way in taking part of such voluntary database.

Any database should be mindful of the special status of home educated children and their parents recognised in the Equality Act 2010.

On that basis, a voluntary database would probably assist LAs to meet their statutory duties and would probably contribute to a mutual understanding between stakeholders.

Question 12 – What, if any, advantages and disadvantages do you think there would be in the disclosing of the required data to populate the database? Complete section relevant to you.

i) Parents/carers

As already mentioned, if the draft regulations were enacted as proposed they would be unlawful. Thus nothing positive (no advantage) could come out of a disclosure in breach of a human right and fundamental freedom.

If the database was lawful, which we deny, there would be several concerns such as the risk of personal data being lost, stolen, unlawfully shared, or used for a purpose outside the law.

ii) Children and young people

Ditto

iii) Local health boards

iv) Independent schools

v) LAs

vi) Other

Local health boards

Question 13 – Do existing protocols concerning data of children who have died ensure that any processing of that data does not lead to any inappropriate communications with families?

Question 14 – Can you identify any key privacy risks and the associated compliance and corporate risks?

Question 15 – Do you have any previous experience of this type of data disclosure/processing?

Question 16 – What are the resource and technical implications of processing and disclosing the required data to LAs?

Independent schools

Question 17 – Can you identify any key privacy risks and the associated compliance and corporate risks?

Question 18 – Do you have any previous experience of this type of processing?

Question 19 – What are the resource and technical implications of processing and disclosing the required data to LAs?

LAs

Question 20 – Is there anything missing from the Schedule of Information to be included in the database?

Question 21 – Do existing protocols concerning data of children who have died ensure that any processing of that data does not lead to any inappropriate communications with families?

Question 22 – Can you identify any key privacy risks and the associated compliance and corporate risks?

Question 23 – Do you have any previous experience of this type of processing?

Question 24 – We would like to know your views on the effects these draft regulations would have on the Welsh language, specifically on:

i) opportunities for people to use Welsh
ii) treating the Welsh language no less favourably than the English language.

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

Supporting comments

Question 25 – Please also explain how you believe the proposed regulations could be formulated or changed so as to have:

i) positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language
ii) no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

Supporting comments

Question 26 – We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

At least one of the Table Talk Workshops was conducted in breach of the terms of the Consultation, in breach of the Welsh Government's very own Guidance on Making Good Decisions and the Gunning principles which were adopted by the said guidance and unfairly discriminated home educators in breach of the Equality Act 2010.

In that regard we refer to our letter to the First Minister of Wales and his response which did not address any of the serious issues raised.

We consider the workshop in question unlawful and that this renders the whole consultation null and void.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here: ☐

THE CHILDREN ACT 2004 EDUCATION DATABASE (WALES) REGULATIONS 2020 (DRAFT)

BRIEF TO COUNSEL

This is a summary of the brief Protecting Home Education Wales sent to David Wolfe QC and his legal advice on The Children Act 2004 Education Database (Wales) Regulations 2020 (draft).

The questions raised by Protecting Home Education Wales in the brief to David Wolfe are in black below.

David Wolfe's responses are identified in purple.

1. The draft regulation does not specify what the purpose of legal basis for the database is (including the legal basis for the use of personal data); and it is not clear (it is not stated) what the local authorities can or have to do with such information. The regulations do not say how the data will be used. Regulation 9 is the only part of the regulations which refers to LAs functions but these functions are only referred to for the purpose of establishing who can add or read the information in the database. Does this raise data protection issues?

   Please consider whether the gathering of information for a non-specified purpose could be a breach of Data Protection law.

   "Whatever this regulation authorised would then be permitted within the Data Protection Act 2018 and the GDPR. But the regulations would still need to comply with the Human Rights Act 1998 (and its Article 8 in particular) so that becomes the focus of any legal challenge to the regulations.

   In broad terms, that means that the regulations must be justified and must be proportionate to the justification. In that regard, regulation 9 is drafted extremely widely. First off, it allows people employed in relation to the 9(2) functions to access the information, without then saying they can only use it for those functions. What happens if someone has one of those things as part of their job, but also does other things within the LA? On the face of the draft, they could then use the information for other purposes.

   Moreover, the regulation 9(2) is very widely cast, and notably so given that the regulations themselves don't say whether they relate to arrangements under section 25 or 28 of the 2004 Act or section 175 EA 2002 which, as you say, is a requisite for section 29(1) to apply. As you say, the justification given in the consultation document relates to identifying children not on a school roll and not receiving suitable education. The 9(2) list goes far beyond that. I think there is a good argument that the wider list is not and cannot be justified by the claimed purpose and so would be unlawfully wide."

2. S.29(1) states that the purposes of a database can only be arrangements under section 25 or 28 of the 2004 Act or under section 175 of the Education Act 2002, but the draft regulations does not say what the purpose of the database is. Please consider:

   "I agree that, as above, that is odd and potentially problematic including given that the consultation document makes no mention of any of those.

You should certainly push them to explain exactly which of the three and on exactly what basis and for exactly what purpose the database is being established.

And whatever the answer to that it is hard to see how they can sustain the wide formulation at regulation 9, as above."

3. The regulations do not say on what basis personal data will be shared. The consultation document does say that data will only be shared if there is a purpose, a legitimate aim such as ensuring a child's wellbeing, but this has not been included in the regulations.

   "I agree. As above, there is a good argument that the regulations are not compatible with Convention rights arising from Article 8 in that they allow for interferences which go well beyond what is even claimed as the justification."

4. Are the regulations in line with data protection (including GDPR) laws?

   "As above, the regulations, if themselves lawful, cover off the GDPR point. However to be lawful, they need (as above) to be within the powers under which they say they are made, and be compatible with Convention rights."

5. Are the regulations in line with human rights, in particular right to private and family life (art 8 ECHR) and the prohibition on interference with privacy and home (art 16 UNCRC)? There does not appear to be any justification for the regulations' interference on the right to privacy.

   a) As mentioned above, the regulations do not have an express purpose and I wonder whether this could show the lack of justification on the interference of the right to privacy and whether this could render the regulations unlawful.

      "I agree, as explained above."

   b) The consultation document does say that the government has considered any potential human rights issue but then it goes on to say that the regulations do not interfere with a parent's right to educate. I think this analysis is wrong and the government has missed the point and what they should have considered is the impact of the regulations in respect of the right to privacy (the regulations dealing mainly, if not only, with the sharing and use of personal data).

      "I agree. The consultation document says that the regulations are proportionate because they support a legitimate aim. But that gets the law wrong. There must be a legitimate aim and then the regulations must be proportionate to that aim (including in not going further than is necessary to achieve that aim). Assuming the aim relates to section 436A then the regulations should not go further than is necessary to achieve that aim. My view is that they go well beyond it, which means they are not proportionate and therefore would not be legal."

   c) The Children's Rights Impact Assessment (the **IA**) briefly touches on the interference on the right to privacy and the minister then says that "*she is of the view this is a reasonable and*

proportionate *step"* but she does not explain how she has formed such view. The IA has a section entitled "*Explain how the proposal is likely to impact on children's rights"* but it does not include an assessment on the impact on the right to privacy. Instead the IA appears to concentrate on the "benefits" of the regulation.

"As above."

6. Regulation 5 requires the local health board to disclose to <u>each</u> local authority [...]. Shouldn't this be limited to the local authority of the area of the residence of the child rather than all local authorities in Wales?

"I agree. That is another way in which they go beyond what appears to be justified."

Finally, [ ] about the archiving under regulation 8. The provisions for retaining data appear to me to go well beyond what could be justified. How, for example, might is be necessary to keep the data on a 22 year old in relation to issues around section 436A.

Protecting Home Education Wales
protectinghewales@gmail.com
https://protectinghomeeducationwales.wordpress.com/

Rt Hon Mark Drakeford
First Minister of Wales
PS.FirstMinister@gov.wales

23 March 2020

Complaint against the Minister for Education Ms Kirsty Williams

Dear Rt Hon Mark Drakeford

We are writing to make a complaint against the Minister for Education Ms Kirsty Williams in relation to the consultation process on the Draft Children Act 2004 Database (Wales) Regulations 2020 and the Education (Information about Children in Independent Schools) (Wales) Regulations 2020 (the **Regulations**) on the basis that the same has been carried out unlawfully.

On 30 January 2020 the Education Minister launched a consultation on the Regulations.

As part of the consultation the minister arranged for "Table Talk" Regional Workshops to take place on 6, 13 and 26 March 2020 in three different locations in Wales. Please see The Invitation to the 'Table Talk' Regional Workshops (the **Invitation**).

[redacted] attended the first of such workshops in Llandudno, and the following issues arose:

1. The workshop was poorly advertised, at short notice and home educating stakeholders received no response to applications to attend. The Invitation says:

   "Places are limited and will be allocated on a 'first-come, first-served basis…Once registered, you will receive an email confirming whether you have been successful in securing a place at your chosen workshop."
   As a result, the meeting was attended by only 8 individuals: 3 home education stakeholders, 3 local authority education officers and 2 women who had some connection with a commercial business working with looked after children. Neither of the two women were stakeholders in the issue at hand.

2. The organisers used report sheets to record votes from the group on each point, thus in our view skewing the outcome as a result of point 1 above.

3. The workshop was dominated by irrelevant references to unconnected concerns and the facilitator repeatedly supported that, whilst closing down any discussion of the actual issue at hand. This was stated to be on instruction from the Welsh Government. By way of example, the facilitator cut an attendee off by stating that the event was not about home education and that the Government had instructed the them to exclude discussion on that subject.

That is at odds with the Invitations which states:
"To gain your feedback on the draft regulations the Welsh Government would like to invite you as stakeholder to a 'Table Talk' workshop."

"[…] your views and experiences are important in helping to inform Welsh Government policy."

To put it into context, the consultation on the Regulations is only but the second part of the Education Minister's plans concerning home education, the first part was the consultation the statutory guidance for local authorities and handbook for home educators which closed last year. You will note that reference to the Regulations is made throughout the documents in relation to that first consultation. Thus, it is clear that the purpose of the Regulations is to create a database of home educated children and to consider the Regulations in isolation (ie without considering that is intended to do in relation to home education) would be non-sensical and unlawful.

4. The questions asked by the facilitators were leading and clearly designed to elicit results which were pre-determined. The facilitator stated unequivocally that the questions were designed by the Welsh Government.

5. The discussion time was cut short at 11 am to accommodate the local authority staff attending (who said they had to leave at 11 am), despite it being advertised as being from 10am -1pm and discussion from the home education stakeholders cut off, without them being given proper opportunity to make relevant points. This is precisely what happened at the consultation meetings last year in respect of the guidance on home education.

   This constitutes a clear breach of one of the Gunning principles set out in R v Brent London Borough Council, ex parte Gunning (1985) 84 LGR 168 which states:

   "Adequate time must be given for consideration and response. The timing and environment of the consultation must be appropriate, sufficient time must be given for people to develop an informed opinion and then provide feedback, and sufficient time must be given for the results to be analysed."

Therefore, it is clear that the workshop was conducted:

1. in breach of the terms of the consultation, more particularly the Invitation; and
2. in breach of the Welsh Government's very own Guidance on Making Good Decisions (the **Guidance**) and the Gunning principles which were adopted by the Guidance.

The above is proof that the workshop was not carried out in a fair manner (for example, home educators were not treated in the same manner as the other stakeholders). This amounts to a breach of the Welsh Government's obligation to carry out consultations fairly (see page 35 of the Guidance).

In addition, we feel that as home educators we have been unfairly discriminated against in breach of the Equality Act 2010 and we are considering making a complaint with the Equality and Human Rights Commission.

We therefore ask that you address these serious concerns, treat the workshop as void and request the Minister for Education to arrange for new workshops to be scheduled when conditions permit.

Yours sincerely

Protecting Home Education Wales

Y Gwir Anrh/Rt Hon Mark Drakeford AC/AM
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref FM -/00459/20

Protecting Home Education Wales

protectinghewales@gmail.com

14 April 2020

I am writing in response to your letter on 23 March 2020.

I am sorry to read about your complaint that the consultation event in relation to the draft Children Act 2004 Database (Wales) Regulations 2020 and the Education (Information about Children in Independent Schools) (Wales) Regulations 2020 on 6 March did not meet your expectations and was not a positive experience for you.

The consultation is specifically about the regulations requiring local authorities to develop and maintain a database of all compulsory school age children regardless of where they receive their education.

The regulations concentrate on requirements for local authorities, health boards and independent schools and is wider than home education. The purpose of the regulations is to enable local authorities to ensure all compulsory school age children in their area are receiving a suitable education – not to create a database of home-educated children.

The particular consultation event you highlight in your letter was arranged to supplement the consultation process. The organisation, which delivered the event in North Wales is a trusted facilitator, which has been used by the Welsh Government on a number of occasions. We received feedback from other participants at the event, which was positive.

This is an emotive subject and balancing the views of a range of stakeholders at these events can be challenging. Not everyone is always satisfied with either the process or the outcome – we will take account of your feedback for future events.

The consultation on the regulations remains open until 22 April. If you feel there are further points you wish to make or points you would like to reinforce, I hope you will take the opportunity to contribute your views.

Bae Caerdydd • Cardiff Bay
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CF99 1NA

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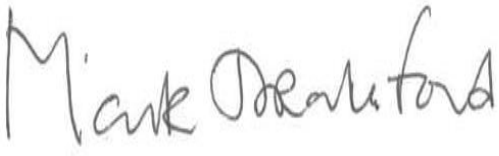
YP.PrifWeinidog@llyw.cymru • ps.firstminister@gov.wales

The consultation is available at https://gov.wales/local-authority-education-databases

Best wishes



MARK DRAKEFORD

Home Education – Statutory Guidance for Local Authorities and a Handbook for Home Educators

Consultation response form

Your name:

Organisation (if applicable): Protecting Home Education Wales

e-mail/telephone number:
protectinghewales@gmail.com

Your address:

Responses should be returned by **21 October 2019** to

Support for Learners
Education and Public Services Directorate
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: WELLBEINGshare@gov.wales

Question 1 – Does the draft statutory guidance provide suitable information to enable local authorities to assess the suitability of the education received by home educated children?

Yes	☐	No	✓	Not sure	☐

Supporting comments

The draft is unsuitable as on many occasions states the law wrong leading local authorities to believe that parents have less rights than they actually have and that local authorities have more rights/duties than they are legally entitled to/have. See legal advice from David Wolfe QC of Matrix Chambers attached.

Question 2 – Chapter 1: legal responsibilities – Does this chapter clearly set out the rights of parents to home educate their children and the duty on local authorities to identify children and make enquiries about their educational provision?

Yes	☐	No	✓	Not sure	☐

Supporting comments

As stated above the draft states the law wrong suggesting that parents have less rights than they actually have and that local authorities have more rights/duties than they are legally entitled to/have. By way of example see paragraphs 6 to 8 of the legal advice from David Wolfe QC attached.

Question 3 – Chapter 2: identifying children not known to the local authority –

a) Does this chapter clearly outline the requirement under Section 436A of the Education Act 1996 for local authorities to make arrangements to enable it to identify, so far as it is possible to do so, the identities of children in its area who are not receiving a suitable education?

Yes	☐	No	✓	Not sure	☐

Supporting comments

Section 436A of the Education Act 1996 requires local authorities to identify children that are not receiving a suitable education whereas Chapter 2 proposes to unlawfully encroach on the right to private and family life of home educating families. If the child is in receipt of suitable education the local authority has no right to get involved/interfere.

b) Do you think that the development of a database is a reasonable and proportionate approach?

Yes	☐	No	✓	Not sure	☐

Supporting comments

It is impossible to assess whether such database would be reasonable and proportionate without considering the draft Children Act 2004 Database (Wales) Regulations 2020 and Education (Information about Children in Independent Schools) (Wales) Regulations 2020. A public counsultation should be launched in respect of the proposed regulations.

c) Do you think there should be a system in place requiring independent schools and local health boards to share limited specified information with local authorities, to enable them to identify children who are not known to them, in order to make arrangements to ensure that these children are receiving a suitable education?

If 'no', how would you suggest the local authority complies with the requirement to identify children who are not known to them in order to make arrangements to ensure that these children are receiving a suitable education?

Yes	☐	No	✓	Not sure	☐

Supporting comments

Such system would be unlawful as it would illegally encroach on the right to private and family life of home educating families.

The second question is incorrect; Section 436A of the Education Act 1996 requires local authorities to identify children that are not receiving a suitable education otherwise than at school; there is no requirement on local authorities to identify children not known to them [...].

Question 4 – Chapter 3: efficient and suitable education – This chapter focuses on the requirement for local authorities to consider whether the education provision is suited to the needs of the individual child; whether learning is taking place; and whether the child is making reasonable progress in line with their age, aptitude and any special education needs they may have.

a) Families opting to home educate should be able to offer a suitable education from the outset and have made preparations with that aim in view. That said, do you think there should be a reasonable period of adjustment for families before the local authority considers whether a suitable education is being provided? If 'yes', please note what would be considered reasonable in your opinion?

Yes	✓	No	☐	Not sure	☐

Supporting comments

A reasonable period is a must and would depend on the specific circumstances of the family and child. A child would need a period to adapt and deal with any trauma before education can resume.

b) Section 4.15–4.18 of the statutory guidance refers to the suggested characteristics of a suitable and efficient education for local authorities to consider. Is there anything else you think should be included?

Yes	☐	No	✓	Not sure	☐

Supporting comments

What the guidance suggests as being the criteria for a suitable and efficient education is unlawful as it is not supported by statute or case law.

c) Article 12 of the UN Convention on the Rights of the Child (UNCRC) states that children have the right to have opinions and for these opinions to be considered when people make decisions about things that involve them. The statutory guidance states that in order for a local authority to satisfy itself of the suitability of education provided, the local authority should see and speak with the child. Do you agree with this statement? If 'Yes' what would be the best way to gather the views of the home educated child?

Yes	☐	No	✓	Not sure	☐

Supporting comments

In this regard the guidance is unlawful (see David Wolfe QC advice in full). You will note from the advice that local authorities have no right to demand to meet, see or speak with the child.

d) In your view, how often would it be reasonable for the local authority to meet with the home educating family to assess the suitability of education provided? Please explain your views.

Supporting comments

As often as the parents of the child requires it. See response to c) above.

e) In your view, who would be best placed to conduct the visits and assess the suitability of the education provision and why? For example, this could include (but is not limited to):

- local authority home education officers
- an independent panel of education professionals
- a qualified teacher
- a teaching assistant
- other.

Supporting comments

Assuming that the parents of the child had (in their absolute discretion) allowed such visit, it should be a home eduation expert from the home educating community. See responses to c) and d) above.

f) In your view, who else should input be sought from when the local authority is assessing the suitability of the education provision and why? For example, this could include (but is not limited to):

- educational psychologists
- a speech and language therapist
- other specialist professionals.

Supporting comments

Assuming that the parents of the child had (in their absolute discretion) allowed such visit, whoever the parents of the child consider suitable at that time. See responses to c), d) and e) above.

g) Do you have any other comments on this chapter?

Supporting comments

See David Wolfe QC advice

Question 5 – Chapter 4: school attendance orders (SAOs) and education supervision orders (ESOs) – This chapter focuses on existing powers available to local authorities when they are unable to satisfy themselves that a home educated child is receiving a suitable education.

Whilst home educators are under no duty to respond to reasonable requests from the local authority, case law has established that it would be unwise for them not to respond. In the absence of information that suggests that the child is being suitably educated, it is reasonable for the local authority to conclude that the education provision does not appear to be suitable.

Is this chapter clear about:

a) local authority responsibilities to issue SAOs and ESOs?; and

Yes	☐	No	✓	Not sure	☐

Supporting comments

The guidance suggests that local authorities have powers that they do not actually have. Para. 5.3 of the guidance says "The most obvious course of action is for local authorities to meet with the parents and home educated child regarding the education they are providing for their child." There is no legal basis for the above. In Phillips v Brown the court said "The most obvious step to take is to ask the parents for information." See paragraph 12 of the advice from David Wolfe QC.

b) clear about the process to follow when issuing SAOs and ESOs?

Yes	☐	No	✓	Not sure	☐

Supporting comments

See answer to a) above.

Question 6 – Chapter 5: educational support – This chapter considers the advice, information and support local authorities could make available to home educating families. Do you think this chapter is useful?

Yes	✓	No	☐	Not sure	☐

Supporting comments

Yes, provided such information and support is only offered if requested by the parents of the child. It should be clarified that this would be a service provided by local authorities (ie not something forced on families).

Question 7 – Chapter 6: Safeguarding – This chapter outlines existing safeguarding duties that apply to local authorities. Whilst there is no proven correlation between home education and safeguarding, specific safeguarding duties apply to all children regardless of how they receive their education. Do you think this chapter is useful?

Yes	☐	No	✓	Not sure	☐

Supporting comments

Education otherwise than at school and safeguarding concerns are totally different matters and it is disappointing that the Guidance is somewhat linking them, despite the fact the Guidance says the opposite. Besides there is no legal basis for local authorities to conclude (as it does at para. 7.17 of the Guidance) that "a lack of information about a child's educational provision is capable of satisfying the 'reasonable cause to suspect' significant harm test under that provision section 47 of the Children Act 1989". Such a conclusion would be unlawful and the Guidance gets the law wrong.

We draw your attention to para. 10 of the legal advice where it says: "There is no lawful basis for a local authority to behave that way simply because a child is being home educated. That must be made clear in the Guidance which currently gets the law wrong."

Question 8 – Handbook for home educators – This handbook provides information for those who are or are considering educating their child at home. Is there anything else you think should be included?

Yes	✓	No	☐	Not sure	☐

Supporting comments

The handbook does not fully set out what the parents rights are vis-a-vis the local authorities. See responses to questions 1 to 3 above.

Question 9 – Whilst we acknowledge that flexi-schooling is not home education, we are aware that some home educators would welcome information on what it is. Do you think this information (see sections 6.15–6.19 in the statutory guidance and 1.20–1.21 in the handbook) is useful?

Yes	☐	No	☐	Not sure	✓

Supporting comments

Flexi-schooling should be in a different stand alone handbook as it has nothing to do with home education.

Question 10 – We would like to know your views on the effects that statutory guidance for local authorities regarding home education would have on the Welsh language, specifically on:

i) opportunities for people to use Welsh
ii) treating the Welsh language no less favourably than the English language.

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

Supporting comments

It is not clear how the guidance would have any effect (whether positive or negative) on the Welsh language

Question 11 – Please also explain how you believe the proposed policy could be formulated or changed so as to have:

iii) positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

iv) no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

Supporting comments

See response to question 10 above.

Question 12 – We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

The draft letters and forms where prepared on the basis of a guidance which in many respects is unlawful. They should be redrafted.

The guidance fails to acknowledge that schooled education and home education have equal standing before the law, and unlawfully discriminates against home education. In that regard, see para. 16 of the QC's opinion.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here: ☐

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RE: CONSULTATION ON NEW HOME EDUCATION GUIDANCE IN WALES

ADVICE FOR 'PROTECTING HOME EDUCATION WALES'

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1. I am instructed to provide advice to Protecting Home Education Wales on some legal matters arising from the Draft Statutory Guidance for Local Authorities on home education on which the Welsh Government is currently consulting.

2. I understand that this advice will be submitted as part of one or more responses to that consultation.

3. Additional legal points may arise if and when the Welsh Government makes information sharing regulations of the kind contemplated by the draft guidance. The legality of those regulations cannot be judged at this stage.

4. The points I make are in the order of the paragraphs of the Draft Guidance itself.

5. Paragraph 1.4 of the Draft Guidance explains that principles of the UNCRC guide how the rights of the child are protected. It says that "these principles are", and then lists Articles 2, 3, 6 and 12 UNCRC. However, and importantly, that list fails to include or recognise the obligations arising under Article 14 (rights and duties of parents) or Article 16 (prohibition on interference with privacy and home).

6. Paragraph 2.19 correctly notes the established legal position that local authorities may make enquiries of parents as part of discharging their legal obligations. However, paragraph 2.23 says that "Where a child has been de-registered, the local authority should meet with the family as soon as possible to determine the reasons for home education [my underlining]." That sentence goes too far in suggesting that such a meeting is mandatory (either for the local authority and/or the family), and in implying that there is some obligation on parents to give a reason for de-registering their child with a view to home education. In particular, the power to ask, does not require local authorities to ask, let alone require parents to answer.

7. While local authorities can request meetings and explanations, they cannot lawfully demand them. As drafted, the sentence gets the law wrong.

8. Similarly, in paragraph 2.31, the Draft Guidance says that "Where they can identify early signs of an intention to de-register, local authorities should contact parents to discuss their reasons." In implying an obligation on parents to respond to such requests, the guidance goes too far and gets the law wrong.

9. Paragraph 4.21 says that "In order for a local authority to satisfy itself of the suitability of education provided by the parents, the local authority **should** see and speak with the child." The word "should" is in bold in the text, and has a footnote which explains that a local authority would need a good reason not to comply with the guidance (and that refusal to comply by a family does not provide a good reason). That goes too far in suggesting that children/parents are under some sort of obligation to meet with the local authority – they are not.

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10. The text also risks being read by local authorities as suggesting that they can (or indeed should) insist on seeing a child without its parents. There is no lawful basis for a local authority to behave that way simply because a child is being home educated. That must be made clear in the Guidance which currently gets the law wrong.

11. Paragraph 4.22 touches on that issue again in saying that "There may be occasions it is not in the best interests of the child for the local authority to meet with them, or in exceptional circumstances, the local authority can conclude without seeing the child they are receiving a suitable education." Two points arise: first of all the question of whether the child sees the local authority in relation to just the question of home education is entirely a matter for the child's parents and (for an older child) the child. This is not a question of "best interests", and it is entirely inappropriate for the Guidance to suggest that such a threshold or test applies.

12. Secondly, sections 436A and 437 Education Act 1996 require the local authority to reach a view on whether a child is not receiving suitable education. Unless there is positive evidence that the education is not suitable, then the local authority could not reach a rational and therefore lawful conclusion to that effect. There is certainly no proper basis to create a presumption that the education is not suitable unless the local authority has seen the child in question, let alone provide that the local authority should only "exceptionally" depart from such a conclusion. While the Welsh Government can provide guidance on how a local authority approaches its statutory obligations, it cannot distort or subvert those obligations in the way which this Draft Guidance would appear to do here.

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13. Paragraph 4.24 refers to information provided by a child and to what use may be made of it. That too implies some form of entitlement on the part of local authorities to insist on seeing a child, or on the part of parents/children to agree to that. There are no such legal entitlements or obligations and the guidance gets the law wrong in suggesting the contrary.

14. The paragraph continues "If it is clear that a child does not wish to be educated at home although the education provision is satisfactory, the local authority should discuss the reasons for this with the parents and encourage them to consider whether home education is in the bests interests of the child when clearly it is not what the child wants." That is unlawful in suggesting some form of hierarchy or presumption in favour of education at schools and against home education, when the law (and Education Act 1996 section 7 in particular) is entirely agnostic as between the two: they are equal in the eyes of the law with the only issue for each being whether the education being provided is suitable.

15. That same sentence is also unlawful in implying that the local authority can insist on discussions with parents and/or children (or that the latter have to engage in such discussions); also in suggesting that the local authority has any role in questioning the parental choice to home educate in circumstances where that education is agreed suitable.

16. Those are clear interferences with, for example, Article 8 ECHR (right to respect for private and family life) which means that Article 14 ECHR (prohibition of discrimination) is engaged. That leads to the conclusion that there would be unlawful discrimination (contrary to Article 14 read in conjunction with Article 8) for a local authority to be taking the action in contemplation in that sentence of the guidance when it would not be doing the same for

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other children – there is (I assume) no equivalent guidance suggesting that local authorities should ask children at school whether they would like to be educated in a different way and then challenging parents on that basis.

17. To ask about those things - and certainly to insist on answers from, and then to act on those answers - from parents and pupils involved would be incompatible with Convention rights under the Human Rights Act 1998, and so unlawful.

18. Overall, if the matters set out above are adopted in the final guidance following consultation, then that final guidance will mis-state or misunderstand the law and so be unlawful (and/or leads to illegality by local authorities acting in the light of it).

David Wolfe QC

MATRIX

14 October 2019

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Agenda Item 8

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

Llywodraeth Cymru
Welsh Government

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

cc. Mark Isherwood
Chair, Public Accounts and Public Administration Committee

08 February 2023

Dear Huw,

Thank you for your letter and the questions put forward by your Committee relating to the Procurement Bill Supplementary Legislative Consent Memoranda (Memorandum No. 3 and Memorandum No. 4). I am pleased to provide my response, which is attached at Annex 1.

I am copying this letter to the Chair of the Public Accounts and Public Administration Committee, who has also written to me and requested that they receive a copy of my response to you.

Yours sincerely,

Rebecca Evans.

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

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Annex 1

1. **You state in the memoranda that you continue to have concerns with the Bill which need to be resolved before you could consider recommending consent. These matters are in respect of the power to add international agreements, the definition of Welsh Contracting Authorities, commencement powers, and powers to make consequential provision. Please could you:**

   a. **provide an update on the degree to which each of these matters have been resolved, if at all;**

   b. **indicate whether, since Memorandum No. 3 and No. 4 have been laid, discussions on each of these matters have been held at Ministerial level, or at official level;**

   c. **indicate whether you have escalated any of these disagreements to a dispute under the Dispute Avoidance and Resolution Process established by the review of intergovernmental relations, and if not, why not.**

   The majority of the outstanding matters of concern you mention have now been satisfactorily resolved. An amendment to the definition of a Welsh Contracting Authority has been agreed and has been tabled for consideration at Commons Committee. This will make it clear that the Welsh rules apply to such authorities if they operate or exercise functions wholly or mainly in relation to Wales. The Cabinet Office has also agreed to our request to amend the powers to make consequential provision to concurrent plus powers, which means UK Government (UKG) Ministers will require the consent of the Welsh Ministers (WMs) when exercising this power in relation to devolved areas. An amendment has been tabled for consideration at Commons Committee. Both these matters were discussed and resolved at official level and were subject to Ministerial approval. Lastly, following both official and Ministerial level discussions, the Cabinet Office has tabled an amendment to the Bill to ensure a Minister of the Crown seeks the consent of the WMs before commencing the Bill's provisions in relation to the devolved Welsh aspects of the Bill.

   The matters which are still outstanding relate to international trade. The first matter is that the power to add international agreements to the list in Schedule 9 to the Bill has been included as a concurrent power, with no requirement to obtain the consent of WMs when UK Government (UKG) Ministers are exercising this power in relation to devolved areas. We have been clear with UK Government that this arrangement is not acceptable.

   The second matter of concern relates to trade disputes and has arisen because of an amendment tabled by the UKG on 25 January 2023. The effect of the amendment is that it creates a concurrent power for a Minister of Crown to make regulations to deal with the procurement consequences of a trade dispute under a treaty implemented by way of Schedule 9 (other than the Trade and Cooperation Agreement with the EU, which is dealt with under existing legislation) with no requirement to obtain the consent of WMs when UKG Ministers are exercising this power in relation to devolved areas. We have been clear with UK Government that this arrangement is also not acceptable.

   With regards to the international trade issues, detailed discussions have been held at Ministerial level and remain ongoing at official level.

We have maintained a good working relationship with UKG on the Procurement Bill and, so far, we have been able to reach agreed solutions without needing to rely on the Dispute Avoidance and Resolution Process set out in the inter-governmental agreement. It is not anticipated that it will be necessary to resolve the outstanding matters using the Process, however, should relationships breakdown in the future, we would look to escalate through the Inter-Ministerial Standing Committee in the first instance.

2. **In Memorandum No. 3 you state that the concern you had with regard to a disapplication power for healthcare services, which you referred to in previous legislative consent memoranda, had been resolved. You stated in the first memorandum that the UK Government had committed to bring forward the required amendment. However, in Memorandum No. 2 you stated that the Welsh Ministers had decided not to pursue the inclusion of the power, but were considering various options, which may include taking forward the powers required via Senedd legislation. The Minister for Health and Social Services has recently informed the Health and Social Care Committee that the Welsh Government will introduce a Health Service Procurement (Wales) Bill to make provision for a "disapplication power" for Welsh health services procurement and a "creation power" to enable the Welsh Ministers to introduce a new separate procurement regime for NHS health services in Wales. The Minister states that the Welsh Government will propose an expedited timetable for the Bill. Please could you:**

   a. **explain why the Welsh Government has changed its position on the inclusion of the disapplication power for healthcare within the Procurement Bill, considering a commitment to bring forward the relevant amendment was secured from the UK Government;**

      UK Government only committed to the disapplication power within the Procurement Bill. Ministers recognised that both powers were required to effect change and therefore there remained a need to legislate in Wales. Given this need to legislate, Welsh Ministers decided bringing forward a Bill that included both the disapplication and creation powers together provided the necessary legislation and gave greater coherence and accessibility to the legislation.

   b. **confirm whether the Welsh Government has assessed the impact of its decision on the accessibility of Welsh procurement law, and if an assessment has been undertaken, please set out the outcome of that assessment. For these purposes, it would appear to us that a Welsh contracting authority may have to consider the Procurement Bill and subordinate legislation to be made under it, the Health Service Procurement (Wales) Bill, the Social Partnership and Public Procurement (Wales) Bill and the Well-being of Future Generations (Wales) Act 2015;**

      The Welsh Government regularly assesses the accessibility implications of legislative proposals. This is a normal part of the Office of the Legislative Counsel's remit and it is also taken into account when deciding whether the UK Parliament or Government should legislate on Wales's behalf.

We do not consider it would be more accessible to use a single Act for the various provisions that relate to procurement.

The Social Partnership and Public Procurement (SPPP) Bill's provisions on procurement are essentially about social partnership and are a more accessible fit in an Act about social partnership (rather than in a Bill that is about public procurement procedures). This is designed to dovetail with the Well-being of Future Generation Act 2015, which sets out the wider organisational principles for public bodies in Wales. The social partnership principles involved are connected to the provisions about sustainable development, hence the need to refer to the 2015 Act.

The Health Services Procurement (Wales) (HSPW) Bill is a temporary legislative vehicle as its provisions are designed to amend existing legislation, specifically:

- the UK Procurement Act (by inserting a Welsh "disapplication power" immediately after a corresponding English disapplication power), and
- the NHS (Wales) Act 2006 (by inserting a "creation power").

This is the most accessible approach because:

- once the HSPW Act has amended the UK Procurement Act and NHS (Wales) Act 2006, users will just read the two amended Acts - there will be no need to refer to the HSPW Act, its "work having been done";
- the UK Procurement Act is the logical home for the disapplication power because it makes clear that health services are treated differently (and it will sit next to the corresponding English disapplication power);
- the NHS (Wales) Act 2006 is the logical home for the creation power, as the principal Act in Wales on health services (and similarly the corresponding English creation power is to be inserted into the equivalent piece of legislation applying in England, the National Health Service Act 2006).

c. confirm whether the Welsh Government had considered broadening the scope of the Health Service Procurement (Wales) Bill to include wider provisions relating to the processes underpinning procurement law in Wales, which would largely mirror those in the UK Government's Procurement Bill, and seek provisions within the legislative competence of the Senedd to be removed from the Procurement Bill;

The Health Services Procurement (Wales) Bill (HSPWB) was conceived in response to the Department of Health and Social Care's Health and Care Act 2022, which provides a legislative basis for establishing the Provider Selection Regime (PSR) that will govern the arrangement of healthcare services in England. The PSR will remove a limited range of healthcare services from the requirement to undertake a full procurement process. The HSPWB will establish a bespoke procurement regime for healthcare services in Wales which mirrors that provided for under the Health and Care Act, thereby creating an appropriate and effective framework for the procurement of healthcare services on a level playing field in England and Wales.

The aim of the PSR is to encourage flexibility and move away from the expectation of competition in some circumstances. The HSPWB will only apply to certain healthcare

services and means that contracts for those services would not need to be procured in accordance with the Procurement Act.

There are benefits of joining UKG's Procurement Bill including ensuring that there will be continuity for suppliers and cross-border businesses. It's unlikely Ministers would be able to completely replicate the cross-border provisions in a Senedd Bill as taking forward our own Bill would likely affect our ability to use the central platform and could lead to different procurement processes to England. The joint approach also means that these reforms can be enacted in Wales sooner than would otherwise have been possible.

d. indicate whether you believe legislating on procurement law via three bills introduced in different legislatures in close succession to each other follows a logical approach to legislating; and whether you will undertake an internal review of the approach taken to inform future practice.

The Social Partnership and Public Procurement Bill is currently being considered by the Senedd. This Bill provides a policy and outcome framework to improve public services in Wales, through social partnership working, promoting fair work and socially responsible public procurement. The UK Government is proposing to introduce a new procurement regime through its Procurement Bill that will make provision for the process of procuring generic 'goods, services and works'. The provisions in the Health Services Procurement (Wales) Bill are different in that they relate to the operational process of procuring health services in Wales and the Bill has been brought forward in response to procurement reforms being progressed for health services in England by the Department of Health and Social Services under their proposed Provider Selection Regime. Careful consideration will be given to ensure implementation plans understand the wider context.

I do not consider an internal review would be appropriate or beneficial, as my officials have worked with colleagues across the organisation to ensure there is maximum alignment as each of these three Bills has developed. I am confident that the approach taken provides certainty and clarity for buyers and suppliers across Wales and will establish an effective and efficient regime for procurement that maximises opportunities to deliver social, environmental, economic and cultural outcomes for Wales.

3. Clause 50 of the Bill (Contract details notices and publication of contracts), as referenced in both memoranda, includes a regulation-making power for the Welsh Ministers subject to the negative procedure. However, by virtue of an amendment, the corresponding power to Minsters of the Crown is subject to the affirmative procedure. Please could you provide an overview of any discussions you are having to seek to amend the power for the Welsh Ministers to also be subject to the affirmative procedure.

This clause is now clause 53 in the version of the Bill as brought from the Lords.

There is no regulation making power for the Welsh Ministers under this clause and therefore no question arises as to the applicable procedure.

4. **Clause 88 of the Bill (Notices, documents and information: regulations and online system), as referenced in Memorandum No. 3, provides that a Minister of the Crown must make arrangements to establish and operate an online system for the purpose of publishing notices, documents and other information under the Bill. There are Welsh online systems which may have some of the same functionality. Please could you clarify how these systems may interact, or whether the new system to be established by a Minister of the Crown will replace any existing systems, and could you indicate if you are seeking amendments to provide the Welsh Ministers with an equivalent power.**

   Sell2Wales will be used to publish procurement lifecycle notices produced by Welsh Contracting Authorities under the secondary legislation that will come into effect in Wales as a result of the Bill. Sell2Wales will then 'push' the relevant procurement lifecycles notices into the new UK online system established by the Minister of the Crown. This is the same way as Sell2Wales notice data is currently pushed into the UKGs existing Find a Tender Service. This will enable Wales to meet transparency requirements set out in the Bill and ensure compliance with obligations under international trade agreements which require all UK's procurements above certain thresholds to be advertised in a single place. The new UK online system will not replace the need for existing Welsh platforms which will be updated to support the new procurement lifecycle notices. Officials are working to ensure that the systems integrate as seamlessly as possible.

   The Bill provides Welsh Ministers with an equivalent power to determine the "form and content of notices, documents or other information to be published". The approach that has been outlined enables Wales to collect additional procurement lifecycle notice information within Sell2Wales. We will not therefore be seeking an amendment to provide Welsh Ministers with an equivalent power to make arrangements to establish and operate an online system for the purpose of publishing notices, documents and other information under the Bill.

5. **You consider clause 12 and 80 of the Bill to be within the legislative competence of the Senedd. However, these provisions do not apply to devolved Welsh procurement arrangements. Additionally, devolved Welsh authorities (within the meaning of section 157A of the Government of Wales Act 2006) are not required to have regard to the national procurement policy statement under clause 12 and are not subject to clause 80, except in relation to procurement under a reserved procurement arrangement. Please could you clarify why you believe these clauses require consent.**

   There will be instances where the duty to have regard to the National Procurement Policy Statement (now clause 13(10) in the version of the Bill brought from the Lords) and clause 80 which relates to regulated below threshold contracts (now clause 84 in the version of the Bill as brought from the Lords) will apply to Welsh contracting authorities. For example, where a Welsh local authority collaborates with an English local authority on a procurement, and the English local authority is the lead authority.

   For this reason, we believe these clauses are within the legislative competence of the Senedd.

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

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Rebecca Evans MS
Minister for Finance and Local Government

26 January 2023

Dear Rebecca,

The UK Government's Procurement Bill – supplementary legislative consent memoranda

At our meeting on 24 January 2023, we considered the supplementary legislative consent memoranda (Memorandum No. 3 and Memorandum No. 4) you have laid in respect of the UK Government's Procurement Bill.

To inform our further consideration, we would be grateful to receive further clarity on some matters referred to in the memoranda; these are set out in the Annex.

Since the deadline for reporting on both memoranda is 2 March, we would be grateful to receive your responses to these questions by noon on 10 February.

I am copying this letter to the Chair of the Public Accounts and Public Administration Committee.

Yours sincerely,

Huw Irranca-Davies

Huw Irranca-Davies
Chair

Annex

1. You state in the memoranda that you continue to have concerns with the Bill which need to be resolved before you could consider recommending consent. These matters are in respect of the power to add international agreements, the definition of Welsh Contracting Authorities, commencement powers, and powers to make consequential provision. Please could you:

    a. provide an update on the degree to which each of these matters have been resolved, if at all;

    b. indicate whether, since Memorandum No. 3 and No. 4 have been laid, discussions on each of these matters have been held at Ministerial level, or at official level;

    c. indicate whether you have escalated any of these disagreements to a dispute under the Dispute Avoidance and Resolution Process established by the review of intergovernmental relations, and if not, why not.

2. In Memorandum No. 3 you state that the concern you had with regard to a disapplication power for healthcare services, which you referred to in previous legislative consent memoranda, had been resolved. You stated in the first memorandum that the UK Government had committed to bring forward the required amendment. However, in Memorandum No. 2 you stated that the Welsh Ministers had decided not to pursue the inclusion of the power, but were considering various options, which may include taking forward the powers required via Senedd legislation. The Minister for Health and Social Services has recently informed the Health and Social Care Committee that the Welsh Government will introduce a Health Service Procurement (Wales) Bill to make provision for a "disapplication power" for Welsh health services procurement and a "creation power" to enable the Welsh Ministers to introduce a new separate procurement regime for NHS health services in Wales. The Minister states that the Welsh Government will propose an expedited timetable for the Bill. Please could you:

    a. explain why the Welsh Government has changed its position on the inclusion of the disapplication power for healthcare within the Procurement Bill, considering a commitment to bring forward the relevant amendment was secured from the UK Government;

    b. confirm whether the Welsh Government has assessed the impact of its decision on the accessibility of Welsh procurement law, and if an assessment has been undertaken, please set out the outcome of that assessment. For these purposes, it would appear to us that a Welsh contracting authority may have to consider the Procurement Bill and subordinate legislation to be made under it, the Health Service Procurement (Wales) Bill, the Social Partnership and Public Procurement (Wales) Bill and the *Well-being of Future Generations (Wales) Act 2015*;

    c. confirm whether the Welsh Government had considered broadening the scope of the Health Service Procurement (Wales) Bill to include wider provisions relating to the processes underpinning procurement law in Wales, which would largely mirror those

in the UK Government's Procurement Bill, and seek provisions within the legislative competence of the Senedd to be removed from the Procurement Bill;

d. indicate whether you believe legislating on procurement law via three bills introduced in different legislatures in close succession to each other follows a logical approach to legislating; and whether you will undertake an internal review of the approach taken to inform future practice.

3. Clause 50 of the Bill (Contract details notices and publication of contracts), as referenced in both memoranda, includes a regulation-making power for the Welsh Ministers subject to the negative procedure. However, by virtue of an amendment, the corresponding power to Minsters of the Crown is subject to the affirmative procedure. Please could you provide an overview of any discussions you are having to seek to amend the power for the Welsh Ministers to also be subject to the affirmative procedure.

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5. You consider clause 12 and 80 of the Bill to be within the legislative competence of the Senedd. However, these provisions do not apply to devolved Welsh procurement arrangements. Additionally, devolved Welsh authorities (within the meaning of section 157A of the *Government of Wales Act 2006*) are not required to have regard to the national procurement policy statement under clause 12 and are not subject to clause 80, except in relation to procurement under a reserved procurement arrangement. Please could you clarify why you believe these clauses require consent.

Agenda Item 9

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