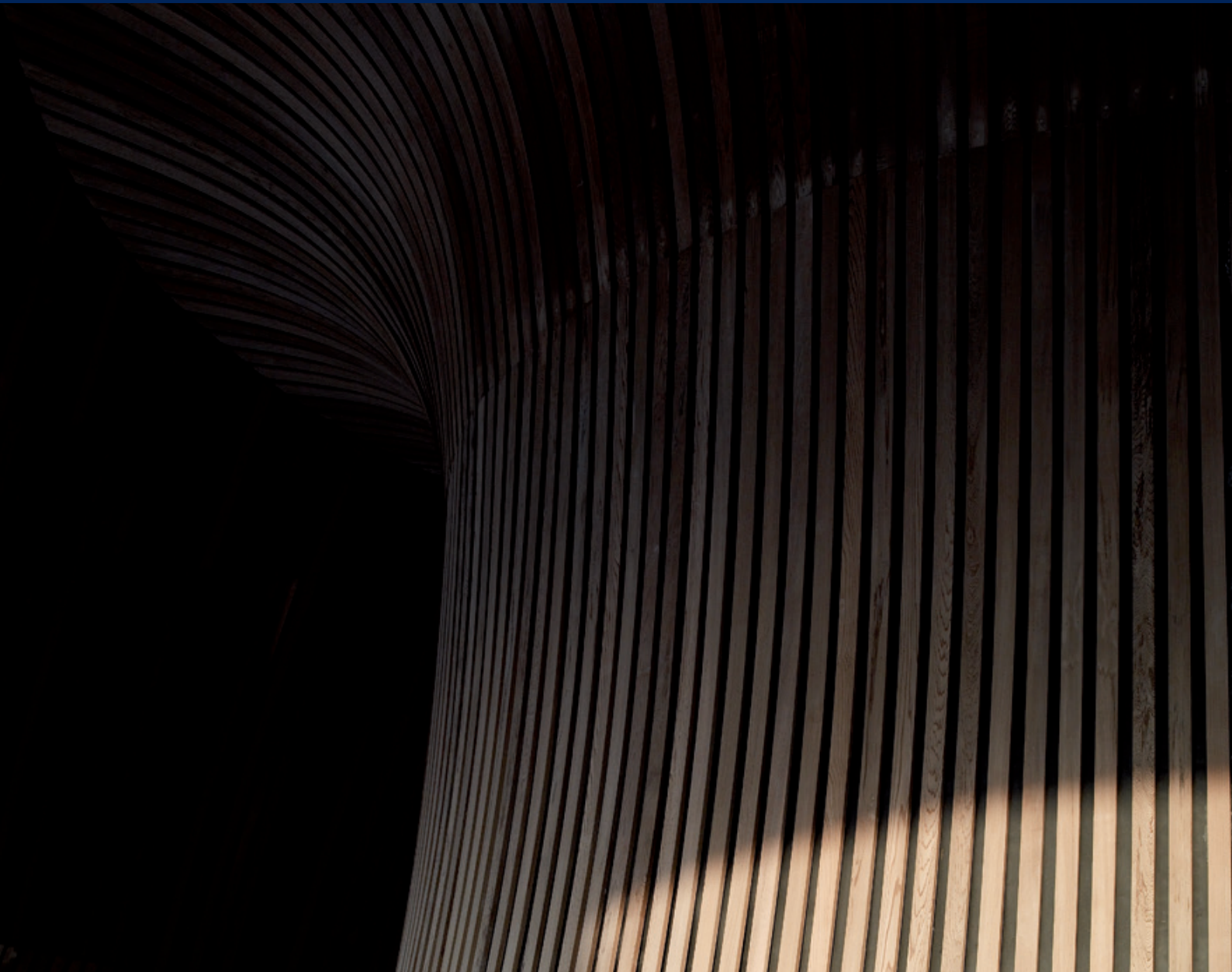


Report on the Local Government and Elections (Wales) Bill

March 2020



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Report on the Local Government and Elections (Wales) Bill

March 2020



About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:
www.assembly.wales/SeneddCLA

Committee Chair:



Mick Antoniw AM
Welsh Labour

Current Committee membership:



Suzy Davies AM
Welsh Conservatives



Carwyn Jones AM
Welsh Labour



Dai Lloyd AM
Plaid Cymru

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Recommendation 2. The Minister should table an amendment to section 18 of the Bill, such that regulations to provide for a database of electoral registration information are subject to a super-affirmative procedure in the first instance, and the affirmative procedure thereafter. Page 34

Recommendation 3. The Minister should table an amendment to the Bill to apply the affirmative procedure to the making of an order under section 10(1B) of the *Representation of the People Act 2000* (as inserted by section 26(1) of the Bill). Page 37

Recommendation 4. The Minister should, during the Stage 1 debate on the Bill, explain clearly why regulation-making powers contained in paragraphs 6, 10(3) and 10(4) of Schedule 4 to the Bill cannot be replaced by equivalent provisions on the face of the Bill. Page 44

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1. Introduction

On 18 November 2019, Julie James AM, the Minister for Housing and Local Government (the Minister), introduced the Local Government and Elections (Wales) Bill (the Bill)¹ and accompanying Explanatory Memorandum (the EM).²

- 1.** The National Assembly's Business Committee referred the Bill to the Equality, Local Government and Communities Committee on 26 November 2019, and set a deadline of 13 March 2020 for reporting on its general principles.³
- 2.** On 19 November 2019 the Minister issued a Statement of Policy Intent to accompany the Bill.⁴
- 3.** We wrote to the Minister setting out a number of specific questions in relation to the Bill on 23 January 2020.⁵ The Minister replied on 30 January 2020.⁶
- 4.** We took evidence from the Minister at our meeting on 3 February 2020.⁷
- 5.** On 6 February 2020, the Minister wrote to us with drafts of proposed Stage 2 amendments relating to the extension of the franchise for local government elections to certain prisoners and young people in custody.⁸ On 2 March 2020,

¹ [Local Government and Elections \(Wales\) Bill](#), as introduced

² Local Government and Elections (Wales) Bill, [Explanatory Memorandum](#) (EM) incorporating the Regulatory Impact Assessment and Explanatory Notes, November 2019

³ Business Committee [Report on the timetable for consideration of the Local Government and Elections \(Wales\) Bill](#), November 2019

⁴ Local Government and Elections (Wales) Bill: [Statement of Policy Intent](#)

⁵ [Letter to the Minister for Housing and Local Government](#), 23 January 2020

⁶ [Letter from the Minister for Housing and Local Government](#), 30 January 2020

⁷ Legislation, Justice and Constitution Committee, [3 February 2020](#)

⁸ Letter from the Minister for Housing and Local Government, 6 February 2020

the Minister wrote a further letter including a draft purpose and effect table to accompany the draft amendments, and a policy note.⁹

The purpose of the Bill

6. The Bill includes provisions that aim to establish “a new and reformed legislative framework for local government elections, democracy, performance and governance”.¹⁰ These include:

- reforms to improve electoral arrangements for local government, including extending the franchise to 16 and 17 year-olds and foreign citizens legally resident in Wales; improving voter registration; and enabling a principal council to choose between the “first past the post” or the “single transferable vote” voting systems;
- a general power of competence for principal councils and eligible community councils;
- reforms to increase public participation in local democracy, and improve transparency;
- provision relating to the leadership of principal councils, including encouraging greater diversity amongst executive members and establishing a statutory position of chief executive;
- the development of a framework and powers to facilitate more consistent and coherent regional working mechanisms;
- a new system for improving performance and governance based on self-assessment and peer review, including the consolidation of the Welsh Ministers’ support and intervention powers;
- powers to facilitate voluntary mergers of principal councils and restructuring a principal area;

⁹ Letter from the Minister for Housing and Local Government, 2 March 2020

¹⁰ EM, paragraph 1.1

- provisions relating to local government finance including non-domestic rating and council tax;
- miscellaneous provisions relating to information sharing between regulators, community polls, fire and rescue authorities, the Local Democracy and Boundary Commission for Wales and Public Service Boards.¹¹

7. According to the EM, the policy objectives and provisions of this Bill have been informed and shaped by a review of public services carried out by the Williams Commission,¹² as well as a series of documents, including White Papers and consultation papers.¹³

The Committee's remit

8. The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other matter relating to legislation, justice and the constitution within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.

9. In our scrutiny of Bills introduced in the National Assembly, our approach is to consider:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and

¹¹ EM, paragraph 1.2

¹² [Commission on Public Service Governance and Delivery Full Report, January 2014](#)

¹³ EM, paragraph 4.2 and chapter 4.

- any other matter we consider relevant to the quality of legislation.

2. Legislative Competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the National Assembly.¹⁴

10. In her statement on legislative competence, the Llywydd, Elin Jones AM, stated that in her view most of the provisions of the Bill would be within the legislative competence of the National Assembly for Wales.¹⁵ However, the Llywydd noted:

“Section 154 would not be within competence. This is because this provision requires the consent of the Secretary of State to bring it within the competence of the National Assembly for Wales and this necessary consent has not been obtained at this time.

Sections 18 and 22 would not be within competence. This is because these provisions require a section 109 Order under the Government of Wales Act 2006 to be made by the Privy Council and this has not been made at this time.”

11. On 27 January 2020, the First Minister wrote to the Llywydd to confirm that the Secretary of State for Wales “has now written to the Minister for Housing and Local Government providing consent in respect of the provisions removing the Welsh Ministers’ powers to make regulations enabling a local authority to make an application to a magistrate’s court to have a council tax debtor imprisoned.”¹⁶

12. In the same letter, the First Minister confirmed:

“(…) the Government of Wales Act 2006 (Amendment) Order 2019, made by the Privy Council at its 17 December meeting, has removed the competency issues in respect of the functions of electoral registration officers.”

¹⁴ EM, Member's Declaration, page 1

¹⁵ [Presiding Officer's Statement on Legislative Competence](#), 18 November 2019

¹⁶ [Letter from the First Minister to the Llywydd](#), 27 January 2020

13. During our evidence session, the Minister confirmed that the Welsh Government is satisfied that the Bill is within the National Assembly's competence, before adding:

“I'm very happy to confirm the Secretary of State has now given consent in relation to section 154, which removes the power of Welsh Ministers to reintroduce committal to prison of council tax debtors, so that is now in place; and the section 109 Order under the Government of Wales Act 2006 was made by the Privy Council on 17 December, which brings sections 18 and 22 within legislative competence, those are the sections on electoral returning officers and automatic registration.”¹⁷

Human rights

14. To be within the legislative competence of the National Assembly, section 108A(2)(e) of the *Government of Wales Act 2006* requires all provisions of a Bill to comply with the European Convention on Human Rights (ECHR).

15. We asked the Minister if there were any human rights issues with regard to the Bill. The Minister told us:

“We considered human rights issues all the way through the development of the Bill and we're very happy that the Bill is within the Assembly's legislative competence and is compatible with all convention rights.”¹⁸

Our view

16. We note the evidence from the Minister and the information provided in the EM.

17. We also note that the Secretary of State has given consent in relation to section 154 of the Bill, and that a section 109 Order under the *Government of*

¹⁷ LJC Committee, 3 February 2020, RoP [4]

¹⁸ LJC Committee, 3 February 2020, RoP [6]

Wales Act 2006 was made by the Privy Council on 17 December 2019, bringing sections 18 and 22 within the National Assembly's legislative competence.

3. General observations

The need for legislation

18. We asked the Minister why she considers the Bill to be necessary given that the Welsh Government has existing powers in this field. She told us:

“This Bill has been in gestation for around six years. It’s been the subject of four major public consultations on local government reform, a consultation on electoral reform, and two consultations on measures to tackle avoidance of non-domestic rates (...) All the consultations have generally expressed support for the proposals and have been influential in refining the proposed policy option. In addition, local government in Wales has long been asking for a power of general competence, which requires legislative change, and so this Bill does that as well.”¹⁹

19. The EM explains that the Bill proposes reforms “to improve electoral arrangements for local government, including extending the franchise to 16 and 17 year-olds and foreign citizens legally resident in Wales”.²⁰

20. We asked the Minister about the Bill’s enfranchisement of young voters in respect of local government elections in Wales. She said:

“(...) our policy proposal is that we do it, particularly now that the Senedd and Elections (Wales) Act 2020 is an Act. So, the Senedd franchise has already changed to encompass 16 and 17-year-olds. Certainly, we would want to make sure that the franchise was as similar as possible to the Senedd. It will not be identical, but as similar as possible.

In terms of the policy aim, though, I am a proponent of that (...) We are including a comprehensive package of education and awareness raising to go alongside that, and we know that, in a democracy, people

¹⁹ LJC Committee, 3 February 2020, RoP [8]

²⁰ EM, paragraph 1.2

who vote in the first election they can vote in continue to vote, so the idea is to get as many people as possible to vote in that first election whilst they're still in formal education, and then to hope that that carries forward into the rest of their life and they continue to vote.”²¹

21. We also asked the Minister why it is necessary to make the constitutional change of enfranchising foreign citizens in relation to local government elections in Wales. The Minister said:

“Well, similarly, we’re mirroring the Senedd Act. So, I think it’s important to keep the franchise as close as we can to it (...). On a policy point, I just think it’s the right thing to do. If people live and work and pay taxes and so on here, then they should have a say in their local services.”²²

22. We asked the Minister to give an overview of where the differences will be between the Bill and the Senedd and Elections (Wales) Act 2020. She told us:

“...there’s no difference for 16 and 17-year-olds or foreign residents, the difference is that we are planning to enfranchise some categories of prisoner, which has not been done in the Senedd and elections Bill.”²³

23. We asked the Minister why prisoner voting provisions were not included in the Bill on introduction allowing for Stage 1 scrutiny, given that the Bill has been in preparation for six years and amendments are to be tabled to the Bill at Stage 2.²⁴ She said:

“...the prisoner voting is specifically this timing because of what the Llywydd did in asking for a committee to look at prisoner voting in terms of the Senedd and elections Bill. And the timing of that meant that that report came out too late for us to be able to introduce it in

²¹ LJC Committee, 3 February 2020, RoP [22-23]

²² LJC Committee, 3 February 2020, RoP [26]

²³ LJC Committee, 3 February 2020, RoP [30]

²⁴ On 19 November 2019, the Minister told a plenary session of the National Assembly of her intention to introduce amendments to the Bill on prisoner voting at Stage 2; RoP, 19 November 2020 [187-188]. See also RoP, 25 September 2020, [312-317]

Stage 1, and I gave an undertaking to that committee to take their findings and the scrutiny of the provisions that they were undertaking into account in framing this.”²⁵

24. We questioned the Minister further on this point and she told us:

“So, there were three things that happened (...) First of all, elections weren’t devolved to us until April 2018, so we wouldn’t have been able to do it before that. Secondly, there was the European court decision that found the UK Government in breach, so each Government has to look to see how it resolves that issue. We’re not entirely satisfied that what the UK level did does actually solve that, although we won’t know until it’s tested in the courts, and that may or may not happen. And the third one was that the Llywydd asked the committee to do it. So, there were a series of things. What I would say, because I take the point about the scrutiny, is that the committee then undertook a very serious scrutiny of the provision. So, although it’s new in being introduced to this Act, it’s not unscrutinised. And we have followed the committee’s recommendations in introducing it.”²⁶

Balance between what is on the face of the Bill and what is left to subordinate legislation

25. The Bill contains 98 powers for the Welsh Ministers to make regulations, orders and directions, and to issue guidance. A full list and summary of the powers can be found in tables 5.1 and 5.2 of the EM.²⁷

26. In our letter to the Minister, we asked why it is appropriate to include 98 powers for the Welsh Ministers to make regulations, orders and directions, and to issue guidance. The Minister told us:

“This is a large Bill covering a significant range of provisions which are often technical in nature. I consider the Bill to contain a proportionate

²⁵ LJC Committee, 3 February 2020, RoP [52]

²⁶ LJC Committee, 3 February 2020, RoP [57]

²⁷ EM, chapter 5, pages 59-99

number of regulation/order making powers which will be mainly used to prescribe technical matters or enable the making of detailed provision within the framework set out on the face of the Bill.

Where there is a power to make provisions of a more fundamental nature, these require the provisions to be subject to the affirmative resolution procedure.

In many instances, the subordinate legislation making powers allow the Welsh Ministers to respond to future circumstances, the precise nature of which cannot be foreseen at the time of making the primary provision. The Welsh Government has sought, as far as possible and appropriate to set out matters of detail on the face of the Bill, albeit with scope to tailor the application of such matters to take account of local circumstances and future developments. It also allows for matters of detail, particularly around operational matters, to be prescribed.”²⁸

27. We also asked the Minister whether she felt the correct balance has been achieved between the provisions on the face of the Bill and what has been left for secondary legislation. The Minister said:

“Our aim has been to set out as much detail on the face of the Bill as possible.

I consider the amount of detail on the face of the Bill to be balanced and appropriate for primary legislation. When dealing with matters as complex and as detailed as elections and local government, it would not be helpful to try to put everything on the face of the Bill. You simply cannot, on the face of a Bill, account for every option or circumstance which might arise in a situation provided for in the primary legislation. Trying to do so would lead to unmanageably lengthy, complex and prescriptive primary provision. The secondary powers sought by Ministers will enable them to take necessary and

²⁸ Letter from the Minister for Housing and Local Government, 30 January 2020

proportionate action as the need arises - within a clear framework provided in the primary legislation.

Powers have been taken to allow us to provide for the technical requirements.

In developing the subordinate legislation, the Welsh Government will work closely with stakeholders in order to ensure the provisions are relevant, valid and proportionate.”²⁹

Consolidation

28. During our evidence session with the Minister, we raised the issue of consolidation, and where this Bill will fit within the Welsh Government’s current programme for consolidating legislation. The Minister told us:

“I think there definitely is a need to improve accessibility of the law on local government. The main piece of legislation is still the Local Government Act 1972 (...) we also have the Local Government Act 1989, and then the Local Government Act 2000. They are the three cornerstone pieces of legislation. It’s quite difficult to track amendments through those pieces of legislation, and there are myriad amounts of regulations and so on to go with them.

So, I do agree absolutely that consolidation will be the way forward. I think the Counsel General’s proposals on classification and communication in the current consultation will also help. Through the classification proposals, we’ll be able to locate all the law on local government administration so we can find it more easily, because that’s one of the big issues. And we’ll improve the information and explanation about the law that’s available. And then, longer term, we will be considering where local government should sit inside the Government’s consolidation proposals, but it’s not proposed to be one of the first two across the starting blocks.”³⁰

²⁹ Letter from the Minister for Housing and Local Government, 30 January 2020

³⁰ LJC Committee, 3 February 2020, RoP [10-11]

29. The Minister went on to confirm that:

“(…) it depends what other pieces of legislation are consolidated first, because the problem with local government (…) is that it encompasses almost all of them. So, (…) the first one that we’re looking at is the planning consolidation, but of course that takes in a local government element, so you’d want to do planning, electoral law and a number of other things first and then look at the rest of local government law, rather than the other way up…”³¹

Our view

30. We note the comments of the Minister regarding the need for legislation.

31. The Bill is large and relatively complex. For a Bill of 172 sections and 13 Schedules, we consider 98 powers to make subordinate legislation to be significant, particularly for one that has taken six years to complete.

32. Many of the powers taken are justifiable but we are concerned to hear the Minister say that:

“In many instances, the subordinate legislation making powers allow the Welsh Ministers to respond to future circumstances, the precise nature of which cannot be foreseen at the time of making the primary provision.”

33. As we note later in the report, the Minister acknowledged that the regulation-making powers in section 18 (Regulations to provide for a database of electoral registration) were taken because time constraints had meant that information about the database could not be included on the face of the Bill.

34. We do not consider it appropriate to take powers to deliver policy that has not yet been fully developed or foreseen. We consider this to be poor legislative practice. This approach provides too much power to the executive at the expense of the legislature. Rather than take such broad powers to make

³¹ LJC Committee, 3 February 2020, RoP [19]

subordinate legislation, a more appropriate approach to law-making would be to bring forward new primary legislation in response to policy need.

35. We are also concerned at the breadth of some of the powers being taken and comment on these separately in chapter 4 of this report.

36. Overall, the inclusion in the Bill of significant regulation-making powers, many of which are taken for the purpose of flexibility and which are also broadly framed in places, gives the impression of it being incomplete on introduction. In reaching this view, we note that the Welsh Government's statement of policy intent for the regulation-making powers in many places simply mirrors the (more limited) information contained in chapter 5 of the EM (related to the appropriateness and rationale for the powers being taken and the procedure to be followed).

37. The impression that the Bill is incomplete on introduction is exacerbated by the clear intention of the Welsh Government to bring forward significant policy at Stage 2 of the legislative process in relation to prisoner voting, bypassing Stage 1 and the scrutiny and consultation it affords.

38. We note the Minister's reason for the approach adopted on prisoner voting but her views are not persuasive.

39. In response to questioning on this point, the Minister suggested that the delay was in part due to a European Court decision. This decision was the Hirst case from 2005.³²

40. In November 2017, the UK Government proposed to introduce temporary voting licences for certain prisoners by the end of 2018.³³

41. In March 2019, the Scottish Government completed a consultation on prisoner voting and how it can ensure compliance with ECHR judgments and

³² [Hirst v. United Kingdom \(No 2\) \(2005\) ECHR 681](#)

³³ House of Commons Library, [Prisoners' voting rights: developments since May 2015](#), September 2019

has now introduced legislation in the Scottish Parliament to extend voting rights to prisoners serving sentences of 12 months or less.³⁴

42. While powers were not devolved to Wales until April 2018, through the Wales Act 2017, this legislation was subject to a wide consultation and the powers would have been known about before that date through various consultation exercises.

43. Given the approach taken in Scotland and the time that has passed since the Hirst case, we believe that there was sufficient opportunity for the Welsh Government to have included prisoner voting in the Bill on introduction or in a separate Bill. We consider that the Welsh Government should have taken the lead on this important issue and given its resolution a higher priority.

44. We note that the Minister has since provided draft amendments in advance of Stage 2 proceedings in respect of provisions related to prisoner voting. While welcome, given the position that has arisen, this should not be seen as a substitute for Stage 1 scrutiny. The approach adopted circumvents the scrutiny and consultation with stakeholders that would have taken place at Stage 1.

45. On introduction, the provisions of the Bill are subject to the requirements of Standing Orders 26.6(vii). As such, the EM should “summarise objectively what each of the provisions of the Bill is intended to do (to the extent that it requires explanation or comment) and give other information necessary to explain the effect of the Bill”.³⁵ No such information accompanied the amendments sent to us and the Equalities Local Government and Communities (ELGC) Committee, the Stage 1 Scrutiny committee for the Bill. We did, however, subsequently receive a purpose and effect table for the draft amendments on 2 March 2020, less than two weeks before our reporting deadline.

46. Furthermore, despite the intention to introduce provisions at Stage 2, the EM is silent on prisoner voting, containing no background information on the relevant history and subject matter.

³⁴ House of Commons Library, Prisoners' voting rights: developments since May 2015, September 2019

³⁵ [Standing Orders of the National Assembly for Wales](#), November 2019

47. We note that the ELGC Committee undertook a policy inquiry in 2019 on extending the franchise to prisoners. However, a policy inquiry is not a substitute for the scrutiny of a Bill. Whereas that Committee has looked at the general principles of extending the franchise to prisoners, it did not scrutinise specific legislative proposals or provisions. As we said in our report on the Senedd and Elections (Wales) Bill:

“We note that the Equalities, Local Government and Communities Committee published its report, *Voting Rights for Prisoners*, on 11 June 2019. The publication of the report does not, of course, equate to Stage 1 scrutiny of a Bill containing specific provisions on prisoner voting that give effect to policy intentions.

Extending voting rights to (...) prisoners represents a significant change to the electoral franchise. The legislative provisions that would be required to deliver such a change should, in line with good practice on law-making, be included in a Bill on introduction.”³⁶

48. We are therefore disappointed that significant areas of new policy and, in this case, potentially controversial policy are being introduced at Stage 2.

49. This is a point that we and our predecessor Committee in the Fourth Assembly have repeatedly made in relation to government and non-government legislation. It is disappointing that our views are being ignored on this important point of principle. Our purpose in continuing to make this point is not to criticise for the sake of it; it is to ensure that legislation is properly and fairly scrutinised to facilitate the making of good law that is effective for the people and organisations subject to its provisions.

50. We therefore repeat the following extract from *Making Laws in Wales*³⁷:

“In our view, the process of amending Bills at Stages 2 and 3 should be used as a means to debate and suggest improvements to a Bill that has been introduced. It should not be used (except in exceptional

³⁶ Constitutional and Legislative Affairs Committee, *Senedd and Elections (Wales) Bill: Stage 1 Report*, June 2019, paragraphs 285-286

³⁷ Constitutional and Legislative Affairs Committee, *Making Laws in Wales*, October 2015

circumstances or to deliver a committee recommendation made at Stage 1) to introduce large and significant amounts of legislative text that were, for whatever reason, not ready or unavailable at the time the Bill was introduced.

Recommendation 10: We recommend that the Welsh Government must introduce Bills that can be reasonably considered to be fully developed at the point of introduction."³⁸

- 51.** We have noted the views of the Minister regarding consolidation of legislation relating to local government.
- 52.** This is a sizeable Bill yet it forms only a small part of local government law in Wales. Accessibility of the law in Wales must be a priority and the law relating to local government would benefit greatly from consolidation, particularly given that this Bill is amending existing legislation from the 1970s and 1980s. We are therefore encouraged by the Minister's response that local government law is on the Welsh Government's horizon for consolidation.
- 53.** We have used the EM to help with our scrutiny of the Bill and we consider that it could have been more helpful, particularly regarding the content of guidance to be issued. We comment separately on this point in chapter 4 of our report.
- 54.** Also, chapter 5 of the EM contains two tables relating to the powers in the Bill to make subordinate legislation. We have noted a number of errors in Table 5.1. These are listed at Annex A. We consider the EM should be corrected accordingly following Stage 2 proceedings.

³⁸ In its **response** to recommendation 10 of the report the Welsh Government said: **Accept in part:** The Welsh Government agrees that Bills at introduction should be fully developed, and the work we are undertaking to review the planning and management of the Government's legislative programme referred to in our response to Recommendation 1 should help strengthen the rigour of the system supporting the development of Bills. However, we do not accept some of the comments on Fourth Assembly Government Bills in this respect. There are many reasons why Bills change during scrutiny, and this is an important part of the democratic process.

4. Specific observations on powers to make subordinate legislation

55. The Bill contains 172 sections, 13 Schedules and 98 powers to make subordinate legislation. Of the 98 powers:

- 50 are to make regulations of which one is subject to an enhanced affirmative procedure, 30 are subject to the affirmative procedure, five are subject to either the affirmative or negative procedure (depending on the circumstances), 10 are subject to the negative procedure and four are subject to no procedure;
- Three are to make orders of which one is subject to the affirmative procedure and two to no procedure;
- 22 are to make directions, all of which are subject to no procedure;
- 23 are to make guidance, all of which are subject to no procedure.

56. As indicated earlier, we wrote to the Minister about specific powers to make subordinate legislation and received a detailed response in advance of her evidence session.

57. We have restricted our views below to those provisions that either remain of concern or where there are important issues that merit being drawn to the attention of the National Assembly.

58. In reaching our views, we note that the Minister's letter of 30 January 2020 frames a number of answers by reference to being in line with the Welsh Government's Legislation Handbook.³⁹ We acknowledge that the Handbook provides advice and guidance on the drafting of legislation and is a very useful point of reference. However, we reach views on a particular provision based on a range of factors, including our own analysis of the Bill and the context of each provision.

³⁹ Welsh Government, [Legislation Handbook on Assembly Bills](#), May 2019

Part 1 – Elections

59. Part 1 of, and Schedules 1 and 2 to, the Bill, contain a range of provisions relating to elections. Of particular interest to us have been provisions related to the voting systems for elections to principal councils, a database of electoral registration information and election pilot schemes.

Voting systems for elections to principal councils

60. Section 5 of the Bill establishes that a simple majority system (known as ‘first past the post’) or a single transferable vote system can be used in polls at contested elections for electing the councillors of a principal council. Section 6 defines the two systems, while section 7 provides that first past the post applies unless changed by a principal council. Sections 8 and 9 deal with how change to the voting system is to be implemented, while sections 10 to 12 of the Bill set out specific circumstances under which each system can be used.

61. We asked the Minister why it is appropriate for each individual local authority to choose its own voting system, what the implications of having different voting systems in different parts of Wales for its citizens would be and also the impact of this approach on democratic engagement. She said:

“So, the whole point of this Bill really is to empower local authorities. So, a very large part of the Bill is around empowering local authorities to do various things. So, it seems to me that it would be entirely incompatible with that to make mandatory provisions for things such as voting in that. The provisions here are the same, they mirror the Senedd. If we want to change the way we’re elected here, we have a two-thirds majority; it’s the same for the councils. I don’t think there’s any magic in having the same system throughout. If you’re voting in the Ceredigion local election, you won’t be affected by how the people in Swansea are voting in their local election because you won’t be voting in it. So, it’s not any more confusing. Each person will still be only voting in their local authority area. So, I don’t really follow the complexity point. We want the local people, via their local councillors, in a representative democracy, to make that decision for themselves.

The other thing is that, if I wanted to make it mandatory, which I emphasise I do not (...) then you're talking about a wholesale system change off the back of a Bill that's introducing quite a lot of changes already (...) So, I'm very happy that it empowers local authorities to take control of their own voting system, and if it's right for their area, they're empowered to do that. And we'd obviously support them in doing that if they wanted to make that change. Once they've done it, they have to keep it for two electoral cycles so they can bed in. So, you can't chop and change either, but then you'd have to go through the two-thirds majority system again to take it away again."⁴⁰

Our view

62. We note that the provisions in the Bill could result in differing voting systems applying to local authorities that exist within the same electoral tier. These provisions are of constitutional interest and we note the Minister's comments explaining their inclusion.

Section 11 – Initial review by the Local Democracy and Boundary Commission, section 137 – Reviews of electoral arrangements and Schedule 1 – Initial reviews of electoral arrangements etc.

63. Section 11, and section 137 introduce Schedule 1 to the Bill.

64. Schedule 1 provides for the conduct of initial reviews of electoral arrangements by the Local Democracy and Boundary Commission in the circumstances where it has been directed by the Welsh Ministers to undertake such reviews under:

- section 11, where the Welsh Ministers have received notice (in accordance with section 10) that a principal council has resolved to change its voting system; or
- section 137, where either the Welsh Ministers have received a voluntary merger application or the Welsh Ministers have given notice under

⁴⁰ LJC Committee, 3 February 2020, RoP [38-39]

section 128(6) that they propose to make regulations to restructure the principal councils specified in the notice.

65. Paragraphs 1 to 8 of Schedule 1 set out requirements for undertaking reviews, including the preparation of an interim report (paragraph 7) and a final report (paragraph 8). Paragraphs 9 and 10 of Schedule 1 provide the Welsh Ministers with regulation-making powers to make provision for electoral arrangements for an area that is under review.

66. Paragraph 9 provides that, having received a final report from the Local Democracy and Boundary Commission, the Welsh Ministers may make regulations to implement the Commission's recommendations (with or without modifications) or make any other provision they consider appropriate for the electoral arrangements of the area under review. Paragraph 10 provides that, if the Commission is unable to submit a final report by the deadline set by the Welsh Ministers in their initial direction, the Welsh Ministers may, in the absence of recommendations from the Commission, make regulations setting out the electoral arrangements of the area under review and any relevant consequential changes. These regulations would not be subject to an Assembly procedure. The EM states:

“These are local regulations for which no procedure is provided for – as is the case for all such electoral arrangements regulations under the Local Government Act 1972 and the Local Democracy (Wales) Act 2013.”⁴¹

67. We asked the Minister why she believed it was appropriate to specify no Assembly procedure, given the significance of amending electoral arrangements. She said:

“These are local regulations for the making of electoral arrangements; it is a long established practice that electoral arrangements regulations are not subject to any procedure. The powers and procedures set out in the Bill are based on the existing powers to change electoral arrangements under the Local Government Act 1972

⁴¹ EM, chapter 5, Table 5.1, pages 76-77

and the Local Democracy (Wales) Act 2013. Orders and regulations made under those Acts have never been subject to a procedure.”⁴²

Our view

68. We note that the powers and procedures set out in the Bill are based on the existing powers to change electoral arrangements under the *Local Government Act 1972* and the *Local Democracy (Wales) Act 2013*.

69. We note the Minister’s comments that no procedure is applied to regulations made under paragraphs 9 and 10 of Schedule 1 because orders and regulations made under the 1972 Act and 2013 Act are not subject to a procedure. In our view this is not a valid justification for simply replicating the procedure attached to those powers.

70. Decisions on the procedures should be subject to an updated analysis and be made on the context and merits of the new Bill. This is an important point of principle.

71. We note that regulations made under paragraph 9 of Schedule 1 to the Bill may implement the recommendations contained in the report of the Local Government and Boundary Commission, with modifications. We also note that paragraph 10 of Schedule 1 to the Bill enables the Welsh Ministers to make regulations in circumstances where the Commission is unable to submit a final report by the deadline set by the Welsh Ministers in their initial direction. We believe that the exercise of powers in these circumstances should be subject to scrutiny by the National Assembly. We consider that the application of the negative procedure to such regulation-making powers would not be onerous and would also aid transparency.

Recommendation 1. The Minister should table an amendment to the Bill to apply the negative procedure to the making of regulations under paragraphs 9 and 10 of Schedule 1.

⁴² Letter from the Minister for Housing and Local Government, 30 January 2020

Section 13 - Rules about the conduct of local elections in Wales

72. Section 13(3) of the Bill amends the *Representation of the People Act 1983*, inserting new section 36A (Rules for local elections in Wales).

73. Section 36A(1) will give the Welsh Ministers the power to prescribe rules for local government and community council elections.

74. Section 36A(2) provides that, at local government level, the rules must: require polls to take place when an election is contested; establish the requirements for becoming a candidate for election; require votes to be given by ballot; and provide for polls to be conducted under either the simple majority or the single transferable vote system. Section 36A(3) provides that the same rules will apply to community council elections, save that these will always be based on the simple majority system.

75. Any regulations made under section 36A containing rules can also make “any other provision for the conduct of elections of councillors for local government areas in Wales”.

76. The statement of policy intent identifies rules that could be prescribed. These include the model of single transferable vote to be used, if a principle council chooses to adopt this electoral system in multi-member wards, and certain candidate requirements. It adds:

“The powers under this section will also be used to support any additional changes needed as a result of the extension of the franchise to 16 and 17 year-olds and foreign citizens legally resident in Wales.”⁴³

77. The EM states:

“This would amend existing legislation in relation to local government elections enabling the Welsh Ministers to prescribe rules for local government elections which impacts on how an election is conducted. Therefore the affirmative procedure is appropriate.”⁴⁴

⁴³ Statement of policy intent, ref. 2, page 4

⁴⁴ EM, chapter 5, Table 5.1, page 59

78. We asked the Minister why this wide power is needed and for what purpose it is intended to be used. She told us:

“Currently local elections in England and Wales apply the Parliamentary rules subject to adaptations – thereby limiting the rules the Welsh Ministers may prescribe. The new power will allow Welsh Ministers to set the rules for local government elections in Wales that deviate from Parliamentary rules allowing for the reflection of Welsh specific circumstances.

Such circumstances will include rules around:

How an STV count is to be conducted as well the format of the ballot paper at an STV election etc.;

- The removal of the requirement for candidates in local government elections to provide a home address to be published.
- Potentially, the requirement that a principle council must publish, on its website, a statement for each candidate standing in a local government election; and
- Potentially, the requirement for candidates standing as “independent” in local government elections to provide, at the point of nomination, to declare whether or not they have been a member of a political party.

The powers under this section will also be used to support any additional changes needed as a result of the extension of the franchise to 16 and 17 year-olds and foreign citizens legally resident in Wales such as electoral forms.”⁴⁵

⁴⁵ Letter from the Minister for Housing and Local Government, 30 January 2020

Our view

79. We note the Minister’s comments explaining why section 36A of the 1983 Act (as introduced by section 13 of the Bill) includes a wide regulation-making power and draw them to the attention of the Assembly.

Section 18 - Regulations to provide for a database of electoral registration information

80. Section 18(1) of the Bill provides the Welsh Ministers with the power to establish and maintain a database of electoral registration information. The power can specify the requirements and functions of the database and must provide for one of the public authorities listed in section 18(5) to maintain the database. Section 19 (Application of electoral registration of regulations) provides that the regulations made under the power in section 18 may also permit the transfer of the information to prescribed third parties.

81. The statement of policy intent notes:

“Establishing the database will enable the piloting and development of further reforms to the electoral process.”⁴⁶

82. The EM notes that the affirmative procedure would apply because the “regulations could amend primary legislation in connection with the electoral registration provisions.”⁴⁷

83. We asked the Minister to confirm why the database is needed and why she considers it appropriate to use executive powers to create such a database, rather than include details on the face of the Bill. The Minister said:

“A database of electoral registration information would allow us to trial innovations in the way we vote and where we vote. It could also assist Registration Officers with administration, combining the electoral information held by each county, with a common format, making the management of the registers more efficient and accurate, facilitating

⁴⁶ Statement of policy intent, ref. 4, page 5

⁴⁷ EM, chapter 5, Table 5.1, page 59

piloting and making easier the process of splitting registers at elections which cross county boundaries

Changes are currently being made to electoral management software to allow the extension of the franchise in Wales and the reform of the annual canvass. The database would need to work with this software and we would want these changes to bed in before we began any work on developing the proposals for the database. Any proposals to establish a database would likely be extensive and complex, and would need to be developed in close collaboration with stakeholders to ensure the database worked in the way we intended and in a way which would be of most use.

The available technology in this field moves forward at pace and we will want to be able to take on board any new innovations if the database was developed and establishing the data via regulations rather than through the Bill would enable these developments to be taken into account.

The provisions in the Bill around the creation of a database of electoral registration information are designed to be entirely compatible with existing data protection laws and with electoral law. If the database were to exist concurrently with electoral registers held by local authorities, those registering would be made entirely aware that their data would be held in two places. While the provisions allow for data to be shared with third parties, this would be strictly in line with the rules set out across the statute book on the collection, holding and sharing of electoral data.”⁴⁸

84. During our evidence session with the Minister, we probed this matter further, and asked whether time constraints had meant that information about the database could not be included on the face of the Bill. The Minister told us:

“The simple answer is ‘yes’, and we haven’t actually worked it out yet. So, once we’ve worked it out, we’ll do the regulatory impact

⁴⁸ Letter from the Minister for Housing and Local Government, 30 January 2020

assessments for the regulations and then put it in place. So, I think that's where we are at the moment.”⁴⁹

85. The Minister's official added:

“... there's already a great deal of system change in the electoral world in terms of the extension of the franchise and also the canvass reform changes—I think this committee looked at the regulations recently. So, it's important, I think, that we give the electoral community the opportunity to bed those changes in properly before we consider further change, and, of course, some of those already include system change to existing electoral databases, so those need to be in place before we can move to the next phase.”⁵⁰

Our view

86. We have already expressed our concern in chapter 3 of this report that this regulation-making power is being taken because of time-constraints and that the policy in this area has yet to be fully developed, despite the Bill being in preparation for six years.

87. We also note that:

- proposals to establish a database would likely be extensive and complex, and would need to be developed in close collaboration with stakeholders to ensure the database worked in the way intended and in a way which would be of most use; and
- the register and database will retain personal information without explicit consent;
- the regulations that could be made under the power would permit the transfer of information to third parties.

⁴⁹ LJC Committee, 3 February 2020, RoP [116]

⁵⁰ LJC Committee, 3 February 2020, RoP [118]

88. We note the Minister’s comments about technological change and new innovations. However, we are unclear why this would prevent principles about the establishment of a database from appearing on the face of the Bill.

89. In the circumstances, and in the absence of time to include information on the face of the Bill, we consider that a super-affirmative procedure would be appropriate in the first instance.

Recommendation 2. The Minister should table an amendment to section 18 of the Bill, such that regulations to provide for a database of electoral registration information are subject to a super-affirmative procedure in the first instance, and the affirmative procedure thereafter. .

Section 26 - Welsh Ministers’ discretion to introduce election pilot schemes

90. Section 26 makes various amendments to electoral legislation to allow the Welsh Ministers to direct a local authority (or as the case may be, a registration officer) to conduct a pilot.

91. Section 10 of the *Representation of the People Act 2000* provides that a local authority is able to submit proposals for piloting an electoral scheme at a specific local government election in their area to the Secretary of State and these proposals can be approved by the Secretary of State, with or without modification. From 24 May 2018, the functions of the Secretary of State and the Minister of the Crown are exercisable in relation to local government elections in Wales by the Welsh Ministers by virtue of the Welsh Ministers (Transfer of Functions) Order 2018. The Explanatory Notes to the Bill indicate that section 26 of the Bill makes amendments to the provisions in the 2000 Act, “so that a pilot may be made without a proposal first being given.”⁵¹

92. As such, section 26(1) of the Bill inserts section 10(1B) into the 2000 Act to permit the Welsh Ministers by order to require a principal council or an Electoral Registration Officer to undertake a local election pilot scheme. Such an order is at the discretion of the Welsh Ministers and is not subject to any Assembly procedure.

⁵¹ EM, Annex A – Explanatory Notes to the Local Government and Elections (Wales) Bill, page 311

93. The EM states that:

“This Order will be only be applied in circumstances where Welsh Ministers feel an electoral pilot would be of specific benefit to electors but no principal council is forthcoming. It is likely to be local in nature applying to a small number of principal councils at most.”⁵²

94. We asked the Minister why the power is subject to no procedure. The Minister told us:

“Any Order made under this power will only be applied in circumstances where Welsh Ministers feel an electoral pilot would be of specific benefit to electors but no principal council is forthcoming. It is likely to be local in nature applying to a small number of principal councils at most. It will be followed by a statutory evaluation undertaken by the Electoral Commission, any long term changes resulting from such a pilot would be subject to full Assembly scrutiny.”⁵³

95. We also asked the Minister how this power fits with the broader intention of the Bill to allow local authorities to make their own decisions on voting systems. The Minister said:

“So, the way that we do it at the moment is the local authority itself proposes the pilot scheme and then we go along with it or not. We’ve been having a conversation with them for quite some time via the [Wales Electoral Coordination Board] ... That’s the co-ordinating committee of returning officers and so on that we work with about wanting to run various pilots, particularly in the light of extending the franchise. And, frankly, we might want to do it over a wider area than one single local authority and we might, therefore, have to compel a local authority to comply with the pilot. I mean, that’s the short answer. We would very much hope not to be in that position. We very

⁵² EM, chapter 5, Table 5.1, page 61. Similar comments are made in the statement of policy intent, ref. 7, page 5.

⁵³ Letter from the Minister for Housing and Local Government, 30 January 2020

much hope to work with returning officers and electoral registration officers who wanted to run a pilot, and, actually, at the moment, we've got no indication that they wouldn't want to run the pilot. It's a backstop provision, effectively."⁵⁴

96. The Minister continued:

"We would not do it unless we'd had an evaluation by the Electoral Commission that went with it, that said we ought to be running a pilot in a particular area and we'd been unable to persuade the local authority to go along with that, and a whole series of ifs that you'd hope never to get to the other end of, but the Electoral Commission were keen that if they were recommending such a thing, we ought to have the power to do it."⁵⁵

Our view

97. We note that the approach adopted in the Bill by virtue of section 26 seeks to change existing provisions in the *Representation of the People Act 2000*.

98. One of the key themes of the Bill is empowering local authorities and advocating decisions being taken at the lowest possible level. It is therefore surprising to see a provision in a Bill that permits the Welsh Ministers to require a local authority to undertake a pilot electoral scheme against its wishes.

99. That being the case, it is even more surprising that a decision to issue an order, as currently drafted in the Bill, would be subject to no scrutiny by the National Assembly.

100. Any such decision by the Welsh Ministers, of any particular political party, could run the risk of being politically motivated and therefore contentious. Even if not politically motivated, this could be the perception. As we and our predecessor Committee have often highlighted, it is important to distinguish

⁵⁴ LJC Committee, 3 February, RoP [121, 122 and 125]

⁵⁵ LJC Committee, 3 February, RoP [127]

how powers could be used by the Welsh Ministers, rather than the intention of the Welsh Ministers currently in post when taking them.

101. In the circumstances we believe that the affirmative procedure should be applied to the making of an order under section 10(1B) of the *Representation of the People Act 2000* (as inserted by section 26(1) of the Bill).

Recommendation 3. The Minister should table an amendment to the Bill to apply the affirmative procedure to the making of an order under section 10(1B) of the *Representation of the People Act 2000* (as inserted by section 26(1) of the Bill).

Part 2 - General power of competence

102. Part 2 of the Bill provides principal councils and eligible community councils (“qualifying local authorities”) with a general power of competence.

Section 30 – Minor and consequential amendments and Schedule 2 – Minor and consequential amendments relating to Part 1: elections

103. Schedule 2 (introduced by section 30) sets out the minor and consequential amendments to existing legislation as a consequence of the election provisions set out in Part 1 of the Bill.

104. Paragraph 2(4) of Schedule 2 inserts a new section 36B into the *Representation of the People Act 1983*. New section 36B(4) provides the Welsh Ministers with regulation-making powers to combine elections of councillors of a Welsh principal council and elections of councillors of a community council if they are held on the same day. New section 36B(6) applies the affirmative procedure to these regulation-making powers.

105. The EM notes that these regulations would be subject to the affirmative procedure because:

“This would amend existing legislation in relation to local government elections enabling the Welsh Ministers to prescribe rules for local

government elections which impacts on how an election is conducted. Therefore the affirmative procedure is appropriate.”⁵⁶

106. We asked the Minister why she thinks this is an appropriate use of a Henry VIII power.⁵⁷ She told us:

“The Bill inserts new sections 36A and 36B into the Representation of the People Act 1983. These sections broadly replicate section 36 of the 1983 Act (with additional powers for the Welsh Ministers). These enable the Welsh Ministers to make rules in relation to the conduct of local government elections in Wales. Paragraph 2(4) of Schedule 2 to the Bill inserts new section 36B into the 1983 Act. This requires county and community council elections to be combined if they are held on the same day. It also enables the Welsh Ministers to make provision in connection with such combination of elections including modifying provisions in the Representation of the People Acts. This is identical to the power that the Welsh Ministers already have in section 36(3C) of the 1983 Act which we are proposing to replicate.

There are existing Regulations that have made minor modifications to the Representation of the Peoples Acts where such polls are combined. As electoral law evolves and amendments are made to the Representation of the Peoples Acts, further modifications may also be required. At this stage, we have no plans to modify the Acts in relation to combinations. However, if such modifications were required they would be specific and may need to be in place within a tight time frame and within the perimeters set out in sections 36A and 36B.”⁵⁸

Our view

107. We note that the Henry VIII regulation-making powers contained in new section 36B(4) of the *Representation of the People Act 1983* replicate identical

⁵⁶ EM, chapter 5, Table 5.1, page 78

⁵⁷ A Henry VIII power is a power to amend primary legislation by subordinate legislation.

⁵⁸ Letter from the Minister for Housing and Local Government, 30 January 2020

powers that the Welsh Ministers currently have in section 36(3C) (and which will be replaced by these new powers).

108. We note the justification for the taking of these powers and the use of the affirmative procedure and are content.

Section 35 - Powers to make supplementary provision

109. Section 31 confers the general power of competence on a local authority and provides that it can be used to undertake activities anywhere in Wales or elsewhere and to undertake commercial activities with or without charging. This general power of competence is subject to the boundaries set out in section 32 and the restrictions set out in sections 33 and 34 and any regulations made by the Welsh Ministers under section 35(3) or (4).

110. Section 35 contains various powers for the Welsh Ministers to make regulations to:

- remove or change statutory provisions that they think could prevent or restrict the ability of local authorities to use the general power of competence;
- remove any overlaps between the general power of competence and any other powers (although they cannot do this by cutting back on the general power itself);
- restrict what a local authority can do under the general power of competence, or making its use subject to restrictions.

111. These powers can be used in relation to a specific local authority, all local authorities or a type of local authority. The Welsh Ministers must consult with appropriate local authorities, their representatives and any other person they consider to be appropriate before making such regulations.

112. The powers mean that although section 32 of the Bill states that the general power of competence does not enable a local authority to do anything which it is prevented from doing by law, this is subject to any provisions which prevent its use. Such provisions can be changed by the Welsh Ministers.

113. The EM notes that the regulation-making powers within section 35 are an enabling power and are subject to the affirmative procedure when amending primary legislation, with the negative procedure to be used for regulations that only amend earlier regulations or other secondary legislation.

114. The Minister explained the purpose of section 31 and the meaning of the power of general competence:

“... local authorities can only do what a statute tells them they can do, and what this does—it’s a bit like the reserved powers model— is it reverses it, so they can do everything that they’re not specifically prohibited from doing. So, it literally reverses it. So, rather than seek a power to do what they want to do, all they have to do is check that they’re not specifically prohibited from doing something.”⁵⁹

115. We asked the Minister for what purposes she intends to use the powers under section 35 of the Bill. She said:

“Regulations under section 35 would be used to remove limitations where it was considered that those limitations unduly or inappropriately limit the use of the general power. Regulations may also be made to subject the general power to additional limitations if situations were to arise where the power were being used in an inappropriate manner. Any regulations would be subject to consultation prior to being made.

It is difficult to precisely identify, in advance, particular circumstances which would require the power to be used however, examples where the equivalent powers in the Localism Act 2011 have been used include:

- amending primary legislation to temporarily dis-apply provisions of an Act so as to allow Harrogate BC to host the Tour de France and Tour de Yorkshire events.

⁵⁹ LJC Committee, 3 February 2020, RoP [14]

- prohibiting local authorities from charging local residents to enter recycling centres to deposit household waste. Local authorities sought to argue that certain of these centres were additional to (and therefore discretionary) to the centres they were required to provide under provision in the Environmental Protection Act 1990. The UK Government disagreed and considered such action amounted to backdoor charges.

I intend to make use the powers in section 35 to make regulations prescribing conditions with which principal councils and eligible community council must comply prior to using the general power of competence for a commercial purpose.

It is my intention then when a council is contemplating exercising the general power for a commercial purpose, with the associated financial implications, they must do so with full understanding of the risks and consequences of doing so. It is proposed these regulations will require the preparation of a business case – this is a comprehensive statement of the financial and other implications of the intended activity, this business case will also require formal approval by the council. It is not intended that the business case would submitted to, or approved, by the Welsh Government. These regulations would be subject to consultation and the affirmative procedure before being made.”⁶⁰

Our view

116. The powers of general competence are an important provision in the Bill.

117. We note how the Minister intends to make supplementary provision by means of regulations with regard to qualifying local authorities exercising the power of general competence. We also note that the use of the affirmative or negative procedure in making such regulations is dependent on whether primary legislation is being amended,

⁶⁰ Letter from the Minister for Housing and Local Government, 30 January 2020

118. We are content with powers to make supplementary provision under section 35 of the Bill and in the use of the affirmative and negative procedures in the making of relevant regulations.

Part 3 – Promoting access to local government

Section 56 – Notices etc. of local authority meetings and Schedule 4 – Notice of local authority meetings and access to documents

119. Schedule 4 is introduced by section 56 of the Bill and amends the *Local Government Act 1972* to modernise provision about notices and other documents relating to meetings of principal councils and community and town councils, including facilitating electronic publication.

120. Paragraphs 6, 10(3) and 10(4) of Schedule 4 provide the Welsh Ministers with the power to make regulations which extend the duty to publish notices of meetings electronically to National Park Authorities and Fire and Rescue Authorities in Wales. The Bill amends the *Local Government Act 1972* and the *Environment Act 1995* to allow the Welsh Ministers to amend or repeal provisions which currently provide that National Park Authorities and Fire and Rescue Authorities are exempt from the requirement to publish notices electronically on their websites. Such regulations are subject to the affirmative procedure. The EM notes that this is because the powers enable the Welsh Ministers to amend provisions in primary legislation.⁶¹

121. We asked the Minister why such powers are being used, rather than putting the exemptions on the face of the Bill. She said:

“Paragraph 2 of Schedule 4 amends the Local Government Act 1972 so that new provision is made with regard to notices of meetings of principal and community councils. Paragraph 4 amends section 100J to maintain the status quo for National Park Authorities and Fire and Rescue Authorities by exempting these organisations from the new requirements. The power in Paragraph 6 is required in order to omit

⁶¹ EM, chapter 5, Table 5.1, pages 78-79

this exemption should it be decided to subject these organisations to these requirements in the future.

Paragraph 10 amends section 232(1ZA) of the 1972 Act so that local authorities must publish public notices electronically. Again National Parks and Fire and Rescue Authorities are not subject to this requirement, with the Welsh Ministers provided with the power to subject these organisations to this requirement at a future date if necessary.

We accept these are Henry VIII powers but they are very narrow powers for a discrete and specific topic impacting a narrow category of bodies.”⁶²

122. We questioned the Minister further on this point and she told us:

“This is a general Bill about the workings of elections, local authorities, and then you’d have to have a very specific provision about two very specific combined authorities. So, it didn’t seem like it would fit in the drafting of the Bill in any easy or happy way.”⁶³

Our view

123. We note that the regulation-making powers contained in paragraphs 6, 10(3) and 10(4) of Schedule 4 are Henry VIII powers and that the Bill applies the affirmative procedure to them.

124. However, where possible we believe that the inclusion of powers on the face of the Bill is preferable to the use of Henry VIII powers. We note that the Henry VIII powers are very narrow for a discrete and specific topic, impacting a narrow category of bodies. We note the Minister’s comments but given this Bill has been six years in preparation, we believe that a clearer explanation for their inclusion is necessary.

⁶² Letter from the Minister for Housing and Local Government, 30 January 2020

⁶³ LJC Committee, 3 February 2020, RoP [18]

Recommendation 4. The Minister should, during the Stage 1 debate on the Bill, explain clearly why regulation-making powers contained in paragraphs 6, 10(3) and 10(4) of Schedule 4 to the Bill cannot be replaced by equivalent provisions on the face of the Bill.

Part 4 - Local authority executives, members, officers and committees

125. The provisions within Part 4 of, and Schedules 5 to 7 to, the Bill require a principal council to appoint a chief executive and make provision about their role. Part 4 also places a duty on leaders of political groups to take reasonable steps to promote and maintain high standards of conduct by the members of the group; and makes provision for the publication and consideration of annual reports by standards committees.

Section 67 - Duties of leaders of political groups in relation to standards of conduct

126. Part 3 of the *Local Government Act 2000* established a statutory framework to promote and maintain high standards of ethical conduct by members and employees of relevant authorities in Wales (county or county borough councils, community councils, fire and rescue authorities and national park authorities).

127. Section 67 inserts a new section 52A into the 2000 Act. Section 52A(2) provides the Welsh Ministers with the power to make regulations about the circumstances in which members of a principal council in Wales are to be treated as constituting a political group and in which a member of a political group is to be treated as a leader of the group. The Welsh Ministers are obliged to “consult such persons as they think appropriate” before making these regulations.

128. The EM notes that these regulations would be subject to the negative procedure. The reason for this procedure is stated as follows:

“The substance of the duties placed on leaders of political groups in relation to standards of conduct is set out in full on the face on the Bill. These Regulations would allow for detailed definitions of the categories of people who would be affected by these provisions to be

amended. This is likely to change over time and require ad hoc, minor amendment.”⁶⁴

129. We also asked the Minister why the regulation-making power is subject to the negative procedure, rather than the affirmative, given that the content of such regulations could be politically sensitive and affect individual rights. She told us:

“I consider negative procedure to be appropriate for these regulations and in line with standard agreed practice. The substance of the duties placed on leaders of political groups in relation to standards of conduct is set out in full on the face of the Bill. These Regulations provide for detailed definitions of the circumstances in which a political group is defined and when a member is to be treated as the leader, this could change over time and require amendment.”⁶⁵

130. We explored this further with the Minister during our evidence session. She said:

“My understanding is that if it’s outlined on the face of the Bill, and the regulations are just a detail of that, then the standard practice is that that’s a negative procedure. It’s only where the procedure is not outlined on the face of the Bill that you require an affirmative, or indeed, a superaffirmative. So, our contention is that it is outlined on the face of the Bill, and therefore it doesn’t require any more of a procedure than the negative procedure.”⁶⁶

Our view

131. We have noted the Minister’s comments. However we remain of the view that the affirmative procedure would be appropriate given that the content of such regulations could be politically sensitive and affect individual rights.

⁶⁴ EM, Table 5.1, paged 65-66. The statement of policy intent, ref. 35, page 13 makes similar comments.

⁶⁵ Letter from the Minister for Housing and Local Government, 30 January 2020

⁶⁶ LJC Committee, 3 February 2020, RoP [135]

132. In reaching this view, we note the Minister’s response that the regulations may need to be amended over time. Applying the affirmative procedure will not affect how frequently regulations may be amended in the future.

Recommendation 5. The Minister should table an amendment to the Bill applying the affirmative procedure to regulations made under section 52A of the *Local Government Act 2000* (as inserted by section 67(2) of the Bill).

Part 5 - Collaborative working by principal councils

133. Part 5 of the Bill deals with the creation of corporate joint committees. A corporate joint committee can be created at the instigation of two or more principal councils (sections 75 to 78), or of the Welsh Ministers (sections 79 and 80). Each corporate joint committee will be a body corporate which will be created by regulations to be made by the Welsh Ministers under section 77 or section 79. Sections 81 to 87 include various provisions relating to corporate joint committees and joint committee regulations.

Section 82 - Amendment and revocation of joint committee regulations

134. Section 82(1) provides the Welsh Ministers with the power to, by regulations, amend any regulations which establish a joint corporate committee between local authorities. This power can be used to confer, modify or remove a function of a corporate joint committee, or “for any other purpose”.

135. The EM notes that the regulations would be subject to the affirmative procedure. It states:

“Provisions to be made under this power will confer new principal council functions on a corporate joint committee. Provisions may also remove functions (including to abolish a corporate joint committee). It is therefore considered that the affirmative procedure is appropriate.”⁶⁷

136. We asked the Minister to explain what she envisages “any other purpose” will cover and why the catch-all provision is necessary. The Minister said:

⁶⁷ EM, Table 5.1, page 67. The statement of policy intent, ref. 41, page 15, makes similar comments.

“Section 82 makes provision for the amendment and revocation of CJC regulations already made under section 77 (requested) or section 79 (not requested). Section 82(1)(a)-(c) is concerned with adding, modifying or removing functions. Section 82(1)(d) relates to the other aspects of the joint committee regulations, i.e. those matters listed in section 81 and which are the constitutional, governance and operational arrangements of that CJC. The power in section 82(1)(d) is necessary to ensure that joint committee regulations can be amended to respond to any changes that are necessary to ensure that the CJC continues to operate correctly, efficiently and effectively.

The section will provide that Welsh Ministers may not confer a function on, or modify or remove a function of, a corporate joint committee (under 82(1)) without the consent of the principal councils unless it is a function mentioned in 79(3).”⁶⁸

137. During our evidence session, we asked the Minister for further clarification and the circumstances envisaged that would require the powers to be used. She told us:

“So, it’s service failure, isn’t it? So, effectively, what we’re saying is that the joint committee carries out the function on behalf of its constituent local authorities. It can employ its own staff and so on, because it’s a legal entity, and presumably, it itself has some kind of performance issue with that, that the constituent authorities are not, for whatever reason, sorting out. So, it’s a series—it’s another set of the series of things that could happen, and so what we’re saying is that we would be able to say that the constituent authorities would no longer be able to delegate their function to that committee—or actually the other way round, would have to delegate the function to that committee, in circumstances of service failure, where none of the peer-reviews or service improvement measures had been effective

⁶⁸ Letter from the Minister for Housing and Local Government, 30 January 2020. “CJC” refers to “corporate joint committee”.

enough to deliver the services that the citizens of that area would be entitled to expect, effectively.”⁶⁹

138. The Minister added:

“So, it’s to envisage any circumstances in which, for whatever reason now unforeseen, the committee can’t continue to function correctly, so I was outlining a service failure there, but it could be that a piece of legislation changes at UK level, and that committee is carrying out both non-devolved and devolved public duties—for example, trading standards, for the sake of one that just pops into my head—and that we need to make changes to it in order for it to continue to do that..”⁷⁰

139. An official accompanying the Minister added:

“What we envisage also using (d) for is, for example, if there is a need to respond to a change of constitutional arrangements or voting rights or, simply, errors in existing legislation or application of future legislation, or legislation that has been missed in application to those CJs, we have a mechanism to be able to respond to that and deal with it. I think it’s important to realise that that, for any other purpose, is separate from the modification, the removal and the conferring of further functions to be transferred to those committees.”⁷¹

Our view

140. We note the Minister’s comments explaining how she intends using regulations to amend regulations made under this section “for any other purpose”.

141. We remain unclear about the meaning of “for any other purpose” and how this provision is intended to be used. We note that the Minister made reference to service failure. However, we are unclear why addressing such failure may not be achieved through regulations made under sections 82(1)(a)-(c), (as

⁶⁹ LJC Committee, 3 February 2020, RoP [142]

⁷⁰ LJC Committee, 3 February 2020, RoP [144]

⁷¹ LJC Committee, 3 February 2020, RoP [148]

highlighted by the Minister’s official), which allow for conferring, modifying or removing functions of a corporate joint committee.

Recommendation 6. The Minister should, during the Stage 1 debate on the Bill, explain:

- how she intends to use regulations under section 82(1)(d);
- the implications of removing section 82(1)(d) from the Bill.

Section 84 - Power of the Welsh Ministers to amend, repeal etc. enactments

142. Section 84(1) permits joint committee regulations and any regulations made under sections 82 (Amendment and revocation of joint committee regulations) or 83 (Supplementary etc. provision in certain regulations under this Part) to amend, modify, apply, disapply, repeal or revoke any enactment (which includes primary legislation). The regulations are subject to the negative procedure, by virtue of section 170(6) of the Bill.

143. The EM notes that the choice of procedure is because:

“These will largely be technical / procedural in nature and will only be used where necessary for the purposes of ensuring the effectiveness of regulations for corporate joint committees in this part.”⁷²

144. We asked the Minister why this provision is subject to the negative procedure when it contains a Henry VIII power to amend, modify, apply, disapply, repeal or revoke primary legislation. The Minister said:

“The power under section 84(1) relates to the scope of joint committee regulations (sections 77 and 79) and amending or supplementary regulations (sections 82 and 83 respectively), with each of these powers being subject to the affirmative procedure.

Section 84(1) sets out the scope of the above regulations but is parasitic on them, i.e. the affirmative procedure applies. It appears that the entry in the table of regulation making powers is incorrect it is my

⁷² EM, chapter 5, Table 5.1, page 69

intention that the powers under section 84(1) will be subject to the affirmative procedure.”⁷³

145. Section 84(2) gives the Welsh Ministers the power to amend, modify, apply, disapply, repeal or revoke any enactment in relation to any enactment (which includes primary legislation) for the purposes of, or otherwise in connection with, Part 5 of the Bill which deals with corporate joint committees.

146. These regulations will be subject to the affirmative procedure, by virtue of section 170(4) and 170(5)(j), although the EM refers to them as being subject to the negative procedure. The EM explains that the choice of procedure is because:

“These will largely be technical / procedural in nature and will only be used where necessary for the purposes of ensuring the effectiveness of regulations for corporate joint committees in this part.”⁷⁴

147. The statement of policy intent for subordinate legislation to be made under the Bill contains no information about regulation-making powers under section 84.

148. We asked the Minister to explain why the powers are required and what she envisages that they will be used for. The Minister said:

“The power under section 84(2) is intended to deal with the need to revoke specific enactments as a consequence of the creation of CJC’s but which do not necessarily relate to CJC’s, i.e. revoking provisions that relate to joint transport authorities and strategic planning panels. The power to amend enactments in section 82(1) is tied in to the various vires in the Part to: establish a CJC; amend Regulations which establish a CJC; make supplementary etc. provision in relation to a particular CJC or more generally for the purposes of or in consequence of regulations establishing CJCs.

It is not clear that these vires would, beyond doubt, allow the Welsh Ministers to make Regulations which amend the law to, for example,

⁷³ Letter from the Minister for Housing and Local Government, 30 January 2020

⁷⁴ EM, chapter 5, Table 5.1, page 69

abolish the powers to create JTAs generally or Strategic Planning Panels generally (which will of course also involve consideration of the abolition of any existing such bodies).

Section 84(2) is a wide power which will allow the Welsh Ministers to do these things but, because such regulations must relate to the part, it still has a sufficient level of constraint to ensure that it is proportionate and constitutional.”⁷⁵

149. We also asked the Minister to explain how section 84 will work when used in conjunction with sections 82 or 83, when regulations made under those sections are subject to the affirmative procedure. She told us:

“Regulations made under sections 77 and 79 are “joint committee regulations”. Section 81 makes provision for the content of those regulations.

Section 82 provides a power to amend joint committee regulations once made to ensure that the Welsh Ministers and local government can respond to any changes that are necessary to ensure that CJC’s continue to operate correctly, efficiently and effectively both in terms of their governance and the exercise of their functions.

Section 83 makes provision for supplementary etc. provisions which may be necessary as a consequence of or to give effect to (initial) joint committee regulations OR amending regulations under section 82.

There is also a power to make standalone regulations of general application (see 83(3)).

Section 84 clarifies the scope of the above regulations and provides a further power to deal with potentially redundant provision on the statute book as they relate to Joint Transport Authorities and Strategic Planning Panels (see 22 below).

⁷⁵ Letter from the Minister for Housing and Local Government, 30 January 2020

Each of these forms of regulations is subject to the affirmative procedure.

In terms of the procedure which applies to section 82 we intend to table stage 2 amendments to clarify the process by which an application to amend joint committee regulations may be made.”⁷⁶

Our view

150. It is our long-standing view that Henry VIII powers should be subject to the affirmative procedure.

151. We note the Ministers comments, and welcome her intention to apply the affirmative procedure to the making of regulations under section 84(1) of the Bill.

Recommendation 7. The Minister should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 84(1).

152. We note the Minister’s explanations for the use of powers under section 84(2). Under the Bill the affirmative procedure will apply, which we welcome. However, the relevant entry in Table 5.1 of the EM makes reference to the negative procedure. This entry should be corrected when a revised EM is prepared following Stage 2 proceedings.

Part 6 - Performance and governance of principal councils

153. Part 6 of the Bill sets out arrangements for reviewing the performance of principal councils.

154. Chapter 1 (sections 88 to 114) places a duty on principal councils to review and report on their performance; makes provision for panel performance assessment, special inspections by the Auditor General for Wales and support and intervention by the Welsh Ministers.

155. In requiring a principal council to keep its performance under review, section 88(3) permits the Welsh Ministers to issue guidance to principal councils

⁷⁶ Letter from the Minister for Housing and Local Government, 30 January 2020

about the performance requirements or the exercise of any functions of a principal council under chapter 1. Principal councils must have regard to any such guidance.

156. Chapter 2 (sections 115 to 117) and Schedule 9 make provision for the membership and proceedings of governance and audit committees.

157. Chapter 3 (sections 118 and 119) provides for co-ordination between regulators.

Section 91 – Duty of principal council to arrange panel performance assessment and section 93 - Panel performance assessments: supplementary regulations

158. Section 91 places a duty on a principal council to arrange for a panel to assess the extent to which the council is meeting the performance requirements (referred to as a “panel performance assessment”), while section 92 places a duty on a principal council to respond to a panel performance assessment report which it receives.

159. Section 93(1) enables the Welsh Ministers to make regulations providing for and in connection with the appointment by principal councils of panels to carry out performance assessments of the council. Such regulations may provide for the appointment of members of the panel and fees to be paid to such members.

160. Any regulations made will be subject to the negative procedure. The EM states:

“The requirement for a principal council to arrange for a performance assessment panel is set out clearly and in detail on the face of the Bill. Welsh Ministers intend to issue guidance on panel assessments. Regulations under this section could set out procedural detail around representation on the panel and remuneration should these be required to support the guidance.”⁷⁷

161. We asked the Minister to explain what steps will be taken in these regulations to ensure the independence of the members of the performance

⁷⁷ EM, chapter 5, Table 5.1, page 69

assessment panels and why such independence is not enshrined on the face of the Bill. The Minister told us:

“The performance and governance provisions in the Local Government and Elections (Wales) Bill are aiming to secure cultural change, and central to this will be supporting and enabling local government to take greater ownership of their own performance.

The provisions in the Local Government and Elections Bill under section 93 give the Welsh Ministers powers to make regulations for and in connection with the appointment of panels if necessary. Our intention however, in line with the overall approach to part 6, is to issue statutory guidance initially on the panels, supporting each principal council to take ownership of its approach to performance and governance.

The statutory guidance will set out more detail on appointing a panel, and local government will be required to have regard to this. The statutory guidance will emphasise the need to ensure independence. For example, it will be expected that a panel member should have sufficient detachment from the council to reach impartial, objective conclusions about how the council is meeting the performance requirements. We think that to be most effective, the panel should have a mix of experienced senior officers, councillors and others who work with local government to ensure councils get the most appropriate challenge, support and constructive recommendations.

My intention is that the guidance will set out that any panel should include as a minimum:-

- An independent chair who is not currently serving in an official or political capacity within local government;
- A peer from the wider public, private or voluntary sectors;
- A serving local government senior officer, likely to be equivalent to chief executive or director; and
- An elected member.

It is intended the statutory guidance will support principal councils to ensure the panel has a range of practical experience, knowledge and perspectives, has integrity, provides independent external challenge and that the assessment can help support a council's improvement journey. My officials are working with local government officers and other stakeholders to develop the detail of how the new system will operate, well in advance of implementation. We want to ensure that this is something which is valuable for local government and provides a meaningful opportunity to continually strengthen councils.

I have also committed to fund a WLGA led improvement and support programme which will support local authorities to implement the new regime and help to identify appropriate panel members."⁷⁸

162. We also asked the Minister to explain why she considers that regulations setting the fees to be paid to panel members under section 93(2)(b) will not be subject to the affirmative procedure. The Minister said:

"The details in respect of the duty on principal council to arrange a panel performance assessment are set out clearly in section 91 of the Bill. Any regulations made under section 93 are intended to set out the necessary technical and procedure detail including the payment of fees.

Therefore, we do not believe that the affirmative procedure is necessary for these regulations."⁷⁹

Our view

163. We believe it is important to ensure the independence of members of performance assessment panels. In her response, the Minister told us that statutory guidance (under section 88(3) of the Bill) will set out detail on appointing a panel, and will emphasise the need to ensure independence, highlighting what the make-up of the panel should be as a minimum.

⁷⁸ Letter from the Minister for Housing and Local Government, 30 January 2020

⁷⁹ Letter from the Minister for Housing and Local Government, 30 January 2020

164. While we note the Minister’s intention and commitment regarding the content of statutory guidance, we see no reason why such a commitment to independence in relation to the make-up of the panel cannot be placed on the face of the Bill. This would ensure that future Ministers in this policy area are required to ensure that a panel includes independent members.

Recommendation 8. The Minister should table an amendment to the Bill to ensure that statutory guidance issued under section 88(3) must cover the need to include members on the performance assessment panel, established under section 91, who are independent of the local authority.

165. We believe that in circumstances where regulations relate to financial matters, including the payment of fees, a more robust scrutiny procedure should apply.

Recommendation 9. The Minister should table an amendment to the Bill applying the affirmative procedure to the making of regulations under section 93(2)(b).

Section 109 - Powers of the Welsh Ministers to amend etc. enactments and confer new powers

166. Section 109 gives the Welsh Ministers power to amend, modify, repeal, revoke or disapply enactments that prevent or obstruct a principal council from complying with chapter 1 of Part 6 of the Bill.

167. Section 109(2) provides the Welsh Ministers to make provision in regulations conferring on any or all principal councils any power which the Welsh Ministers consider to be necessary or expedient to permit or facilitate compliance with chapter 1 of Part 6 of the Bill which deals with performance, performance assessments and intervention for principal councils.

168. The statement of policy intent notes:

“The nature of the support provided, and the circumstances in which an intervention takes place will naturally be different in each case in order to respond to the individual and particular issues faced by a

principal council, and the power has to be sufficiently broad to accommodate each individual circumstance as it may arise.”⁸⁰

169. Such regulations would be subject to the affirmative procedure. The EM states:

“Because the power will enable the Welsh Ministers to confer new powers on principal councils, the affirmative procedure is deemed more appropriate.”⁸¹

170. We asked the Minister why it was necessary to use the word “expedient” and why “necessary” is not sufficient. The Minister said:

“Section 109(2) will enable Welsh Ministers to confer new powers on one or more principal councils, if they consider those powers to be either necessary or expedient. Some new powers for principal councils may not be absolutely “necessary” to enable compliance with Chapter 1 of Part 6, but may still be desirable to facilitate compliance, and this is why the term “or expedient” is needed in this section.

The nature of support provided, and the circumstances in which an inspection or an intervention takes place will be different in each case. In order to respond to the individual and particular issues faced by a principal council, the power has to be sufficiently broad to accommodate each individual circumstance as it may arise.

A power to make regulations to confer new powers on principal councils but only if they are deemed “necessary” would be too narrow. This power replicates the power under section 31 of the 2009 Measure which enabled Ministers to do the same things in relation to securing continuous improvement. We have never used these powers but when the new approach was being developed it was felt appropriate to replicate them to future proof the new approach.”⁸²

⁸⁰ Statement of policy intent, ref. 51, page 18

⁸¹ EM, chapter 5, Table 5.1, page 71

⁸² Letter from the Minister for Housing and Local Government, 30 January 2020

Our view

171. We note the comments of the Minister regarding the use of the term “expedient” in section 109(2) of the Bill. We regularly express concerns about the use of this and similar terms when applied to regulation-making powers, be it in government or non-government legislation.

172. It remains our general position that the Welsh Ministers should adopt a more targeted approach rather than taking the widest possible regulation-making powers available to them. We also believe that regulation-making powers should be taken for a clear purpose.

173. We note the Minister’s comments that a power to make regulations to confer new powers on principal councils but only if they are deemed “necessary” would be too narrow. However, the Minister also indicated that they have been replicated from the *Local Government (Wales) Measure 2009* and have never been used. If these powers have never been used before, it is unclear how they could be considered to be too narrow. It is also unclear why powers are needed for the purpose of expediency, when the overall thrust of the Bill is to empower local authorities.

174. Furthermore, as a general point of principle (similar to the point we make above in respect of section 11), we do not believe that it is good practice to simply replicate a particular section of an existing piece of primary law within a new Bill, without giving consideration to the context of the new Bill and an analysis of the effectiveness of the existing provision on which it is drawn.

175. In the case of this Bill, it would seem that the use of “expedient” broadens the regulation-making powers for the purpose of “future-proofing”, without any clear indication of how they will be used. Future-proofing is not a valid argument for taking broad powers. Drawing powers too widely always runs the risk of them being used in the future in ways that were not originally intended or anticipated when the Bill was introduced.

Recommendation 10. The Minister should, during the Stage 1 debate on the Bill, set out clearly and in detail how she intends to use the powers contained in section 109(2).

Recommendation 11. The Minister should table an amendment to the Bill to delete the words “or expedient” from section 109(2).

Part 7 - Mergers and restructuring of principal areas

176. Part 7 of, and Schedules 10 and 11 to, the Bill contain provisions for the merger and restructuring of principal councils.

177. Chapter 1 (sections 120 to 127) makes provision for the voluntary merger of principal areas, including applications for voluntary mergers, consultation requirements, powers for the Welsh Ministers to give effect to mergers, arrangements for shadow councils and executives, the voting system and elections and a duty on merging councils to co-operate.

178. Chapter 2 (sections 128 to 134) makes provision for restructuring principal areas, including conditions to be met, abolition requests, powers for the Welsh Ministers to give effect to restructuring proposals and a duty on restructuring councils to cooperate.

179. Chapter 3 (sections 135 to 140) and Schedules 10 and 11 make provision for transition committees, restraints on transactions and recruitment, reviews of electoral arrangements, executive arrangements and the provision of information by councils.

180. Chapter 4 (sections 141 to 144) makes provision for remuneration arrangements for shadow councils and new principal councils established under Part 7, including functions of the Independent Remuneration Panel for Wales and pay policy statements.

181. Chapter 5 (sections 145 to 148) concerns supplementary provisions.

Section 126 – Elections

182. Section 126 requires merger regulations to specify the date for the first ordinary elections to the new principal council. Section 126(4) gives the Welsh Ministers the power to direct a principal council as to the appointment of a returning officer for such an election. The EM states that this power:

“(…) will be used only if merging councils have themselves failed to appoint a returning officer for the first elections to the new council.”⁸³

183. According to the EM, no Assembly procedure is to be applied to such a direction, because:

“The appointment will be a matter of priority and an Assembly procedure is not considered appropriate.”⁸⁴

Section 127 – Duties of merging councils to facilitate transfer and have regard to guidance

184. Section 127 concerns the duties of merging councils to facilitate the transfer of functions, staff etc, to give effect to the merger and to have regard to guidance. Section 127(2) gives the Welsh Ministers the power to direct a principal council to take action to facilitate the effective transfer of staff, property etc in the circumstances of a merger. No Assembly procedure is to be applied to such a direction. The EM states that:

“Power will be used only if merging councils are themselves failing to take effective action to facilitate the effective transfer of staff, property etc. to a new council to be established under already approved merger regulations. As such an Assembly procedure is not considered appropriate.”⁸⁵

Section 134 – Duties on restructuring councils to facilitate transfer and have regard to guidance

185. Section 134 places a duty on restructuring councils to take all reasonable steps to facilitate the transfer of functions, staff etc. to give effect to the restructuring and to have regard to guidance. Section 134(4) gives the Welsh Ministers the power to direct a principal council to take action to facilitate the

⁸³ EM, chapter 5, Table 5.1, page 89

⁸⁴ EM, chapter 5, Table 5.1, page 89

⁸⁵ EM, chapter 5, Table 5.1, page 90

effective transfer of staff, property etc in the circumstances of a restructuring. No Assembly procedure is to be applied to such a direction. The EM states:

“Power will be used only if restructuring councils are themselves failing to take effective action to facilitate the effective transfer of staff, property etc. to another council in the event of restructuring provided for under already approved restructuring regulations. As such an Assembly procedure is not considered appropriate.”⁸⁶

Section 135 – Transition committees and Schedule 10 – Transition committees of merging councils and restructuring councils

186. Section 135 introduces Schedule 10 which makes provision about the establishment of transition committees in merging and restructuring authorities.

187. Paragraph 7(1) of Schedule 10 gives the Welsh Ministers the power to direct a transition committee for merging or restructuring councils to exercise its functions in accordance with the direction. The EM states:

“The Direction will be local in nature. It will be used to require a transition committee to exercise its functions where it is considered that the transition committee has been negligent or tardy in exercising a given responsibility.”⁸⁷

Section 139 – Requirement on principal councils to provide information to the Welsh Ministers

188. Section 139 concerns a requirement on principal councils to provide information to the Welsh Ministers. In particular, section 139(1) gives the Welsh Ministers the power to direct a principal council to provide them with information relating to a transfer of functions between councils. The EM states:

“The Direction will be local in nature. It will be used if a principal council does not provide the Welsh Ministers with specified

⁸⁶ EM, chapter 5, Table 5.1, page 91

⁸⁷ EM, chapter 5, Table 5.1, page 97

information which would enable the Welsh Ministers to make an informed decision about a voluntary merger application or a potential restructuring.”⁸⁸

189. No Assembly procedure is to be applied to such a direction, as the EM states:

“The exercise of the power is entirely dependent on individual councils, as such, to apply an Assembly procedure is not considered appropriate.”⁸⁹

Section 140 – Requirement on principal councils to provide information to other bodies

190. Section 140 concerns a requirement on principal councils to provide information to other bodies. In particular, section 140(1) gives the Welsh Ministers the power to direct a principal council to provide other bodies which the Welsh Ministers consider appropriate with information relating to a transfer of functions between councils. No Assembly procedure is to be applied to such a direction. The EM states:

“The Direction will be local in nature. It will be used if a principal council does not cooperate with other relevant bodies in sharing specified information which would facilitate or make proper preparation for a voluntary merger or a restructuring. The exercise of the power is entirely dependent on individual councils, as such, to apply an Assembly procedure is not considered appropriate.”⁹⁰

Consideration of sections 126, 127, 134, 135, 139, 140 and Schedule 10

191. In relation to the powers under section 126, 127, 134, 139, 140 and Schedule 10 (as introduced by section 135) we note that the EM appears to set out restrictions in relations to each power, as identified in paragraphs 182 to 190 above.

⁸⁸ EM, chapter 5, Table 5.1, page 91

⁸⁹ EM, chapter 5, Table 5.1, pages 91-92

⁹⁰ EM, chapter 5, Table 5.1, page 93

192. In her letter of 30 January 2020, the Minister told us:

“Each direction power needs to be able to respond to a range of relevant circumstances. The Explanatory Memorandum provides some illustrative – not detailed - examples of when each power of direction might be used, within the framework set out in the relevant provisions on the face of the Bill. Given the circumstances where these directions might be used, it would require provisions of significant length and detail and even then it would be impossible to foresee all eventualities which might need to be covered.”⁹¹

193. During the evidence session we sought clarification from the Minister that the apparent restrictions listed were only examples of how the powers may be used. An official accompanying the Minister indicated that:

“We accept that those examples are there simply as examples—they’re not meant as restrictions; they’re not meant as a definitive list. In the case of local government reorganisation, the amount of tasks that will be needed to carry out those reorganisations, whether they’re voluntary or on a restructured basis, would be extensive. I think, on that basis, it would be unlikely that any court would consider that the limited exceptions and restrictions or examples that we set out on the face of the explanatory notes were meant to be exhaustive, simply because of the sheer volume and breadth of the things that would be necessary.”⁹²

194. The Minister added:

“I think the problem with a lack of examples is (...) if you don’t give any illustrative examples of it, there is a danger of everybody having a completely separate idea of it. We had some discussion about whether they are or are not helpful, and, if the committee has a view on that, I’d be very happy to have a look at it.”⁹³

⁹¹ Letter from the Minister for Housing and Local Government, 30 January 2020

⁹² LJC Committee, 3 February 2020, RoP [169]

⁹³ LJC Committee, 3 February 2020, RoP [172]

Our view

195. We note the Minister’s comments and welcome the helpful clarification provided, namely that the EM gives several examples of how the Welsh Ministers would use specified powers in various circumstances. As such, we acknowledge that they are not restrictions on how the Welsh Ministers may act and are not appropriate for inclusion on the face of the Bill.

196. We believe that the use of illustrative examples in the EM to aid understanding of any legislative provisions or delegated powers in the Bill is helpful. However, any EM adopting such an approach should make it explicitly clear that the use of examples is for illustrative purposes only.

Powers to issue guidance

197. The Bill includes 23 powers for the Minister to issue guidance, all of which are subject to no procedure. In almost all cases neither the Bill or the EM contain information about what the guidance is likely to cover.

198. Our concerns about this lack of transparency are illustrated by our consideration of sections 86 and 122.

Section 86 – Guidance and section 122 – Guidance about merger applications

199. Section 86 sets out a power for the Welsh Ministers to issue guidance, to which principal councils and corporate joint committees must have regard, in relation to Chapters 3-5 of Part 5 of the Bill (which cover the establishment and operation of corporate joint committees and corporate joint committee regulations). No Assembly procedure is applied to such guidance.

200. The EM states:

“The power to issue guidance is intended to facilitate the application of the primary legislation and the implementation of the legislation or regulations. This guidance is largely concerned with process and, as such, Assembly procedure is not considered appropriate.”⁹⁴

⁹⁴ EM, chapter 5, Table 5.2, page 86

201. The statement of policy intent adds that the guidance “could include guidance on how principal councils might apply for the creation of a corporate joint committee and, where not set out in regulations, guidance on the constitutional, workforce or other technical matters related to a corporate joint committee”.⁹⁵

202. We asked the Minister to explain what this wide power to issue guidance is intended to cover and why specific reference to what the guidance will cover is not made on the face of the Bill. The Minister told us:

“The guidance is intended to facilitate the application of this part to CJC’s established by the Welsh Ministers and at the request of principal councils. It will need to address a host of circumstances which may well differ. It would be impracticable and completely unhelpful for all concerned to try to translate the level of detail and the degree of flexibility afforded by guidance into provision on the face of a Bill – which could easily then become too prescriptive.”⁹⁶

203. We also asked, given the wide remit of the power, whether the Minister agreed that an Assembly procedure should be applied to any guidance issued under it. The Minister replied:

“The power to issue guidance is intended to facilitate the application of the part and the implementation of the legislation or regulations, it is largely concerned with process and, as such, it is not considered appropriate for it to be subject to Senedd procedure.”⁹⁷

204. The Minister also explained that the Welsh Government is being consulted and involved in co-producing all guidance related to the Bill.⁹⁸

⁹⁵ Statement of policy intent, ref. 44, page 16

⁹⁶ Letter from the Minister for Housing and Local Government, 30 January 2020

⁹⁷ Letter from the Minister for Housing and Local Government, 30 January 2020

⁹⁸ LJC Committee, 3 February 2020, RoP [8]

Section 122 - Guidance about merger applications

205. Section 122 obliges principal councils to have regard to any guidance issued by the Welsh Ministers about the making of a merger application between two or more principal councils.

206. This provision has retrospective effect, so principal councils may satisfy this obligation by having regard to any guidance which is issued before section 122 comes into force, where such guidance has been expressly issued for the purposes of section 122.

207. The statement of policy intent notes:

“The Welsh Ministers need to issue guidance to assist principal councils on matters relating to the making of an application for voluntary merger. The guidance will inform and facilitate principal councils in preparing an application for voluntary mergers.

The guidance could include advice on identifying a business case for merger, addressing the concerns of local people and stakeholders and the degrees of convergence with other strategic boundaries.”⁹⁹

208. The Explanatory Notes state:

“Such guidance would cover matters the principal councils will need to consider in formulating an application, including the intended benefits, costs and savings, impact assessments, the scope of consultations and any other relevant issues (for example, once the provisions about choosing the voting system have come into force, identifying which voting system should be used for the first elections to the new council for the new principal area). This provision has retrospective effect; any guidance issued by the Welsh Ministers before the provision comes into force will have the same effect, so principal councils will be able to start work, if they so wish, on

⁹⁹ Statement of policy intent, ref. 54, page 19

preparing a voluntary merger application whilst this Bill is still being considered.”¹⁰⁰

209. The EM states:

“This guidance is largely concerned with process and, as such, to apply an Assembly procedure is not considered appropriate.”¹⁰¹

210. We asked the Minister to explain why the detail from the Explanatory Notes is not on the face of the Bill. The Minister said:

“The guidance will need to address a host of circumstances which may well differ from council to council. It would be impracticable to try to translate the level of detail and the degree of flexibility afforded by guidance into provision on the face of a Bill – which could easily then become too prescriptive. The examples given in the Explanatory Notes are for explanatory purposes.”¹⁰²

211. We also asked the Minister to confirm when she expects to issue guidance for the purposes of section 122, and why such guidance is not to be laid before the Assembly, given that it can be issued before the statutory power to do so comes into force. She replied:

“I expect to issue guidance shortly. It is standard practice for there to be no procedure for the issue of guidance; this guidance is intended to support councils in implementing the legislation so will highlight good practice and be technical and procedural in nature. To lay guidance in the Assembly would be time consuming and serve little to no benefit.”¹⁰³

212. During our evidence session, we explored this area further with the Minister and asked why no procedure applied to this section. The Minister said:

¹⁰⁰ EM, Annex A – Explanatory Notes to the Local Government and Elections (Wales) Bill, page 340

¹⁰¹ EM, chapter 5, Table 5.2, page 89

¹⁰² Letter from the Minister for Housing and Local Government, 30 January 2020

¹⁰³ Letter from the Minister for Housing and Local Government, 30 January 2020

“First of all, we’re consulting on all of the guidance and the regulations that go with this Bill simultaneously with the Welsh Local Government Association. They’re all being co-produced. So, we’re not doing anything that isn’t done with the local authorities themselves in partnership. They’re very much part of the drafting team that’s pulling that together. So, we’re co-producing it.

Secondly, as I understand it, all of the powers that exist in there are powers that currently don’t have Assembly processes attached to them...”¹⁰⁴

Our view

213. In highlighting and raising questions about these provisions, our main intention was to explore to what extent it is helpful for all stakeholders to know in advance about the broad issues that the relevant guidance is likely to cover, which could help them in planning and delivering obligations arising from the Bill.

214. We believe this could be achieved without being prescriptive and in a way that retains flexibility in what the final guidance covers. It was not our intention to suggest in our letter to the Minister of 23 January 2020 that the Bill should be amended to include provisions that constrain what the Welsh Government should provide by way of guidance.

215. We recognise that the guidance is being co-produced with the Welsh Local Government Association, but do not believe that this detracts from the benefit of providing a broad indication of what the guidance will cover.

216. On this point, we note and welcome that the Explanatory Notes in relation to section 122 indicate that the guidance will cover intended benefits, costs and savings, impact assessments, the scope of consultations and identifying voting systems i.e. the matters the principal councils will need to consider in formulating an application.

¹⁰⁴ LJC Committee, 3 February 2020, RoP [81-82]

217. We believe that all other sections that include a power to issue guidance would benefit from the approach adopted in relation to the Explanatory Notes in respect of section 122.

Recommendation 12. We consider that the Explanatory Notes to the Bill should, for each section that includes a power to issue guidance, provide a broad indication of what that guidance is likely to cover. The Explanatory Notes should be amended accordingly.

Annex – changes required to Table 5.1 of the Explanatory Memorandum

218. The Bill contains 98 powers for the Welsh Ministers to make regulations, orders and directions, and to issue guidance. A full list of the powers can be found, together with a summary, in tables 5.1 and 5.2 of the Explanatory Memorandum (page 59-99). There are errors in table 5.1 in that:

- section 22(4) does not provide any power to make regulations, the correct reference should be to section 22(3) which provides for a new regulation making power in a new section 9ZA(4) of the *Representation of the People Act 1983*;
- regulations made under section 53(7) are stated as being subject to the negative procedure, or the affirmative procedure if specific legislation is being amended. However, section 170(4) and section 170(5)(e) state that such regulations are always subject to the affirmative procedure;
- regulations made under section 83(1), 83(2), 83(3) and 83(7) are stated as being subject to the negative procedure. However, section 170(4) and section 170(5)(i) state that such regulations are always subject to the affirmative procedure;
- regulations made under section 84(2) are stated as being subject to the negative procedure. However, section 170(4) and section 170(5)(j) state that such regulations are always subject to the affirmative procedure;
- the “reason for procedure” box in respect of section 108 states that the power enables Welsh Ministers to add/amend/remove a body/person to/from lists. This is not the case – section 108 only permits additions to the lists;
- section 150(6) does not provide any power to make regulations, as there is no subsection (6). The correct reference should be to section 150(2) only, the reference to subsection (6) should be omitted.