Agenda – Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 4 – Tŷ Hywel
Meeting date: 16 April 2018
Meeting time: 08.00

For further information contact:
Gareth Williams
Committee Clerk
0300 200 6362
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1 Introduction, Apologies and Substitutions

2 The EU (Withdrawal) Bill: Evidence session

(Pages 1 – 14)

The Rt Hon Alun Cairns MP, Secretary of State for Wales

CLA(5)-11-18 – Briefing

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

(Page 15)

CLA(5)-11-18 – Paper 1 – Statutory instruments with clear reports

Negative Resolution Instruments

3.1 **SL(5)200 – The National Health Service (Dental Charges) (Wales) (Amendment) Regulations 2018**

4 Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3

Negative Resolution Instruments

4.1 **SL(5)205 – The Land Transaction Tax (Transitional Provisions) (Wales) (Amendment) Regulations 2018**

(Pages 16 – 26)

CLA(5)-11-18 – Paper 2 – Regulations

CLA(5)-11-18 – Paper 3 – Explanatory Memorandum

CLA(5)-11-18 – Paper 4 – Letter from Leader of House and Chief Whip, Breech of the 21 day rule

CLA(5)-11-18 – Paper 5 – Report

Affirmative Resolution Instruments

4.2 **SL(5)204 – The Digital Government (Welsh Bodies) (Wales) Regulations 2018**

(Pages 27 – 50)

CLA(5)-11-18 – Paper 6 – Regulations

CLA(5)-11-18 – Paper 7 – Explanatory Memorandum

CLA(5)-11-18 – Paper 8 – Report

5 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 but have implications as a result of the UK exiting the EU

5.1 **SL(5)203 – The Local Authorities (Capital Finance and Accounting) (Wales) (Amendment) Regulations 2018**

(Pages 51 – 52)

CLA(5)-11-18 – Paper 9 – Report

6 Supplementary Report: SL(5)190 – The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018

(Pages 53 – 64)

CLA(5)-11-18 – Paper 10 – Supplementary Report

CLA(5)-11-18 – Paper 11 – Revised Explanatory Memorandum

7 Supplementary Report: SL(5)191 – The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018

(Pages 65 – 66)

CLA(5)-11-18 – Paper 12 – Supplementary report

8 Papers to note

8.1 European Union (Withdrawal) Bill

(Pages 67 – 83)

CLA(5)-11-18 – Paper 13 – Letter from the Secretary of State for Wales to the Llywydd, 16 March 2018

CLA(5)-11-18 – Paper 14 – Letter from the Llywydd to Secretary of State for Wales, 22 March 2018

CLA(5)-11-18 – Paper 15 – Letter from the Chair of the External Affairs and Additional Legislation Committee to the First Minister, 23 March 2018

CLA(5)-11-18 – Paper 16 – Letter Leader of the House and Chief Whip, 27 March 2018

CLA(5)-11-18 – Paper 17 – Letter from the First Minister to Secretary of State for Wales, 29 March 2018

8.2 Letter from Llywydd: UK Governance post Brexit Report

(Page 84)

CLA(5)-11-18 – Paper 18 – Letter from Llywydd: UK Governance post Brexit Report

8.3 Letter from the Cabinet Secretary for Health and Social Services: Public Health (Minimum Price for Alcohol) (Wales) Bill

(Pages 85 – 90)

CLA(5)-11-18 – Paper 19 – Letter from the Cabinet Secretary for Health and Social Services: Public Health (Minimum Price for Alcohol) (Wales) Bill

8.4 Letter from Simon Thomas AM, Member in Charge of the Public Services Ombudsman (Wales) Bill

(Pages 91 – 93)

CLA(5)-11-18 – Paper 20 – Letter from Simon Thomas AM, Member in Charge of the Public Services Ombudsman (Wales) Bill

8.5 Welsh Government Statement: Draft Legislation (Wales) Bill

(Pages 94 – 96)

CLA(5)-11-18 – Paper 21 – Welsh Government Statement: Draft Legislation (Wales) Bill

8.6 **Letter from the Cabinet Secretary for Finance: Law Derived from the European Union (Wales) Bill**

(Pages 97 – 101)

CLA(5)-11-18 – Paper 22 – Letter form the Cabinet Secretary for Finance: Law Derived from the European Union (Wales) Bill

8.7 **IWA Event Note on the Impact of the EU Withdrawal Bill on the devolved**

(Pages 102 – 116)

CLA(5)-11-18 – Paper 23 – IWA Event Note on the Impact of the EU Withdrawal Bill on the devolved legislatures and their respective powers

9 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

10 Consideration of evidence from the Secretary of State for Wales

11 European Union (Withdrawal) Bill: Latest Developments

(Pages 117 – 123)

CLA(5)-11-18 – Paper 24 – Research Service: European Union (Withdrawal) Bill: Latest Developments

12 UK Governance post Brexit: Summary of Evidence draft report

(Pages 124 – 201)

CLA(5)-11-18 – Paper 25 – draft report

Date of the next meeting

23 April 2018

Agenda Item 2

Document is Restricted

Statutory Instruments with Clear Reports

16 April 2018

SL(5)200 – The National Health Service (Dental Charges) (Wales) (Amendment) Regulations 2018

Procedure: Negative

These Regulations amend the National Health Service (Dental Charges) (Wales) Regulations 2006 ("the 2006 Regulations").

Regulation 2 amends regulation 4 of the 2006 Regulations (calculation of charges) by increasing the applicable charge payable for a Band 2 and a Band 3 course of treatment.

Parent Act: National Health Service (Wales) Act 2006

Date Made: 01 March 2018

Date Laid: 07 March 2018

Coming into force date: 01 April 2018

WELSH STATUTORY INSTRUMENTS

2018 No. 401 (W. 71)

LAND TRANSACTION TAX, WALES

The Land Transaction Tax (Transitional Provisions) (Wales) (Amendment) Regulations 2018

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Land Transaction Tax (Transitional Provisions) (Wales) Regulations 2018 to make further transitional provision in respect of a specific case where a fixed term lease continues for a period of more than a year after its contractual termination date (a period known as "holdover"), and is subsequently renewed and backdated to a day during holdover.

Where the conditions in paragraph 8(1) of Schedule 6 to the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 have been met, rent payable under the new lease is reduced for the purposes of land transaction tax by the amount of taxable rent payable in respect of the holdover tenancy.

The amendment made by regulation 2 ensures that the reduction available under paragraph 8(3) of that Schedule applies in respect of leases granted prior to 1 April 2018 but renewed on or after that date, notwithstanding that the rent payable during the holdover was chargeable to stamp duty land tax.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, a Regulatory Impact Assessment has been prepared as to the likely costs and benefits of complying with these Regulations A copy can be obtained from the Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

WELSH STATUTORY INSTRUMENTS

2018 No. 401 (W. 71)

LAND TRANSACTION TAX, WALES

The Land Transaction Tax (Transitional Provisions) (Wales) (Amendment) Regulations 2018

Made	*22 March 2018*
Laid before the National Assembly for Wales	*23 March 2018*
Coming into force	*1 April 2018*

The Welsh Ministers make the following Regulations in exercise of the power conferred on them by section 78(1) of the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017(**1**).

Title and commencement

1.—(1) The title of these Regulations is the Land Transaction Tax (Transitional Provisions) (Wales) (Amendment) Regulations 2018.

(2) These Regulations come into force on 1 April 2018.

Amendment of the Land Transaction Tax (Transitional Provisions) (Wales) Regulations 2018

2. After regulation 9 of the Land Transaction Tax (Transitional Provisions) (Wales) Regulations 2018(**2**), insert—

"Holdover tenancies

9A.—(1) This regulation applies where the old lease referred to in paragraph 8(1) of the Schedule has been granted prior to the commencement date.

(**1**) 2017 anaw 1.
(**2**) S.I. 2018/126 (W. 31).

(2) Where this regulation applies—

(a) paragraph 8(1) of the Schedule applies to the old lease;

(b) paragraph 8(3)(b) and (4) of the Schedule has effect as if for "ending at the end of the whole years of holdover" there were substituted "ending on the date before the date on which the new lease is granted"; and

(c) the "taxable rent" payable in respect of the holdover tenancy for the purposes of paragraph 8(3) and (5)(b) of the Schedule is to include the amount that was taken into account in determining the tax chargeable under the provisions of Schedule 5 to the FA 2003 for that period.

(3) In this regulation, "the Schedule" means Schedule 6 to the LTT Act."

Mark Drakeford
Cabinet Secretary for Finance, one of the Welsh Ministers
22 March 2018

Explanatory Memorandum to

The Land Transaction Tax (Transitional Provisions) (Wales) (Amendment) Regulations 2018

This Explanatory Memorandum has been prepared by the Office of the First Minister and Cabinet Office of the Welsh Government and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Land Transaction Tax (Transitional Provisions) (Wales) (Amendment) Regulations 2018. I am satisfied that the benefits justify the likely costs.

Mark Drakeford AM
Cabinet Secretary for Finance
23 March 2018

1. Description

1.1 These Regulations make an amendment to the Land Transaction Tax (Transitional Provisions) (Wales) Regulations 2018 so as to provide an additional transitional provision in respect of the introduction of land transaction tax ("LTT") in Wales by the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 ("the LTTA Act"). The amendment ensures that transactions which take place on or after 1 April 2018 receive treatment which is consistent, meaning that transactions are not taxed twice under LTT and Stamp Duty Land Tax ("SDLT").

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2.1 Section 79(3) of the LTTA Act provides that Regulations made under section 78(1) of the LTTA Act are subject to the negative procedure, unless they have the effect of imposing or increasing liability to tax. The effect of the regulation contained in this instrument does not impose tax liabilities, in fact it provides for a reduction in the amount of LTT chargeable to ensure that a double charge to tax does not arise, therefore the Regulations are subject to the negative procedure.

2.2 In order to provide certainty to Welsh taxpayers and avoid any risk that a taxpayer may be affected by any double taxation arising as a result of the transition from SDLT to LTT, it is necessary to breach the 21 day rule to ensure that the Regulations come into force on 1 April 2018.

3. Legislative background

3.1 Section 78(1) of the LTTA Act provides for the Welsh Ministers to make such transitional provision as they think appropriate for the purposes of, or in connection with, or giving full effect to any provision under the Act.

3.2 Commencement of LTT will take place after SDLT has been dis-applied in Wales, which will be on 1 April 2018, in accordance with the Wales Act 2014, Sections 16 and 19 (Disapplication of UK Stamp Duty Land Tax and UK Landfill Tax) (Appointed Date) Order 2018 (S.I. 2018/214).

4. Purpose & intended effect of the legislation

4.1 The **purpose** of these Regulations is to set out the treatment of certain leases granted on or after 1 April 2018 which follow a period where the tenant continued in occupation after the contractual termination date of the old lease.

4.2 When a lease reaches its contractual termination date, a number of events may occur:

i. A new lease may have been negotiated prior to the termination date which is granted to start on the day after that termination date;
ii. The tenant may vacate the property; or
iii. When permitted by law or agreed between the parties to the lease, the tenant may continue in occupation until both parties agree the terms of a new lease (a situation known as 'holding over'). The effect of holding over the lease is that the terms of the lease continue (including paying rent as agreed under the lease) for the duration of the holdover.

4.3 Various tax consequences arise as a result of a tenant holding over. The immediate consequence is that liability to additional tax might arise as a result of the rent paid during the holdover period. For leases that cross the LTT 'go live' date (that is they were granted under the SDLT regime, but a hold-over period arises, or continues, on or after 1 April 2018), the additional tax payable is assessed to SDLT. Once a new lease is granted a LTT liability will arise.

4.4 There is a risk of a double-taxation situation arising where a new lease is granted, but the landlord and tenant decide to backdate the term of that lease so that it commences on a date falling within the hold-over period. In these circumstances, paragraph 8 of Schedule 6 to the LTTA Act is made available to ensure that the amount of rents chargeable during the hold-over period may be taken into account when calculating the LTT liability.

4.5 The **intention** is to ensure that paragraph 8 of Schedule 6 to the LTTA Act is also made available where rent is paid during a holdover period and assessed to SDLT and a subsequent lease (that will be liable to LTT) is granted with a backdated commencement date. The regulation ensures that the rents on that holdover period are not taxed twice (by both SDLT and LTT) as a result of the transition from SDLT to LTT, and despite the fact that the old ('SDLT') lease was granted prior to the commencement date

4.6 Guidance on the effect of this transitional rule will be published by WRA.

5. Consultation

5.1 The risk of taxpayers incurring a double charge to tax under both SDLT and LTT was brought to the Welsh Government's attention by external advisers.

6. Regulatory Impact Assessment

6.1 A primary aim of the Regulations is to ensure the correct liabilities to tax arise to the correct tax authority and that no taxpayer is unfairly disadvantaged by the switch from SDLT to LTT for Welsh land transactions. The key benefit of these Regulations is therefore that they provide taxpayers with certainty, clarity and fairness in the tax liability results arising from their land transactions.

Option 1: Do Nothing

6.2 The key potential impact of not making this instrument as part of the legislative framework for LTT would be that some transactions with relevant events falling either side of the commencement date will be taxed, on the same consideration given, to both SDLT and LTT. The instrument ensures the proper and fair collection of LTT and SDLT for leases affected by the transition from one tax to the other.

Option 2: Provide for the Welsh Ministers to make transitional provision for the purposes of LTT

6.3 Description: the regulation applies to leases that were granted before 1 April 2018 and were, on grant, subject to SDLT. If the lease terminates and is heldover following that termination date an SDLT liability will arise on for each year following the termination date until the tenant (the taxpayer) leaves the premises or a new lease is granted. In some cases that lease may be backdated so that the lease is expressed to begin in a holdover period for which the taxpayer will have paid SDLT. In these cases the regulation ensures that the amount of taxable rent payable under the holdover tenancy for the old lease is, for the purposes of LTT on the newly granted (but backdated lease), taken into account when determining the LTT chargeable.

6.4 Impact: These regulations are expected to reduce tax; removing double taxation, for a few non-residential leasehold transactions over the next few years as the conditions to which it applies are considered to be relatively exceptional. Given the number of taxable transactions to which these regulations may apply, it is therefore estimated to reduce revenues by less than £0.2m per year, with a declining profile over future years as fewer transactions are affected.

6.5 Benefit: These regulations ensure where rents are paid under a holdover tenancy which was assessed under SDLT, the rents assessed under SDLT will be taken into account when calculating the tax liability under LTT on the grant of the new lease. This enables these types of leasehold situations to not be double taxed.

7. Post Implementation review

7.1 Section 77 of the LTTA Act provides that the Welsh Ministers must make arrangements for an independent review of land transaction tax to be completed within 6 years of the day after the day of the LTTA Act receiving Royal Assent. A review of LTT will encompass all of the subordinate legislation made under the LTTA Act.

Julie James AC/AM
Arweinydd y Tŷ a'r Prif Chwip
Leader of the House and Chief Whip

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA-L/MD/0181/18

Elin Jones AM
Presiding Officer
National Assembly for Wales

23 March 2018

Dear Elin,

The Land Transaction Tax (Transitional Provisions) (Wales) (Amendment) Regulations 2018

In accordance with guidance, I am writing to notify you that section 11A(4) of the Statutory Instruments Act 1946, as inserted by Sch.10 para 3 of the Government of Wales Act 2006, which affords the rule that statutory instruments come into force at least 21 days from the date of laying, will, unfortunately but unavoidably, be breached for the introduction of the above amending regulation.

The Cabinet Secretary for Finance has been clear that it is his intention that the transition from stamp duty land tax to land transaction tax should not result in a taxpayer being unfairly disadvantaged. A set of transitional regulations have already been made that address a number of such issues. It has, however, come to his attention late in the day that there is another situation where the transition to land transaction tax could result in double taxation. These new regulations will remove that unfairness from the date that land transaction tax commences.

The Land Transaction Tax (Transitional Provisions) (Wales) (Amendment) Regulations provide for a further transitional rule in relation to certain lease transactions where the start of the lease is backdated to a date when the taxpayer was 'holding over' a previous lease that was chargeable to stamp duty land tax.

The regulations amend the Land Transaction Tax (Transitional Provisions) (Wales) Regulations 2018 to include a rule similar to the transitional rule already provided which deals with a similar situation where the first lease was chargeable to stamp duty land tax and the second to land transaction tax in relation to overlapping leases.

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The new regulation addresses the potential for a taxpayer incurring both a charge to stamp duty land tax and to land transaction tax on the same amount of rent payable to the landlord by the tenant (the taxpayer). This situation arises if the lease has reached the end of its contractual term but is then held over (as a result of the tenant continuing to occupy) on the same terms as set out in the 'old' lease until a new lease is granted. In cases where the 'old' lease was granted under stamp duty land tax, the taxpayer will be required to pay stamp duty land tax on rent paid during that holdover period (if the rents are chargeable).

When a new lease is granted, that lease will be subject to land transaction tax. In many cases, the new lease will be granted and commence from a date following the ending of the holdover period. In such cases there will be no double taxation arising as a result of the transition from stamp duty land tax to land transaction tax. However, there will be some cases where the new lease will be backdated to a date between the end date of the old lease and the date on which the new lease is granted. It is in these cases where a taxpayer would, without the transitional rule included in these regulations, be chargeable to land transaction tax on rents which have already been chargeable to stamp duty land tax.

My officials became aware of this issue only recently and have sought to take action to address the issue as quickly as possible thereby preventing the risk of taxpayers being subject to paying double taxation in these circumstances. The Cabinet Secretary for Finance has decided to lay the statutory instrument so it comes into force on 1 April 2018 – the commencement date for land transaction tax. This decision is driven by the need to protect taxpayers from double taxation and maintain the policy that land transaction tax should operate in a fair and consistent manner for taxpayers.

I recognise that breaching the 21-day rule is far from ideal and I regret to inform you that in order to bring these regulations into force in time to ensure the transitional rule is effective from the commencement of land transaction tax, we are unable to allow 21 days before this instrument comes into force.

The Explanatory Memorandum is attached for your information; a Regulatory Impact Assessment has been prepared for these regulations and is also included as part of the Explanatory Memorandum. Both are being laid, together with the regulations, in the Table Office.

A copy of this letter is being sent to Mick Antoniw AM, chair of the Constitutional and Legislative Affairs Committee; to Simon Thomas AM, chair of the Finance Committee and to Chris Warner, head of the Assembly Commission's Policy and Legislation Committee Service.

Yours sincerely,

Julie James AC/AM
Arweinydd y Tŷ a'r Prif Chwip
Leader of the House and Chief Whip

SL(5)205 – The Land Transaction Tax (Transitional Provisions) (Wales) (Amendment) Regulations 2018

Background and Purpose

These Regulations amend the Land Transaction Tax (Transitional Provisions) (Wales) Regulations 2018 to make further transitional provision in respect of a specific case where a fixed term lease continues for a period of more than a year after its contractual termination date (a period known as "**holdover**"), and is subsequently renewed and backdated to a day during holdover.

Where the conditions in paragraph 8(1) of Schedule 6 to the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 have been met, then pursuant to 8(3) of that Schedule, rent payable under the new lease is reduced for the purposes of land transaction tax by the amount of taxable rent payable in respect of the holdover tenancy.

The amendments made by these Regulations ensure that the reduction referred to above applies in respect of leases granted prior to 1 April 2018 but renewed on or after that date, notwithstanding that the rent payable during the holdover was chargeable to stamp duty land tax.

Procedure

Negative.

Technical Scrutiny

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

Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3(ii) in respect of this instrument [**that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly**]:

These Regulations were made on 22 March 2018, laid on 23 March 2018 and come into force on 1 April 2018.

Pursuant to section 11A(4) of the Statutory Instruments Act 1946, where a copy of any statutory instrument subject to annulment in pursuance of a resolution of the National Assembly for Wales is not laid before the Assembly at least 21 days before the instrument comes into operation, notification must be sent to the Llywydd drawing attention to that fact and explaining why.

By a **letter** dated 23 March 2018, the Welsh Government notified the Llywydd that the above "21 day rule" has been breached in respect of these Regulations. The letter confirms that Government officials only recently became aware of the specific circumstances which would lead to a situation where double taxation could occur (that is, both Stamp Duty Land Tax and Land Transaction Tax in relation to the same transaction) and that these Regulations were therefore made to protect taxpayers from the risk of paying double taxation. The coming into force date coincides with the commencement of the Land Transaction Tax regime. The explanation does not therefore appear to be unreasonable.

Implications arising from exiting the European Union

None.

Government Response

No government response is required.

Legal Advisers
Constitutional and Legislative Affairs Committee
27 March 2018

Draft Regulations laid before the National Assembly for Wales under sections 44(9), 54(6) and 62(6) of the Digital Economy Act 2017, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY INSTRUMENTS

2018 No. (W.)

DISCLOSURE OF INFORMATION, WALES

The Digital Government (Welsh Bodies) (Wales) Regulations 2018

EXPLANATORY NOTE

(This note is not part of the Regulations)

Part 5 of the Digital Economy Act 2017 ("the Act") allows specified persons, listed in the Schedules to the Act, to share information for specific purposes.

These Regulations amend Schedules 4, 5 and 6 (specified persons for the purposes of public service delivery), Schedule 7 (specified persons for the purposes of the debt provisions) and Schedule 8 (specified persons for the purposes of the fraud provisions) to the Act. These Regulations add persons who are Welsh bodies (as defined in the Act) to those Schedules to enable them to make use of the powers in Chapter 1 (public service delivery), Chapter 3 (debt owed to the public sector) and Chapter 4 (fraud against the public sector) of Part 5 (Digital Government) of the Act.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, a regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these Regulations. A copy can be obtained at XXX.

Draft Regulations laid before the National Assembly for Wales under sections 44(9), 54(6) and 62(6) of the Digital Economy Act 2017, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY INSTRUMENTS

2018 No. (W.)

DISCLOSURE OF INFORMATION, WALES

The Digital Government (Welsh Bodies) (Wales) Regulations 2018

Made	***
Coming into force	*26 April 2018*

The Welsh Ministers, in exercise of the powers conferred by sections 35(3), 36(5)(a), 38(5)(a), 44(2)(b), 48(5), 54(2)(b), 56(6) and 62(2)(b) of the Digital Economy Act 2017(**1**) ("the Act") make the following Regulations.

The Welsh Ministers have consulted with the Information Commissioner, the Commissioners for Her Majesty's Revenue and Customs, the Scottish Ministers, the Department of Finance in Northern Ireland, the Minister for the Cabinet Office, and such other persons as the Welsh Ministers consider appropriate, as required by sections 44(4), 48(11) and 56(12) of the Act.

In accordance with sections 35(6), 36(8), 38(8), 48(10) and 56(11) of the Act, the Welsh Ministers have had regard to the systems and procedures for the secure handling of information by the persons referred to in the Schedule to these Regulations.

A draft of these Regulations was laid before the National Assembly for Wales under sections 44(9), 54(6) and 62(6) of the Act, and has been approved by a resolution of the National Assembly for Wales.

(**1**) 2017, c. 30. *See* sections 45(1), 55(1) and 63(1) for definitions of "appropriate national authority".

Title, commencement, and interpretation

1.—(1) The title of these Regulations is the Digital Government (Welsh Bodies) (Wales) Regulations 2018.

(2) These Regulations come into force on XX.

(3) In these Regulations "the Act" means the Digital Economy Act 2017.

Amendment of Schedules 4, 5, 6, 7 and 8

2. Schedule 4 (public service delivery: specified persons for the purposes of section 35) to the Act is amended in accordance with paragraph 1 of the Schedule.

3. Schedule 5 (public service delivery: specified persons for the purposes of sections 36 and 37) to the Act is amended in accordance with paragraph 2 of the Schedule.

4. Schedule 6 (public service delivery: specified persons for the purposes of sections 38 and 39) to the Act is amended in accordance with paragraph 3 of the Schedule.

5. Schedule 7 (specified persons for the purposes of the debt provisions) to the Act is amended in accordance with paragraph 4 of the Schedule.

6. Schedule 8 (specified persons for the purposes of the fraud provisions) to the Act is amended in accordance with paragraph 5 of the Schedule.

Name
Leader of the House and Chief Whip, one of the Welsh Ministers
Date

SCHEDULE Regulations 2, 3, 4, 5 and 6

Amendments to Schedules 4, 5, 6, 7 and 8

1.—(1) Schedule 4 to the Act is amended in accordance with sub-paragraphs (2) to (4).

(2) After the heading of the Schedule insert—

"PART 1

UK AND ENGLISH BODIES".

(3) In paragraph 28, after the word "who" insert—

"—

(a) falls within this Part of this Schedule; and

(b)".

(4) After paragraph 28 insert—

"PART 2

WELSH BODIES

29. The Welsh Ministers.

30. The Counsel General to the Welsh Government.

31. The Welsh Revenue Authority.

32. A county council in Wales.

33. A county borough council in Wales.

34. A community council in Wales.

35. A Community Health Council in Wales.

36. A Local Health Board established under section 11 of the National Health Service (Wales) Act 2006.

37. An NHS Trust established under section 18 of the National Health Service (Wales) Act 2006.

38. The Board of Community Health Councils in Wales.

39. A Special Health Authority established under section 22 of the National Health Service (Wales) Act 2006.

40. A fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004, or a scheme to which section 4 of that Act applies, for an area in Wales.

41. Career Choices Dewis Gyrfa Ltd (company number 07442837, operating as Careers Wales).

42. The governing body of an educational establishment maintained by a Welsh local authority (within the meaning of section 162 of the Education and Inspections Act 2006).

43. The governing body of an institution in Wales within the further education sector (within the meaning of section 91(3) of the Further and Higher Education Act 1992) whose activities are carried on, or principally carried on, in Wales.

44. The governing body of an institution in Wales within the higher education sector (within the meaning of section 91(5) of the Further and Higher Education Act 1992) whose activities are carried on, or principally carried on, in Wales.

45. A regulated institution within the meaning of the Higher Education (Wales) Act 2015 (ignoring section 26 of that Act) other than an institution within the higher education sector (within the meaning of section 91(5) of the Further and Higher Education Act 1992).

46. The Natural Resources Body for Wales.

47. A registered social landlord being a body registered in the register maintained under section 1 of the Housing Act 1996.

48. A person providing services in connection with a specified objective (within the meaning of section 35) to a specified person who—

(a) falls within this Part of this Schedule; and

(b) is a public authority."

2.—(1) Schedule 5 to the Act is amended in accordance with sub-paragraphs (2) to (4).

(2) After the heading of the Schedule insert—

"PART 1

UK AND ENGLISH BODIES".

(3) In paragraph 18, after the word "who" insert—

"—

(a) falls within this Part of this Schedule; and

(b)".

(4) After paragraph 18 insert—

"PART 2

WELSH BODIES

19. The Welsh Ministers.

20. The Counsel General to the Welsh Government.

21. The Welsh Revenue Authority.

22 A county council in Wales.

23. A county borough council in Wales.

24 A community council in Wales.

25. A fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004, or a scheme to which section 4 of that Act applies, for an area in Wales.

26 The Natural Resources Body for Wales.

27. A registered social landlord being a body registered in the register maintained under section 1 of the Housing Act 1996.

28. The governing body of an educational establishment maintained by a Welsh local authority (within the meaning of section 162 of the Education and Inspections Act 2006).

29. The governing body of an institution in Wales within the further education sector (within the meaning of section 91(3) of the Further and Higher Education Act 1992) whose activities are carried on, or principally carried on, in Wales.

30. The governing body of an institution in Wales within the higher education sector (within the meaning of section 91(5) of the Further and Higher Education Act 1992) whose activities are carried on, or principally carried on, in Wales.

31. A regulated institution within the meaning of the Higher Education (Wales) Act 2015 (ignoring section 26 of that Act) other than an institution within the higher education sector (within the meaning of section 91(5) of the Further and Higher Education Act 1992).

32. A person providing services in connection with a fuel poverty measure (within the meaning of section 36) to a specified person who—

(a) falls within this Part of this Schedule; and

(b) is a public authority."

3.—(1) Schedule 6 to the Act is amended in accordance with sub-paragraphs (2) to (4).

(2) After the heading of the Schedule insert—

"PART 1

UK AND ENGLISH BODIES".

(3) In paragraph 12, after the word "who" insert—

"—

(a) falls within this Part of this Schedule; and

(b)".

(4) After paragraph 12 insert—

"PART 2

WELSH BODIES

13. The Welsh Ministers.

14. The Counsel General to the Welsh Government.

15. The Welsh Revenue Authority.

16. A county council in Wales.

17. A county borough council in Wales.

18. A community council in Wales.

19. A registered social landlord being a body registered in the register maintained under section 1 of the Housing Act 1996.

20. The Natural Resources Body for Wales.

21. The governing body of an educational establishment maintained by a Welsh local authority (within the meaning of section 162 of the Education and Inspections Act 2006).

22. The governing body of an institution in Wales within the further education sector (within the meaning of section 91(3) of the Further and Higher Education Act 1992) whose activities are carried on, or principally carried on, in Wales.

23. The governing body of an institution in Wales within the higher education sector (within the meaning of section 91(5) of the Further and Higher Education Act 1992) whose activities are carried on, or principally carried on, in Wales.

24. A regulated institution within the meaning of the Higher Education (Wales) Act 2015 (ignoring section 26 of that Act) other than an institution within the higher education sector (within the meaning of section 91(5) of the Further and Higher Education Act 1992).

25. A person providing services in connection with a water poverty measure (within the meaning of section 38) to a specified person who—

(a) falls within this Part of this Schedule; and

(b) is a public authority."

4.—(1) Schedule 7 to the Act is amended in accordance with sub-paragraphs (2) to (4).

(2) After the heading of the Schedule insert—

"PART 1

UK AND ENGLISH BODIES".

(3) For paragraph 17 substitute—

"17. A person providing services to a specified person who —

(a) falls within this Part of this Schedule; and

(b) is a public authority,

in respect of the taking of action in connection with debt owed to a public authority or to the Crown."

(4) After paragraph 17 insert—

"PART 2

WELSH BODIES

18. The Welsh Ministers.

19. The Counsel General to the Welsh Government.

20. The Welsh Revenue Authority.

21. A county council in Wales.

22. A county borough council in Wales.

23. A community council in Wales.

24. A person providing services to a specified person who—

(a) falls within this Part of this Schedule; and

(b) is a public authority,

in respect of the taking of action in connection with debt owed to a public authority or to the Crown."

5.—(1) Schedule 8 to the Act is amended in accordance with sub-paragraphs (2) to (4).

(2) After the heading of the Schedule insert—

"PART 1

UK AND ENGLISH BODIES".

(3) For paragraph 41 substitute—

"41. A person providing services to a specified person who—

(a) falls within this Part of this Schedule; and

(b) is a public authority,

in respect of the taking of action in connection with fraud against a public authority."

(4) After paragraph 41 insert—

"PART 2

WELSH BODIES

42. The Welsh Ministers.

43. The Counsel General to the Welsh Government.

44. The Welsh Revenue Authority.

45. A county council in Wales.

46. A county borough council in Wales.

47. A community council in Wales.

48. A fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004, or a scheme to which section 4 of that Act applies, for an area in Wales.

49. The Higher Education Funding Council for Wales.

50. The Natural Resources Body for Wales.

51. Arts Council of Wales.

52. The Sports Council for Wales.

53. The Royal Commission on Ancient and Historical Monuments in Wales.

54. The National Library of Wales.

55. A registered social landlord being a body registered in the register maintained under section 1 of the Housing Act 1996.

56. A person providing services to a specified person who—

(a) falls within this Part of this Schedule; and

(b) is a public authority,

in respect of the taking of action in connection with fraud against a public authority.”

Explanatory Memorandum to The Digital Government (Welsh Bodies) (Wales) Regulations 2018

This Explanatory Memorandum has been prepared by the Office of the Chief Digital Officer and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with

Standing Order 27.1

Cabinet Secretary/Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Digital Government (Welsh Bodies) (Wales) Regulations 2018. I am satisfied that the benefits justify the likely costs.

Julie James
Leader of the House and Chief Whip
13 March2018

1. Description

1.1. The Digital Economy Act 2017 ("The Act") provides new powers for public bodies to share data to help improve the delivery of public services, and to identify and deal with debts owed to, and fraud against, the public sector. To be able to access these new powers, public bodies need to be named in the appropriate Schedules to the Act and, in the case of the public service delivery powers, also named against a specific objective.

1.2. These regulations set out the devolved Welsh public bodies that will be able to access the new powers alongside the English and non-devolved bodies that are already named in the Schedules to the Act.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

None.

3. Legislative background

3.1. The Act introduced a suite of measures designed to support the digital transformation of government and enabling the delivery of better public services. The digital government elements of the Act provide new powers for public authorities to share personal information to combat fraud against the public sector and empowers the public sector to reduce the debts owed to government by allowing early identification of and help for people who owe debts to multiple public agencies. The Act also introduces new offences and penalties for unlawful disclosure.

3.2. In March, the UK Government will also set out new regulations which include four specific objectives for the use of the new powers in relation to sharing data for public service delivery – objectives designed to help identify and support individuals and households affected by multiple disadvantages, eligible for support under a television retuning scheme, or living in fuel or water poverty.

3.3. To be able to access these new powers, public bodies need to be named in the relevant Schedule to the Act. At present, only English and non-devolved public authorities are named in those Schedules.

3.4. These new regulations are made under the following sections of the Act :

- Section 35(3) enables the Welsh Ministers to add, remove or modify any entry relating to a person or description of a person listed in Schedule 4: Public Service Delivery: specified persons for the purposes of section 35 (Disclosure of information to improve public service delivery).
- Section 36(5)(a) enables the Welsh Ministers to add, remove or modify an entry relating to a person or description of a person listed in Schedule 5: Public Service Delivery: specified persons for the purposes of sections 36 and 37 (Disclosure of Information to/by gas

and electricity suppliers).

- Section 38(5)(a) enables the Welsh Ministers to add, remove or modify an entry relating to a person or description of a person listed in Schedule 6: Public Service Delivery: specified persons for the purposes of sections 38 and 39 (Disclosure of information to/by water and sewerage undertakers).
- Section 44(2)(b) enables the Welsh Ministers to make consequential, supplementary, transitional or savings provisions in consequence of the provisions listed above.
- Section 48(5) enables the Welsh Ministers to add, remove or modify any entry relating to a person or a description of a person listed in Schedule 7: specified persons for the purposes of the debt provisions.
- Section 54(2)(b) enables the Welsh Ministers to make consequential, supplementary, transitional or savings provisions in consequence of section 48(5).
- Section 56(6) enables the Welsh Ministers to add, remove or modify any person listed in Schedule 8: specified persons for the purposes of the fraud provisions.
- Section 62(2)(b) enables the Welsh Ministers to make consequential, supplementary, transitional or savings provisions in consequence of section 56(6).

3.5. This instrument is subject to the approval of the Assembly.

4. Purpose & intended effect of the legislation

4.1. The effect of these new regulations is to extend the new powers to share data in the Act to devolved Welsh public authorities. This will mean they can share data for the purposes of improving public service delivery, dealing with debt and tackling fraud with other public bodies in Wales and bodies across the UK that are also specified in the Act.

4.2. Specifying these bodies at this time also means that the appropriate Welsh bodies can be referred to in the Digital Government (Disclosure of Information) Regulations 2018 that UK Government intends to lay in March. This will enable those bodies to share data to support the objectives listed in para 3.2.

4.3. These new powers are permissive. Where a public body in Wales is named, it is under no obligation to share data for any purpose, if it chooses not to. If data-sharing is desired, new codes of practice are being introduced by UK Government which will set out how that data should be shared and the procedures to follow. These will be available in Welsh once they have been finalised. These new powers provide a statutory basis for data to be shared – organisations involved in sharing

data will still need to meet the requirements of current and future data-protection regulations.

4.4. If these Regulations are not made, Welsh public bodies will not be able to access the new powers and will continue to have to create new statutory gateways using existing processes, where these are needed.

5. Consultation

5.1. Details of the consultation are included in the Regulatory Impact Assessment in Part 2 below.

PART 2 – REGULATORY IMPACT ASSESSMENT

1. Options

1.1. Option 1 – Do nothing

Maintain the status quo. Public authorities in Wales will be able to share data under any existing legal gateways but if they do not exist they will need to establish new legal gateways for specific purposes when a need for them arises, as they will not have access to the new data sharing powers granted to specified public bodies under Part 5 of the Digital Economy Act 2017.

1.2. Option 2 – Introduce new Regulations

Introduce new legislation which will insert relevant Welsh public authorities into schedules 5 to 8 to the Digital Economy Act 2017. This will enable Welsh public authorities to share data with other public bodies (specified in the same schedules) across the UK for the purposes of improving public service delivery, identifying and collecting debts, and identifying and taking action against fraud.

2. Costs & benefits

Option 1 - Costs

2.1. Establishing new statutory gateways for data-sharing can meet an identifiable need, but it is a time consuming and resource intensive process. It does not provide public authorities with a clear and established solution which enables them to respond quickly to changing needs. The resources required to establish specific gateways to share data will continue to be used inefficiently under this option.

2.2. The anticipated costs of this option are assessed as minimal as there will be no change from existing processes. The current main costs are discussed below.

2.3. Establishing a new legal gateway involves public sector officials' time in researching the legal framework and negotiating the terms of the data sharing with the authorities involved. New gateways will also require new legislation. The process required for each new gateway will depend on the specific requirements in each case and the administrative requirements will therefore also vary. Anecdotal evidence from civil servants across the UK suggests establishing a new data sharing gateway can take several years to negotiate and establish. This is an ongoing cost and the total value will depend on the number and type of gateways required.

2.4. A further cost is associated with the time delay in negotiating a data sharing gateway. This can cause delays in improved processes or launching policy interventions, and delay the benefits of those interventions. This may directly impact on the well-being of the individuals for whom data sharing was intended to benefit, and lead to a wide range of unquantifiable societal and economical costs. Delaying the provision of a legal gateway for data sharing for these purposes will also lead to, again

unquantifiable, costs in terms of duplication of administrative processes across public authorities.

Option 1 - Benefits

2.5. The main benefit in maintaining the status quo is that it is a known process, with well understood benefits and risks. The scrutiny around the current process already prevents data-sharing where this would be outside of the limits set by the Human Rights Act as well as current and future data protection requirements, preventing possible data loss. These safeguards would be maintained and strengthened under option 2 through scrutiny of public service delivery regulations and new safeguards around data sharing agreements. Policy benefits can still be delivered under this option but may be delayed, reduced or prevented entirely where a data sharing gateway cannot be established in good time, or at all.

Option 2 - Costs

2.6. Public authorities will incur no additional cost as a direct result of this change. The powers are permissive and therefore impose no statutory requirement on the authorities. Those that do decide to participate in data-sharing exercises under the new powers will incur one-off costs to familiarise their staff with the new legislation. Familiarisation may take a number of forms but could include reading and understanding the new legislation, disseminating the new information and training staff to understand the new rules.

2.7. If they do decide to use the powers, as is the case for data sharing under a do nothing option public authorities will also incur costs to establish a new data sharing agreement under the new regulations. Each new agreement must be established as a pilot and the potential impact, risks, ethical issues, monitoring, evaluation requirements and other factors considered in line with the new codes of conduct before any data is shared. Again, the cost of this process is difficult to estimate but is also expected to be minimal, and significantly less than the resource required to establish a new gateway under the existing regime.

2.8. There may also be costs for private bodies working on behalf of a public authority. These costs will be reimbursed by the public sector as part of commercial arrangements.

2.9. Data sharing is expected to increase as a result of these new powers, which will increase administrative costs involved in the data sharing itself as well as the additional costs incurred in recovering increased amounts of debt. These costs cannot be readily estimated, as they will depend on the data sharing arrangements that are established under this power. However, time will need to be spent on preparing the new arrangement (including the production and publication of privacy and other impact statements), auditing by the ICO, and operating the new arrangement in line with DPA, GDPR and Human Rights Act principles. This change may result in more data sharing requests. However, this will be limited to

requests from the specified bodies, and only where the objective is to improve the delivery of public services, to identify and deal with debts owed to the public sector, and to identify and tackle fraud. These costs would exist for any data sharing undertaken through any other new or existing legal gateway and are expected to be outweighed by the benefits achieved.

Option 2 - Benefits

2.10. The administrative burden on the public sector bodies will be reduced. The costs associated with existing process of establishing specific legal gateways will be eliminated and significant time savings will be achieved. These are ongoing benefits and the total value will depend on the number and type of future data sharing requests.

2.11. ***Simplifying the legislative framework***
The law surrounding data-sharing between public bodies at present is complex, with powers scattered across a large number of statutes, which may be expressly set out, or implied. Establishing a new data sharing gateway for each specific requirement only adds to this complexity. The current system lacks flexibility and cannot respond to rapidly changing requirements due to the length of time the legislative process takes.

2.12. This option will simplify the legislative landscape for Welsh public bodies and will reduce the time it takes to create new data sharing relationships. Although legislation will be required to set out the list of Welsh public bodies and to define any new data-sharing objectives for the public service delivery powers, these will not need to set out fully all of the categories of data being shared. This will allow more flexibility for public authorities seeking to share data which may change over time.

2.13. ***Policy delivery benefits***
The new process to establish a data sharing exercise under the new powers will be simpler and quicker to complete than establishing a new legal gateway. This will eliminate any delays in policy delivery, and ensure policy is always developed on the latest data available. Policy benefits will be delivered more rapidly and will be increased by better availability of data which will also allow more robust measurement of the impact.

2.14. Although the number of data sharing requests may rise, further benefits may be realised through more policies making better use of available data due to the increased ease of data sharing.

2.15. ***Targeting of public services***
This change will ensure that public services have access to the data they need to deliver public services that are accurately targeted and delivered to those that need them most. Changing the way data is shared, and reducing the bureaucracy around establishing a data sharing agreement, will ensure that data can move between appropriate public authorities in a way which supports improved outcomes for citizens, makes the best use of public resources, and protects personal privacy. The overall societal

and economic benefits of this are difficult to quantify and will be dependent on the intended outcomes of data sharing.

2.16. This change will mean that public resources and funds that are currently used to establish appropriate gateways for sharing information can be redirected to other priorities.

2.17. ***Recovery of debt***

This option aids in the recovery of debt through a number of means:

(i) Reducing the cost and time required to set up a data sharing agreement, and reducing the complexity of the agreement, will increase the amount of data shared overall;

(ii) Helping to develop a single customer view which will aid a coordinated response to recovering debt owed to Government.

2.18. 90% of the debt owed to the public sector is owed to either DWP or HMRC, which already have sufficient powers to share data. The remaining debt is owed to other government departments and Local Authorities, which do not have sufficient powers to share information easily. Improved data sharing around debt could aid in earlier identification of debt, increase recoveries, and reduce the amount of debt written off by public bodies.

2.19. UK Government estimates that £2.4 billion is owed by debtors who owe money to multiple government departments, and that approximately 10% of this is not covered by existing data sharing agreements. This option will help identify people who have multiple debts to government, and enable a coordinated approach to recoveries that would reduce costs and minimise the impact on potentially vulnerable citizens who may be struggling to deal with multiple demands for repayment.

2.20. ***Tackling Fraud***

The Annual Fraud Indicator estimated that the total loss to the UK economy due to fraud as £190 billion, and the total amount attributable to the public sector as £40.4 billion.[1] This estimate does not include losses as a result of 'errors' or other factors such as negligence or failure to take due care. The actual level of losses, both overall and to the public sector, is likely to be much higher.

2.21. Data matching is a proven way to identify fraud. The National Fraud Initiative is a national data-matching exercise designed to identify and prevent fraud and overpayments. Between 1996 and 2015, the NFI has identified over £30 million fraud losses in Wales and over £1.3 billion in the UK, across a variety of areas including council tax, immigration, welfare benefits and blue badge use amongst others.[2]

[1] https://www.croweclarkwhitehill.co.uk/wp-content/uploads/sites/2/2017/11/Annual-fraud-indicator-2017.pdf

[2] https://www.wao.gov.uk/sites/default/files/download_documents/417A2016-NFI-eng.pdf

2.22. Wider use of data sharing could improve the prevention, detection and investigation of fraud through a number of means, including:

- Improved targeting and risk-profiling of potentially fraudulent individuals;
- Streamlining processes, enabling the Government to act more quickly; and
- Simplifying the legislative landscape.

2.23. Increased data sharing will contribute to an improved evidence base, helping to inform decision making, supporting the use of tailored approaches such as behavioural insights, and making interventions more effective overall.

Summary

2.24. When comparing the relative costs and benefits of the two options, there is a strong argument that simplifying the data sharing legislative landscape will lead to minimal increase in relative costs but provide far wider potential for benefits. Without the new powers it is likely that data sharing would continue to be desired but this would either be hampered or delayed by the lack of a flexible legal gateway, leading to poor outcomes for citizens and increased relative costs for public authorities.

2.25. The powers will also give Welsh public bodies the same powers as English and non-devolved bodies. The costs associated with the new processes are significantly less than those associated with the current process of establishing new data-sharing gateways (with legislation) and offer more flexibility and ability to respond to emerging requirements.

3. Sectors

3.1. **Local Government**

There is no direct regulatory impact being imposed on local government as a result of this change. The powers are permissive and as such, local authorities are free to use them or not. One off familiarisation costs, costs to assess in line with code of conduct, more data requests (but from a restricted group of other authorities) may emerge.

3.2. **Business**

There will be no direct impact being imposed on business as a result of this change. These new powers will not introduce any new statutory obligations or requirements or increase the amount of debt a business may owe the Government.

3.3 As an indirect impact on businesses, data sharing may identify a higher level of debt or increase levels of fraud than the current system, which may result in increased debt recovery from businesses.

3.4 **Voluntary Sector**

There will be no direct impact on any voluntary sector organisation as a result of this change. Where voluntary sector organisations provide services on behalf of government bodies, they may incur familiarisation costs for their staff if they are to participate in a future data sharing agreement, but these are not likely to be intensive or time-consuming and will not require more resource than current processes.

4. Duties

4.1. **Equality of Opportunity**
An equality impact assessment has been completed and will be published on the Welsh Government website. No significant impact has been identified as a result of these Regulations.

4.2. **Welsh Language**
A Welsh Language impact assessment has been completed and will be published on the Welsh Government website. No significant impact has been identified as a result of these Regulations.

4.3. **Sustainable Development**
Environmental impact screening has been conducted and no environmental impact has been identified.

The Well-being of Future Generations (Wales) Act 2015 requires the Welsh Ministers to take action, taking account of the five ways of working set out in section 5 of the Act ('the sustainable development principle'), aimed at achieving the 7 well-being goals set out in section 4 of the Act, and the objectives published by the Welsh Ministers in November 2016.

4.4. Providing public bodies in Wales with the ability to share information and data will improve the delivery of public services to all. At this stage the Welsh Government are simply implementing the Digital Economy Act 2017 against the UK Government objectives and other data sharing provisions within the Act. Consideration of the sustainable development principle will continue as the Act is further implemented in devolved areas.

4.5. **Welsh Consolidated Fund**
There is no expenditure from the Welsh Consolidated Fund anticipated as a result of this change.

5. Consultation

5.1. A public consultation was held from 8th December 2017 – 5th February 2018. Stakeholders were asked to consider whether the public bodies that were being considered for each power were the right ones. The consultation also asked for specific feedback on the inclusion of health bodies, what public service objectives could be considered for Wales in the future, and how the new powers could be used to support the Welsh

Language. Full lists of the proposed bodies intended to be named in the regulations were included in the consultation.[3]

5.2. This consultation was open to all, but responses were specifically encouraged from:

- Local government;
- Arms length bodies;
- NHS organisations;
- Third sector organisations;
- Fire and rescue authorities; and
- Schools, colleges and universities

5.3. A small number of statutory consultees (Scottish and Northern Irish Governments, the Information Commissioner and Ministers for the Cabinet Office) were also contacted separately and encouraged to respond.

5.4. A total of 26 responses, including one statutory consultee, were received as follows:

Category	Responses received
Public body in Wales	11
Local authority	6
Voluntary sector organisation	2
Registered Social Landlord	2
Individual	2
Private organisation	1
UK Government department	1
Other	1

5.5. Following the consultation, the responses were assessed with a particular focus on any suggestions for changes to the list of Welsh public authorities to be included for each list, and the questions around the inclusion of health bodies in the Public Service Delivery powers. The responses to the questions about the Welsh language were also assessed.

5.6. The responses to the consultation were broadly positive, with a number of suggestions to include additional bodies. A small number of these suggestions were to include non-devolved bodies (such as the Department for Work and Pensions), or other bodies which have already been specified in the UK schedules and do not need to replicated.

[3] https://beta.gov.wales/digital-economy-act-proposed-list-data-sharing-public-bodies-wales

5.7. As a result of the consultation, and to ensure the list of bodies were proportionate in terms of their requirement to share personal data, the following changes were made to the lists of bodies:

Public Service Delivery Powers

- State schools, further education colleges and higher education institutions were added to the list of bodies able to share data with/from energy and water suppliers
- The Board of Community Health Councils and Special Health Authorities were added to the list of bodies able to share data, for the purposes of future objectives (health bodies are excluded from using the forthcoming UK Government objectives)
- Registered Social Landlords were added to the list of bodies able to share data
- The Higher Education Funding Council for Wales was removed from the list of bodies able to share data
- The National Parks Authority was removed from the list of bodies able to share data

Fraud Powers

- Natural Resources Wales was added to the list of bodies able to share data
- Registered Social Landlord were added to the list of bodies able to share data
- The following bodies were removed from the list of bodies able to share data:
    - The Local Democracy and Boundary Commission for Wales
    - Qualifications Wales
    - National Park Authorities in Wales
    - The National Museum of Wales

5.8. No changes were made to the list of bodies able to share data under the new debt powers.

5.9. A full government response to the consultation is being prepared and will be published in due course.

6. Competition Assessment

A competition filter test was applied to the changes and no significant impact was identified to businesses, charities or the voluntary sector. The main impact and costs will fall to the public sector.

7. Post implementation review

7.1. No formal review is planned. However, Welsh Government will take an interest in any future use of the new powers and how effective any data sharing arrangement are.

7.2. Each new data sharing arrangement will need to include monitoring and evaluation requirements and these will be used to inform future data sharing exercises using the new powers.

SL(5)204 – The Digital Government (Welsh Bodies) (Wales) Regulations 2018

Background and Purpose

Part 5 of the Digital Economy Act 2017 ("the Act") allows specified persons, listed in the Schedules to the Act, to share information for specific purposes.

These Regulations amend Schedules 4, 5 and 6 (specified persons for the purposes of public service delivery), Schedule 7 (specified persons for the purposes of the debt provisions) and Schedule 8 (specified persons for the purposes of the fraud provisions) to the Act. These Regulations add persons who are Welsh bodies (as defined in the Act) to those Schedules to enable them to make use of the powers in Chapter 1 (public service delivery), Chapter 3 (debt owed to the public sector) and Chapter 4 (fraud against the public sector) of Part 5 (Digital Government) of the Act. There are already a number of English and non-devolved bodies listed in the Schedules to the Act.

Procedure

Affirmative.

Technical Scrutiny

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

Merits Scrutiny

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

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

These Regulations will in future enable the Welsh public bodies listed in the Schedules to the Act to share personal information in certain circumstances (e.g. fraud prevention and to identify and help people who owe debt to multiple public agencies). The powers to share data in these circumstances is permissive (the bodies named in the Schedules to the Act are under no obligation to share data for any purpose). Codes of practice are being introduced by the UK Government which will set out how any data is to be shared and the procedures which will need to be followed. However, organisations that are involved in sharing data will still need to meet the requirements of current and future data protection legislation.

Implications arising from exiting the European Union

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

Government Response

No government response is required.

Legal Advisers
Constitutional and Legislative Affairs Committee
April 2018

SL(5)203 – The Local Authorities (Capital Finance and Accounting) (Wales) (Amendment) Regulations 2018

Background and Purpose

Part 1 of the Local Government Act 2003 ("the **2003 Act**") introduced a legal framework within which local government may undertake capital expenditure. The Welsh Ministers may regulate that activity by regulations. Such provision was made by the Local Authorities (Capital Finance and Accounting) (Wales) Regulations 2003 (S.I. 2003/3239) ("the **2003 Regulations**") which provide the regulatory regime for local government capital finance and accounting practices to be followed by local authorities in Wales. The 2003 Regulations have been amended several times since coming into force.

These Regulations make a series of further amendments the 2003 Regulations, which the Explanatory Memorandum notes will "relax the current constraints around loan capital transactions, specific share capital transactions and bonds placing local authorities in Wales on an equivalent footing to counterparts in England."

The specific amendments include the following:

- A requirement for securitisation transactions to be treated as credit arrangements for the purposes of section 7 of the 2003 Act and the value of any consideration received as a result of a securitisation transaction by a local authority to be treated as a capital receipt;
- Removal of the requirement for expenditure by local authorities on the acquisition of loan capital to be treated as capital expenditure; and
- The exclusion of expenditure on the acquisition of certain types of share capital (in collective investment schemes) from being treated as capital expenditure.

Procedure

Negative.

Technical Scrutiny

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

Merits Scrutiny

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

Implications arising from exiting the European Union

These Regulations define "money market fund" by reference to EU legislation, i.e. Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

The Welsh Government will therefore need to give consideration to the continuing appropriateness of this definition following the UK's exit from the EU.

Government Response

No government response is required.

Legal Advisers
Constitutional and Legislative Affairs Committee
3 April 2018

Supplementary Report: SL(5)190 – The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018

Background and Purpose

These Regulations provide for various provisions of the Police and Criminal Evidence Act 1984 and the Criminal Justice and Police Act 2001 to be applied to the investigation of offences conducted by the Welsh Revenue Authority ("WRA"). They include obtaining entry to premises under specified circumstances and seizing relevant items.

Explanations of the individual powers are given in the Explanatory Note and Explanatory Memorandum. The Cabinet Secretary made a written statement on 21 February 2018 that referred to the consultation on the powers and the decisions that were taken.

The Committee considered the instrument at its meeting on 5 March [link] and reported to the Assembly in line with the merits point identified.

However, during its consideration the Committee agreed to include another point for reporting relating to an anomaly between the regulations and the Explanatory Memorandum.

The Explanatory Memorandum states that the WRA must comply with statutory codes of practice, but our understanding is that they need only have regard to the code, and then only a duty to have regard to relevant bits of the code (see section 67(9) of the Police and Criminal Evidence Act 1984). There is an important difference between having to comply with something and having to have regard to it. The Welsh Government should clarify the position and if necessary, ensure that all relevant documents related to the regulations are corrected.

Procedure

Affirmative

Supplementary Committee Response

The Committee will wish to be aware that the Explanatory Memorandum has been revised to reflect comments in the Constitutional and Legislative Affairs Committee report.

The Committee thanks the Welsh Government for its response and welcomes the changes that have been made to the Explanatory Memorandum.

Explanatory Memorandum to:

1. **The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018**

2. **The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018**

This Explanatory Memorandum has been prepared by the Welsh Revenue Authority Implementation Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of:

1. The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018; and
2. The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018

I am satisfied that the benefits justify the likely costs.

Mark Drakeford AM
Cabinet Secretary for Finance

21 February 2018

1. Description

1.1 Part 9 of the Tax Collection and Management (Wales) Act 2016 ("TCMA") amended the Police and Criminal Evidence Act 1984 ("the 1984 Act"), the Criminal Justice and Police Act 2001 ("the 2001 Act") and the Proceeds of Crime Act 2002 ("the 2002 Act") to allow the Welsh Ministers, by regulation and order, to confer powers on the Welsh Revenue Authority ("WRA") to investigate devolved tax crime.

The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018.

1.2 These Regulations provide that the following provisions contained in the 1984 Act apply to WRA when it investigates devolved tax crime:

- a power to apply for and obtain a warrant from a justice of the peace to authorise entry and search of premises (section 8 of the 1984 Act);
- a power to obtain access to "excluded material" or "special procedure material" (defined Part 2 of the 1984 Act), subject to obtaining a warrant from a judge in accordance with the procedure in Schedule 1 to the 1984 Act (section 9 of the 1984 Act);
- a power to seize relevant items found during the course of a search (section 19);
- the extension of seizure powers to require information contained in an electronic format to be produced during the course of a search (section 20);
- a power which enables WRA to copy information which has been seized during the course of a search (section 21);
- a power to retain anything seized during the course of a search (section 22).

1.3 In addition to these powers, the Regulations apply appropriate safeguards and governance on their potential use. These include safeguards in relation to execution of searches and the seizure of items found during the course of a search (sections 15 and 16), and accompanying rights for the owners of property seized during the course of a search (section 21). WRA will also be under a duty to notify in writing a person interviewed in relation to an offence when a decision is taken not to proceed (section 60B). More generally, WRA must have regard to the relevant statutory codes of practice issued under sections 66 and 67 of the 1984 Act when investigating criminal offences.

1.4 These Regulations will also apply provisions in Part 2 of the 2001 Act to investigations conducted by WRA, which, among other things, provide for additional powers of seizure during the course of a search. As with the 1984 Act, various safeguards are also applied to the use of those powers. For example, section 52 of the 2001 Act imposes a requirement on WRA when relying on the powers of seizure provided by sections 50 or 51 to provide the owner of the property with a written notice setting down various details, including what has been seized, the grounds of seizure and the scope to apply to a judge for the return of the seized

items. Section 59 of the 2001 Act gives any person with an interest in property seized using these powers the right to apply to the court for it to be returned, subject to certain conditions being met.

1.5 Regulation 3 provides that further to the provisions listed in the Schedule to the Regulations, any applicable safeguards, and procedural elements in the 1984 Act will also apply. Consequently, any terms defined by other provisions in the 1984 Act will also apply to WRA when the provisions listed in the Schedule are applied to WRA investigations.

1.6 Regulation 3(3) substitutes references to police officers, constables and the police with references to WRA.

1.7 Regulation 4 allows a person exercising a function conferred on WRA by the Regulations to use reasonable force if that person considers it necessary in the exercise of that function. This could range from guiding a person to stand aside by placing a hand on their arm through to stopping a person by restraining them to prevent violence or injury against another person or officer, for example.

1.8 Regulation 5 makes provision for WRA to search any person found on the premises which is the subject of a search in reliance of a warrant issued under the 1984 Act. However, WRA may only search a person where there is reasonable cause to believe the person is in possession of something which is likely to be of “substantial value” to the investigation. This may be concealing/hiding something which may be relevant to the investigation, whether by itself, such as a relevant document in a briefcase, or something which when considered alongside other material could be of value, such as a mobile phone with passwords for electronic files or a key in a persons pocket which would open a filing cabinet on the premises.

1.9 Regulation 6 modifies section 16 of the 1984 Act, which makes provision in relation to the authorisation required before multiple premises warrants can be executed on a second or subsequent occasion, and where an all premises warrant can be executed in respect of property not specified in the warrant. The modification made by regulation 6 has the effect of substituting the requirement of obtaining a police inspector’s approval with a requirement that approval may only be provided by a person exercising WRA functions of at least civil service Grade 7 (or equivalent).

1.10 Regulation 7 modifies section 77 of the 1984 Act, which makes provision in relation to the treatment of confessions made by a person with a learning disability. Where such a confession is received as evidence in criminal proceedings, section 77 of the 1984 Act requires the court to exercise caution before relying on that evidence where (among other things) it has not been made in the presence of an “independent person”. The modification made by regulation 7 ensures that a person

exercising a function conferred on WRA by these Regulations is not regarded as an “independent person”.

1.11 Regulation 8 specifies that the functions conferred by these Regulations may only be exercised by a person with written authorisation from WRA to conduct relevant investigations.

1.12 These Regulations will come into force on 1 April 2018.

The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018

1.13 The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018 (“the Order”) enables accredited financial investigators who are members of staff of the WRA to exercise the following powers under the 2002 Act:

- apply for a restraint order under Part 2;
- seize property to which a restraint order applies;
- search for, seize, detain and apply for the forfeiture of cash under Chapter 3, Part 5 (recovery of cash in summary proceedings); and
- apply for orders and warrants in relation to confiscation, money laundering and detained cash investigations under Part 8, including an application to the courts for an order requiring a financial institution to provide customer information in relation to a specified person.

1.14 The types of investigations referred to in relation to Part 8 can be described as follows:

- **Confiscation** – A confiscation investigation is an investigation into whether a person has benefited from his criminal conduct or to the extent or whereabouts of his benefit from his criminal conduct, following criminal prosecution.
- **Detained Cash** – A detained cash investigation is an investigation for the purposes of Chapter 3 of Part 5 of the 2002 Act into the derivation of cash detained under that chapter or a part of such cash, or whether cash detained under that chapter is intended by any person to be used in unlawful conduct.
- **Money laundering** – A Money laundering investigation is an investigation into whether a person has committed a money laundering offence. This could occur where for example, there is a reasonable suspicion that a person has converted criminal property.

1.15 In addition, the Order applies appropriate safeguards and governance on the potential use of these powers, including the requirement that certain powers can only be exercised after obtaining senior officer approval.

1.16 Article 3 of the Order provides that a reference to an accredited financial investigator in a provision of the 2002 Act specified in Part 1 of the Schedule to the Order, is a reference to an accredited financial investigator who is a member of staff of WRA.

1.17 Article 4 of the Order provides that a reference to an accredited financial investigator in a provision of the 2002 Act specified in Part 2 of the Schedule, is a reference to an accredited financial investigator who is a member of staff of WRA and is at or above grade 7 or equivalent.

1.18 This Order comes into force on 1 April 2018.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2.1 This Explanatory Memorandum covers two Statutory Instruments; The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018, which is subject to the affirmative procedure and the Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018, which is subject to the negative procedure.

2.2 These Statutory Instruments are interlinked and it is beneficial to interpret the impacts of each Statutory Instrument jointly to explain the wider legislative context. Thus, an Explanatory Memorandum incorporating a Regulatory Impact Assessment has been prepared to describe both Statutory Instruments.

3. Legislative background

3.1 The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018 are made under section 114ZA of the Police and Criminal Evidence Act 1984 and section 67A into the Criminal Justice and Police Act 2001.

3.2 Section 114ZA of the Police and Criminal Evidence Act 1984 was inserted by section 185(1) TCMA and section 67A of the Criminal Justice and Police Act 2001 was inserted by section 185(2) TCMA.

3.3 In accordance with section 114ZA(4) of the 1984 Act and section 67A(4) of the 2001 Act, the regulations must be laid before and approved by the National Assembly for Wales (the affirmative procedure).

3.4 The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial investigators) Order 2018 is made pursuant to section 453(1A) and (2) of the Proceeds of Crime Act 2002. This Order is subject to the negative resolution procedure.

3.5 Section 453(1A) of the Proceeds of Crime Act 2002 was inserted by section 186 TCMA.

4. Purpose & intended effect of the legislation

4.1 The Tax Collection and Management (Wales) Act 2016 creates three criminal offences: wrongful disclosure of protected taxpayer information under section 20; concealing or destroying documents following an information notice under section 114 and concealing or destroying documents following notification under section 115. In addition to these offences there are a number of other criminal offences relevant to devolved taxes, including fraud (under the Fraud Act 2006); the common law offence of cheating the public revenue; and facilitating tax evasion (under the Criminal Finances Act 2017).

4.2 WRA's functions include promoting compliance with the law relating to devolved taxes (section 12 TCMA). This means that WRA has a role to play in tackling criminal behaviour that impacts on the devolved taxes. The purpose of the Regulations and the Order are to confer relevant investigatory powers on WRA so that it can lawfully and effectively tackle criminal behaviour, exercising powers as a law enforcement agency, by acquiring evidence to enable the prosecution of criminal offences.

4.3 Criminal behaviour in this context can be wide ranging, covering both devolved taxes, and could include deliberately providing false information to WRA (e.g. lying in a tax return); deliberately failing to comply with the requirements of the law (e.g. not weighing waste before it is sent to landfill or misstating the value of a land transaction); or deliberately destroying documents or other information that may be needed to establish a person's true tax position. The criminal intent in each of these circumstances is to make a financial gain or to seek to reduce the amount of money that should be paid to the public revenue.

4.4 These criminal investigation powers are additional to the civil investigatory powers conferred on WRA under the devolved tax legislation (Tax Collection and Management (Wales) Act 2016, Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 and Land Disposals Tax (Wales) Act 2017), which are primarily intended to allow WRA to identify and collect the correct amount of tax due (by obtaining information and inspecting premises, and where appropriate, imposing financial penalties). In some cases, it may be appropriate for individuals to face criminal sanctions for their behaviour, including fines and custodial sentences and these powers facilitate that.

4.5 It may also be considered appropriate to recover the money and assets a person acquires as a result of that criminal behaviour. The 2002 Act enables an accredited financial investigator to look into the financial position of individuals under investigation to identify, trace and freeze the proceeds of crime with a view to asking the courts to make a confiscation order following prosecution.

4.6 The Regulations and Order seek to put WRA in a similar position to HMRC in terms of criminal investigation powers, although the powers conferred on WRA by these statutory instruments are narrower than those conferred on HMRC. This reflects the narrower scope of the functions which WRA is able to exercise, for example WRA has no customs functions. WRA will not, for example, have the power to arrest or detain a person, or the powers to stop and search a person or vehicles without a warrant from a justice of the peace.

4.7 There is a real possibility of criminal offences in relation to Welsh devolved taxes in the future. The OECD report on Fighting Tax Crime recognises that "criminal law plays an important role... it enhances the general preventive effect that criminal law enforcement can have and reduces non compliance."[1] Enabling the WRA to investigate devolved tax offences, as HMRC does for LfT and SDLT, with a consistent set of criminal investigation powers will help to ensure Wales is not seen as a soft target for those who may be seeking to evade taxes. Public knowledge that there are the appropriate criminal powers in place will allow WRA to prioritise criminal enforcement in appropriate cases and, therefore, act as a deterrent for those contemplating breaking the law. However, as previously noted, the civil powers conferred on WRA will be used in the majority of compliance cases.

4.8 The Regulations and Order are intended to provide WRA with proportionate criminal investigation powers to tackle and deter devolved tax crime. In exercising the powers conferred by these statutory instruments, WRA will be subject to the supervision of the courts and will be required to comply with or have regard to all relevant safeguards in the same way as the exercise of these powers by other law enforcement agencies such as the police and HMRC. In particular, a person will only be authorised by WRA to exercise these powers where that person has the requisite experience, training and understanding of the relevant legal framework and it is anticipated that these staff will carry specific identification similar to a warrant card. In addition, use of the powers will need to have regard to the relevant PACE codes of practice and, where specified, be approved at an appropriate level within WRA by a senior, authorised officer with the requisite experience, training, accreditation and understanding of the relevant legal framework.

4.9 In relation to the POCA order, accredited financial investigators must be trained, accredited and monitored by the National Crime Agency and the use of these investigatory powers must be by order or warrant from the court. Evidence and information obtained through the use of these powers must be retained and stored in a safe and secure way and used only for the purpose for which it was obtained, as is the case for all protected taxpayer information.

[1] Fighting Tax Crime: The Ten Global Principles OECD 2017, p.14 - http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf

PART 2 – REGULATORY IMPACT ASSESSMENT

1. Options

Option 1: Do Nothing

1.1 Under this option, the Regulations and Order would not be introduced.

Option 2: Introduce the regulations

1.2 Under this option, the Regulations and Order as described in Part 1 of this Explanatory Memorandum would be introduced. This is the preferred option.

2. Costs & benefits

Option 1: Do Nothing

2.1 If these Regulations and Order were not introduced, the WRA would be unable to use the investigative powers in the 1984 Act, the 2001 Act and the 2002 Act to investigate criminality and reclaim the proceeds of that crime for the public purse in relation to the devolved Welsh taxes. In this option, powers to investigate criminality in the devolved Welsh taxes would fall to the police forces in Wales.

2.2 It would be possible for the police in Wales to lead on all elements of investigation of devolved tax offences. However, this would be an additional responsibility for police in Wales and any police action would be dependent on their consideration of a range of other priorities. The Home Office are responsible for policing across England and Wales, (though the Welsh Government partially funds the police and, along with Welsh local authorities, have a strong and close relationship with the Welsh police).

Option 2: Introduce the Regulations and Order

2.3 The Welsh Government's preferred option is that the WRA investigate tax crime themselves. Financial profit is the driver for almost all serious and organised crime, and other lower-level acquisitive crime. It is difficult to estimate the cost of tax crime in relation to the two devolved taxes, however, HMRC estimate that there is a 10% tax gap for landfill tax and a 1% tax gap for stamp duty land tax[2]. This suggests that the potential lost revenue to the WRA for LDT could be in the region of £2.6 million and for LTT in the region of £2.5 million – although only part of this

[2] Measuring the Tax Gap 2017, HMRC The tax gap is the difference between the amount of tax that should, in theory, be collected by HMRC, and what is actually collected.

would be due to tax crime.[3]As tax rules diverge across the UK following the devolution of tax powers to Wales and Scotland, it is imperative that tax crime is tackled consistently and in the best interests of compliant taxpayers and businesses, so no part of the UK is a safe haven for those who evade tax. It will be important that any organisation responsible for investigating devolved tax offences works closely with HMRC and Revenue Scotland to share information and ensure effective enforcement.

2.4 It is clear that the application of the 1984 Act, the 2001 Act and the 2002 Act will have resource implications for WRA and the Welsh Government and there is a shared commitment to ensuring that appropriate resources are made available.

2.5 Much of the governance and compliance work required to enable the lawful exercise of these powers will be case-specific – the powers under consideration are permissive: WRA would not be required to use them, but would have the option to do so in appropriate circumstances.

2.6 This means that the immediate impact of the Regulations and the Order could be relatively limited, for example, to allow staff to receive appropriate training and accreditation. It is anticipated that the initial resource requirements stemming from WRA access to criminal powers can be accommodated within the existing WRA budget allocation of £6m for 2018/19 and 2019/20.

2.7 The exercise of the powers in particular cases could imply further cost, for example, relating to the storage of evidence and the appropriate equipment for staff. The ongoing resource will depend on the extent and nature of the case-work that WRA may wish to take forward and the priority attached to it. The costs associated will be dependant upon the nature, volume and extent of criminality uncovered once WRA becomes operational and has access to protected taxpayer information.

2.8 However, it may be anticipated that some of those costs may overlap with WRA's civil enforcement powers under TCMA, to inspect premises and to take samples and remove documents during an inspection.

2.9 The Office of Budget Responsibility considers the cost and benefits associated with compliance work subject to "high levels of uncertainty since they target specific subsets of taxpayers who are already actively changing their behaviour to lower their tax liabilities. As a result, there is usually relatively high behavioural uncertainty. Similarly, since the measures are directed at uncollected tax, there is usually less reliable data available to inform the costing."[4]

[3] Based on information from HMRC Measuring the Tax Gap 2017 and Welsh Government tax forecasts

[4] Office of Budget Responsibility – "Working Paper No.11: Evaluation of HMRC anti-avoidance and operational measures, September 2017" http://budgetresponsibility.org.uk/docs/dlm_uploads/WP-No.11-Evaluation-of-HMRC-anti-avoidance-and-operational-measures.pdf

2.10 However, the benefit of investment in tackling tax crime are seen as not only recovering lost tax, but also in encouraging wider compliance as the risk of being caught outweighs the potential benefit. In addition, OECD states that "the investment is worthwhile, with some jurisdictions being able to calculate the return on investment from the criminal tax investigation teams and reporting recovery of funds well in excess of the expenditure, ranging from 150% to 1500% return on investment."[5]

2.11 The Regulations and Order are not expected to impose costs on business, other than those that may become subject to an investigation from potential criminal activity.

2.12 The Regulations and Order are considered as a way of levelling the playing field for legitimate businesses in Wales. The Regulations and Order are designed to tackle tax crime and we anticipate this to be most prevalent in landfill disposals tax, which will have the potential to impact on wider waste crime which can have serious environmental impacts. However, the motive for tax crime is economic and is aimed at the acquisition of financial benefit. As with any crime, waste crime has a cost to the wider economy, taking business away from legitimate, permitted waste operators, who therefore lose income and the ability to invest in their businesses and the wider local economy. However, the profits come largely at the expense of the taxpayer. The Environmental Services Association estimates "each pound spent on enforcement is likely to yield a return of as much as £5.60. Of this £3.20 would be received directly by government in taxes, with the rest benefitting legitimate waste sector businesses and wider society."[6]

2.13 Overall, the benefits of this option are:

- By creating an effective deterrent to criminal behaviour, it has the potential to reduce tax lost as a result of criminal activity;
- There is the potential to reclaim revenue lost to the public purses as a result of criminal behaviour;
- It has the potential to create a fairer environment for waste businesses and other tax payers in Wales; and
- Consultation responses from other law enforcement agencies, including the police, National Crime Agency and NRW were supportive of the proposals.

3. Consultation

3.1 On 10 July, the Welsh Government published a consultation on WRA access to criminal powers to tackle tax crime, which closed on 2 October. In total, the Welsh Government received 17 responses from a

[5] Fighting Tax Crime – The Ten Global Principles: OECD 2017- http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf

[6] Environmental Services Association Education Trust- Waste Crime: Tackling Britain's Dirty Secret: http://www.esauk.org/esa_reports/ESAET_Waste_Crime_Tackling_Britains_Dirty_Secret_LIVE.pdf

range of stakeholders from various sectors, all from within Wales.

3.2 A full Welsh Government response to the consultation can be viewed here: https://consultations.gov.wales/consultations/welsh-revenue-authority-powers-tackle-tax-crime

3.3 Following the consultation, engagement has taken place with the Home Office, HMRC, CPS, NRW, National Crime Agency and the Police as well as other WRA stakeholders. Their views have been taken into account when developing these Regulations and Order.

4. Post implementation review

4.1 The Finance Committee in it's Stage 1 Report on the TCMA stated: "the Minister should consider reviewing these powers once the taxes have been established and in operation for a number of years."[7]

4.2 It is anticipated that TCMA will be reviewed within three to five years. The Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 will be reviewed by May 2023 and the Landfill Disposals Tax (Wales) Act 2017 will follow the same timeline. The impact of the powers conferred by the Regulations and Order will be considered as part of the wider review programme.

[7]National Assembly for Wales, Finance Committee, Tax Collection and Management (Wales) Bill Stage 1 Committee Report, November 2015. Paragraph 241. http://www.assembly.wales/laid%20documents/cr-ld10451/cr-ld10451-e.pdf

Supplementary Report: SL(5)191 – The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018

Background and Purpose

This Order provides that references to accredited financial investigators in the Proceeds of Crime Act 2002 ('POCA') are to be read as references to accredited financial investigators who are members of staff of the Welsh Revenue Authority (WRA).

Accredited financial investigators may apply for restraint orders under Part 2 of POCA and may seize property to which any such order applies. Accredited financial investigators may also search for, seize, detail and apply for the forfeiture of cash. Before exercising powers of search they must obtain prior approval from either a justice of the peace or a senior officer (unless in the circumstances it is impracticable to do so).

Accredited financial investigators may also apply for orders and warrants in relation to confiscation, money laundering and detained cash investigations. The purpose of such orders and warrants can include e.g. requiring a person to produce certain material, permitting the search and seizure of material from premises and requiring a financial institution to provide customer information. Only an accredited financial investigator who is (depending on the nature of the order or warrant) either an appropriate person, appropriate officer or senior appropriate officer can apply for and/or exercise the powers provided by such orders and warrants.

The Committee considered the instrument at its meeting on 12 March 2018, along with the Government response and reports to the Assembly in line with the merits point identified.

However, during its consideration the Committee agreed to include another point for reporting relating to an anomaly between the regulations and the Explanatory Memorandum.

The Explanatory Memorandum states that the WRA must comply with statutory codes of practice, but our understanding is that they need only have regard to the code, and then only a duty to have regard to relevant bits of the code (see section 67(9) of the *Police and Criminal Evidence Act 1984*). There is an important difference between having to comply with something and having to have regard to it. The Welsh Government should clarify the position and if necessary, ensure that all relevant documents related to the regulations are corrected.

Procedure

Negative

Supplementary Committee Response

The Committee will wish to be aware that the Explanatory Memorandum has been revised to reflect comments in the Constitutional and Legislative Affairs Committee report.

The Committee thanks the Welsh Government for its response and welcomes the changes that have been made to the Explanatory Memorandum.

UK Government
Llywodraeth y DU

Rt Hon Alun Cairns MP
Secretary of State for Wales
Ysgrifennydd Gwladol Cymru

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Elin Jones AM
Presiding Officer
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16 March 2018

Dear Elin,

CHANGES TO THE EUROPEAN UNION (WITHDRAWAL) BILL

Further to my letter of 16 January, UK Government officials have been working closely with their counterparts in the Welsh Government, Scottish Government and Northern Ireland Civil Service on a number of detailed issues relating to the devolution provisions in the EU (Withdrawal) Bill.

I am writing to set out where we have got to in our work on these issues. I am pleased that this work has delivered agreement in many areas. Notwithstanding ongoing discussions between the UK government and the Welsh Government to secure the Welsh Government's support for the Bill, we now need to finalise detailed provision in order to prepare for the Bill's Lords Report stage.

I enclose an annex setting out the changes we intend to make to the Bill. In summary, we will:

- Amend the Bill so that the Clause 7 power to correct deficiencies cannot be used to amend the Government of Wales Act 2006 (or the Scotland Act 1998);
- Correct the deficiency in the reservation for technical standards on the face of the Bill as it is common to all three devolution settlements;
- Make corrections to the Government of Wales Act 2006 on the face of the Bill where they are within devolved competence, as requested in the First Minister's letter of 5 February; and
- Amend the Bill to ensure that the 'made affirmative' procedure is available to scrutinise the Welsh Ministers' use of the powers in the Bill, as recommended by the Assembly's Constitutional and Legislative Affairs Committee.

There remain further corrections that will need to be made to the Government of Wales Act which my officials have discussed with yours. The remaining deficiencies that have been identified are in reservations in Schedule 7A to the Act and I can confirm that, as our officials have discussed, my intention is to use the Order in Council power in section 109 of the Act so that the Assembly is able to approve the changes that are made. My officials will continue to work closely with yours and

counterparts in the Welsh Government over the coming weeks to ensure that you are sighted on the changes that will be made in this order.

There remain some outstanding issues relating to scrutiny arrangements by the Assembly where the First Minister's view, as set out in his 5 February letter, differs from the recommendations made by the Assembly's Constitutional and Legislative Affairs Committee following its scrutiny of the Bill. I have asked the First Minister to confirm whether his consideration of the Committee's recommendations have resulted in any change in what he is seeking.

I am copying this letter to the First Minister and to the Chairs of the Assembly's Constitutional and Legislative Affairs Committee and External Affairs and Additional Legislation Committee. I am also writing in similar terms to the First Minister.

Yours,

Rt Hon Alun Cairns MP
Secretary of State for Wales
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ANNEX A - CHANGES TO THE EU (WITHDRAWAL) BILL

1. Protection for the Devolution Statutes under the Correcting Power

1.1 Working with Welsh Government officials, we have been able to confirm that we will not need to use the clause 7 power to correct the remaining deficiencies in the Government of Wales 2006 (GoWA) and can instead use the Bill itself or orders made under section 109 of GoWA. We will therefore table amendments to clause 7 to apply the same protection from modification to GoWA (and the Scotland Act) that currently applies to the Northern Ireland Act.

1.2 Subject to agreement of the drafting we will also correct the 'technical standards' reservation for all three Acts in the Bill. The change will read across to the correcting power conferred on devolved ministers in Schedule 2 Part 1. That power too will not generally be capable of modifying the Devolution Acts.

1.3 We announced the amendments to clause 7 at Committee Stage, to be tabled at Report Stage. We now need to draft and agree the amendments for those deficiencies that will be corrected on the face of the Bill in time for Report Stage.

2. Outstanding Corrections to the Government of Wales Act 2006

The technical standards reservation:

2.1 UK Government and Welsh Government officials have been considering how best to remedy the deficiency in the reservation covering technical standards and requirements for products in pursuance of an EU obligation for each of the three devolution statutes. For this, and every deficiency in a reservation, we intend that the corrections should be devolution neutral, i.e. that they should not change the scope of the reservation.

2.2 The proposed correction to the technical standards reservation would reserve existing technical standards in relation to products as they apply immediately before exit day, including any subsequent changes that are made to those standards (as it currently works whilst we are in the EU). Technical standards for new products arising post-exit, and therefore outside of an EU obligation would not fall within the scope of the existing reservation and would not be covered by the amended reservation.

2.3 We will need to work with the Welsh Government and the other devolved administrations to consider any technical standards arising in future outside of the reservation, just as we would now for those that are outside of our EU obligations and are not covered by the existing reservation. This will be a matter for relevant departments to consider.

2.4 We have now shared the drafting of the amendment with the Welsh Government and my officials will continue to work with their counterparts in the devolved administrations to agree drafting.

Deficiencies within devolved competence:

2.5 In his letter of 5 February the First Minister confirmed that he wants the deficiencies within GoWA that fall within devolved competence to be corrected in the Bill.

2.6 In order to instruct Parliamentary Counsel in sufficient time for these to be drafted, for the drafting to be agreed and the amendments tabled for Report Stage, we will need to make progress quickly and to have instructed Counsel no later than 23 March. My officials are working with Welsh Government officials on how these deficiencies will be corrected.

3. Restrictions on Delegated Powers

Restricting the definition of deficiency:

3.1 The Commons accepted the amendment to limit the scope of the clause 7 power to amend only those deficiencies that are listed in subsection (2) of clause 7, while providing a 'sweeper' provision to ensure deficiencies not on the list but of a 'similar kind' to those on the list are recognised as also being deficiencies.

3.2 The new power to add to this list of definitions is available to UK ministers. In line with our commitment at the despatch box, we will consider closely any suggestions put forward for additional definitions of deficiencies that you identify in your own laws. We would expect any definitions added to the list to apply to the power for ministers in both the UK Government and devolved administrations. This is important to ensure that there is consistency across the jurisdiction of the UK so that we can all deal with any deficiencies that arise.

Enhanced explanatory material:

3.3 The First Minister has confirmed that the requirements for enhanced explanatory material relating to the effect of SIs and equalities statements should not be applied to Welsh Ministers' powers. I will keep you informed if there are any further changes to the provisions on explanatory material.

3.4 We have been considering further the question of how this duty should apply in relation to the joint procedure. The joint procedure is a means to ensure scrutiny by Parliament and the relevant devolved legislature where it is appropriate that both consider the legislation, for example where correcting a deficiency in an existing joint instrument. We would not want it to be viewed as a means to avoid scrutiny by not having to provide the same level of explanatory material. We therefore think that it is correct for the duty to continue to apply to a UK minister when legislating jointly with a devolved minister.

3.5 This would mean that the material that is required to be produced by the UK minister would be available to the relevant devolved legislature to consider. But the duty would apply to the UK minister only, not to the devolved minister.

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4. Scrutiny Arrangements

The 'made affirmative' procedure:

4.1 In its report on the EU (Withdrawal) Bill the Assembly's Constitutional and Legislative Affairs Committee ("the Committee") recommended that the 'made affirmative' procedure is available for the exercise of the Bill powers by the Welsh Ministers. The First Minister also asked for this in his 5 February letter. The Scottish Government have confirmed that this should be available to the Scottish Ministers. We have also confirmed with the Northern Ireland Civil Service that we will make the procedure available to Northern Ireland departments.

4.2 My officials will work with yours, and those in the Devolved Administrations to ensure that the amendments deliver the intended effect and work properly in the context of each legislature's procedures.

The 'sifting committee' procedure:

4.3 The Committee recommended that the provisions relating to a sifting committee in the Bill should be extended to scrutiny of instruments laid before the Assembly and that it should be binding, going further than the procedure that has been applied in the Bill in relation to UK Ministers. However, the First Minister has stated that such a procedure should not apply to the Welsh Ministers' powers.

4.4 I recognise that this is a question for the Assembly and Welsh Government to consider and I would be grateful for your thoughts on how you would like us to proceed. It is worth noting that amending the scrutiny arrangements in the Bill will be within the legislative competence of the Assembly and so this does not necessarily need to be addressed in the Bill, but could be dealt with in new Assembly legislation if that were more appropriate.

Further changes to scrutiny:

4.5 I have previously invited you to comment on any other changes that you would wish to be made to the scrutiny arrangements for the Welsh Ministers' powers. If there are any such changes I would be grateful for confirmation of what they would be at the earliest opportunity.

5. Technical and Consequential Changes

Severance of ultra vires provision in Schedule 2 regulations:

5.1 A question has been raised by Welsh Government legal advisers and Scottish Parliament legal advisers as to the effect of the provision requiring that Schedule 2 regulations can only be made where they are within competence.

5.2 The current drafting stipulates that no regulations can be made unless every provision is within competence. The point has been made that this could prevent the courts from applying the usual principle of severance, by which they could

sever a provision that is outside of competence rather than striking down the whole instrument.

5.3 Having tested this with Parliamentary Counsel, we do not think that this would be the case and severance would apply as normal. However, we believe that it would provide helpful reassurance if we amend the drafting to make this clearer. Counsel has drafted amendments that will achieve this and we will share these with you. We intend for these to be tabled at Report Stage.

Allowing for composite instruments under the joint procedure:

5.4 The joint procedure included for the Schedule 2 powers currently permits a UK minister and a devolved minister to make 'joint instruments', which will be laid before and scrutinised by Parliament and the relevant devolved legislature. These would be where the UK minister and devolved minister are exercising the same power and each has the competence to make every provision within the instrument.

5.5 The intention is that this should also permit the making of a 'composite instrument', where provisions made under different powers by a UK minister and a devolved minister are combined in a single instrument. We expect this to be the more common manner in which the procedure would be used, for instance where a Welsh Minister is making provision for Wales and a UK minister is making the same or equivalent provision for England.

5.6 Some doubt has been expressed as to whether the current drafting does allow for composite instruments to be made using this procedure. Counsel has drafted technical amendments to address this, which we will share with you. We plan to table these at Report Stage as well.

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Elin Jones AM, Presiding Officer
National Assembly for Wales

Rt Hon Alun Cairns MP
Secretary of State for Wales
1 Caspian Point
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CF104DQ

22 March 2018

Dear Alun

Changes to the European Union (Withdrawal) Bill

You wrote to me on 16 January 2018 (and again on 16 March 2018) regarding the European Union (Withdrawal) Bill (the Bill). In particular, you provided an update on amendments made to the Bill at Committee stage in the House of Commons and included a list of questions relating to scrutiny procedures that should apply to regulations in devolved areas.

At the time of your letter, the National Assembly's Constitutional and Legislative Affairs Committee (CLA Committee) had already initiated its inquiry into the powers in the Bill to make subordinate legislation. Its report, *The Scrutiny of regulations made under the European Union (Withdrawal) Bill*', was laid and published on 16 February and covers the questions you raised in your 16 January letter.

The Chair of CLA Committee wrote to you on 16 February enclosing its report and setting out its views on all the issues raised in your 16 January letter.

On 7 March, Assembly Members debated the report of the CLA Committee and unanimously endorsed recommendations 1, 2, 4 and 7. For ease of reference, those recommendations are set out in an annexe to this letter.

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Therefore, I draw your attention to those recommendations and ask that you receive this letter as formal notification of the National Assembly for Wales's position on what amendments should be made to the Bill in respect of procedures for the scrutiny of subordinate legislation.

I agree that it is important that your officials work closely with Assembly officials in the drafting of these amendments before they are tabled to ensure that the recommendations of the CLA Committee are effectively translated to amendments to the Bill.

I am copying this letter to Mick Antoniw AM, Chair of the Constitutional and Legislative Affairs Committee, David Rees AM, Chair of the External Affairs and Additional Legislation Committee and the First Minister.

Yours sincerely,

Elin Jones AM
Llywydd

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Annexe – Constitutional and Legislative Affairs Committee report '*Scrutiny of regulations made under the European Union (Withdrawal) Bill'* - recommendations 1, 2, 4 and 7

Recommendation 1. We recommend that the sifting mechanism currently included in the Bill should be extended to cover all regulations that are made under the Bill and are laid before the National Assembly, and that a committee of the National Assembly is responsible for making a recommendation as to the appropriate procedure for the regulations.

Recommendation 2. The recommendation made by the sifting committee under recommendation 1 should be binding, save where the National Assembly resolves otherwise. This requirement should be reflected on the face of the Bill.

Recommendation 4. We recommend that the Bill is amended in line with paragraphs 44 to 46 of this report, which include endorsements of recommendations made by the House of Lords Constitution Committee and the House of Lords Delegated Powers and Regulatory Reform Committee.

Recommendation 7. We recommend that the made affirmative procedure for urgent cases should also apply to regulations made by the Welsh Ministers (whether acting alone or acting with UK Ministers in composite regulations or acting with UK Ministers in joint regulations) in order for there to be consistent treatment of ministers of all governments.

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Y Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol

National Assembly for Wales
External Affairs and Additional Legislation Committee

Rt Hon Carwyn Jones AM
First Minister of Wales

23 March 2018

Dear First Minister,

European Union (Withdrawal) Bill: Scrutiny arrangements

The Secretary of State for Wales wrote to the Llywydd on 16 March 2018 in relation to changes to the European Union (Withdrawal) Bill ('the Withdrawal Bill'), copied to you and the External Affairs and Additional Legislation Committee.

In that letter, the Secretary of State writes:

> "There remain some outstanding issues relating to scrutiny arrangements by the Assembly where the First Minister's view, as set out in his 5 February letter, differs from the recommendations made by the Assembly's Constitutional and Legislative Affairs Committee following its scrutiny of the Bill. I have asked the First Minister to confirm whether his consideration of the Committee's recommendations have resulted in any change in what he is seeking."

Whilst the Constitutional and Legislative Affairs Committee ('the CLA Committee') has proposed detailed scrutiny arrangements for the subordinate legislation that will flow from the Withdrawal Bill, this remains an area of considerable interest to us as the Assembly committee charged with overall scrutiny of the Brexit process.

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Without commenting on the detail of the CLA Committee's proposals, we believe that they are broadly in line with our position on scrutiny arrangements, as expressed in the sixth objective that we set for improving the Withdrawal Bill.

In discussing our position on the setting of scrutiny arrangements, the Cabinet Secretary for Finance has previously been clear in stating that this should be a matter for the Assembly to determine.

I would be grateful if you could provide us with details of how your position differs from that of the CLA Committee's recommendations and whether it differs from our position as expressed in our sixth objective for the Withdrawal Bill.

A copy of our objectives for the Withdrawal Bill are enclosed for ease of reference.

A second point we wish to raise is in relation to enhanced explanatory material.

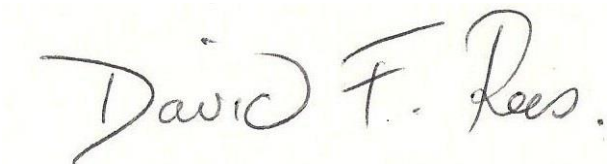
The Secretary of State, in paragraph 3.3 of the annex to his letter to the Llywydd dated 16 March, states:

> "The First Minister has confirmed that the requirements for enhanced explanatory material relating to the effect of SIs and equalities statements should not be applied to Welsh Ministers' powers."

I would be grateful if you could confirm your reasons for this decision.

I have copied this letter to the Chair of the CLA Committee and the Llywydd.

Yours sincerely,



David Rees AM, Chair of the External Affairs and Additional Legislation Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.

Julie James AC/AM
Arweinydd y Tŷ a'r Prif Chwip
Leader of the House and Chief Whip

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA/L/JJ/ 0198/18

Mick Antoniw AM/AC
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
CF99 1NA

27 March 2018

Dear Mick

I am writing to notify you of the Welsh Government's formal response to the Committee's recent report on the scrutiny of regulations made under the European Union (Withdrawal) Bill. I attach a table which sets out our response to each recommendation.

I am grateful to the Committee for their work on this matter.

Yours sincerely,

Julie James AC/AM
Arweinydd y Tŷ a'r Prif Chwip
Leader of the House and Chief Whip

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Welsh Government response to the Constitutional and Legislative Affairs Committee - Scrutiny of regulations made under the European Union (Withdrawal) Bill

Recommendation	Response
Recommendation 1. We recommend that the sifting mechanism currently included in the Bill should be extended to cover all regulations that are made under the Bill and are laid before the National Assembly, and that a committee of the National Assembly is responsible for making a recommendation as to the appropriate procedure for the regulations.	**AGREE:** This is properly a matter for the Assembly to consider and agree with the UK Government and Parliament. The Welsh Government agrees that the exercise of delegated powers should be subject to appropriate and proportionate scrutiny. We also believe that, in respect of the provisions relating to the exercise and scrutiny of delegated powers, the powers and duties on Welsh Ministers should be in line with those which apply to UK Ministers. Therefore, the Welsh Government would be content for equivalent sifting requirements to apply to instruments laid before the Assembly, as to instruments laid before Parliament.
Recommendation 2. The recommendation made by the sifting committee under recommendation 1 should be binding, save where the National Assembly resolves otherwise. This requirement should be reflected on the face of the Bill.	**REJECT:** The Welsh Government recognises this is primarily a matter for the National Assembly to consider and agree with the UK Government and Parliament. However, we are not persuaded that the recommendation made by the sifting committee should be binding. We agree that the exercise of delegated powers should be subject to appropriate and proportionate scrutiny and we have demonstrated our commitment to robust scrutiny through the approach we have taken in the LDEU Bill. We also believe that in the vast majority of cases Welsh Ministers will accept the recommendation of the sifting committee that a set of regulations should be subject to the affirmative procedure rather than negative procedure. However, there may be situations where – for reasons of urgency – Welsh Ministers will need to act more quickly than the affirmative procedure provides for, and it is essential the government retains the flexibility to do so, notwithstanding the recommendations of the sifting committee. The Welsh Government also believes there is a case for maintaining consistent arrangements between the National Assembly and the UK Parliament, particularly for joint and composite instruments where both the Assembly's and Parliament's sifting committees would be making recommendations on the appropriate procedure.

Recommendation	Response
Recommendation 3. We recommend that the sifting criteria set out in paragraph 35(b) of this report are applied to all regulations that are made under the Bill and are laid before the National Assembly, and that the criteria should be set out in the Standing Orders of the National Assembly	**REJECT:** The Welsh Government recognises that the sifting committee will need to agree criteria by which it performs the sifting process. However, these criteria will need to be consistent with the final framework for the sifting mechanism, and the Assembly needs to maintain some flexibility in this regard. The Welsh Government is therefore not persuaded that the criteria should be included in Standing Orders.
Recommendation 4. We recommend that the Bill is amended in line with paragraphs 44 to 46 of this report, which include endorsements of recommendations made by the House of Lords Constitution Committee and the House of Lords Delegated Powers and Regulatory Reform Committee. The amendments proposed at paragraphs 44-46 are: • That the affirmative procedure should apply to any measure which involves the making of policy • That the affirmative procedure should apply to regulations made under clauses 7, 8, 9 and 17 that amend or repeal primary legislation 46 • That the Government of Wales Act 2006 should be included in the list of enactments in clause 7(7) that cannot be amended by regulations	**AGREE:** The Welsh Government believes, in respect of the provisions relating to the exercise and scrutiny of delegated powers, that the powers and duties on Welsh Ministers should be in line with those which apply to UK Ministers. We are supportive of the EUW Bill being amended in the way proposed by CLAC (paragraphs 44-46).
Recommendation 5. We recommend that this Committee—the Constitutional and Legislative Affairs Committee—should be the sifting committee for the National Assembly for Wales and that the Assembly's Standing Orders are amended accordingly.	**AGREE IN PRINCIPLE:** This is a matter for the Assembly. The Welsh Government agrees it would be appropriate for CLAC to assume this function. However, we do not believe it is necessary for Standing Orders to be amended to reflect this.
Recommendation 6. We recommend that the sifting mechanism should apply to regulations under Categories 1, 2 and 3 identified in this report, namely all regulations made under the Bill containing devolved provisions that are laid before the National Assembly. • Category 1: regulations made by the Welsh Ministers acting alone using their powers under Schedule 2, laid	**AGREE:** The Welsh Government agrees that the sifting mechanism should apply to the categories of regulations set out by CLAC, although it notes the potential logistical challenges in respect of joint and concurrent regulations, where both the National Assembly and Parliamentary sifting committees will be considering the same set of regulations.

Recommendation	Response
before the National Assembly for Wales only; • Category 2: regulations made by the Welsh Ministers and UK Ministers acting jointly under Schedule 2, laid before both the National Assembly for Wales and the UK Parliament; • Category 3: regulations made by the Welsh Ministers and UK Ministers using their concurrent powers (under Schedule 2 and clauses 7, 8 and 9, respectively) in composite regulations, laid before both the National Assembly for Wales and the UK Parliament; • Category 4: regulations made by UK Ministers acting alone using their powers under clauses 7, 8, 9 and 17, laid before the UK Parliament only.	
Recommendation 7. We recommend that the made affirmative procedure for urgent cases should also apply to regulations made by the Welsh Ministers (whether acting alone or acting with UK Ministers in composite regulations or acting with UK Ministers in joint regulations) in order for there to be consistent treatment of ministers of all governments.	**AGREE:** The Welsh Government believes that the made-affirmative procedures for urgent cases should be available in respect of regulations made by Welsh Ministers, to match the flexibility available to UK Ministers, and consistent with the principle of consistent treatment of ministers of all governments.

Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

Rt Hon Alun Cairns MP
Secretary of State for Wales
Gwydyr House
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29th March 2018

Dear Alun

I am writing in response to your letter of 16 March 2018 about changes to the European Union (Withdrawal) Bill. I note the summary of the changes you intend to make to the Bill at Lords Report, and the progress in respect of other matters, including the correction of within competence deficiencies in the Government of Wales Act 2006, the correction to the technical standards reservation, and your proposal in respect of enhanced explanatory material.

You raise a specific question in respect of the 'sifting committee' provisions, with reference to the recommendation of the Constitutional and Legislative Affairs Committee that the provisions should apply to instruments laid before the Assembly, and that the sifting committee's recommendation on the appropriate procedure should be binding. The Welsh Government's view is that it would be appropriate for the sifting committee provisions as set out in the Bill to apply to instruments laid before the Assembly.

However, we are not persuaded that the recommendation made by the sifting committee should be binding. It is right that the exercise of delegated powers should be subject to appropriate and proportionate scrutiny and I expect that in the vast majority of cases Welsh Ministers will accept the recommendation of the sifting committee. However, there may be situations where – for reasons of urgency – Welsh Ministers will need to act more quickly than the affirmative procedure provides for, and it is essential the government retains the flexibility to do so, notwithstanding the recommendations of the sifting committee. We also believe there is a strong case for maintaining consistent arrangements between the National Assembly and the UK Parliament.

I can also confirm that we have no other proposed changes to the scrutiny arrangements for the Welsh Ministers' powers.

I am copying this letter to the Presiding Officer and to the Chair of the Assembly's Constitutional and Legislative Affairs Committee.

Yours sincerely

CARWYN JONES

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Mick Antoniw AM
Chair of the Constitutional and Legislative Affairs Committee
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22 March 2018

Dear Mick,

I am grateful to your Committee for the work it has undertaken on your inquiry '*UK governance post-Brexit*'. The report makes a valuable contribution to the important discussions needed on the implications of Brexit for the National Assembly for Wales and the necessary inter-institutional arrangements required for the political structures across the UK.

Recommendations 5, 6 and 8 of your report relate directly to the role of the Llywydd in establishing a Speakers Conference with the aim of determining how best to develop inter-parliamentary working post Brexit. I am certainly of the view that there is merit in exploring these proposals and examining how it would work in practice.

As you are aware, I, alongside you, gave evidence to the Westminster Public Administration and Constitutional Affairs Committee (PACAC) on 5 February as part of their inquiry on 'Devolution and Exiting the EU', during which the potential for a Speakers' Conference was also examined. In response, I committed to raising these matters as a potential item of discussion for the Speakers' quadrilateral meetings.

By means of an update to your committee and in response to the recommendations you have made, I can confirm that I have tabled the recommendations as an agenda item for discussion at the next Speakers' quadrilateral meeting in May.

I will update your committee in due course.

Yours sincerely,

Elin Jones

Elin Jones AM
Llywydd

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Vaughan Gething AC/AM
Ysgrifennydd y Cabinet dros Iechyd a Gwasanaethau Cymdeithasol
Cabinet Secretary for Health and Social Services

Llywodraeth Cymru
Welsh Government

Ein cyf / Our ref: VG/0157/18

Mick Antoniw AM
Chair of the Constitutional and Legislative Affairs Committee

28 March 2018

Dear Mick,

I would like to thank the Constitutional and Legislative Affairs Committee for its scrutiny of the Public Health (Minimum Price for Alcohol) (Wales) Bill during Stage 1 of the legislative process. In Annex A to this letter, I have set out my response to the six recommendations made in the Committee's Stage 1 scrutiny report on the Bill. This reflects my current view.

I will also be writing to the Chairs of the Health, Social Care and Sport Committee and the Finance Committee with regard to their Stage 1 reports and will copy the letters to all three Committee Chairs.

I look forward to continuing to work with Members as the Bill progresses through the Assembly process.

Yours sincerely,

Vaughan Gething AC/AM
Ysgrifennydd y Cabinet dros Iechyd a Gwasanaethau Cymdeithasol
Cabinet Secretary for Health and Social Services

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Annex A: Constitutional and Legislation Affairs Committee Recommendations

On 5 March, the Constitutional and Legislation Affairs Committee published their report on the General Principles of the Public Health (Minimum Price for Alcohol) (Wales) Bill. This provides the Welsh Government's response to each of the recommendations included in their report.

The General Principles of the Bill were agreed by the National Assembly on 13 March.

Recommendation 1: We recommend that the Cabinet Secretary should table an amendment to section 16 of the Bill to require the occupier to be informed of the names of persons accompanying an officer when entering premises.

Welsh Government response:

I have considered this issue and the concerns of the committee carefully but remain of the view that it is not necessary to amend section 16 of the Bill. We are satisfied that section 16 is appropriate. This section is consistent with other legislative provisions such as the equivalent enforcement provisions in the Public Health (Wales) Act 2017. Consistency with their existing enforcement powers is something which has been welcomed by local government stakeholders.

During the debate on the general principles of the Bill, the importance of human rights considerations in the context of the powers granted by section 16 were raised. The Welsh Government considers that the enforcement regime proposed by the Bill is either compatible with the European Convention on Human Rights or is capable of being exercised in a manner that is so compatible. We consider that it would achieve a fair and proportionate balance between the protection of the rights of those affected by those powers of entry, and the effectiveness of the enforcement of the proposed regime.

Any decision about what equipment or which persons, if any, to bring along under section 16 would have to be made in a manner consistent with the objectives of sections 13 to 17; section 16(1) is limited in that it is only intended to allow officers to do things which facilitate the exercise of the substantive powers of entry.

In addition to the various safeguards built into the Bill itself, the enforcement powers given to authorised officers of local authorities will operate in the context of various other, existing safeguards such as the Human Rights Act 1998.

Likewise, as was also alluded to in the debate on the general principles of the Bill, the Police and Criminal Evidence Act 1984 Code B, to which those charged with the duty of investigating offences will be required to have regard to. This code also provides well-established general guidance which further places clear emphasis on acting in accordance with the Convention rights. Specifically in relation to the Committee's recommendation, this Code already includes provision governing the provision of the identity of those accompanying officers on searches. The exceptions which exist to this provision reflect in our view the complexity of the situations which those in charge of a search of premises may find themselves in and are we consider, well-tested and appropriate.

For all of these reasons, I am not minded to bring forward an amendment to section 16.

Recommendation 2: We recommend that the Cabinet Secretary should table amendments to the Bill, placing a duty on the Welsh Ministers to issue guidance about the exercise of all powers and duties under the Bill, and to ensure that the Bill includes appropriate duties to have regard to that guidance.

Welsh Government response:

The Welsh Government will be issuing guidance regarding the Bill to assist and promote an understanding of the proposed new regime but no power is set out on the face of the Bill in relation to this because the Welsh Government already has existing powers to issue it.

The development of the guidance will form part of operational work undertaken in the lead up to implementation and the Welsh Government will work closely with stakeholders to ensure that the guidance is a practical and useful tool to help retailers and those enforcing the legislation. This will include working with the Welsh Retail Consortium, the Welsh Government Alcohol Industry Network, with local authorities and with the Welsh Heads of Trading Standards.

We are also planning to engage with the Third Sector on the development of guidance and associated communications. We will do this by working with the Substance Misuse Network – whose members include a range of different stakeholders and service providers.

Recommendation 3: We recommend that an amendment should be tabled to place the minimum unit price of alcohol on the face of the Bill.

Welsh Government response:

The Welsh Government continues to consider it appropriate to delegate the power to specify the Minimum Unit Price (MUP) for the purposes of the Bill to subordinate legislation for reasons of flexibility, timeliness and accuracy. Doing so will ensure that Welsh Ministers are able to review and set the price considered most appropriate at the relevant time – taking into account the most relevant and most up to date data, subject to the approval of the National Assembly. These factors taken into account, I do not consider it appropriate for the MUP to be set on the face of the Bill.

We believe that this strikes a correct and proportionate balance between the acknowledged significance of the issue and the ability to most effectively respond to any relevant change in economic and social circumstances.

Another factor which has been taken into account is the earliest date the policy is likely to be implemented. It is proposed that there will be a period of time before the minimum pricing regime is brought into force which will allow those affected to prepare. We do not want to be specifying a level of MUP on the face of the Bill which may then not be current at the point of implementation. This will also allow us to conduct a consultation on our proposed MUP to invite comments on this proposed level, mirroring the approach taken in Scotland.

Recommendation 4: In conjunction with recommendation 3, we recommend that any future change to the minimum unit price of alcohol in section 1 of the Bill should be achieved by the use of a super-affirmative procedure.

Welsh Government response:

Given its impact on stakeholders and the wider public, we consider it appropriate that the MUP will not be specified or amended without full consideration and the opportunity for debate in the National Assembly. The Welsh Government is content that the affirmative procedure provides that opportunity and is appropriate.

We will be consulting on the initial level of the MUP that Welsh Ministers are minded to specify. This will provide both Assembly Members and external stakeholders with the opportunity to consider the proposed level of the MUP.

Furthermore, the affirmative procedure is not the only safeguard built into the proposed means of specifying the MUP for the purposes of the Bill. The Bill commits

the Welsh Minsters to publishing a report on the operation and effect of the minimum pricing regime after five years. It also provides for the legislation to be repealed after a period of six years unless the Welsh Ministers, with the approval of the Assembly, actively decide to continue it.

Recommendation 5: We recommend that the Cabinet Secretary justifies during the Stage 1 debate: the inclusion of illustrative examples of calculations of the applicable minimum price of alcohol on the face of the Bill, and explains how he will avoid the potential for confusion caused where the figure used in the illustrative example differs from that included either on the face of the Bill (our preference) or in regulations.

Welsh Government response:

I accept this recommendation and am happy to reiterate and add to the points I made during the General Principles debate on 13 March.

The Welsh Government is committed to making legislation user friendly and accessible. The steps that need to be taken in promoting accessibility will vary from Bill to Bill, depending on the subject matter and the intended audience. In this case, the minimum pricing provisions involve mathematical calculations and are a practical issue, affecting everyday life, in which many people will have an interest.

Examples have been inserted into the text of the Bill in order to flesh out what would otherwise be purely technical or mathematical steps, and express them in practical everyday ways that would promote understanding. Multi-buys in particular are a complex area, and it was felt that accessibility would be promoted by inserting examples in the text of the Bill itself. The figures stated in the examples have been selected purely to enable examples to be worked through in a straightforward way.

The Committee Report points out that the figures given in the examples, but not the MUP itself, are capable of being amended as the Bill progresses through the Assembly. The Welsh Government does not consider this to be an inconsistency. In determining what figures are appropriate to use in the examples, we feel that the key consideration should be the accessibility of the examples, and the ease with which members of the public will be able to follow them. They need not reflect the actual minimum price.

The Bill, as well as all supporting documentation, make clear that the MUP for the purposes of the Bill will be whatever price is specified in regulations made by the Welsh Ministers (with the approval of the Assembly.)

Financial implications
There are no financial implications to accepting this recommendation.

Recommendation 6: We recommend that the Cabinet Secretary should table an amendment to the Bill to delete the words “or expedient” from section 22(3).

Welsh Government response:

The Welsh Government considers it to be important that the words “or expedient” remain.

Section 22 of the Bill provides for the repeal of the minimum pricing provisions at the end of a six year period, subject to regulations being made which provide otherwise. If repeal takes place at the end of this period, consequential changes may be required to other legislation to make that repeal work, or to ensure that the legislation works effectively or in the way originally intended. Likewise, transitional, transitory or saving provision may be required. Section 22(3) allows for this.

Some such provision might clearly be “necessary”. But to demonstrate that every single provision is “necessary”, as opposed to beneficial, or expedient, or useful would reduce flexibility and increase the risk of repeal leading to unforeseen adverse results, or an out of date and unhelpful statute book. The word “expedient” has its own meaning and allows for amendments which may be desirable, useful or have a practical benefit, but which may fail a strict “necessity” test.

It must also be remembered that the scope of this power is limited. It would only be exercised if the minimum pricing provisions are repealed with effect from the expiry of the 6 year period and in that event, any provision made under this power would have to be closely connected to the repeal of the Bill.

We therefore consider it to be important that the current wording remains, in order to allow appropriate flexibility for any repeal to be implemented in the most effective way.

Mick Antoniw AM,
Chair of the Constitutional and Legislative Affairs
Committee

20 March 2018

Dear Mick,

PUBLIC SERVICES OMBUDSMAN (WALES) BILL

I would like to thank the Constitutional and Legislative Affairs Committee (CLA) for its consideration and report on the subordinate legislation provisions within the Public Services Ombudsman (Wales) Bill.

In your report, you made one recommendation:

> *"We recommend that the Member in charge should table an amendment to the Bill to delete the words "or expedient" from section 78(1)."*

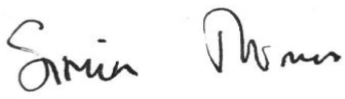
I believe the power to make provision as is "necessary" under section 78 will be sufficient to ensure the effective operation of the Bill/Act. Therefore, I accept that the power to make provision that is "expedient" could be removed.

However, given that this relates to the powers of the Welsh Ministers, I will be raising this issue with the Welsh Government as part of general discussions on the Bill.

Should the Bill proceed to Stage 2, I look forward to working with Committee members on the legislation in the future.

I am copying this letter to the Chair of the Equality, Local Government and Communities Committee.

Yours sincerely



Simon Thomas AM

Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English

STATEMENT
BY
THE WELSH GOVERNMENT

TITLE **Consultation on the Draft Legislation (Wales) Bill**

DATE **20 March 2018**

BY **Jeremy Miles AM, Counsel General for Wales**

A little over a year ago my predecessor as Counsel General announced that the Government was beginning a ground breaking process to create Codes of Welsh Law. This was the start of a long journey, and it is with great pleasure that I can now announce plans to embark upon an ambitious new leg to that journey.

Today I am launching a public consultation on the Draft Legislation (Wales) Bill. This Bill will impose obligations on the Welsh Ministers and the Counsel General to make Welsh laws more accessible, and also makes bespoke provision about the interpretation of Welsh legislation.

One of our most fundamental roles as a government is to protect the rule of law, and to do so we must ensure that devolved law is accessible and understandable.

We recognise that a clear, certain and accessible statute book is an economic asset. It gives those who wish to do business a more stable and settled legal framework. This in turn should help investment and growth. Public sector bodies and other organisations will more easily understand the legal context within which they need operate. Policy makers within government will have a clearer basis from which to develop new ideas. Legislators will find scrutiny of laws easier. And it would make an enormous difference to those of us who may wish to use the law in Welsh.

But this is first and foremost a question of social justice.

Making the law accessible is vital to enable citizens to understand their rights and responsibilities under the law – something that has become increasingly important since repeated cuts have been made to legal aid and to other services designed to advise those in need of assistance or representation.

We are the custodians of the Welsh “statute book”, made up not only of the laws made by this Assembly and the Welsh Ministers, but also those pre-devolution laws we have inherited. That element of the statute book, in particular, is not in a good state. In recent decades legislation has been allowed to proliferate without pausing to fully rationalise and integrate what is new with what had gone before.

The statute book of thousands of Acts and Statutory Instruments has long been difficult to navigate. But Welsh legislation is even more inaccessible due to our highly complex system of devolution and the absence – because of the single England and Wales legal jurisdiction – of a formal body of distinct Welsh law. It is difficult for the people of Wales to know what the law means and to understand who is responsible for what – which undermines democratic accountability.

This Government is committed to a systemic, ongoing and comprehensive consolidation of legislation within our competence, and the organisation of that law into subject specific Codes. While this will be ground breaking in the UK, at least in modern times, we would be following similar precedents set across the common law world. Jurisdictions in Australia and Canada, for example, have routinely consolidated their legislation since the beginning of the 20th century after inheriting laws of the UK Parliament in not dissimilar circumstances. And the United States went a step further and created a code of law in 1926 that has been maintained ever since.

But we need not only look afar for examples of good practice. The laws of Hywel Dda were organised in codes and the lawyers of the day had access to these laws in one book. So codification is an important part of our legal tradition. Our task now is to make sure it is a part of our legal future. We in Wales have done this before, and I am determined that we will do it again.

Our vision for making the Welsh law more accessible is not confined to rationalising legislation. A well-ordered and clearly drafted statute book must also be effectively published and supplementary material is often needed to set out context and fully explain the practical effect of the law. For this reason further improvements to the legislation.gov.uk website operated by The National Archives and to the “Cyfraith Cymru - Law Wales” website are intended to form part of the programme.

Making bespoke, bilingual provision about how our legislation should be interpreted is also part of our wider ambition to make Welsh law more accessible. An Interpretation Act was first enacted by the UK Parliament in 1850 and this practice has since been replicated in common law jurisdictions across the world, including in Scotland and Northern Ireland.

To date Wales has not had its own Interpretation Act, rather we rely on legislation enacted by the UK Parliament in 1978 and later modified in an attempt to take the existence of Welsh legislation into account. In light of our rapidly developing body of Welsh legislation, I believe it is now time to correct that anomaly and develop our own specific provisions for Wales.

I believe, therefore, as a matter of principle that our legislation should be accompanied by its own provisions on how it should be interpreted. Further, the 1978 Act is now 40 years old and in need of modernisation – which we are taking the opportunity to do in our Bill. Importantly the existing arrangements do not properly take into account the bilingual nature of our legislation, and the equal status of the Welsh and English language texts. The 1978 Act was of course made in English only and defines terms in Welsh legislation in the English language only. This must be

remedied, something I know that was of concern to the Constitutional and Legislative Affairs Committee of the Fourth Assembly and to the Law Commission.

I am sure you will join me in marking this important milestone in the development of devolved government in Wales. The Draft Bill is designed to help make Welsh law fit for the future and will, I'm sure, become a foundation stone for the emerging Welsh legal jurisdiction. It is a Draft Bill both of constitutional significance and practical importance to the people of Wales.

I invite Members to consider not only the Draft Bill that is published today but also the vision for the future that underpins it. And I encourage all interested parties from across Wales and further afield to help shape a Bill that will improve the way Welsh law works and, most fundamentally, will help all those affected by the law to find it and understand it.

Mark Drakeford AM/AC
Ysgrifennydd y Cabinet dros Gyllid
Cabinet Secretary for Finance

Llywodraeth Cymru
Welsh Government

Our ref: MA-L/MD/0160/18

Mick Antoniw AM
Chair of the Constitutional and Legislative Affairs Committee
Ty Hywel
National Assembly for Wales
Cardiff
CF99 1NA

15 March 2018

Dear Mick,

LAW DERIVED FROM THE EUROPEAN UNION (WALES) BILL

Thank you for the report of the Constitutional and Legislative Affairs Committee on the Law derived from the European Union (Wales) Bill.

I am grateful to the Committee for its efforts in producing this report at such short notice, and I would like to commend Committee Members on the thoroughness of their scrutiny and for the report itself, given the very limited time that was available. I have no doubt that the report will help us to strengthen the Bill and ensure that it is as robust a piece of legislation as possible.

I have considered carefully the eight recommendations contained in the report and my detailed response to each is set out below.

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Recommendation 1. *We recommend that the Cabinet Secretary during the Stage 1 debate confirms that our understanding of the use of powers under section 4 of the LDEU Bill is correct.*

I confirmed during the Stage 1 debate that the power in section 4 to make modifications or further provision can only be used to ensure the effective operation of the restated enactment. I am happy to confirm that again now in writing.

Recommendation 2. *We recommend that the Cabinet Secretary clarifies during the Stage 1 debate whether the self-limiting ordinances (as the Cabinet Secretary described them) contained in the LDEU Bill are more restrictive than those contained in the EU (Withdrawal) Bill.*

During the Stage 1 debate I said that we had carefully reflected on the views of the Committee, and the Assembly more widely, in preparing our Bill and that this included narrowing the scope of the powers, taking specific account of the concerns raised on the breadth of powers in the EU (Withdrawal) Bill. I went on to confirm that in general, the powers in this Bill are more restrictive than the powers in the EU (Withdrawal) Bill.

Recommendation 3. *We recommend that the Cabinet Secretary justifies during the Stage 1 debate why primary legislation cannot be used to deliver regulatory alignment on a case by case basis instead of the subordinate legislation currently envisaged under section 11.*

As recommended by the Committee, I set out in full during the Stage 1 debate my justification for the use, in the first instance, of subordinate rather than primary legislation to maintain regulatory alignment with the European Union.

The single most important consideration at this point in time lies in the volume of subordinate legislation that we are likely to face. We are already responsible for making a large number of statutory instruments each year in order to implement EU directives. If we are to succeed in our aim of maintaining full and unfettered access to EU markets for Welsh businesses one would need to add to that figure the numerous EU regulations, EU decisions and EU tertiary legislation adopted each year at EU level. Given the significant volume of work involved, I do not believe that primary legislation would be a practical legislative vehicle for maintaining alignment for the time being. In order to be certain that we can deliver that continuity and that continued access to EU markets for our businesses, I consider that the powers in section 11 are essential in the immediate future. However, as I set out in my response to recommendation 5 below, there may be an alternative solution in the longer term.

Recommendation 4. *We recommend that the Cabinet Secretary should table an amendment to section 11 of the LDEU Bill, if retained, to narrow its scope solely to matters which maintain regulatory alignment with the European Union, as indicated in the Explanatory Memorandum*.

I have carefully considered this recommendation, which reflects a central aspect of the policy intention behind section 11. I consider, however, that it is not appropriate formally to seek to limit the scope of the power in that way. This is because the language around ‘maintaining regulatory alignment’ is inherently uncertain, and would create legal uncertainty as to the validity of the measures to be taken. It is not at all clear to me that there is any limiting language which would maintain that legal certainty.

Insofar as it can be clearly defined, it seems to me that it also potentially unduly narrows the scope of the power, and may well act to prevent legislation being made to, for example, keep pace with enhancements of social rights adopted by the EU (this issue was referenced in our Stage 1 debate).

I therefore do not propose to accept this amendment – my view is that the power already contains some important caveats, which the Assembly will see as safeguards against what it would consider to be an inappropriate use of the power. These include the limitations in relation to taxation, retrospective provision and criminal offences (s. 11(4)) and the obligation to consult (s. 11(5)). It is of great importance to note that this power may be exercised only if the Assembly approves its use under the enhanced procedure. To my mind that, rather than imposing uncertain legal tests, is the right way to deal with the issue the Committee quite properly raises: to give the Assembly the power to scrutinise and, if necessary, reject the draft legislation where it considers the Welsh Government has overstepped the mark.

Recommendation 5. *We recommend that the Cabinet Secretary should table amendments to the LDEU Bill to provide that:*

(i) section 11 is repealed with effect after 5 years from exit day unless regulations, subject to the affirmative procedure, provide otherwise;

(ii) regulations made in respect of (i) must be informed by a review as to the continuing necessity for the powers provided by section 11;

*(iii) the review in (ii) should be conducted by a committee of the National Assembly and require public consultatio*n.

I have reflected on the careful consideration of this issue by the Committee and reasoned debate that took place in Plenary on Tuesday. I agree that the Bill can be strengthened on this issue and therefore, commit to working with Members of the Assembly on an amendment which will meet the Committee's recommendation.

I note that the Committee recommends that a review of the continuing necessity of the power should be conducted by a committee of the Assembly. I consider that the duty to conduct a review would be better placed on the Welsh Ministers. Requiring a committee of the Assembly to conduct a review could inadvertently raise questions about the powers of Assembly committees to conduct such reviews. The role of the Assembly, including its committees, is to scrutinise and hold the Government to account. I expect this to be no different in the case of section 11 of the Bill.

I therefore propose the amendment would place a duty on the Welsh Ministers to lay a report before the Assembly which outlines the Welsh Government's view on the operation and effect of the power and its continuing necessity. This will then enable a committee to scrutinise that report and to conduct any further reviews it considers appropriate in accordance with the mechanisms available. I also propose that the regulations to continue the effect of the power be subject to the enhanced procedure which gives the Assembly sufficient time to scrutinise the regulations and report before determining whether the power is to continue in effect.

Recommendation 6. *We recommend that the Cabinet Secretary:*

- *justifies why there is no consent role for the National Assembly under sections 13 and 14, particularly where the UK Ministers amend primary legislation, including Acts and Measure of the National Assembly;*

- *clarifies how the consent role for Welsh Ministers under sections 13 and 14 fits with the statutory instrument consent process set out in Standing Order 30A.*

We have noted and carefully considered the points made within this recommendation.

Fundamentally, the point relates to the role of the Assembly – as distinct from the Welsh Ministers – in consenting to UK Government legislation.

This whole issue needs to be seen in the context of EU-derived law, and in the context of what is necessary and appropriate to protect the legislation and the regulatory schemes operating in devolved areas currently governed by EU law (e.g. environment, food, farming) once the UK has left the EU.

Where the UK Government proposes secondary legislation which amends primary legislation within devolved competence (that is, UK Acts or Acts of the Assembly) the Assembly *does* have a consenting role by virtue of Standing Order 30A (the so-called statutory instrument consent motion process). That is an important safeguard, but not one which takes effect as a legal restriction. And there is no equivalent process where the UK secondary legislation *only* amends secondary legislation within devolved competence. That is a problem in itself, not least because the difference between primary and secondary legislation is often an entirely technical one. In the context of EU withdrawal, where a great deal of the legislation is secondary, the protection of devolved legislation and the regulatory schemes operating in devolved areas currently governed by EU law is of great importance.

The purpose of sections 13 and 14, as is plain, is that the UK Government should, as a matter of law, need consent in relation to secondary legislation within the scope of EU law made under new powers. That is inherently an important safeguard for those devolved regulatory schemes etc.

Under our provision, it is the Welsh Ministers rather than the Assembly which should give consent. That position is without prejudice to the Statutory Instrument Consent Motion process, and so where UK legislation amends primary legislation the Assembly's current role is preserved. More generally, it is appropriate that the consent process for UK secondary legislation should be conducted between Governments, rather than legislatures.

Recommendation 7. *We recommend that the Cabinet Secretary should table an amendment to the LDEU Bill, requiring Explanatory Memoranda accompanying regulations made under the Bill, to be clear and transparent as to:*

- *why the affirmative procedure should apply;*
- *what changes are being made by the regulations, including what is being changed, why it is being changed and the impact that the change will have;*
- *whether there has been adequate consultation and what was the response to the consultation;*
- *the impact the regulations may have on equality and human rights;*
- *whether the regulations raise matters of public, political or legal importance.*

I agree that further provision could be made on this matter to better enable the decisions to be made by the Assembly as part of the enhanced procedure. Under the Bill, whether the enhanced procedure is to apply is a matter for the Assembly, not the Welsh Ministers.

Therefore I propose that rather than explaining why the affirmative procedure should apply, a duty should be placed on the Welsh Ministers to explain whether they consider the enhanced procedure should apply. This could then assist the Assembly in making its decision on whether the enhanced procedure is to apply. I am bringing forward a Government amendment to this effect at Stage 2.

I am unconvinced that a duty to provide the other information specified is necessary. This information, and more, is currently provided in relation to each statutory instrument that is laid before the Assembly. I would not wish to begin constraining what should or should not be set out in explanatory memoranda. The Committee should be able to scrutinise each statutory instrument and the accompanying memorandum on its own merits.

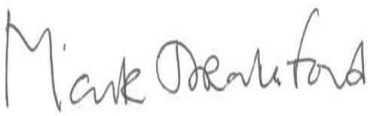
Recommendation 8. *We recommend that the Cabinet Secretary should table an amendment to the Bill, requiring Explanatory Memoranda accompanying regulations made under the Bill, to be clear and transparent as to:*

- *why the urgent procedure should apply;*
- *what changes are being made by the regulations, including what is being changed, why it is being changed and the impact that the change will have;*
- *whether there has been adequate consultation and what was the response to the consultation;*
- *the impact the regulations may have on equality and human rights;*
- *whether the regulations raise matters of public, political or legal importance.*

I propose a similar approach to recommendation 7. I am bringing forward an amendment which will require the Welsh Ministers to give reasons as to why the urgent procedure should apply. For the same reasons as set out in relation to recommendation 7, I do not consider it to be necessary or helpful to impose duties on the contents of explanatory memoranda.

I hope that these responses demonstrate my commitment to listen and to work collaboratively to deliver an effective piece of legislation that ensures legal continuity. I look forward to continuing to work with Members as the Bill progresses through its further stages.

Yours sincerely,



Mark Drakeford AM/AC
Ysgrifennydd y Cabinet dros Gyllid
Cabinet Secretary for Finance

MAKING WALES BETTER iwa GWNEUD CYMRU WELL

The impact of the EU Withdrawal Bill on the devolved legislatures and their respective powers

Briefing to the All Party Parliamentary Group on Reform, Decentralisation and Devolution on 26th February 2018 at the House of Lords, in partnership with Cardiff University's Wales Governance Centre

Contents

IWA Event Note on the Impact of the EU Withdrawal Bill on the devolved legislatures and their respective powers

Brexit negotiations, both parliamentary and international, have felt so long and protracted, and their presence in the media so ever present and dominating, that it begins to seem like, under its great centripetal force, the issue will engulf all others. So we can no longer have discussions merely about agricultural policy, rather about our post-Brexit agriculture; and the regime of austerity – the focus of bitter political discussion and one of the most seismic shifts in the UK in recent times – although not yet disappeared has now become absorbed into a discussion on how to mitigate the effects of Brexit on the economy.

It was the refreshing *reversal* of this hierarchy that made Lord Foulkes's opening statement welcoming all attendees to the most recent meeting of the APPG for Reform, Decentralisation and Devolution in the UK, organised in association with the Institute of Welsh Affairs and the Wales Governance Centre, notable: 'We couldn't have a better time to discuss devolution with relation to the Withdrawal Bill'. In this spirit, what was notable about the meeting's speakers and their contributions was that very reversal: not what Brexit will do to devolution, but rather what devolution means Brexit *must look like*. Through robust discussion of the shortcomings of the EU Withdrawal Bill, the speakers proposed concrete ways forward to meet the UK's coming constitutional challenges.

The meeting, held in the House of Lords on 26 February 2018, brought legal experts from Wales, Scotland and Northern Ireland in conversation with the parliamentary members of the APPG. Giving evidence were Dr Jo Hunt, Reader in Law at Cardiff University, Alan Page, Professor of Public Law at the University of Dundee, and Colin Harvey, Professor of Human Rights Law at Queen's University Belfast, and the message they issued collectively was a stark one. Not only does the EU Withdrawal Bill in its present form present an unworkable, inconsistent model for devolution going forwards, but, as Colin Harvey stated, it has become clear that 'the processes for intergovernmental cooperation in the UK are not fit for purpose'. Without descending into hyperbole, the three speakers made clear that the process of Brexit, as well as its eventual effects upon the distribution of power within the UK, must reflect the considerable shift in constitutional make-up that the UK has experienced in the past twenty years as a result of devolution, a shift that many in Westminster and more widely in England are not truly cognizant of.

Beginning the session, Colin Harvey focused on the fraught issue of the place of Northern Ireland in the negotiations. As Professor Harvey noted, many of the issues circling around Northern Ireland have actually been at the heart of discussions not just in Westminster but also in Brussels, affecting as they do a current and future EU member – the Republic of Ireland. However, Northern Ireland has had no assembly and no executive throughout these discussions. For Harvey, this is at the heart of the issue: the 'carefully crafted powersharing arrangements' set out twenty years ago in the Good Friday Agreement have been found wanting in a situation where the UK Government has unashamedly tied its own political future to the support of one of the parties of government in Northern Ireland, the DUP. This leads to a 'rather stark constitutional imbalance around the discussions', where Sinn Fein has turned its back on the Westminster system almost entirely as a result. It is 'merely a factual statement', he said, that one community has effectively been silenced by the DUP's cooperation with the Conservative government: 'the DUP does not speak for the majority in Northern Ireland that voted remain'.

In the face of this intractable situation, Harvey underlined the importance of the Good Friday Agreement. When the Northern Irish institutions of government are eventually reconstituted, they will still have to follow that agreement, and its principles are as pertinent now as they were in 1998. In a practical sense, Harvey called for respect for the Good Friday Agreement to find a place in the EU Withdrawal Bill. Clarifying what this might mean, Harvey argued that the Agreement needs legal expression and legislative recognition of the institutions it enshrines. The Northern Irish Brexit settlement will clearly be unique in certain ways: Harvey insisted that the promise of 'no diminution' of rights for Northern Irish citizens necessarily means, given the spirit of cooperation across communities enshrined in the Good Friday Agreement, that the EU Charter of Human Rights should be brought into domestic law.

However, Colin Harvey also stressed the wider significance from the Good Friday Agreement, and its possible utility across the UK. In pointing out the unsuitability of current systems of intergovernmental cooperation to the post-devolution, post-Brexit situation, Harvey highlighted a lack of trust and a failure to grapple constitutionally with the complexity of the UK since devolution that make structures such as the Joint Ministerial Council, which has taken on much greater significance during Brexit than it has previously, insufficiently flexible to deal with the levels of cooperation that the return of EU frameworks to domestic control will necessarily require. Business will not go back to how it was previously; all speakers made clear that more open and structured negotiation and discussion between the UK governments will be necessary from now on. Pushed on the issue by Baroness Janke, Harvey said that in practice this should

mean having the discussion about the common frameworks first and legislating when agreement is reached. Necessarily therefore, and in agreement with the other speakers, Harvey was calling here for the removal of Clause 11 from the EU Withdrawal Bill.

In a much anticipated speech happening at the same time as the meeting was held, David Lidington, the Cabinet Office minister, promised the repatriation of 'the vast majority' of powers to the devolved administrations (without specifying which), whilst also stressing the need for control over 'common UK frameworks' in order to protect the UK common market. Quick to pick up on this, Dr Jo Hunt began her statement by pointing out that these powers had indeed been exercised by the devolved administrations on behalf of the EU for many years; thus the Bill proposes to 'effectively recentralise powers that had previously been devolved'. Lidington's supposed concession, far from the forward step it appears, moves us in the opposite direction of travel to the last twenty years of decentralisation and devolution. What the bill makes 'startlingly clear', Hunt argued, was that Westminster parliamentary supremacy still exists above the 'permanent' devolved administrations.

Dr Hunt's key focus was on the issue of divergence within frameworks – a key feature of current EU frameworks such as the Common Agricultural Policy, which sees an 'un-common' approach to regulation of the common market. Similarly, the forms of free movement currently in place in the single market allow for local measures that may indeed hinder trade. For example, minimum alcohol pricing may be an obstacle to free movement of goods, but the health benefits it brings can trump that concern. Clause 11 as it stands does not allow for such flexibility. As Hunt argued, 'what do we know about a UK internal market, and will it come with the guarantees that such protections can be recognised'? 'The lack of transparency and any meaningful explanation of what the concept of the UK internal or common market is, beyond a ready appeal to it by politicians to justify harmonising UK wide measures is concerning', Hunt stated.

The internal market, an increasingly important concept for the UK, must be seen as a political as well as economic construction, revealing what will be valued and what will be protected against the demands for frictionless trade. The EU's model holds free movement rights against other objectives and principles, something there is no sign of in Government discourse surrounding the emergent UK internal market. Dr Hunt argued that 'we need to think about ways that these interests can be anchored down so that values can underpin a UK internal market. The adoption of amendments to the Withdrawal Bill which would provide for continued respect for such critical values should be strongly considered'.

And what is at risk if the Bill is not significantly amended? Professor Alan Page answered succinctly in beginning his statement, saying that 'Brexit has the potential to weaken if not subvert the UK territorial constitution'. This is in part because of the number of powers that shall be reserved without amendment to the Scotland, and Wales, Acts – far more than will be devolved according to research undertaken by Professor Page – but also because of the fundamental weakness of UK intergovernmental relations. Even where powers are reserved, functioning intergovernmental relations would ensure the voice of devolved nations were heard. The EU Withdrawal Bill, which according to Page 'has been drafted with scant regard to the principles on which the devolution settlements are based', will serve only to further impoverish these relations. In place of Clause 11, Page called for a standstill agreement while frameworks and the necessary revisions to repatriated EU law are worked out between the UK governments.

Professor Page's most striking intervention, however, was over the law-making powers UK Government ministers will gain over areas of devolved competence. Under the provisions of the Withdrawal Bill, they will gain powers 'in areas in which ministerial responsibility has been transferred' to the devolved ministers. The current proposal that these powers are only checked by a 'non-binding requirement of consultation' and no devolved parliamentary scrutiny is 'contrary to the principles on which the devolution settlement is based'. Instead, and as Page pointed out, as has been proposed by the Welsh and Scottish Governments, these powers, necessary to correct imported law, should only be exercised in areas of devolved competence with explicit consent of relevant devolved ministers.

Clearly convinced of the deficiencies of the current proposed legislation in dealing with the complexities of UK intergovernmental relations, Lord Purvis asked what can be done to improve this, and what structures could be put in place or added to the Bill. Jo Hunt responded that 'we've heard time and again about the lack of trust so it's about constructing institutions that people can have trust in'; there is a good case therefore, Alan Page argued, for putting such structures of intergovernmental relations on a statutory basis. Statutory requirements for meetings and discussions to take place between the UK governments at significant junctures – rather than the rather piecemeal pattern of the Joint Ministerial Committee – could form the basis for future adjudication of disputes in the UK common market. UK courts have been involved in the adjudication of EU trade issues.

Lord Foulkes suggested that perhaps the eventual structure this formalisation of intergovernmental relations implies is federalism, ensuring a devolved settlement that addresses

England too. However, what was clear from the preceding discussion was that first there needs to evolve a mature form of arbitration between the competing needs of the various governments of the UK: as Colin Harvey summarised, ‘powersharing needs to find a place within the UK arrangement’. We will be looking, no matter what, at a ‘remodelled UK’.

Merlin Gable, IWA

Professor Alan Page (Professor of Public Law at the University of Dundee) - Brexit and the territorial constitution

I start from the observation that Brexit has the potential to seriously weaken if not to undermine the UK's territorial constitution. I say that for two reasons.

First because it will alter the balance of powers and responsibilities between the UK parliament on the one hand and the devolved legislatures on the other, regardless of the outcome of the current dispute over whether EU competences in the devolved areas should be allowed to lie where they fall under the devolution settlements. That was the conclusion I drew from the analysis I did for the Scottish Parliament's European and External Relations Committee after the referendum, which showed that the majority of EU competences are reserved and will therefore fall to London rather than Edinburgh, Cardiff or Belfast. The Committee's interest understandably was in the powers that would fall to Scottish Parliament in the absence of any amendment to the Scotland Act but for me what was more striking was the extent of powers that would fall to the UK Parliament. The powers that are the subject of dispute – in agriculture, fisheries and the environment for example – are only a small proportion of those that will be repatriated.

The second is because of the weakness of UK intergovernmental relations. One of the purposes of a properly functioning system of intergovernmental relations should be to ensure that the interests of the devolved nations are taken into account in the exercise of non-devolved or reserved responsibilities, but that is a role which the current 'not fit for purpose' system performs patchily at best.

Allied to which there is a sense of a European Union (Withdrawal) Bill (EUWB) which has been drafted with scant regard to the principles on which the devolution settlements are based.

There is a long list of issues we might discuss. Let me pick out three: Clause 11 and the destination of repatriated competences; the proposed power of UK ministers to legislate in the devolved areas; and the protection of the devolved nations' interests in relation to reserved matters.

Issue 1: Clause 11 and the destination of repatriated competences

The 'debate' over Clause 11, much of which has been conducted behind closed doors, is revealing of a deep-seated lack of trust between the UK Government and the devolved administrations over the repatriation of competences.

On the one side, fear on the part of the UK Government that the devolved administrations – and an SNP Government in particular – will seize the opportunity provided by the repatriation of

competences to make mischief if they possibly can. In an effort to forestall this it is therefore proposing that EU competences should first be repatriated to London before any decision is taken on where they should finally sit.

On the other side, suspicion on the part of the devolved administrations that Clause 11 is not so much about legal certainty as stripping the devolved administrations of the leverage they would otherwise possess when it comes to the negotiation of common frameworks – the need for which, it should not be forgotten, is accepted by both sides to the current dispute.

The devolved administrations also fear that Whitehall departments will find it convenient to hang on to repatriated competences rather than pass them on, quite apart from which the grafting of a conferred powers model onto a reserved powers model will reduce the intelligibility of the settlement,[1] as well as make more difficult for the devolved administrations to carry out the responsibilities which in the original scheme of the Scotland Act certainly were regarded as theirs.

In any consideration of this issue it is important not to exaggerate the threat to the integrity of the UK single market posed by the repatriation of EU competences in the devolved areas. In particular, sight should not be lost of the part played by the reserved matters listed in Schedule 5 to the Scotland Act, for example, in maintaining the UK single market – many of which have a single market rationale as I explained in my paper for the Scottish Parliament's Europe and External Relations Committee in 2016. Once allowance is made for the part played by the reserved matters, it seems to me that the UK Government's 'guiding principle' can be more felicitously secured by a combination of the existing reservations and a 'standstill agreement' whereby the UK Government and the devolved administrations agree not to introduce, in the Prime Minister's words, 'new barriers to living and doing business within our own Union' while the business of common frameworks – and, no less importantly, the necessary revisions to retained EU law – are being worked out. As well as preserving the integrity of the UK single market, the combination of reserved matters and a standstill agreement would avoid the undeniably damaging consequences of Clause 11.

Issue 2: the proposed power of UK ministers to legislate in the devolved areas

Under the EUWB UK ministers will gain far-reaching powers to legislate in the devolved areas, powers which are said to justified by the scale of the challenge represented by Brexit and the shortness of the time within which it may have to be completed. To fully appreciate how radical

[1] 'One fears that only lawyers and Civil Servants, but by no means all of them, will be able to work out or give reliable advice on the full meaning of the affirmations as qualified by the negations. Beyond doubt, this complexity and difficulty of comprehension is a defect of the Act. It infringes the principle of intelligibility of law, a principle most to be prized in constitutional enactments': Neil MacCormick quoted in Page, *Constitutional Law of Scotland* (W Green 2015) p 115, fn 14. MacCormick was writing about the Scotland Act 1978, but the comment would apply equally to the Scotland Act 1998, as it is proposed to be amended by the EU (Withdrawal) Bill.

a departure this represents from the principles on which the devolution settlement is based we need to recall that there is no subordinate law-making equivalent of the 'sovereign' power of the UK Parliament to make laws for Scotland (SA 1998, s 28(7)).

UK ministers accordingly have only limited subordinate law making powers in the devolved areas, the principal one being in respect of the implementation of EU obligations, which may be exercised by UK ministers concurrently with their devolved counterparts (SA 1998, 57(1)). Under the EUWB, however, they will gain powers to correct deficiencies in retained EU law, to ensure continued compliance with the UK's international obligations, and to implement the withdrawal agreement in devolved as well as reserved areas, i.e. in areas in which ministerial responsibility has been transferred to the Scottish ministers as well as in areas in which it has been retained. It is contrary to the principles on which the devolution settlement is based therefore for these powers to be exercisable, as is currently proposed, subject only to a non-binding requirement of consultation with Scottish ministers – and with no provision for Scottish parliamentary scrutiny of their exercise (below). Instead, as the Scottish and Welsh governments have proposed, they should be exercisable only with the consent of the Scottish and Welsh ministers.

Issue 3: The protection of the devolved nations' interests in relation to reserved matters
As I have indicated the policy responsibilities that will fall to London following Brexit will far exceed in importance those that will fall to Edinburgh, Cardiff and Belfast. As well as the four freedoms, they include responsibilities in respect of immigration, competition policy, financial assistance to industry, and the negotiation and conclusion of trade agreements with non-EU countries to name only a few. The UK's intended withdrawal from the EU raises in a new and acute form the question of the protection of the devolved nations' interests in relation to matters decided at Westminster, an issue which in Scotland's case is as old as the (Anglo-Scottish) Union itself. The negotiation and conclusion of trade agreements with non-EU countries, in particular, is likely to be a matter keen interest to Scotland and the other devolved nations.

In the 2013 Memorandum of Understanding which governs relations between the UK government and the devolved administrations, the UK Government 'recognises that the devolved administrations will have an interest in international and European policy making in relation to devolved matters, notably where implementing action by the devolved administrations may be required', before undertaking to involve them 'as fully as possible in discussions about the formulation of the UK's policy position on all EU and international issues which touch on devolved matters (paras 18 and 20).

But whereas JMC machinery has been put in place for involving the devolved administrations in (UK) decision making on EU matters, no comparable machinery exists for involving the

devolved administrations in UK decision-making on international matters. That may be because such machinery has not been thought necessary hitherto, notwithstanding the breach of the Concordat on International Relations revealed by the 2001 Labour Government's 'deal in the desert', but with the UK's intended withdrawal from the EU the lack of such machinery, and with it the overhaul of the 'not fit for purpose' system of intergovernmental relations, will need to be addressed as matters of urgency.

ends

Dr. Jo Hunt (Reader in Law at Cardiff University) - Devolution: The Withdrawal Bill and the concept of the UK Common Market

David Lidington's speech on 26 February 2017 makes the promise of a 'considerable offer' to the devolved administrations in the form of a 'very big change' to the approach taken so far by HM Government to the repatriation of competences under the Withdrawal Bill. Under the original version of the Bill, Clause 11, which makes the exercise of devolved competence subject to the constraints of needing to respect 'retained EU law' (whilst the Westminster Parliament remains unshackled by any such requirement) effectively recentralises powers which have previously been devolved. The existing body of EU-derived rules continue to apply and constrain the devolved administrations and legislatures across policy areas which have previously been devolved to them, until such a point as Westminster or Whitehall agree to a release. In constitutional terms, the Clause moves the UK, in the opposite direction of travel to that of the last 20 years of devolution, which had been seeing an ongoing process concretising and solidifying of redistribution and resettlement of power and authority within the UK's territorial constitution.

The Withdrawal Bill makes startlingly clear the vulnerabilities of this order against what may be a version of the UK constitution centred on a still all powerful notion of Westminster Parliamentary supremacy. The devolution settlements, set out in the Scotland Act, the Government of Wales Act and the Northern Ireland Act have all seen ongoing reform and expansion, confirmed through successive referenda, and have now reached the point where their institutions are acknowledged as permanent, with primary legislative powers to exercise across a range of devolved areas. But these settlements are contained in Acts of Parliament and under a reading of the UK constitution which continues to reify a parliamentary sovereignty located in Westminster alone there is little to defend them against being undone by another Act of Parliament, and potentially, and particularly controversially, by secondary powers under the Withdrawal Bill. Other approaches to understanding the locus of sovereignty and the status of the devolved nations are held, and the current period is one of that could see these crystalise and replace the Westminster norm, but to date the debate in Westminster and Whitehall has discounted them as yet unformed and at best imminent.

The Clause 11 restrictions have been justified by HM Government as being needed to provide stability and consistency as the scaffolding of EU law is knocked away. Until now, EU law and the discipline of the EU's internal market has meant that the scope for differentiation within the UK has been minimised. Frameworks have been set by EU measures across the fields of agricultural policy, and environmental policy for example, which have placed limitation on how divergent the policy and law making by the different powers in the UK may be in those areas. As these frameworks are moved away from, HM Gov maintains there is a need to ensure that the

devolved nations do not use their devolved powers in such a way as to create new barriers to trade within the UK – that they respect the 'constitutional integrity' of the UK's internal or common market.

It is not yet clear what HM Government's new form of Clause 11 looks like. It has said that the starting point now is that powers returning from Brussels are to devolved, rather than held at Westminster. An approach to the creation of common frameworks which would be considerably more sensitive to the approach taken to date would simply see the removal of the Clause 11 constraint on the devolveds to comply with retained EU law. As things currently stand, where frameworks are needed the Westminster Parliament could legislate, with devolved involvement drawn in through respect for the Sewel Convention. However, this does not go as far as the means of participation in matters of EU governance held by the devolved nations. They currently are able to engage directly and indirectly in the policy processes that set EU wide common frameworks within an EU governance system, which, crucially has a constitutional orientation towards subsidiarity, that decisions should be taken at the lowest effective level. There is a strong case to consider amendments to the Bill that write in formal mechanisms for devolved involvement in making of common frameworks, and that these extend to both intergovernmental and interparliamentary relations.

Observers of the EU will know just how powerful the legal concept of the EU's internal market had been. To date, and through the adoption of harmonising legislation and through the reach of the enforcement of the free movement provisions, EU law has created a level playing field for trade across the Member States. But we need to acknowledge that this EU internal market does not necessarily demand uniformity, and gives space to local divergence and differentiation. That space for difference may be built into the legislation itself – whether in provisions of environmental legislation that allow for local variation, or in the rules of the CAP, which sees an increasingly 'un-common' approach to farming support and its related regulatory structures. Divergence may also be seen in the way the free movement provisions apply and the space for justification which may be afforded to protect local measures which hinder trade. So for example, Scotland may be recognised under EU internal market rules as being justified on public health grounds on introducing a minimum price per unit for alcohol – the public policy objectives outweighing the impact on trade, but what do we know about a U.K. internal market, and will it come with the guarantees that such protections can be recognised? The lack of transparency and any meaningful explanation of what the concept of the UK internal or common market is, beyond a ready appeal to it by politicians to justify harmonising UK wide measures is concerning.

It must be recognised that an internal market – any internal market, whether the UK's or the EU's – is not simply an economic construction, it is also profoundly political. It reflects a set of

choices, about what will be valued and what interests will be protected against the pressures of ensuring freedom of movement. When looking at the EU, we know the free movement rights within its internal market are not unconditional. The internal market is placed in a constitutional setting alongside other objectives and principles, including the mainstreaming of equality, promoting environmental sustainability, and subsidiarity. The UK notion of a common market is not, as far as we are aware from the way it has been presented to date, grounded in anything like this. So we need to think about ways that these interests can be anchored down, that values can underpin a UK internal market. The adoption of amendments to the Withdrawal Bill which would provide for continued respect for such critical values should be strongly considered.

ends

Dr. Colin Harvey (Professor of Human Rights Law at Queen's University Belfast) - Brexit, the EU (Withdrawal) Bill and Northern Ireland

Brexit has brought the position of Northern Ireland to the centre of an intense EU-wide debate that at present is circling around the nature of the border on the island of Ireland. The EU (Withdrawal) Bill, currently making its way through Westminster, is only one part of a bigger picture. It is the piece of Brexit legislation that aims to bring clarity and certainty but which seems to have succeeded in creating widespread confusion and disharmony. The focus here is on Northern Ireland, and I will concentrate on three themes: context; the Bill; and ways forward.

First, let us reflect on context. There is currently no government in Northern Ireland, in the sense that there is no functioning Executive or Assembly. Northern Ireland does have a Secretary of State, of course, and the Westminster Parliament is currently stepping in when required (for example, on the budget). Since the resignation of the late Martin McGuinness in January 2017 as deputy First Minister there have been ongoing attempts to re-establish the institutions. The latest effort failed, so at the time of writing there is much consideration of what next for power-sharing government.

Brexit has re-opened the British–Irish national identity fault line at the heart of Northern Irish politics in problematic ways. The majority voted to remain but the two main communities were notably divided. The Democratic Unionist Party (DUP) supported the Leave campaign and Sinn Féin argued for a Remain vote. The outcome means that Northern Ireland did not consent to leave, and given the contentious politics and history of that concept that fact still matters (in ways that transcend debates over the Sewel convention). There is a wider constitutional imbalance that also requires careful thought; the DUP has reached a 'confidence and supply' arrangement with the Conservative Party. In this deal the DUP has agreed to support the Government's Brexit legislation. In this the DUP is departing from the majority view in Northern Ireland. At a time of heightened anxiety about the future of the peace process, the agreement with the Conservative Party has done little to reassure those who are worried that the Westminster Government can act impartially with respect to Northern Ireland. When you add to this general scene the fact that nationalism/republicanism in Northern Ireland opted for candidates who stood clearly on an abstentionist platform and that unionism lost its overall majority in the Assembly elections of March 2017 then the complexities multiply. This all now combines to create a real risk of upsetting the fragile cross-community balances that exist in Northern Ireland. Although many will be reflecting on the Good Friday Agreement this year (2018 is its twentieth anniversary) it increasingly seems as if the fundamentals of the peace process are steadily being abandoned.

Second, many of the questions raised by the EU (Withdrawal) Bill are now well known. These include clarity around the status of retained EU law, the power of Ministers (both devolved and Westminster), the claim of a 'power grab' by the centre, the decision to exclude the Charter of

Fundamental Rights of the EU and a concern that insufficient recognition has been given domestically to the Good Friday Agreement (and subsequent agreements). There is some protection in the Bill for the Northern Ireland Act 1998, and it has been amended, but many of the concerns remain. It must be recalled that this will not be the only piece of legislation dealing with Brexit, and it seems increasingly clear that Northern-Ireland-specific legislation may be needed to address a range of issues emerging from Brexit and the collapse of the recent political negotiations. The elements noted above do need to be considered in this Bill but thought must also turn now to the sort of measures that may be required to secure the special arrangements for Northern Ireland that may flow from the EU–UK negotiations. There is additionally the matter of trust. The UK's flexible constitution comes under strain when trust breaks down to the extent that it now has, particularly between the constituent parts of the territorial constitution. The current efforts to secure a negotiated way forward, on common frameworks and Clause 11, are revealing the flaws in the UK's system of intergovernmentalism. This requires urgent attention.

Finally, what about ways forwards? An obvious point is that the Bill should be amended to reflect devolved concerns. The work around this will send an important signal about the sort of UK that might evolve on the other side of Brexit. Given the continuing discussions regarding the position of Ireland/Northern Ireland it would make sense to prepare the ground for the sort of special arrangements that logically follow the agreements reached thus far between the EU and the UK. In general, and with much reflection on the state of the Northern Ireland peace process, it may well be wise to return to the spirit of the Good Friday Agreement. That document has a determined focus on relationships across these islands and the sorts of values that would provide helpful guidance (including on human rights and equality). Recall the scale of the current constitutional imbalance within this ongoing process. There is a need to ensure voices are heard at Westminster across all communities, however this is achieved. On this issue, among others, the DUP (with its impressive electoral mandate) simply does not speak for Northern Ireland. A question for the Westminster Parliament is how it can mitigate the problems identified and show genuine respect for the power-sharing principles that are central to the peace process. There is also the urgent need for enhanced British-Irish intergovernmental cooperation, and on this the Good Friday Agreement provides an answer: the British-Irish Intergovernmental Conference. It is time for a meeting of this body to be arranged.

These are challenging times for Northern Ireland but concerns have plainly been heard in Dublin and Brussels. If it is to demonstrate respect for the peace process the Westminster Government will have to take care that it acts with 'rigorous impartiality' and that the fundamental principles flowing from the Good Friday Agreement are central to whatever happens next.

ends

Agenda Item 11

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