



Eich cyf/Your ref CG/PO/171/2024
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Mike Hedges MS, Chair
Legislation, Justice & Constitution Committee
Senedd Cymru
Cardiff Bay
Cardiff
CF99 1SN

26th June 2024

Dear Mike,

Corrections to statutory instruments subject to the draft affirmative scrutiny procedure

Thank you for your letter of 4 June.

You have sought further clarification on the criteria applied by the Government when considering whether corrections could or should be made on the making of a draft affirmative instrument.

By way of context our starting point has always been guided by striking the right balance between two competing principles.

The first is to avoid taking a disproportionate approach to correcting errors. This is an issue illustrated by *Craies on Legislation* under a heading “sleeping dogs” in which it is said:

In the case of a minor error where what is intended is clear beyond doubt and there is no room for misunderstanding or for serious confusion, it is best simply to allow sleeping dogs to lie. Corrective legislation involves large expenditure of public money, and even the administrative costs associated with the issue of a correction clip are considerable. There are therefore a number of instances in which trivial errors have simply been allowed to remain.

This is set against the second (fundamental and obvious) principle that making incorrect legislation should be avoided where practicable. There is a certain deference given to the written law in most users’ minds, a natural assumption that there will not be an error in the legislation. As a result, errors are not as obvious to the users of legislation as they may be to the makers of the legislation.

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

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

So where we can correct an error and do so without significant difficulty this is always our preference. However we only do this when the error in question is very minor and, to be clear, this our 'test' rather than whether it is 'substantive' as your letter seems to suggest.

I think this distinction is very important as it illustrates the viewpoint we start from.

Through my engagement with the Committee over the past 18 months on the matter of correcting statutory instruments, I believe we have developed a finer appreciation within Government of the criteria that underpin correction slips, and how equivalent corrections can be made to those instruments to which a correction slip cannot apply as it has not yet been made.

The test we use is essentially the same as that applied by the SI Registrar, which is to consider whether the error is very minor and whether its remedy is clear and obvious. (I hesitate to adopt the words "small scale" here, as the UK Parliament's Joint Committee on Statutory Instruments has done as I do not want to conflate the size and number of corrections with their impact.)

I should be clear, however, that like nearly all tests, much depends on context and there is an element of subjectivity. This is unavoidable.

In the situation in which we are considering whether a correction can be made before a instrument is made, we have the benefit, unlike the SI Registrar, of firstly being aware of the full context in which the instrument is being made and will operate, and secondly of knowing that the decision is made subject to the constraints of the checks and balances that arise from: (a) being transparent about what has been done in advance of the Instrument being approved, and (b) the Senedd being able to refuse to approve the Instrument.

By contrast, the SI Registrar is an individual who simply has the legislation which has been made in front of him, and no ability to test the correction with the Minister who will make the legislation if approved, and indeed the legislature's approval of the instrument with the information about the proposed correction before them.

This is why we may, very occasionally, correct matters that the SI Registrar may not be willing to correct.

The usual process for corrections made by the Government is that the error is considered by the drafting lawyer(s), discussed with policy officials and sometimes also the Legislative Codes Office (who manage requests for correction slips to the SI Registrar). Advice is prepared and cleared through a range of officials before being put to the Minister in charge of the instrument, and if the Minister is content the intended correction is put before the Senedd.

Please note also that there can be instances that are finely balanced, and when we are faced with a very minor matter but also other matters that clearly do need to be dealt with by way of a subsequent amending instrument, then we are likely to prefer dealing with *all* of those issues in that amending instrument

To summarise:

- we are guided by both proportionality in taking any action and a desire to avoid making incorrect legislation, because of the risk the end user will not understand an error exists;

- we adopt a equivalent test to the SI Registrar to determine if a matter is very minor, but (unavoidably) whether a correction is very minor can be open to interpretation;
- if we believe it is anything other than very minor, no further action can be taken and an alternate remedy will need to be found (for example, withdrawing and re-laying the instrument);
- if we believe it is a very minor matter, the Minister must agree the correction can be made if the instrument is ultimately approved by the Senedd and the proposed correction must be set out to the Committee and to Members;
- there is the further safeguard that the instrument can only be made if it is approved (in the knowledge of the proposed correction) by the Senedd.

You have also sought to further understand the (then) Minister for Climate Change's remarks during the debate on the Packaging Waste (Data Collection and Reporting) (Wales) (Amendment) Regulations 2024. I am sure you will understand I cannot speak for the Minister but I was sat next to her in the Chamber during that debate and I did not understand her remarks to indicate (as you put in your letter) that *"any correction will not be substantive as long as it does not alter the policy intent of the instrument."*

To be clear, the Government's view is that a correction that substantively changes an instrument in any way (let alone changes the underpinning policy intention of that instrument), is *not* one which can be dealt with on making. We would not propose such a correction be dealt with in that way.

I am copying this letter to the Cabinet Secretary for Climate Change and Rural Affairs.

Yours sincerely,

A handwritten signature in blue ink that reads "Mick Antoniw". The signature is written in a cursive style and is underlined with a single horizontal line.

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol
Counsel General