Agenda – Legislation, Justice and Constitution Committee

Meeting Venue:
Video Conference via Zoom
Meeting date: 7 February 2022
Meeting time: 13.30

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

1 Introductions, apologies and substitutions

13.30

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

13.30 – 13.35 (Page 1)

Attached Documents:

LJC(6)-05-22 – Paper 1 – Statutory instruments with clear reports

Affirmative Resolution Instruments

2.1 SL(6)143 – The South East Wales Corporate Joint Committee (Amendment) Regulations 2022

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

13.35 – 13.45

Made Negative Resolution Instruments

3.1 SL(6)140 – The Education (School Day and School Year) (Wales) (Amendment and Revocation) Regulations 2022

(Pages 2 – 3)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-05-22 - Paper 2 - Draft report

3.2 SL(6)141 - The Government of Wales Act 2006 (Budget Motions and Designated Bodies) (Amendment) Order 2022

(Pages 4 - 5)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-05-22 - Paper 3 - Draft report

3.3 SL(6)145 - The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 3) Regulations 2022

(Pages 6 - 10)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-05-22 - Paper 4 - Draft report

LJC(6)-05-22 - Paper 5 - Letter from the First Minister to the Llywydd, 26 January 2022

3.4 SL(6)147 - The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 4) Regulations 2022

(Pages 11 - 15)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-05-22 - Paper 6 - Draft report

LJC(6)-05-22 - Paper 7 - Letter from the First Minister to the Llywydd, 27 January 2022

Affirmative Resolution Instruments

3.5 **SL(6)142 – The Plant Health etc. (Fees) (Amendment) (Wales) (EU Exit) Regulations 2022**

(Pages 16 – 17)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-05-22 – Paper 8 – Draft report

3.6 **SL(6)144 – The Corporate Joint Committees (Transport Functions) (Consequential Modifications and Transitional Provisions) (Wales) Regulations 2022**

(Pages 18 – 21)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-05-22 – Paper 9 – Draft report

LJC(6)-05-22 – Paper 9a – Welsh Government response

Made Affirmative Resolution Instruments

3.7 **SL(6)138 – The Non-Domestic Rating (Multiplier) (Wales) Regulations 2022**

(Pages 22 – 24)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-05-22 – Paper 10 – Draft report

LJC(6)-05-22 – Paper 11 – Letter from Minister for Finance and Local Government to the Llywydd, 18 January 2022

4 Instruments that raise issues to be reported to the Senedd under Standing Order 21.7

13.45 – 13.50

4.1 **SL(6)146 – The Sea Fishing Operations (Monitoring Devices) (Wales) Order 2022**

(Pages 25 – 26)

Order

Attached Documents:

LJC(6)-05-22 – Paper 12 – Draft report

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

13.50 – 13.55

5.1 **SL(6)130 – The Renting Homes (Supported Standard Contracts) (Supplementary Provisions) (Wales) Regulations 2022**

(Pages 27 – 31)

Attached Documents:

LJC(6)-05-22 – Paper 13 – Report

LJC(6)-05-22 – Paper 14 – Welsh Government response

5.2 **SL(6)131 – The Renting Homes (Supplementary Provisions) (Wales) Regulations 2022**

(Pages 32 – 35)

Attached Documents:

LJC(6)-05-22 – Paper 15 – Report

LJC(6)-05-22 – Paper 16 – Welsh Government response

5.3 **SL(6)132 – The Renting Homes (Explanatory Information for Written Statements of Occupation Contracts) (Wales) Regulations 2022**

(Pages 36 – 39)

Attached Documents:

LJC(6)-05-22 – Paper 17 – Report

LJC(6)-05-22 – Paper 18 – Welsh Government response

5.4 SL(6)133 - The Renting Homes (Wales) Act 2016 (Amendment of Schedule 9A) Regulations 2022

(Pages 40 - 42)

Attached Documents:

LJC(6)-05-22 - Paper 19 - Report

LJC(6)-05-22 - Paper 20 - Welsh Government response

5.5 SL(6)134 - The Renting Homes (Model Written Statements of Contract) (Wales) Regulations 2022

(Pages 43 - 47)

Attached Documents:

LJC(6)-05-22 - Paper 21 - Report

LJC(6)-05-22 - Paper 22 - Welsh Government response

5.6 SL(6)137 - Code of Recommended Practice for Local Authority Publicity

(Pages 48 - 50)

Attached Documents:

LJC(6)-05-22 - Paper 23 - Report

LJC(6)-05-22 - Paper 24 - Welsh Government response

5.7 SL(6)139 - The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 2) Regulations 2022

(Pages 51 - 54)

Attached Documents:

LJC(6)-05-22 - Paper 25 - Report

LJC(6)-05-22 - Paper 26 - Welsh Government response

6 Inter-Institutional Relations Agreement

13.55 - 14.00

6.1 Correspondence from the Minister for Rural Affairs and North Wales, and Trefnydd: The Official Controls (Extension of Transitional Periods) (Amendment) (No. 2) Regulations 2021

(Pages 55 - 58)

Attached Documents:

LJC(6)-05-22 - Paper 27 - Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 3 February 2022

LJC(6)-05-22 - Paper 28 - Letter to the Minister for Rural Affairs and North Wales, and Trefnydd, 21 January 2022

6.2 Written Statement and correspondence from the Minister for Rural Affairs and North Wales, and Trefnydd: The Ivory Prohibitions (Exemptions) (Process and Procedure) Regulations 2021 and the Ivory Act (Commencement No.1) Regulations 2021

(Pages 59 - 61)

Attached Documents:

LJC(6)-05-22 - Paper 29 - Written Statement by the Minister for Rural Affairs and North Wales, and Trefnydd, 3 February 2022

LJC(6)-05-22 - Paper 30 - Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 28 January 2022

6.3 Correspondence from the Minister for Climate Change: Phytosanitary Conditions (Amendment) Regulations 2022

(Pages 62 - 63)

Attached Documents:

LJC(6)-05-22 - Paper 43 - Letter from the Minister for Climate Change, 4 February 2022

7 Papers to note

14.00 - 14.05

7.1 Written Statement by the Deputy Minister for Social Partnership: Public Service Pensions and Judicial Offices Bill

(Pages 64 - 66)

Attached Documents:

LJC(6)-05-22 - Paper 31 - Written statement, 28 January 2022

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

14.05

9 Tertiary Education and Research (Wales) Bill: Draft report

14.05 - 14.25 (Pages 67 - 147)

Attached Documents:

LJC(6)-05-22 - Paper 32 - Draft report

LJC(6)-05-22 - Paper 33 - Letter from the Minister for Education and Welsh Language to the Legislation, Justice and Constitution Committee, 18 January 2022

LJC(6)-05-22 - Paper 34 - Letter from the Legislation, Justice and Constitution Committee to the Minister for Education and Welsh Language, 10 December 2021

LJC(6)-05-22 - Paper 35 - Letter from Minister for Education and Welsh Language to the Finance Committee, 22 December 2021

LJC(6)-05-22 - Paper 36 - Letter from the Minister for Education and Welsh Language to the Children, Young People and Education Committee, 14 December 2021

10 Supplementary Legislative Consent Memoranda (Memorandum No. 2 and Memorandum No.3) on the Health and Care Bill

14.25 - 14.35 (Pages 148 - 208)

Supplementary Legislative Consent Memorandum (Memorandum No. 2) - Health and Care Bill

Supplementary Legislative Consent Memorandum (Memorandum No. 3) - Health and Care Bill

Attached Documents:

LJC(6)-05-22 - Paper 37 - Legal advice note

LJC(6)-05-22 - Paper 38 - Draft report

LJC(6)-05-22 - Paper 44 - Letter from the Minister for Health and Social Services to the Legislation, Justice and Constitution Committee, 2 February 2022

LJC(6)-05-22 - Paper 45 - Memorandum of understanding

LJC(6)-05-22 - Paper 46 - Letter from the Minister for Health and Social Services to the Health and Social Care Committee, 2 February 2022

11 Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Subsidy Control Bill

14.35 - 14.45 (Pages 209 - 213)

Supplementary Legislative Consent Memorandum (Memorandum No. 2) - Subsidy Control Bill

Attached Documents:

LJC(6)-05-22 - Paper 39 - Legal advice note

12 Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Animal Welfare (Kept Animals) Bill

14.45 - 14.55 (Pages 214 - 225)

Supplementary Legislative Consent Memorandum (Memorandum No. 2) - Animal Welfare (Kept Animals) Bill

Attached Documents:

LJC(6)-05-22- Paper 40 - Legal advice note

13 Strategic planning and forward work

14.55 - 15.05 (Pages 226 - 235)

Attached Documents:

LJC(6)-05-22 - Paper 41 - Discussion paper

14 Public Service Pensions and Judicial Offices Bill

(Page 236)

Attached Documents:

LJC(6)-05-22 - Paper 42 - Legal advice note

Statutory Instruments with Clear Reports
07 February 2022

SL(6)143 – The South East Wales Corporate Joint Committee (Amendment) Regulations 2022

Procedure: Affirmative

The South East Wales Corporate Joint Committee (Amendment) Regulations 2022 ("the Amendment Regulations") amend the South East Wales Corporate Joint Committee Regulations 2021 ("the SE Establishment Regulations") to change the date on which certain functions will be conferred on the South East Wales Corporate Joint Committee.

The Amendment Regulations amend regulation 1(3) of the SE Establishment Regulations so that regulations 11, 12 and 13, and regulation 15 (in so far as it relates to functions conferred on the South East Wales Corporate Joint Committee by regulations 12 and 13 of the SE Establishment Regulations) commence on 30 June 2022 instead of 28 February 2022 as currently provided for. This amendment was requested by the South East Wales Corporate Joint Committee to provide more time to address emerging technical issues in relation to implementation before the three core functions commence.

Regulation 11 of the SE Establishment Regulations confers on the South East Wales Corporate Joint Committee the economic well-being function, regulation 12 confers the function of developing transport policies under Part 2 of the Transport Act 2000 and regulation 13 confers the function of preparing a strategic development plan.

Parent Act: Local Government and Elections (Wales) Act 2021
Date Made:
Date Laid:
Coming into force date: 18 February 2022

SL(6)140 – The Education (School Day and School Year) (Wales) (Amendment and Revocation) Regulations 2022

Background and Purpose

The Education (School Day and School Year) (Wales) Regulations 2003 ("the 2003 Regulations") make provision, among other things, for a school day which is ordinarily to be divided into two sessions with a break in the middle, and for schools (other than nursery schools) to meet for at least 380 sessions during any school year.

These Regulations amend the 2003 Regulations to reduce the minimum number of school sessions which must be held in the 2021–2022 school year from 380 to 378. The reduction in the minimum number of school sessions is to allow for the additional bank holiday taking place during the half term holiday on 3 June 2022 to celebrate the Platinum Jubilee of Her Majesty the Queen. Schools may choose, in agreement with their local authority, when to close for an extra day because the additional bank holiday is scheduled during the Whitsun half term break.

These Regulations also revoke the Education (School Day and School Year) (Wales) (Amendment) (Coronavirus) Regulations 2020 which made amendments to the 2003 Regulations in relation to the 2020-2021 school year.

Procedure

Negative.

The Regulations 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 likely to be of interest to the Senedd.

The Welsh Government has undertaken an Equality Impact Assessment in respect of these Regulations. The potential negative impact on families, especially those in poverty (which may arise where additional childcare is needed for the reduced school time), is noted in paragraphs 7.7 of the Explanatory Memorandum which accompanies the Regulations. Paragraphs 7.8 and 7.9 explain the steps the Welsh Government has taken with regard to equalities:

> *7.7 Disadvantaged and vulnerable groups could be adversely affected by a day's loss of schooling. Families who live in poverty or those whose income is reliant on actual hours worked may struggle with childcare for this extra day.*
>
> *7.8 The Welsh Government asked local authorities and school to provide early notification to the change of term dates to give parents the time to plan for any additional childcare needs for the additional day.*
>
> *7.9 Welsh Government has taken steps to comply with regulation 8(1)(d) of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 by conducting impact assessments and ensuring local authorities are aware of their statutory responsibilities, in providing the required number of school sessions.*

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
2 February 2022

SL(6)141 – The Government of Wales Act 2006 (Budget Motions and Designated Bodies) (Amendment) Order 2022

Background and Purpose

This Order amends the Government of Wales Act 2006 (Budget Motions and Designated Bodies) Order 2018 ("the 2018 Order") which designates specified bodies in relation to the Welsh Ministers for the purpose of including within a Budget motion the resources expected to be used by those bodies.

This Order corrects an error in the 2018 Order by removing North East Property LP (company number LP017936) from the list of designated bodies in the Schedule to the 2018 Order, which had been inserted in error by the Government of Wales Act 2006 (Budget Motions and Designated Bodies) (Amendment) Order 2021. This Order also adds North East Property (GP) Limited (company number 04069901) to that Schedule. The Explanatory Memorandum states that this amendment is necessary because North East Property LP has not been classified to the central government sector and does not form part of the Development Bank of Wales Group Consolidated accounts whereas the North East Property (GP) Limited has been classified to the central government sector and does form part of Development Bank of Wales Group Consolidated accounts. It is only appropriate for bodies that fall within the central government sector to be designated by the 2018 Order.

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

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

The Welsh Ministers had a choice of procedure for this instrument pursuant to sections 126A(9) and 126A(10) of the Government of Wales Act 2006 and chose the negative procedure, which appears to be appropriate.

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
2 February 2022

SL(6)145 – The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 3) Regulations 2022

Background and Purpose

These Regulations amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 to (the Principal Regulations) to—

- provide that persons testing positive for coronavirus are required to self-isolate for a 5-day period (rather than a 7- day period);

- provide that where a person was under a requirement to isolate immediately before these Regulations come into force, the end of the isolation period is to be determined in accordance with the Principal Regulations as amended by these Regulations;

- omit a spent transitional provision relating to previous amendments to the isolation period.

Procedure

Negative

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

Technical Scrutiny

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

Merits Scrutiny

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

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

We note the Welsh Government's justification for any potential interference with human rights. In particular, we note the following paragraphs in the Explanatory Memorandum:

Whilst the principal Regulations, as amended by these Regulations, engage individual rights under the Human Rights Act 1998 and the European Convention on Human Rights, the Government considers that they are justified for the purpose of preventing the spreading of infectious diseases and/or the interference is permitted on the basis that it is in pursuit of a legitimate aim, namely of protecting public health, and are proportionate.

Article 5 (right to liberty), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 11 (freedom of assembly and association) and Article 1 of the First Protocol (protection of property) are engaged by the principal Regulations.

Each of these is a qualified right, which permits the Welsh Ministers to interfere with the exercise of the rights if necessary in a democratic society in the interests of public safety or for the protection of health. All such restrictions and requirements must be justified on the basis that they are in pursuit of a legitimate aim, namely of protecting public health, and are proportionate. Any interference with these rights also needs to be balanced with the State's positive obligations under Article 2 (right to life). The adjustment of the restrictions and requirements under the principal Regulations by these Regulations is a proportionate response to the spread of coronavirus. It balances the need to maintain an appropriate response to the threat posed by coronavirus against the rights of individuals and businesses, in a manner which remains proportionate to the need to reduce the rate of transmission of the coronavirus, taking into account the scientific evidence.

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. In particular, we note the following paragraphs in the Explanatory Memorandum:

Given the need to minimise the impact of isolation on individual's liberties, well-being and economic impacts, there has been no public consultation in relation to these Regulations.

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

We note the breach of the 21-day rule (i.e. the rule that 21 days should pass between the date a "made negative" instrument is laid before the Senedd and the date the instrument comes into force), and the explanation for the breach provided by Mark Drakeford MS, the First Minister, in a letter to the Llywydd dated 26 January 2022.

In particular, we note the following paragraph in the letter, as regards not requiring people to isolate for longer than is needed:

Not adhering with the 21-day convention allows the Regulations to come into force at the earliest opportunity to ensure that individuals are being asked to isolate in accordance with public health advice and not longer than needed, which will help mitigate the impact of protracted staff absences on essential public services in Wales and align our position in Wales with that of the UK Government to reduce any cross-border issues or confusion.

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
28 January 2022

Y Gwir Anrh/Rt Hon Mark Drakeford AS/MS
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

Elin Jones MS
Llywydd
Senedd Cymru
Cardiff Bay
CARDIFF
CF99 1SN

26 January 2022

Dear Elin,

The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 3) Regulations 2022

I have today made these Regulations under sections 45C(1) and (3)(c) and 45P(2) of the Public Health (Control of Disease) Act 1984. I intend to lay these and an accompanying Explanatory Memorandum once the statutory instrument has been registered.

In accordance with section 11A(4) of the Statutory Instruments Act 1946 I am notifying you that this statutory instrument will come into force on 28 January 2022, less than 21 days after it has been laid. A copy of the statutory instrument and the Explanatory Memorandum that accompanies it are attached for your information.

These Regulations amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 ("the principal Regulations") to provide that persons testing positive for coronavirus are now required to self-isolate for a 5-day period (rather than a 7-day period). The amendments being made today also provide that where a person comes within this category but was under a requirement to isolate immediately before the start of the day on 28 January 2022 as a result of having a notification to self-isolate following a positive COVID-19 test result, the isolation period ends in accordance with regulation 6 or 7 of the principal Regulations as amended by these Regulations.

Not adhering with the 21-day convention allows the Regulations to come into force at the earliest opportunity to ensure that individuals are being asked to isolate in accordance with public health advice and not longer than needed, which will help mitigate the impact of protracted staff absences on essential public services in Wales and align our position in Wales with that of the UK Government to reduce any cross-border issues or confusion.

I am copying this letter to the Minister for Rural Affairs and North Wales, and Trefnydd, Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee, Siwan

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
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Gohebiaeth.Mark.Drakeford@llyw.cymru
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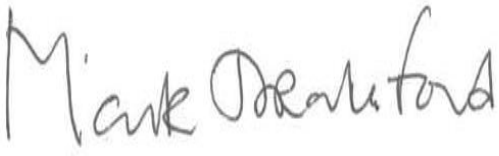
Davies, Director of Senedd Business, Sian Wilkins, Head of Chamber and Committee Services and Julian Luke, Head of Policy and Legislation Committee Service.

Yours sincerely



MARK DRAKEFORD

SL(6)147 – The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 4) Regulations 2022

Background and Purpose

These Regulations amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 ("the Principal Regulations"), with effect from 6:00am on 28 January 2022, to provide that no alert level applies to Wales (also known as alert level zero). This means that none of the restrictions and requirements in Schedules 1 to 4 to the Principal Regulations apply. The effect is that:

- There are no specific limits on the number of people who can gather together;
- There are no specific limits on the number of people that may attend events at any time;
- There are no requirements for any particular types of businesses or services to close.

The Regulations also revoke:

- Regulation 18B of the Principal Regulations, which provides that no person may leave the place where they are living for the purposes of work where it is reasonably practicable for the person to work from home;
- Regulation 42A of the Principal Regulations, which provides for the enforcement of regulation 18B;
- Specific provisions in regulation 16 of the Principal Regulations relating to allowing or requiring persons who ordinarily work from home, and provisions requiring the person responsible for regulated premises to ensure that a distance of 2 metres is maintained between persons indoors on the premises;
- Regulations 16ZA and 16ZB of the Principal Regulations, which make specific provision about the measures that must be taken to minimise the risk of exposure to coronavirus on licensed premises and retail premises.

The requirements to wear face coverings on public transport and in particular indoor public places continue to apply, as do the restrictions and requirements in other parts (aside from the provisions set out above and Schedules 1 to 4) of the Principal Regulations. However, these Regulations amend the Principal Regulations to provide that a person is no longer required to wear a face covering in premises where food or drink is sold or otherwise provided for consumption on the premises.

The Regulations also change eligibility for being present in certain premises under regulation 16A of the Principal Regulations (commonly known as a "COVID Pass") to include persons with evidence that, for medical reasons, they cannot be vaccinated or take a qualifying test for coronavirus.

Procedure

Negative.

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

Technical Scrutiny

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

Merits Scrutiny

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

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

We note the Welsh Government's justification for any potential interference with human rights. In particular, we note the following paragraphs in the Explanatory Memorandum:

> *"Whilst the principal Regulations, as amended by these Regulations, engage individual rights under the Human Rights Act 1998 and the European Convention on Human Rights, the Government considers that they are justified for the purpose of preventing the spread of infectious diseases and/or the interference is permitted on the basis that it is in pursuit of a legitimate aim, namely of protecting public health, and are proportionate.*
>
> *Article 5 (right to liberty), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 11 (freedom of assembly and association) and Article 1 of the First Protocol (protection of property) are engaged by the principal Regulations.*
>
> *Each of these is a qualified right, which permits the Welsh Ministers to interfere with the exercise of the rights if necessary in a democratic society in the interests of public safety or for the protection of health. All such restrictions and requirements must be justified on the basis that they are in pursuit of a legitimate aim, namely of protecting public health, and are proportionate. Any interference with these rights also needs to be balanced with the state's positive obligations under Article 2 (right to life). The adjustment of the restrictions and requirements under the principal Regulations by these Regulations is a proportionate response to the spread of coronavirus. It balances the need to maintain an appropriate response to the threat posed by coronavirus against the rights of individuals and businesses, in a manner which remains proportionate to the need to reduce the rate of transmission of the coronavirus, taking into account the scientific evidence."*

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. In particular, we note the following paragraphs in the Explanatory Memorandum:

> *"Given the ongoing threat from coronavirus and the need for a prompt public health response, there has been no public consultation in relation to these Regulations. However, engagement has taken place with various stakeholders".*

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 note the breach of the 21-day rule (i.e. the rule that 21 days should pass between the date a "made negative" instrument is laid before the Senedd and the date the instrument comes into force), and the explanation for the breach provided by Mark Drakeford MS, the First Minister, in a letter dated 27 January 2022.

In particular, we note the following paragraph in the letter:

> *"In accordance with section 11A(4) of the Statutory Instruments Act 1946 I am notifying you that this statutory instrument will come into force at 6.00 a.m. on 28 January 2022, less than 21 days after it has been laid. This is necessary in order to ensure that the restrictions and requirements of the principal Regulations remain proportionate."*

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
31 January 2022

Y Gwir Anrh/Rt Hon Mark Drakeford AS/MS
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

Elin Jones MS
Llywydd
Senedd Cymru
Cardiff Bay
CARDIFF
CF99 1SN

27 January 2022

Dear Elin,

The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 4) Regulations 2022

I have today made these Regulations under sections 45C(1) and (3)(c) and 45P(2) of the Public Health (Control of Disease) Act 1984, which come into force at 6.00 a.m. on 28 January 2022. I attach a copy of the statutory instrument and I intend to lay this and an accompanying Explanatory Memorandum once the statutory instrument has been registered.

In accordance with section 11A(4) of the Statutory Instruments Act 1946 I am notifying you that this statutory instrument will come into force at 6.00 a.m. on 28 January 2022, less than 21 days after it has been laid. This is necessary in order to ensure that the restrictions and requirements of the principal Regulations remain proportionate.

I am copying this letter to the Minister for Rural Affairs and North Wales, and Trefnydd, Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee, Siwan Davies, Director of Senedd Business, Sian Wilkins, Head of Chamber and Committee Services and Julian Luke, Head of Policy and Legislation Committee Service.

Yours sincerely

Mark Drakeford

MARK DRAKEFORD

Bae Caerdydd • Cardiff Bay
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Correspondence.Mark.Drakefordy@gov.wales

SL(6)142 – The Plant Health etc. (Fees) (Amendment) (Wales) (EU Exit) Regulations 2022

Background and Purpose

These Regulations will make amendments to the Plant Health etc. (Fees) (Wales) Regulations 2018 ("the 2018 Regulations"). These Regulations are made in exercise of the powers conferred on the Welsh Ministers by the European Union (Withdrawal) Act 2018.

Documentary, identity and physical checks on regulated plants, plant products and other objects were due to be phased in through 2021/22 as part of the transitional staging period which set out what sanitary and phytosanitary (SPS) checks would be due and on what date for all high priority and non-high priority plants and plant products.

As part of recent changes the transition staging period has been extended with a revised date for the required SPS checks to now be introduced from 1 July 2022. These changes were achieved through an amendment made by the Official Controls (Extension of Transitional Periods) (England and Wales) (Amendment) (No. 2) Regulations 2021, which came into force 30 December 2021, following Welsh Government consent.

Regulation 2 of these Regulations amends the 2018 Regulations to align the timing of the imposition of certain fees in Wales with the extended transitional staging period. These changes are required to ensure that the requisite importation plant fees are not charged to businesses in Wales ahead of the new 1 July 2022 implementation date. The current implementation date for fees in Wales is set in legislation as 1 March 2022.

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

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 likely to be of interest to the Senedd

There is no requirement in respect of consultation within the European Union (Withdrawal) Act 2018. However, we note the following comments in the Welsh Government's Explanatory Memorandum with regards to consultation:

> *"In December 2021 the UK Government issued a short, targeted consultation via email, also on behalf of Welsh Ministers, to more than 120 key stakeholders, including those in Wales. No responses opposing the proposals were received."*

The consultation referred to above was carried out from 10 - 13 December 2021 by the UK Government in relation to the Official Controls (Extension of Transitional Periods) (England and Wales) (Amendment) (No. 2) Regulations 2021 which extended the transitional staging period.

This brief consultation was referred to in a Welsh Government response to the Committee's report regarding the Official Controls (Extension of Transitional Periods and Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2021. The Welsh Government response stated that:

> *"Defra officials collated and shared the consultation response with Welsh Government. At the close of consultation, only one response had been received, which was supportive of the proposals."*

We note that whilst no responses opposing the proposals were received as stated in the Explanatory Memorandum, it is notable that only one response was received to this very short consulation.

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
1 February 2022

SL(6)144 - The Corporate Joint Committees (Transport Functions) (Consequential Modifications and Transitional Provisions) (Wales) Regulations 2022

Background and Purpose

The Corporate Joint Committees (Transport Functions) (Consequential Modifications and Transitional Provisions) (Wales) Regulations 2022 ("the Regulations") are made by the Welsh Ministers under sections 173 and 174 of the Local Government and Elections (Wales) Act 2021 (the 2021 Act"). They make amendments to primary and secondary legislation consequent to the modifications to the Transport Act 2000 made by the Corporate Joint Committees (Transport Functions) (Wales) Regulations 2021 ("the 2021 Regulations").

The Part 5 of the 2021 Act confers power on the Welsh Ministers to establish corporate joint committees. Corporate joint committees are bodies corporate consisting of such county councils and county borough councils in Wales as are specified in the Regulations establishing them. They may exercise the functions specified in those Regulations, including (among other things) specified functions of a county or county borough council relating to transport.

Section 108 of the Transport Act 2000 requires that each local transport authority whose area is in Wales must prepare a document to be known as the Local Transport Plan ("LTP"). This plan must contain their policies for the promotion and encouragement of safe, integrated, efficient and economic transport to, from and within their area, and their policies for the implementation in their area of the Wales Transport Strategy. The Regional Transport Planning (Wales) Order 2014 allowed local authorities to produce joint local transport plans.

Functions under section 108 of the Transport Act 2000 have been conferred on four separate corporate joint committees under the following regulations made under sections 74, 83 and 174 of the 2021 Act:

- The South East Wales Corporate Joint Committee Regulations 2021 (S.I. 2021/343 (W. 97));
- The South West Wales Corporate Joint Committee Regulations 2021 (S.I. 2021/352 (W. 104));
- The Mid Wales Corporate Joint Committee Regulations 2021 (S.I. 2021/342 (W. 96));
- The North Wales Corporate Joint Committee Regulations 2021 (S.I. 2021/339 (W. 93)).

The 2021 Regulations, which come into force on the same day as the Regulations, modify the Transport Act 2000 in cases where a corporate joint committee has been established by Regulations and the function of developing policies under section 108 of the Transport Act

2000 has been conferred on the corporate joint committee. The modifications require the corporate joint committee to develop transport policies and establish a regional transport plan for its area.

The Regulations:

- Amend related legislation which refers to LTPs, including the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 (SI 2005/2839), the Local Authorities (Executive Arrangements) (Functions and Responsibilities) (Wales) Regulations 2007 (SI 2007/399), the Transport (Wales) Act 2006 and the Active Travel (Wales) Act 2013.
- Ensure that the policies contained within existing LTPs remain in force until the new regional transport plans are in force.
- Revoke the Regional Transport Planning (Wales) Order 2014.

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

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.

The Regulations at various points refer to Paragraph 108(2A)(a) of the Transport Act 2000, which relates to the development of relevant policies, as opposed to Paragraph 108(2A)(b), which relates to the implementation of those policies. It is noted, however, that at other points in the Regulations reference is simply made to subsection 108(2A)[1]. It is unclear why the reference to Paragraph (a) was omitted on these occasions as all the references appear to relate to the development of relevant polices and not their implementation.

Merits Scrutiny

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

Welsh Government response

A Welsh Government response is required.

[1] At: paras. 4(4) and 4(5) of the Regulations, and sub-para. 1(b) of the Schedule

Legal Advisers
Legislation, Justice and Constitution Committee
1 February 2022

Government Response: The Corporate Joint Committees (Transport Functions) (Consequential Modifications and Transitional Provisions) (Wales) Regulations 2022

Technical Scrutiny point : It is noted that the Regulations at various points refer to Section 108(2A)(a) of the Transport Act 2000, which relates to the development of relevant policies (as opposed to Paragraph 108(2A)(b), which relates to the implementation of those policies). Where such references are made, they are intended to refer specifically to section 108(2A)(a) of the Transport Act 2000, which provides that each local transport authority whose area is in Wales must develop policies for the implementation in their area of the Wales Transport Strategy. However, the Corporate Joint Committees (Transport Functions) (Wales) Regulations 2021 (SI 2021/328) modify the Transport Act 2000 where the function of developing policies under section 108(1)(a) and (2A)(a) of the Transport Act 2000 in respect of the area of a local transport authority is conferred on a corporate joint committee.

Regulation 2(2)(Interpretation) provides for this via providing for how references to a modified provision of the 2000 Act in the Regulations should be read.

While the unmodified section 108(2A) of the Transport Act 2000 includes section 108(2A)(a) and (b), the modified section 108(2A) does not have paragraphs within it. In consequence, it is considered correct to refer to modified section 108(2A) as opposed to modified section 108(2A)(a) where such references are made in regulations 4(4) and (5). In addition, the reference to section 108(2A) in the first paragraph of the Schedule is a reference to the modified section 108(2A).

The Welsh Government concedes that, for the sake of consistency, the reference in regulation 4(4) to any policies developed by a constituent council under section 108(2A) could have been drafted to specifically refer to section 108(2A)(a). However, there is only one reference to the development of policies in section 108(2A) and accordingly it is considered that the meaning of the provision is clear.

Merits Scrutiny : No points were identified.

SL(6)138 – The Non-Domestic Rating (Multiplier) (Wales) Regulations 2022

Background and Purpose

In relation to Wales, the non-domestic rating multiplier is calculated in accordance with paragraph 3B of Schedule 7 to the Local Government Finance Act 1988 ("the 1988 Act") for each financial year when new rating lists are not being compiled. New rating lists are not being compiled for the financial year beginning on 1 April 2022.

The formula in paragraph 3B of Schedule 7 to the 1988 Act includes an item B which is the consumer prices index for September of the financial year preceding the year concerned, unless the Welsh Ministers exercise their power under paragraph 5(13A) of Schedule 7 to the Act to specify, by regulations, a different figure for item B. These regulations specify that for the financial year beginning on 1 April 2022, the figure for item B is 109.1.

The effect of these Regulations will be that the non-domestic rating multiplier remains the same figure as that calculated for the financial years beginning on 1 April 2020 and 1 April 2021.

Procedure

Made Affirmative.

These Regulations were made by the Welsh Ministers before they were laid before the Senedd. In accordance with paragraph 5(13C) of Schedule 7 to the 1988 Act, the Senedd must approve the Regulations before the Senedd approves the local government finance report for the financial year beginning on 1 April 2022, or before 1 March 2022 (whichever is earlier).

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 Orders 21.3(i) and 21.3(ii) in respect of this instrument.

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

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:

a. the importance of these Regulations and their effect on the annual local government revenue settlements, and

b. the decision by the Welsh Government to freeze the multiplier for the financial year beginning on 1 April 2022 rather than increasing the multiplier by reference to the Consumer Prices Index (the new "default" position in the 1988 Act as amended by the Local Government and Elections (Wales) Act 2021).

The Explanatory Memorandum to these Regulations, at section 4, confirms that:

> *"All owners or occupiers of non-domestic properties who pay rates will benefit from the change. Even properties which receive significant amounts of rates relief will benefit, as the residual liability will be calculated using a lower multiplier…*
>
> *Freezing the multiplier in Wales, rather than increasing it by CPI, will reduce the income into the non-domestic rates pool in 2022-23. The reduction will be fully funded by the Welsh Government and will be reflected in the calculations for the local government settlements, so that there is no financial impact on local authorities or police budgets."*

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
1 February 2022

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-4209-21

Elin Jones, MS
Llywydd
Senedd Cymru
Cardiff Bay
CF99 1SN

18 January 2022

THE NON-DOMESTIC RATING (MULTIPLIER) (WALES) REGULATIONS 2022

I have today made the Non-Domestic Rating (Multiplier) (Wales) Regulations 2022, under paragraph 5(13A) of Schedule 7 to the Local Government Finance Act 1988. The legislation will come into force on the day after the day on which it is approved by a resolution of Senedd Cymru and will take effect from 1 April 2022. I attach a copy of the statutory instrument which I intend to lay once the statutory instrument has been registered.

In accordance with paragraph 5(13C) of Schedule 7 to the Local Government Finance Act 1988, this instrument must be approved by the Senedd Cymru before the Senedd approves the *Local Government Finance Reports* for the financial year beginning 1 April 2022, or before 1 March, whichever is earlier, in order for it to be effective. In these circumstances, I understand Standing Order 21.4A is relevant and the Business Committee may establish and publish a timetable for the responsible committee or committees to report. It may be helpful to know that I intend to hold the Plenary debate for this item of subordinate legislation on 15 February.

I am copying this letter to Lesley Griffiths MS, the Minister for Rural Affairs and North Wales, and Trefnydd, Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee, Peredur Owen Griffiths MS, Chair of the Finance Committee, Siwan Davies, Director of Senedd Business, Sian Wilkins, Head of Chamber and Committee Services, and Julian Luke, Head of Policy and Legislation Committee Service.

Yours sincerely,

Rebecca Evans.

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

Bae Caerdydd • Cardiff Bay
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SL(6)146 –The Sea Fishing Operations (Monitoring Devices) (Wales) Order 2022

Background and Purpose

This Order prohibits:

- licensed fishing boats of less than 12 metres in length (undertaking fishing operations in Wales or the Welsh zone), and
- Welsh fishing boats of less than 12 metres in length (undertaking fishing operations wherever the boat may be),

from undertaking fishing operations without an operating vessel monitoring system ("VMS"). Certain information (including the geographical position, date, time, speed and course of the vessel) must be transmitted from each boat's VMS to the Welsh Ministers at least once in every 10 minutes whilst undertaking fishing operations.

Procedure

No procedure.

Scrutiny under Standing Order 21.7

The following points are identified for reporting under Standing Order 21.7 in respect of this Order:

1. Standing Order 21.7(i) – any other subordinate legislation laid before the Senedd other than that subject to Special Senedd Procedure under Standing Order 28

Article 3 of these Regulations creates a new offence. Paragraph (1) provides that a fishing boat must not undertake fishing operations unless the requirements of that paragraph (i.e. that the boat have VMS installed and transmitting the required information to the Welsh Ministers) are satisfied. Paragraph (2) provides that where a fishing boat is used in contravention of paragraph (1), then the person in charge of the boat is guilty of an offence.

The new offence created by Article 3(2) is punishable on summary conviction by an unlimited fine.[1]

2. Standing Order 21.7(i) – any other subordinate legislation laid before the Senedd other than that subject to Special Senedd Procedure under Standing Order 28

[1] By virtue of section 5(4) of the Sea Fisheries Act 1968

This Order is made by the Welsh Ministers in exercise of powers conferred by section 5(1) of the Sea Fisheries Act 1968. Orders made under that section are not subject to a procedure of the Senedd.[2]

The creation of a new offence is a significant matter, and ordinarily it would be expected that a statutory instrument that did so would be subject to (as a minimum) the negative procedure. However, in this instance the enabling power is over half a century old.

Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
1 February 2021

[2] Section 18(2) of the Sea Fisheries Act 1968

SL(6)130 - The Renting Homes (Supported Standard Contracts) (Supplementary Provisions) (Wales) Regulations 2022

Background and Purpose

The Renting Homes (Supported Standard Contracts) (Supplementary Provisions) (Wales) Regulations 2022 ("the Regulations") are made in exercise of the powers conferred by sections 23(1), 131 and 256(1) of the Renting Homes (Wales) Act 2016 ("2016 Act"). The Regulations come into force on a day to be appointed by the Welsh Ministers in accordance with regulation 1.

The 2016 Act seeks to make it simpler and easier to rent a home in Wales by replacing various, complex pieces of existing legislation with one clear legal framework. New "occupation contracts" will replace current residential tenancies and licenses, making the rights and obligations of both landlord and tenant or licensee (referred to in the 2016 Act as the "contract-holder") much clearer.

All occupation contracts will include the relevant fundamental terms, which are set out in the 2016 Act as fundamental provisions. These deal with the essential rights and obligations of landlords and contract-holders. Supplementary terms deal with practical matters which help to make the occupation contract work, such as enabling a landlord to access a property to undertake repairs or maintenance. The supplementary terms are set out as provisions in regulations rather than in the 2016 Act itself. This is to more easily allow for any future changes in housing legislation or practice to be incorporated into occupation contracts than would otherwise be the case.

The Regulations set out the supplementary provisions which are, subject to sections 21, 24 and 25 of the 2016 Act, incorporated into supported standard contracts, as supplementary terms. However, at the creation of the occupation contract, the parties may agree that a supplementary provision is modified or that it is not included in the occupation contract. But, a modification or omission must not render the occupation contract incompatible with any fundamental term of the contract.

Regulation 4 of the Regulations requires the contract-holder to obtain the landlord's consent before carrying on a trade or business at the dwelling.

Regulation 5 requires the contract-holder to obtain the landlord's consent before allowing lodgers to live at the dwelling.

Regulation 6 requires the landlord to provide an inventory to the contract-holder, within a specified timescale. It also makes provision enabling the contract-holder to make comments on the inventory and how the landlord may respond to those comments.

Regulation 7 provides the contract-holder is not liable for rent for each day (or part day) the dwelling is unfit for human habitation.

Regulation 8 requires the landlord to provide, within 14 days of any request by the contract-holder, a written receipt for rent or other consideration paid by the contract-holder.

Regulation 9 sets out how a contract-holder may change the providers of utilities to the dwelling.

Regulation 10 imposes a number of requirements on the contract-holder in relation to the care of the dwelling, fixtures and fittings within the dwelling and any items listed in the inventory. This includes requiring the contract-holder to obtain the landlord's consent before removing any of the fixtures and fittings or any items listed in the inventory from the dwelling. It requires the contract-holder to keep the dwelling in reasonable decorative order. It also prohibits the contract-holder from keeping anything in the dwelling that would be a health and safety risk.

Regulation 11 requires the contract-holder to report to the landlord any fault, defect, damage or disrepair within the dwelling which the contract-holder reasonably believes is the landlord's responsibility. It also requires the contract-holder to undertake those repairs that they reasonably believe are not the landlord's responsibility.

Regulation 12 provides the landlord with a right, having given 24 hours' notice, to enter the dwelling at any reasonable time for the purpose of carrying out those repairs that were the contract-holder's responsibility that have not been undertaken.

Regulation 13 requires the contract-holder to give the landlord immediate access to the dwelling to deal with an emergency. It sets out that the landlord may access the dwelling in an emergency if the contract-holder does not provide access.

Regulation 14 requires the contract-holder to keep the dwelling secure and sets out that the contract-holder can change the locks in the dwelling, provided the changes provide no less security, and that copies of any new keys are given to the landlord.

Regulation 15 requires the contract-holder to obtain the landlord's consent before making alterations to the dwelling and defines "alteration" for the purposes of this regulation.

Regulation 16 requires a contract-holder, at the end of the occupation contract, to remove from the dwelling their belongings and the belongings of any permitted occupiers. It also requires any property belonging to the landlord to be returned to the position it was in at the beginning of the occupation contract, and requires keys to be returned.

Regulation 17 prescribes the notice period to be given to the landlord by a joint contract-holder who wishes to withdraw from the occupation contract.

Regulation 18 requires the landlord to repay (within a reasonable time) the contract-holder any pre-paid rent or other consideration which relates to any period falling after the end of the contract.

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.

Regulation 6 deals with the provision of an inventory. Regulation 6(5) sets out the actions that the landlord must take to address any comments made by the contract-holder in relation to the inventory. No time frame is set within which the landlord must take these actions, which may give rise to issues with the enforceability of the provision – if the landlord is not required to comply within a certain time then it is more difficult for a contract-holder to present an argument that compliance should already have occurred. The Welsh Government is asked to explain why no time frame is set for landlords to comply with the requirements in regulation 6(5).

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 likely to be of interest to the Senedd.

Regulations 12 and 13 give the landlord the right to enter the dwelling. The 2016 Act provides that a landlord may be a "private landlord" or a "community landlord", and the latter can include a local authority by virtue of section 9 of that Act. If this right is exercised by a public body such as a local authority, then it may interfere with the contract-holder's right to private life under article 8 of the European Convention on Human Rights ("ECHR"). Similarly, it could interfere with the contract-holder's right to the peaceful enjoyment of their possessions under article 1 of the First Protocol to the ECHR. The Welsh Government is asked to provide details of the human rights assessment that it undertook in relation to regulations 12 and 13.

Welsh Government response

A Welsh Government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 31 January 2022 and reports to the Senedd in line with the reporting points above.

Government Response: ***The Renting Homes (Supported Standard Contracts) (Supplementary Provisions) (Wales) Regulations 2022***

Technical Scrutiny : The Welsh Government considers that, as issues around the accuracy of the inventory are only likely to arise at the end of the occupation contract, no specific time frame is required. It is also unlikely that the landlord would not respond, if the landlord disagreed with the contract-holder's comments on the inventory, as a failure to respond in that situation could lead to the implication that the landlord agrees with the contract-holder's comments.

Merit Scrutiny point: Welsh Government considers the provisions balance the Convention rights of contract-holders, landlords and, other individuals who could be endangered by an emergency situation.

SL(6)131 - The Renting Homes (Supplementary Provisions) (Wales) Regulation 2022

Background and Purpose

These Regulations set out the supplementary provisions which are, subject to sections 21, 24 and 25 of the Renting Homes (Wales) Act 2016 ("the Act"), incorporated into occupation contracts as supplementary terms.

The default position is that supplementary provisions are incorporated as supplementary terms of an occupation contract. However, at the creation of the occupation contract, the parties may agree that a supplementary provision is modified or that it is not included in the occupation contract. A modification or omission must not render the occupation contract incompatible with any fundamental term of the contract.

The Regulations set out supplementary provisions which apply to different types of occupation contracts and deal with matters such as:

- landlord's consent to carry on a trade or business at the dwelling;
- persons permitted to live at the dwelling;
- how to change utility providers;
- the dwelling being unoccupied;
- what happens to property at the dwelling at the end of the occupation contract;
- repayment of pre-paid rent or other consideration after the end of the contract:
- non-payment of rent when the dwelling is unfit for human habitation;
- provision of rent receipts;
- care of the dwelling, fixtures and fittings and any items listed in any inventory;
- reporting problems with the dwelling and carrying out repairs;
- the notice period to be given to the landlord by a joint contract-holder who wishes to withdraw from the occupation contract;
- occupation of the dwelling as a principal home;
- keeping the dwelling secure and changing the locks;
- consent to alteration to any structures in the dwelling;
- transfer of the occupation contract;
- provision of advice to the contract-holder following a report of prohibited conduct, such as anti-social behaviour;
- provision of an inventory and the process to agree it;
- retention of documents relating to the dwelling; and
- consent regarding lodgers.

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.

Regulation 27 deals with the provision of an inventory under certain types of occupation contract. Regulation 27(5) sets out the actions that the landlord must take to address any comments made by the contract-holder in relation to the inventory. No time frame is set within which the landlord must take these actions, which may give rise to issues with the enforceability of the provision – if the landlord is not required to comply within a certain time then it is more difficult for a contract-holder to present an argument that compliance should already have occurred. The Welsh Government is asked to explain why no time frame is set for landlords to comply with the requirements in Regulation 27(5).

Merits Scrutiny

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

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

The Explanatory Note to the Regulations states that:

> *Regulation 5 provides that the contract-holder may permit persons who are not lodgers or sub-holders to live in the dwelling. Neither the landlord nor the contract-holder may cause or permit the dwelling to become overcrowded within the meaning of Part 10 (overcrowding) of the Housing Act 1985 (c. 68).*

However, the restriction on the landlord and the contract-holder which states that they cannot cause or permit the dwelling to become overcrowded within the meaning of Part 10 (overcrowding) of the Housing Act 1985 is not included in Regulation 5 itself or elsewhere in the Regulations. The Explanatory Memorandum to the Regulations notes that the provision was redrafted to remove reference to 'overcrowding' within the meaning of Part 10 of the Housing Act 1985. Referring to a restriction within the Explanatory Notes which is no longer included in the Regulations may cause confusion for the reader. The Welsh Government is asked to confirm why this reference is included in the Explanatory Note when it has been removed from the Regulations.

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.

Regulations 15, 16 and 33 give the landlord, who may be a private landlord or a "community landlord", which is defined to include a local authority, the right to enter the dwelling. Where this right is exercised by a public body such as a local authority then it may interfere with the contract-holder's right to private life under article 8 of the European Convention on Human Rights ("ECHR"). Similarly, it could interfere with the contract-holder's right to the peaceful enjoyment of their possessions under article 1 of the First Protocol to the ECHR. The Welsh Government is asked to provide details of the human rights assessment that it undertook in relation to Regulations 15, 16 and 33.

Welsh Government response

A Welsh Government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 31 January 2022 and reports to the Senedd in line with the reporting points above.

Government Response: ***The Renting Homes (Supplementary Provisions) (Wales) Regulation 2022***

Technical Scrutiny: The Welsh Government considers that, as issues around the accuracy of the inventory are only likely to arise at the end of the occupation contract, no specific time frame is required. It is also unlikely that the landlord would not respond, if the landlord disagreed with the contract-holder's comments on the inventory, as a failure to respond in that situation could lead to the implication that the landlord agrees with the contract-holder's comments.

Merit Scrutiny point 1: The Welsh Government considers that, as the requirements imposed by Part 10 of the Housing Act 1985 are free standing obligations, it would not be good law to re-impose those requirements within these Regulations. The Welsh Government considers that reference to the restrictions within the Explanatory Note is helpful to the reader to make them aware of their duties under Part 10 of the Housing Act 1985 in relation to overcrowding.

Merit Scrutiny point 2: Welsh Government considers the provisions balance the Convention rights of contract-holders, landlords and, other individuals who could be endangered by an emergency situation.

SL(6)132 – The Renting Homes (Explanatory Information for Written Statements of Occupation Contracts) (Wales) Regulations 2022

Background and Purpose

These Regulations prescribe the explanatory information that must be contained in a written statement of an occupation contract issued in accordance with section 31 of the Renting Homes (Wales) Act 2016 ("the Act").

The Act establishes two types of occupation contract, the secure contract and the standard contract. The Act also establishes a number of different types of standard contract which can be used in particular circumstances.

Regulation 3 of these Regulations prescribe explanatory information which must be contained in all written statements of occupation contracts. Regulations 5 to 9 prescribe explanatory information which must be contained in written statements of specific types of occupation contracts.

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

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

Section 31 of the Act requires a landlord to provide a contract-holder with a written statement of their occupation contract within 14 days of the occupation date. If the landlord fails to do so, the landlord may be required to pay compensation to the contract-holder. Section 35 of the Act makes provision about the duration of the period in respect of which compensation is payable. For example, if a contract-holder first occupies premises on 1 January, the landlord must provide a written statement within 14 days, i.e. before the end of 14 January. If the landlord fails to do so, compensation is payable for every day from 1 January onwards (subject to a maximum of 2 months).

However, regulation 3(g) of these Regulations says that the written statement must include an explanation that, for each day the written statement is late, the landlord may be liable to pay compensation to the contract-holder for each day the written statement is not provided.

We are concerned that regulation 3(g) could easily be read as saying that compensation is payable in respect only of the period that begins after the initial 14-day period has passed. We believe it is easy to read "liable to pay compensation…for each day the written statement is late" as excluding compensation being payable in respect of the 14-day period itself. Applying the example above, such a reading would mean that compensation is not payable in respect of the period 1 to 14 January. However, such an interpretation would be contrary to the position we set out above under section 31 and 35 of the Act.

We would be grateful if the Welsh Government could confirm whether our understanding of the Act is correct, and whether the Welsh Government believes the Regulations should be clearer as to the period in respect of which compensation is payable.

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

Regulation 5(b) requires written statements of periodic standard contracts to contain an explanation that, before a court can make a possession order, the landlord must demonstrate that all the correct procedures have been followed and that certain conditions (depending on the particular circumstances) have been satisfied.

Regulation 5(b)(iv)(aa) requires a specific explanation that, where such contracts incorporate section 173 of the Act (landlord's notice), the landlord must demonstrate that:

- the landlord has given the contract-holder notice under section 173 that they must give up possession on a specified date in the notice, and
- no restrictions on giving notice under section 173 apply, including specific restrictions set out in sections 75 and 98 of the Housing Act 2004 and section 44 of the Housing (Wales) Act 2014.

We would be grateful if the Welsh Government could clarify the legislative basis for requiring a landlord to comply with the specific restrictions referred to above in order to give notice under section 173 of the Act.

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

Regulation 8(b)(v) requires the provision of certain explanatory information in circumstances where a fixed term standard occupation contract incorporates section 194 of the Act as a term of that contract. The specified information includes the landlord needing to demonstrate that where the occupation contract is within:

- Schedule 8A to the Act, the contract-holder was given an least two months' notice that they must give up possession (Regulation 8(b)(v)(cc)); and

- Either Schedule 8A, Schedule 9 or Schedule 9C to the Act (or any combination of them), the contract-holder was given the relevant notice that they must give up possession (Regulation 8(b)(v)(dd)).

The Welsh Government is asked to clarify the reason for referring to occupation contracts within Schedule 8A in Regulation 8(b)(v)(dd), given that a minimum notice period for these contracts of two months' is already specified in Regulation 8(b)(v)(cc).

Merits Scrutiny

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

Welsh Government response

A Welsh Government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 31 January 2022 and reports to the Senedd in line with the reporting points above.

Government Response: ***The Renting Homes (Explanatory Information for Written Statements of Occupation Contracts) (Wales) Regulations 2022***

Technical Scrutiny point 1: The Committee's understanding of these sections of the Act is correct. The Welsh Government points out that regulation 3(g) of these Regulations would be interpreted in accordance with section 35(6) of the Act, so that the Welsh Government considers it to be clear that "for each day the written statement of the occupation contract is late" means that compensation is payable from the first day (i.e. the "relevant date" for the purposes of section 35 of the 2016 Act) on which the landlord was required to provide the written statement. However, the Welsh Government acknowledges that regulation 3(g) of these Regulations could make the position more certain and will consider making an amendment, to put the matter beyond doubt, when it next becomes necessary to amend these Regulations.

Technical Scrutiny point 2:

Section 173(1) of the Act requires that the landlord must give notice (under that section) in order to bring the contract to an end. Section 178 enables the landlord to use the notice under section 173 as a ground for possession and section 215(3) and (4) enable the Court to make an order for possession in those circumstances. These Regulations require the landlord to make the contract-holder aware of the procedural step at section 173 of the 2016 Act.

The further restrictions will apply to section 173 notices of the Act by virtue of consequential amendments that will be made to the Housing Act 2004 and the Housing (Wales) Act 2014 and those amendments will be in force by the implementation of the 2016 Act. Landlords are not required to provide the explanatory information prescribed by these regulations until after implementation of the Act by which time the relevant sections restrictions referred to above will apply to notices given under section 173 of the Act.

Technical Scrutiny point 3: Regulation 8(b)(v)(cc) requires the landlord to give explanatory information regarding the fact that the landlord has to give two months' notice to occupation contracts that fall within that sub-paragraph. However, regulation 8(b)(v)(dd) requires the landlord to give explanatory information about the fact that the landlord must give notice under the specific relevant section of the Act before the landlord can make a claim for possession. In other words, sub-paragraph (cc) is about the notice period and sub-paragraph (dd) is about the notice itself and when it can be given, for that reason, the Welsh Government considers it appropriate to refer to Schedule 8A within both sub-paragraphs 8(b)(v)(cc) and (dd).

SL(6)133 – The Renting Homes (Wales) Act 2016 (Amendment of Schedule 9A) Regulations 2022

Background and Purpose

These Regulations amend Schedule 9A to the Renting Homes (Wales) Act 2016 ("the 2016 Act") to include two additional requirements with which landlords are required to comply.

Schedule 9A was inserted into the 2016 Act by the Renting Homes (Amendment) (Wales) Act 2021. Schedule 9A already prevents a landlord from issuing a notice under sections 173, 186, or under a landlord's break clause, in certain circumstances.

These Regulations place two further restrictions on a landlord's ability to issue a notice seeking possession. The prohibitions are:

- if an energy performance certificate ("EPC") has not been provided – a valid EPC is required whenever a property is built, sold, or rented; or
- if the notice relates to health and safety – the relevant health and safety circumstances are that the landlord has failed to:
    - ensure working smoke alarms and, where required, carbon monoxide alarms, are installed;
    - obtain an electrical condition report, or to give the contract holder such a report or written confirmation of certain other electrical work; or
    - comply with the Gas Safety Regulations 1998 by providing to the contract-holder, or displaying, a relevant gas safety certificate.

These Regulations are intended to operate alongside other relevant provisions in Part 4 of the 2016 Act, which deals with the condition of dwellings let by landlords, as well as associated subordinate legislation, including the Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022 and the Renting Homes (Supplementary Provisions) (Wales) Regulations 2022.

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

The following 2 points are identified for reporting under Standing Order 21.3 in respect of this instrument.

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

Regulations 3 and 4, which insert new paragraphs 3A, 5A, 5B and 5C into Schedule 9A to the 2016 Act, prevent a landlord giving notice if there are breaches of certain statutory obligations. Any provision that interferes with an individual's property or use of that property will potentially engage Article 1 Protocol 1 to the European Convention on Human Rights.

The Explanatory Memorandum does not contain a justification for the interference with human rights. The Welsh Government is asked to provide details of the human rights assessment that it undertook in relation to Regulations 3 and 4.

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

These Regulations amend primary legislation, namely the Renting Homes (Wales) Act 2016. The Committee notes that the Legislation, Justice and Constitution Committee of the Fifth Senedd reported on the Renting Homes (Amendment) (Wales) Bill during Stage 1 proceedings. The Report references the existence of this Henry VIII power and the clarifications sought at the time from the Minister in relation to the justification for the power (like all other regulation-making powers in that Bill) being a Henry VIII power. The Minister's response was:

> *"The Schedules to the 2016 Act contain a power for the Welsh Ministers to amend them, as we will need to review the matters contained within those Schedules as the housing landscape evolves over time. We need to have the flexibility to react to those changes and make appropriate provision within the various Schedules, as necessary. The Bill therefore adopts the same approach. The alternative would seem to be regulations which would also amend primary legislation or, alternatively, would need to be read alongside the primary legislation, resulting in detail falling outside of primary legislation into secondary legislation, which can itself attract criticism so far as scrutiny and accessibility of the law issues are concerned."*

Welsh Government response

A Welsh Government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 31 January 2022 and reports to the Senedd in line with the reporting points above.

Government Response: The Renting Homes (Wales) Act 2016 (Amendment of Schedule 9A) Regulations 2022

Merit Scrutiny point 1:

Response

As the committee have noted the Regulations prevent a landlord from giving notice if there are breaches of certain statutory duties, namely, to provide an Energy Performance Certificate and meet the requirements of the Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022.

Part 4 of the Explanatory Memorandum explains the rationale of the Regulations. Provided the landlord is in compliance with the statutory duties named above any harmful effect is mitigated.

The Welsh Government is satisfied that the Regulations are compatible with Convention Rights.

Merit Scrutiny point 2:

Response

The Welsh Government have noted the Minister's response to the above point, and have nothing further to add.

SL(6)134 - The Renting Homes (Model Written Statements of Contract) (Wales) Regulations 2022

Background and Purpose

These Model Written Statements Regulations prescribe three model written statements of occupation contract for use by landlords under the new framework established by the Renting Homes (Wales) Act 2016 (the 2016 Act).

The model written statements relate to three types of contract:

1. secure occupation contracts,
2. periodic standard occupation contracts, and
3. and fixed term standard contracts made for a term less than seven years.

The model written statements incorporate the terms that are applicable to each type of contract. The Explanatory Memorandum states that this is intended to encourage consistency in the way that written statements are drafted and provides written statements that are compliant with the legal requirements of the 2016 Act.

Landlords must provide contract-holders with written statements, though they do not have to use the model written statements.

Procedure

Negative.

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

Technical Scrutiny

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

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

It is unclear where the model written statement of a fixed term standard occupation contract for a term of less than seven years (in Schedule 3) provides for the term of the contract to be set out in the written statement.

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

We note the following drafting issues:

(a) Schedule 2, term 47: the words "on that ground" have been unnecessarily repeated. The words are not repeated in section 157 of the 2016 Act (i.e. the section from which term 47 derives);

(b) Schedule 3, term 10: the word "Repairs" is used in the heading to term 10 but not in the heading to section 98 of the 2016 Act (i.e. the section from which term 10 derives);

(c) Schedule 3, term 39: all terms should be labelled F, F+ or S in order to help readers understand the status of term. However, term 39 is not labelled.

Merits Scrutiny

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

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

We ask whether it would be helpful if the model written statement in Schedule 3:

(a) set out a brief explanation or warning as to what happens at the end of the term (see, for example, the information included in section 184 of the 2016 Act);

(b) warned readers that additional terms could include very important terms (for example, a landlord's break clause that allows a landlord to end the contract before the end of the term).

4. 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

These Model Written Statements Regulations form part of a suite of regulations that implement the 2016 Act. We note the following reporting points raised by this committee in respect of some of those other regulations that implement the 2016 Act, and how those reporting points are inherited by these Model Written Statements Regulations.

Name of regulations	Reporting point	Knock-on effect on the Model Written Statements Regulations
The Renting Homes (Supplementary Provisions) (Wales) Regulations 2022	Where a contract-holder makes comments to the landlord as regards an inventory, the landlord must	The term relating to inventories is a new supplementary term. The model written statements in

	take certain steps. However, no timescale is given for the landlord to take those steps.	Schedules 2 and 3 to the Model Written Statements Regulations incorporate such new supplementary terms, therefore the issue regarding timescales is inherited by the Model Written Statements Regulations.
The Renting Homes (Explanatory Information for Written Statements of Occupation Contracts) (Wales) Regulations 2022	Lack of clarity in the wording relating to the period during which compensation is payable when a landlord fails to provide a written statement to a contract-holder.	The wording to be used in written statements is inherited by the Model Written Statement Regulations. Therefore, the lack of clarity is also inherited.
The Renting Homes (Explanatory Information for Written Statements of Occupation Contracts) (Wales) Regulations 2022	Lack of clarity as to the explanation of the need to comply with certain requirements before a landlord can give notice of termination to a contract-holder.	The explanation of the requirement to comply with those requirements is inherited by Schedule 2 to the Model Written Statement Regulations. Therefore, the lack of clarity is also inherited.

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

The Explanatory Memorandum repeatedly refers to the Regulatory Impact Assessment carried out for the 2016 Act. Can the Welsh Government confirm whether that RIA (now 5 years old) is still a good basis for the 'costs and benefits' conclusions set out in the Explanatory Memorandum?

Welsh Government response

A Welsh Government response is required to points one, three and five.

Committee Consideration

The Committee considered the instrument at its meeting on 31 January 2022 and reports to the Senedd in line with the reporting points above.

Government Response: The Renting Homes (Model Written Statements of Contract) (Wales) Regulations 2022

Technical Scrutiny point 1:

It would be possible to set out the term of the contract in several places within Part 2 of the model written statement of a fixed term contract – for example, as part of the information about when further payments are to be made. However, the Welsh Government accepts that the model written statement could be clearer about precisely where information about the duration of the contract should be included. When it next becomes necessary to amend these, we will seek to amend these Regulations to include this information.

Merit Scrutiny point 3:

(a) The explanatory information set out in the model written statement of a fixed term contract explains that the contract initially lasts for a specified period of time agreed between contract-holder and the landlord but the contract-holder cannot be evicted without a court order. The Welsh Government considers that this would indicate to the contract-holder that they have the right to remain at the end of the term. Furthermore, in the footnotes relating to Part 2 of the model written statement, it states that 'If you remain in occupation of the dwelling after the end of the term, you and the landlord are to be treated as having made a new periodic standard contract in relation to the dwelling'. However, the Welsh Government accepts that this point could be clearer, and when it becomes necessary to next amend these Regulations, we will seek to amend so that this information is explicitly included in the explanatory information section to put the matter beyond doubt.

(b) The explanatory information set out in the model written statement of a fixed term contract explains the wide ranging nature of additional terms and that they can cover any other matter. However, were a landlord's break clause to be included in a fixed term standard contract, it could not be included as an additional term. Rather, it would be incorporated as fundamental term in accordance with the requirements of the 2016 Act. The Act severely restricts the circumstances in which break clause can be included and the Welsh Government expects that contracts including such clauses will be made relatively infrequently. The model written statements included in the Regulations relate to those contracts that we expect to be used most frequently. Therefore a model written statement relating to a fixed term contract that includes a break clause is not set out in the Regulations. (Regulation 3(2)(b) makes it clear that the model written statement set out in Schedule 3 does not apply in the case of such a contract.) Consequently, we do not think it would be appropriate to make reference to a landlord's break clause in the model written statement. The Committee may wish to

note that where an occupation contract does incorporate a break clause, regulation 8(v) of the Renting Homes (Explanatory Information for Written Statements of Occupation Contracts) (Wales) Regulations 2022 requires the landlord to provide additional information in relation to the operation of break clauses.

Merit Scrutiny point 5:

The Welsh Government is satisfied that rationale for identifying the costs and benefits of producing model written statements set out in the Regulatory Impact Assessment (RIA) that accompanied the 2016 Act, remains sound. Furthermore, we consider that the method used to calculate the costs and benefits remains the appropriate one. Therefore, the RIA that accompanies the Renting Homes (Model Written Statements of Contract) (Wales) Regulations 2022 uses that same rationale and method of calculation. However, in recognition of the significant amount of time that has elapsed since that previous RIA was written, and the various changes to costs that will have occurred during that time, the calculations set out in the RIA accompanying the 2022 Regulations have been revised to reflect current costs.

SL(6)137 – The Code of Recommended Practice for Local Authority Publicity

Background and Purpose

The Code of Recommended Practice for Local Authority Publication ("the Code") provides guidance on the content, style, distribution and cost of local authority publicity. The Code is being updated and revised to reflect changes that have taken place since the last Code was issued in 2014.

Local authorities, defined in section 6(2) of the Local Government Act 1986, are required by section 4(1) of that Act to have regard to the Code in coming to any decision on publicity. "Publicity" is defined in section 6(4) of the 1986 Act as "any communication, in whatever form, addressed to the public at large or a section of the public".

It is intended that the revisions to the Code will be made and come into force no later than 18 March 2022.

Procedure

Draft Negative.

The Welsh Ministers have laid a draft of the Code before the Senedd. If, within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the draft being laid, the Senedd resolves not to approve the draft Code then the Welsh Ministers must not issue the Code.

If no such resolution is made, the Welsh Ministers must issue the Code (in the form of the draft) and the Code comes into force on a day specified in an order made by the Welsh Ministers.

Scrutiny under Standing Order 21.7

The following points are identified for reporting under Standing Order 21.7 in respect of this code.

1. The 2014 version of the Code makes clear that it is a revision of a previous Code. For example, the first paragraph of the 2014 Code refers twice to the Code being a revision. However, this distinction is not made in this version of the Code, which instead merely refers to the Code being issued. This distinction is important as the negative procedure only applies where the Code is revised, in accordance with section 4(6) of the Local Government Act 1986. Whilst it is noted that the Explanatory Memorandum makes clear that the Code is a revision, clarification is sought as to why this version of the Code takes a different approach to the 2014 Code by not making clear that it is a revision.

2. Paragraphs 34 and 42 state that any material produced should "have regard" to the Equality Act 2010 and should be produced "in accordance" with the Welsh Language (Wales) Measure 2011. Clarification is sought as to why material should be produced "in accordance" with the 2011 Measure but only *"have regard"* to the 2010 Act.

3. Paragraph 19 of the Code refers to *"section 142(A) of the 1972 Act"*. It appears that this should read *"section 142**(1A)** of the 1972 Act"* (emphasis added). This error also occurs in the Welsh language version of the Code and appears to have been carried over from the 2014 version of the Code.

4. We note the following inconsistencies between the English and Welsh versions of the Code:

a. In paragraph 7, the Welsh version refers to regular review of strategies. However, the English version refers to reviews (not regular reviews);

b. In paragraph 20 of the Welsh version, it appears that *"prif aelod etholedig o'r cyngor"* should read *"aelod etholedig o'r prif gyngor"*;

c. In paragraph 26, the Welsh version refers to *"a/neu ddenu rhai newydd"*. However, the English version refers to *"or attract new ones"* (not "and/or attract new ones").

Government response

A Welsh Government response is required in relation to points 1 to 3 above.

Committee Consideration

The Committee considered the instrument at its meeting on 31 January 2022 and reports to the Senedd in line with the reporting points above.

Government Response: Code of Recommended Practice for Local Authority Publicity

Response to scrutiny under Standing Order 21.7

1. The Welsh Government agrees that it would be helpful for that distinction to be specifically referred to in the Code, and will therefore make minor amendments to the draft Code to make it clear that it is a revision of a previous Code.

2. It is accepted that the wording of paragraphs 34 and 42 may provide an unhelpful distinction as to the applicability of the Equality Act 2010 and the Welsh Language (Wales) Measure 2011 to local authorities. The Welsh Government will therefore make minor amendments to the draft Code to clarify that any material produced by local authorities should be produced in accordance with the Equality Act 2010.

3. The error in paragraph 19 of the Code will be corrected to read section “142(1A) of the 1972” Act in both the English and Welsh versions.

SL(6)139 – The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 2) Regulations 2022

Background and Purpose

These Regulations amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 ("the principal Regulations") to remove restrictions on outdoor gatherings and events that apply in relation to Alert Level 2, which were introduced on 26 December 2021 and amended on 15 January 2022. The restrictions removed are:

- the limit on numbers for regulated outdoor events of 500 people;
- the limit on numbers and the offence for gathering outdoors in excess of 50;
- the additional reasonable measures for outdoor hospitality (the rule of six, and the table service requirement).

These Regulations make amendments:

- related to the Alert Level 2 changes, including removing the offence of participating in a gathering of more than 50 people outdoors in a private dwelling; and
- so that the requirement to control entry to premises and for customers to be seated when ordering food or drink only applies to indoors parts of the premises.

These Regulations took effect from 6:00a.m. on 21 January 2022.

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

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

We note the Welsh Government's justification for any potential interference with human rights. In particular, we note the following paragraphs in the Explanatory Memorandum:

> *"Whilst the principal Regulations, as amended by these Regulations, engage individual rights under the Human Rights Act 1998 and the European Convention on Human Rights, the Government considers that they are justified for the purpose of preventing the spread of infectious diseases and/or the interference is permitted on the basis that it is in pursuit of a legitimate aim, namely of protecting public health, and are proportionate.*
>
> …
>
> *The adjustment of the restrictions and requirements under the principal Regulations by these Regulations is a proportionate response to the spread of coronavirus. It balances the need to maintain an appropriate response to the threat posed by coronavirus against the rights of individuals and businesses, in a manner which remains proportionate to the need to reduce the rate of transmission of the coronavirus, taking into account the scientific evidence."*

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. In particular, we note the following paragraphs in the Explanatory Memorandum:

> *"Given the ongoing threat arising from coronavirus and the need for a prompt public health response, there has been no public consultation in relation to these Regulations. However, engagement has taken place with various stakeholders."*

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 note the breach of the 21-day rule (i.e. the rule that 21 days should pass between the date a "made negative" instrument is laid before the Senedd and the date the instrument comes into force), and the explanation for the breach provided by Mark Drakeford MS, First Minister, in a letter to the Llywydd dated 20 January 2022.

In particular, we note that the letter says:

> *"This is necessary in order to ensure that the principal Regulations' restrictions and requirements continue to be proportionate."*

4. 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.

It is noted that there are no consequential amendments made to Schedule 1 to the principal Regulations, which set out restrictions which apply to Alert Level 1. This has the consequence, in relation to outdoor gatherings and events, of making the restrictions which apply to Alert Level 2 less onerous than those that apply to Alert Level 1. This could cause confusion to those looking at the Alert Levels with an intention of understanding possible measures that could be adopted for each of the Alert Levels.

Although Welsh Government can bring forward regulations to correct these inconsistencies if Alert Level 1 were to be adopted, doing so necessitates additional amending regulations. The Committee notes that, including these Regulations, there are 30 amending regulations relating to the principal Regulations. Increasing the number of amending regulations could reduce the clarity, specifically this increases the number of instruments that a person needs to review in order to understand the position at any one time. That could lead to confusion and ambiguity. It is acknowledged that Welsh Government currently publishes a consolidated version of the principal Regulations.

Welsh Government are asked:

- if any consideration is being given to producing a new consolidated set of regulations?
- whether consideration could be given to using explanatory material (Explanatory Notes and Explanatory Memorandums) to include additional explanations to aid clarity, such as explaining which Alert Level and corresponding Schedule is in force, and clarifying that the reader should not contrast and compare Schedules?

Welsh Government response

A Welsh Government response is required in relation to the fourth merits point.

Committee Consideration

The Committee considered the instrument at its meeting on 31 January 2022 and reports to the Senedd in line with the reporting points above.

Government Response: The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 2) Regulations 2022

Merit Scrutiny point 4:

We confirm that the question of whether to consolidate the principal Regulations is being kept under review. The Committee will appreciate the need to strike a balance in this respect between the time and resource required to produce consolidated regulations with the necessity to make regulations at speed to react to changing circumstances, or to ensure the principal Regulations' continued proportionality. And as the Committee notes, we seek to aid accessibility by publishing a consolidated version of the principal Regulations bilingually on https://gov.wales/health-protection-coronavirus-restrictions-no-5-wales-regulations-2020-amended, usually within a few hours of new regulations being made.

We are grateful to the Committee for its suggestion that the explanatory material to amendment regulations could include additional explanations to aid the principal Regulations' accessibility. The proposals are very helpful and we will consider including them, and a link to the consolidated version we publish, in the explanatory material to any future amendment regulations.

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

Llywodraeth Cymru
Welsh Government

Our ref MA-LG-3951-21

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

huw.Irranca-Davies@senedd.wales

3 February 2022

Dear Huw,

Thank you for your letter of 21 January regarding The Official Controls (Extension of Transitional Periods) (Amendment) (No. 2) Regulations 2021 ('the regulations').

As I stated in my letter of 14 December 2021, these regulations were necessary in order to allow goods to continue to flow across the Irish Sea from 1st January 2022. Without the amendments introduced by these regulations, businesses in Great Britain importing animals, products of animal origin, plants and plant products such as fruit and vegetables would need to comply with SPS control requirements and could only enter GB through Welsh ports which were designated as a Border Control Post ("BCPs").

Currently there are no BCPs in Wales and the temporary provisions of these regulations push the requirements for SPS checks to take place at BCPs to 1 July 2022. The measures taken in these regulations avoid significant risk of sector confusion and disruption in the food supply chain into Great Britain. Further, the regulations also temporarily extend the exemption on the pre-notification requirement for goods which are produced and imported into GB from the island of Ireland. This effectively maintains the status quo for Irish goods, waives pre-notification for goods from Northern Ireland and minimises disruption and uncertainty for importing and exporting businesses whilst negotiations continue around the Northern Ireland Protocol. In particular, the question of which goods are eligible for unfettered access to the GB market is complicated by the interwoven, north-south nature of industries on the island, particularly in the agri-food sector.

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I can confirm Welsh Government and UK Government officials discussed the amendments proposed in these regulations and formal consent was requested in a letter from the Secretary of State on 10th of December. The UK Government's decision to continue the exemption for the island of Ireland from pre-notification did not form part of the initial discussions for the regulations and was a later addition to the regulations. However, with the Christmas recess and holiday period and the need to mitigate the potential impact and disruption on Welsh businesses, I considered the amendments were appropriate and proportionate in the circumstances and consent was provided on the 14th of December. This enabled the legislation to be laid by the 15th of December and ensured the amendments were introduced by the required date.

I can confirm, my letter of consent to the Secretary of State did raise concerns as to how the UK Government had approached the decision making in this case and these concerns also focussed on the short timescales for revisions and how the approach taken did not accord with Lord Frost's commitment to '*work closely with the Devolved Administrations on the implementation of this new timetable, given their devolved responsibilities for agri-food controls*'

To confirm, the legislation is temporary in nature and I believe it to be necessary and proportionate.

Regards,

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

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Lesley Griffiths MS
Minister for Rural Affairs and North Wales, and
Trefnydd

21 January 2022

Dear Lesley

The Official Controls (Extension of Transitional Periods) (Amendment) (No. 2) Regulations 2021

During our meeting on 10 January 2022 we considered your letter dated 20 December 2021 regarding your giving of consent to the UK Government making The Official Controls (Extension of Transitional Periods) (Amendment) (No. 2) Regulations 2021.

We noted with concern your assessment that the Regulations "raise questions in relation to the WTO and the Trade and Cooperation Agreement" but that you are "satisfied that these risks do not fall to Welsh Ministers."

As you will be aware, the Senedd and the Welsh Ministers are required to comply with international obligations by the devolution settlement and the Welsh Government's Ministerial Code.

In the Fifth Senedd, the then Counsel General and Minister for European Transition, Jeremy Miles, told the Fifth Senedd's Legislation, Justice and Constitution Committee that:

> *"It is inconceivable that the [Welsh] Government would recommend to the Senedd a piece of legislation that breaches international law, Chair. There's no question of that."*

We therefore would welcome further clarification on the statements made in your letter and whether or not they are a departure from the position set out earlier in the EU Exit process to our predecessor committee by the previous Welsh Government.

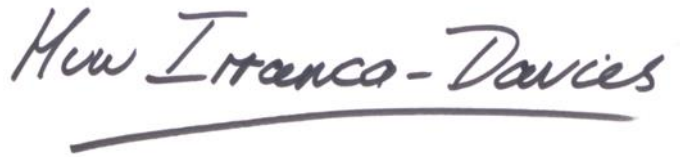
We therefore would be grateful if you would clarify the following:

- Does the Welsh Government consider that these Regulations constitute a breach of the UK's international obligations?
- Whether the Welsh Government considers these Regulations are inconsistent with international agreements and, if so, which ones?
- Could you confirm that your concerns have been raised with the UK Government? If so, could you detail the nature of those discussions?
- What consideration has been given within the Welsh Government of the implications of its support for legislation that potentially constitutes a breach of the UK's international obligations and its own Ministerial Code, which explicitly lists compliance with "international law and treaty obligations"?

I am copying this letter to the Minister for the Economy, the Counsel General and Minister for the Constitution, the Minister for Climate Change, the Deputy Minister for Mental Health and Wellbeing, and the Chair of the Climate Change, Environment and Infrastructure Committee.

I would be grateful to receive your response by 1 February 2022.

Yours sincerely,



Huw Irranca-Davies
Chair

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**The Ivory Prohibitions (Exemptions) (Process and Procedure) Regulations 2021** **The Ivory Act (Commencement No.1) Regulations 2021**
DATE	**03 February 2022**
BY	**Lesley Griffiths, Minister for Rural Affairs and North Wales, and Trefnydd**

Members of the Senedd will wish to be aware I am giving consent to the Secretary of State for Environment, Food and Rural Affairs to lay The Ivory Prohibitions (Exemption) (Process and Procedure) Regulations on 3 February 2022. These regulations will come into force on 24 February 2022.

Agreement was sought by Victoria Prentis MP, Minister for Farming, Fisheries and Food to make these regulations, which will apply to the United Kingdom.

The Ivory Prohibitions (Exemptions) (Process and Procedure) Regulation 2021 make detailed provision for the operation of the exemptions processes under the Act. This will apply to the UK as a whole and will allow persons to register items containing ivory for exemption from the eventual prohibition of ivory sales, subject to specific criteria.

The Ivory Act (Commencement No.1) Regulations 2021 also accompanies the Prohibitions Regulations. These regulations will bring into force the specified provisions of the Ivory Act (2018), which deal with registration and exemption on 1 February 2022 (for regulation making powers) and 24 February 2022 for all remaining purposes.

The Schedule of the Prohibitions Regulations includes a list of Prescribed Institutions, which are institutions (chiefly museums) authorised to assess items for which applications for exemption certificates from sale prohibition under the Act have been made.

The Prohibitions Regulations will not commence the prohibition of ivory sales in the UK. The prohibition of ivory sales in the UK is due to commence in spring 2022.

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

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Legislation, Justice and Constitution Committee

Huw.Irranca-Davies@senedd.wales

28 January 2022

Dear Huw,

The Ivory Prohibitions (Exemptions) (Process and Procedure) Regulations 2021
The Ivory Act (Commencement No.1) Regulations 2021

I am writing to make you aware I am giving consent to the Secretary of State for Environment, Food and Rural Affairs to lay The Ivory Prohibitions (Exemption) (Process and Procedure) Regulations on 3 February 2022. These regulations will come into force on 24 February 2022.

Agreement was sought by Victoria Prentis MP, Minister for Farming, Fisheries and Food to make these regulations, which will apply to the United Kingdom.

The Ivory Prohibitions (Exemptions) (Process and Procedure) Regulations 2021 makes detailed provision for the operation of the exemptions processes under the Ivory Act (2018). This will apply to the UK as a whole and will allow persons to register items containing ivory for exemption from the eventual prohibition of ivory sales, subject to specific criteria.

The Ivory Act (Commencement No.1) Regulations 2021 accompanies the Prohibitions Regulations. These regulations will bring into force the specified provisions of the Ivory Act (2018), which deal with registration and exemption on 1 February 2022 (for regulation making powers) and 24 February 2022 for all remaining purposes.

It is normally the policy of the Welsh Government to legislate for Wales in matters of devolved competence. However, as the Welsh Government's position on ivory trade aligns with that of DEFRA and the other UK administrations, I am giving my consent to the proposed legislation which I believe will bring consistency to the introduction of an ivory sales prohibition in the UK.

Without such consent, Wales would be left out of alignment with other UK administrations in its approach to ivory sale prohibition. This could reduce the positive impacts of banning ivory sales across the UK and maintain demand for products containing ivory, thus contributing to the persisting threat to global elephant populations, which are illegally poached for ivory.

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The Prohibitions Regulations will not commence the prohibition of ivory sales in the UK. The prohibition of ivory sales in the UK is due to commence in spring 2022.

I am copying this letter to the Climate Change, Environment, and Infrastructure Committee, and the Economy, Trade, and Rural Affairs Committee for their information.

Regards,

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

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

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

4 February 2022

Dear Huw,

I am writing to inform the Committee of the intention to consent to the UK Government making and laying The Phytosanitary Conditions (Amendment) Regulations 2022 by 8 February 2022.

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

The Regulations will be made in exercise of the powers conferred by Articles 5(3), 30(1), 32(3), 37(5), 41(3), 42(3), 54(3), 72(3) and 105(6) of Regulation (EU) 2016/2031 of the European Parliament and of the Council on protective measures against pests of plants.

The amendments will include pest measures requiring urgent and non-urgent implementation, prevent the introduction of plant pests, update import and movement requirements of specific pests and deregulate pests which no longer pose a threat to Great Britain (GB) biosecurity. As a result these Regulations will protect biosecurity and protect trade between GB and relevant third countries and Russia by introducing further protective measures for at-risk plant goods. The Statutory Instrument (SI) is subject to the negative procedure and is due to be laid before Parliament on 8 February 2022 with a commencement date of 2 March 2022.

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

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

Yours sincerely

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE **Public Service Pensions and Judicial Offices Bill**

DATE **28 January 2022**

BY **Hannah Blythyn MS, Deputy Minister for Social Partnership**

This written statement is laid under Standing Order 30 – Notification in relation to UK Parliament Bills. It relates to specific provisions in the Public Service Pensions and Judicial Offices Bill (the Bill), which will modify the Welsh Ministers' functions. These provisions do not require a Legislative Consent Motion under Standing Order 29, as the Senedd does not have legislative competence in respect of them. Occupational pensions are a reserved matter. However, the Welsh Ministers are the responsible authority for firefighters' pensions in Wales and have executive functions in that context.

The Bill was introduced in the House of Lords on 19 July 2021. On 12 August and 6 December, I laid written statements in accordance with Standing Order 30. Those written statements set out provisions in the Bill and subsequent amendments to the Bill, which amend or affect the executive functions of the Welsh Ministers in respect of firefighters' pension schemes in Wales. The written statements can be found at:

https://gov.wales/written-statement-laid-under-standing-order-30c-34

https://gov.wales/written-statement-public-service-pensions-and-judicial-offices-bill

This written statement should be read in the same context as my first statement, which set out the purpose and aims of the Bill in detail. This written statement updates Members of the Senedd on further UK Government amendments to the Bill, published on 7 December 2021, which can be found at:

https://publications.parliament.uk/pa/bills/cbill/58-02/0211/210211.pdf

The amendments were tabled on 6 January and 20 January for consideration at Committee Stage in the House of Commons.

All of the amendments set out below, expand the Welsh Ministers' functions as regards firefighters' pensions; they do not restrict or withdraw them. Other amendments tabled at this stage have no effect on the Welsh Ministers' functions in this area.

Relevant amendments to the provisions in the Bill

Clause 22 (Further powers to make provision about special cases) *(Clause 20 in the Bill as introduced)*

Clause 22 would provide the Welsh Ministers with powers to make regulations in respect of a Chapter 1 scheme which makes further provision about a number of areas where steps may need to be taken by schemes to ensure that schemes operate as intended. This is in order to ensure that members receive the correct legacy or new scheme benefits in relation to their remediable service.

The amendments add new paragraphs to provide the Welsh Ministers with the power to ensure appropriate provision can be made about the benefits payable to surviving children of a deceased member who do not live in the same household as a surviving adult.

Clause 86 (Amendments relating to the employer cost cap)
(Clause 80 in the Bill as introduced)

Clause 86 of the Bill as introduced, which amends the existing mechanism for controlling the cost of pension schemes to employers (the "employer cost cap") would be replaced by two new clauses.

The first new clause (Amendments relating to employer cost cap) contains a number of additional changes to the cost cap regime for public service pension schemes, including in particular provision for the economic check that is to be introduced for the 2020 and subsequent valuations.

The second new Clause (Operation of employer cost cap in relation to 2016/17 valuation) reproduces, with technical changes, the effect of subsections (4), (8) and (9) of clause 86 as it currently stands in the Bill.

Reasons for making these provisions

The Bill seeks to remedy age discrimination across public sector pension schemes by placing all eligible members back into the position that they would have been in if the discrimination had never occurred, for a "remedy period" from April 2015 to March 2022. After that period, all members will join the 2015 Scheme without exception. The new clauses provide further clarity and detail to ensure benefits payable for surviving children of members work as they should.

The Bill also waives the requirement to act on any 2016 pension valuation cost cap ceiling breaches which occur as a result of remedy costs being built into the valuation process. Without that, the valuation would probably otherwise lead to very significant increases in member contributions, or reductions in scheme benefits. The new clauses now tabled make technical changes to those provisions.

I consider that it is appropriate for these amended provisions to apply in relation to Wales and for them to be included in this Bill.

Agenda Item 9

Document is Restricted

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

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru
Ty Hywel
Cardiff Bay
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CF99 1NA

18 January 2022

Dear Huw

Tertiary Education and Research (Wales) Bill

Thank you for your letter of 10 December following my attendance at Committee to give evidence on the Tertiary Education and Research (Wales) Bill ('the Bill').

Your letter raised a number of questions, to which I have responded in Annex A to this letter.

This letter has been copied to the Children, Young People and Education Committee.

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

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Annex A

1. Can you confirm what assessments have been undertaken in relation to the human rights impact of the Bill and what the outcome of these assessments has been? In particular, are you satisfied that the rights of entry and inspection provided for in sections 62 and 72 of the Bill are compliant with the Human Rights Act 1998?

1.1 The Welsh Government is satisfied that the provisions of the Bill are compatible with Convention rights

2. The Statement of Policy Intent for this Bill sets out a list of 20 regulation-making powers largely inherited from existing legislation, referred to as the inherited powers. Are each of the inherited powers subject to the same Senedd scrutiny procedure as they are in the existing legislation? Can you also confirm that where powers in the Bill previously existed in a different form, for example previously a regulation making power but now a power to make directions, the same or a higher procedure is applied? It would be helpful to have a comprehensive list setting out the position in relation to each of the powers?

2.1 A table is provided at Annex B which sets out the powers inherited from existing legislation, their previous form and procedure and their form and procedure in the Bill.

3. Why isn't the Welsh Ministers' power to issue directions under paragraph 1 of Schedule 15 dealt with in the Statement of Policy Intent?

3.1 This oversight has been addressed and the additional text to be added to the Statement of Policy Intent is included with this letter at Annex C. The revised Statement of Policy Intent has also been shared with the Children, Young People and Education Committee.

4. Section 11 of the Bill requires the Welsh Ministers to publish a statement of strategic priorities in relation to tertiary education and research and innovation. Can you clarify why there is no duty on the face of the Bill on the Welsh Ministers to consult any other party when preparing the statement?

4.1 The statement of priorities, in conjunction with the Commission's strategic duties, will outline the core matters the Commission must consider and take into account when exercising its functions. The statement will, in effect, be a "term of government remit letter" and is designed with a longer term planning approach in mind. In practice, it is expected to contain a small number of strategic priorities and high-level success indicators.

4.2 Whilst there is no statutory requirement to consult on what will be included in the statement, I recognise it would be counter-productive to move away from current practice whereby arms-length bodies in general, and HEFCW in particular, are involved in dialogue with their partnership teams within government when matters are considered for inclusion in their remit.

4.3 When the Commission is fully operational, it is expected that it will provide evidence about the strengths and weaknesses of the PCET&R system to Welsh Ministers that will assist in making their statement of priorities most meaningful.

4.4 Once the statement is published, the Commission has a 6 month period for the preparation of its strategic plan, which will be subject to consultation before being considered by Welsh Ministers.

5. Section 13(4) of the Bill requires the Commission to publish its approved strategic plan but provides no timescale for doing so. Why is this?

5.1 If necessary Welsh Ministers could issue guidance (under s18) concerning the expectations regarding the strategic plan which aren't included on the face of the Bill. Alternatively, these expectations could be captured in the Commission's framework documents to ensure there is total clarity concerning matters such as these.

5.2 By way of background, HEFCW's framework documents only specify a timeframe regarding submission of the business plan they draw up in response to the remit letter. Although they are required to make their other documents available to the public, no timescale is specified. This current approach has not been problematic, and given stakeholders' views that being over prescriptive on the Bill regarding operational processes is not beneficial, I believe the approach we have adopted is appropriate. This will allow flexible and appropriate mechanisms to be developed.

6. Section 22 of the Bill introduces Schedule 2, which provides the Welsh Ministers with the power to make schemes to transfer staff, property, rights and liabilities from HEFCW and the Welsh Ministers to the Commission. There is no provision for the Senedd to scrutinise this scheme. Can you explain why this is the case?

6.1 Paragraph 1 of Schedule 2 to the Bill enables the Welsh Ministers to make transfer schemes which provide for the transfer of staff from HEFCW and the Welsh Government to the Commission and for the transfer of property, rights and liabilities of HEFCW and the Welsh Ministers to the Commission.

6.2 Procedurally, the schemes do not need to be made by way of order, paragraph 3 of Schedule 2 provides for the Welsh Ministers to lay a copy of a transfer scheme made under Schedule 2 before the Senedd. The transfer of staff and property from WG to the Commission is, in my view, an administrative issue for the Welsh Government, and, although the scheme(s) would also provide for the transfer of staff and property from HEFCW to the Commission, there has to be legal certainty regarding the transfers, hence the obligation on the Welsh Ministers being limited to laying Schedule 2 transfer Schemes before the Senedd.

6.3 Similar provisions in respect of transfer schemes are contained in the Qualifications (Wales) Act 2015 (see section 2 and Schedule 2). Under the 2015 Act, the Welsh Ministers are able to make schemes providing for the transfer of Welsh Government staff and Welsh Minister's property, rights and liabilities to QW. In terms of procedure, the WMs are only obliged to lay a copy of such a transfer scheme before the Senedd (the schemes do not need to be set out in an SI).

6.4 As for Parliamentary Acts, section 115 and Schedule 10 to the Higher Education and Research Act 2017 are also similar to the Bill. Under Schedule 10 of the 2017 Act, the Secretary of State can make property or staff transfer schemes in connection with the establishment of the Office for Students or UK Research Institute and (amongst other things) HEFCW ceasing to exist. There are no procedural requirements relating to these Schemes (they do not need to be made by / contained within an SI) and there is no duty imposed on the Secretary of State to lay the schemes before Parliament. The Energy Act 2016 took a similar approach with transfer of staff from the civil service to the Oil and Gas Authority (OGA) where the Secretary of State scheme did not need to be made by / contained within an SI and was not subject to any Parliamentary procedure.

7. Section 23 provides for various regulation-making powers in relation to the registration of providers by the Commission. The Statement of Policy Intent explains that:

"the funding structure (and hence appropriate regulation) of tertiary education (particularly higher education) across the UK has changed frequently in recent years, with changes in other UK administrations often having an effect on funding policy in Wales. These changes have occurred at a rate faster than is appropriate or practicable for the Welsh Government to respond with primary legislation regarding the details of regulation in each and every instance. The Bill enables details of the regulatory framework to be changed in response to any future changes in the structure or funding of the tertiary sector in Wales."

Can you provide further information on this and confirm whether discussions are taking place with the other UK administrations to ensure that the law is able to keep pace with the changes?

7.1 A major change to the Welsh Government's tuition fee and student support regime took place in the 2012/13 academic year following the Browne Review of Student Finance in England. The changes made at that time had significant consequences for the funding and regulatory oversight of higher education in Wales and resulted in the need for new primary legislation in the form of the Higher Education (Wales) Act 2015. The 2015 Act provide the statutory framework to ensure that HEFCW could continue to regulate Welsh higher education providers whose relevant HE courses are subject to fee limits in light of the shift in funding from institutional grants towards an increased reliance on tuition fee income.

7.2 The Bill seeks to establish a future-proofed regulatory framework, to enable the Commission to maintain regulatory oversight of tertiary education providers, which can be adapted in response to future changes to funding or student support arrangements.

7.3 The Bill creates a regulatory system fit for the future. It allows for secondary legislation to set out different categories of registration and to link these categories to distinct regulatory requirements and access to funding. This will enable the regulatory system to evolve in response to any future changes in the size, shape and funding of tertiary education in Wales, which may in turn be influenced by changes in such funding elsewhere in the UK.

7.4 The UK Government has recently proposed the introduction of a "Lifelong Loan Entitlement" which could radically change the financing of further and higher education provision in future years. Much of the detail of the UK Government's proposals is not currently known but, if implemented, may have implications for future Welsh Government policy in this area. I have recently met with the Minister of State for Higher and Further Education and understand that the UK Government intends to consult on the Lifelong Loan Entitlement.

7.5 My officials are continuing to engage with their counterparts in the UK Government's Department for Education on a range of matters arising from the Skills and Post-16 Education Bill, including the development of the proposed Lifelong Loan Entitlement.

7.6 We will work closely with stakeholders in the further education and training sectors to move towards a regulatory settlement which is fit for the long-term and brings greater parity between the FE and HE sectors.

8. There are several sections in the Bill where "examples" are given for matters that regulations may cover, for example, sections 25(4) and section 59(2). Does the Minister consider that this may lead some readers to think that the regulations in question can only cover the matters listed?

8.1 Section 25(4) sets out examples of what regulations that are made under section 25(3) may do. This includes conferring functions on the Commission in connection with the operation of further initial conditions provided for in the regulations, and examples of what further initial conditions of registration may relate to.

8.2 In accordance with the current practice for drafting laws for Wales[1], it is made clear that the list is not exhaustive by the use of the words "may (among other things)". This is a recommended approach to clearly conveying in primary legislation the relationship between the regulation-making power and the non-exhaustive list of examples of what it may be used for. The specific wording used makes clear that section 25(4) doesn't qualify or limit the scope of section 25(3).

8.3 The second example cited in the question, section 59(2), operates in a similar way; the words "may include" serve to clarify that the examples listed in the section do not limit the scope of the regulation-making power in section 59(1). Again, the wording is used in accordance with the drafting recommendations and practice set out in "Writing Laws for Wales: a Guide to Legislative Drafting".

9. Section 30(2)(b) provides for the Welsh Ministers to make regulations to specify what constitutes a "fee limit category". This power is subject to the affirmative procedure, but the three other regulation-making powers in section 30 which also deal with fee limits are subject to the negative procedure. Can you explain why all of the powers in this section are not subject to the affirmative procedure when they deal with the same subject matter?

9.1 The regulation making power under section 30(2)(b) enables the Welsh Ministers to specify categories of registration in relation to which the Commission must impose an ongoing registration condition concerning fee limits.

[1] paragraphs 5.6(8) and (9) of "Writing Laws for Wales: a Guide to Legislative Drafting" published in 2019

9.2 Our intention is for this registration condition to apply in respect of the proposed "core" higher education registration category. It is not envisaged that these arrangements would be subject to frequent change. However, if in future arrangements for funding and student support were to change (see answer to question 7), the Bill enables the Welsh Ministers to prescribe other categories of registration to which a fee limit condition must apply. As compliance with fee limits is a significant matter for tertiary education providers and an important feature of the legislative scheme it is appropriate that the affirmative procedure is applied to this regulation making power, and this is consistent with use of the affirmative procedure for other powers regarding registration categories and conditions.

9.3 In contrast the other regulation making powers under section 30 enable the Welsh Ministers to specify qualifying courses and persons for the purpose of regulating fee limits (sections 30(4) and 30(8)(b)) as well as to set out when fees payable to a provider in respect of a course it provides on behalf of a registered provider are to be treated as payable to the registered provider for the purpose of fee limits (section 30(10)). These matters may need to change over time to ensure synergy between the courses and persons to whom the fee limit applies and the Welsh Government's student support regulations. The Welsh Government would consult on proposed changes ahead of making regulations under these powers. It is my view that that the negative procedure is appropriate for these regulation making powers, and this is also consistent with the equivalent powers held under section 5 of the Higher Education (Wales) Act 2015.

10. With regard to the intervention powers of the Welsh Ministers under the Bill, section 68 gives the Welsh Ministers the power to give a direction directly to a provider's governing body. The Statement of Policy Intent confirms that this is intended to be used when the Commission has exhausted its intervention functions or when the matter is so serious that urgent action is required. Why are these conditions not reflected on the face of the Bill?

10.1 Whilst it is intended that these intervention powers will be used in only the most serious cases and will operate alongside the intervention powers available to the Commission under the Bill, express conditions relating to these matters have not been included on the face of the Bill for the following reasons:

- the way in which the Welsh Ministers intervention functions will operate alongside the Commission's powers of intervention, and decisions around the urgency of intervention are operational matters that would need to reflect the specific circumstances of each individual case. It would be more appropriate to include operational detail such as this within the Welsh Ministers published statement on how these intervention powers will be exercised (section 70 of the Bill). This would be a continuation of current practice;
- section 67 of the Bill already sets out the specific grounds that must be satisfied in order for the Welsh Ministers to intervene under these powers. These broadly restate the existing grounds for intervention that are prescribed under section 57 of the Further and Higher Education Act 1992;
- the nature of the grounds for intervention set out under section 67 of the Bill may give rise to circumstances where the issue requiring intervention is not related to the Commission's registration or funding functions, for example breaches of statutory duties by a further education institution. In such cases, the

Commission's intervention functions may not be appropriate or able to address the identified issue;

- it is likely that many further education institutions will not be registered providers in the first instance, therefore the Commission's regulatory relationship with these providers will be through terms and conditions of funding; and.
- it would be difficult to define what constitutes circumstances where more urgent action is needed.

10.2 In light of the above, there could be potential risks arising from the inclusion of conditions on the face of the Bill that relate to the Commission's intervention functions or the requirement of urgency of use for these powers. Should such conditions be included, the Welsh Ministers would have to demonstrate that all of the Commission's intervention powers had been exhausted (or would not resolve the issue in question) or that there was sufficient urgency before they are able to intervene under these powers. This could have the unintended effect of preventing the Welsh Ministers from taking action under these powers or delay such action in circumstances where it may be necessary to protect further education provision in Wales.

10.3 It is also important to note that the Bill makes provision for the Commission to play a role in the exercise of these intervention functions which reflect its regulatory role in respect of further education institutions in Wales. The Bill also requires the Welsh Ministers to have regard to the Commission's view in deciding whether to intervene using these powers. Advice from the Commission will help the Welsh Ministers take all relevant factors into account when deciding whether or not to intervene in the specific circumstances of each case. It is anticipated that this advice will include the Commission's view on the most appropriate form of intervention to address the issue identified.

11. In relation to section 77(4) of the Bill, the Statement of Policy Intent indicates that any regulations made under this provision would be "broadly similar" to the current arrangements in the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015. Can you confirm what is meant by the phrase "broadly similar"?

11.1 The regulation making power under sections 77(3) and 77(4) of the Bill concerns procedural arrangements to apply in respect of any reviews of the Commission's decisions in relation to the register and its regulatory oversight of registered tertiary education providers. This is similar to a power under sections 44(3) and 44(4) of the Higher Education (Wales) Act 2015. The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015 make provision, amongst other matters, in respect of procedural arrangements for the issue and review of notices and directions under Part 6 of the 2015 Act, including section 44.

11.2 We have not as yet identified any reason for amending the policy on decision reviews as set out in regulations 7 to 10 of the 2015 regulations. These set out the grounds for review of notices and directions, the procedure to apply for reviews, the procedure for the conduct of reviews, and post-review procedure. However, this will be reviewed in full upon drafting of the regulations and with consideration given to any feedback provided by stakeholders on appropriate provisions for review procedure.

11.3 In line with standard Welsh Government practice we the regulations to be made under section 77 would be issued for formal consultation.

12. Section 86(6) of the Bill contains regulation-making powers which the Statement of Policy Intent says are not currently intended to be used. Why are they included in this Bill? Would they not be better addressed in the future if and when the need arises?

12.1 Section 86(1) is designed to allow specified courses of higher education to be funded by the Commission outside of courses provided by registered providers in a category specified for the purposes of section 85. The power in section 86 is intended to ensure that gaps in higher education provision could be addressed should it not be possible or practicable for such courses to be provided by a registered provider in the "core" category.

12.2 The Commission's main higher education function power (section 85) is intended to apply to higher education providers registered in the proposed "core" category and regulations would provide for that. However, there could be providers in Wales, who for example, elect to register in the "alternative" category or are not registered at all who would not be eligible for higher education funding by the Commission under its main higher education funding power, but may be able to provide 'specialist' courses identified by the Welsh Ministers as being needed for Wales. There may also, in very rare instances, be courses at providers outside of Wales which the Welsh Ministers or Commission identify as requiring funding so as to provide benefits to Wales and people ordinarily resident in Wales.

12.3 Whilst no such instances have been identified as yet, we believe it would be prudent to retain this power in order to provide sufficient flexibility to the Commission in the future and ensure that funded higher education can meet the needs of Wales.

13. In relation to section 91, the Statement of Policy Intent says that "The use of secondary legislation to determine the scope of relevant education and eligibility for the purpose of the funding duty is intended to enable a progressive expansion of the funded adult further education and training offer over time to address evolving patterns of need."
Similarly, the Statement of Policy Intent uses wording such as "not current government policy" and "should the need arise" in the context of regulation making powers under sections 95 and 101.
Can you expand on this and explain why you consider it to be appropriate to put these powers in place now, rather than when the need actually arises?

13.1 Section 91(3) requires the Welsh Ministers to specify relevant further education and training for the purposes of the Commission's duty to secure proper facilities for persons aged 19 and over.

13.2 We presently intend to introduce regulations under this section upon, or shortly following, commencement of these provisions, in line with this duty. It is my intention that these regulations will set out the first iteration of requirements for the provision of further education and training made available for adults.

13.3 Full details of the policy that will underpin these regulations is being developed following publication in December of a report for the Welsh Government by the Wales

Centre for Publication Policy entitled ‘Supporting the Welsh Lifelong Learning System’, which set out recommendations in this area. This report demonstrates the vital importance of expanding opportunities for lifelong learning in Wales, which we hope to achieve through this legislation.

13.4 Regulations under sections 95 and 101 concern the powers to require providers to be registered to access further education and apprenticeships funding. As noted in my response to question 7, these powers are intended to ensure the regulatory system can evolve in response to future changes in the size, shape and funding of tertiary education in Wales.

14. Part 3 of the Bill deals with the funding of tertiary education and research. Virtually all of the powers in this Part for the Welsh Ministers to make regulations are subject to the affirmative procedure. However, section 106 of the Bill enables the Welsh Ministers to issue directions to the Commission in the event that funds are being mismanaged by a provider and these directions are subject to no procedure other than being laid before the Senedd. These are broadly modelled on the existing section 57 of the Further and Higher Education Act 1992 relating to HEFCW, where such directions can only be given by order of the Welsh Ministers which is subject to the negative procedure. Can you confirm why such directions are not subject to a scrutiny procedure before the Senedd?

14.1 The financial support direction power in section 106 of the Bill is similar to existing order-making powers in section 57 of the Further and Higher Education Act 1992. Section 89 of the 1992 Act provides that orders made under section 57 do not need to be made by statutory instrument, and consequently are not subject to any Senedd procedure. The provisions as reflected in section 106 of the Bill have been considered anew with consideration given to how these powers may need to be used.

14.2 One of the key benefits of a direction making power is to enable the Welsh Ministers to respond to a situation and impose requirements quickly in order to ensure public money is subject to appropriate controls. As such an approach has been developed for the Bill based on three steps:

- consulting the Commission before issuing a direction,
- being required to publish the direction when given and
- providing a report to the Senedd after issuing a direction.

14.3 Alongside this, the Welsh Ministers are required to keep the direction under review.

14.4 I consider this approach enables an appropriate response to matters which may require a timely response. The three step procedural requirements are intended to address possible concerns about scrutiny and transparency of the directions.

14.5 I attended the Children, Young People and Education Committee earlier this month where the arrangements in respect of issuing general directions to the Commission (section 19 of the Bill) was raised. At that meeting I confirmed I would consider whether there were alternative approaches which could allow for the flexibility whilst addressing the concerns of the Committee. During these considerations I will also reflect on the arrangements for the financial support directions.

15. The Statement of Policy Intent notes that a number of the powers in Part 4 "build upon, or re-enact, existing regulation making powers in the Apprenticeship, Skills, Children and Learning Act 2009". Can you confirm that, where this is the case, the scrutiny procedure which was applicable under the 2009 Act remains applicable under the Bill?

15.1 I can confirm that, where a power in Part 4 is derived from a regulation making power in the Apprenticeship, Skills, Children and Learning Act 2009, the scrutiny procedure in the Bill is at least equivalent to the procedure which was applicable under the 2009 Act.

16. Section 130(6) imposes a duty on the Welsh Ministers to publish guidance regarding factors they will take into account when deciding whether to approve a body or individual to receive application to acceptance information and to carry out and publish research in relation to such information. There is no requirement for this guidance to be laid before the Senedd. Can you explain why this is the case?

16.1 This guidance is intended to cover procedural and technical matters to support the implementation of these provisions and as such I do not consider the application of a Senedd procedure or a requirement to lay the guidance before the Senedd to be necessary.

17. Section 135 preserves a wide-ranging power to dissolve higher education corporations with no justification for the retention of this power other than that it is a "desirable position". Do you consider this to be sufficient justification and can you expand on the reasons for the retention of this power?

17.1 The powers that are retained in the Bill in respect of the dissolution of HECs, are, apart from some technical modifications, the same powers that exist at present. These are, in essence, backstop powers and their use would be subject to the principles of public law.

17.2 I recognise the strength of stakeholder feeling in respect of these powers and as such am actively exploring an amendment to these provisions and have asked my officials to consider the feedback and comments made by stakeholders in respect of these provisions as part of developing that amendment. I would also welcome the views and recommendations of the Committee.

17.3 As we continue to consider this matter I am happy write to Committee with any further updates.

Annex B

Tertiary Education and Research (Wales) Bill				Current Legislation			
Section	**Power**	**Form**	**Procedure**	**Derived from**	**Power**	**Form**	**Procedure**
19(1)	Direction	Published	Report to Senedd Cymru that a direction has been given and lay a copy of the direction before the Senedd. The direction must be kept under review	Section 81(2) of the Further and Higher Education Act 1992	Direction	SI	Negative
30(4)	Regulations	SI	Affirmative	Section 5(2)(b) of the Higher Education (Wales) Act 2015	Regulations	SI	Negative
30(8)(b)	Regulations	SI	Negative	Section 5(5)(b) of the Higher Education (Wales) Act 2015	Regulations	SI	Negative
30(10)	Regulations	SI	Negative	Section 5(9) of the Higher Education (Wales) Act 2015	Regulations	SI	Negative
44(6)	Regulations	SI	Affirmative	Section 5(3) of the Higher Education (Wales) Act 2015	Regulations	SI	The first set of regulations to be made under section 5(3) are subject to the affirmative procedure and thereafter the negative procedure.

Tertiary Education and Research (Wales) Bill				Current Legislation			
Section	**Power**	**Form**	**Procedure**	**Derived from**	**Power**	**Form**	**Procedure**
52(8)	Regulations	SI	Negative	Section 17(4)(a) of the Higher Education (Wales) Act 2015	Regulations	SI	Negative
55(1)(f)	Regulations	SI	Negative	Section 75(1)(e) of the Learning and Skills Act 2000	Regulations	SI	No procedure
55(4)	Regulations	SI	Negative	Section 77(2) and 77(4) of the Learning and Skills Act 2000	Regulations	SI	No procedure
59(1)	Regulations	SI	Negative	Section 76(3) of the Learning and Skills Act 2000	Regulations	SI	No procedure
61(9)	Regulations	SI	Negative	Section 83(7) and (9) of the Learning and Skills Act 2000	Regulations	SI	No procedure
77(3)	Regulations	SI	Negative	Section 44(3) of the Higher Education (Wales) Act 2015	Regulations	SI	Negative
81(4)	Regulations	SI	Affirmative	Section 3(4) of the Higher Education (Wales) Act 2015	Regulations	SI	Affirmative
82 (see (d) in the definition of “fees”)	Regulations	SI	Negative	Section 57(1) of the Higher Education (Wales) Act 2015	Regulations	SI	Negative

Tertiary Education and Research (Wales) Bill				Current Legislation			
Section	**Power**	**Form**	**Procedure**	**Derived from**	**Power**	**Form**	**Procedure**
				(see (d) in the definition of "fees")			
106(1)	Direction	Published	Report to Senedd Cymru that a direction has been given and lay a copy of the direction before the Senedd. The direction must be kept under review.	Section 81(3) of the Further and Higher Education Act 1992	Direction	SI	Negative

General directions to the Commission

Section	Form	Provision	Procedure
Schedule 1 paragraph 15(1)(a)	Direction	The Commission must prepare a statement of accounts in respect of each financial year in accordance with directions given by the Welsh Ministers	No procedure

Description of powers

Paragraph 15(1)(a) of Schedule 1 to the Bill enables the Welsh Ministers to issue a direction to the Commission about the preparation of a statement of accounts. Each financial year the Commission must prepare accounts in accordance with the accounts direction issued by the Welsh Ministers.

By the end of August following the financial year to which the accounts relate, the Commission must submit to the Auditor General for Wales (AGW) the signed accounts together with a letter of representation. The Commission must forward two copies of the signed accounts to the Welsh Government.

Policy purpose and intent

The Welsh Ministers are currently able to give directions to HEFCW in relation to the preparation of their accounts and it is intended to issue equivalent directions to the Commission once established.

The substance of the direction is set out in paragraph 15(2)(b) of Schedule 1 and includes:

- the information to be contained in the statement;
- the manner in which the information is to be presented;
- the methods and principles according to which the statement is to be prepared; and
- any additional information that is to accompany the statement.

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

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Jeremy Miles MS
Minister for Education and Welsh Language

10 December 2021

Dear Jeremy

Tertiary Education and Research (Wales) Bill: Further questions

Thank you for joining our meeting on Monday 6 December to give evidence on the Tertiary Education and Research (Wales) Bill.

As mentioned during the session, we have a number of additional questions in relation to the Bill, which are set out in the Annex.

We would be grateful to receive your response by 19 January 2022.

I am copying this letter to Jayne Bryant, Chair of the Children, Young People and Education Committee.

Yours sincerely

Huw Irranca-Davies

Huw Irranca-Davies
Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.

ANNEX

General

1. Can you confirm what assessments have been undertaken in relation to the human rights impact of the Bill and what the outcome of these assessments has been? In particular, are you satisfied that the rights of entry and inspection provided for in sections 62 and 72 of the Bill are compliant with the *Human Rights Act 1998*?

2. The Statement of Policy Intent for this Bill sets out a list of 20 regulation-making powers largely inherited from existing legislation, referred to as the inherited powers. Are each of the inherited powers subject to the same Senedd scrutiny procedure as they are in the existing legislation? Can you also confirm that where powers in the Bill previously existed in a different form, for example previously a regulation making power but now a power to make directions, the same or a higher procedure is applied? It would be helpful to have a comprehensive list setting out the position in relation to each of the powers.

3. Why isn't the Welsh Ministers' power to issue directions under paragraph 1 of Schedule 15 dealt with in the Statement of Policy Intent?

Part 1

4. Section 11 of the Bill requires the Welsh Ministers to publish a statement of strategic priorities in relation to tertiary education and research and innovation. Can you clarify why there is no duty on the face of the Bill on the Welsh Ministers to consult any other party when preparing the statement?

5. Section 13(4) of the Bill requires the Commission to publish its approved strategic plan but provides no timescale for doing so. Why is this?

6. Section 22 of the Bill introduces Schedule 2, which provides the Welsh Ministers with the power to make schemes to transfer staff, property, rights and liabilities from HEFCW and the Welsh Ministers to the Commission. There is no provision for the Senedd to scrutinise this scheme. Can you explain why this is the case?

Part 2

7. Section 23 provides for various regulation-making powers in relation to the registration of providers by the Commission. The Statement of Policy Intent explains that:

"the funding structure (and hence appropriate regulation) of tertiary education (particularly higher education) across the UK has changed frequently in recent years, with changes in other UK administrations often having an effect on funding policy in Wales. These changes have occurred at a rate faster than is appropriate or practicable for the Welsh Government to respond with primary legislation regarding the details of regulation in each and every instance. The Bill enables details of the regulatory framework to be changed in response to any future changes in the structure or funding of the tertiary sector in Wales."

Can you provide further information on this and confirm whether discussions are taking place with the other UK administrations to ensure that the law is able to keep pace with the changes?

8. There are several sections in the Bill where "examples" are given for matters that regulations may cover, for example, sections 25(4) and section 59(2). Does the Minister consider that this may lead some readers to think that the regulations in question can only cover the matters listed?

9. Section 30(2)(b) provides for the Welsh Ministers to make regulations to specify what constitutes a "fee limit category". This power is subject to the affirmative procedure, but the three other regulation-making powers in section 30 which also deal with fee limits are subject to the negative procedure. Can you explain why all of the powers in this section are not subject to the affirmative procedure when they deal with the same subject matter?

10. With regard to the intervention powers of the Welsh Ministers under the Bill, section 68 gives the Welsh Ministers the power to give a direction directly to a provider's governing body. The Statement of Policy Intent confirms that this is intended to be used when the Commission has exhausted its intervention functions or when the matter is so serious that urgent action is required. Why are these conditions not reflected on the face of the Bill?

11. In relation to section 77(4) of the Bill, the Statement of Policy Intent indicates that any regulations made under this provision would be "broadly similar" to the current arrangements in the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015. Can you confirm what is meant by the phrase "broadly similar"?

Part 3

12. Section 86(6) of the Bill contains regulation-making powers which the Statement of Policy Intent says are not currently intended to be used. Why are they included in this Bill? Would they not be better addressed in the future if and when the need arises?

13. In relation to section 91, the Statement of Policy Intent says that "The use of secondary legislation to determine the scope of relevant education and eligibility for the purpose of the

funding duty is intended to enable a progressive expansion of the funded adult further education and training offer over time to address evolving patterns of need." Similarly, the Statement of Policy Intent uses wording such as "not current government policy" and "should the need arise" in the context of regulation making powers under sections 95 and 101. Can you expand on this and explain why you consider it to be appropriate to put these powers in place now, rather than when the need actually arises?

14. Part 3 of the Bill deals with the funding of tertiary education and research. Virtually all of the powers in this Part for the Welsh Ministers to make regulations are subject to the affirmative procedure. However, section 106 of the Bill enables the Welsh Ministers to issue directions to the Commission in the event that funds are being mismanaged by a provider and these directions are subject to no procedure other than being laid before the Senedd. These are broadly modelled on the existing section 57 of the *Further and Higher Education Act 1992* relating to HEFCW, where such directions can only be given by order of the Welsh Ministers which is subject to the negative procedure. Can you confirm why such directions are not subject to a scrutiny procedure before the Senedd?

Part 4

15. The Statement of Policy Intent notes that a number of the powers in Part 4 "build upon, or re-enact, existing regulation making powers in the *Apprenticeship, Skills, Children and Learning Act 2009*". Can you confirm that, where this is the case, the scrutiny procedure which was applicable under the 2009 Act remains applicable under the Bill?

Part 5

16. Section 130(6) imposes a duty on the Welsh Ministers to publish guidance regarding factors they will take into account when deciding whether to approve a body or individual to receive application to acceptance information and to carry out and publish research in relation to such information. There is no requirement for this guidance to be laid before the Senedd. Can you explain why this is the case?

Part 7

17. Section 135 preserves a wide-ranging power to dissolve higher education corporations with no justification for the retention of this power other than that it is a "desirable position". Do you consider this to be sufficient justification and can you expand on the reasons for the retention of this power?

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22 December 2021

Dear Peredur,

Thank you for your letter of 26 November following my attendance at Committee to give evidence on the Tertiary Education and Research (Wales) Bill ('the Bill'). Your letter raised a number of questions and I'm pleased to set out answers and further information.

Q. Costs attributed to the new Commission - the Regulatory Impact Assessment notes that the Commission will manage a budget of around £500 million per annum. Can you provide details of what other financial risks the Welsh Government associates with the Bill, by area of cost, along with a breakdown on how each area of cost was calculated?

As implementation of the Commission gathers pace, decisions will be taken that impact on the assumptions made to estimate the overall costs of the Commission both in terms of setting up the Commission and ongoing costs. The three largest financial risks areas associated with the Bill are staffing, IT and location. These areas are subject to potential significant volatility as decisions are made. The costs are broken down as follows

	Transitional costs	Ongoing
	Total £m	
Staff Costs	0.5	13.0
IT Costs - capital	4.9	5.2
Location costs - capital	1.8	0.3

Key risks that could impact these costs are:

- COVID, which has upended assumptions in relation to the kind of office space organisations need. The decisions around location will need to take as much of the impact of COVID and wider societal changes into account or risk burdening

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the Commission with expensive and/or unsuitable office space. COVID is also driving an increased demand for both IT hardware and specialist skills increasing staffing and IT costs.

- Location, which must take into account the current location of HEFCW and Welsh Government workforce. A relocation from south east Wales (while perhaps saving money initially) could potentially impact the number of staff who transfer into the organisation, increasing staff recruitment and training costs significantly.

- IT strategy Key decisions have not yet been taken so it is likely that some initial cost assumptions may change as choices over systems and processes are finalised.

Further breakdown for ongoing staff and IT costs is covered in the following questions. In addition more details around how estimates were calculated are set out in detail in the original Regulatory Impact Assessment (RIA).

As outlined at Committee, when the RIA is revised, in line with standard procedure, after Stage 2, I will ensure that all cost estimates are reviewed against the latest implementation decisions so as to give the most up-to date estimates of cost.

There are two other broad areas of financial risk associated with the Bill that I wanted to mention, as at the present time it has not been able to quantify them. These are the costs of the new powers the Bill confers on the Commission and, if there will be additional costs to bodies in the Tertiary Education Sector as a result of the Bill or the actions of the Commission. In both cases the financial risk is that the Bill would place additional or excessive additional costs on either the Commission or providers in the sector. While it is not possible yet to quantify these risks as they will depend upon decisions taken by the Commission once it is established, we continue to monitor and engage closely with stakeholders to ensure any additional costs incurred due to the bill are absolutely necessary and kept to a minimum.

All the areas of financial risk noted above will be impacted by the decisions taken during the transition phase and I want to reiterate, as I said at Committee, that these costs will be closely managed. In terms of that ensuring that risks are both identified and managed effectively, a post compulsory education and training (PCET) programme team has been established within the Welsh Government. The programme team will manage the delivery of the Bill and oversee the necessary legislative, operational, HR etc. related activity necessary to establish the Commission. The programme team will also be the front line for managing broader risks. In addition there are a number of other controls in place to manage the risks of the project:

- Internally and in line with the requirements of Managing Welsh Public Money the programme to establish the new Commission will be reviewed monthly as part of the normal management accounting and financial management arrangements within Welsh Government. Progress against plan is then considered within the Skills, Higher Education and Lifelong Learning directorate and reviewed periodically by the Economy, Skills and Natural Resources' Audit and Risk Assurance Committee (ARAC) and if necessary at a higher level by the Welsh Government ARAC. This process may be the focus of subsequent review by Audit Wales and the Public Accounts Committee.

- As mentioned at Committee I have also established a Strategy and Implementation Board, which I chair and whose membership is drawn from key stakeholders from across the tertiary education sector. This Board will work

collectively, providing expert advice to inform and support the delivery of the reforms, transition and implementation of the Bill and the establishment of Commission.

Q. Staff costs are the biggest expense for the new Commission, totalling just under £13 million per annum from 2023-24. During evidence, you stated that "only £3.3 million of those costs are new; the £9.7 million balance relates to existing HEFCW and Welsh Government staffing". You agreed to provide a breakdown of the £13 million for both the Welsh Government and the Commission staff.

The high level target operating model assumes a staff maximum of 169 for the Commission, including 53 from HEFCW. The staff costs incorporate all current HEFCW staff and a count of WG staff currently working on the functions included in the Bill. It is important to note that no decisions have been made regarding staffing and roles, so these assumptions were taken to estimate costs. The figure of 169 represents the maximum staff needed to run the Commission based on current assumptions. The breakdown of the £13m staff costs is:

	Staff		Cost (£M)	No. of staff
CTER	Existing	HEFCW staff:	£3.2	53
	Existing	Welsh Government transferred in:	£6.5	110
	New	Additional staff for IT, HR and Finance:	£0.4	6
WG	New	New WG Sponsorship Team staff:	£2.9	45
		Total	**£13.0**	**214**

Q. On-going IT costs for the new Commission are in excess of £5 million per annum anticipated from 2023-34. You provided a breakdown of the estimated IT costs in four main categories: software development (£0.15 million); annual security and recertification (£0.03 million); user costs (£4.28 million); and consultancy costs (£0.69 million) (total £5.15 million). You indicated that some of the costs included in the breakdown would be incurred regardless of the reform, due to upgrading existing systems. Can you provide a breakdown of what the 'business as usual' costs would be and the additional costs of the reform; and what risks may impact these costs?

The breakdown of the ongoing 'business as usual' costs and their comparison with the 'ongoing costs' for the Commission are set out below. The establishment of the Commission offers an opportunity to ensure that the IT system in place is high performing, secure and reliable. Simply maintaining existing legacy systems incurs 'hidden opportunity costs' in terms of maintaining inefficient processes. In addition, in time, the systems will not be able to cope with the ambition of the reform and the demands that need to be placed upon them. At this stage costs have been included for upgrading and maintaining existing systems only as opposed to replacement, as it is unclear at this stage exactly when this would have to happen.

	Ongoing IT costs for CTER (£M)	Business as usual costs (£M)	Difference (£M)
IT Running Cost - development software	£0.15	-	£0.15
IT Running cost - annual security recertification	£0.03	-	£0.03

IT Running Costs - user costs	£4.28	£3.13	£1.15
IT Running costs - IT Consultants	£0.69	-	£0.69
Cost of upgrading/maintaining legacy systems	-	£0.25	-£0.25
Total	**£5.15**	**£3.38**	**£1.77**

These forecast costs are driven by assumptions based on the best estimates of need and cost for the new Commission. As noted above decisions are taken through the implementation phase, and indeed beyond, it is likely that some initial assumptions will prove to be wide of the mark. Given that IT running costs for users makes up by far the biggest amount of ongoing costs it is here that the biggest risks of a mismatch occurs. We have mitigated that risk by:

- Being prudent in our cost estimates, for example including using Welsh Government costs for hardware/software at the high end of the scale of cost.

- Testing the assumptions with members of Welsh Government digital profession.

- Including the maximum number of staff in our assumptions.

Q. Data collection - the Bill confers a series of new powers on the Commission, including introducing an improved, compliant and effective data collection, analysis and dissemination system with the aim of ensuring timely, accessible and relevant information about tertiary education in Wales is available for all who need it. You agreed to provide examples of what this data collection might entail.

There are a number of data sources in the tertiary education sector. At this stage no decisions have been made on what data the Commission will collect, and therefore no decision has been taken on additional data, if any is to be collected. However by using an example of data that is already collected by the Welsh Government we can demonstrate what data collection might entail and what improvements we hope to make. The data collection and utilisation systems will play a vital role supporting the Commission in achieving the aims of the reform. The systems will contribute to the evidence base underpinning the important decisions that the Commission will take every day.

A large set of data that the Commission may either need to collect, or have access to, is data currently collected via the Lifelong Learning Wales Record (LLWR). Operational data is collected on a monthly basis from approximately 48 providers, comprised of Further Education Colleges, Work-Based Learning providers (including apprenticeships and traineeships), and Adult Community Learning providers. The LLWR is used widely throughout Welsh Government for funding calculations and to allocate funding to the providers, analysis, and for reporting and information purposes.

LLWR is not a single system or piece of software. It is better described as a collection of ways of doing things along with the use of standard cross-functional software. It is widely recognised among those using LLWR that there are currently many challenges resulting from LLWR being a legacy environment which has not been modernised for many years. For example data is transferred from each provider to the Welsh Government in XML format via a web portal, and then undergoes extensive validation before being loaded into a Welsh Government database if valid. Any records which fail validation are not loaded, and are reported back to the provider through the website for re-submission. Currently there is a high level of validation failures for incoming data (caused by a large amount of duplicated

data). It is clear that in the case of LLWR data it could not be a case of ‘lift and shift’ without also importing these challenges and deficiencies.

The new data collection system might entail having web APIs (Application Programme Interfaces) as a solution to collect data. An important principle for designing the data collection system will be to reduce unnecessary burden on the data providers and a web API based system would deliver this by enabling data providers to simply log on to and submit data, with automated validation built in before accepting the data.

In the case of data currently collected through the LLWR improvements in data collection would lead to:

- Providers no longer have to produce data in a complex and increasingly out-of-date format at odds with the way that most of us submit data in the digital age.

- A reduction in validation failures for incoming data, improving processing efficiency and reducing work for providers.

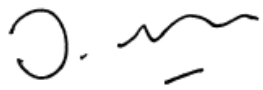
- Increased flexibility as the current extended timescales relating to any changes to the data collection format could be greatly reduced.

- An improvement in overall data quality and streamlined sharing of data with the other organisations that are allowed to utilise it (e.g. Welsh Government).

Regardless of whether CTER becomes responsible for collecting LLWR or not, there is a need to update and improve it. Importantly if all or parts of LLWR were replaced with more efficient processes and up to date software then future changes to the system could be much easier and quicker to make to the data collection process, reducing pressure on resources and costs, and reducing the burden on providers. It would also give the data users the ability to integrate additional data in the future leading to more insightful analysis.

I have copied this letter to the Chairs of the Children, Young People, and Education Committee and the Legislation, Justice and Constitution Committee.

Yours sincerely,



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14 December 2021

Dear Jayne

Tertiary Education and Research (Wales) Bill

Thank you for your letter of 24 November following my attendance at Committee to give evidence on the Tertiary Education and Research (Wales) Bill ('the Bill'). Your letter raised a number of questions to which I have responded in the Annex to this letter.

In establishing a single body with responsibility across the tertiary education sector, the Bill will enable the Commission to develop more effective and meaningful relationships across the sector. In your letter you queried how the relationship between employers, awarding bodies, the Commission and Qualifications Wales could improve through the Bill.

Whilst the statutory role and functions of Qualifications Wales won't change as a direct result of the introduction of the Bill and the establishment of the Commission, the Bill does enable the sharing of information between both bodies for the purposes of each being able to exercise their statutory functions effectively. Qualifications Wales will continue to regulate qualifications awarded in Wales by recognised awarding bodies below degree level. Qualifications Wales regulate apprenticeship qualification in Wales and therefore have an important role to play in improving the quality of the apprenticeship programme, ensuring that qualifications contained in apprenticeships meet employer and apprentice needs.

It is my intention that the Commission will work closely with employers, awarding bodies and Qualification Wales in the development and review of apprenticeship frameworks to ensure those frameworks remain relevant to employer needs, sector standards and changing technology.

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I anticipate that the Wales Apprenticeship Advisory Board will also continue to play a significant role. As an independent enterprise-led Board, with representatives from business, trade unions, further education bodies, this Board serves to provide advice and recommendations on matters relating to the content of apprenticeship frameworks and priorities in relation to their development in Wales. Informed by input from Regional Skills Partnerships, it contributes to improvements in the scope and impact of the apprenticeship offer in Wales.

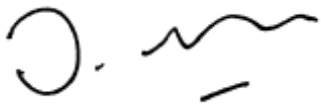
In the meantime, stakeholders from across the sector are represented on the PCET Strategy and Implementation Board, and I will continue working with all parts of the sector collegiately to bring about the changes we want to see.

Turning to implementation, as I mentioned during Committee, there is a significant programme of work to be completed in order to successfully establish a Commission that is fit for purpose and commands the confidence of the tertiary education sector. It remains my intention to establish the Commission in 2023, with a phased approach to implementation continuing across 2024 and into 2025, and I am considering how best to approach this so as to ensure continuity of provision during the transition to the Commission.

In respect of when an implementation plan may be available for the Committee's consideration, my officials continue to scope and develop this work. I wish to ensure that we provide key stakeholders with appropriate opportunity to inform this work so anticipate that it will probably be February when I am in a position to provide this to the Committee.

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

I look forward to attending on 13 January to give further evidence.



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

Annex

1. What is Welsh Government's evidence base for believing the Bill will realise Welsh Government's intent?
Your cost-benefit analysis by Alma Economics identified gaps in the evidence-base and appears to have had some misunderstandings about the nature of the proposed reforms.
For example it indicates that the Commission will bring together the sector under one regulatory umbrella, and cites that this will eliminate confusion around overlapping roles of a number of organisations, it then lists a number of organisations which are outside devolved competence, such as the UK Government Department for Education and Skills; and the QAA

1.1 In 2015, Professor Ellen Hazelkorn undertook a review of the oversight of post-compulsory education and training in Wales. The review examined the effectiveness of the current arrangements, in particular in relation to funding, governance, quality assurance, standards and the management of risk.

1.2 Professor Hazelkorn's report was published on 10 March 2016 and made two primary recommendations. The first, that the Welsh Government should develop an overarching vision for the PCET system, with stronger links between education/training policy, providers and social and economic goals. The second was that a new, arm's length body should be established to be the sole regulatory, coordinating and oversight authority for the post-compulsory system.

1.3 Subsequently the Welsh Government undertook a White Paper consultation and a technical consultation and engaged extensively with stakeholders to develop the necessary legislative provision so as to deliver on the recommendations made by Professor Hazelkorn.

1.4 The cost-benefit analysis by Alma Economic highlighted difficulties in identifying the causal link between policy changes and the potential savings for the future (in relation to education reforms generally rather than this set of reforms in particular), however it also identified potential benefits and opportunities that these changes could bring.

1.5 We know that our tertiary education sector has a number of barriers created by the institutional and sector divide. Removing these barriers, utilising resources collectively and making the learner the focus has clear potential to enable a more appropriate allocation of resources to learners needs, including the flexibility to address both gaps and duplication of provision. It also provides the opportunity to bring the learner voice into shaping provision for the future, ensuring that career pathways are more clearly articulated and accessible, and parity of esteem is progressed.

2. No clear rationale is present in the Explanatory Memorandum on why some options were dropped early on in the process. This makes it very difficult to understanding Welsh Government's decision-making process for this new Bill. Can you explain why there isn't more information on this available to us?

2.1 In developing the Bill, a robust and detailed options identification and appraisal process was undertaken. Chapter 7 of the Explanatory Memorandum sets out the

approach taken, and details the long list of six options (plus sub-options) considered, and the scoring and appraisal which resulted in their being discounted.

2.2 As set out in the Explanatory Memorandum, the long list options were subject to two options appraisal processes where they were assessed against five high level goals, consistent with the Welsh Government's priorities for tertiary education as articulated in the Welsh Government's Strategic Vision, and eleven high level objectives.

2.3 Each option was evaluated and scored in accordance with a set scoring scale and upon completion of the appraisal / scoring process each option was classified as either Discounted, Preferred, or Possible

- The discounted options were identified due to a variety of factors alone or in combination, including scoring low against the high level objectives or not providing benefits across the whole tertiary education sector or
- being undeliverable due to insufficient political and/or stakeholder support

2.4 The Explanatory Memorandum subsequently sets out the detailed analysis of the preferred option, the possible option (the second highest scoring option) and the do nothing option, this is in line with common practice.

3. How will the regulatory and funding transition be managed considering providers will need to apply for registration and prepare those applications?

3.1 Work relating to the implementation of the Bill has been progressing in the background for a while, for example through workshops with stakeholders regarding the identification of the strategic requirements for the Commission, and consideration of the necessary arrangements, both legal and operational, to ensure a smooth transition from the current arrangements to the new arrangements.

3.2 My officials are currently scoping the work necessary to further develop a high level implementation plan, supported by a programme of legislation for implementation. Our key focus will be understanding the lead times for the main pillars within the Bill which are the registration system, quality framework and extended FE provision. My officials have started to engage with key stakeholders regarding the development of this plan and this engagement will continue over the coming months.

3.3 The full implementation of the Commission's functions, as provided for in the Bill, will span into 2025. This will enable robust engagement with stakeholders during the implementation and ensure that the Commission is able to lead in key areas.

4. What is the rationale for not giving the Commission powers to establish its own coherent funding framework, but to instead set eligibility for funding based on Welsh Minister's regulations?

4.1 I believe that the Bill enables the Commission to establish a coherent funding framework. Legislating for a new body requires striking the right balance by ensuring there are clear limits governing that new body's power, whilst ensuring flexibility to ensure such a body can work effectively over the long-term.

4.2 Section 85 of the Bill enables the Commission to provide financial support to specified providers in respect of the provision of higher education and the carrying on of other activities. “Specified providers” are those registered in certain categories which are specified in regulations made by the Welsh Ministers. The intention is that providers registered in those categories will be eligible for direct funding from the Commission. Regulations must be made by the Welsh Ministers in order for funding to be provided pursuant to section 85.

4.3 The same principles apply in respect of the funding of research and innovation pursuant to section 102 of the Bill which makes provision for the Commission to provide funding to specified providers for the purposes of, or in connection with, research or innovation. The Welsh Ministers also have the option to provide, by way of regulations, that funding in respect of the provision of approved Welsh apprenticeships and further education and training may only be provided by the Commission to registered providers in certain categories (sections 101(3) and 95(2) refer, respectively). Separately, it is intended that higher education courses provided by registered providers will be designated for certain amounts of student support, depending on the category in which the provider is registered. Courses would be designated for student support through regulations made under the Teaching and Higher Education Act 1998.

4.4 Taken together, these regulations will ensure the benefits that providers receive are aligned with the regulatory requirements placed on them. Setting out the relevant categories of registration ensures transparency and allows for scrutiny by Senedd members.

4.5 The Bill enables the Commission to fund the full range of tertiary education including school sixth form provision, further education, adult community based learning and higher education. The funding powers reflect the different operating environments of local authorities, providers of further education and training and providers of higher education. The Commission will determine funding allocations to eligible providers.

5. The legislation enables Government to fund research around the Commission through retaining powers under the Science and Technology Act 1965 and the Higher Education Act 2004. Can you set out the logic for this?

5.1 Welsh Ministers have held powers to fund research and innovation since the beginning of devolution. Welsh Government funds a large number of research and innovation programmes directly across a range of areas including health research, business innovation, and programmes such as Ser Cymru, with many of these programmes having been reliant on EU funding. It is not Welsh Government policy to remove Welsh Ministers’ powers to fund these areas. .

5.2 The Commission will inherit HEFCW’s responsibilities for funding research and innovation, including QR research funding, postgraduate research funding, research capital funding, and the higher education innovation funding recently re-introduced.

5.3 Registered further education institutions within a specified category (currently expected to be the higher education – core category) will be eligible to receive funding from the Commission for research and innovation. Unregistered FE institutions can also receive research and innovation funding from the Commission via another registered institution with whom they are collaborating.

6. What is the rationale for not expecting all providers to meet the equality of opportunity on-going condition for registration? Which providers will be expected to meet this condition?

6.1 Following consideration of responses to the consultation on the Draft Bill, proposals in respect of institutional Access and Opportunity Plans have been removed from the Bill, and replaced by a more general registration condition for registered providers for access to and other aspects of the provision of tertiary education fairer and more just.

6.2 Initially, it is intended to provide for two categories of registration (higher education - core and higher education - alternative) and for both of these categories to be subject to the equality of opportunity registration condition. This would therefore include all providers seeking to be designated for Welsh Government student support.

6.3 The Commission will also have a clear strategic duty to promote widening participation, improved retention, reduced attainment gaps, and support for students in tertiary education from under-represented groups and disadvantaged demographics.

6.4 It will be for the Commission to determine the precise requirements of the equality of opportunity registration condition, as well as any equality of opportunity requirements it might require of funded providers via Outcome Agreements and terms and conditions of funding. We expect that the Commission will develop its policy in this area in consultation with providers, staff and student representatives.

6.5 It is worth noting that many tertiary education providers in Wales, such as schools, colleges and universities, are already under a number of duties related to equality under the Equality Act 2010.

6.6 I am however giving further consideration to whether to include provision on the face of the Bill, to subject all registered providers to the equality of opportunity on-going condition for registration. This would result in any future categories of registration automatically being subject to the equality of opportunity condition rather than being dependant on the making of regulations. I will keep the Committee informed as this work progresses.

7. To what extent have you addressed HEFCW's concerns regarding the consideration of quality arrangements for transnational education, validation arrangements and degree apprenticeships?

7.1 The duty of the Commission to assess the quality of higher education extends to higher education provided:

- by a registered provider;
- on behalf of each registered provider (whether by another registered provider or by an external provider)

7.2 Those providers who are providing higher education on behalf of a registered provider are captured by this duty whether they are in or outside of Wales.

7.3 The higher education elements of degree apprenticeships are “higher education” for the purposes of quality assessment provisions of the Bill, and therefore the duty to assess quality in the higher education elements of degree apprenticeships will be held by the Commission, and is due to be conducted by the designated body (or by the Commission itself if the Commission so chooses).

7.4 It is understood that HEFCW, QAA and Estyn have been in discussions about the ways in which Estyn’s experience of inspecting apprenticeships could support the assessment of quality in respect of the higher education elements of degree apprenticeships. It will be for the Commission, the designated quality body and Estyn to agree what role Estyn might have here in the future.

7.5 In addition, section 55 of the Bill enables the Welsh Ministers to specify, in regulations, education and training that falls within Estyn’s remit, and this could include higher education elements of degree apprenticeships where considered necessary or desirable.

8. Post legislative scrutiny of the HE Act found that the quality assurance system for further education providers that delivered higher education meant subjecting institutions to both QAA and Estyn requirements. The Bill appears to continue this situation – can you set out the rationale for this.

8.1 The Bill delineates the responsibilities of Estyn and the designated quality body (or the Commission if it chooses not to designate a body) by type of provision rather than by provider. This is necessary to ensure that there is consistency in how further education provision is assessed across schools and colleges, and how higher education is assessed across colleges and universities.

8.2 The Bill requires Estyn to agree its plan of inspections for provision within the Commission’s remit with the Commission, and for the designated quality body to conduct its higher education quality assessments in accordance with any arrangements made with the Commission. This will enable much better coordination and join-up of assessments and inspections in providers which might be subject to both. Additionally, Estyn and the designated body will be expected to align their processes with the Commission’s overall priorities and frameworks for quality, which we hope will create additional coherence and alignment.

9. During the session, you agreed to respond in writing to this question: Do main apprenticeship contractors currently need consent from Welsh Government to pass on funding to sub-contractors, and if not, what's the rationale for changing this in the Bill to require consent?

9.1 Current apprenticeship providers are enabled, through the terms and conditions set out in their contracts with the Welsh Government, to appoint sub-contractors without the written consent of the Welsh Ministers. Those terms and conditions also require apprenticeship providers to satisfy themselves, on a continuing basis, as to the financial standing of any sub-contractor they engage and its ability to perform whatever tasks the sub-contractor is retained to perform.

9.2 The Bill makes provision for the Commission to provide consent for the passage of funds from directly funded providers to collaborating bodies for or in connection with the provision of an approved Welsh apprenticeship.

9.3 In relation to the provision of financial support by the Commission for approved Welsh apprenticeships, collaborating bodies are providers who are:

- providing, or have provided, an approved Welsh apprenticeship on behalf of the directly funded provider or
- are working, or have worked, in collaboration with the provider for the purpose for which the financial support was provided by the Commission.

9.4 As the Commission may not have a direct regulatory or funding relationship with the collaborating body, this framework of controls will allow it to take appropriate action, for example the withholding or withdrawal of consent or the giving of consent subject to conditions. The rationale being to better enable the Commission to take steps to protect the interests of learners, ensure the proper use of public money and protect the reputation of the Welsh tertiary education and research sector.

10. How do you envisage Learner Protection Plans will support students who wish to transfer courses when there are often systemic barriers to doing so, such as recognising advanced standing and credit transfer?

10.1 The learner protection plan provisions are intended to support the implementation of consistent arrangements across the tertiary education sector to protect the interests of a learner in the event of a course or campus closure, a provider failure or a learner choosing to transfer to another course or provider. The main focus of the provision is to minimise the impact of these events on the learning of individuals and reduce the risk of that individual dropping out of learning.

10.2 Whilst there are pockets of good practice across the tertiary education sector, in respect of protecting the interests of learners if the progress of their learning is disrupted by an event such as a course or campus closure or a provider failure, there is a need for a consistent and comprehensive approach across the sector and providing for statutory arrangements in respect of learner protection plans will help ensure such an approach.

10.3 It is anticipated that the plans will build on existing good practice, providing a renewed focus to overcoming barriers standing in the way of learners transferring courses to enable them to continue successfully in their learning. It is intended that this will offer learners greater flexibility in the way they study, and aid progression from one level to the next and between different types of learning, for example between further education and higher education.

10.4 The Commission will be required to develop guidance, in consultation with stakeholders, on the detail of how the learner protection plans will be developed, including how students can be supported to transfer from one course to another.

10.5 It is vital that prospective and existing learners and staff working for tertiary education providers are aware of these arrangements. The Commission will be able to issue guidance to providers, under of para 22(1)(a) or (b) of Schedule 1, in respect of matters such as how the plans should be communicated appropriately to prospective, and existing learners and staff.

11. To what extent will there be consistency of expectation across all tertiary education providers regarding the level of commitment and content of their Learner Protection Plan?

11.1 The Commission is under a duty to issue guidance on the preparation and revision of learner protection plans pursuant to section 122(6) of the Bill. It is envisaged that learner protection plans will be underpinned by a common set of principles based on that guidance, to ensure consistency for learners across the PCET sector.

11.2 Draft principles were shared with stakeholders in the Welsh Government's technical consultation "Public Good and a Prosperous Wales – the next steps". These principles included that the plans should be learner centred, be supportive of learners' well-being, be communicated effectively to prospective and existing learners and staff and be underpinned by timely and effective arrangements. It is envisaged that the common set of principles will be finalised by the Commission following consultation with stakeholders as the Commission is under a statutory duty to consult such persons as it considers appropriate before issuing guidance under section 122(6) (as per section 122(7)).

11.3 Subject to notice being given, having a Learner Protection Plan approved by the Commission and to give effect to that plan, will be an ongoing registration condition or funding condition, depending on the relationship of a provider with the Commission. Also the Commission will be required to monitor the effectiveness of learner protection plans and include its findings in its annual report.

11.4 Although learner protection plans should align with these common principles it is recognised that the detail of these arrangements will differ across the PCET sector. It is intended that a proportionate approach is adopted in the development of learner protection plans, which does not result in additional unnecessary burden for providers but meets the needs of its learners.

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Eluned Morgan AS/MS
Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Llywodraeth Cymru
Welsh Government

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

2 February 2022

Dear Huw

Thank you for the Legislation, Justice and Constitution Committee's report laid on 3 December on the Legislative Consent Memorandum (LCM) for the Health and Care Bill (the Bill).

I note the Committee's comments on the first LCM laid on 1 September.

The position has been superseded by a number of amendments made to the Bill and two Supplementary LCMs laid on 17 December 2021 and 28 January 2022 respectively. This letter therefore reflects the latest position on the Bill in responding to the Committee's recommendations.

Please find my responses to your specific recommendations below

Recommendation 1 - Clause 87 (formerly Clause 85) (Medicines information systems)

Recommendation 1
The Minister should, in advance of the Senedd's debate on the relevant consent motion, provide further details of the intergovernmental discussions regarding clause 85 and confirm whether the amendments she has sought will be tabled to the Bill by the UK Government

Response
As set out in the Supplementary LCM (Memorandum No. 2) laid on 17 December, the UK Government has amended the Bill to address our concerns regarding clause 87 (formerly clause 85).

In relation to inappropriate use of data, the scope of the purposes for which medicine information systems regulations can be made under clause 87 is now limited. The clause now provides that provision in the regulations for a purpose in relation to clinical decision

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making can only be made where there is a connection with the safety of such decisions relating to human medicines.

Our concerns regarding the availability of data to the Welsh Ministers for purposes within devolved competence such as clinical decision making, and further concerns regarding the overlap of data collection for the purposes of the Registry with existing data gathering in Wales have also been addressed, as well as the commitment to consult on provisions made in regulations made under the provisions. The clause now provides that that secondary legislation made under it must provide for information to be collected by the Welsh Ministers or a person designated by them such as Digital Health and Care Wales (DHCW), subject to specified exceptions in that secondary legislation. The amendment ensures where appropriate, data remains available for use by the Welsh Ministers.

Finally, in addition to the safeguards agreed on the face of the Bill as introduced, there is now a requirement that the Welsh Ministers be consulted on any regulations or directions relating to medicine information systems which relate to Wales. This will be supported by a Memorandum of Understanding to be developed and agreed between the UK Government and the Devolved Governments. We have communicated to UK Government the need to develop this Memorandum as soon as possible with a view to it being in place before the provisions come into force.

Taken together I am content that the amendments made to these provisions address our key concerns and consequently I can now support this Bill clause.

Recommendations 2 and 3 - Clauses 88-94 (formerly Clauses 86-92): Arm's Length Bodies Transfer of Functions

Recommendation 2
The Minister should, in advance of the Senedd's debate on the relevant consent motion, provide further details of the intergovernmental discussions regarding clauses 86 to 92 and confirm whether the amendments she has sought will be tabled to the Bill by the UK Government.

Response
My two major concerns in this area have been addressed.

On 24 January 2022, the UK Government tabled an amendment providing for a statutory consent requirement, whereby the consent of the Welsh Ministers is required before the Secretary of State can make regulations under clauses 89 (formerly clause 87) (Power to transfer functions between bodies) or clause 90 (formerly clause 88) (Power to provide for exercise of functions of Secretary of State) where those regulations contain provision which would be within the legislative competence of the Senedd if contained in an Act of Senedd Cymru (and is not merely incidental to, or consequential on, provision which would be outside that legislative competence) or which modifies the functions of the Welsh Ministers (i.e. modifies their executive competence).

Further detail regarding this amendment is set out in the Supplementary LCM (Memorandum No. 3) laid before the Senedd on 28 January 2022.

With regard to my concern about the ability of the Secretary of State to transfer property, rights and other liabilities from Arm's Length Bodies to the Welsh Ministers, Welsh NHS Trusts and Wales-only Special Health Authorities in clause 92 (formerly clause 90), to resolve this, the UK Government also tabled, on 24 January, amendments removing the

Welsh Ministers, Welsh NHS Trusts and Wales-only Special Health Authorities from the list of “appropriate persons” in the clause, thus fully addressing our concerns in this area.

In my view, my concern regarding clause 91, which provides the Secretary of State with the power to, by regulations, make provision which is consequential on clauses 88 or 90 (formerly clauses 86 and 88) of the Bill, has been addressed by the UK Government as set out in the response to Recommendation 8, below.

Recommendation 3
The Minister should seek an amendment to the Bill to address her concerns regarding clause 87 to the effect that the Secretary of State cannot use the powers therein to transfer and/or delegate functions in relation to Special Health Authorities, where those functions were directed by the Welsh Ministers in relation to Wales.

Response
As set out in my response to Recommendation 2, above, subject to the passing of the UK Government amendments laid on 24 January, this power can only be exercised with the consent of the Welsh Ministers, thus fully addressing our concerns in this area.

Recommendations 4 and 5 - Clause 136 (formerly Clause 120): International Healthcare Arrangements

Recommendation 4
The Minister should, in advance of the Senedd’s debate on the relevant consent motion, provide the Committee and all Senedd Members with a copy of the final Memorandum of Understanding (MoU) in place between the Welsh and UK Government’s in relation to the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, and confirm that the text of the MoU reflects the final, limited scope of the Bill as agreed by the UK Parliament

Response
I am pleased to enclose the reciprocal healthcare Memorandum of Understanding (MOU) with this letter for the consideration of the Committee, which I can confirm reflects the Bill provisions as amended on 23 November 2021. The MOU has been agreed by all four nations. The Committee will wish to note that the wider linkages in relation to the new intergovernmental relations (IGR) governance arrangements have not yet been included in the MOU but are being considered. The MOU will be updated to reflect the new IGR arrangements in due course.

Recommendation 5
The Minister should seek an amendment to the Bill to the effect that a clear and proportionate test for what qualifies as an ‘exceptional circumstance’ in clause 120 is included on the face of the Bill.

Response
Section 1 of the Healthcare (European Economic Area and Switzerland) Act 2019 (HEEASAA) currently provides the Secretary of State with a power to make payments, and arrange for payments to be made, in respect of the cost of healthcare provided in an EEA State or Switzerland.

Clause 136 (formerly clause 120) of the Bill will remove the power in section 1 of HEEASAA and replace it with regulation making powers enabling the Secretary of State to make regulations (a) for the purpose of giving effect to a healthcare agreement

(including about making payments) between the UK and either a country or territory outside the UK or an international organisation, and (b) authorising the Secretary of State to make a payment in respect of healthcare provided otherwise than under a healthcare agreement, in a country or territory with which the UK has a reciprocal healthcare agreement, but only where the Secretary of State considers that the payment is justified by exceptional circumstances.

The purpose of the power enabling the Secretary of State to fund healthcare outside of an international healthcare agreement in exceptional circumstances is to assist the UK Government in supporting the healthcare needs of British residents when they are abroad in circumstances which might otherwise narrowly fall outside of a reciprocal healthcare agreement.

The UK Government has previously, for example, used existing powers under HEESAA to provide crisis mental healthcare support to a minor in the EU where the Member State stated that the treatment was not covered under the European Health Insurance Card Scheme. The UK Government has also funded treatment in the EU for twins with infantile haemangiomas who were born to UK residents but were unable to easily travel back to the UK due to COVID-19 travel restrictions and the risks of travelling at the time. They would not otherwise have been in scope of the planned treatment provisions in the EU reciprocal healthcare agreements as they could have received the treatment in the UK without undue delay had they been in the UK at the time.

Payments for healthcare outside the UK is a reserved matter because it concerns the welfare of people outside of the UK, and has no material bearing on, or connection to the domestic provision of healthcare in the UK; it is a matter of international relations whether and to what extent the UK decides to arrange and fund healthcare for people outside the UK.

Exceptional circumstances are likely to be those in which the refusal to fund healthcare treatment would result in unjustifiably harsh consequences for the individual such that the refusal of an application for funding would not be proportionate. Determining whether a payment is justified by exceptional circumstances will necessarily require a balance to be struck between any competing public and individual interests involved. Attempting to define this further in primary legislation by reference to an amount or type of healthcare that can be funded would unduly restrict the Secretary of State's ability to exercise this discretion and hinder the ability to assist British residents when they most need it.

It is therefore my view that it is not appropriate to put a clear and proportionate test on the face of the Bill for what would qualify as an 'exceptional circumstance' for the purposes of the amount or type of healthcare that can be funded outside of an international healthcare agreement as this could have a detrimental or limiting impact to provide support when needed.

Recommendation 6 - Clause 142 (formerly Clause 123): Regulation of Healthcare and Associated Professions

Recommendation 6
The Minister should, in advance of the Senedd's debate on the relevant consent motion, provide further details of the intergovernmental discussions regarding clause 123 and confirm whether the amendment she has sought will be tabled to the Bill by the UK Government.

Response
I can confirm that the amendment we sought was achieved and the Bill amended so as to require the consent of the Welsh Ministers to an Order in Council made under section 60 of the Health Act 1999, which makes provision that is within the legislative competence of the Senedd and brings into regulation a group of workers who are not professionals, but who are concerned with the physical or mental health of individuals.

Further detail of the amendment is set out in the Supplementary LCM laid before the Senedd on 17 December 2021.

Recommendation 7 - Clause 144 and Schedule 17 (formerly Clause 125 and Schedule 16): Advertising of Less Healthy Food and Drink

Recommendation 7
The Minister should, in advance of the Senedd's debate on the relevant consent motion, provide further details of the intergovernmental discussions regarding clause 125 of and Schedule 16 to the Bill.

Response
I set out in my letter of 28 October 2021 to the Committee that whilst the substantive content of the clauses covering restrictions on the advertising of unhealthy food on a four nations basis is welcomed, there is consequential power included enabling the Secretary of State to amend Welsh legislation.

It should be noted that this is an area of the Bill which the UK Government does not accept is devolved and therefore does not agree should be subject to a requirement for the legislative consent of the Senedd.

However, as set out in the response to Recommendation 8, below, on the basis of the assurances provided by the UK Government on the possible use of the powers, we accept the consequential amendments which might arise from clause 144 (formerly clause 125) as an acceptable and minor constitutional risk.

Recommendation 8 - Clauses 149, 144 and 91 (formerly clauses 89, 125 and 130): Consequential Amendments to Senedd Legislation

Recommendation 8
The Minister should seek an amendment to the Bill to the effect that the powers in the Bill cannot be used by UK Ministers to make regulations that amend the Government of Wales Act 2006.

Response
These clauses provide the Secretary of State with the power, by regulations, to make provision which is consequential on the Bill. This includes provision that amends, repeals, revokes or otherwise modifies provision made by, or under, an Act or Measure of the Senedd.

As set out in the Supplementary Legislative Consent Memorandum (Memorandum No. 3) laid on 28 January 2022, I and my officials have met with the Minister of State for Health, Edward Argar MP and his officials on a number of occasions to discuss these provisions. The UK Government is of the view that these are standard clauses and it is the case that Wales similarly takes powers in Senedd Acts to make consequential amendments to UK Government legislation.

UK Government officials have provided examples of how these powers may be used – the amendments likely would be of a minor nature, for example the changing of the name of an English organisation which is referred to in Senedd legislation where a transfer of functions has occurred. The Minister of State for Health has also given a written commitment to making a Dispatch Box Statement in relation to clauses 91 and 149, on how these powers might be used. (As advised in response to Recommendation 7 above, the UK Government has not identified clause 144 as requiring the legislative consent of the Senedd and therefore will not include in the Dispatch Box Statement).

We have agreed the wording of the Dispatch Box Statement with UK Government and the UK Government has committed to making the statement prior to the Legislative Consent Motion debate in the Senedd scheduled to take place on 15 February.

On the basis of the statement being made, and in the light of all the assurances given by the UK Government, I regard the risk presented by the provisions now to be acceptable.

I trust this response will be helpful in the Committee's scrutiny of the Legislative Consent Memoranda on the Bill.

I am copying this letter to Russell George MS, Chair of the Health and Social Care Committee.

Yours sincerely

Eluned Morgan AS/MS
Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

MEMORANDUM OF UNDERSTANDING BETWEEN THE UK GOVERNMENT SECRETARY OF STATE FOR THE DEPARTMENT OF HEALTH AND SOCIAL CARE AND THE SCOTTISH MINISTERS, THE WELSH MINISTER FOR HEALTH AND SOCIAL SERVICES, AND THE MINISTER OF HEALTH FOR NORTHERN IRELAND (THE "DEVOLVED GOVERNMENTS")

In Respect of the Consultation Process for International Healthcare Agreements and their Implementation

CONTENTS

A. INTRODUCTION

1. Overview and Scope

1.1 This Memorandum sets out the understanding of the United Kingdom (UK) Government Secretary of State for the Department of Health and Social Care (DHSC) and the Scottish Ministers, the Welsh Minister for Health and Social Services, and the Minister of Health for Northern Ireland ("the Devolved Governments"), on the Healthcare (International Arrangements) Act 2019 (HIAA). It sets out the arrangements for consultation and meaningful engagement in the formulation, negotiation, and implementation of new, revised and updated international reciprocal healthcare agreements, which go further than the consultation duty under section 5 of HIAA (see para 1.3 below).

1.2 The implementation of international reciprocal healthcare agreements, which include reimbursement and the exchange of data, is enabled by HIAA. Sections 2 and 2A of HIAA confer powers on the Secretary of State and Ministers in the Devolved Governments to make regulations for the purpose of giving effect to international reciprocal healthcare agreements. The power to make regulations is conferred on Ministers within the Devolved Governments where it would be within their devolved competence to make such provision.

1.3 This Memorandum also sets out how the Secretary of State will meet the legal requirement to consult with the Devolved Governments before making regulations under section 2 that contain provisions within the legislative competence of the devolved legislatures. However, the UK Government will

proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.

1.4 This Memorandum does not create any additional legally enforceable rights and obligations between the parties. Nothing in this Memorandum should be construed as conflicting with the Belfast Agreement.

Responsibilities for Negotiating and Delivery of International Reciprocal Healthcare Agreements

1.5 The UK Government is responsible for international relations and has overall responsibility for concluding treaties and other international agreements on behalf of the United Kingdom.

1.6 The implementation of international healthcare obligations will usually be within the devolved competence of the Devolved Governments when the obligations relate to devolved healthcare provision within those countries.

2. Overarching Principles

2.1 DHSC and the Devolved Governments are committed to delivering collectively a reciprocal healthcare policy that works for residents throughout the UK as a whole in order to realise the broad benefits of international reciprocal healthcare agreements.

2.2 The arrangements set out in this Memorandum of Understanding will be underpinned by the principles of open communication, consultation, and cooperation. DHSC and the Devolved Governments are committed to making representations to each other as necessary in sufficient time for those views or concerns to be fully considered.

2.3 DHSC and the Devolved Governments recognise the importance of ensuring international reciprocal healthcare policy alignment for all healthcare systems across the UK and will work closely to develop and maintain a cohesive international reciprocal healthcare system that delivers for all UK residents. At the beginning of each stage of the process, DHSC and the Devolved Governments will agree a feasible timetable for all parties.

2.4 For those negotiations where DHSC is not the lead Government Department, DHSC and the Devolved Governments will proceed on the principles set out in this Memorandum of Understanding on specific international reciprocal healthcare elements.

B. CONSULTATION PROCESS – POLICY AND AGREEMENTS

3. Policy Mandate and Formation

Strategy Formulation

3.1 This Memorandum establishes arrangements (Annex A – Stage 1) for collaborative policy development and analysis where responsibility for implementation of those policies is within devolved competence. These arrangements provide a vehicle for meaningful engagement on policy proposals to take into negotiations. The arrangements will apply to the formation of overarching policy and model agreements as well as to individual policy mandates for reciprocal healthcare agreements with third countries. These arrangements will apply to any proposals for the review or amendment of implemented healthcare agreements with a view to reaching consensus by all parties on the proposed action. The Governments recognise that cooperation is necessary to meet their respective policy objectives.

3.2 DHSC will consult the Devolved Governments in writing where policy areas engage or have the potential to engage devolved competence. In addition, to support the effective implementation of

international healthcare agreements, DHSC will engage with the Devolved Governments on the full scope of any future international healthcare agreements to ensure that healthcare provisions work optimally across the whole of the UK. Consultation will be as early as possible and at a formative stage of policy development, as officials start to consider policy proposals, political steers, or third country requests for reciprocal healthcare agreements. The Devolved Governments will respond in writing, by an agreed date whenever possible, to DHSC setting out their views and any concerns about what is proposed on behalf of their Ministers and Executive. The Devolved Governments will be sent copies of papers and be invited to fully participate in meetings on subjects in which they have a devolved policy interest. Given the complexity of agreements, the strategy formulation will include engagement with all key partners as outlined in Annex A - Stage 1.

3.3 The arrangements will include regular informal and working level engagement between officials and Ministers to discuss policy proposals on the strategic direction for new international reciprocal healthcare agreements, or for proposals to renegotiate existing international reciprocal healthcare agreements and any projected impact assessments of those proposals. DHSC will arrange a regular international reciprocal healthcare meeting with the Devolved Governments on the issues, to be held with a frequency agreed with the Devolved Governments. DHSC will ensure that the Devolved Governments are given as much time as possible to properly consider proposals and feedback their views.

3.4 In order to enable each Government to operate effectively, the Governments will aim to provide each other with full and open access to policy information, for example data on S2 planned treatment, that may be requested where reasonable and appropriate. The Devolved Governments will be invited to contribute to impact assessments, on areas of devolved competence, which will be shared to support transparency on cost and benefits and inform evaluations of impact across the UK. The emphasis will always be on exchanging information where this proves possible to ensure a consistent approach to reciprocal healthcare policy and consideration of impact.

3.5 There will always be discussions between DHSC and Devolved Government officials in the first instance to reach a view on the policy before DHSC and Devolved Government officials put advice to their respective Ministers. DHSC officials will clearly identify where the views of the Devolved Government Ministers are still pending in their advice to DHSC Ministers. DHSC officials will ensure that the views of the Devolved Government Ministers are represented to DHSC Ministers in a timely manner, as soon as these are known. DHSC Ministers will write to Devolved Government Ministers to set out the policy proposals they endorse, giving them a reasonable period to respond, in order to build consensus on the direction to be taken in negotiations. Ministers from the Devolved Governments will provide their responses to DHSC Ministers by an agreed date whenever possible.

Agreement of Negotiating Mandate

3.6 All Devolved Governments will have the opportunity to influence the overall objective and shape of the mandate, noting this may be subject to change. As at Stage 1 (Annex A), the Devolved Governments will be sent copies of papers as early as possible and be invited to fully participate in meetings to build consensus on the negotiating mandate with regular informal and working level engagement between officials and Ministers to discuss policy proposals. Discussions between officials will be arranged with a frequency agreed with the Devolved Governments and depending on the timeframes for negotiations.

3.7 DHSC will share draft mandate text with the Devolved Governments for consultation and comment, prior to policy mandates going through cross UK Government write round and before publication. This will ensure appropriate consideration to the views of the Devolved Governments and that the negotiation mandates are acceptable to all parts of the UK (Annex A - Stage 2).

3.8 The Governments agree to share their respective legislative requirements at an early stage in the policy development process to provide for a common understanding of what will be necessary for implementation of a UK-wide agreement, to ensure transparency and timely consideration to feed into negotiations. This will be discussed by policy officials with policy and legal teams providing assurance on necessary implementation steps.

4. Negotiations and Drafting of International Agreements

4.1 DHSC will consult the Devolved Governments about the formulation of the UK Government's position for international reciprocal healthcare negotiations and any resulting deviations to the mandate where this has, or may have, an impact on devolved responsibilities. In such cases the Devolved Governments will be given early sight of evolving negotiating positions, with a reasonable period for consultation and comment, in order to reflect the views of the Devolved Governments in determining the approach for handling discussions. The Devolved Governments will respond with any concerns by an agreed date whenever possible.

4.2 Where there are deviations to the mandate DHSC officials will write to the Devolved Governments setting out the deviations for their review and consideration where this has, or may, impact on devolved responsibilities. Concession requests will be considered at official level in the first instance, with advice being put to DHSC Ministers and Devolved Government Ministers at the same time. DHSC will clearly identify where the views of the Devolved Government Ministers are still pending and will ensure that the views of the Devolved Government Ministers are represented to DHSC Ministers in a timely manner, as soon as these are known. Ministers from the Devolved Governments will provide any comments by an agreed date whenever possible. DHSC Ministers will consider any representations made and keep Devolved Government Ministers informed of any decisions by an agreed date whenever possible.

4.3 DHSC will provide regular updates to the Devolved Governments on the progress of negotiations including tracking documents and timelines (Annex A - Stage 3).

4.4 Once agreement with the third country has been reached in principle, advice will be provided to Ministers and the Devolved Governments on the final agreement. The legal text is the final output of the negotiations and will be drafted to reflect the policy proposals as they are developed (Annex A - Stage 4). DHSC will always seek to find consensus that the agreement reflects the policy position and assessment of implications and their suitability for implementation across the UK.

5. Ministerial Engagement

5.1 Engagement between Ministers may take place at any point throughout the consultation process set out in this Memorandum of Understanding upon request of any of the Ministers at DHSC or the Devolved Governments. DHSC and the Devolved Governments are committed to constructive and proportionate engagement with Ministers through the optimal engagement forum and commit to arranging ministerial discussions if required and desirable, coupled with formal written communications at key points on all negotiations.

6. Dispute Resolution

6.1 While the aim of this Memorandum of Understanding is to facilitate the consultation process on reciprocal healthcare agreements and section 2A of the HIAA provides powers for the Devolved Governments to introduce regulations when deemed necessary, recognising devolved competency, in circumstances where agreement cannot be reached, all efforts should be made to resolve disputes by an agreed date through the following process where possible:

i. In the first instance, concerns will be raised informally and at working level between policy officials. All officials should fully commit themselves to achieving agreement if possible.
ii. Where officials cannot reach an agreement, the issue should be brought to the attention of more senior officials. Senior officials should make every effort to resolve the problem without the need for ministerial engagement.
iii. If no agreement is reached at official level, concerns should be raised at ministerial level. The final escalation point will be to Ministers.

6.2 The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. In the event that no resolution can be found, there will be an exchange of letters between

Ministers. This would provide the opportunity for a Devolved Government to set out its position, and for the Secretary of State to explain the reasons for the final position and how the UK Government has sought to reach agreement with the Devolved Governments. If the Secretary of State decides to proceed without resolution and guided by the principles set out in this Memorandum, the exchange of letters should be made available to both Houses of Parliament.

6.3 The process outlined above gives the Governments an opportunity to resolve disputes, but there is not a formal obligation to follow this process.

7. Confidentiality

7.1 Each Government will wish to ensure that the information it supplies to others is subject to appropriate safeguards in order to avoid prejudicing its interests. Complete confidentiality is often essential in matters touching on international relations and in formulating a UK policy position. The effectiveness of arrangements agreed under this Memorandum of Understanding will rely on mutual respect for the confidentiality of information exchange. The Governments accept that in certain circumstances a duty of confidence may arise and will between themselves respect legal requirements of confidentiality. Each Government can only expect to receive information if it treats such information with appropriate discretion and not share anything publicly without agreement of all parties.

7.2 There will also be a common approach to the classification and handling of sensitive material. Information will be shared at the appropriate classification level decided by the administration providing the information. Each Government will treat information which it receives in accordance with the restrictions specified. In the event that a Government is subject to a legal obligation to disclose information, for example a freedom of information request, the Governments will consult each other and assist the Governments in complying with their legal obligations.

C. CONSULTATION PROCESS - IMPLEMENTATION AND REVIEW

8. Regulations under HIAA

8.1 In line with the principles set out above, it is necessary to ensure a transparent and consistent engagement process between DHSC and the Devolved Governments to support the making of regulations under section 2 and 2A of HIAA.

8.2 Meetings will be held as early as possible during the process set out in Section B to agree how international obligations in areas of devolved competence should be implemented and determine a feasible timetable for all parties. This might include Ministers in the Devolved Governments making regulations or alternatively the Secretary of State making regulations on behalf of the Devolved Governments.

8.3 The Devolved Governments will notify DHSC how they wish to proceed in a timely manner to ensure obligations can be implemented by any agreed deadline in an international reciprocal healthcare agreement. DHSC do not intend to exercise section 2 powers to make regulations in areas of devolved competence without the agreement of the relevant Devolved Governments.

8.4 When making regulations in areas of devolved competence, officials and Ministers agree to share information, including draft regulations and proposed timetables, to ensure obligations in international agreements are implemented coherently and on time. The timetable for delivery of the regulations will be agreed in advance with the Devolved Governments. The Devolved Governments will notify the UK Government and each other of any potential impacts on the delivery timetable for example, minimum notification periods, legislative process/protocol and translation requirements. Drafted regulations will be shared in a timely manner to provide an opportunity for consideration and comment. Engagement must be as early as possible to allow time for ministerial and Parliamentary

consideration. Officials will collectively agree when to share a draft of the regulations to which HIAA applies with their respective Ministers.

8.5 Section 2A of the HIAA provides powers to the Devolved Governments to make regulations to implement reciprocal agreements in their respective countries if provision is within the devolved competence of the Devolved Government. If the UK Government has concerns about any delay in the implementation of international obligations, or the Devolved Governments fail to make regulations within the agreed timeframe, or in the event that agreement on the regulations cannot be reached, the process set out above (6. Dispute Resolution) will be followed. If no resolution is found, there will be an exchange of letters between Ministers. This would provide the opportunity for a Devolved Government to set out its position, and for the Secretary of State to explain the reasons for the final form of the regulations and how the UK Government has sought to reach agreement. If the Secretary of State decides to proceed without resolution and guided by the principles set out in this Memorandum, the exchange of letters will be made available to both Houses of Parliament and the Devolved Governments will bring them to the attention of their respective parliaments.

9. Operational Implementation

9.1 Before an agreement comes into force the Governments should demonstrate operational and communication readiness. Officials from all Governments commit to consult on and set out a timescale for implementation.

9.2 DHSC and the Devolved Governments will ensure a cooperative and coordinated approach to the operational implementation of reciprocal healthcare policy that works for all parts of the UK. This may for example include developing and coordinating bespoke packages of communications to inform individuals and healthcare providers about new reciprocal healthcare agreements.

9.3 All four Governments will work together, where appropriate, on matters of mutual interest to provide the most effective outcomes for citizens of the UK and promote equity of treatment across the UK. Various public bodies deal with reciprocal healthcare matters within the responsibilities both of the UK Government and the Devolved Governments. The UK Government and Devolved Governments affirm their commitment to work together, where appropriate, to ensure that such bodies continue to operate effectively.

10. Review

10.1 This Memorandum of Understanding will be reviewed no later than 24 months after the date it is agreed, with any subsequent reviews to be scheduled in the course of the review. This review will be conducted by officials and agreed by Ministers.

10.2 The Governments recognise that there may be a need from time to time for some adjustment to be made to the Memorandum of Understanding, for example, in response to new issues or in the light of any changes to concordats and bilateral relations more generally. The Governments agree that there should be mechanisms in place to review the operation of the settlements and for adjustments to be agreed.

D. DATA SHARING

To support ongoing collaboration between all parts of the UK, a separate Memorandum of Understanding will cover data sharing.

E. SIGNATORIES

Minister of State for Health, UK Government

Minister for Health and Social Services, Welsh Government

Cabinet Secretary for Health and Social Care, Scottish Government

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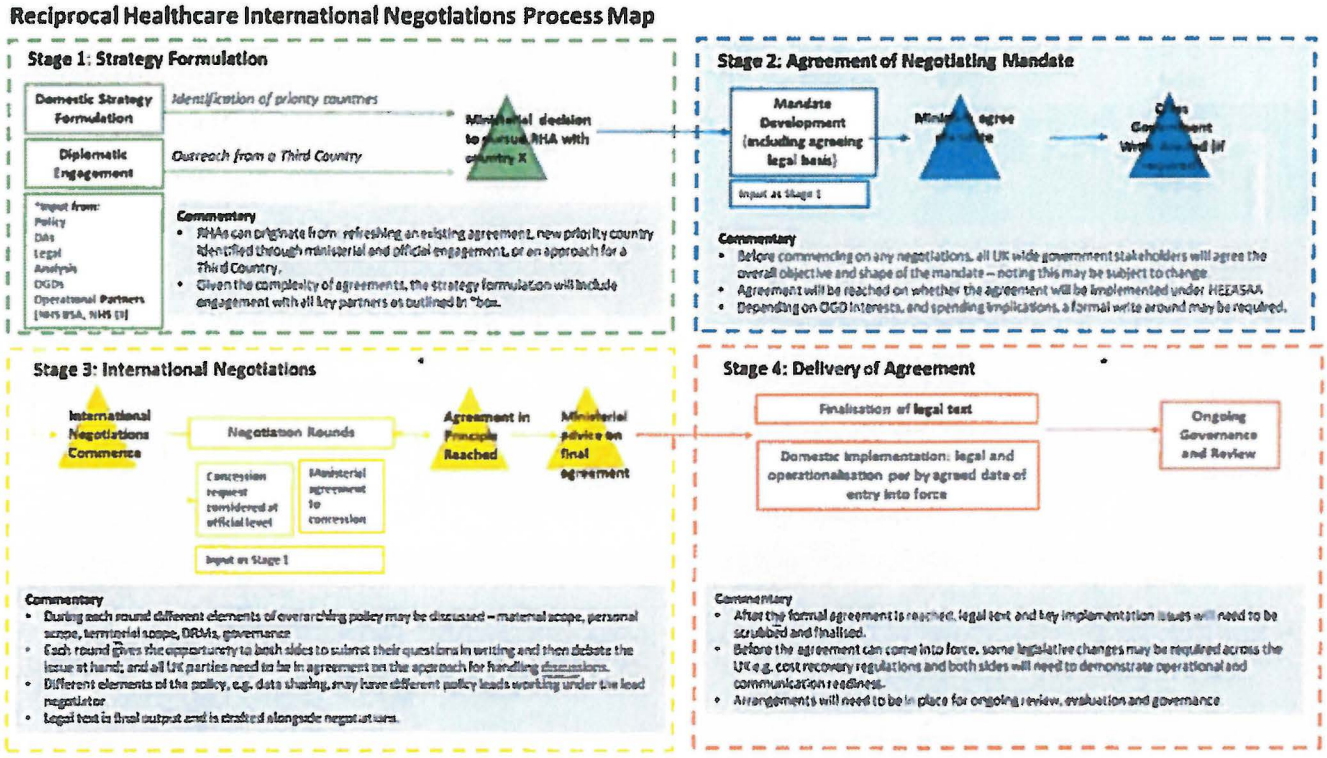
Minister of Health, Northern Ireland Department of Health

ANNEX A

Reciprocal Healthcare International Negotiations Process Map



MEMORANDUM OF UNDERSTANDING BETWEEN THE UK GOVERNMENT SECRETARY OF STATE FOR THE DEPARTMENT OF HEALTH AND SOCIAL CARE AND THE SCOTTISH MINISTERS, THE WELSH MINISTER FOR HEALTH AND SOCIAL SERVICES, AND THE MINISTER OF HEALTH FOR NORTHERN IRELAND (THE "DEVOLVED GOVERNMENTS")

In Respect of the Consultation Process for International Healthcare Agreements and their Implementation

CONTENTS

A. INTRODUCTION

1. Overview and Scope

1.1 This Memorandum sets out the understanding of the United Kingdom (UK) Government Secretary of State for the Department of Health and Social Care (DHSC) and the Scottish Ministers, the Welsh Minister for Health and Social Services, and the Minister of Health for Northern Ireland ("the Devolved Governments"), on the Healthcare (International Arrangements) Act 2019 (HIAA). It sets out the arrangements for consultation and meaningful engagement in the formulation, negotiation, and implementation of new, revised and updated international reciprocal healthcare agreements, which go further than the consultation duty under section 5 of HIAA (see para 1.3 below).

1.2 The implementation of international reciprocal healthcare agreements, which include reimbursement and the exchange of data, is enabled by HIAA. Sections 2 and 2A of HIAA confer powers on the Secretary of State and Ministers in the Devolved Governments to make regulations for the purpose of giving effect to international reciprocal healthcare agreements. The power to make regulations is conferred on Ministers within the Devolved Governments where it would be within their devolved competence to make such provision.

1.3 This Memorandum also sets out how the Secretary of State will meet the legal requirement to consult with the Devolved Governments before making regulations under section 2 that contain provisions within the legislative competence of the devolved legislatures. However, the UK Government will

proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.

1.4 This Memorandum does not create any additional legally enforceable rights and obligations between the parties. Nothing in this Memorandum should be construed as conflicting with the Belfast Agreement.

Responsibilities for Negotiating and Delivery of International Reciprocal Healthcare Agreements

1.5 The UK Government is responsible for international relations and has overall responsibility for concluding treaties and other international agreements on behalf of the United Kingdom.

1.6 The implementation of international healthcare obligations will usually be within the devolved competence of the Devolved Governments when the obligations relate to devolved healthcare provision within those countries.

2. Overarching Principles

2.1 DHSC and the Devolved Governments are committed to delivering collectively a reciprocal healthcare policy that works for residents throughout the UK as a whole in order to realise the broad benefits of international reciprocal healthcare agreements.

2.2 The arrangements set out in this Memorandum of Understanding will be underpinned by the principles of open communication, consultation, and cooperation. DHSC and the Devolved Governments are committed to making representations to each other as necessary in sufficient time for those views or concerns to be fully considered.

2.3 DHSC and the Devolved Governments recognise the importance of ensuring international reciprocal healthcare policy alignment for all healthcare systems across the UK and will work closely to develop and maintain a cohesive international reciprocal healthcare system that delivers for all UK residents. At the beginning of each stage of the process, DHSC and the Devolved Governments will agree a feasible timetable for all parties.

2.4 For those negotiations where DHSC is not the lead Government Department, DHSC and the Devolved Governments will proceed on the principles set out in this Memorandum of Understanding on specific international reciprocal healthcare elements.

B. CONSULTATION PROCESS – POLICY AND AGREEMENTS

3. Policy Mandate and Formation

Strategy Formulation

3.1 This Memorandum establishes arrangements (Annex A – Stage 1) for collaborative policy development and analysis where responsibility for implementation of those policies is within devolved competence. These arrangements provide a vehicle for meaningful engagement on policy proposals to take into negotiations. The arrangements will apply to the formation of overarching policy and model agreements as well as to individual policy mandates for reciprocal healthcare agreements with third countries. These arrangements will apply to any proposals for the review or amendment of implemented healthcare agreements with a view to reaching consensus by all parties on the proposed action. The Governments recognise that cooperation is necessary to meet their respective policy objectives.

3.2 DHSC will consult the Devolved Governments in writing where policy areas engage or have the potential to engage devolved competence. In addition, to support the effective implementation of

international healthcare agreements, DHSC will engage with the Devolved Governments on the full scope of any future international healthcare agreements to ensure that healthcare provisions work optimally across the whole of the UK. Consultation will be as early as possible and at a formative stage of policy development, as officials start to consider policy proposals, political steers, or third country requests for reciprocal healthcare agreements. The Devolved Governments will respond in writing, by an agreed date whenever possible, to DHSC setting out their views and any concerns about what is proposed on behalf of their Ministers and Executive. The Devolved Governments will be sent copies of papers and be invited to fully participate in meetings on subjects in which they have a devolved policy interest. Given the complexity of agreements, the strategy formulation will include engagement with all key partners as outlined in Annex A - Stage 1.

3.3 The arrangements will include regular informal and working level engagement between officials and Ministers to discuss policy proposals on the strategic direction for new international reciprocal healthcare agreements, or for proposals to renegotiate existing international reciprocal healthcare agreements and any projected impact assessments of those proposals. DHSC will arrange a regular international reciprocal healthcare meeting with the Devolved Governments on the issues, to be held with a frequency agreed with the Devolved Governments. DHSC will ensure that the Devolved Governments are given as much time as possible to properly consider proposals and feedback their views.

3.4 In order to enable each Government to operate effectively, the Governments will aim to provide each other with full and open access to policy information, for example data on S2 planned treatment, that may be requested where reasonable and appropriate. The Devolved Governments will be invited to contribute to impact assessments, on areas of devolved competence, which will be shared to support transparency on cost and benefits and inform evaluations of impact across the UK. The emphasis will always be on exchanging information where this proves possible to ensure a consistent approach to reciprocal healthcare policy and consideration of impact.

3.5 There will always be discussions between DHSC and Devolved Government officials in the first instance to reach a view on the policy before DHSC and Devolved Government officials put advice to their respective Ministers. DHSC officials will clearly identify where the views of the Devolved Government Ministers are still pending in their advice to DHSC Ministers. DHSC officials will ensure that the views of the Devolved Government Ministers are represented to DHSC Ministers in a timely manner, as soon as these are known. DHSC Ministers will write to Devolved Government Ministers to set out the policy proposals they endorse, giving them a reasonable period to respond, in order to build consensus on the direction to be taken in negotiations. Ministers from the Devolved Governments will provide their responses to DHSC Ministers by an agreed date whenever possible.

Agreement of Negotiating Mandate

3.6 All Devolved Governments will have the opportunity to influence the overall objective and shape of the mandate, noting this may be subject to change. As at Stage 1 (Annex A), the Devolved Governments will be sent copies of papers as early as possible and be invited to fully participate in meetings to build consensus on the negotiating mandate with regular informal and working level engagement between officials and Ministers to discuss policy proposals. Discussions between officials will be arranged with a frequency agreed with the Devolved Governments and depending on the timeframes for negotiations.

3.7 DHSC will share draft mandate text with the Devolved Governments for consultation and comment, prior to policy mandates going through cross UK Government write round and before publication. This will ensure appropriate consideration to the views of the Devolved Governments and that the negotiation mandates are acceptable to all parts of the UK (Annex A - Stage 2).

3.8 The Governments agree to share their respective legislative requirements at an early stage in the policy development process to provide for a common understanding of what will be necessary for implementation of a UK-wide agreement, to ensure transparency and timely consideration to feed into negotiations. This will be discussed by policy officials with policy and legal teams providing assurance on necessary implementation steps.

4. Negotiations and Drafting of International Agreements

4.1 DHSC will consult the Devolved Governments about the formulation of the UK Government's position for international reciprocal healthcare negotiations and any resulting deviations to the mandate where this has, or may have, an impact on devolved responsibilities. In such cases the Devolved Governments will be given early sight of evolving negotiating positions, with a reasonable period for consultation and comment, in order to reflect the views of the Devolved Governments in determining the approach for handling discussions. The Devolved Governments will respond with any concerns by an agreed date whenever possible.

4.2 Where there are deviations to the mandate DHSC officials will write to the Devolved Governments setting out the deviations for their review and consideration where this has, or may, impact on devolved responsibilities. Concession requests will be considered at official level in the first instance, with advice being put to DHSC Ministers and Devolved Government Ministers at the same time. DHSC will clearly identify where the views of the Devolved Government Ministers are still pending and will ensure that the views of the Devolved Government Ministers are represented to DHSC Ministers in a timely manner, as soon as these are known. Ministers from the Devolved Governments will provide any comments by an agreed date whenever possible. DHSC Ministers will consider any representations made and keep Devolved Government Ministers informed of any decisions by an agreed date whenever possible.

4.3 DHSC will provide regular updates to the Devolved Governments on the progress of negotiations including tracking documents and timelines (Annex A - Stage 3).

4.4 Once agreement with the third country has been reached in principle, advice will be provided to Ministers and the Devolved Governments on the final agreement. The legal text is the final output of the negotiations and will be drafted to reflect the policy proposals as they are developed (Annex A - Stage 4). DHSC will always seek to find consensus that the agreement reflects the policy position and assessment of implications and their suitability for implementation across the UK.

5. Ministerial Engagement

5.1 Engagement between Ministers may take place at any point throughout the consultation process set out in this Memorandum of Understanding upon request of any of the Ministers at DHSC or the Devolved Governments. DHSC and the Devolved Governments are committed to constructive and proportionate engagement with Ministers through the optimal engagement forum and commit to arranging ministerial discussions if required and desirable, coupled with formal written communications at key points on all negotiations.

6. Dispute Resolution

6.1 While the aim of this Memorandum of Understanding is to facilitate the consultation process on reciprocal healthcare agreements and section 2A of the HIAA provides powers for the Devolved Governments to introduce regulations when deemed necessary, recognising devolved competency, in circumstances where agreement cannot be reached, all efforts should be made to resolve disputes by an agreed date through the following process where possible:

i. In the first instance, concerns will be raised informally and at working level between policy officials. All officials should fully commit themselves to achieving agreement if possible.
ii. Where officials cannot reach an agreement, the issue should be brought to the attention of more senior officials. Senior officials should make every effort to resolve the problem without the need for ministerial engagement.
iii. If no agreement is reached at official level, concerns should be raised at ministerial level. The final escalation point will be to Ministers.

6.2 The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. In the event that no resolution can be found, there will be an exchange of letters between

Ministers. This would provide the opportunity for a Devolved Government to set out its position, and for the Secretary of State to explain the reasons for the final position and how the UK Government has sought to reach agreement with the Devolved Governments. If the Secretary of State decides to proceed without resolution and guided by the principles set out in this Memorandum, the exchange of letters should be made available to both Houses of Parliament.

6.3 The process outlined above gives the Governments an opportunity to resolve disputes, but there is not a formal obligation to follow this process.

7. Confidentiality

7.1 Each Government will wish to ensure that the information it supplies to others is subject to appropriate safeguards in order to avoid prejudicing its interests. Complete confidentiality is often essential in matters touching on international relations and in formulating a UK policy position. The effectiveness of arrangements agreed under this Memorandum of Understanding will rely on mutual respect for the confidentiality of information exchange. The Governments accept that in certain circumstances a duty of confidence may arise and will between themselves respect legal requirements of confidentiality. Each Government can only expect to receive information if it treats such information with appropriate discretion and not share anything publicly without agreement of all parties.

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C. CONSULTATION PROCESS - IMPLEMENTATION AND REVIEW

8. Regulations under HIAA

8.1 In line with the principles set out above, it is necessary to ensure a transparent and consistent engagement process between DHSC and the Devolved Governments to support the making of regulations under section 2 and 2A of HIAA.

8.2 Meetings will be held as early as possible during the process set out in Section B to agree how international obligations in areas of devolved competence should be implemented and determine a feasible timetable for all parties. This might include Ministers in the Devolved Governments making regulations or alternatively the Secretary of State making regulations on behalf of the Devolved Governments.

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consideration. Officials will collectively agree when to share a draft of the regulations to which HIAA applies with their respective Ministers.

8.5 Section 2A of the HIAA provides powers to the Devolved Governments to make regulations to implement reciprocal agreements in their respective countries if provision is within the devolved competence of the Devolved Government. If the UK Government has concerns about any delay in the implementation of international obligations, or the Devolved Governments fail to make regulations within the agreed timeframe, or in the event that agreement on the regulations cannot be reached, the process set out above (6. Dispute Resolution) will be followed. If no resolution is found, there will be an exchange of letters between Ministers. This would provide the opportunity for a Devolved Government to set out its position, and for the Secretary of State to explain the reasons for the final form of the regulations and how the UK Government has sought to reach agreement. If the Secretary of State decides to proceed without resolution and guided by the principles set out in this Memorandum, the exchange of letters will be made available to both Houses of Parliament and the Devolved Governments will bring them to the attention of their respective parliaments.

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9.1 Before an agreement comes into force the Governments should demonstrate operational and communication readiness. Officials from all Governments commit to consult on and set out a timescale for implementation.

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9.3 All four Governments will work together, where appropriate, on matters of mutual interest to provide the most effective outcomes for citizens of the UK and promote equity of treatment across the UK. Various public bodies deal with reciprocal healthcare matters within the responsibilities both of the UK Government and the Devolved Governments. The UK Government and Devolved Governments affirm their commitment to work together, where appropriate, to ensure that such bodies continue to operate effectively.

10. Review

10.1 This Memorandum of Understanding will be reviewed no later than 24 months after the date it is agreed, with any subsequent reviews to be scheduled in the course of the review. This review will be conducted by officials and agreed by Ministers.

10.2 The Governments recognise that there may be a need from time to time for some adjustment to be made to the Memorandum of Understanding, for example, in response to new issues or in the light of any changes to concordats and bilateral relations more generally. The Governments agree that there should be mechanisms in place to review the operation of the settlements and for adjustments to be agreed.

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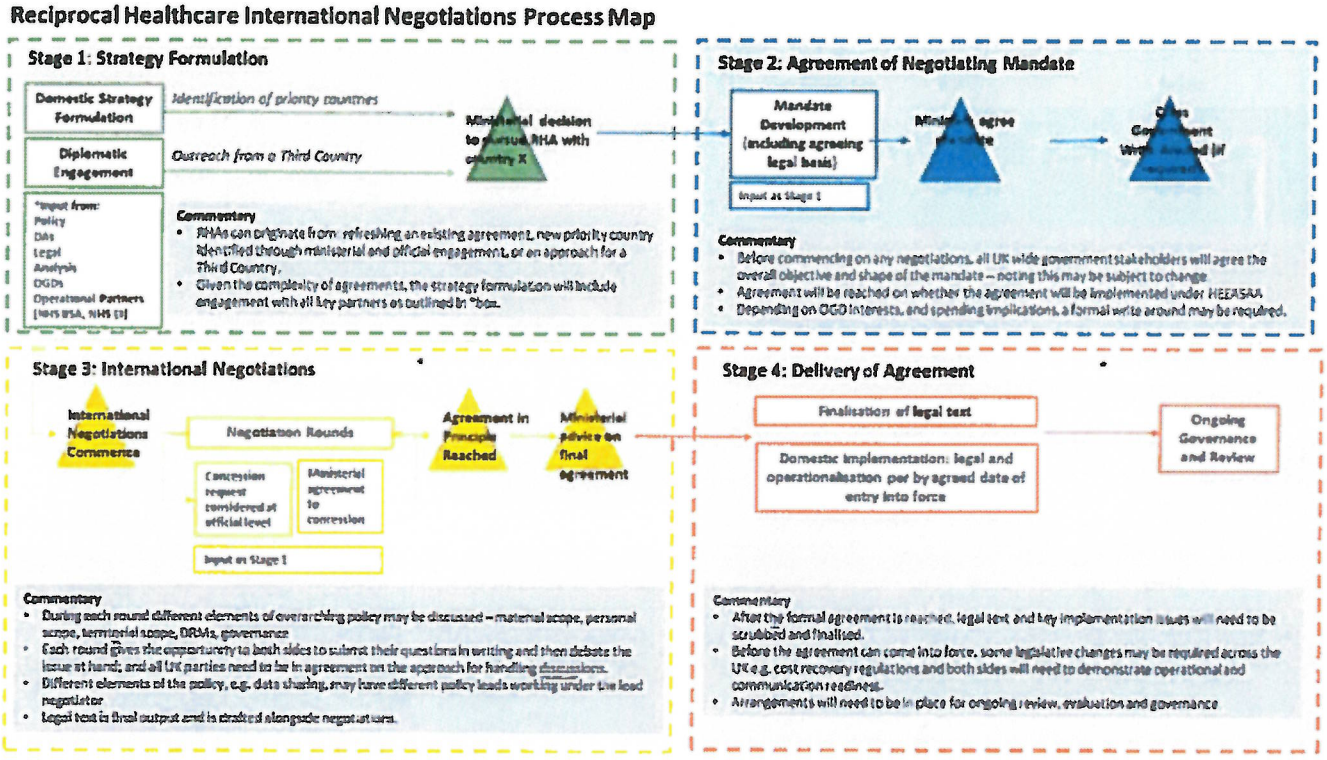
Minister of Health, Northern Ireland Department of Health

ANNEX A

Reciprocal Healthcare International Negotiations Process Map



Eluned Morgan AS/MS
Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Llywodraeth Cymru
Welsh Government

Russell George MS
Chair
Health and Social Care Committee

SeneddHealth@senedd.wales

2 February 2022

Dear Russell

Thank you for the Health and Social Care Committee's report on the Legislative Consent Memorandum (LCM) on the Health and Care Bill, laid 16 December 2021.

The position has been superseded by a number of amendments made to the Bill and two Supplementary LCMs laid on 17 December 2021 and 28 January 2022 respectively. This letter therefore reflects the latest position on the Bill in responding to the Committee's recommendations.

Firstly, I welcome the Committee's confirmation that it has no objection to the Senedd giving its consent to the inclusion in the Bill of:

- Clause 77 (formerly Clause 75) (Tidying up etc provisions about accounts of certain NHS bodies);
- Clause 80 (formerly Clause 78) (Hospital patients with care and support needs: repeals etc);
- Clause 87 (formerly Clause 85) (Medicines information systems) as amended by the House of Commons on 23 November 2021;
- Clause 142 (formerly clause 123) (regulation of health care and associated professions) as amended by the House of Commons on 23 November 2021; and
- Clause 146 (formerly Clause 127) (Food information for consumers - power to amend retained EU law).

I note the Committee's views regarding clauses 88-94 (formerly clauses 86-92): Arm's Length Bodies Transfer of Functions and I consider the amendments tabled by the UK Government on 24 January 2022 will, if passed, address the Committee's concerns regarding these clauses. The detail of the amendments is set out in the Supplementary Legislative Consent Memorandum (Memorandum No 3) laid on 28 January 2022.

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Please find my responses to your specific recommendations below.

Recommendations 1 and 2 - Clause 136 (formerly Clause 120): International Healthcare Arrangements

Recommendation 1

The Minister for Health and Social Services should make representations to the UK Government for an amendment to be brought forward to include on the face of the Bill a clear and proportionate test for what would qualify as an 'exceptional circumstance' for the purposes of the amount or type of healthcare that can be funded outside of an international healthcare agreement.

Response

Section 1 of the Healthcare (European Economic Area and Switzerland) Act 2019 (HEEASAA) currently provides the Secretary of State with a power to make payments, and arrange for payments to be made, in respect of the cost of healthcare provided in an EEA State or Switzerland.

Clause 136 (formerly clause 120) of the Bill will remove the power in section 1 of HEEASAA and replace it with regulation making powers enabling the Secretary of State to make regulations (a) for the purpose of giving effect to a healthcare agreement (including about making payments) between the UK and either a country or territory outside the UK or an international organisation, and (b) authorising the Secretary of State to make a payment in respect of healthcare provided otherwise than under a healthcare agreement, in a country or territory with which the UK has a reciprocal healthcare agreement, but only where the Secretary of State considers that the payment is justified by exceptional circumstances.

The purpose of the power enabling the Secretary of State to fund healthcare outside of an international healthcare agreement in exceptional circumstances is to assist the UK Government in supporting the healthcare needs of British residents when they are abroad in circumstances which might otherwise narrowly fall outside of a reciprocal healthcare agreement.

The UK Government has previously, for example, used existing powers under HEEASAA to provide crisis mental healthcare support to a minor in the EU where the Member State stated that the treatment was not covered under the European Health Insurance Card (EHIC) scheme. The UK Government has also funded treatment in the EU for twins with infantile haemangiomas who were born to UK residents but were unable to easily travel back to the UK due to COVID-19 travel restrictions and the risks of travelling at the time. They would not otherwise have been in scope of the planned treatment provisions in the EU reciprocal healthcare agreements as they could have received the treatment in the UK without undue delay had they been in the UK at the time.

Payments for healthcare outside the UK is a reserved matter because it concerns the welfare of people outside of the UK, and has no material bearing on, or connection to the domestic provision of healthcare in the UK; it is a matter of international relations whether and to what extent the UK decides to arrange and fund healthcare for people outside the UK.

Exceptional circumstances are likely to be those in which the refusal to fund healthcare treatment would result in unjustifiably harsh consequences for the individual such that the refusal of an application for funding would not be proportionate. Determining whether a payment is justified by exceptional circumstances will necessarily require a balance to be

struck between any competing public and individual interests involved. Attempting to define this further in primary legislation by reference to an amount or type of healthcare that can be funded would unduly restrict the Secretary of State's ability to exercise this discretion and hinder the ability to assist British residents when they most need it.

It is therefore my view that it is not appropriate to put a clear and proportionate test on the face of the Bill for what would qualify as an 'exceptional circumstance' for the purposes of the amount or type of healthcare that can be funded outside of an international healthcare agreement, as this could have a detrimental or limiting impact to provide support when needed.

Recommendation 2
Before the Senedd is asked to decide whether or not to give its consent to the inclusion in the Bill of clause 120 (now clause 136) (international healthcare agreements), the Minister for Health and Social Services should ensure that all Members have been provided with a copy of the final Memorandum of Understanding agreed between the UK Government and the Welsh Government in relation to the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019.

Response
I am pleased to enclose the reciprocal healthcare Memorandum of Understanding (MOU) with this letter for the consideration of the Committee, which has been revised in the light of the Bill provisions. The MOU has been agreed by all four nations. The Committee will wish to note that the wider linkages in relation to the new intergovernmental relations (IGR) governance arrangements have not yet been included in the MOU but are being considered. The MOU will be updated to reflect the new IGR arrangements in due course.

Recommendation 3 - Clause 142 (formerly Clause 123): Regulation of Healthcare and Associated Professions

Recommendation 3
The Minister for Health and Social Services should outline what analysis has been undertaken by the Welsh Government of the risks and benefits associated with regulating, or not regulating, senior health leaders and managers in Wales, and what the rationale is for her decision not to introduce such regulation.

Response

Clause 142 (formerly clause 123) has been amended to provide that no recommendation is to be made to Her Majesty to make an Order in Council under section 60 of the Health Act 1999 which relates to any group of workers, who are not professionals but who are concerned with the physical or mental health of individuals, where the Order contains provision that is within the legislative competence of the Senedd, unless the Welsh Ministers have consented to that provision.

No decision with regard to the regulation of these workers (which includes senior health leaders and managers in Wales) by Order in Council has yet been taken. Should the UK Government decide to regulate with regard to such professionals at a future point, if this was to also apply in Wales, then the Welsh Ministers will consider whether or not to consent to an Order making such provision. Such a decision would be supported by relevant evidence as to the risks, costs and benefits of applying the regulations within Wales.

We have no plans to regulate senior health leaders and managers in Wales and the configuration of the NHS within Wales make this an unlikely event in the future. The Department of Health and Social Care has also indicated that it has no specific plans to regulate this group of workers in the near future.

I am content this amendment addresses our concerns in respect of this provision and consequently I can now support this Bill clause.

Recommendation 4 - Clauses 149, 144 and 91 (formerly clauses 89, 125 and 130): Consequential Amendments to Senedd Legislation

Recommendation 4
Before the Senedd is asked whether to give its consent to the Bill, the Minister for Health and Social Services should provide a further update on her discussions with the UK Government on the consequential amendment powers in clauses 89, 125 and 130 of the Bill (as introduced), including whether, in her view, the assurances she has received from the UK Government in respect of the proposed use of the powers reduce the associated risks to acceptable levels.

Response
These clauses provide the Secretary of State with the powers, by regulation, to make provision which is consequential on the Bill. This includes provision that amends, repeals, revokes or otherwise modifies provision made by, or under, an Act or Measure of the Senedd.

As set out in the Supplementary LCM (Memorandum No. 3) laid on 28 January 2022, I and my officials have met with the Minister of State for Health, Edward Argar MP and his officials on a number of occasions to discuss these provisions. The UK Government is of the view that these are standard clauses and it is the case that Wales similarly takes powers in Senedd Acts to make consequential amendments to UK Government legislation.

UK Government officials have provided examples of how these powers may be used – the amendments likely would be of a minor nature, for example the changing of the name of an English organisation which is referred to in Senedd legislation where a transfer of functions has occurred. The Minister of State for Health has also given a written commitment to making a Dispatch Box Statement in relation to clauses 91 and 149, on how these powers might be used.

Clause 144 refers to Schedule 17 which amends the Communications Act 2003 to restrict the advertising of certain food and drink products in relation to the UK. The Clause and Schedule are covered in the first LCM on the Bill. Whilst this clause also contains provisions which enable consequential change to Senedd legislation, the UK Government has not identified this as a clause which requires the legislative consent of the Senedd and therefore will not include within the wording Dispatch Box Statement. However, on the basis of the assurances provided by the UK Government on the possible use of the powers, I accept the consequential amendments which might arise from clause 144 as an acceptable and minor constitutional risk.

We have agreed the wording of the Despatch Box Statement with UK Government and the UK Government has committed to making the statement prior to the Legislative Consent Motion debate in the Senedd scheduled to take place on 15 February.

On the basis of the statement being made, and in the light of all of the assurances given by the UK Government, I regard the risk presented by the provisions now to be acceptable.

Recommendations 5 and 6 – Laying of LCMs and Content of LCMs

Recommendation 5
The Welsh Government should ensure that LCMs are normally laid no more than two weeks after a Bill is introduced in accordance with Standing Order 29.2(i). Should circumstances require a delay before an LCM is laid, the relevant Minister should write to the appropriate Senedd committees to provide an estimate of when the LCM will be brought forward.

Response
The Standing Order deadline is potentially achievable for Bills on which the Welsh Government and the UK Government have worked closely together and are in agreement. The "normally" qualification recognises the realities of what is a highly variable process. The increasing size and complexity of Bills and whether the UK Government has shared draft provisions, which is at its discretion, in advance of publication, can impact our timing for laying LCMs.

We will consider the amendment of the formal guidance for completing LCMs as part of our engagement with the Business Committee's review of the LCM process to make writing to the Senedd Committees as described a requirement. In the meantime, when laying LCMs in more recent times, we have included explanation regarding any delay in laying within the LCM itself, to ensure Members are informed.

In addition where possible we have laid LCMs within the two week deadline to ensure the Senedd Committees have as much time as possible to scrutinise the LCM. For example I laid Supplementary LCM, Memorandum No. 3 on this Bill on 28 January, just four days after the tabling of UK Government amendments to the Bill.

Recommendation 6
The Welsh Government should ensure that the LCMs it lays provide the relevant committees with sufficient information about the Welsh Government's position, its concerns, any remedies it is seeking, and such other matters as may be appropriate to enable full and effective scrutiny.

Response

When preparing LCMs, the Welsh Government seeks to fully inform Members of the extent of its position with regard to clauses engaging the LCM process, and of the position with regard to negotiations with the UK Government. However, as you will appreciate, there is a need to respect confidentiality, and we may not always be in a position to share all the information we receive. The negotiations with regard to this Bill have been successfully completed and the outcomes are set out in the Supplementary LCMs (Memorandum No 2 and Memorandum No 3) laid on the Bill.

I trust this response will be helpful in the Committee's scrutiny of the Legislative Consent Memoranda on the Bill.

I am copying this letter to Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee.

Yours sincerely

Eluned Morgan AS/MS
Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Agenda Item 11

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