

The Welsh Government's Legislative Consent Memoranda on the Environment Bill

September 2021



1. Background

The UK Government's Environment Bill

1. The Environment Bill (the Bill)¹ was introduced to the House of Commons and given its first reading on 30 January 2020. It is a UK Government Bill, sponsored by the Department for Environment, Food and Rural Affairs.
2. The Bill seeks to establish a new environmental framework following the UK's withdrawal from the European Union (EU). The majority of UK and Welsh environmental legislation previously implemented EU legal requirements.
3. The long title to the Bill states that it is:

"A Bill to make provision about targets, plans and policies for improving the natural environment; for statements and reports about environmental protection; for the Office for Environmental Protection; about waste and resource efficiency; about air quality; for the recall of products that fail to meet environmental standards; about water; about nature and biodiversity; for conservation covenants; about the regulation of chemicals; and for connected purposes."

4. The Bill completed its passage through the House of Commons on 26 May 2021. It completed its Report Stage in the House of Lords on 15 September 2021.

Background to the Bill

5. The Bill was the subject of two reports by our predecessor Committee.² These reports set out background information on the Bill's progress through the UK Parliament.

The Welsh Government's Legislative Consent Memorandum

6. In accordance with Standing Orders 29.1 and 29.2, a Legislative Consent Memorandum is required because provisions within the Bill modify or fall within the Senedd's legislative competence.

¹ [Environment Bill 2019-21 \[HC Bill 9\]](#)

² Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memorandum on the Environment Bill](#), July 2020; [Welsh Government response](#), August 2020; Legislation, Justice and Constitution Committee, [The Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Environment Bill](#), February 2021; [Welsh Government response](#), March 2021

7. On 18 June 2021, the Minister for Climate Change, Julie James MS (the Minister) laid before the Senedd a Legislative Consent Memorandum (Memorandum)³ in respect of the Bill. A Supplementary Legislative Consent Memorandum was laid on 3 September 2021 (Memorandum No 2).⁴

8. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Climate Change, Environment and Infrastructure Committee should report on the Bill by 13 September 2021.⁵ The date was subsequently extended to 23 September 2021.⁶

Provision for which the Senedd's consent is required

9. Paragraphs 8 to 83 of the Memorandum describe the provisions for which, in the view of the Welsh Government, consent is required.

10. Paragraphs 86 to 99 set out the Welsh Government's reasons for making the provisions for Wales in the Bill.

11. In particular, paragraph 86 states:

"We follow the principle that primary legislation in devolved areas should be enacted by Senedd Cymru. However, there are circumstances where it is sensible and advantageous to seek provisions in UK Parliament Bills which would be within the Senedd's legislative competence, with the consent of the Senedd."

12. Memorandum No 2 explains that the UK Government has proposed amendments to the Bill within the legislative competence of the Senedd and accordingly consent is also required for further clauses. These are described in paragraphs 8 to 30 of Memorandum No 2.

³ Welsh Government, [Legislative Consent Memorandum, Environment Bill](#), June 2021

⁴ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No 2\), Environment Bill](#), September 2021

⁵ Business Committee, [Timetable for consideration of the Legislative Consent Memorandum for the Environment Bill](#), July 2021

⁶ Business Committee, [Revised timetable for consideration of the Legislative Consent Memorandum for the Environment Bill](#), September 2021

2. Committee consideration

13. We took evidence from the Minister at our meeting on 12 July 2021.⁷ Following our meeting, we wrote to the Minister to request further information.⁸ The Minister replied on 6 August 2021.⁹

Overall approach

14. We note that our predecessor Committee, in its July 2020 report, stated:

*"Seeking the consent of the Senedd to permit the UK Parliament to legislate significantly in areas of environmental policy that have been devolved for over 20 years should be accompanied by full and transparent information. This is because, in adopting this approach, the ability of Members of the Senedd to hear expert evidence, listen to the views of stakeholders in Wales and table amendments to test, challenge and influence the Welsh Ministers—a key tool of scrutiny—ceases to be available. Any case made by the Welsh Government for the UK Parliament to legislate in devolved areas should be fully justified and not approached as a matter of routine business."*¹⁰

15. We share this view. We are therefore disappointed at the lack of information contained in the Memorandum. At the start of the Sixth Senedd, with new Members elected, the Memorandum should have been much more explicit about the background to the Bill and why, in the Welsh Government's view, it is appropriate for a UK Bill to be used to legislate significantly in devolved areas. Indeed, the Minister told us the Bill had a "long history"¹¹ but that was not apparent from reading the Memorandum. Moreover, as our predecessor Committee indicated, a Memorandum should make the case for the approach adopted and not take the Senedd's consent for granted.

16. Despite the environment being a priority policy area for the Welsh Government, we note the Minister's view that, "it didn't seem sensible to try and introduce a new Bill at this stage" because of time constraints, the amount of work already undertaken, the need for UK co-ordination, "the real stretch of resources in the Welsh Government because of Brexit and COVID

⁷ [Legislation, Justice and Constitution Committee, 12 July 2021](#)

⁸ [Letter to the Minister for Climate Change](#), 14 July 2021

⁹ [Letter from the Minister for Climate Change](#), 6 August 2021

¹⁰ Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memorandum on the Environment Bill](#), July 2020, paragraph 19

¹¹ LJC Committee, RoP [12], 12 July 2021

still ongoing” and issues with resourcing “the enormous amount of legislation that we have coming forward through the portfolio”.¹²

17. We were surprised to hear the Minister go on to say that the Bill “at the moment, ... represents the speediest way of getting the powers in place, which we certainly want to do”¹³ and also:

“... we have to carefully balance what maximises the outcome of legislation for the people of Wales. So, we try to do that with a mixture of Senedd and UK Parliament legislation, working both within the constraints of our capacity, ... but also what opportunities are available in the UK Government's legislative programme in terms of timing and in terms of cross-border co-ordination, particularly for things that we know travel around the UK in great numbers.”¹⁴

18. When we highlighted the greater scrutiny that would take place in the Senedd with a Welsh Bill, the Minister said:

“We'd much prefer to do it in the Senedd ourselves, but [...] there are a number of things to be weighed in the balance here, and in this particular instance we've come down on the side of making sure that the Bill is fit for purpose. That's not to say then, of course, that having made that decision, an enormous amount of work then goes on to make sure that Welsh interests are fully protected in the Bill, and they fully reflect the needs of Wales that Welsh Ministers are given the right amount of powers, that we have the right procedures in place [for affirmative resolution] for the regulations to give the Senedd the right amount of scrutiny, and so on.”¹⁵

19. She added:

“... if we only use Senedd legislation, we just wouldn't get everything done; it's just as simple as that, really.”¹⁶

20. The situation in which we find ourselves is not ideal and it is regrettable that the Welsh Government does not feel in a position to follow the principle outlined in its Memorandum that primary legislation in devolved areas should be enacted by the Senedd. If this principle had been adopted earlier in the Fifth Senedd by the previous Welsh Government (noting that the Bill was developed and introduced pre-pandemic), then many of the regulation-making powers

¹² LJC Committee, RoP [17, 48-49], 12 July 2021

¹³ LJC Committee, RoP [18], 12 July 2021

¹⁴ LJC Committee, RoP [21], 12 July 2021

¹⁵ LJC Committee, RoP [52], 12 July 2021

¹⁶ LJC Committee, RoP [52], 12 July 2021

could potentially have been included in a bilingual Welsh environmental Bill and subject to full Senedd legislative scrutiny.

21. While it may be “sensible and advantageous” for the Welsh Government to include provisions in a UK Bill, it does not follow that it is always in the best interests of the Senedd’s function of holding the Welsh Government to account and legislating for Wales.

22. The Minister highlighted the significant amount of work that has gone into ensuring that the Bill fully protects Welsh interests and reflects the needs of Wales. On significant matters in a devolved policy area, such as the environment, it should not be for the Welsh Government to secure appropriate provisions for this purpose through negotiation with the UK Government. Fully protecting Welsh needs and interests through legislation is the function of the Senedd in devolved areas. Similarly, it should be for the Senedd, rather than the Welsh Government, to ensure that the Welsh Ministers are given the appropriate powers, and that the right procedures are attached to powers to make subordinate legislation to enable proper and appropriate scrutiny by the Senedd. The Welsh Government should not make assumptions and decisions on behalf of the Senedd when negotiating with the UK Government.

23. The Minister’s suggestion that there is a need for the Welsh Government to rely on the UK Government and UK Parliament to get its legislative programme through is therefore disconcerting. This stance denies the Senedd and its elected Members the ability to directly influence and shape legislation that will become law in Wales. Furthermore, it also relies on there being good intergovernmental relations with UK Government Ministers (which could vary between departments), with no guarantee of successful outcomes.

24. The Minister acknowledged that negotiating provisions in UK Bills takes up a lot of administrative time and resource.¹⁷ However, it is unclear how much resource goes into such intergovernmental negotiations and whether it is any less than would be needed to support the passage of Welsh legislation through the Senedd.

25. We also note that the Welsh Government’s criteria for determining whether it would be acceptable to use a UK Bill to take forward Welsh Government policy are likely to have changed. This is because in August 2020, our predecessor Committee was told¹⁸ that one of these criterion was that “there is no time available for similar provisions to brought forward” in the

¹⁷ LJC Committee, RoP [53], 12 July 2021

¹⁸ [Letter from the Minister for Environment, Energy and Rural Affairs](#), 28 August 2020

Senedd. Given that we are at the start of the Sixth Senedd and there is plenty of time for a Welsh Government Bill to be brought forward, this criterion would no longer appear to apply.

26. We are therefore disappointed at the approach adopted by the Welsh Government in relation to this Bill.

27. When we asked the Minister how the Welsh Government approach corresponded to its commitment to consolidate and improve accessibility to Welsh law, the Minister said:

"We always look to see, when introducing Bills of our own into the Senedd, whether we can include carve-outs—so, taking UK legislation and repeating them in the Welsh Acts".¹⁹

28. The Minister indicated that while the Welsh Government was not currently looking to consolidate environmental law,²⁰ it was potentially one of the next areas to be looked at and she also noted that officials have been asked "to scope out a possible review of environmental law in Wales".²¹

29. We note the Minister's suggestion of replicating devolved provisions contained in UK Acts within Welsh Acts. Such an approach in relation to this Bill would help correct some of the deficiencies in the current approach and improve the accessibility of Welsh law, as well as making it bilingual. It would also allow for full Senedd scrutiny and enable stakeholders to participate in the Senedd's law-making process. The Welsh Government's own Bill relating to environmental governance,²² potentially coming forward in the second year of the Senedd, may be a suitable vehicle.²³

Recommendation 1. A future environmental Bill introduced by the Minister should address devolved issues contained within the UK Government's Environment Bill, following appropriate consultation with stakeholders.

¹⁹ LJC Committee, RoP [23], 12 July 2021

²⁰ LJC Committee, RoP [23], 12 July 2021

²¹ LJC Committee, RoP [94], 12 July 2021

²² Senedd Research, [Environmental governance following Brexit](#), July 2021

²³ LJC Committee, RoP [98], 12 July 2021; Climate Change, Environment, and Infrastructure Committee, [RoP \[10\]](#), 15 July 2021

Delegated powers to make regulations

The use of concurrent plus powers

30. The Bill includes concurrent plus powers to make regulations. Concurrent powers are those exercised by the Welsh Ministers or UK Ministers in relation to Wales, where the exercise of the power by UK Ministers requires the consent of the Welsh Ministers. Within the Bill, these apply to regulations where cross-border arrangements would be beneficial in relation to producer responsibility obligations, resource efficiency, deposit schemes and REACH legislation (clauses 50, 51, 52, 53 and 54 and Schedules 4, 5, 6, 7 and 8 respectively, and clause 136 and Schedule 21).²⁴

31. The Minister explained that:

"Although we are looking at extended producer responsibility for packaging on a UK-wide basis ... and on a deposit return scheme for drink containers covering Wales, England and Northern Ireland, we are planning to lay Welsh-specific regulations in the Senedd, which bring the regimes into force. So, although they're concurrent, we're also laying the regulations in the Senedd. We're actually doing that co-ordinated with the other nations of the UK."²⁵

32. When we asked whether there should be a joint parliamentary procedure for environmental regulations that have a UK-wide theme, the Minister said:

"Yes, that's what we're proposing. So, they're concurrent; we're working on mirrored provisions, basically, so that each legislature has a chance to look at it, but they're mirrored across the UK."²⁶

33. During her evidence the Minister told us that, subject to time being available:

"If the UK Government used the powers with the consent of Welsh Ministers, the guidance on Welsh Ministers' consent to the UK exercising powers in relation to Wales provides specifically that the Senedd is given an opportunity to provide a view before Ministers provide consent. So, a written statement would be laid before the Senedd in that regard, and then a debate could be scheduled and Members' views can be sought."²⁷

²⁴ Clause numbers in accordance with Bill as agreed at Committee Stage in the House of Lords.

²⁵ LJC Committee, RoP [69], 12 July 2021

²⁶ LJC Committee, RoP [74], 12 July 2021

²⁷ LJC Committee, RoP [46], 12 July 2021

34. She also added that she would write to relevant policy committees to inform them of the intention to consent²⁸ and subsequently provided a copy of the guidance.²⁹

35. The guidance provides eight principles for the exercise of concurrent functions. Principle 7 states that “Concurrent functions should be removed at the first opportunity”, while Principle 8 states that:

“New concurrent functions should only be created in very exceptional circumstances and teams should ensure that a carve out will apply such that no consent will be required when removing them (to protect legislative competence), and that they are concurrent plus (to protect executive competence).”

36. The inclusion of concurrent plus powers in the Bill does not appear to be in line with the Welsh Government’s guidance because the “very exceptional circumstances” caveat cannot be expected to apply when the Minister has indicated that the powers will be exercised by the Welsh Ministers co-ordinated with the actions of other governments.

37. The removal from the Bill of the concurrent plus powers and the accompanying carve out agreed by amendment³⁰ would therefore not affect the ability of the UK or Welsh Governments to act. Furthermore, it remains unclear why they were included in the first place, as there does not appear to be any intention to use them in relation to the Bill’s (immediate) policy objectives and government guidance is to ensure they are removed at the first opportunity.

Recommendation 2. The Welsh Government should seek an amendment to the Bill removing concurrent plus regulation-making powers.

Recommendation 3. If recommendation 2 is not accepted, or the concurrent plus powers are not removed from the Bill by amendment, the Minister must explain the reasons why they have not been removed, and clarify:

- the specific circumstances and timetable for the use of concurrent plus powers;
- when she expects the concurrent plus powers to be removed from the Bill in accordance with principle 7 of the Welsh Government guidance referred to in paragraph 35 above.

²⁸ LJC Committee, RoP [78], 12 July 2021

²⁹ Letter from the Minister for Climate Change, 6 August 2021

³⁰ LJC Committee, RoP [83-85], 12 July 2021; Letter from the Minister for Climate Change, 6 August 20201

Other powers

38. The Minister's letter of 6 August 2021 indicated that eight regulation-making powers being provided to the Welsh Ministers through the Bill, which in the main do not relate to cross-border arrangements, are subject to either a vague timetable for their use or have no timetable attached at all.

39. The Minister's case for taking these powers appears to be based on speed and a lack of resources. We do not consider these to be valid reasons for acquiring these powers when there is no clear timetable for their use. We consider this to be poor practice, which diminishes the role of the Senedd as a legislature having responsibility and oversight of powers to be delegated to the Welsh Ministers in devolved areas.

40. We note that most of the powers to make subordinate legislation are subject to the affirmative procedure, which will require their formal approval by the Senedd and we view this as positive.

41. We asked the Minister why the power to make regulations under clause 68 (now clause 69 – Fixed Penalty Notices) was subject to the negative procedure. The Minister told us that “an affirmative procedure seems disproportionate for just updating a figure, effectively” and that the Welsh Government is “required to act in accordance with public law principles.”³¹ We note this position.

42. This illustrates a particular problem with using a UK Bill to deliver Welsh policy. If any Senedd Member wants to probe or advocate the need for an affirmative procedure for a set of regulations, tabling an amendment to a Bill would be one means of doing so, providing an opportunity for a debate as a result. However, that would not be possible for clause 69 because Senedd Members cannot table amendments to a UK Bill in the way they could for a Welsh Bill in the Senedd. Furthermore, any recommendation by this Committee that the Welsh Government should seek to table an amendment to the UK Bill to give effect to changing the procedure could be rejected by the Welsh Government (rather than having a debate and vote on an amendment in the Senedd). Alternatively, it may not be possible to get an appropriate amendment tabled on behalf of the Welsh Government or there may not be enough time to do so because of the UK parliamentary timetable.³²

³¹ LJC Committee, RoP [61], 12 July 2021

³² In this regard, see LJC Committee, RoP [37-38], 12 July 2021

UK-EU obligations

43. Since the introduction of the Bill, the UK and EU have agreed the terms of their new relationship in the Trade and Cooperation Agreement (TCA).

44. The TCA contains provisions relating to the environment and climate designed to ensure fair competition between the UK and EU. These include a non-regression duty requiring there to be no reduction or weakening of the levels of protection in place on 31 December 2021 and the option to take rebalancing measures should the UK and EU diverge in future.

45. Most areas covered in the Bill are subject to these provisions such as governance, air quality and waste management.

46. We asked the Minister to provide more detail on how it plans to ensure that it remains in compliance with the TCA when exercising powers provided by the Bill. The Minister responded by saying that the TCA has a complex governance structure that is being clarified. She added that once clarity emerges following UK-wide discussions, the Welsh Government will then be in a position to determine what mechanisms are required in Wales in order for the Welsh Government to meet the TCA's requirements.³³

47. As we have noted above, the concurrent plus powers provided by the Bill make it possible for the UK Government to action UK-EU environmental obligations in Wales with the consent of the Welsh Ministers. While the Minister has indicated that the relevant powers will be exercised through Welsh regulations (rather than concurrently) mirroring regulations across the UK, their use, however exercised, could impact the TCA's requirements in future.

48. The Welsh Government's uncertainty around TCA requirements, coupled with the lack of clarity around how and when powers provided by the Bill are to be exercised means that the approach taken by the Welsh Government to meet its obligations is unclear. This includes the extent to which it intends to rely on UK-wide measures, which could introduce different policy or divergence from the EU.

49. The greater the reliance on UK Government legislation to action UK-EU obligations in Wales, the more difficult it becomes for the Senedd to effectively scrutinise Welsh Government compliance with UK-EU obligations. Non-regression of environmental and climate protection or future divergence from the EU could incur retaliatory measures by the EU in areas of

³³ LJC Committee, RoP [98], 12 July 2021; Letter from the Minister for Climate Change, 6 August 2021

significance to Wales. This affects the Senedd's ability to effectively scrutinise whether the Welsh Government is acting in the best interests of Wales.

Memorandum No 2

50. We have not had time to question the Minister on Memorandum No 2 and explore its implications fully.

51. However, in our view, the Bill, as amended at Committee Stage in the House of Lords, contains amendments that are "relevant provisions" for the purposes of Standing Order 29 and that were not identified in Memorandum No 2. These are as follows:

- a. New Clause 137 (Amendments of Schedule 7B to the Government of Wales Act 2006). The purpose of clause 137 is to modify the legislative competence of the Senedd and it was referenced by the Minister in her evidence.³⁴
- b. Paragraphs 8 and 20 of Schedule 4, paragraphs 10 and 18 of Schedule 5, paragraphs 5 and 14 of Schedule 6, paragraphs 5 and 14 of Schedule 7 and paragraph 3 of Schedule 11 to the Bill have been amended to insert new sub-paragraphs. In each case those paragraphs require the Welsh Ministers, before making regulations under the relevant parts of Schedules 4, 5, 6, 7 and 11 to consult persons appearing to represent the interests of those likely to be affected. The amendment made by inserting the new sub-paragraph allows the Welsh Ministers to carry out consultation before the relevant paragraph comes into force. The purpose of the amendments to Schedules 4 and 5 is the environment, the purpose of the amendments to Schedules 6 and 7 is waste and the purpose of the amendments to Schedule 11 is air quality, which are all devolved matters. In so far as the amendments to Schedules 4, 5, 6, 7 and 11 apply to Wales, we consider that the amendments require consent.

52. We acknowledge that the relevant clauses and accompanying Schedules containing these regulation-making provisions were identified in the first Memorandum. However, Standing Order 29.2(iii) requires a legislative consent memorandum to be laid in relation to amendments and therefore these provisions should have been included in Memorandum No 2, together with new clause 137. In addition, we note that clause 67 (Littering enforcement) appeared in Memorandum No 1 and amendments to that clause (now clause 68) were covered in Memorandum No 2.

³⁴ LJC Committee, RoP [83-85], 12 July 2021; Letter from the Minister for Climate Change, 6 August 2021

53. It is essential that the Welsh Government, which has been negotiating with the UK Government, is transparent and accurate about the precise nature of the provisions in a UK Bill for which the Senedd's consent is being sought.

Recommendation 4. The Minister should, in advance of the Senedd's debate on the relevant consent motion, explain why the provisions noted in paragraph 51 of this report were not identified in Memorandum No 2 and confirm that the Senedd's consent is required for their inclusion in the Bill.