

Julie James MS  
Minister for Climate Change

25 November 2022

Dear Julie

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

Thank you for your letter of 25 October 2022 responding to our report on the above Bill.

It is not our normal practice to comment on government responses to our Bill reports but your response raises a number of important issues of principle that we believe need to be addressed.

### The effect of the United Kingdom Internal Market Act 2020 (UKIMA)

Our report acknowledged that:

*"... UKIMA cannot limit the Senedd's competence to legislate on matters that are devolved and within its legislative competence. However, our concern is that once law is made by the Senedd, UKIMA can impact on how effective that law is because of the market access principles it introduces across the UK." (paragraph 73).*

Our evidence session and report sought to seek your views on the impact of UKIMA on the Bill should it become an Act. Your response has been to say that the Bill's provisions are within legislative competence, a position with which we agree but which does not directly address the key issue of concern to us.

The response being used continues to conflate two separate issues: whether or not the Bill is within legislative competence and the impact of UKIMA on the effectiveness of the Bill once it becomes an Act. In our view the fundamental point is that UKIMA could impact on the law once it is made; it does not prevent the law being made by the Senedd in the first place.

By not acknowledging and addressing these issues, the Welsh Government is creating confusion and blurring understanding of what the Bill could achieve and therefore its effectiveness as a piece of law made by the Senedd. We have some concerns that this approach could also have had an impact on the amendments Members considered tabling during the amending stages of the legislative process, which is regrettable.

### Expedited Scrutiny and legal challenges

We note your response to recommendation 5 in our report which sought information about when you intend to commence all the provisions of the Bill so that it is fully operational.

In our view, given that the Bill was subject to an expedited scrutiny process on grounds of urgency, we would have expected to have been provided with a more precise implementation timetable, rather than being advised that “the earliest provision can be commenced is autumn 2023” and that the intention is “for all commencement dates to be within this Senedd term i.e. by April 2026”. These comments do not suggest that the legislation is so urgent that it needed an expedited scrutiny process.

Also, during the Climate Change, Environment, and Infrastructure Committee’s Stage 2 proceedings, we note you did not accept the need to include a commencement date (1 January 2024) on the face of the Bill. In doing so, one of the arguments you advanced was that the Welsh Government may need longer to develop guidance, consult with stakeholders and promote the change in law. Again, this does not suggest the urgency you have been advocating.

It is also worth repeating that if the situation was urgent, and the intention was not to fall behind the position in England and Scotland (where broadly the same policy outcome was achieved through regulations in 2020 and 2021), then Regulations could have been used to ban single-use plastics, with a Bill following at a later date to make provision for more plastic types (see paragraph 66 of our report).

In response to recommendation 4, you said:

*“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.**”[Our emphasis].*

It is not clear why taking a Bill through the full Stage 1 Bill process would have prejudiced options available to the Welsh Government to bring a matter to Court, or how those options are preserved by expediting the Bill. Your response links expediting scrutiny to preserving all options in relation to

possible Court action. However, your response to recommendation 11, which sought information about the grounds on which the Welsh Government could make a legal challenge in relation to UKIMA, only made reference to making a legal challenge in relation to legislative competence and not the impact of UKIMA should the Bill become an Act, which highlights again our point above about conflating two separate issues.

As such we do not believe that your response to recommendation 11 addresses the issue because it does not list all the options for legal challenge available; there is no reference to the grounds on which you would test UKIMA in the Courts which we assume, based on your previous legal challenge, is an option that would be covered under "all the options" you refer to in your response to recommendation 4.

In your response to recommendation 4 you acknowledged one of "two good reasons as to why the Bill should be expedited" was "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." We do not believe that it is possible to hold the view that UKIMA "does not bite on the Bill" and then to pursue action on the impact of UKIMA on the legislation through the Courts (save in relation to matters of legislative competence, although this would seem unlikely given the widely held view, including that of the Welsh Government, that the Bill is within the Senedd's legislative competence). If the view of the Welsh Government changed between July 2022 and September 2022 such that it no longer considered the Bill was a suitable vehicle in relation to the Court of Appeal's request referred to above, and therefore one of its reasons to expedite scrutiny no longer applied, it remains unclear why this has not been stated clearly in your response to recommendation 4.

We are therefore drawing your responses to recommendations 4, 5 and 11 and this letter to the attention of the Business Committee.

## Case study

Recommendation 8 of our report asked you to provide a detailed assessment of our case study on oxo-degradable plastic. Your response said that it did not accurately represent the position, stating:

*"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."*

We acknowledge that the Bill only prohibits the supply of prohibited single-use plastic products to a consumer in Wales; it does not prohibit business-to-business supply. However, in our view the Explanatory Memorandum does not make it clear or explicit that the Bill is not intended to cover business-to-business supply in this particular case. As such we do not believe that it is clear to the public that the farmer in our case study would still be able to purchase the mulch film and use it on their farm. The Bill's Explanatory Memorandum (at paragraph 7.7.31) identifies mulch film as one of

the biggest sources of plastic in agriculture. However, the Bill in its current form seems unlikely to do much to decrease the “2-3 million tonnes” of plastics used in agriculture every year.

The Bill’s Explanatory Memorandum does not in our view explain sufficiently the degree to which the items prohibited by the Bill are used by consumers or by businesses and therefore to what extent the Bill’s provisions would reduce the use of the prohibited single-use plastic items, particularly in relation to oxo-degradable plastic.

This again highlights that a full Stage 1 scrutiny process would have helped provide a greater depth of understanding of what the Welsh Government is seeking to achieve with the Bill and the impact it will have in reducing the single-use plastic items, covered by the Bill, in Wales. In turn, this would have provided Senedd Members with more information to assist them in considering amendments that could be tabled to potentially improve the Bill and contribute to reducing the impact of single-use plastic in Wales.

## Recommendation 12

We are concerned at the language used to justify your position on recommendation 12 and in particular the phrase: “Legislative drafting often involves a trade-off between ease of understanding and absolute certainty”.

Despite the Committee highlighting that one of the underlying principles of the rule of law is certainty (at paragraph 79) and therefore expressing concern at the use of this phrase in your evidence session, we are disappointed to see you repeat these words. We acknowledge that guidance for Welsh Government drafters recognises the need for a judgement to be taken around simplicity, clarity and precision but in our view this is different from “a trade-off between ease of understanding and absolute certainty”.

I am copying this letter to the Chair of the Climate Change, Environment and Infrastructure Committee.

Yours sincerely,

A handwritten signature in black ink that reads "Huw Irranca-Davies". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Huw Irranca-Davies  
Chair