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Y Gweinidog Newid Hinsawdd
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Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref

Huw Irranca Davies, MS
Chair of the Legislation, Justice and Constitution Committee
Senedd Cymru
Cardiff Bay
CF99 1SN

25th October 2022

The Environmental Protection (Single-use Plastic Products) (Wales) Bill

Dear Huw,

Thank you for the Legislation, Justice and Constitution Committee report which was published on 10 October 2022 in relation to the Environmental Protection (Single-use Plastic Products) (Wales) Bill (“the Bill”).

Please see my response below to the set of recommendations within the report which I could not fully address during the Stage 1 General Principles Debate on 11 October 2022.

I have also written today to the Chair of the Finance Committee and the Chair of the Climate Change, Environment and Infrastructure Committee to set out my response to their recommendations.

Recommendation 1

During the Stage 1 debate, the Minister should explain why a Bill was not introduced early in the first year of the Senedd.

Response

Plans to ban and restrict single-use plastic products have been in policy development for several years. I am aware the Senedd has also previously called for legislative action in this area. However, EU Exit and the COVID-19 pandemic have undoubtedly presented some significant pressures and challenges in delivering these policies. The enactment of the United Kingdom Internal Market Act 2020 (UKIMA) caused an initial delay as we considered whether the market access principles in UKIMA had any impact on the Bill. As you are aware, the Counsel General and the Llywydd have both said the Bill’s provisions are within competence and we are confident the Bill’s provisions are fully enforceable and effective.

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

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

Recommendation 2

During the Stage 1 debate, the Minister should explain what the consequences would have been for the Welsh environment if the Bill had been subject to the Senedd's normal Stage 1 scrutiny process and full legislative scrutiny.

Response

The single-use plastic products targeted in the Bill are often difficult to recycle, are often littered and commonly found in our seas and rivers which can cause harm to our wildlife. This Bill is a key step in stemming the flow of plastic pollution and the use of the expedited process will mean it can contribute towards our action to tackle the climate and nature emergencies as quickly as possible.

Recommendation 3

During the Stage 1 debate, given her view that the legislation is needed urgently, the Minister should explain why she did not request the use of the Senedd's Emergency Bill procedure.

Response

The emergency Bill procedure was considered but was not regarded as appropriate in this instance as it completely bypasses Stage 1 scrutiny, which is necessary under specific circumstances. This was not the case for the Bill.

It was important we provided Committees with the opportunity to consider the Bill before amendments stages, even if it was a shortened one. To aid the pre-legislative scrutiny process we published the draft Bill before introduction. I also notified Committees of a small number of technical amendments to the Bill that we will be putting forward at Stage 2. I am pleased to note that your Committee was able to scrutinise the Bill and produce a comprehensive report despite the time constraints.

Recommendation 4

During the Stage 1 debate, given her view that the United Kingdom Internal Market Act 2020 "does not bite on the Bill", the Minister should explain why it was advanced as an argument to expedite scrutiny of the Bill.

Response

When I wrote to the Business Committee on this matter in July, there were two good reasons as to why the Bill should be expedited. Firstly, there was the environmental protection imperative, and secondly, the Court of Appeal's request for a legislative context in which to consider the arguments being advanced by the Counsel General in the (then ongoing) application for judicial review of UKIMA.

The Bill is part of our efforts to address the climate and nature emergencies, the scale of which means the health of our environment must be prioritised. Urgent change is needed to avoid leaving a legacy of plastic waste for future generations to deal with. We considered it necessary to introduce the Bill on an expedited timetable to ensure significant progress is made and we do not fall behind other countries in the UK and across the globe.

While the Supreme Court rejected our application for permission to appeal the Court of Appeal's decision that our claim for judicial review of UKIMA was premature, it left the door open for the substantive arguments to be considered in a future case. Our position - that the Bill is within competence and is fully enforceable and effective - is not incompatible with our view the Bill is capable of providing the context which would assist the Court in testing the arguments about UKIMA in a future case. Those two positions are not mutually exclusive. Expediting the Bill preserves all the options in terms of how that issue may be brought before the Court.

Recommendation 5

During the Stage 1 debate, the Minister should state clearly when she intends to commence all provisions of the Bill so that it is fully operational.

Response

I accept this recommendation. We intend for all commencement dates to be within this Senedd term i.e. by April 2026. To help support manufacturers, retailers and distributors of single-use plastic products, we will introduce later commencement dates for single-use plastic carrier bags, lids made from polystyrene and oxo-degradable plastics. This is intended to help businesses to adjust to the legislative change and to source alternatives.

The Bill engages the World Trade Organisation's (WTO) treaty on Technical Barriers to Trade Agreement. The WTO requires a six-month standstill period following the passing of the Bill and its being submitted for Royal Assent. This delay is needed to allow foreign operators to adapt their products to the new requirements. It is also customary to commence a Bill's provisions eight weeks after Royal Assent. As a result, the earliest any provisions can be commenced is autumn 2023.

Recommendation 6

During the Stage 1 debate, the Minister should confirm how the World Trade Organisation treaty on technical barriers to trade will impact on the commencement and implementation of the Bill's provisions.

Response

I accept this recommendation. Article 2.12 of the World Trade Organisation Technical Barriers to Trade agreement requires members to allow a reasonable interval between the publication of measures and their entry into force. This is to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member. In order to satisfy this requirement, it is intended that following the Senedd's approval of the Bill there will be a six-month standstill period prior to the Bill obtaining Royal Assent and the subsequent commencement of the Bill's provisions.

Recommendation 7

During the Stage 1 debate, the Minister should confirm whether the case study on oxo-degradable plastic is accurate and if not, why not.

Response

I refer to my response provided during the Stage 1 debate and to Recommendation 8 below for more details on this point.

Recommendation 8

No later than 10 working days after the Stage 1 debate, the Minister should write to us and the Climate Change, Environment and Infrastructure Committee, providing her detailed assessment of our case study on oxo-degradable plastic including any implications for enforcement of the law arising from the Bill.

Response

I do not agree the Legislation and Justice Committee's case study accurately represents the position. The case study deals with business-to-business supply whereas the Bill prohibits the supply of prohibited single-use plastic products to a *consumer* in Wales. A "consumer" is defined by section 5(9) of the Bill as "an individual acting for purposes that are wholly or mainly outside that individual's trade, business or profession".

On the broader question of enforceability, our position is the provisions of the Bill are within competence and are fully effective and enforceable, including the cross-border elements of the provisions which make it an offence to supply a prohibited single-use oxo-degradable plastic product to consumers in Wales.

Recommendation 9

During the Stage 1 debate, the Minister should explain how local authorities will be able to take enforcement action in relation to all prohibited items in the Bill, even if they are supplied from other parts of the UK, including, in particular, single-use carrier bags and oxo-degradable plastics.

Response

I refer to my answer given during the Stage 1 debate and to my response to Recommendation 10 below.

Recommendation 10

No later than 10 working days after the Stage 1 debate, the Minister should write to us and the Climate Change, Environment and Infrastructure Committee providing detailed information explaining how local authorities will be able to take enforcement action in relation to all prohibited items in the Bill, even if they are supplied from other parts of the UK, including, in particular, single-use carrier bags and oxo-degradable plastics.

Response

I consider, and the Llywydd agrees, that all the provisions in this Bill are within the Senedd's competence. That determination includes the provisions which prohibit the supply to consumers in Wales, from other parts of the UK, of single-use carrier bags and oxo-degradable plastics. Accordingly, we consider the provisions are fully effective and enforceable. We expect local authorities, with the benefit of the practical guidance we will provide, to enforce them, as they would any other Senedd legislation.

Local authorities already inspect premises relevant to the provisions of the Bill under existing statutory duties. My officials are developing comprehensive guidance to help businesses, consumers and local authorities understand the changes brought in by this legislation. In the first instance, the focus will be on education and engagement with retailers and business representatives, before enforcement action is taken.

Recommendation 11

During the Stage 1 debate, the Minister should, if UKIMA "does not bite on the Bill" and the Bill is within the Senedd's legislative competence, (and following the Counsel General's comments in Plenary on 5 October) explain the grounds on which the Welsh Government could make a legal challenge in relation to UKIMA and via which legal avenue.

Response

Our position is the Bill is within the Senedd's competence, that it is fully enforceable, and it is not affected by UKIMA. We take that view because this Bill makes provision in relation to devolved matters. UKIMA cannot and does not, in our view, cut across the Senedd's competence to legislate about those matters. It cannot impliedly repeal the Government of Wales Act 2006 (GoWA), which is a constitutional statute. It cannot reserve matters by the back door.

All the options for challenging UKIMA remain open to the Counsel General. The Counsel General has a power under section 112 of GoWA to refer this Bill to the Supreme Court. He has made no decision on that yet and he cannot do so until the Bill is passed by the

Senedd, and its final content is known. As the Counsel General has said, he will consider all the relevant factors in making his decision at that time.

The UK Government's Attorney General also has a power to refer the Bill to the Supreme Court and we will of course respond accordingly if he does.

Recommendation 12

The Minister should re-visit the definitions in section 1 of the Bill, with a view to tabling amendments that contain more complete definitions, which reduce the scope for loopholes to be exploited and provide greater certainty for those enforcing the Bill.

Response

I resist this recommendation. Legislative drafting often involves a trade-off between ease of understanding and absolute certainty. At the Climate Change, Environment and Infrastructure Committee evidence hearing I explained that while the drafting of key terms in Section 1 of the Bill differed to the drafting of those terms under the European Union's Single Use Plastic Directive, we consider these definitions to be the same in so far as their practical effect is concerned.

The drafting is not identical as we have sought to clarify the text or to remove wording we considered to be unnecessary, in accordance with our drafting practice. Our position, therefore, is the drafting of the key terms is clear. To aid further clarity, we will be publishing comprehensive guidance to help businesses, consumers and local authorities to understand the various legal definitions in the Bill. This will be developed collaboratively and undertaken in advance of the legislation coming into effect.

We will also work with stakeholders when developing communications relating to the Bill. This will include provision of information to help clarify the products being included.

Recommendation 13

The Minister should table amendments to the Bill to provide that there is a duty in the Bill to provide guidance; that the duty includes consultation with stakeholders and that the guidance should be subject to scrutiny by the Senedd.

Response

I accept this recommendation in principle. I will table an amendment to the Bill at Stage 2 to confer a duty on the Welsh Ministers to publish guidance about the single-use plastic products that are prohibited under the Bill and exemptions listed in column 2 of the Table in the Schedule.

Recommendation 14

The Minister should table an amendment to the Bill to provide a duty to consult stakeholders including manufacturers and producers before making regulations under section 3.

Response

I accept this recommendation. An amendment will be tabled to provide a duty to consult stakeholders including manufacturers and producers before making regulations under section 3.

Recommendation 15

During the Stage 1 debate, the Minister should explain the reasons for providing that a person outside Wales commits an offence where they supply a prohibited single-use plastic product to a consumer who is in Wales.

Response

I accept this recommendation. The Bill seeks to tackle the negative impacts from plastic pollution on our environment, wildlife, health and well-being. A person from outside of Wales who supplies products listed in the Bill to consumers in Wales will be liable for a criminal offence. We believe this will provide a deterrent to those wishing to undermine our legislation and will help prevent the inward supply of these prohibited goods in Wales.

We recognise there are practical issues in enforcing the offence in respect of distance selling (particularly when the item is being supplied from outside of the England and Wales legal jurisdiction). However, we intend to work with businesses to ensure we restrict the supply of these products into Wales as far as possible.

Recommendation 16

During the Stage 1 debate, the Minister should explain how section 5 of the Bill will be enforced as regards single-use carrier bags and oxo-degradable plastics.

Response

We consider, and the Llywydd agrees, that all the provisions in this Bill are within the Senedd's competence. That determination includes the provisions which prohibit the supply to consumers in Wales, from other parts of the UK, of single-use carrier bags and oxo-degradable plastics. Accordingly, we consider that the provisions are fully effective and enforceable. We expect local authorities – with the benefit of the practical guidance we will provide – to enforce them, as they would any other Senedd legislation. There will be further engagement and consultation with local authorities as we co-produce the guidance for single-use carrier bags and oxo-degradable plastics.

Recommendation 17

The Minister should ensure that detailed responses in relation to the substance of each recommendation are included in her response to this report, which should be provided no later than 10 working days after the Stage 1 debate.

Response

I accept this recommendation. Please accept this letter as fulfilling this recommendation.

Yours sincerely



Julie James AS/MS

Y Gweinidog Newid Hinsawdd
Minister for Climate Change