

Agenda – Legislation, Justice and Constitution Committee

Meeting Venue:	For further information contact:
Video Conference via Zoom	P Gareth Williams
Meeting date: 6 June 2022	Committee Clerk
Meeting time: 13.30	0300 200 6565
	SeneddLJC@senedd.wales

1 Introductions, apologies, substitutions and declarations of interest

(13.30)

2 Inter–Institutional Relations Agreement

(13.30–13.35)

2.1 Correspondence from the First Minister of Wales: Inter–Institutional Relations Agreement: Inter–Ministerial Standing Committee

(Page 1)

Attached Documents:

LJC(6)–16–22 – Paper 1 – Letter from the First Minister, 30 May 2022

3 Papers to note

(13.35–13.55)

3.1 Correspondence from the Minister for Finance and Local Government to the Llywydd: Legislative Consent – Procurement Bill

(Page 2)

Attached Documents:

LJC(6)–16–22 – Paper 2 – Letter from the Minister for Finance and Local Government to the Llywydd, 24 May 2022



**3.2 Correspondence from the Minister for Climate Change to the Llywydd:
Legislative Consent – Levelling-up and Regeneration Bill**

(Pages 3 – 4)

Attached Documents:

LJC(6)-16-22 – Paper 3 – Letter from the Minister for Climate Change to the Llywydd, 24 May 2022

**3.3 Correspondence from the Chair of the Procedure Committee:
Interparliamentary relations**

(Page 5)

Attached Documents:

LJC(6)-16-22 – Paper 4 – Letter from the Chair of the Procedure Committee, 25 May 2022

**3.4 Correspondence from the Deputy Minister for Climate Change: The Swansea
(Closure of the Prince of Wales Dock) Harbour Revision Order 2022**

(Pages 6 – 13)

[SL\(6\)204 – Swansea \(Closure of the Prince of Wales Dock\) Harbour Revision Order 2022](#)

Attached Documents:

LJC(6)-16-22 – Paper 5 – Letter from the Deputy Minister, 25 May 2022

LJC(6)-16-22 – Paper 6 – Decision letter, 24 May 2022

**3.5 Correspondence from the Llywydd: Report on the Welsh Government’s
Legislative Consent Memorandum on the British Sign Language Bill**

(Pages 14 – 16)

Attached Documents:

LJC(6)-16-22 – Paper 7 – Letter from the Llywydd, 26 May 2022

LJC(6)-16-22 – Paper 8 – Letter to the Llywydd, 10 May 2022

**3.6 Correspondence with the Llywydd and the Rt Hon Sir Oliver Heald QC MP: the
first meeting of the UK–EU Parliamentary Partnership Assembly**

(Pages 17 – 20)

Attached Documents:

LJC(6)-16-22 – Paper 9 – Letter to the Llywydd, 25 May 2022

LJC(6)-16-22 – Paper 10 – Letter to the Rt Hon Sir Oliver Heald QC MP, 26 May 2022

3.7 Correspondence from the House of Lords International Agreements Committee: International Agreement – Convention on the International Organization for Marine Aids to Navigation

(Pages 21 – 23)

Attached Documents:

LJC(6)-16-22 – Paper 11 – Letter from the Chair of the International Agreements Committee, 27 May 2022

LJC(6)-16-22 – Paper 12 – Letter to the Chair of the International Agreements Committee, 20 May 2022

3.8 Correspondence between the Climate Change, Environment, and Infrastructure Committee and the Minister for Climate Change: Exclusion to the UK Internal Market Act for single use plastics

(Pages 24 – 31)

Attached Documents:

LJC(6)-16-22 – Paper 13 – Letter from the Minister for Climate Change to the Climate Change, Environment, and Infrastructure Committee, 31 May 2022

LJC(6)-16-22 – Paper 14 – Letter from the Climate Change, Environment, and Infrastructure Committee to the Minister for Climate Change, 10 May 2022

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

(13.55)

5 Legislative Consent Memorandum on the Online Safety Bill

(13.55–14.10)

(Pages 32 – 38)

[Legislative Consent Memorandum: Online Safety Bill](#)

Attached Documents:

LJC(6)-16-22 – Paper 15 – Legal Advice Note

LJC(6)-16-22 – Paper 16 – Letter from the Chair of the Children, Young People and Education Committee, 31 May 2022

6 Consideration of international agreements

(14.10–14.20)

(Pages 39 – 44)

Attached Documents:

LJC(6)-16-22 – Paper 17 – Briefing paper

7 Intergovernmental agreements between the Welsh and UK Governments

(14.20–14.40)

(Pages 45 – 70)

Attached Documents:

LJC(6)-16-22 – Paper 18 – Paper by Dr Gregory Davies, University of Liverpool: Is a bad deal better than no deal? An examination of intergovernmental agreements between the Welsh and UK Governments

8 Forward work programme

(14.40–15.00)

(Pages 71 – 81)

Attached Documents:

LJC(6)-16-22 – Paper 19 – Briefing paper

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

SeneddLJC@senedd.wales

30 May 2022

Dear Huw

Inter-Institutional Relations Agreement: Inter-Ministerial Standing Committee

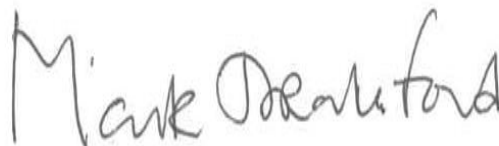
I am writing in accordance with the inter-institutional relations agreement to notify you of the second meeting of the Inter-Ministerial Standing Committee, which will take place on the 7th June.

The Standing Committee will be chaired by the Scottish Government's deputy First Minister and Cabinet Secretary for Covid Recovery John Swinney MSP. The Counsel General, Minister for Finance and Local Government and I will represent the Welsh Government at the meeting.

In this virtual meeting I anticipate the discussion will focus on UK legislation and the cost of living crisis.

I will provide an update after the meeting.

Yours sincerely



MARK DRAKEFORD

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400

Gohebiaeth.Mark.Drakeford@llyw.cymru
Correspondence.Mark.Drakeford@gov.wales

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

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

Agenda Item 3.1

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



Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref

Elin Jones MS
By Email: Llywydd@senedd.wales

24 May 2022

Dear Llywydd,

Procurement Bill

The Procurement Bill (the Bill) was introduced into the UK Parliament, the House of Lords, on 11 May 2022.

The Bill is some 113 pages in length, comprising 13 Parts and 11 Schedules and is complex in nature. Our initial analysis is that the Bill makes relevant provision for the purposes of Standing Order 29 and will therefore require a Legislative Consent Memorandum to be laid. We are working through the detail required. However, due to the scale and complexity of the Bill, whilst the Legislative Consent Memorandum will be laid as soon as possible, this will, however, be outside the normal two week Standing Order 29 deadline. It is hoped the Legislative Consent Memorandum will be laid in time for it to be considered by the Business Committee at its meeting on 14 June.

The Bill is not expected to move through Parliament at pace. House of Lords Second reading is due to take place on 25 May and if passed it is anticipated the Bill will receive Royal Assent in 2023.

I am copying this letter to the Counsel General and Minister for the Constitution, Mick Antoniw MS, the Minister for Rural Affairs and North Wales, and Trefnydd, Lesley Griffiths MS, and the Chair of the Legislation, Justice and Constitution Committee, Huw Irranca-Davies MS.

Yours sincerely,

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

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
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Correspondence.Rebecca.Evans@gov.wales
Gohebiaeth.Rebecca.Evans@llyw.cymru

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

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

Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref

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

Llywydd@senedd.wales

24th May 2022

Dear Elin

The UK Government introduced the Levelling-up and Regeneration Bill (the Bill) to the House of Commons on 11 May.

The Bill contains a large number of largely unrelated provisions as illustrated by the long title:

A Bill to make provision for the setting of levelling-up missions and reporting on progress in delivering them; about local democracy; about town and country planning; about Community Infrastructure Levy; about the imposition of Infrastructure Levy; about environmental outcome reports for certain consents and plans; about regeneration; about the compulsory purchase of land; about information and records relating to land, the environment or heritage; for the provision for pavement licences to be permanent; about governance of the Royal Institution of Chartered Surveyors; about vagrancy and begging; and for connected purposes.

The Bill is lengthy and complex running to 338 pages, comprising 11 Parts and 17 Schedules. From our initial analysis, the Bill touches upon a number of areas of devolved competence and may modify Welsh Ministers' functions in reserved areas. However, due to very limited prior consultation by the UK Government and the complexity of the Bill, it has not yet been possible to fully consider the devolution consequences of what is being proposed.

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

I intend to lay a Legislative Consent Memorandum and any other relevant statements before the Senedd as soon as we have a clear picture of the devolution consequences of the proposed legislation, however, it is clear this will be outside the normal two week Standing Order 29 deadline. The Bill is not expected to move through Parliament at pace. House of Commons second reading is scheduled to take place on 8 June, and, if passed, the Bill is not expected to receive Royal Assent until Spring 2023.

I am copying this letter to the Counsel General and Minister for the Constitution, Mick Antoniw MS, the Minister for Rural Affairs and North Wales, and Trefnydd, Lesley Griffiths MS and the Chair of the Legislation, Justice and Constitution Committee, Huw Irranca-Davies MS.

Yours sincerely



Julie James AS/MS

Y Gweinidog Newid Hinsawdd
Minister for Climate Change



Procedure Committee

Huw Irranca-Davies MS
Welsh Parliament
Cardiff Bay
Cardiff
CF99 1SN

25 May 2022

D Huw

On behalf of all of the Members who participated in our visit last week, I would like to express our thanks for the extremely valuable discussions we had with you and the rest of the Legislation, Justice and Constitution Committee – all the more so for being able to meet in person.

It was clear from our discussions that the way in which legislative consent is sought and provided leaves much to be desired. My Committee will consider our discussion and decide what information may be helpful to request from the UK Government in order to ensure that any future report is properly informed.

It was also very helpful to discuss the current status of interparliamentary relations, as well as the options that exist to improve cooperation between the committees of the Senedd and the House of Commons.

We now plan to visit Edinburgh in order to continue discussions on House of Commons procedure and the territorial constitution. My Committee will consider the options for how the procedures of the House of Commons could be adapted and look forward to continuing discussing with you and your colleagues further in future.

Yours ever
K

Rt Hon Karen Bradley MP
Chair of the Procedure Committee

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<https://committees.parliament.uk/committee/126/procedure-committee/>

Agenda Item 3.4

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

Document 2



Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref: MA-JJ-0339-21

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

25 May 2022

Dear Huw,

I write to notify the LJCC Committee of a recent item of subordinate legislation I have recently authorised, namely Swansea (Closure of the Prince of Wales Dock) Harbour Revision Order 2022.

You will be aware that as a “no procedure” order, no legislative documentation is required to be produced or laid before the Senedd, nor is there any requirement to notify the Committee of such.

However as a matter of courtesy I wish to make an exception in this instant given this is the first harbour order that the Welsh Ministers have had to consider since functions were transferred pursuant to the Wales Act 2017.

Please see attached copies of the:

1. Decision Letter; and
2. Swansea (Closure of the Prince of Wales Dock) Harbour Revision Order 2022

Yours sincerely



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

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Eich cyf / Your ref - 10995/76/PFI
Ein cyf/ Our ref - WGHRO-2020-02

David Walker
Winckworth Sherwood LLP
dwalkers@wslaw.co.uk
(email only)

24 May 2022

Dear Mr Walker,

Harbours Act 1964
Swansea (Closure of the Prince of Wales Dock) Harbour Revision Order 2022

1. The Welsh Ministers have considered your application for the Swansea (Closure of the Prince of Wales Dock) Harbour Revision Order 2022 (the “Order”), which you applied for on behalf of Associated British Ports (the “Applicant”) under section 14 of the Harbours Act 1964 (the “HA 1964”) on 2 September 2020.
2. The function of deciding whether or not to make the Order, has been transferred to the Welsh Ministers by virtue of section 29 of the Wales Act 2017. The decision falls under the responsibility of Lee Waters, the Deputy Minister for Climate Change, one of the Welsh Ministers as the appropriate Minister for the purposes of the HA 1964.

Summary of Decision

3. The Deputy Minister for Climate Change has authorised the making of the Order without substantive amendment.
4. The Order provides for the closure of the Prince of Wales Dock (the “Dock”) within the Port of Swansea (the “Port”), including cessation of:
 - a. the Applicant’s statutory responsibilities in relation to the Dock;
 - b. all rights of navigation in relation to the Dock; and
 - c. the obligation to maintain navigational access to the Dock from the rest of the Port.
5. The Welsh Ministers consider that the closure is required to reflect the current circumstances of the Port and is in the interests of securing the management of the Port in an efficient and economical manner for the purpose of section 14(2) (b) of the HA 1964. The Welsh Ministers also consider that the application accords with the Port

Marine Safety Code (the “Code”)¹, which is published by the Department for Transport and endorsed by the devolved administrations. The Code sets out a national standard for every aspect of port marine safety and, whilst not mandatory, the Welsh Government expects all harbour authorities in Wales to comply.

Background

6. The Applicant is the statutory harbour authority for the Port, of which the Dock forms part. The Applicant was reconstituted under the Transport Act 1981 as the statutory successor to the British Transport Docks Board which was created in 1962 on the dissolution of the British Transport Commission (in turn established in 1947 following the nationalisation of ports covered by the railway and canal companies). The harbour undertaking inherited from the British Transport Docks Board includes the powers and duties conferred by local legislation in relation to the Port.
7. The Dock was originally authorised by the Swansea Harbour Act 1874. It was extended by the Swansea Harbour Act 1894 and further responsibilities were conferred by the Swansea Harbour Act 1901. The functions in relation to the Dock originally conferred on the Swansea Harbour Trustees, then passed to the Great Western Railway Company before passing to British Transport Commission as mentioned above.
8. Over its history the Dock has served the export of locally mined minerals such as coal and metals. More recently, and in reflection of the decline in raw material exports from the UK, the Dock had facilitated the import of sea dredged aggregates, but since 2017 this activity has been relocated to other more suitable facilities. In assessing the future of the Dock, the Applicant has considered these factors alongside physical limitations (in particular, the need to access the Dock by navigating through the narrow communication passage), as well as other, more suitable and available port facilities within the rest of the Port and locally. There is currently no use of the Dock for port purposes, and the only current use is for the purposes of water sport activities, a non-port use which is not affected by the closure of the Dock.
9. The Applicant has concluded that it is very unlikely that there would ever be a need for the Dock to be used for port purposes in the future, and therefore the closure of the Dock is desirable in the interest of the efficient and economic management of the Port since it removes the obligation to maintain a facility within the Port for which there is no need.
10. The Code requires harbour authorities to keep their powers and jurisdiction under review and take account of the various mechanisms such as harbour orders which are available to amend statutory powers in an authority’s local legislation. In accordance with this requirement, the Applicant has reviewed its powers in relation to the Port and concluded that it is unnecessary to continue to maintain the Dock for port use. It is therefore considered desirable in the interests of safety to close navigation between the operational Port to a water area which is no longer being maintained for that purpose.
11. Public authorities are required by section 58 of the Marine and Coastal Access Act 2009 to have regard to the UK Marine Policy Statement² and relevant marine plans in

¹ [Port Marine Safety Code \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

² [UK marine policy statement - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

making decisions or, in this case the Welsh National Marine Plan, the relevant marine plan made for the purpose of section 51 of the Marine and Coastal Access Act 2009. The Welsh Ministers, having considered the requirements of section 58 of the Marine and Coastal Access Act 2009, the UK Marine Policy Statement and the Welsh National Marine Plan, agree with the position of the Applicant that the Order does not authorise any development or directly engage the UK Marine Policy Statement or any of the policies contained in the Welsh National Marine Plan.

12. It is considered that the Order achieves various objects specified in Schedule 2 of the HA 1964, these are detailed within Annex I of this letter. These include objects identified by the Applicant and further objects considered by officials to be applicable.

Application Procedure

13. On 2 September 2020 an application for the Order was submitted to the Welsh Government by Winckworth Sherwood LLP on behalf of the Applicant.
14. Notice of the application for the Order was advertised in the London Gazette on 4 September 2020 and the South Wales Evening Post on 4 and 11 September 2020. A 42-day consultation ran from 04 September 2020 to 16 October 2020.

Consultation

15. In September 2020 the Welsh Government notified the list on consultees within Annex A of the **Procedural Harbour Order Guidance for Wales 2018**.³ Comments received are summarised in the table below:

Organisation	Response received
Natural Resources Wales (“NRW”)	NRW raised no objection, however they did raise a number of matters relating to the future operation and management of the Dock area.
Maritime and Coastguard Agency (the “MCA”)	The MCA raised no objections or concerns, but stressed that any future management of the Dock in relation to recreational activity should adhere to the Code and its guide to good practice.

NRW

16. NRW raised no objections to the Order and advised that the removal of the statutory responsibilities in relation to the Dock will not affect any European or National Protected Sites within or adjacent to the related area. However, they made a number of comments concerning the future management of the Dock, including:

(a) the increased social amenity value of the Dock;

³ [Procedural harbour order guidance for Wales 2018 \(gov.wales\)](https://gov.wales/procedural-harbour-order-guidance-for-wales-2018)

- (b) the importance of maintaining water transfer to and from the Dock to maintain salinity and water quality;
 - (c) the need for any future change of use to account for potential biosecurity issues; and
 - (d) the importance of protecting the route to reconnect the Tennant Canal to the River Tawe via the Docks.
17. In response, the Applicant advised that the purpose of this Order is not to authorise any development but simply to change the legal status of the Dock and to remove the Applicant's statutory duties and powers in relation to the Dock. Any concerns relating to potential future development, or change of use that would require consent under the planning regime would allow NRW to comment at the time of such an application. The Applicant also confirmed that it intends to maintain the ability to transfer water and to maintain water quality to and from the Dock, and that the Order would not prevent the reconnection of the Tennant Canal.

MCA

18. The MCA confirmed that they had no objections to raise with regard to the Order on the understanding that the proposals are to be carried out in accordance with the Code and supplementary Guide to Good Practice on Port Marine Operations⁴. The MCA did however question who would take ownership of the management of the Dock and oversee its safe operation following its closure.
19. In their response, the Applicant confirmed that the works required to operationally close the Dock would require planning permission under the Town and Country Planning Act 1990, and would also be subject to the requirements of the Marine and Coastal Access Act 2009, which would consider the application of the Code. They also confirmed that the recreational activities that are currently undertaken on the Dock are done so under an agreement with the Applicant that is in line with the requirements of the Code. The Applicant's intention is that this licence to operate (and associated obligations) would be transferred to the new owner at the point of sale of the Dock.
20. No public representations were received within the statutory 42-day period provided for in Schedule 3 to the HA 1964.

Welsh Ministers' Consideration

21. The Welsh Ministers note that an order may be made under section 14 of the HA 1964 in relation to a harbour which is being improved, maintained or managed by a harbour authority in the exercise and performance of statutory powers and duties for achieving all or any of the objects set out in Schedule 2 to the HA 1964.
22. By virtue of section 14(2)(a) of the HA 1964, a harbour revision order may not be made in relation to a harbour unless the Welsh Ministers are satisfied that an appropriate written application has been made by the authority engaged in improving, maintaining

⁴

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854521/MCA-Port Marine Guide to Good Practice NEW-links.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854521/MCA-Port_Marine_Guide_to_Good_Practice_NEW-links.pdf)

or managing it, or by a person appearing to it to have a substantial interest or body representative of persons appearing to it to have such an interest.

23. Section 14(2)(b) of the HA 1964 provides that a harbour revision order shall not be made in relation to a harbour unless the Welsh Ministers are satisfied that the making of the order is desirable in the interests of securing the improvement, maintenance or management of the harbour in an efficient and economical manner, or of facilitating the efficient and economical transport of goods or passengers by sea or in the interests of the recreational use of sea-going ships.
24. Section 14(3) of the HA 1964 provides that a harbour revision order may include all such provisions as appear to the Welsh Ministers to be requisite or expedient for rendering of full effect any other provision of the order and any supplementary, consequential or incidental provisions appearing to him to be requisite or expedient for the purposes of, or in connection with, the order.
25. The Welsh Ministers recognise that there is no current or future predicted use of the Dock for port purposes. Furthermore, the only current activity associated with the Dock is for the purposes of water sport activities, a non-port use which is not affected by the closure of the Dock. The Welsh Ministers therefore consider that the closure of the Dock is required to reflect the circumstances of the Port, is desirable in the interests of securing the improvement, maintenance or management of the Port in an efficient and economical manner for the purpose of section 14(2) (b) of the HA 1964, and is in accordance with the Code.
26. The Welsh Ministers have also considered the substantive comments raised by NRW and MCA, and are satisfied that the response provided by the Applicant adequately addresses the concerns raised.

Welsh Ministers' Decision

27. The Welsh Ministers are satisfied that the Order meets the requirements of section 14(1) and sections 14(2)(a) and 14(2)(b) of the HA 1964. The Welsh Ministers are also satisfied that the statutory procedural requirements have been complied with.
28. The Welsh Ministers are satisfied that there are no objections to the application for the Order.
29. The Welsh Ministers are satisfied for the reasons set out by the Applicant in their statement of support, and summarised above, that the making of the Order (and each provision of the Order) is desirable for the purposes of section 14(2)(a) and (b) of the HA 1964 and should be made. The Welsh Ministers also consider some supplementary, consequential and incidental provisions of the Order to be requisite and expedient for rendering full effect to the Order pursuant to section 14(3) of the HA 1964.
30. The Welsh Ministers therefore authorise the making of the Order, with no substantive amendments.
31. The Welsh Ministers note that the Order is not subject to any procedure and therefore is not required to be laid before the Senedd.

Conveyance of Decision

32. As soon as possible after the Order has been made, the Applicant is required to publish a notice by Gazette and local advertisement stating that the Order has been made and specifying a place where a copy of the Order and any map may be inspected at all reasonable hours, in accordance with the provisions of the HA 1964.

Right of Challenge

33. Any person who desires to question the making of the Order on the ground that there was no power to make the Order or that a requirement of the HA 1964 was not complied with in relation to the Order, may within 6 weeks from the date on which the Order becomes operative make an application for the purpose to the High Court.
34. **A person who thinks they may have grounds for challenging the decision to make the Order is advised to seek legal advice before taking any action.**

Yours sincerely,

Carolyn Hughes

Carolyn Hughes

Governance & Legislation Manager | Rheolwr Llywodraethu a Deddfwriaeth
National & International Connectivity | Cysylltedd Cenedlaethol a Rhyngwladol
Welsh Government | Llywodraeth Cymru

Annex I

Applicable Objects for whose achievement Harbour Revision Orders may be made within the Harbours Act 1964, Schedule 2

Paragraph 3:

“Varying or abolishing duties or powers imposed or conferred on the authority by a statutory provision of local application affecting the harbour, being duties or powers imposed or conferred for the purpose of—

- a) improving, maintaining or managing the harbour;*
- b) marking or lighting the harbour, raising wrecks therein or otherwise making safe the navigation thereof; or*
- c) regulating the carrying on by others of activities relating to the harbour or of activities on harbour land.”*

Paragraph 6:

“Settling (either for all purposes or for limited purposes) the limits within which the authority are to have jurisdiction or altering (either for all purposes or for limited purposes) such limits as previously settled.”

Paragraph 8A:

“Enabling the authority to close part of the harbour or to reduce the facilities available in the harbour.”

Paragraph 17:

“Any object which, though not falling within any of the foregoing paragraphs, appears to the appropriate Minister to be one the achievement of which will conduce to the efficient functioning of the harbour.”

Agenda Item 3.5

Y Pwyllgor Busnes

Business Committee

Senedd Cymru

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Huw Irranca-Davies MS

Chair, Legislation, Justice and Constitution Committee

26 May 2022

Report on the Welsh Government's Legislative Consent Memorandum on the British Sign Language Bill

Dear Huw,

Thank you for your letter of 10 May 2022 drawing Business Committee's attention to your Committee's report on the Welsh Government's Legislative Consent Memorandum on the British Sign Language Bill.

Business Committee considered the correspondence at its meeting on 17 May and noted the points you make in relation to Members' campaigns for legislation on British Sign Language to be introduced in the Senedd.

As you will be aware, Standing Order 26.87 states that the "Presiding Officer must from time to time hold a ballot to determine the name of a Member, other than a member of the government, who may seek agreement to introduce a Bill". A proposal for a Member Bill on British Sign Language was tabled but was unsuccessful in the most recent ballot.

Consequently, under current Standing Orders it is not possible to create a link between a Members' Legislative Proposal debated in the Senedd and the Member Bill process.



Business Committee agreed to consider a further paper regarding the potential for reviewing the selection process for Member Bills when this can be accommodated within our wider procedural work programme.

Kind regards,

A handwritten signature in blue ink, appearing to read 'Elin Jones', is centered below the text 'Kind regards,'.

The Rt Hon. Elin Jones MS

Y Llywydd and Chair of the Business Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.

Elin Jones MS
Llywydd
Chair, Business Committee

10 May 2022

Dear Llywydd

Report on the Welsh Government's Legislative Consent Memorandum on the British Sign Language Bill

Our report on the Welsh Government's Legislative Consent Memorandum on the British Sign Language Bill was laid on 25 April.

Within our report, we note that over previous Seneddau, Members' campaigns for legislation to be introduced in the Senedd in relation to British Sign Language have received cross-party support. One of the first examples was a statement of opinion tabled in the first Senedd, and a more recent example from the final year of the fifth Senedd was a debate on a Member's Legislative Proposal for a British Sign Language Bill.

In the absence of the Welsh Government introducing primary legislation on the use of British Sign Language, we note that backbench Members have submitted proposals for Member Bills on the subject. For example, in the first Member Bill ballot of this Senedd, Mark Isherwood MS proposed a Bill with the same stated aims as noted by the Senedd in the aforementioned Member's Legislative Proposal.

In our report, we expressed disappointment at the fact that an opportunity for a backbench Member to introduce legislation on this important subject has not arisen. This is despite there being widespread support over many Seneddau for the introduction of such a Bill. We therefore draw this to the attention of the Business Committee and suggest that it considers ways to address this problem including potentially a review of the procedure for Member Bills.

Yours sincerely,



Huw Irranca-Davies
Chair

The Rt Hon. Elin Jones MS
Llywydd

25 May 2022

Dear Elin,

The UK-EU Parliamentary Partnership Assembly

It was a great pleasure to represent the Senedd at the first meeting of the UK-EU Parliamentary Partnership Assembly (PPA) in Brussels on 12-13 May 2022. As you are aware the PPA was established under the UK-EU Trade and Cooperation Agreement to bring together parliamentarians from the UK and the EU to discuss implementation of the agreement and the status of UK-EU relations more broadly.



It was important that we, as Members of the Senedd along with colleagues from the Scottish Parliament, were able to attend the meeting along with colleagues from the House of Commons and the House of Lords.

The meeting was addressed by Commissioner Sěčovič and by Michael Ellis MP, Minister for the Cabinet Office. Whilst the differences on implementation of the Protocol and other issues were stark, the meeting also provided the opportunity for honest dialogue between parliamentarians of the issues facing Northern Ireland and possible solutions that might allow for the implementation of the Protocol.



Discussion was also held on security and foreign policy cooperation between the UK and the EU and in particular on the collective efforts to support the Ukrainian Government in the war in Ukraine. The Director General of the European External Action Service (EEAS) Stefano Sannino and the Rt. Hon James Heapey, Minister for the Armed Forces, addressed the meeting and



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took part in a detailed debate on what the war means for UK-EU cooperation in these fields, areas of possible future collaboration and the investigation of possible war crimes.

The exchange of views on energy security, climate change, innovation and research demonstrated the extent of the areas of common interest between the delegations and a range of possible areas where the Assembly could have a collective impact in future.

Discussion was also held on future ways of working of the Assembly itself. Whilst having Members of the Senedd present in the room was invaluable in terms of building relationships with UK and European colleagues, the opportunity for representatives of devolved legislatures to contribute to the meetings on areas pertinent to devolved matters should be further explored. This would enrich the discussions and ensure that devolved legislatures are able to set out their views on the areas they have a responsibility to implement.

It was important that the proceedings were broadcast live by the European Parliament so that stakeholders and citizens could follow the discussions taking place and we hope that this transparent approach continues for all future meetings of the Assembly.

One issue which you may wish to consider is how the Senedd is informed of the outcome of these meetings by those participating. This letter aims to start that process and we hope will be useful as part of the discussions due to take place this week at the Chairs' Forum on future representation on the PPA.

Yours sincerely,



Alun Davies MS

Member of the Legislation, Justice and Constitution Committee



Sam Kurtz MS

Member of the Economy, Trade and Rural Affairs Committee



Rt Hon Sir Oliver Heald QC MP
Leader and Co-chair of the UK Delegation to
the UK-EU Parliamentary Partnership Assembly
House of Commons
London
SW1A 0AA

26 May 2022

Dear Oliver,

The UK-EU Parliamentary Partnership Assembly

On behalf of my colleagues who represented the Senedd at the first meeting of the UK-EU Parliamentary Partnership Assembly, I wanted to extend our thanks to you, the Vice Chairs and your co-chairs in the European Parliament for organising a very successful first meeting, for extending the invitation to representatives from the Senedd and for the welcome provided to those Members who attended. I wish to also extend my thanks to all those involved in the secretariat on both sides for all their assistance.

I understand, as reported by Alun Davies MS to our Legislation, Justice and Constitution Committee, that the meeting not only offered an opportunity for honest dialogue and discussion on the currently difficulties facing UK-EU future relations, but also an opportunity to explore areas of extensive common interest and areas for future cooperation on subjects such as energy, climate change, research and, of course, our collective freedom and security.

As mentioned during the pre-meeting with you and UK Bureau Members, we look forward to building the relationship between the Senedd and the UK delegation and to further discussions on the best mechanisms for deepening this engagement. We hope in future meetings, on issues where it would be useful to share knowledge and hear of the positive work being undertaken on matters being

discussed (such as for example on climate and environmental policy), that room can be found in the agenda to allow representatives of the devolved legislatures to make direct contributions. We know from speaking to colleagues in the Committee of the Regions that they share this ambition, and we share a belief that hearing directly from representatives at this level will enrich and enhance the important discussions taking place.

I very much look forward to continuing discussions with you, the UK delegation and our colleagues in the European Parliament on the work of the Assembly.

I am copying this letter to the Rt Hon Hilary Benn MP and the Earl of Kinnoull, Vice Chairs of the UK delegation; Nathalie Loiseau MEP, Chair of the European Parliament delegation; Alun Davies MS, member of the Legislation, Justice and Constitution Committee; Paul Davies MS, Chair of the Economy, Trade, and Rural Affairs Committee, and Sam Kurtz MS, a member of the Committee; the Rt Hon Elin Jones MS, Llywydd; and Clare Adamson MSP, Convener of the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee.

Yours sincerely,

Huw Irranca-Davies

Huw Irranca-Davies

Chair of the Legislation, Justice and Constitution Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



HOUSE OF LORDS

International Agreements Committee

House of Lords
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Huw Irranca-Davies
Chair, Legislation, Justice and Constitution Committee
Cardiff Bay
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27 May 2022

Dear Mr Irranca-Davies,

International Agreement: Convention on the International Organization for Marine Aids to Navigation

Thank you for your letter of 20 May. We were surprised and disappointed to read that the Welsh Government had not been consulted on the Convention for Marine Aids to Navigation. This is serious and links in with the Committee's ongoing discussions with the Government on the proper involvement of DAs in their various negotiations. You might have seen that we had a debate on these issues on 19 May, based on our report on Working Practices.¹ We have today written to the Government and put to them the issues raised in your letter.

I understand that plans are underway for us to meet when you are in London next month, which members on my Committee and I are very much looking forward to. We are always keen to hear the views of the DAs and legislatures directly, and this of course also extends to the devolved legislative committees.

Yours sincerely,

Baroness Hayter

Chair of the House of Lords International Agreements Committee

¹ <https://publications.parliament.uk/pa/ld5802/ldselect/ldintagr/195/19502.htm>

Baroness Hayter of Kentish Town
Chair, House of Lords International Agreements
Committee

20 May 2022

Dear Lady Hayter

International agreement: Convention on the International Organization for Marine Aids to Navigation

Further to our letter of 23 March 2022, in which we shared a copy of our seventh report on international agreements considered by the Committee, you may wish to be aware we have received a response from the Welsh Government to our letter seeking further information regarding the consultation process for the Convention on the International Organization for Marine Aids to Navigation (IOMAN).

The explanatory memorandum for this agreement stated that the UK Government 'consulted the Devolved Administrations on the drafting of the Convention and they are also content with the position.' However, in its response to our letter, the Welsh Government stated it 'was not consulted by the UK Government in the drafting of the convention' and it is 'disappointed that a UK-wide decision such as the establishment of this new intergovernmental organisation has been made without engagement with the Welsh Government.' While the response welcomes the strengthening of international cooperation in enhancing the safety of global marine navigation, it makes clear that the convention 'affects all parts of the UK and Welsh interests need to be part of the decision-making process'.

We are aware that the scrutiny deadline for this agreement has passed. However we wanted to bring this disparity regarding the consultation process to your attention.

We would also like to use this opportunity to highlight that our scrutiny of international agreements may involve exchanging correspondence with the Welsh Government to seek further information. As such, we may not always be able to complete scrutiny within the initial 21-day period provided by the Constitutional Reform and Governance Act 2010, and to therefore share relevant information to inform your conclusions. However, we will continue to share information which might be relevant to your general consideration of international agreements.

Yours sincerely,



Huw Irranca-Davies
Chair



Agenda Item 3.8

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



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA/JJ/1805/22

Climate Change, Environment, and Infrastructure Committee

Legislation, Justice and Constitution Committee

Economy, Trade, and Rural Affairs Committee

Equality and Social Justice Committee

31 May 2022

Dear Llyr,

I am writing in response to a letter of 10 May from the Chair of Climate Change Committee, Environment, and Infrastructure Committee with regards the single use plastic bans and the potential exclusion under the draft Waste and Resources Framework. (**Please see annex A** below).

During 2020, the Welsh Government consulted on plans to introduce regulations to ban or restrict the sale to end users of these commonly littered single use plastic items:

- cutlery (including forks, knives, spoons, chopsticks and sporks)
- plates (including bowls, platters and trays)
- stirrers
- drinking straws
- expanded polystyrene food and drinks containers
- cotton buds
- balloon sticks, and
- items made of oxo-degradable plastics.

Our Programme for Government reiterated our commitment to legislate to abolish the use of more commonly littered, single use plastics. I remain committed to bringing forward such legislation early in this Senedd term.

Regarding the Scottish Government's request for an exclusion under the Common Frameworks Process, under the UK Internal Market Act 2020 (UKIMA), an exclusion requires a Statutory Instrument, which must be laid by the Secretary of State for Environment in the UK Parliament. I have now received a letter from Minister Prentice of the UK Government seeking the formal consent from Welsh Ministers (as required by UKIMA) which I intend to give.

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
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Gohebiaeth.Julie.James@llyw.cymru
Correspondence.Julie.James@gov.Wales

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

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

Any consent would be without prejudice to the ongoing UKIMA litigation. Our position remains that we do not consider UKIMA has the impact on the Senedd's competence that it purports to have. By agreeing to the UK Government exclusions SI, we are not changing this position. I consider that while the litigation is ongoing, there is a need to co-operate and engage on the exclusions process.

Following feedback to our consultation, I also propose to include a ban on the sale of wet wipes which contain plastic and single use plastic carrier bags in the planned legislation. My officials are currently undertaking a rapid evidence review and they are engaging with stakeholders on the inclusion of these additional measures.

I have copied this letter to the Legislation, Justice and Constitution Committee.

Yours sincerely,



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

ANNEX A

1. Can you provide an indication of when the provisional Framework for Resources and Waste will be made available for scrutiny and explain the reason for the ongoing delay in its publication?

Answer: It is expected that the Resources and Waste Frameworks will be agreed at official level during the Summer. It is, however, important to note that in order to publish the Framework for scrutiny, portfolio Ministerial clearance will be required from all four Governments.

2. While we acknowledge the request for the exclusion originated from the Scottish Government, it appears the Welsh Government will be relying on the exclusion to progress its proposals to ban SUPs. Can you confirm that this is the case?

Answer: As I outline in my letter above, our position remains that we do not consider UKIMA has the impact on the Senedd's competence that it purports to have, and by agreeing to the UKG exclusions SI, we are not changing this position.

However, I consider that while the litigation is ongoing, there is a continued need to co-operate and engage on the exclusions process.

3. In the absence of the Resources and Waste Common Framework, can you outline the processes for considering and agreeing the exclusion?

Answer: The process followed was as laid out in the UKIMA Exclusions Process previously shared with Committees.

In her letter, the Minister for Rural Affairs, and North Wales, and Trefnydd refers to the Welsh Government's disappointment at the "narrow nature of the exclusion".

4. Can you provide details of the exclusion and explain in what way it is narrower than you and your counterpart in the Scottish Government had hoped for?

Answer: Under the terms of UKIMA, the UK Government has decided to grant a narrow exclusion limited to the items in the Scottish Governments regulations.

The disappointment, which I share with Minister for Rural Affairs, and North Wales, and Trefnydd, is because under the Common Frameworks and UKIMA, any further policy deviation in this policy area will mean a return to the beginning of the exclusion negotiation process, taking time away from the development of the policies themselves.

As I have outlined above, our position is we do not consider UKIMA has the impact on the Senedd's competence that it purports to have. Nevertheless, while the litigation is ongoing, we recognise a need to co-operate and engage on the exclusions process.

The Process for considering UK Internal Market exclusions in Common Framework areas sets out that the four governments are able to engage the dispute resolution mechanism within the relevant Framework if desired.

5. Can you clarify whether the dispute resolution mechanism was utilised with a view to securing a wider exclusion? If not, why was this?

Answer: I can confirm it was used.

6. Can you explain whether and how the “narrow nature of the exclusion” will impact on the scope of the proposed ban on SUPs in Wales?

Answer: As stated above, our position remains that we do not consider UKIMA has the impact on the Senedd’s competence that it purports to have. Therefore, the narrow nature of the exclusion will not impact on any proposed ban of SUPs in Wales.

Under the Act, amendments to the schedules containing exclusions require the approval of both Houses of the UK Parliament. The Secretary of State is responsible for ensuring that draft regulations are put before the UK Parliament. Before making regulations, the Secretary of State must seek the consent of the devolved administrations.

7. What discussions have you had with the UK Government about the timing of draft regulations that will give effect to the exclusion?

Answer: The Scottish Government have already laid regulations banning a list of single use plastic items which come into effect on 2 June 2022. I understand the UK Government intends to lay the SI as close as possible to that date.

8. Can you confirm that you will notify the Senedd when the draft regulations are laid before the UK Parliament?

Answer: Yes, I will prepare a Written Statement.

9. Can you confirm that you will seek the views of the Senedd before deciding on whether to give consent to the Secretary of State making the regulations? If so, can you provide an indication of when this is likely to be and what process you intend to follow?

Answer: Regarding the Scottish Government’s request for an exclusion under the Common Frameworks Process, under UK Internal Market Act 2020 (UKIMA), an exclusion requires a Statutory Instrument, which must be laid by the Secretary of State for environment in the UK Parliament. I have now received a letter from Minister Prentice of the UK Government seeking the formal consent from Welsh Ministers which I intend to give.

I have included other Senedd Committees with a likely interest to this consent in this response.

In September 2021, you told us the Welsh Government's response to the consultation on the proposed ban on SUPs, including next steps, would be published in October 2021. Again, in December 2021, you said the response would be published in January 2022. The response is still to be published.

10. Can you confirm the timing of the publication of the response and explain the reason for the ongoing delay?

Answer: I wish to be able to share detailed plans and an indicative timetable for how I intend to take forward this policy in light of the consultation responses. You will see in my answers above why I have not been able to do that so far.

I anticipate publishing the responses over the summer period.

**Pwyllgor Newid Hinsawdd,
yr Amgylchedd a Seilwaith**

—
**Climate Change, Environment,
and Infrastructure Committee**

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Julie James MS

Minister for Climate Change

10 May 2022

Dear Minister,

Exclusion to the UK Internal Market Act for single use plastics

I am writing following the Minister for Rural Affairs, and North Wales, and Trefnydd's letter to the Legislation, Justice and Constitution Committee, dated 28 March 2022, in which she refers to the UK Government's decision to grant an exclusion to the UK Internal Market Act ('the UKIMA') for single use plastics ('SUPs').

Given our ongoing interest in the proposed ban on SUPs, and our continuing calls for clarity on the outcome of intergovernmental discussions concerning a possible exclusion to the UKIMA, we are disappointed not to have received an update from you. To this end, we would be grateful if you could address the questions set out in this letter.

It is our understanding that the exclusion would have been considered and agreed in line with established processes set out in the Resources and Waste Common Framework ('the Framework'). We note that the Framework has yet to be published or made available for parliamentary scrutiny and is the subject of ongoing delay. We are concerned about the lack of transparency in the decision making process, and the reliance on an unpublished provisional Framework as a basis for consideration and agreement of the exclusion.

1. Can you provide an indication of when the provisional Framework for Resources and Waste will be made available for scrutiny and explain the reason for the ongoing delay in its publication?

2. While we acknowledge the request for the exclusion originated from the Scottish Government, it appears the Welsh Government will be relying on the exclusion to progress its proposals to ban SUPs. Can you confirm that this is the case?

3. In the absence of the Resources and Waste Common Framework, can you outline the processes for considering and agreeing the exclusion?

In her letter, the Minister for Rural Affairs, and North Wales, and Trefnydd refers to the Welsh Government's disappointment at the "narrow nature of the exclusion".

4. Can you provide details of the exclusion and explain in what way it is narrower than you and your counterpart in the Scottish Government had hoped for?

The [Process for considering UK Internal Market exclusions in Common Framework areas](#) sets out that the four governments are able to engage the dispute resolution mechanism within the relevant Framework if desired.

5. Can you clarify whether the dispute resolution mechanism was utilised with a view to securing a wider exclusion? If not, why was this?

6. Can you explain whether and how the "narrow nature of the exclusion" will impact on the scope of the proposed ban on SUPs in Wales?

Under the Act, amendments to the schedules containing exclusions require the approval of both Houses of the UK Parliament. The Secretary of State is responsible for ensuring that draft regulations are put before the UK Parliament. Before making regulations, the Secretary of State must seek the consent of the devolved administrations.

7. What discussions have you had with the UK Government about the timing of draft regulations that will give effect to the exclusion?

8. Can you confirm that you will notify the Senedd when the draft regulations are laid before the UK Parliament?

9. Can you confirm that you will seek the views of the Senedd before deciding on whether to give consent to the Secretary of State making the regulations? If so, can you provide an indication of when this is likely to be and what process you intend to follow?

In September 2021, you told us the Welsh Government's response to the consultation on the proposed ban on SUPs, including next steps, would be published in October 2021. Again, in December 2021, you said the response would be published in January 2022. The response is still to be published.

10. Can you confirm the timing of the publication of the response and explain the reason for the ongoing delay?

I should be grateful if you could respond to the above as soon as possible, and by 24 May at the latest.

I am copying this letter to Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitutional Committee.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Llyr', is centered on a light yellow rectangular background.

Llyr Gruffydd MS,
Chair, Climate Change, Environment and Infrastructure Committee

Agenda Item 5

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

Document is Restricted

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

Delyth Jewell MS
Chair of the Culture, Communications, Welsh Language,
Sport and International Relations Committee

31 May 2022

Letter to the UK Government re. Online Safety Bill

Dear Huw and Delyth,

I note that the Business Committee has invited your committees to consider and report on the Welsh Government's Legislative Consent Memorandum on the UK Government's Online Safety Bill.

On 19 May, I wrote to the Secretary of State for Digital, Culture, Media and Sport, the Rt Hon Nadine Dorries MP. The letter sets out concerns raised to us by a group of students about the role of social media, gaming websites, and other social networking websites and applications in peer on peer sexual harassment in schools and colleges. What the students told us reinforced our own longstanding concerns about the impact of social media on the mental health and wellbeing of children and young people.

I have asked the UK Government to set out whether, and to what extent, the Bill addresses the students' concerns, and for a technical briefing from UK Government officials about the impact of the Bill on children and young people. I would be happy to open the briefing to members of your committees if the UK Government responds favourably to my request.

I will keep you informed about any response we receive from the UK Government.

Yours sincerely,

Jayne Bryant

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Document is Restricted

Agenda Item 7

Is a bad deal better than no deal? An examination of intergovernmental agreements between the Welsh and UK Governments

Dr Gregory Davies

School of Law and Social Justice, University of Liverpool

Structure

1. Introduction
2. Ten intergovernmental agreements
3. The aims of non-legislative agreements
4. The limitations of non-legislative agreements
5. Conclusions and recommendations

I. Introduction

This report examines the use of non-legislative agreements between the Welsh and UK Governments. Specifically, it considers their role in resolving disputes over devolved legislative consent for UK bills, particularly those related to the UK's withdrawal from the European Union ('Brexit').

The agreements have taken various forms: memoranda of understanding, concordats, despatch box commitments and exchanges of letters. These devices are not new; they have been central to UK intergovernmental relationships since devolved elected institutions were established in 1998-9. The devolution statutes were silent on how the new bodies would interact with the UK Government. Various codes and agreements – what Rawlings has called the 'concordats of the constitution'¹ – filled the gap.

In the wake of the UK's exit from the EU, however, recourse to these non-legislative tools has proliferated. The Fifth Senedd's Legislation, Justice and Constitution Committee (LJCC) observed that they are a key feature of Wales' changing constitution.² The complex process of re-regulation required by departure from the various fields of EU governance led to considerable political contestation between the UK's four central governments over their respective powers and responsibilities. In the Welsh context, non-legislative commitments have had an important role in the resolution of these disputes. Repeatedly, the Welsh Government has been prepared to accept the UK Government acquiring broad law-making powers, whose scope extends over devolved matters, in exchange for non-statutory assurances from the UK Government as to how the powers will be used.

Recourse to these agreements has been controversial. While they offer a light-touch means of regulating intergovernmental relationships, they are not legally enforceable, prompting consternation over the protection of devolved powers and the integrity of decision-making at the devolved level. The current Welsh Government appears to have accepted this concern. Following the 2021 Senedd election, it stated that it would seek to avoid non-legislative agreements on UK bills in future, which suggests that they will be used less frequently going

¹ R. Rawlings, 'Concordats of the constitution' (2000) 116 LQR 257.

² Legislation, Justice and Constitution Committee, *Fifth Senedd Legacy Report* (Senedd Cymru, 2021). <https://senedd.wales/media/eccmngfv/cr-ld14319-e.pdf> accessed 27 May 2022

forward.³ The extended use of such agreements during the Brexit process therefore presents an instance of constitutional experimentation from which important lessons can be drawn for devolution in the UK.

This report takes stock of these non-legislative agreements and considers their implications. Part 2 provides ten examples where non-legislative commitments were used to resolve disputes on legislative consent. Parts 3 and 4 examine the purposes of the agreements and their effects, evaluating the justifications offered by the Welsh Government for their use and the criticisms which have been made against them. Part 5 offers some conclusions and recommendations concerning the use of such agreements in future.

2. Ten intergovernmental agreements

To date, non-legislative agreements between the Welsh and UK governments have featured alongside at least nine UK statutes and one set of regulations. These have spanned both the Fifth (2016-2021) and Sixth (2021-present) Senedd terms and concerned several major UK Government bills related to Brexit, albeit not exclusively. From the Welsh Government's point of view, the aim of these agreements has been consistent: the protection of devolved competences and the fostering of closer intergovernmental cooperation in the design and implementation of post-Brexit governance. As will become clear in what follows, however, the agreements have had – at best – mixed results in achieving these aims.

2.1. European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 makes provision for the continuing effect of 'retained' EU law after the UK's secession. Under the terms of the original bill, the devolved institutions would be prevented from modifying that body of law, even in areas intersecting with devolved competences, such as agriculture, fisheries and the environment. The devolved governments opposed this arrangement: they demanded the removal of the restrictions on devolved competences and sought a requirement on UK ministers to obtain their consent before exercising any new powers in devolved areas.

This dispute was partly resolved on the basis of two intergovernmental agreements. First, in October 2017, the governments agreed a set of principles for the development of common frameworks to replace EU regulation.⁴ According to this agreement, the frameworks would 'enable the functioning of the UK internal market, while acknowledging policy divergence'. They would 'respect the devolution settlements and the democratic accountability of the devolved legislatures'. The development of frameworks would be 'based on established

³ Letter from the Counsel General to the Chair of the Legislation, Justice and Constitution Committee (22 October 2021). <<https://business.senedd.wales/documents/s118991/LJC6-11-21-%20Paper%2010%20Letter%20from%20the%20Counsel%20General%20and%20Minister%20for%20the%20Constitution%2022%20Octob.pdf>> accessed 25 May 2022

⁴ Cabinet Office, 'Joint Ministerial Committee (EU Negotiations) Communique' (UK Government, 16 October 2017). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf> accessed 27 May 2022

conventions', in particular the convention that devolved competences are not normally altered without the consent of the devolved institutions (the 'Sewel Convention'). The flexibility permitted to devolved institutions by EU law would be maintained; there would also be a 'significant increase' in devolved powers.

Later, in April 2018, the Welsh and UK governments came to an agreement on the terms of the legislation. The 'Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks'⁵ consisted of legislative and non-legislative commitments. The clauses which would have restricted the ability of devolved institutions to amend retained EU law within devolved areas were removed. In their place, UK ministers were granted time-limited powers to suspend devolved competences, subject to UK parliamentary approval, if agreement could not be reached on common frameworks and only after seeking the consent of the devolved institutions and providing their views to the UK Parliament if consent was refused.

The non-legislative parts of the agreement contained renewed commitments to work by consensus, respect established constitutional conventions (particularly the Sewel Convention) and develop common frameworks through collaboration and consensus. The UK Government undertook not to use its new powers under the legislation to create new policy within devolved areas, and to refrain from enacting policy in areas in which devolved powers were suspended, while the Welsh Government committed to not withhold consent 'unreasonably'. A memorandum of understanding set out further details regarding the development of common frameworks. The Senedd was able to scrutinise the terms of the agreement alongside the revised bill and legislative consent was granted on 15 May 2018.

To some extent, these arrangements were successful. Devolved competences were maintained; the powers to introduce restrictions on those competences were never used;⁶ joint work on common frameworks has steadily progressed to completion. However, both the Welsh Government and the Senedd's committees accused the UK Government of breaching the agreement on several occasions. For example, the Welsh Government argued that UK ministers made the Animal Health and Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019 without seeking the consent of devolved ministers, despite it having reaffirmed its commitment to seeking consent under the IGA 2018.⁷ The Fifth Senedd's Constitutional and Legislative Affairs Committee in 2019 also observed that the UK

⁵ Cabinet Office, 'Intergovernmental Agreement on the European Union (Withdrawal) Bill' (UK Government, 25 April 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf> accessed 27 May 2022

⁶ The powers have since been repealed by the European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022.

⁷ Counsel General for Wales, 'Written submissions of the Counsel General for Wales' (Welsh Government, 2019). <<https://gov.wales/sites/default/files/inline-documents/2019-09/WRITTEN%20SUBMISSIONS%20OF%20THE%20COUNSEL%20GENERAL%20FOR%20WALES.pdf>> accessed 27 May 2022

Government appeared to make two sets of regulations in breach of its commitment not to enact new policy within devolved areas.⁸

The 2017 and 2018 agreements were undermined further by the Internal Market Act 2020. Despite both agreements having emphasised cooperation, consent and the autonomy and empowerment of devolved institutions, this legislation introduced significant limitations on devolved competences and was enacted without their consent. The Act establishes ‘market access’ principles, according to which goods, services and professional qualifications recognised in one part of the UK cannot be subject to additional restrictions or competitive disadvantages in another part of the UK. Further, while there are some exceptions to the application of these rules, the range of exceptions is not as broad as those permitted under EU law. The result is that a ‘collaborative model of economic unionism’⁹ reflected in the common frameworks programme will potentially be undermined by a deregulatory system in which ‘market integration is ... an almost absolute rule’.¹⁰

The 2020 Act provides some scope for flexibility, however: UK ministers have powers to alter the application of the market access principles, including to give effect to a common framework agreement, subject to a request for the consent of the devolved institutions.¹¹ Additionally, the governments have since agreed a process by which those powers will be exercised.¹² However, the discretion to create exceptions is ‘a power, not a duty; in principle, therefore, agreed common frameworks remain vulnerable to being undermined by the application of the market access principles’.¹³

Despite the governments having since agreed upon the process for those powers, the 2020 Act arguably represents an inversion of the previous agreements: a presumption against restrictions on devolved competences has been supplanted by a presumption that restrictions, albeit of a different variety, will apply unless and until agreed otherwise. The United Kingdom

⁸ The Animal Welfare (Amendment) (EU Exit) Regulations 2018; The Floods and Water (Amendment etc.) (EU Exit) Regulations 2019. Constitutional and Legislative Affairs Committee, ‘Scrutiny of regulations under the European Union (Withdrawal) Act 2018: progress report’ (National Assembly for Wales, 2019). <<https://senedd.wales/laid%20documents/cr-ld12128/cr-ld12128-e.pdf>> accessed 27 May 22.

The Welsh Government, however, did not accept that these regulations amounted to ‘new’ policy. Letter from the First Minister to the Chair of the Constitutional and Legislative Affairs Committee (7 February 2019). <<https://business.senedd.wales/documents/s84405/Letter%20from%20the%20First%20Minister%20-%207%20February%202019.pdf>> accessed 1 June 2022

⁹ K.A. Armstrong, ‘The governance of economic unionism after the United Kingdom Internal Market Act’ (2022) 85(3) MLR 635, 636.

¹⁰ N. McEwen, A. McHarg, J. Hunt and M. Dougan, ‘Sleeping with an elephant: devolution and the United Kingdom Internal Market Act 2020’ (2022) Law Quarterly Review (forthcoming). <<https://ssrn.com/abstract=4018581>> accessed 27 May 2022

¹¹ Internal Market Act 2020, ss. 10 and 18

¹² Cabinet Office, ‘Process for considering UK Internal Market Act exclusions in Common Framework areas’ (UK Government, 10 December 2021). <<https://www.gov.uk/government/publications/process-for-considering-ukim-act-exclusions-in-common-framework-areas/process-for-considering-uk-internal-market-act-exclusions-in-common-framework-areas>> accessed 27 May 2022. This is a post-legislative agreement, reached after the enactment of the 2020 Act. For this reason, it has not been listed in this report among the non-legislative agreements which preceded a Welsh Government recommendation of legislative consent.

¹³ McEwen et al (n 10).

Constitution Monitoring Group observes that the Act is ‘a clear challenge to the principle that there is a need for cooperation and meaningful co-decision-making between devolved and UK government’.¹⁴ In September 2020, asked about the status of the 2018 agreement, the Welsh Government responded that it ‘remains in place and must be respected’,¹⁵ but there has been little mention of it since.

2.2. Healthcare (European Economic Area and Switzerland Arrangements) Act 2019

This Act provides UK ministers with powers related to the implementation of reciprocal healthcare agreements between the UK, the EEA states and Switzerland. The UK Government claimed that the negotiation of international agreements was a reserved matter; the Welsh Government argued that the powers cut across devolved competences over health and the implementation of international agreements.

The governments subsequently reached an agreement which mirrored the 2018 agreement on the EU (Withdrawal) Bill. The UK Government agreed to amend the bill to require UK ministers to consult with their devolved counterparts before exercising the powers to implement healthcare agreements. This was accompanied by a draft memorandum of understanding designed to reinforce intergovernmental collaboration.¹⁶ The memorandum stated that the Welsh Government would be consulted in the negotiation and development of international healthcare agreements and in the drafting of regulations which implement such agreements. Further, regulations would not normally be enacted without the consent of devolved ministers. In the event of disagreement, the views of devolved ministers would be presented to the UK Parliament before a vote was taken on the regulations.

On the basis of these commitments, the Welsh Government recommended legislative consent to the legislation, which was given on 12 March 2019. Notably, however, although the draft memorandum was published prior to the consent vote, it was after committee scrutiny had already concluded. The ‘final’ memorandum was not shared with the Senedd’s committees until 2 February 2022 – almost three years later – and (at the time of writing) will need to be revised again following negotiations on the Health and Care Act 2022, discussed below.

2.3. Agriculture Act 2020

This Act was designed to establish a legal framework in England to replace agricultural support schemes under the Common Agricultural Policy. It also establishes an equivalent regime for Wales, at the Welsh Government’s request, and includes various UK-wide provisions. The

¹⁴ United Kingdom Constitution Monitoring Group, *The constitution in review: first report from the United Kingdom Constitution Monitoring Group* (The Constitution Society, 2022) 7. <<https://consoc.org.uk/wp-content/uploads/2021/09/UKCMG-CONSTITUTION-IN-REVIEW-1.pdf>> accessed 27 May 2022

¹⁵ Senedd Cymru, ‘Answers to questions not reached in Plenary’ (22 September 2020, Record of Proceedings). <<https://record.assembly.wales/QNR/6565>> accessed 27 May 2022

¹⁶ Welsh Government, ‘Supplementary legislative consent memorandum (memorandum no 2): Health (International Arrangements) Bill’ (March 2019). <<https://senedd.wales/laid%20documents/lcm-ld12232/lcm-ld12232-e.pdf>> accessed 27 May 2022

governments initially disagreed over powers which would enable UK ministers to make regulations to ensure the UK's compliance with the World Trade Organisation's Agreement on Agriculture. The UK Government's position was that this concerned the reserved matter of international trade; the Welsh Government argued that it cut across devolved competences in agriculture and the implementation of international obligations.

The disagreement as to whether this matter was reserved or devolved was not resolved. However, following 'extensive and highly collaborative working',¹⁷ the two agreed to a collaborative process based on the principles of the 2018 IGA. This process would not be written into the bill itself. Instead, it was set out in a bilateral agreement: the 'UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill', published on 12 March 2019.¹⁸

According to this agreement, draft regulations would be shared with devolved officials and agriculture ministers, followed by an exchange of letters with their respective views. Disagreements would be addressed 'in line with the existing MoU governing Intergovernmental relations and any future agreements in place between Defra and the DAs on dispute resolution'.¹⁹ If the disagreement persisted, the views of devolved and UK ministers would be presented to the UK Parliament before a decision was taken on the regulations.

Additionally, Welsh ministers would be able to propose the WTO classification for Welsh agricultural support schemes, and in the event of disagreement, UK ministers would be able to take independent advice on classifications. They would be expected to take that advice into consideration, before relaying all relevant information regarding their decision to devolved ministers. The Welsh Government was satisfied with the 'clear onus ... on seeking agreement', along with 'strong mechanisms for the Welsh Ministers to exert their views'.²⁰

A new Agriculture Bill was introduced in January 2020. The Welsh Government remained satisfied with the bilateral agreement, which the UK Government confirmed would be 'enshrined'²¹ in a concordat, developed by the UK's four governments. However, the bilateral agreement was not presented alongside the legislative consent memorandum. According to the Minister for Environment, Energy and Rural Affairs, the UK Government's commitments were repeated by the Parliamentary Under Secretary of State in a letter on 6 July 2020.²² The

¹⁷ Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2): Agriculture Bill' (March 2019). <<https://senedd.wales/laid%20documents/lcm-ld12461/lcm-ld12461-e.pdf>> accessed 27 May 2022

¹⁸ Department for Environment, Food and Rural Affairs, 'UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill' (UK Government, 21 March 2019). <<https://www.gov.uk/government/publications/agriculture-bill-progress-with-devolved-administrations/uk-and-welsh-government-bilateral-agreement-on-wto-provisions-within-the-agriculture-bill>> accessed 27 May 2022

¹⁹ *ibid.*

²⁰ Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2) on the Agriculture Bill (n 19).

²¹ Letter from the Minister for Environment, Energy and Rural Affairs to the Chair of the Legislation, Justice and Constitution Committee (11 September 2020). <<https://business.senedd.wales/documents/s105187/Letter%20from%20the%20Minister%20for%20Environment%20Energy%20and%20Rural%20Affairs%20to%20the%20Chair%20of%20the%20Legislation%20.pdf>> accessed 27 May 2022

²² *ibid.*

Senedd consented to the legislation on 29 September 2020, before the concordat was finalised or published.²³

2.4. Fisheries Act 2020

The Fisheries Act 2020 makes provision for the management of UK fisheries outside of the European Union and the Common Fisheries Policy. The Welsh Government objected to a provision which would give UK ministers the power to set UK fishing quotas in accordance with international obligations, contending that this would encroach upon the regulation of stocks falling within the exclusive jurisdiction of the devolved governments.

The governments later agreed to develop a memorandum of understanding on a consultation process to be followed for the exercise of the disputed powers. However, the memorandum was not finalised or published before the Act came into force. On 18 September 2020, Victoria Prentis MP, Parliamentary Under Secretary of State at DEFRA, confirmed the agreement in principle in an exchange of letters, offering assurance that a future memorandum would ‘set out principles for consultation’ and ‘a fisheries dispute resolution process between the Fisheries Administrations, incorporating and building on existing processes where appropriate’.²⁴ However, disagreement over the terms of consultation remained. For instance, the UK Government refused to commit to a 21-day consultation period on draft regulations. It also declined to make a despatch box commitment regarding the memorandum of understanding, as requested by the Welsh Minister for Environment, Energy and Rural Affairs, because the bill was close to completing the legislative process. The Senedd voted to give its consent on 6 October 2020, without the memorandum having been finalised or published.

The UK Government published the framework and memorandum of understanding in February 2022.²⁵ However, this contains no detail on the consultation process. As the Welsh Minister for Environment, Energy and Rural Affairs observed, it sets out ‘high principles by which the fisheries policy authorities will work together’.²⁶ According to the framework document, further details would be provided in ‘operational agreements’. At the time of writing, however, these are yet to be published.

²³ A draft common framework on agricultural support, published in February 2022, makes reference to an additional concordat related to WTO regulations, but this has not been published at the time of writing. Department for Environment, Food and Rural Affairs, *Agricultural support common framework: provisional framework outline agreement and concordat* (Cm 613, 2022).
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052061/agricultural-support-provisional-common-framework.pdf> accessed 27 May 2022

²⁴ Letter from the Parliamentary Under Secretary of State, Department for Environment, Food and Rural Affairs to the Minister for Environment, Energy and Rural Affairs (18 September 2020).
<<https://business.senedd.wales/documents/s105684/Letter%20from%20the%20Minister%20for%20Environment%20Energy%20and%20Rural%20Affairs%20to%20the%20Chair%20of%20the%20Legislation%20.pdf>> accessed 27 May 2022

²⁵ Department for Environment, Food and Rural Affairs, *Fisheries Management and Support Common Framework: Provisional Framework Outline Agreement and Memorandum of Understanding* (Cm 616, 2022).
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054476/fisheries-management-provisional-common-framework.pdf> accessed 27 May 2022

²⁶ Economy, Trade, and Rural Affairs Committee (3 March 2022, Record of Proceedings).
<<https://record.assembly.wales/Committee/12605#C406713>> accessed 27 March 2022

2.5. Trade Act 2021

The Trade Act 2020 makes provision for the implementation of international trade agreements. The Welsh Government raised concerns over the inclusion of Henry VIII law-making powers which could be used by UK ministers to amend devolved Acts and the devolution statutes without the consent of devolved ministers. The Welsh Government had initially considered it 'vital' that these powers 'must only be used with the prior consent of Welsh Ministers' and that a requirement should be 'on the face of the Bill'.²⁷

Later, however, the Welsh Government indicated that it was prepared to recommend consent on the basis of various 'non-legislative commitments'²⁸ expressed by the UK Government at the despatch box in the House of Commons. UK ministers pledged that they would not normally use the powers in devolved areas without obtaining the consent of devolved ministers, nor would the powers be used to implement new policies. Additionally, UK ministers would engage with devolved counterparts before extending the period in which these powers could be used, and the devolved governments would be involved in the activities of the new Trade Remedies Authority.

Following the prorogation of the UK Parliament in October 2019, the Trade Bill was reintroduced in the House of Commons in March 2020. The Welsh Government recommended consent on the basis that the UK Government had 'agreed to restate [its] commitments'²⁹ in respect of the previous bill. These despatch box commitments were delivered in the House of Commons on 23 June 2020; the Senedd subsequently consented to the Trade Bill on 12 January 2021.³⁰

2.6. Trade (Disclosure of Information) Act 2021

This Act establishes UK-wide data-sharing mechanisms, authorising HMRC and other bodies to share data with public and private authorities to support the delivery of trade-related functions. It also empowers UK ministers to amend the list of authorities permitted to share data. The Welsh Government sought commitments from the UK Government that relevant data would be shared with the devolved governments to support the delivery of devolved functions, and that devolved ministers would be consulted before Welsh public authorities are added or removed from the list of authorities permitted to share data.

The UK Government provided these assurances in the form of despatch box commitments on 15 October 2020, when the relevant provisions featured in the Trade Bill.³¹ The Welsh Government was prepared to grant consent because it had received further assurances that

²⁷ Welsh Government, 'Legislative consent memorandum: Trade Bill' (December 2017). <<https://senedd.wales/laid%20documents/lcm-ld11314/lcm-ld11314-e.pdf>> accessed 27 May 2022

²⁸ Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2): Trade Bill' (February 2019). <<https://senedd.wales/laid%20documents/lcm-ld12169/lcm-ld12169-e.pdf>> accessed 27 May 2022

²⁹ Welsh Government, 'Legislative consent memorandum: Trade Bill' (April 2020). <<https://senedd.wales/laid%20documents/lcm-ld13122/lcm-ld13122%20-e.pdf>> accessed 27 May 2022

³⁰ HC Deb 23 June 2020 vol 677 col 240.

³¹ HL Deb 15 October 2020 vol 806 col 1247.

these commitments would be ‘restated, either in the Houses of Parliament or within a Ministerial letter’.³² The Minister for Trade Policy, Greg Hands MP, restated the commitments in the House of Commons on 16 December 2020.³³ On the same day, the Senedd gave its consent to the legislation. While there was no reference to the assurances made a few hours earlier, the Counsel General, Jeremy Miles MS, stated that ‘we have been able to assure ourselves that the pledges made are meaningful in this context’.³⁴

2.7. Medicines and Medical Devices Act 2021

This Act grants UK ministers the powers to regulate human and veterinary medicines and medical devices, along with powers to establish information-sharing systems related to medical devices. The Welsh Government expressed concern with powers which enable UK ministers to establish a database related to medical devices. While this was aimed at product safety, it observed that the power was ‘very broad’³⁵ and could be used in relation to devolved responsibilities in health, with no requirement to consult with devolved ministers.

The bill was subsequently amended to require UK ministers to consult with devolved ministers. Further, the UK Government gave non-legislative assurances that devolved governments would be included in the design and implementation of medical device information systems. A memorandum of understanding was agreed providing terms for the shared development and governance of the medical device information system. The Department of Health and Social Care sent a draft of the memorandum to the Welsh Government on 11 December 2020, which was then shared with the Senedd committees on 5 January 2021.³⁶ As summarised by the Minister for Health and Social Services, the memorandum provides for ‘four nation consultation and reporting on the operation of the MDIS, the establishment of joint officials’ working groups to discuss and draft the regulations, escalation arrangements in the event of disagreement and technical operational matters’.³⁷ By the time the draft memorandum was shared with committees, however, they had concluded their scrutiny of the legislation. The Senedd gave consent to the bill on 12 January 2021.

³² Welsh Government, ‘Legislative consent memorandum: Trade (Disclosure of Information) Bill’ (December 2020). <<https://business.senedd.wales/documents/s110069/Legislative%20Consent%20Memorandum%20-%20Trade%20Disclosure%20of%20Information%20Bill%20-%20December%202020.pdf>> accessed 27 May 2022

³³ HC Deb 16 December 2020 vol 686 col 330.

³⁴ Senedd Cymru, ‘Legislative consent motion on the Trade (Disclosure of Information) Bill’ (16 December 2020, Record of Proceedings). <<https://record.assembly.wales/Plenary/11127>> accessed 27 May 2022

³⁵ Welsh Government, ‘Legislative consent memorandum: Medicines and Medical Devices Bill’ (July 2020). <<https://senedd.wales/laid%20documents/lcm-ld13306/lcm-ld13306%20-e.pdf>> accessed 27 May 2022

³⁶ Letter from the Minister for Health and Social Services to the Chair of the Health, Social Care and Sports Committee (5 January 2021). <<https://business.senedd.wales/documents/s500006313/Letter%20from%20the%20Minister%20for%20Health%20and%20Social%20Services%20to%20the%20Chair%20of%20the%20Health%20Social%20Care%20and%20.pdf>> accessed 27 May 2022.

³⁷ *ibid.*

2.8. Health and Care Act 2022

This Act is a notable example of informal intergovernmental agreements being used on legislation unrelated to EU withdrawal. It makes provision primarily for reforms to NHS England but also includes a number of clauses which intersect with devolved competences.

The Welsh Government objected to several provisions. Among these were powers which would enable UK ministers to establish UK-wide medicine information systems held by Health and Social Care Information Centre (NHS Digital), including powers to require the disclosure of information to NHS Digital by devolved services. It also took issue with powers which would enable UK ministers to give effect to international healthcare agreements (thereby expanding those powers contained under the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019), subject to a requirement to consult devolved ministers. Additionally, it objected to provisions which would allow UK ministers to make ‘consequential’ amendments to Senedd legislation.

These objections were addressed through a combination of legislative and non-legislative concessions. The powers related to information systems are now subject to a statutory requirement to consult with Welsh ministers, along with a memorandum of understanding providing the terms of consultation. As of 18 February 2022, however, this memorandum had not been published. According to the Minister for Health and Social Services, UK ministers had indicated that they would aim to have the memorandum finalised ‘before the provisions come into effect, but at the very latest in advance of drafting of regulations’.³⁸

Meanwhile, the exercise of powers relating to the implementation of international healthcare agreements would be guided by a further memorandum of understanding providing a role for devolved ministers and officials in the development of those agreements.³⁹ This memorandum was shared with Senedd committees on 2 February 2022, by which point it needed to be updated in light of the Intergovernmental Relations Review.⁴⁰

Finally, the UK Government agreed to make despatch box commitments regarding the powers to make consequential provision. However, it refused to do so in respect of some of these powers because, in its view, they did not fall within devolved competence. In light of the assurances obtained, however, the Welsh Government concluded that the powers posed

³⁸ Letter from the Minister for Health and Social Services to the Chair of the Health and Social Care Committee (18 February 2022).

<<https://business.senedd.wales/documents/s122826/Response%20from%20the%20Minister%20for%20Health%20and%20Social%20Services%20to%20the%20Health%20and%20Social%20Care%20Committees%20.pdf>> accessed 27 May 2022.

³⁹ Letter from the Minister for Health and Social Services to the Chair of the Health and Social Care Committee (2 February 2022).

<<https://business.senedd.wales/documents/s122712/Response%20from%20the%20Minister%20for%20Health%20and%20Social%20Services%20to%20the%20reports%20of%20the%20Health%20and%20Social%20Ca.pdf>> accessed 27 May 2022.

⁴⁰ *ibid.* Cabinet Office, ‘The review of intergovernmental relations’ (UK Government, January 2022).

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf> accessed 27 May 2022

‘an acceptable and minor constitutional risk’.⁴¹ The Senedd gave its consent to the legislation on 15 February 2022, with the memorandum relating to medical information systems still having not been published.

2.9. Advanced Research and Invention Agency Act 2022

This Act makes provision for the creation of a new UK-wide body (the Advanced Research and Invention Agency (ARIA)) responsible for long-term funding of emerging fields of research and technology.

The original version of the bill provided that ARIA would be added to the list of ‘particular authorities’ under the Government of Wales Act 2006 Sch 7A, with the effect that devolved powers relating to research and development would be reserved to the UK level. However, negotiations resulted in this provision being removed and replaced with a memorandum of understanding. The ‘Agreement on the Independence of the Advanced Research and Invention Agency (ARIA)’ emphasises that the governments should not interfere with the running of ARIA and, further, that devolved scientific advisors would be involved in the oversight of the new body.⁴²

The Welsh Government considered this sufficient. Having prevented the reservation of devolved powers, it noted that the memorandum of understanding represented a ‘better use’ of intergovernmental agreements.⁴³ The Senedd gave its consent to the legislation on 7 December 2021. Once again, however, the memorandum of understanding had not been signed or published by the time the Senedd was asked to give its consent to the legislation.

2.10. Secondary legislation

Occasionally, non-legislative commitments have also formed the basis of Welsh Government consent to secondary legislation made by the UK Government under the EU (Withdrawal) Act 2018.

For example, the Welsh Government initially disputed draft regulations pertaining to food naming and geographical indications, matters which it claimed were devolved. Although it was unable to secure joint decision-making functions, it was prepared to consent to the relevant regulations after UK ministers gave ‘written assurances that all Devolved Administrations will have a clear role in the development and operation of the new scheme’.⁴⁴ The Welsh

⁴¹ Welsh Government, ‘Supplementary legislative consent memorandum (memorandum no 3): Health and Social Care Bill’ (January 2022). <<https://senedd.wales/media/45cguwqo/slcm-ld14900-e.pdf>> accessed 27 May 2022

⁴² Welsh Government, ‘Supplementary legislative consent memorandum (memorandum no 2): Advanced Research and Invention Agency Bill’ (November 2021). <<https://senedd.wales/media/c3kota2p/slcm-ld14692-e.pdf>> accessed 27 May 2022

⁴³ *ibid.*

⁴⁴ Welsh Government, ‘Written statement by the Welsh Government: Agricultural Products, Food and Drink (Amendment etc.)(EU Exit) Regulations 2019’ (October 2019).

Government later claimed that it would 'have satisfactory input regarding the appraisal of [GI] applications in a transparent and objective manner. A comprehensive operational process has been codesigned and ... it should create a successful scheme'.⁴⁵ The agreement, it argued, also included 'a clear process for dispute resolution should conflict arise'.⁴⁶ The Welsh Government committed to keep the agreed process under review, but since then few details have been made available.⁴⁷

Another area of disagreement was state aid. Since state aid was not the subject of an explicit reservation under the Government of Wales Act 2006, the Welsh Government claimed that it was a devolved matter, invoking the logic of the reserved powers 'model' established under the Wales Act 2017. Having initially called for shared governance of the UK's state aid regime, it subsequently sought to negotiate a memorandum of understanding with the UK Government in order to secure for itself a 'meaningful role' in the provision of state aid, but without success.⁴⁸ State aid was subsequently reserved explicitly to the UK level following the enactment of the Internal Market Act 2020.

<<https://business.senedd.wales/documents/s94833/WS-30C5156%20-%20The%20Agricultural%20Products%20Food%20and%20Drink%20Amendment%20etc.EU%20Exit%20Regulations%202019.pdf>> accessed 27 May 2022

Welsh Government, 'Written statement by the Welsh Government: Agricultural Products, Food and Drink (Amendment Etc.) (EU Exit) Regulations 2020' (October 2020). <<https://senedd.wales/laid%20documents/ws-ld13640/ws-ld13640-e.pdf>> accessed 27 May 2022.

⁴⁵ Letter from the Minister for the Environment, Energy and Rural Affairs to the Chair of the Legislation, Justice and Constitution Committee (2 December 2020). <<https://business.senedd.wales/documents/s113560/Letter%20from%20the%20Minister%20for%20Environment%20Energy%20and%20Rural%20Affairs%20to%20the%20Chair%20of%20the%20External%20Affa.pdf>> accessed 27 May 2022

⁴⁶ *ibid.*

⁴⁷ On 18 January 2022, the Minister for Rural Affairs and North Wales indicated that 'Wales ... had the first geographical indications designated under the new UK scheme'. Senedd Cymru, 'Statement by the Minister for Rural Affairs and North Wales, and Trefnydd: Blas Cymru/Taste Wales—Promoting Welsh food and drink to the world' (18 January 2022, Record of Proceedings). <<https://record.assembly.wales/Plenary/12590#C400020>> accessed 27 May 2022

⁴⁸ Welsh Government, 'Written statement: State Aid (Agriculture and Fisheries) (Amendment) (EU Exit) Regulations 2019' (February 2019). <<https://business.senedd.wales/documents/s84794/WS-30C5109%20-%20The%20State%20Aid%20Agriculture%20and%20Fisheries%20Amendment%20EU%20Exit%20Regulations%202019.pdf>> accessed 27 May 2022.

3. The aims of non-legislative agreements

3.1. Intergovernmental agreements in multi-level systems

At this stage, it is useful to consider the different functions which intergovernmental agreements can perform within multi-level systems. Poirier observes five: substantive policy coordination; procedural cooperation; soft law; para-constitutional engineering, and regulation by contract.⁴⁹

Substantive policy coordination refers to the use of intergovernmental agreements to demarcate the responsibilities and tasks of different tiers of government in particular policy fields. Procedural cooperation, meanwhile, concerns the mechanisms and processes by which the different levels of government agree to engage with one another. As a form of 'soft law', agreements can also produce similar effects to legal rules: while they are not legally binding, they can nonetheless guide official behaviour while keeping disputes out of the courts and allowing the participants the flexibility to change course.

The 'para-constitutional' function of agreements concerns their role in providing an alternative to legal-constitutional reform. By focusing on the exercise of powers rather than their formal distribution, political agreements can allow the parties to 'avoid direct and difficult constitutional questions and confrontation'.⁵⁰ Finally, a more critical view of intergovernmental agreements – 'regulation by contract' – is that they serve as 'tools of centralisation, under the guise of compromise and consensus'.⁵¹ From this perspective, political agreements offer the more powerful tier of government a means of 'indirect regulation'⁵² in place of unilateral legislative action and the potentially graver political costs associated with it.

The Welsh Government has offered two principal justifications for using non-binding agreements. The first is the protection of devolved competences and policy spaces, an aim which now features in a set of Welsh Government principles designed to guide its consideration of UK bills.⁵³ The second is enhanced intergovernmental collaboration, one of its overarching constitutional aims since 2017.⁵⁴ Applying Poirier's terminology, it seems that the various agreements discussed above were designed to perform procedural, para-constitutional and soft law functions which would further these overarching aims. Whether they have succeeded, however, is open to question.

⁴⁹ J. Poirier, 'The functions of intergovernmental agreements: post-devolution concordats in a comparative perspective' (Constitution Unit, 2001). <<https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/75.pdf>> accessed 27 May 2022

⁵⁰ *ibid*, 12.

⁵¹ *ibid*, 14.

⁵² *ibid*.

⁵³ 'UK Parliament Bills should either protect or enhance the existing devolution settlement, rather than introducing new reservations'. Letter from the Counsel General to the Chair of the Legislation, Justice and Constitution Committee (n 3).

⁵⁴ Welsh Government, *Brexit and devolution* (2017). <[https://gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20\(en\).pdf](https://gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20(en).pdf)> accessed 28 May 2022

3.2. Protecting devolved competences

While the form of intergovernmental agreements has varied, they are intended to safeguard devolution in several ways. Some have involved the removal of proposed restrictions on devolved competences in exchange for political commitments from devolved ministers as to how those competences would be used. In this regard, the agreements on the European Union (Withdrawal) and Advanced Research and Invention Agency bills are notable examples. The Welsh Government argued that the former ‘entrenched’⁵⁵ devolution and would prevent the UK Government from imposing post-Brexit rules unilaterally. Likewise, it was prepared to recommend consent to the Advanced Research and Invention Agency Bill on the ground that a memorandum of understanding would replace proposed restrictions on devolved competence.⁵⁶

In this way, the agreements have performed a clear para-constitutional function: specific conflicts over the formal distribution of competences have been addressed through political, rather than legal, means. Further, it is clear that the agreements – and in particular the memoranda of understanding – are intended to protect devolution by functioning as a form of soft law, guiding and constraining intergovernmental interactions as de facto administrative rules. In addition to these para-constitutional and soft law functions, the agreements have also established terms for procedural cooperation between the governments in the development of cross-cutting post-Brexit policy. Most have contained assurances that UK ministers will not exercise new powers within devolved areas without consulting, or seeking the consent of, the devolved ministers, and not without providing them the opportunity to influence the content of the relevant regulations. Clearly, this input is intended to ensure devolved competences and policy aims are respected.

The Welsh Government’s determination to obtain at least some assurance from the UK Government about how the latter would exercise new powers within devolved areas also helps to explain the various forms which the intergovernmental agreements have taken. For much of the Brexit process, its position has been that devolution is better protected by striving for agreement with the UK Government than refusing to recommend legislative consent. As First Minister, Mark Drakeford justified this position in the following terms:

...where the UK Government is not prepared to agree the inclusion of such provisions on the face of its Bills, the Welsh Government faces a difficult choice. On the one hand, we could recommend that the Senedd does not consent to a UK Bill, with the clear risk that the UK Government will invite Parliament to ignore the withholding of consent, thus further undermining the inadequate Sewel convention. On the other, we could look to non legislative solutions, such as an intergovernmental agreement to enable a recommendation that the Senedd consents to the Bill. In the current constitutional and political circumstances, with a Government with a large majority in the House of Commons and facing significant policy and legislative

⁵⁵ Senedd Cymru, ‘Debate: the Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018’ (20 November 2018, Record of Proceedings). <<https://record.assembly.wales/Plenary/5365#C140170>> accessed 28 May 2022

⁵⁶ Welsh Government, ‘Supplementary legislative consent memorandum (memorandum no 2): Advanced Research and Invention Agency Bill’ (n 47).

challenges arising from the UK's departure from the EU, there are likely to be some occasions when we favour the latter option.⁵⁷

This rationale was echoed by other Welsh ministers. As Minister for International Relations and the Welsh Language, Eluned Morgan MS argued that the UK Government was in a 'strengthened position'⁵⁸ following the 2019 general election. It was therefore 'extremely unlikely' that requests from Welsh ministers for stronger protections for devolved competences 'would receive serious consideration'.⁵⁹ Similarly, as Counsel General, Jeremy Miles MS sought to justify the Welsh Government's reliance on informal assurances from UK ministers 'in light of the difficulty overall in achieving changes to the face of the Bill'.⁶⁰

The Welsh Government has therefore accepted non-binding agreements primarily on the basis that legislative safeguards were unobtainable. On this reading, the agreements offer the devolved institutions a form of damage control when confronted with unilateral reforms to devolution. Faced with the certainty that UK ministers will acquire regulatory powers which extend into devolved policy areas, the Welsh Government considered that some form of agreement as to how those powers would be exercised was still desirable. Inverting Theresa May's Brexit mantra, a bad deal was better than no deal.

3.3. Enhancing intergovernmental collaboration

The second principal aim of the agreements is enhanced collaboration in the design and implementation of post-Brexit governance. As discussed above, the agreements facilitate this by setting the terms of procedural cooperation and functioning as a form of soft law, guiding and constraining intergovernmental interactions.

As Brexit minister, Mark Drakeford argued that the intergovernmental agreement on the EU (Withdrawal) Act 2018 represented 'a first significant step towards an equitable approach to inter-governmental working of the sort that we argue should be characteristic of the post European Union United Kingdom'.⁶¹ In an attempt to embed a cooperative approach, the Welsh Government subsequently used the 2018 agreement as a template for subsequent

⁵⁷ Letter from the First Minister to the Chair of the Legislation, Justice and Constitution Committee (11 June 2020) <<https://business.senedd.wales/documents/s102035/CLA5-18-20%20Paper%2021.pdf>> accessed 28 May 2022

⁵⁸ Letter from the Minister for International Relations and the Welsh Language to the Chair of the Legislation, Justice and Constitution Committee (11 September 2020). <<https://business.senedd.wales/documents/s105188/Welsh%20Government%20response%20to%20the%20Legislation%20Justice%20and%20Constitution%20Committee%20report%20on%20the%20Legis.pdf>> accessed 28 May 2022

⁵⁹ *ibid.*

⁶⁰ Senedd Cymru, 'Legislative consent motion on the Trade Bill' (12 January 2021, Record of Proceedings). <<https://record.assembly.wales/Plenary/11146#C344273>> accessed 28 May 2022

⁶¹ Senedd Cymru, 'Statement by the Cabinet Secretary for Finance: the European Union (Withdrawal) Bill' (25 April 2018, Record of Proceedings). <<https://record.assembly.wales/Plenary/4978#A43203>> accessed 28 May 2022

agreements on UK bills.⁶² During the May premiership, one legislative consent motion after another revealed the same motive:

This is a good outcome providing a strong role and flexibility for the Welsh Ministers following extensive and highly collaborative working between Governments. It provides a valuable model which could be used in other areas where intergovernmental cooperation is needed and demonstrates both governments' commitment to collaboration.⁶³

From the Welsh Government's perspective, the agreements have also enabled devolved input into non-devolved policy areas – another one of its objectives for the Brexit process.⁶⁴ Here it has had some success, most notably regarding the role it secured for devolved governments in the negotiation of international healthcare agreements.

Finally, the Welsh Government has also argued that the agreements provide a form of intergovernmental accountability. They provide 'a legitimate, although not ideal device that devolved governments can use to hold the UK Government to account in relation to UK Bills'.⁶⁵ When UK ministers refused to countenance a legal obligation to engage with devolved institutions, these publicly stated commitments provide a basis for holding the UK Government to its word: 'it's been said on the floor of the house, and you've got something to appeal against, effectively'.⁶⁶

⁶² Jeremy Miles, 'Brexit and devolution' (17 June 2019, Wales Governance Centre). <<https://gov.wales/brexit-and-devolution-speech-17-june-2019>> accessed 28 May 2022

⁶³ Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2): Agriculture Bill' (n 19).

⁶⁴ Welsh Government, *Brexit and devolution* (n 59).

⁶⁵ Letter from the Minister for International Relations and the Welsh Language to the Chair of the Legislation, Justice and Constitution Committee (n 66).

⁶⁶ Senedd Cymru, 'Legislative consent motion on the Health and Care Bill' (15 February 2022, Record of Proceedings). <<https://record.assembly.wales/Plenary/12618#C409866>> accessed 28 May 2022

4. The limitations of non-legislative agreements

Despite its efforts to justify reliance on non-legislative agreements, the Welsh Government's approach has been criticised by a number of Senedd committees, in particular the Fifth Senedd's Legislation, Justice and Constitution Committee (formerly Constitutional and Legislative Affairs Committee). Drawing on their criticisms, this section examines the limitations of the agreements.

4.1. The disputed efficacy of non-binding safeguards

A key criticism is that the agreements are non-binding: in place of legal enforcement, their efficacy and longevity depends upon the mutual commitment and trust of those who negotiated them and their political successors. While this provides flexibility, it means that the agreements can be displaced by circumstances or simply ignored by ministers with different priorities.

This risk is perhaps most acute with the agreements which are not codified in memoranda of understanding. Whereas memoranda of understanding are detailed and codified, and can thereby function as de facto administrative rules which permeate institutional processes, despatch box commitments and other agreements arguably represent government by 'good chaps' *par excellence*, dependent entirely on individuals 'knowing what the unwritten rules are and wanting to adhere to them'.⁶⁷ Such agreements offer, at best, a light-touch and potentially temporary discouragement to UK ministers from interfering with devolved competences. By contrast, the statutory powers which the agreements purport to constrain will often last much longer; indeed, they may not be subject to any time limits at all.

Further, the risk of agreements being either breached or ignored is not borne equally: UK ministers always have recourse to their own law-making powers or the legislative supremacy of the UK Parliament to achieve their aims should the devolved governments choose not to abide by the terms of agreements. As Rawlings notes, the agreements are therefore 'vulnerable to side-stepping or trumping by the dominant legal and political player'.⁶⁸ This was particularly evident in the case of the agreement on the EU (Withdrawal) Act, arguably the most significant of the intergovernmental agreements negotiated during the Brexit process. As discussed in Part 2, despite incorporating both legislative and non-legislative commitments, the edifice of the agreement was undermined considerably by the Internal Market Act 2020. The extent to which the common frameworks, developed by consensus, will escape the

⁶⁷ A. Blick and P. Hennessy, *Good chaps no more? Safeguarding the constitution in stressful times* (Constitution Society, 2019). <<https://consoc.org.uk/wp-content/uploads/2019/11/FINAL-Blick-Hennessy-Good-Chaps-No-More.pdf>> accessed 28 May 2022

⁶⁸ R. Rawlings, 'Wales and the United Kingdom: a territorial constitutional policy drive' (2022) *Territory, Politics, Governance*. <<https://www.tandfonline.com/doi/pdf/10.1080/21622671.2022.2036630>> accessed 28 May 2022

automatic application of the market access principles, unilaterally imposed by the UK Government, remains to be seen.⁶⁹

Another problem is that the agreements can give rise to conflicting interpretations. Without recourse to independent arbitration, however, the determination as to whether a breach of terms has taken place was, until recently, left to the UK Government, acting as judge in its own cause. This issue of enforceability also brings into focus the Welsh Government's claims about the agreements providing a mechanism of intergovernmental accountability. As discussed earlier, even before the Internal Market Act 2020 threatened to undermine the common frameworks falling within its scope, both the Welsh Government and the Constitutional and Legislative Affairs Committee had alleged during the Fifth Senedd that the UK Government had breached the agreement, yet to no avail.

In this respect, non-legislative agreements of this kind appear to share the now well-established flaws in the Sewel Convention: not only are UK ministers the final arbiters of what constitutes a violation, they are unlikely to suffer any electoral consequences for their behaviour towards devolved institutions. Technical and obscure, breaches of despatch box commitments and memoranda of understanding are unlikely to give rise to the sort of major political controversy which could deter a UK Government. Beyond the objections of devolved ministers and the sure attrition of trust, from the UK Government's perspective there is little to lose.⁷⁰

The extent to which the agreements have performed a para-constitutional function in defence of devolution can also be questioned. While the European Union (Withdrawal) and Advanced Research and Invention Agency bills are notable examples of agreements being used to replace proposed restrictions on devolved competences, the majority of examples discussed above centred on the UK Government acquiring *new* powers in devolved areas. As the Fifth Senedd's Constitutional and Legislative Affairs Committee argued, the use of non-binding agreements instead of statutory consent requirements to constrain those powers is inconsistent with the view that the relevant matters are devolved.⁷¹ In the final analysis, the Welsh Government has recommended that the Senedd consent to various UK Government powers in devolved areas, subject to no legal requirements to obtain devolved consent or consult with devolved institutions. The agreements thus reflect not the avoidance of constitutional conflict but its resolution, with the Welsh Government relinquishing its claim to the various competences which were in dispute.

⁶⁹ The governments have agreed a first exception to the market access principles, concerning single use plastics. Department for Levelling Up, Housing and Communities, 'Intergovernmental relations quarterly report quarter 1 2022' (UK Government, May 2022).
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1078721/CP_M0522992596-001_Intergovernmental_Relations_-_Quarterly_Report_25M__1_.pdf> accessed 28 May 2022

⁷⁰ The question of whether the changes introduced following the Intergovernmental Relations Review will address the problem of enforcement is considered in the concluding section of this report.

⁷¹ Constitutional and Legislative Affairs Committee, *The Welsh Government's supplementary legislative consent memorandum (memorandum no 2) on the Agriculture Bill* (National Assembly for Wales, 2019).
<<https://senedd.wales/laid%20documents/cr-ld12547/cr-ld12547-e.pdf>> accessed 28 May 2022

The Fifth Senedd's LJCC also argued that frequent recourse to non-binding commitments created a 'perverse incentive'⁷² for the UK Government to refrain from including requirements for devolved consent or consultation in legislation. With the Welsh Government having demonstrated its amenability to non-legislative assurances, it argued, legal requirements would appear increasingly unnecessary. The Committee warned of the cumulative effects of this trend for the future of Welsh devolution: 'Welsh Ministers' continued acceptance of such agreements might have the effect of normalising their use, reducing the likelihood of legislative safeguards being agreed and, consequently, weakening the devolution settlement'.⁷³

4.2. Marginalising the Senedd

The proliferation of non-binding agreements has had significant ramifications for the Senedd. The Fifth Senedd's LJCC argued that, although the agreements are between governments, they have arisen from disputes around *legislative* consent and ultimately concern the Senedd's powers. To the extent that they are used as an alternative to statutory provisions, therefore, they displace the normal legislative consent process. Their effect is 'to take power away from the Senedd as the legislature and place it the hands of the Welsh Government'.⁷⁴ Further, several of the agreements – most notably on the Agriculture Act 2020 – have left to the UK Parliament the task of scrutinising UK Government regulations in devolved areas, 'despite it not having done so ... for 20 years'.⁷⁵ To this extent, the LJCC said, the Senedd's role has been 'bypassed'.⁷⁶

It could also be argued that the agreements have prioritised intergovernmental relations over the integrity of the Senedd's powers. As discussed above, for much of the Fifth Senedd the Welsh Government deemed non-binding agreements preferable to the Senedd withholding its consent. This may have reflected its commitment in the 2018 Agreement not to withhold a recommendation of consent 'unreasonably', or perhaps a desire to play the 'good unionist' and influence the UK Government through cooperation rather than contestation.⁷⁷

Whatever its intentions, the agreements have often involved the governments making significant decisions between themselves about the allocation of law-making responsibilities in devolved areas, with little input from the Senedd. Given that the Welsh Government has repeatedly argued that the Senedd's law-making powers are grounded in popular sovereignty, as expressed in the two referendums on Welsh devolution, this approach is particularly

⁷² Legislation, Justice and Constitution Committee, *Fifth Senedd legacy report* (n 2) 15.

⁷³ Legislation, Justice and Constitution Committee, *The Welsh Government's legislative consent memorandum on the Trade Bill* (Senedd Cymru, 2020) 18. <<https://senedd.wales/laid%20documents/cr-ldl3375/cr-ldl3375-e.pdf>> accessed 28 May 2022

⁷⁴ Legislation, Justice and Constitution Committee, *Fifth Senedd legacy report* (n 2) 15.

⁷⁵ Constitutional and Legislative Affairs Committee, *The Welsh Government's supplementary legislative consent memorandum (memorandum no 2) on the Agriculture Bill* (n 81) 9.

⁷⁶ *ibid.*

⁷⁷ J. Hunt and R. Minto, 'Between intergovernmental relations and paradiplomacy: Wales and the Brexit of the regions' (2017) 19(4) *British Journal of Politics and International Relations* 647.

questionable.⁷⁸ To the extent that the agreements reflect an attempt to play the ‘good unionist’, they may have come at the expense of constitutional principle.

The Senedd’s role has also been undermined by a lack of transparency regarding the terms of the agreements. It has frequently been asked to consent to the relevant UK legislation without the agreements having been finalised, published or subject to committee scrutiny. Indeed, the publication of the terms of the agreements ahead of legislative consent votes has been the exception rather than the norm. For four of the nine bills discussed above, the Senedd was asked to give consent without the relevant memoranda of understanding having been scrutinised.⁷⁹ On other occasions, the agreements, once published, have been out of date.⁸⁰ Further, the Welsh Government in some instances has accepted agreements on the basis of intergovernmental dispute mechanisms which had not yet been negotiated or finalised – most notably in relation to the Agriculture Bill.

The Senedd has also been asked to consent to agreements amid confusion as to which specific commitments given by the May administration had been reaffirmed by the Johnson administration.⁸¹ Despatch box commitments have been particularly problematic in this regard: it has often been unclear whether, when, and by whom, the relevant commitments have been given in the UK Parliament. Thus the Senedd has been confronted with circumstances which not only reduce its role in the legislative consent process but also hinder its ability to scrutinise fully the implications of UK legislation for its competences.

A final issue is post-legislative scrutiny. The Fifth Senedd’s LJCC expressed concern that the agreements, once given consent, ‘could be subject to change without scrutiny by, or notification to, the Senedd’.⁸² This proved to be prescient: with the exception of the agreement on the EU (Withdrawal) Bill, it is difficult to ascertain how most of the agreements discussed in Part 2 have operated in practice. Generally, once the Senedd consented to the relevant legislation and accompanying agreement, there has been little reporting. This makes it difficult to determine whether the UK Government is doing what it said it would do.

Following the 2021 Senedd election, a revised ‘Inter-Institutional Relations Agreement’ was established between the Welsh Government and the Senedd. This provides that the Welsh Government will give regular updates to the Senedd on its ‘participation in formal, ministerial-level inter-governmental meetings, agreements, concordats, and memorandums of

⁷⁸ Welsh Government, *Reforming our Union: shared governance in the UK* (2021). <<https://gov.wales/reforming-our-union-shared-governance-in-the-uk-2nd-edition>> accessed 28 May 2022

⁷⁹ The Fisheries, Medicines and Medical Devices, Advanced Research and Invention Agency and Health and Social Care Bills.

⁸⁰ For example, the draft Memorandum of Understanding on reciprocal healthcare agreements under the Health and Care Bill.

⁸¹ Letter from the Minister for International Relations and the Welsh Language to the Minister of State for Trade Policy (11 September 2020). <<https://business.senedd.wales/documents/s104885/CLA5-25-20%20Paper%2041.pdf>> accessed 28 May 2022

⁸² Legislation, Justice and Constitution Committee, *Fifth Senedd legacy report* (n 2) 15.

understanding'.⁸³ However, the emphasis here is on 'formal, Intergovernmental Structures'.⁸⁴ This wording could be interpreted by the Welsh Government in a way which excludes the various agreements discussed in Part 2, with the consequence that a lack of transparency around the operation of those agreements might continue to be an issue in future.

4.3. A lack of principled justification

Finally, the Welsh Government has been criticised for lacking a compelling rationale for its repeated reliance on non-binding agreements. As discussed in Part 3, its position has been that non-binding agreements have offered the best and only protection for devolved competences achievable under the political circumstances, placing particular emphasis on its perception of the UK Government's mandate following the 2019 general election. For the Fifth Senedd's LJCC, 'this response, and the principle on which it is based, is unacceptable'.⁸⁵

The approach could be criticised on several grounds. First, it suggests that the UK Government was entitled to unilaterally determine the appropriate safeguards for devolution on the basis of a majority in the House of Commons. At the same time, it seemed to ignore the Welsh Government's own electoral mandate and authority to demand effective safeguards for the Welsh devolved system. In the UK's contested constitutional setup, the devolved institutions are not passive actors; they have a central role in articulating what is constitutionally and democratically legitimate for a UK Government to do. Particularly during the Fifth Senedd, the Welsh Government at times appeared to lose sight of this responsibility in its attempts to instil better working relationships with the UK Government.

The Welsh Government's position also appeared to be based on highly selective *realpolitik*. While it was not unreasonable to conclude that the UK Government would not be prepared to offer stronger safeguards for devolution in the aftermath of the 2019 election, equally it could have concluded that the same government would fail to fulfil its commitments, particularly in light of its willingness to dispense with constitutional conventions and practices, and that this posed an unacceptable risk to Welsh devolution which should not be endorsed with legislative consent.⁸⁶ The experience of devolution to date would also militate against reliance on non-binding agreements. For instance, devolution guidance notes state explicitly that the devolved institutions should be consulted in the drafting of UK parliamentary

⁸³ Legislation, Justice and Constitution Committee, *Inter-Institutional Relations Agreement between Senedd Cymru and the Welsh Government* (Senedd Cymru, 2021). <<https://senedd.wales/media/ifaavfn2/cr-ld14674-e.pdf>> accessed 28 May 2022

⁸⁴ *ibid.*

⁸⁵ Legislation, Justice and Constitution Committee, *The Welsh Government's supplementary legislative consent memorandum (memorandum no. 2) on the Trade Bill* (Senedd Cymru, 2020) 7. <<https://senedd.wales/media/nttbvh23/cr-ld13896-e.pdf>> accessed 28 May 2022

⁸⁶ '...[T]he UK government has in recent years shown an increasing willingness to push the limits of the norms and conventions that are central to the relationship between the four political institutions of the UK and override the devolved institutions in areas of their own responsibility'. M.T. Jack, J. Sargeant and J. Pannell, *A framework for reviewing the UK constitution* (Bennett Institute for Public Policy Cambridge and Institute for Government, 2022) 31. <<https://www.instituteforgovernment.org.uk/sites/default/files/publications/framework-reviewing-uk-constitution.pdf>> accessed 28 May 2022

legislation which impinges on devolved competences. Even in respect of legislation with major ramifications for devolution, however, often this has either not occurred or has not been done to the satisfaction of the devolved governments.⁸⁷

To some extent, the use of non-binding agreements has also followed a self-perpetuating logic: occasionally Welsh ministers cited previous agreements as precedent and justification for new agreements. As the Minister for International Relations and the Welsh Language said in relation to the Trade Bill, '[i]t would ... be consistent with the approach taken to other legislation to rely on a despatch box commitment in this instance'.⁸⁸ Such remarks suggest that the use of such commitments in place of legislative safeguards were becoming normalised, despite their limitations.

Contrary to the Welsh Government's claims, it could also be argued that the agreements offered limited gains in intergovernmental collaboration. Some agreements, for example, centred not on new but rather pre-existing dispute resolution mechanisms.⁸⁹ Meanwhile, it has been suggested that the process constructed through the agreement on the EU (Withdrawal) Act 2018 – the benchmark of intergovernmental collaboration – merely reflected 'traditional UK territorial management: informal negotiations, with central sovereignty as a backstop', one which 'openly clashes with a version of permissive autonomy based on consent from the devolved bodies'.⁹⁰ Additionally, while the co-development of common frameworks progressed steadily in line with that agreement, this did not dissuade the UK Government from enacting profound changes to the devolution settlement, without devolved consent, through the Internal Market Act 2020, despite the emphasis which the 2018 agreement had placed on cooperation and consensus.

⁸⁷ Rawlings notes that the Welsh Government had a 'bystander status' during the discussions which preceded the initial draft of the Wales Bill in 2015. R. Rawlings, 'The strange reconstitution of Wales' [2018] Public Law 62, 68. More recently, the UK Government did not consult with the devolved governments prior to the publication of its proposals for the Internal Market Bill, or its plans to replace the Human Rights Act 1998.

⁸⁸ Letter from the Minister for International Relations and the Welsh Language to the Chair of the Legislation, Justice and Constitution Committee (n 66).

⁸⁹ E.g. the UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill, which stated that disputes would be resolved 'in line with the existing MoU governing Intergovernmental relations'.

⁹⁰ M. Sandford and C. Gormley-Heenan, 'Taking back control', the UK's constitutional narrative and Schrodinger's devolution' (2020) 73(1) Parliamentary Affairs 108, 118.

5. Conclusions and recommendations

Non-binding intergovernmental agreements have played a prominent role in the Welsh context since the 2016 referendum on EU membership, emerging from the legislative consent negotiations on a wide range of UK Government bills. Where disagreements have arisen as to the boundary between devolved and non-devolved responsibilities, or the appropriate limits and conditions to be attached to new regulatory powers for UK ministers, memoranda of understanding, despatch box commitments and written assurances have provided one of the principal means of unlocking the disputes.

Despite their different forms, the aims of the agreements have been consistent: discouraging UK Government interference with devolved competences and the enhancement of intergovernmental collaboration in the design and implementation of UK governance outside of the EU. To date, however, they have had mixed results in achieving these aims. Further, the agreements have repeatedly undermined the Senedd's law-making and scrutiny functions and have often lacked a principled justification. Despite the Inter-Institutional Relations Agreement between the Welsh Government and Senedd, there remains a lack of transparency around how many of the agreements are working in practice.

The Welsh Government has now stated that the agreements 'should be avoided' because 'they only bind the current UK Government to an extent, and they do not bind future UK Governments'.⁹¹ This stance is reflected in its recent approach to legislative consent. For instance, the Professional Qualifications Act 2022 provides concurrent powers for UK and devolved ministers to regulate the recognition of qualifications and experience obtained outside of the UK, thereby enabling both to make laws in devolved areas. The Welsh Government argued that this approach 'undermine[s] the long-established powers of the Senedd and the Welsh Ministers'.⁹² It rejected an assurance from the UK Government that it 'does not intend to use the concurrent powers in the areas of devolved competence without the agreement of the relevant DAs'.⁹³ It sought the removal of the concurrent powers or, alternatively, the inclusion of a requirement on UK ministers to obtain the consent of devolved ministers when making regulations in devolved areas. It also requested a 'carve out' from paragraph 11 of Schedule 7B to the Government of Wales Act 2006 which would allow the Senedd to remove the relevant powers held by UK ministers without requiring their consent. Although the UK Government conceded the carve out, it refused to remove the concurrent powers and was only prepared to introduce a requirement to consult with

⁹¹ Letter from the Counsel General to the Chair of the Legislation, Justice and Constitution Committee (n 3).

⁹² Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2): Professional Qualifications Bill' (December 2021). <<https://senedd.wales/media/uawh2jvp/slcm-ldl4720-e.pdf>> accessed 28 May 2022

⁹³ Letter from the Minister for Education and Welsh Language to the Chair of the Legislation, Justice and Constitution Committee (10 September 2021). <<https://business.senedd.wales/documents/sl17457/Letter%20from%20the%20Minister%20for%20Education%20and%20the%20Welsh%20Language%20to%20the%20Chair%20of%20the%20Legislation%20Justi.pdf>> accessed 28 May 2022

devolved ministers; the Welsh Government therefore refused to recommend legislative consent.⁹⁴

In light of the limitations of non-binding agreements discussed in Part 4, the Welsh Government's change of approach should be welcomed. Nevertheless, it is important to note that the Welsh Government has continued to rely on intergovernmental agreements to resolve legislative disputes: for instance, in relation to the Health and Care Act 2022. Clearly, therefore, such agreements on UK legislation will remain an important feature of the Welsh devolved system. It should also be noted from the negotiations on the Professional Qualifications Act 2022 that the Welsh Government sought a requirement to obtain the consent of devolved *ministers*, not the Senedd. While such a mechanism offers legal protection for devolved competences, thereby avoiding one of the key risks associated within non-binding agreements, it limits the scrutiny of regulations in devolved areas by the Senedd.⁹⁵

To a certain extent, the political context of non-binding agreements has changed following the conclusion of the Intergovernmental Relations Review in January 2021, negotiated and agreed by the UK's four governments.⁹⁶ Three features of the review are particularly noteworthy. First, it sets out an enhanced dispute resolution mechanism, intended to cover disagreements over the interpretation and fulfilment of intergovernmental agreements, which will be overseen by an Intergovernmental Relations (IGR) Secretariat made up of officials from each government. The new process enables the governments to obtain third party advice on the dispute, provided each agrees. Second, there is a commitment to increased transparency in intergovernmental relations through enhanced reporting to the UK's legislatures, for which the individual governments and IGR Secretariat have responsibility. Third, and crucially, the review is not legally binding: it is 'a statement of political intent, ... not intended to create new, or override existing, legal relations or obligations'.⁹⁷

These changes should be welcomed cautiously. Recourse to an enhanced dispute process may help to address the imbalance of power between the UK and devolved governments which has characterised previous non-binding agreements, whereby the latter had no means of redress for alleged breaches of such agreements.⁹⁸ Likewise, if the commitment to increased transparency extends to the operation of the agreements discussed in this report, that would also represent significant progress, given the issues of transparency discussed in Part 4. However, it is unclear whether that is the case; indeed, it has been noted that the review

⁹⁴ Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 3): Professional Qualifications Bill' (March 2022). <<https://senedd.wales/media/oidjlnic/slcm-ld15023-e.pdf>> accessed 28 May 2022

⁹⁵ As noted by the Sixth Senedd's LJCC. Legislation, Justice and Constitution Committee, *The Welsh Government's legislative consent memorandum on the Professional Qualifications Bill* (Senedd Cymru, 2021) <<https://senedd.wales/media/r0yn5fhu/cr-ld14574-e.pdf>>

⁹⁶ Cabinet Office, 'The review of intergovernmental relations' (n 45).

⁹⁷ *ibid.*

⁹⁸ 'Whereas previously the UK government could deny the existence of a dispute, now any administration can escalate a disagreement to a formal dispute. The secretariat can seek third-party advice or mediation, and the process must be chaired by a body not party to the dispute. The days when the UK government could act as the accused, the judge and the jury appear to be over.' N. McEwen, 'Intergovernmental relations review: worth the wait?' (*UK in a Changing Europe*, 17 January 2022).

‘offers very little’⁹⁹ in gains for transparency. Finally, since the review ‘doesn’t have any legal constitutional status’,¹⁰⁰ as the Counsel General has noted, it cannot be enforced in the courts. Thus if the dispute process concludes with the UK Government refusing to concede that it has breached an intergovernmental agreement, the devolved governments have no further recourse.

Notwithstanding the modest alterations to the UK’s system of intergovernmental relations, therefore, non-binding agreements on UK legislation will remain a weaker, high-risk substitute for statutory requirements for devolved legislative consent, and their repeated use will continue to undermine the Senedd’s law-making and scrutiny functions.

Recommendations

- The Welsh Government should maintain its policy of avoiding the use of non-binding agreements as a solution to disputes on legislative consent, unless they are used as a substitute for new reservations on devolved competences.
- The Welsh Government’s criteria for using such agreements should be clarified in light of its continued (albeit more reluctant) reliance on them during the Sixth Senedd. One option would be to revise its principles for considering UK bills to specify when it will consider accepting non-binding agreements, particularly when the agreements are not being used as alternatives to new restrictions on devolved competences.
- The Legislation, Justice and Constitution Committee should consider requesting an update from the Welsh Government on the status and progress of the various non-binding agreements which were used to overcome disputes on legislative consent. This will facilitate post-legislative scrutiny of the various laws to which those agreements related and align with the Welsh Government’s commitment to increased transparency in the Intergovernmental Relations Review.
- If necessary, the Welsh Government should request the support of the new IGR Secretariat to assist it in preparing updates for the Senedd on the status of the various non-binding agreements which have been negotiated.
- The Legislation, Justice and Constitution Committee should consider seeking clarification from the Welsh Government as to whether the Inter-Institutional Relations Agreement includes the various non-binding agreements which have been used to resolve disputes on legislative consent. If the Welsh Government’s view is that it does not, the Agreement should be amended in future to include them.

⁹⁹ *ibid.*

¹⁰⁰ Legislation, Justice and Constitution Committee (14 March 2022, Record of Proceedings) <<https://record.senedd.wales/Committee/12646>> accessed 28 May 2022

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