

Mick Antoniw MS
Counsel General

23 April 2024

Dear Mick

Corrections to statutory instruments subject to the draft affirmative scrutiny procedure

First, may I congratulate you on your re-appointment as Counsel General. The Committee looks forward to continuing productive engagement with you on the matters which fall across our respective remits and responsibilities.

On 15 March 2024 my predecessor, Huw Irranca-Davies MS, wrote to you on the subject of the correction of Welsh statutory instruments. In that letter, it was noted that the Committee would likely write again to comment more broadly on the arrangements the Welsh Government has put in place to make Members of the Senedd aware of any corrections that will be made to a draft statutory instrument subject to the affirmative procedure, after a draft has been approved by the Senedd but before it is signed by one of the Welsh Ministers.

On 19 March 2024, during the Plenary debate on The Packaging Waste (Data Collection and Reporting) (Wales) (Amendment) Regulations 2024 (the Packaging Waste Regulations), my predecessor commented on these new arrangements. In doing so, he noted that, while the Committee initially saw the positives in these new arrangements, its welcoming of the new processes was not meant to be seen as providing support for substantive corrections being made to an instrument after Members of the Senedd have given it their approval.

In the debate, my predecessor explained that the Committee has concerns that there is a vires point to be considered. You will know that the draft affirmative procedure is a statutory requirement, and one which is set out in the enabling Act. The Welsh Ministers may not make such regulations unless a draft of the statutory instrument has been laid before, and approved by, the Senedd. My predecessor

noted that there may come a point at which proposed corrections are so substantive that the Senedd cannot be said to have 'approved' a draft of the instrument signed into law.

When the Welsh Government seeks correction slips from the SI Registrar to instruments already made, there are, the Committee has been told, strict criteria that must be adhered to, including that the corrections must be minor and obvious.

The Committee understood that the Welsh Government would apply such criteria when it proposed to make amendments to draft affirmative instruments after the Committee had scrutinised them and after the Senedd votes on them, but prior to them being made. This is not what we believe we might be seeing in some cases.

As a specific example, the comments made by the then Minister for Climate Change, Julie James MS, during the Plenary debate I refer to above on the Packaging Waste Regulations on how the Welsh Government would seek to correct the error highlighted in our ninth reporting point are of concern.

You may be aware that, in this example, the Welsh Government is proposing to replace an entire subparagraph in regulation 10 of the Packaging Waste Regulations after the Senedd has voted to approve the draft laid before the Senedd. My predecessor questioned how that was a minor and obvious correction. The then Minister for Climate Change said "I would submit to you that those [changes] are very technical and the likelihood of any Member of the Senedd thinking that that has substantively changed the policy intent of the regulations is zero."

Respectfully, we suggest that this misses a very important point. It is our understanding that legislation is interpreted first by reference to the text of the instrument, not by reference to policy intent. As such, we believe that of key importance when considering a proposed correction should be the effect of the legislation as it appears in the draft version, and whether the correction would change that effect in any substantive way. We are unclear why the Welsh Government may be of the view that a "technical" change would therefore automatically be minor (particularly when perceived "technical" changes, such as the addition of a comma, can change the meaning of text included in a statutory instrument).

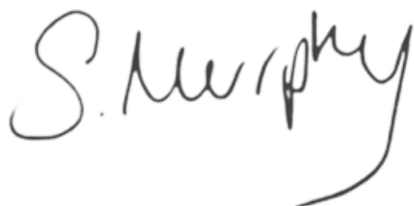
We would welcome clarification and confirmation that the Welsh Government is applying the same criteria for correction prior to making that the SI Registrar applies for correction slips. We would also welcome clarification on whether the then Minister for Climate Change's comments reflect the Welsh Government's policy on correction prior to making and, if so, the basis on which the Welsh Government considers this to be appropriate and *intra vires*.

In my predecessor's opening remarks during the debate on the Packaging Waste Regulations he said that the Committee's scrutiny of statutory instruments is genuinely undertaken in the spirit of trying to be a constructive critical partner in the overall legislation-making process. The Committee welcomes the Welsh Government's positive engagement in this Sixth Senedd to ensure better quality of Welsh

statutory instruments, and clarity and transparency around any corrections which may be subsequently needed. It is as this constructive partner that we seek this further clarity from you.

I am copying this letter to the new Cabinet Secretary for Climate Change & Rural Affairs, Huw Irranca-Davies MS.

Yours sincerely,

A handwritten signature in black ink that reads "S. Murphy". The signature is written in a cursive style with a large initial 'S' and a long, sweeping underline.

Sarah Murphy
Chair

