Visitor Accommodation (Register & Levy) Etc. (Wales) Bill

(what's the Etc for!)

The Draft Legislation:

Legislation, Justice and Constitutional Committee

As well as the Finance Committee, this committee will look at the drafting of the Act on **20th January.** While some policy points may slip through, this is mainly about drafting inconsistencies, lack of clarity, powers v duties and wording which deviates from explicit policy intent. We advise that it is read in tandem with the Wales Tourism Alliance response to the Finance Committee consultation facilitating scrutiny of the Bill.

The content of this paper follows the order of the Bill but does not check the amendments made to other legislation. We would point out that this is an opportunity to use the powers in the Legislation (Wales) Act 2019 to consolidate law in a Wales-only statute without reference to England & Wales law, and it is disappointing that the opportunity was not taken.

Key points:

1. Our main concerns relating to the drafting of the Bill is that it has emerged as something of a Trojan horse: this is not the "tourism tax" referred to in the Welsh Labour manifesto. Further, even though it captures visits for a wide variety of visitor reasons, it is confusing as to whether it captures all accommodation offered to provide for those reasons.

2. (a) While overnight stays in accommodation provided, short term, for "business, leisure and education" visits trigger tax liability, these terms are not defined. What about where the purpose of the visit is none of those things, as commonly understood. An everyday interpretation of these terms would not include overnight stays prior to hospital admission, or visiting someone in hospital. It would not include women and children fleeing domestic violence, although the latter are clearly envisaged as having to pay the levy as they are given the right to reclaim it within 30 days (itself a proposition which reveals a lack of understanding of the disruptive situation in which such women find themselves).

   By comparison accommodation offered to refugees/asylum seekers, people subject to bail conditions etc is not considered to be "visitor accommodation" If this is bespoke accommodation (the references to sections in other statutes is not clear that it is) that is understandable, and there is no reason that the list could not include women's refuges. If not, bespoke and has a mixed use, does the premises fall outside the definition just for the period it houses such individuals?

   We note that live-in staff and contract workers staying for more than 31 nights are exempted from liability for the tax despite their right to occupation arising under contract.

   (b) Regardless of the motives of the visitor, the accommodation provider also has to be providing the accommodation "in the course of a trade or business". Without definition, it will be easy for someone casually letting spare time in a second home, or a day here and there in their own home for a big event, or who open a field in their farm (the actual trade or business) to argue that they are not engaged in a trade or business and, therefore, do not have to collect the tax.* This would fundamentally undermine one purpose of the policy which is to require the 'unregulated' operators in the market to

contribute in the same way as professional businesses. The drafting is confusing as, earlier in the Bill, it appears that these operators are included; this is covered in more detail later in this document. (* We urge caution in describing these as "Airbnbs" as the Airbnb platform now also includes professional tourism businesses).

3. The appearance of the power for a local authority to charge a premium on top of the visitor levy was not consulted upon in the written consultation, was not raised in any of the in-person consultation meetings arranged by Welsh Government or with its own Visitor Levy Advisory Group.

   It also contradicts the accepted view, reflected in the Explanatory Memorandum, that the levy must be simple, fair, consistent and centrally collected. Any deviation from that reignites the argument that, if councils set their own rates, they should also be responsible for collecting their tax.

4. Nearly all regulation referred to is to be introduced via the draft affirmative procedure. While this gives some limited opportunity for scrutiny in due course, it also suggests that there are areas of importance where the consequences, let alone practical requirements, have not been sufficiently considered before publication of the Bill. There is a lot of material detail which will escape the level of scrutiny appropriate to primary legislation.

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Part 1 Overview and Key Terms

Section 1(3) confirms that relationship is between the person obliged to collect the levy and the WRA, not the local authority. NB any attempts within the Act to confuse that.

Section 2 defines "Visitor Accommodation": Sections 1 - 4

Subsection 2(1)(a) includes accommodation which is "similar" to hotels, guest houses and B&Bs. There is no indication as to what WG has in mind by "similar" accommodation.

Other listed accommodation captured in other subsections include hostels, bunkhouses, caravan & motorhome pitches, any kind of accommodation on a recognisable site or "another similar place". The same lack of clarity of intention of what that may mean.

Subsection 2(1)(e) needs clarification. While subsection (g) operates as a catch-all, subsection (e) appears to try and include non-conventional units, which is welcome. While referring to a sited mobile home, it also refers to a "vessel or other vehicle" which is sited. This should capture houseboats, railway carriages, old buses and other strangely converted vehicles (for examples, please look at the "OMG" option on the Airbnb app) sited on land but it needs clarification of intention. It does not capture fly camping by vehicles.

There is no definition of "visitor" in this legislation but it does include accommodation let to those staying overnight and participating in business and education as well as leisure. Fly campers, in their own vehicles and tents, are staying overnight but not contributing: Responsible campers, in their own vehicles and tents but staying on premises are caught by the legislation. Does this reflect the policy intention of all tourists contributing to their host community?

The distinction is drawn at Section 3(3), namely the Act applies only where there is a contract. Why does this Act only apply to a "contracted" activity? An overnight stay is an overnight stay. The statutory definition under Section 9 is limited to a stay in pursuance of a contract, but how

does this wording captured the explicit policy aim of “fairness” as often repeated by Cabinet secretaries and officials?

The use of the word “vessel” is also unhelpful as that invites the inclusion of (semi) permanently moored houseboats. This contradicts the reservation of powers at Section 1(4)(b) to “extend” the Act to apply to berths and moorings for vessels. The word “extend” invites the inference that any type of boat and its location fall outside the scope of the Act at the moment.

Section 2(1)(f) needs careful consideration. The current drafting captures any accommodation offering self-catering, however infrequently. This is to be welcomed as this is where unregulated growth has taken place in the market; “unregulated” meaning no requirements for insurance, hygiene and safety standards. These are also the properties most difficult to track down and capture for the register. Even so, the whole of Section 1 needs to be read in conjunction with Section 3(2)(1) - see later - which describes the persons to whom this Act applies (gypsy travellers having already been excluded).

Further, what if the stay is not for “business, leisure or educational trips”? For example, visiting someone in hospital, jury service, witness in a trial. Either some definitions are needed here or under Section 24. At the very least these other activities should appear under Section 15 (repayment). And, does it matter who has paid; the individual or the organising body?

***Policy consideration* The levy is raised on properties used for educational trips”. The monies raised by this levy are for visitors to contribute to communities in a tourism-led way, not charge other LEAs extra to educate children and young people.**

Also, establishments run for charitable purposes are not mentioned, for example, those offering holiday respite to disadvantaged families. Nor are such visitors permitted to reclaim the levy (unless disabled) under Section 15; see later.

Section 2(3) states that occupation for more than 31 days falls outside the scope of the Act. This is, presumably, to exclude contract workers, students etc. Would need confirmation that no levy is payable for the first 31 days, ie is this a cap or a recognition that this kind of occupation is not by "visitors". However, not all contractor stays are 31 days. They are certainly not tourists and they (usually) have no agency in deciding where they stay. Further, does this mean consecutive days - they may go back home on days off -, and does it have to be the same individuals over the 31 days - there may be some staff churn due to illness or redeployment.

Section 2(5) reserves powers to "Welsh Ministers" to change what is included in Section 1. (Assume this covers "Cabinet Secretaries"). The power is *draft affirmative*, which is welcome.

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Section 3 identifies who will be made responsible for collecting and paying the levy under later sections in the bill. It raises many questions

Section 3(2)(a) in particular refers to the person needing to be "in the course of a trade or business". What does this mean? Those offering casual lets may well be able to argue that their offer of occasional accommodation is not part of a trade or business as ordinarily understood. Indeed, those casually letting their second home or back bedroom will say that they do it to contribute to the costs of having a second (or primary) home and not as a means of earning a living.

The botched distinction between professional furnished holiday let businesses (FHLs) and casual lets of second homes has already caused problems under the 182-day occupancy rule. If this interpretation of these words in this subsection is correct then it is either double jeopardy (levy and council tax) for professional FHLs or a get-out-of-jail-free card re the levy. Here's why:

A FHL is not treated as a business for local taxation purposes if it fails to meet the 182-day occupancy threshold.
The levy, while centrally managed, is a form of local taxation, being council specific and spent by local councils.
If a self-catering property is not treated as a business because of the 182-day rule (and compelled to pay a council tax premium as a result, identifying it firmly as a second home for local taxation purposes) then is it a "trade or business" for the purposes of this Bill?
It is not sufficient to say that these rules are introduced via different pieces of legislation: WG cannot have it both ways on local taxation.

If this is not the intention, then the Bill needs to define "trade or business" here or in Section 43

However, it then needs to be clear on the status of casual lets. Subsection 2(1), as we say, appears to envisage their inclusion, in which case the reference to "trade or business" needs to be dropped or a new subsection included to capture casual lets of second homes (and other casual lets)

If the intention is not to include casual lets of second homes (or at all), despite this being where the problems in the self-catering market arise, the question has to be why. Their inclusion was certainly a consideration in the consultation papers. If they are not captured as a result of Section 3(2)(a), it will also completely undermine WG's intention to introduce statutory licensing for self-catering units and the development of a register of those offering self-catering.

This inconsistency between Sections 2 & 3 in this regard needs addressing or clarifying.

Section 3(2)(c) also states that the person offering the accommodation must be "the occupier". Presumably this means ownership or legal possession rather than living in the unit as that would be impossible for business owners with more than one unit - and not very professional.

Neither can it be the intention of the Bill that a legal tenant of any property can offer their accommodation, professionally or casually, in breach of their own tenancy agreement. Yet the tenant might be "an occupier". While the three elements of Section 3(2) are cumulative, they are also confusing for the reasons above.

Subsection 3(3) refers to a contract being necessary for the person offering the accommodation to be considered a VAP. There is no reference to what the consideration might be in such a contract, here or in Section 43. The background to this policy being introduced was predicated on accommodation being let "at a commercial market rate" in order for owners to be liable to collect and pay the levy. The narrative leading up to the consultation was firmly in that vein and approached accordingly.

Here, there is no reference to a commercial rate - a penny might suffice. Or a payment in kind or a house swap. (Section 3(4) does make it plain that a contract for accommodation for live-in workers or trainees eg at hotels, are not included in the definition of a "contract" but this is just one exception.)

Section 3(2),(3) & 4 need revisiting to capture or clarify the intention of the Bill

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<u>Part Two - Register of Visitor Accommodation Providers</u>

The *duty* to keep a register of VAPs lies with WG. The details to be included on the register, Section 4(2), seem reasonable but can be added to in future. This section could well be extended once statutory licensing comes in. Again WG's powers to change this Section are draft affirmative and would need Senedd scrutiny, which is welcome.

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There is *duty* for VAPs to "be registered". Or what? Enforcement will come up later but there's nothing to say here that failure to register is an offence, that an unregistered provider must not offer accommodation etc. These are tax evasion issues (as well as ones of competition, safety etc)

Section 5(2) allows WG to exempt certain provision from being registered but the explanatory notes, gives no indication what they have in mind as a possible example They would have to be units which would otherwise be caught by Part 1.

Section 5(3)(b) allows for the Act itself to be amended but through secondary legislation, which is not ideal. The power is confined to exempting a particular VAP from registration, and will be exercised via the *draft affirmative* procedure. Query whether this would be suitable for the super-affirmative procedure to allow for some targeted consultation.

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Section 6 is about the information that WG can publish if they want to. Their power to do so derives from the Bill itself but no insight into what they have in mind or how their decision could be challenged. There is no scrutiny procedure. This is not just a technical, admin issue: VAPs may want some information kept confidential for legitimate reasons.

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This matters as, in Section 7, WG reserves the power to introduce additional requirements around registration, including at Section 7(c) "authorising or requiring disclosure of information contained in the register". This could include passing on information to HMRC, which would be difficult to object to if the purpose was to help HMRC tackle tax evasion. However, no such restriction or explanation appears in the EM and they could disclose for all kinds of reasons which may prove unwelcome. We caution against an open-ended power for the reasons above.

Further, the other powers listed here relate to variation and cancellation of registration, offence and penalties for, essentially, failure to register properly, review and appeals.

Offences and penalities, in particular, are matters on which WG should have certainty **at this stage**, not to be thought about at some future time. This is not the same as bringing in regulations which may amend existing descriptions as circumstances and policy change: They are about missing bits of legislation which need to be good to go as soon as the Act comes into effect.

It is useful to ask when these regulations will be ready, when will they come into force and when will they come into effect; as soon as possible after the Bill does. The powers are also merely permissive - there is no obligation on WG to introduce them. VAPs who comply will want confirmation that those who do not comply will be dealt with promptly and proportionately. Will draft guidance be available before the end of Stage 2 scrutiny?

Regulations using these powers would also be introduced via the *draft affirmative* procedure which is welcome

Part 3 - Visitor Levy

Chapter One: Application, Operation and Rates of Levy

Section 8 confuses the issue somewhat in that the definition of "visitor accommodation" used in this Chapter only refers to units within the footprint of participating councils, whereas all relevant accommodation has to be registered wherever it is. It also confirms that the WRA, with whom a VAP will be working, is acting as an agent for local authorities rather than being the 'owner' of the tax take, and I go back to the earlier point as to whether FHLs paying council tax count as being in "trade or business" when they do not under local taxation rules (if they fail to reach 182 days)

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Section 9, the definition of an "overnight stay". The same points re the unqualified use of the word "contract" and the requirement for the unit to be provided in the course of a "trade or business" can be made here in defining what counts as an overnight stay; Section (1)(a) and (b).

We also come up against the issue of **"any"** of the people staying have the unit as their own residence. This can be read as, if you offer Airbnb to others in your own home, you will not be considered to be offering "overnight stays". The wording is not the same as Section 2's description of "visitor accommodation" and the Explanatory Note in the EM is misleading as it does not account for the position where not all those staying will be using the place as their primary home.

Again, at Section 9(5), WG has reserved the power to amend all this Section to change what counts as an "overnight stay". The *draft affirmative* procedure is anticipated once again, which is welcome.

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Section 10(2) and Section 11(a) give some reassurance. While the unit owner has to pay the levy, whether or not they demand it from the visitor, the Section 10(2) states that liability only arises when the visitors actually show up. This gives rise to a situation where a VAP may have

to refund the levy if the customer has already paid in full. It may even be included in a non-refundable deposit, in which case, does that have to be paid to the WRA?

As a per person levy, it won't matter if fewer people arrive than booked for. If more people turn up than booked for Section 11(a) says the levy is payable calculated on the number "entitled" to stay there. How does this section cover the situation where more people stay over than expected? If you know or find out that there are more people and don't do anything about it, have you varied the contract terms and you would have to make payment for them all? Do party guests who crash count as overnight stays?

And what if a provider doesn't know? This is why having the appeals process clear from the date the Act comes into effect is critical, because if you don't know, you need to be able to protect your position (see later)

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Section 12(2) allows WG to change the rates as you would expect. They would do this via the *draft affirmative* procedure, which is welcome. What would also be welcome is a statement that WG will not use these powers for a given period to allow for the system to bed in.

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Section 13 confirms the lower and higher rate types of unit, but also reserves powers to change what falls into which category, including a nil-rate category.. This keeps space clear to include marine accommodation or any new types of offer of an overnight stay. Changes would, again, be introduced via the *draft affirmative* route, which is welcome.

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Section 14, the power of councils to raise a premium is completely incompatible with the principle of the Bill and was not covered in public consultation

Here is the relevant section of the EM:

"4.2.7 A point raised by many respondents to the consultation **including many local authorities** was for a levy to be consistent. Question 3 of the consultation explored what local autonomy should be provided for application of a levy. 66% of respondents disagreed with any aspect of local autonomy, believing that a more centrally aligned scheme would be of benefit.

4.2.8 Taking account of feedback on this point, the policy design is based on the application of a national framework for the operation of the visitor levy across those local authorities that choose to introduce it. The programme for government commitment is to 'permit' local authorities to raise a visitor levy. Discretion and local decision making are important parameters for the policy. Therefore, local authorities **will decide whether to introduce a levy and how to use revenues.** Should local authorities opt-in, they will be subject to the national framework established for the levy."

The discretion accepted was for a local authority to decide to raise a levy or not and how to spend it . It was not for the amount charged.

Adding a premium is incompatible with this statement in the EM and was firmly rejected in the in-person consultation meetings led by the industry to complement those run by Visit Wales. It also undermines the *purpose* of central management and administration. This is a local tax raised for local purposes but if there is to be inconsistency regarding amounts charged then the whole admin and management should be devolved to participating councils as well, as with council tax premiums, without the additional expense of a WRA role.

This is not on all fours with the 182-day rule where councils have *no* discretion as to whether to implement the NDR/council tax taxation rules re FHLs; their only discretion is whether to charge a premium or not. In the case of the levy, councils *do* have the discretion whether to participate on the basis of the fees set out on the face of the statute. If it's not cost effective, they don't have to do it (unlike the 182-day rule).

To then give local authorities the powers to raise those fees beyond the consistency protected by having fees on the face of the Bill is incoherent. It is no protection to give WG the powers to cap any premium in Section 14(3) as there is no obligation on WG to do so.

This section should be scrapped in its entirety for inconsistency of policy intention. If WG is determined to pursue this, then they should include a lockstep % or capped figure on the face of the Bill at Section 14(3), otherwise there is little point in Section 12(1) remaining on the face of the Bill.

Consultation beforehand is also no protection. This will be covered under notes for Chapter 4.

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Section 15 looks at who would be entitled to ask for a reimbursement of the levy. The Section focuses mainly on people in receipt of a range of disability benefits and companions necessary to effect their care. They and the relevant carers would have to reclaim the equivalent of the levy within 30 days.

The entitlement to - effectively - a refund extends to a particular class of homeless person, and those who had to leave their home due to "a risk to their health, safety or welfare". The reason given for accommodation used, even temporarily, for this purpose not being automatically

exempt is that it would be insensitive for the VAP to ask someone seeking that accommodation why they are there.

Even so, people fleeing their home for the reasons of fear, especially of violence and abuse, are unlikely to be in a position, practically or emotionally, to think about claiming refunds. Even those shocked by floods, landslips and sink holes may be too dazed to think about this in such a short period of time.

Unless it is the intention of WG to worsen the experiences referred to, the WG needs to reconsider how the Bill deals with them in order to align with the stated purpose of the legislation. These aren't its genuine target and can be differentiated from those on disability benefits on the grounds of being acute rather than chronic circumstances.

Again, who is included in this section of the Act can be amended via the *draft affirmative* procedure. However, as with Section 7, these are matters on which there needs to be certainty at the outset as the vulnerability is clear now, as is the likely capacity of those listed in Section 5(1)(a)&(b) to meet an application deadline. As well as extending the deadline, it would be helpful to see draft regulations at the same time as the Bill so understand how refunds are to be claimed.

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Chapter Two: Accounting for and Payment of the Levy

This Chapter deals with how to make a "return" within each "accounting period". The latter is defined but what the former looks like is unknown even though the frequency of making them is clear.

Section 16(3) contains typical tax wording which is the space to include an assessment of the figure payable and declarations of honesty. ***With (essentially) a year to make a return, why are we talking "assessment". The VAP will know what they've collected and any software should be reliable. In what circumstances will the VAP or WRA seek to amend the return (Section 20)?***

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Whether or not the figure and frequency is appropriate is a policy matter but some clarity is needed on Section 17(1)(b) and Section 17(2). It is quite likely that a levy of <£1k will be raised in a first year of less than 12 months before April; therefore, an annual return is permissible. VAPs can also supply an annual return if the preceding year produced a <£1k levy take. Does this mean that an annual return is permissible in the second year even if the anticipated/actual take is >£1k.

Welsh Government can change the nature of what to disclose and when at any time, using secondary legislation, this time through the *negative* procedure. To be fair, most regulations of this type will not be controversial, but sometimes they do need more scrutiny. Here, for example, there may be some issues about how quickly a change is introduced and how practical that is. We recommend the draft affirmative procedure for that reason.

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Sections 18 and 19 aim to get everyone preparing their returns for the traditional financial year. For bona fide businesses, this is already an expectation and would be difficult to contest as an appropriate period. However, for the casuals, the most difficult to find, and least likely to be making any HMRC returns, what are the proposal to help/penalise non compliance? The question is raised so that businesses who might miss a deadline are not considered low hanging fruit for penalties when the main evasion of this tax will be the casuals.

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Chapter Three: Use of Proceeds of the Levy by Principal Councils

There will be plenty of policy to challenge under this under Chapter, summarised in the observation that the tax take should not just be spent by councils. We try and limit comment on that here but, again, there are issues with the drafting and interpretation we wish to draw to your attention.

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Section 23 says that councils must use the proceeds for "destination management and improvement in the area". Is this one concept or two different ones? Section 23(2), which attempts some definition, gives some examples of what "destination management and improvement" include, but it is neither comprehensive nor clear on whether "improvement" is limited in any way to tourism. Providing better schools or social care in an area is "improvement", so this needs a redraft to ensure that the "and" functions to combine the terms rather than reinforce their separate nature.

What is the status of the four examples included in Section 23(2)? Are these to be priorities for spend as this is not a comprehensive list? Also, by way of example only, what, exactly, is "maintaining and promoting use of the Welsh language" and where is the overt connection to tourism services and experience? There clearly are examples but there is nothing here to limit or target spend on Welsh language in this confined context, which would be necessary to prevent local authorities using tax take beyond the tourism-focus purpose of the levy.

Who would argue with promoting and supporting the sustainable economic growth of tourism, but what is "other kinds of travel"? Tourism isn't just "travel". That is a prime example of lack of understanding of the tourism ecosystem. If, however, it means modes of transport which benefit tourists (eg more park and ride/car parks/buses to popular destinations) this needs to be clearer in the drafting.

Section 23(2)(d) is the public toilet/car park clause essentially. The question is whether it's sufficiently tightly drafted to prevent 'interpretation bleed'. Just because a visitor might need to see a GP or pharmacist, is not sufficient for funds to be diverted to the local health centre.

It would be worthwhile pressing the Finance Committee for a recommendation that Welsh Government make an early statement or commit to statutory guidance on what this money can NOT be used for.

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Section 24 is about the council's duty to report, annually, on the levy. We are assuming that Section 24(2)(a), in talking about the "amount of levy collected" and the "proceeds of the levy" seek to distinguish between two things - gross and the Section 22 definition of "proceeds"? - but we are not sure. That needs clarification. It is welcome that Section 24(2)(b) requires councils to report what they have spent the "proceeds" on but there is no indication as to the detail required. This is fertile territory for high level figures when we should be looking for the strongest possible granularity so that councils cannot disguise or hide spend under vague classifications or headings. Unlike VAPs, whose relationship with the WRA will require certain details already under the 2016 Act (even though the form of a return is yet unclear), there is nothing in this section to give any direction to assist councils and those scrutinising them.

In marked contrast to Section 17(3)(b), which gives WG the power to change the information which can be required of a VAP to make in their annual returns, there is no equivalent power here at Section 24(4) to tell councils what to put in their annual reports; all that can be changed is the frequency of reporting.

Before this Act is passed, we recommend a non-exclusive list of what detail councils should report on on the face of the Bill, or, at least, an amendment to this section to include information required - preferably accompanied by some draft statutory guidance.

Further, the councils have far longer to report than VAPs have to return and pay. There may be practical reasons connected with councils' existing accounting periods, we don't know, but why? Strategic decisions backed by agreed delivery plans should be in place in advance so the ability to scrutinise spend against plans shouldn't be delayed by up to two years.

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Chapter Four: Introducing, Changing or Abolishing the Levy

WG will be aware that confidence in public consultation is very low, especially in all matters tourism. Even in the WTA discussion with Jayne Bryant, which included the more switched on estate agents, they didn't know that there was a second homes pilot happening in Dwyfor. In short, there is very little confidence that the private sector, which delivers tourism, will be adequately reached or informed. In those cases where they are (due to membership organisation mainly), their evidence and views are treated as "they would say that wouldn't they"; the content is then underweighted as a consequence cf evidence or views which support a WG position is overweighted. Inconvenient truths are invisible truths as far as tourism providers are concerned.

Section 25(2) states that "changing" refers to changing any premium. This should be removed as there has been no discussion of a premium and I refer you back to the notes on Section 14.

Section 25(3) imposes a range of duties on councils planning to introduce, change or abolish a levy. They have to explain why to the WRA, notably setting out a cost-benefit analysis to support what they want to do. The section does not set out any detail on how costs are to be identified; nothing on data and assumptions. While you might not expect that in the face of the Bill, there are no powers or duties for WG to issue guidance or provide detail in regulations as to how the figures in the report to the WRA should be calculated. This, again leaves space for obfuscation and delay.

Further, there is no indication as to the purpose of this report to the WRA. They do not appear to have the power to resist a council's plan or to challenge any inadequacies of process. While this reinforces our point that this is a local tax, with the WRA merely acting as a collecting agency, it also exposes the vulnerability of the VAPs who bear the brunt of a council's decision. The councils have no responsibility vis a vis individual VAPs, so if the WRA cannot push back against the councils for poorly crafted decisions, who can?

This is an important point on the balance of power. The WRA, on behalf of councils, will be able to collect taxes with some powers of adjustment for error and - in due course - exercise penalty powers to be introduced by WG in the future, in addition to those in the 2016 Act, for non-compliance. By comparison, VAPs can only avail themselves of judicial review to challenge a council's decision under this section. Judicial review is no remedy at all for an individual, and barely a remedy for a representative group because of the cost. It is also of no help in challenging a council's process for reaching its decision under Section 25 if the process for reaching that decision is unclear or incomplete.

I say “incomplete” as the process is partly set out Section 25(4) & (5), which define the mandatory consultees to a council’s proposals to introduce, change or abolish the levy. While a list is welcome, the current draft comes with its own problems. Section 25(4) (b - f) are straightforward, although it would be worth asking why all neighbouring local authorities have to be consulted. There is a risk of mutual influence which could go either way, and it comes with no guarantee that neighbouring councils would work together strategically. It is Section 25(4)(a) and (g) which need consideration.

Section 25(4)(a) states that “local people” must be consulted. This is defined at Section 28(a) as people who “live, work and study” in the council area. Does it include second home owners (as distinguished from local FHL owners)? Does it include people in long term respite or hospital care from out of county? People not on the electoral register? Refugees and asylum seekers? Moreover, if “non-local” people respond, are their responses disregarded? What weight is given to, say, a petition - not everyone wants to complete a formal consultation response.

Section 25(4)(g) specifically includes tourism organisations as mandatory consultees, which is certainly to be welcomed. What would be even more welcome is an obligation to facilitate consultees in their preparation of consultation responses. It would be worth, in the evidence to Committees, asking for a recommendation that councils adopt the same rule that WG does re facilitation (££ usually), and advertises that help as part of the consultation documentation.

In any event, for consultations on changing and abolishing the levy, mandatory consultees should explicitly include those businesses already on the visitor levy register. One of the purposes of having the register is to have communication access to tourism accommodation providers so why not use it! Even for introducing a levy, businesses

whose details are known to councils should be contacted **directly** and not left to tourism membership organisations to find.

The publication of the preliminary and final reports referred to in this section is on the council's website and "in such other manner" as the council thinks fit (as per Section 43(2)). This needs strengthening to include notification to all consultees of the date that they can be found there. There's already too much reliance on psychic powers in public administration.

Section 25(9) is worrying. It allows councils to prepare reports and embark on consultations before this part of the Act comes into force so that they can introduce the levy on Day 1 of coming into force. In this case, it's the day after Royal Assent is received (Section 44). So it is possible, within 24 hours of the Act becoming law for the 12-month notice of introduction of a levy to be published in any given council area (as per Section 26).

So, this subsection allows a significant retrospective element to be included in the legal process of introducing a levy. This is still a very uncomfortable situation, especially after the 182-day issue of taking retrospective data into account. A council could start preparing a report and starting a consultation now, based on the contents of the draft Bill, even before any amendments have been tabled - and it may be considered "sufficient" even if there are amendments. This needs to be challenged as the duty on a council to take all these steps does not arise until the day after Royal Assent. Any steps taken prior to that cannot be undertaken in fulfilling that duty as the duty doesn't exist: These are just steps which happen to be (possibly) the same as those newly required. Whichever way you look at it, any activity taken before the Act becomes law cannot be acts of presumed compliance with a new duty which only arises under that Act. It is a step too far to be allowed to rely on a well informed guess.

If I paint my exterior house walls blue because I know there is a law on the horizon which compels me to have blue exterior house walls, this doesn't mean I have complied with that as yet non-existent law. I may even have seen a draft Bill which says I must "paint" my walls blue, and so I've taken the risk, bought some paint and a paintbrush, and have got straight to it. I may even have asked the paint shop and my neighbours what colour blue, as I have to ask them as putative mandatory consultees. And put a notice in my front door about what I planned to do. In the end though, the actual law says I needed to ask my family members as well, and that I needed to use a roller not a paintbrush to do the painting, plus it had to be minimum of two coats. And I needed to tell all my neighbours and the paint shop, not just rely on the notice on my door. So can I be considered to have complied with the requirements of the new law? This subsection says I may!

Section 25(5) places a duty on councils to consider consultation responses. As ever, there is no mention of guidance as to what due regard looks like and, to repeat ourselves, no useful remedy in the event of a potential failure of process.

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Section 26 sets out what happens once a decision is made which complies - or it taken to comply - with Section 25. Again, it's a publication, this time of a notice of how much the levy (or premium) will be and when it goes live (or, indeed, abolished). That date has to be the first April 1st or October 1st after the 12 month anniversary of the notice being published (6 months for a premium) so you can imagine most councils will be publishing notices as close to those dates as possible. For abolition, it's a date specified in the notice, no notice periods prescribed.

Considering a premium will be just as/more controversial than the statutory levy, we wonder why the notice period is half that for introduction. It's the same level of inconvenience to change all your systems and it has a material as well as reputational effect for you when it comes to advance bookings taken on the basis of the existing levy. This provision should be removed

because of our position on Section 14 but, if not, the notice period needs to be extended to accommodate a suitable date for advance bookings.

Publication has the same meaning as mentioned in Section 25 and really should be more widely defined or construed.

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Section 27 gives examples of overnight stays which are not captured by the Bill. The main one is advance bookings taken before the council "decided to introduce" or "decided to change" the levy.

What does "decided to introduce the levy" and "decided to change the levy" mean? A handful have already decided, making a joke of the consultation at Section 25(4) already. This wording needs to be replaced and a date identified by reference to a date from either Section 25 or Section 26. In Section 37, the same wording is used but given a definition specific to that section; there needs to be something similar here.

Section 27(6) prompts a query. The contract referred to needs to be between the visitor and the VAP. There needs to be a clarification around this as to the role of booking agencies and OTAs to ensure that agency relationships do not confuse the identity of the contract parties.

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Chapter Five: Special Cases

The provisions of Sections 29 - 33 deal with the joint and several liability of VAPs who are partners or managers of other non-companies, which could include small community groups, and which are generally welcome.

Again the definition of "occupier" needs attention as it did under Section 3(2) to confirm whether the VAP needs to be physically on the premises or not.

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Section 31 allows WG to expand provisions for partnerships and unincorporated bodies, suggesting they haven't really thought this through. We can't offer any insight into what they might have in mind but it would have to be compatible with existing common, equity and statute law or amend existing England & Wales legislation. Regulations for any change this will be introduced via the *draft affirmative* procedure so MSes will get a say if they're interested enough, and suggests no major changes to other primary legislation is anticipated.

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Section 32 is worth checking as liability for fulfilling all the reporting/paying responsibilities may transfer from a VAP to someone who acts for them while they are ill or insolvent - or dead. The wording allows the WRA to treat the person who's now stepped in as if they were the VAP "for the purposes of the levy", which is a pretty wide-reaching statement.

We think it's been drafted with professional executors and insolvency practitioners in mind primarily, not members of the family having to step in at short notice without much idea of how the person ran the business. They will have bookings to deal with. Whoever steps in has 30 days to inform the WRA and, again, may have no idea they're supposed to do this. While the WRA needs to know what's happening, it would not be very equitable to treat the accidental

amateur as a defaulter if they miss half of what they're supposed to do. If the VAP is a casual letter, family members may have no idea that they've even taken money from visitors in any given financial year. There needs to be some protection for good faith errors here and would ask for this to be sorted out before the end of Stage 2.

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Sections 33 and 34 are described as "routine powers" to ensure effective assignment of tax liabilities and operations of the tax system for special cases. This may well be the case but these are powers enabling WG to change any enactment relating to the levy in the event of a VAP's death, in capacity, insolvency or transfer of a business as a going concern. This includes transfer of liabilities and potential for penalties. This is a potential bear trap for purchasers of a business who fail to check on whether all tax has been paid or whether there is a WRA enquiry outstanding. On the other hand - don't buy without legal advice!

More importantly, both sections also reserve powers to WG to provide for penalties and appeals. In the first instance, these are dealt with by amending the Tax Collection & Management (Wales) Act 2016 and can be scrutinised as part of this primary legislation, albeit in a non-consolidated draft Bill. Considering the effect of proposed penalties and appeals, these should be consulted upon properly and, so, ***ask the LJC Committee to ask what Welsh Government is doing to draw attention to Schedule 1 before Stage 2.***

We would also ask for certainty that the Section 34 (3 - 5) references to "the regulations" are restricted to those defined in Section 34(2), otherwise it gets very generous to WG!

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<u>Chapter Six - Miscellaneous - important</u>

Section 35 raises some interesting questions! Where the accommodation crosses a county line, the greater part determines which county it's in for levy purposes The drafting works fine for a cottage that straddles the border, although it would mean the use of tape measures and surveyors where it's not clear where the larger part of a single unit lies. But what about a much larger footprint? Does a site with three cottages one side count as the greater part of the visitor accommodation if there are just two the other side of the border? What if the two are twice the size of the three? Or what if the clubhouse is one side and the chalets the other, the spa one side and the dining room the other. Or the fact it's postal address is in a non-levy county? This section is effectively meaningless without guidance on what "greater or greatest" part of the premises will look like.

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Sections 36 and 37 are important. The first reserves to WG powers to govern third party collection, payment and repayment (by agencies and OTAs) whilst confirming that liability lies with the VAP themselves. The fact there is no indication at all whether WG intends to do anything about this has all the hallmarks of can kicking, whereas VAPs really could do with some support in ensuring that agencies and OTAs behave in a timely and accurate way with the WRA to avoid the VAPs getting into trouble due to a third party failure of some sort.

Further, Section 37 reserves powers to WG to set out how the existence of the levy is made known to customers eg how it appears on invoices and promotional material. Here, there's a better indication of what penalties for non-compliance with these unknown rules would look.

In combination, these rules are necessary to ensure that OTAs (as advertising vehicles) in particular, but agencies and owner managers too are transparent and can avoid penalties. We would say, then, that these should be duties for Welsh Government to introduce these missing

details (and as soon as possible), as this leaves a particularly contentious area undecided as the Bill moves through the Senedd. For the same reason, as it cannot be scrutinised as part of primary legislation, the regulations - which we suggest "must" not "may" be introduced - should be brought in via the super affirmative procedure at first introduction, draft affirmative for changes over time.

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Section 39 says WG can issue guidance in relation to implementing the Act and any subsequent regulations - and it has to consult who it thinks appropriate first. We think it's worth pushing for as much draft guidance as possible to be published in time for Stage 2 scrutiny. It will be indicative only and pre-consultation, but it will help fill some of the policy intention gaps referred to. The good point in Section 39(2) is that councils must have regard to any such guidance - not "should" or "may" - which gives it the weight of statutory guidance. However, we refer back to the point about the lack of means of challenging a local authority.

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Section 40 is the reservation of powers to extend the Act via regulation. As this is another can kicked down the road, absolutely should have been covered on the face of the Bill, then I'd push for ***the super affirmative process*** for any of these regulations too. It's probably a candidate for this being a duty not a power too as this limbo could go on indefinitely.

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Sections 41 and 42 are the usual, annoying, catch all clauses which allow WG to make regulations in connection with the Act that they hadn't thought of, including amending the primary legislation. However, at least any such attempt has to survive the draft affirmative procedure.

Section 44 - Apparently, you pick this up as standard!

Wales Tourism Alliance

bethan@wta.org.uk

Wales Tourism Alliance – Response to Consultation on the Visitor Levy January 2025 – LJC Committee