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Ein cyf/Our ref: CG/PO/359/2024

Mike Hedges MS, Chair
Legislation, Justice and Constitution Committee
Cardiff Bay
Cardiff
CF99 1SN

29 November 2024

Dear Mike

Legislation (Procedure, Publication and Repeals) (Wales) Bill

Thank you for your letter of 15 November regarding the Bill. My response follows.

The marshalled list for legislation

We briefly discussed the marshalled list during my evidence to the Committee.

Amendments to Bills are numbered in the order in which they are tabled, but the consideration of amendments is determined, usually, in the order in which they affect the Bill. Once all the amendments have been tabled they are then assembled and arranged (in other words 'marshalled') into the order in which they will be considered and voted upon. A "marshalled list" showing this order is then produced.

I agree with the sentiments expressed by Members of the Committee that both the marshalled list and voting on amendments as they affect the Bill rather as they are debated, can be confusing for those outside the immediate proceedings. We need to consider how to encourage fuller engagement in the legislative process and the way we amend Bills is an important part of that.

As my officials mentioned in evidence to you, the marshalled list and our current system of considering amendments is based on a paper-based print orientated world. This is a world we should have moved on from in other circumstances. We need to consider how technology that already exists could enable amendments to be viewed and voted upon in a more accessible and understandable way. I am keen for the Senedd and the Government to consider the opportunities that may be available to improve the current process.

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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.

Borrowing powers of the Welsh Development Agency

The Welsh Development Agency (WDA) was established under the Welsh Development Agency Act 1975 ("the 1975 Act"). The WDA was abolished in 2006 and its functions were transferred initially to the National Assembly as constituted in 1999 and then in turn (by virtue of the Government of Wales Act 2006) to the Welsh Ministers.

Although the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005 (S.I. 2005/3226) abolished the WDA and transferred its functions, property, rights and liabilities, the 1975 Act was retained albeit in amended form. A borrowing power that the WDA had under Schedule 3 to the 1975 Act was also transferred to the Welsh Ministers. However, this had become only a theoretical power by the time it was transferred. This was because under (UK) Treasury rules, if the Welsh Ministers (or indeed the former WDA) had exercised the power, the money would have been treated as a receipt, passing directly to the Welsh Consolidated Fund, producing no additional net resources for Wales. In other words, the sum borrowed would have been deducted from the moneys allocated to the Welsh Consolidated Fund by the Treasury – meaning, in practice, it was a power that could not be used.

The Wales Act 2014, which enabled the Welsh Ministers to borrow in limited circumstances (without that restriction), eventually repealed the power in the 1975 Act.

Response to questions in the Annex to the Committee's letter

Question 1: With regard to your responsibility for overseeing the timetable for, and delivery of, the Legislative Programme, please outline why the decision was made to attach a higher priority for the introduction of this Bill over the potential introduction of a Senedd Bill including provisions which currently appear within UK Government legislation, such as within the Renters' Rights Bill.

During my evidence on 4 November I explained that this Bill has been developed by our Legislative Counsel, who have worked on it as and when time has allowed. It has not been prioritised above other legislation, it is merely the case that it is now ready and a slot was available for introduction.

I do not view this Bill today as being more important than another one. Instead it is just part of the work we have been doing for some time: quietly and persistently working to improve the accessibility of Welsh law.

The Cabinet Secretary for Housing and Local Government has already provided evidence to the Committee on the Renters' Rights Bill, which I note amends Welsh housing legislation.

Question 2: The Explanatory Memorandum (EM) does not reference the Bill's impact on human rights. Please indicate:

- **whether the Welsh Government has undertaken an assessment of the human rights implications of the Bill's provisions; and**
- **in particular, whether the Welsh Government believes that section 2 of the Bill will have any impact on human rights.**

The Government has undertaken an assessment of the human rights implications of the Bill, and I am satisfied that its provisions are compatible with the Convention rights. Furthermore, I consider that the Bill has a positive impact on both human rights and the rule of law, because it puts the arrangements for the scrutiny and publication of legislation on a clearer legal basis and removes unnecessary clutter from the law of Wales.

The Government does not consider that section 2 gives rise to any issues about compatibility with the Convention rights. In any case where a road traffic order engages Convention rights, the Welsh Ministers will be required to act compatibly with those rights in making and enforcing the order. There are also statutory procedures for making and publicising road traffic orders, for example in SI 1990/1656 and SI 1992/1251 made under the Road Traffic Regulation Act 1984; and new section 37Z of the 2019 Act (inserted by section 3 of the Bill) will require the Welsh Ministers to publish all Welsh subordinate instruments they make that are not required to be made by Welsh statutory instrument.

Question 3: The EM, at paragraph 82, states that there is "no immediate intention" to use the powers in new section 37F(2)(c) and Schedule 1A, paragraph 6(3)(c), of the Legislation (Wales) Act 2019 (the 2019 Act), as inserted by section 1 of the Bill. The EM goes on to state that it is however "prudent to ensure there is an appropriate mechanism available to enable specific enactments to be listed if the Senedd or the Welsh Ministers consider particular instruments need not be laid before the Senedd." Please provide:

- **further justification for the inclusion of these powers, in the apparent absence of an intention to use them; and**
- **an explanation of why it was decided to confer these powers on the Welsh Ministers, rather than leave it for the Senedd to decide in each enactment.**

As I outlined to the Committee in my evidence, the intention with new Parts 2A and 2B is to codify and modernise existing legislative arrangements to reflect both the realities of devolution and of current practice. Section 37F captures both existing arrangements and practices, as well as improving on the current position.

At present if an enactment does not provide that a statutory instrument must be laid before the Senedd (either as part of the procedure for its making or otherwise), then the instrument would not be laid. New section 37F provides a 'default' such that Welsh statutory instruments not subject to a procedure under section 37C, 37D or 37F, must be laid. This will mainly affect commencement orders and certain other orders

However, there are some exemptions from the default requirement: "local" instruments that are not currently required to be laid, and those subject to the special Senedd procedure (and which would therefore be laid under that procedure). Officials have undertaken an exercise to identify any other enactments where there is not currently a requirement to lay an instrument before the Senedd, the effect of which should be maintained. To date that work has not identified any relevant enactments, however we cannot be sure that such an existing enactment would not be uncovered at a future point. The powers at section 37F(2)(c) and paragraph 6(3)(c) of Schedule 1A therefore provide a mechanism for adding such enactments to the list of exemptions from the default requirement.

I trust the Committee will therefore understand that I do not agree with your characterisation of the Government's intentions in your correspondence. As set out in the Explanatory Memorandum there is no "immediate intention", which is not the same as no intention ever.

It remains open to the Senedd to decide that powers in a future Bill to make subordinate legislation as a Welsh statutory instrument need not be exercised subject to a procedure. And in those cases, it is also open to the Senedd to set out that section 37F would not apply. The Bill does not constrain the powers of the Senedd in this regard.

Question 4: Please outline in more detail how new section 37Z(2) of the 2019 Act, which requires the Welsh Ministers to prepare and publish a determination about the numbering and classification of Welsh subordinate instruments, will operate in practice.

In developing new Part 2B we sought to ensure that where certain aspects of publication affected both Acts and Welsh statutory instruments, we made comparable provision. For example, section 37J deals with the numbering of Acts and section 37P makes analogous arrangements for instruments. Similarly, we have sought to ensure like for like arrangements exist for publication and preservation.

Because subordinate legislation made by the Welsh Ministers other than as a Welsh statutory instrument is not published by or on behalf of the King's Printer, we have not included the detailed arrangements for publication of this legislation in the Bill/Part 2B. Instead, as noted by your Committee, new section 37Z(2) requires the Welsh Ministers to prepare and publish a determination on such matters.

I expect the determination to set out the detailed requirements that officials will follow when arranging publication. As such it will need to outline the approach to be taken on numbering - for example, a new series to start each calendar year, where the number is to be located on different types of subordinate legislation, etc. It will also set out how such subordinate legislation is to be classified. For example, by subject and if so, whether a subject heading is recorded on the subordinate legislation or whether this forms part of a register of subordinate legislation.

The overall intention is that all subordinate legislation will be published when it is made. Where legislation has been superseded (for example, a Code of Practice has been updated), the current working assumption is that if the earlier version is replaced and is not on the Government's website a reference to it will be shown and it will be available on request. To support these publication ambitions it is necessary that a full record is made, and individual legislation is capable of identification (through numbering and classification).

The determination will serve as a clear point of reference to strengthen our approach to publishing subordinate legislation.

Question 5: Please outline why it is necessary to include the provision in paragraph 7 of Schedule 1A, which provides the Welsh Ministers with delegated powers to amend any enactment to reflect the effect of, or make provision consequential upon, the Schedule.

Please see Table 3 of the Explanatory Memorandum and paragraph 59 of the Explanatory Notes.

Question 6: Please can you indicate whether there are any provisions in the Bill that would enable the Welsh Ministers to change the procedure attached to an existing power delegated to the Welsh Ministers?

The only circumstances in the Bill under which the Welsh Ministers may change the procedure attached to an existing power, is set out in new section 37G. This is however a restatement of existing section 40 of the 2019 Act (and section 40 is omitted by virtue of paragraph 14 of Schedule 3 to the Bill).

There is no general power to change the procedure attached to existing powers.

Question 7: During the evidence session, your official referred to the Bill's creation of a new obligation on the King's Printer of Acts of Parliament to publish Welsh legislation in an up-to-date form. Your official also noted that other "certain gaps" in relation to the King's Printer will be filled by the Bill. Please provide an outline of these gaps and how the Bill seeks to address them.

In relation to Acts of Senedd Cymru, the Bill provides:

- an express obligation upon the King's Printer for Wales to publish the certified copy of the official print of the Act (see section 37M). The obligation to do so is only implied in section 115 of the Government of Wales Act 2006.
- a requirement to publish associated documents (section 37M) and a power to print these (section 37Y). This is not currently provided for in legislation, but in practice the King's Printer publishes the Explanatory Notes to Acts of Senedd Cymru. For consolidation Acts, the King's Printer also publishes tables of origins and destinations, and copies of the drafters' notes. In future this could also include impact assessment or other materials.
- a requirement to publish a table of the effect of the Act upon other enactments (if applicable) (section 37U).
- the requirement to publish means publishing online, something that is not currently expressly provided for.

In relation to Welsh statutory instruments,

- new sections 37N(2)(c), 37P(2)(b) and 37Q(2)(c) make provision regarding the subject headings found on statutory instruments.
- new section 37P(3) make clear that subsidiary numbers may be used in relation to instruments (see also paragraph 93 of the Explanatory Notes).
- new sections 37N(2)(b) and 37Q(2)(d) and (e) fully reflect the way that commencement information is both provided and included on instruments (see also paragraph 95 of the Explanatory Notes).
- there is a new requirement to publish associated documents (section 37Q(3)) and a power to print these (section 37Y).
- new section 37R is designed to reflect how an instrument subject to (what is referred to today as) the 'made affirmative' procedure is re-published. In making provision on this we have included an obligation on the King's Printer to include a statement that an instrument has ceased to have effect where the Senedd has not confirmed it under section 37D. The current practice is that in those circumstances such instruments are not republished with that information, which could cause a reader not to appreciate the subordinate legislation has ceased to have effect.
- there is a current requirement upon the Secretary of State to arrange for the King's Printer to publish tables of the effects on other enactments of statutory instruments that are published in something called the "annual edition". The Bill requires tables of effects to be published, but this is now online and they must be published in a much more timely manner than current legislative provision.
- as with Acts, requirements to publish means publishing online, something that is not currently expressly provided for.

These matters are either not dealt with, or not as comprehensively dealt with, in the Statutory Instruments Act 1946 or the associated 1947 Regulations.
The duties and powers of the King's Printer to print and sell Acts, instruments, draft instruments and certain documents (section 37Y) takes account of existing legislative provision, albeit this is not expressed as clearly, and also reflects the current arrangements in practice.

In preparing new section 37Z2 account has been taken of the Statutory Instruments (Production and Sale) Act 1996, but again has been designed to ensure there is express provision regarding delegation of functions.

The requirement upon the King's Printer to maintain and publish a record of Welsh legislation (section 37W) is new.

For completeness, it is worth noting two additional matters:

- the 1946 Act and associated 1947 Regulations make provision regarding statutory instruments made under “any Act” and by virtue of section 11A of the 1946 Act this includes Acts of Senedd Cymru and Measures. But the definition of “responsible authority” in regulation 1 of the 1947 Regulations does not encompass persons other than the Minister who makes an instrument or the Minister responsible for the preparation of an Order in Council. So in relation to Wales this includes the Welsh Ministers but does not expressly include any devolved Welsh authority that makes such an instrument. A statutory instrument may be made by the Welsh Ministers or another devolved Welsh authority, and as such the definition of Welsh statutory instrument now expressly provides for this (see section 37A). The Bill then goes on to ensure that the requirements within Part 2B fully reflect the relevant responsibilities of all parties. This will also avoid future Bills having to expressly apply the 1946 Act to devolved Welsh authorities if the Senedd is giving them powers to make subordinate legislation by way of statutory instrument (as is currently required).

- new section 37O fills a separate gap in the current legislative arrangements and reflects existing operational practices between the Welsh Government and the National Library of Wales.

Question 8: The EM, at paragraphs 70 to 72, outlines consultation relevant to the Bill’s repeal of the Domestic Fire Safety (Wales) Measure 2011. Specifically, it refers to a consultation on the inclusion of sprinkler systems in care homes for children; however – as the EM also states – the Measure was intended to apply to “all new and converted residences”. Please provide:

- **an outline of any further consultation that has been undertaken in respect of this proposed repeal;**

The requirements for installing fire suppression systems are set out in and, importantly, enforced through, the Building Regulations. This was not the case when the Measure was introduced. The most recent consultation regarding sprinklers in care homes was the last step in ensuring the Building Regulations reflect all aspects the Measure could have covered.

The Government did not consider it necessary therefore to undertake a separate consultation to establish whether any aspect of the Measure needed to remain, and it is now included in the Bill for repeal.

- **your assessment of the impacts of moving sprinkler system requirements from primary legislation to secondary legislation;**

The requirements for fire suppression systems are already in the Building Regulations, this Bill is not changing that position. When the Government included the requirements in those Regulations in 2013, this was seen as an important step forward. The Building Regulations help ensure that new buildings, conversions, renovation and extensions are safe, healthy and high-performing. They also provide arrangements for compliance and enforcement. They are supported by a suite of Approved Documents. Those involved in the construction and renovation of buildings are therefore looking in one place for the requirements that will apply. They do not need to go and find another piece of legislation to cover one discrete aspect. It is the same principle we are using for codification more generally.

Given that the sprinkler system requirements are already addressed by the Building Regulations, and it is the Regulations that are operative in practice, I do not consider there

are any adverse impacts from now repealing the Measure. The repeal is removing primary legislation that is no longer of practical utility or benefit.

- **confirmation as to whether current Building Regulations provide the same level of requirements for sprinklers systems as was included within the Measure.**

Given the limited extent to which the Measure was commenced, and the recent amendment in relation to care homes for children, the Building Regulations now cover the same matters that, in practice, the Measure covered. As such no gaps will be created in practice by the repeal of the Measure.

Question 9: The EM, at paragraphs 60 and 61, states that the Bill no longer includes repeal of sections 53 to 56 of the Countryside and Rights of Way Act 2000, following their commencement in England, despite it remaining the Welsh Government's policy not to commence these provisions. Please provide:

- **further information in relation to the Welsh Government's decision not to include these provisions within the Bill;**
- **an explanation as to whether, in place of repealing the sections, it could not have added "in England" to the end of the relevant provisions, which would appear to be in accordance with the other repeals in the Bill;**

The Government's position has been set out on sections 53 to 56 of the 2000 Act and it remains the case that we do not consider these sections should be commenced in relation to Wales.

However, the test we have used for including a repeal in the Bill is that the matter is suitable for inclusion because the provisions are no longer of practical utility or benefit. Something could fall into this category if it is:

(a) obsolete, spent or superseded;

(b) unlikely to be commenced, having remained un-commenced for a period of time over which the original context has changed; or

(c) otherwise unnecessary (for example, where the end is met by some other means).

So although sections 53 to 56 of the 2000 Act provisions have not been commenced, the opportunity to commence and bring in a cut-off date remains. There is therefore a policy choice about whether or not they are commenced. We consulted on the draft Bill on that basis.

The UK Government's decision means the provisions now appear to have some practical utility in relation to England. Further, for the time being at least, that they could not be repealed by a Repeals Bill operating in relation to England.

I reiterate the Welsh Government's position is that these sections should not be commenced in relation to Wales. But in the terms of the test we set ourselves for including matters in the Bill, there is no longer a strong argument that the provisions are obsolete, unlikely to be commenced as the original context is unchanged, or otherwise unnecessary.

Given our intention to maintain an ongoing programme of repeal Bills, and the nature of the consultation already undertaken on this matter, we felt it was important to stay within the parameters that we have set for ourselves. It is worth highlighting that these are the

parameters that have governed the numerous repeals bills (prepared by the Law Commission) that have been taken through the UK Parliament in the past.

Adding “in England” is one method (used elsewhere in the Bill, as you say) to, in effect, “repeal” provisions in relation to Wales; it is used when the provisions in question need to be left in place in relation to England and therefore cannot be repealed by means of simply omitting them from the Act that contains them, or by repealing the entire Act. The reasons why we have not done this here are as set out above.

- **an outline of the possible implications of any future decisions made by the UK Government to commence other provisions that the Bill proposes to repeal.**

In relation to the repeal through the Bill of provisions that have not been commenced, the UK Government does not hold equivalent powers.

Question 10: Please outline whether there are any implications of the references to Scotland in provisions in the Industry Act 1979 and Industry Act 1980 which are proposed for repeal.

There are no implications relating to the references to Scotland in the provisions in the Industry Act 1979 and Industry Act 1980 that are proposed for repeal. Any lingering references in those provisions to the Scottish Development Agency or the Scottish Development Agency Act 1975 have been redundant for some time, or have already been effectively repealed, by virtue of Schedule 5 to the Enterprise and New Towns (Scotland) Act 1990.

Question 11: Please indicate whether the Welsh Government has plans for a future programme of law repeals, and if so, when a Bill including such provisions is expected to be introduced.

We are already on record as saying that decluttering the statute book through repealing provisions that are no longer of practical utility or benefit, helps to bring clarity about the law is relevant to Wales. It helps avoid unnecessary time being spent and people being misled by obsolete laws. This is why the Government has previously set out that it would anticipate future accessibility of law programmes including such Bills.

The process is managed within the Office of the Legislative Counsel who, following this current Bill, will collect and maintain lists of suggested matters for inclusion in future Bills. The timing of the next Bill will be a matter for the next Government.

I mentioned in my evidence that we need to consider how certain types of Bills are considered, and I would be keen to see a repeals Bill procedure developed. There are a number of examples from around the Commonwealth we could consider, and certainly I think there could be an efficient and effective method put in place for such Bills to be dealt with.

Question 12: Please indicate whether consideration been given to any requirement to modify the long title of the 2019 Act as a result of the Bill.

At present we do not propose modifying the long title of the 2019 Act.

Question 13: When in a position to do so, please provide an update on the Welsh Government’s discussions with the UK Government in respect of the Minister of the Crown consents necessary to ensure that the Bill is within the Senedd’s legislative competence.

At the time of writing I am not in a position to provide an update, but will do so when further information is available.

Yours sincerely,

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