

Welsh Parliament
Legislation, Justice and Constitution Committee

Fifth Senedd Legacy Report

March 2021



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Fifth Senedd Legacy Report

March 2021



About the Committee

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

Committee Chair:



Mick Antoniw MS
Welsh Labour

Current Committee membership:



Carwyn Jones MS
Welsh Labour



Dai Lloyd MS
Plaid Cymru



David Melding MS
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Contents

Introduction	5
Part One - An overview of the Fifth Senedd and a forward look	7
1. Our assessment	8
Scrutiny of Welsh Government legislation.....	8
Scrutiny of UK Government legislating in devolved areas.....	9
The Sewel Convention.....	13
The use of intergovernmental agreements.....	15
Intergovernmental working.....	17
Interparliamentary working.....	18
Justice in Wales.....	19
Challenges for the Sixth Senedd	21
Size and remit of the Committee	23
Part Two - A detailed analysis of our scrutiny work during the Fifth Senedd	25
2. Scrutiny of subordinate legislation	26
Subordinate legislation - overall.....	26
Subordinate legislation - Covid-19 pandemic	27
Subordinate legislation - EU exit.....	28
Reviewing how subordinate legislation is scrutinised	30
3. Other Legislative Scrutiny.....	32
Introduction	32
Scrutiny of Bills	32
General comments.....	32
Stage 1 scrutiny of Bills as the responsible committee.....	33
LCMs.....	35
SICMs.....	37
Standing Order 30C Written Statements	38
Impact of the United Kingdom Internal Market Act 2020	40

4.	Wales’ Changing Constitution	43
	Approach and purpose of the inquiry.....	43
	The Sewel Convention.....	44
	The effectiveness of the Sewel Convention.....	44
	The views of the UK Government on the Sewel Convention.....	47
	Intergovernmental agreements.....	50
	Intergovernmental working.....	52
	Future constitutional change.....	53
5.	Making Justice work in Wales.....	55
	Approach to our inquiry.....	55
	Welsh Government responsibilities	56
	UK and Welsh Government responsibilities	57
	Oversight of the justice system.....	61

Introduction

1. The Committee was established in June 2016 to carry out the functions of the responsible committee as 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 Senedd or the Welsh Ministers.¹
2. Over the last five years, a wide range of issues that have affected everyone in Wales have featured in our weekly committee meetings. In total we have scrutinised nearly 800 pieces of subordinate legislation and issued 74 reports covering our scrutiny of other legislation (including Bills and Legislative Consent Memoranda), as well as work undertaken on various inquiries.
3. Early in the Fifth Senedd we looked at how devolution in Wales should and would function in the future as we scrutinised the UK Government's Wales Bill.² In 2019, our attention turned to primary legislation that would eventually change the name of our institution, while also extending the electoral franchise in Wales to allow 16 and 17 years olds to vote in Senedd elections.³ In 2020, and in a milestone event for the Senedd, we took on the responsibility for monitoring the operation of the justice system in Wales.⁴
4. Throughout the Fifth Senedd, as a core part of our remit, we have scrutinised a significant volume of legislation, both primary and secondary, most recently related to the Covid-19 pandemic.
5. Our report is split into two parts. Part One provides our overall assessment of our work in the Fifth Senedd and highlights some of the issues our successor Committee may wish to consider in the Sixth Senedd.
6. Part Two provides a more detailed assessment of our work and is itself split into four chapters covering the scrutiny of subordinate and other legislation, as well as providing a narrative on our two outstanding inquiries on [Wales' Changing Constitution](#) and [Making Justice work in Wales](#).

¹ See the Legislation, Justice and Constitution (LJC) Committee [webpage](#) for full details of the Committee's remit. The justice function was added in January 2020. Transcripts of all meetings referred to in this report are also available on this webpage.

² [UK Government's Wales Bill](#)

³ [Senedd and Elections \(Wales\) Act 2020](#)

⁴ Plenary, RoP, [29 January 2020](#)

7. Our report is based on scrutiny undertaken throughout the Fifth Senedd, including a wide-ranging wash-up evidence session with Jeremy Miles MS, the Counsel General, on 1 March 2021.

Part One

An overview of the
Fifth Senedd and a
forward look



1. Our assessment

Scrutiny of Welsh Government legislation

8. A core part of our remit is to scrutinise legislation.⁵ In undertaking this role, our focus is limited and does not include considering the underlying policy of legislation.⁶ So for example, as regards subordinate legislation our remit is to draw the Senedd's attention to potential deficiencies and inconsistencies in its drafting, as well as to identify particular matters of interest so that Members of the Senedd may take decisions on whether to approve such legislation or to table a motion to annul it.

9. Since 2016 we have scrutinised a range of subordinate legislation; for example, in relation to council tax, a new social care regime, animal health, firefighter pensions, climate change, M4 speed limits, and student loans. We have also scrutinised a range of Bills, often large and complex, relating to public health, local government and devolved taxes.⁷ Part Two of the report provides more detailed information about our scrutiny of subordinate legislation and other legislation including Bills.

10. A substantial amount of the legislation which we have considered has related to two issues that have dominated so many peoples' lives: the UK's exit from the European Union (EU) and since 2020, the Covid-19 pandemic.

11. In February 2019, we reported on the Welsh Government's progress in correcting the statute book as a result of the UK's exit from the EU.⁸ We explained how we had not anticipated the extent to which the UK Government would act in devolved areas, focusing in the report on the use of subordinate legislation in particular. We have continued to raise these concerns since then and discuss those matters in the next section.

12. A significant body of Welsh law has been made by the Welsh Government through subordinate legislation in response to the Covid-19 pandemic and we

⁵ See Standing Order 21 of [Standing Orders of the Welsh Parliament](#), November 2020

⁶ Exceptions occurred in the Fifth Senedd, when we became the Stage 1 committee responsible for the Legislation (Wales) Bill and the Senedd and Elections (Wales) Bill. See Part Two, Chapter 3.

⁷ See our reports relevant to the [Public Health \(Wales\) Act 2017](#), [Local Government and Elections \(Wales\) Act 2021](#), and [Land Transaction Tax and Anti-avoidance of Devolved Taxes \(Wales\) Act 2017](#)

⁸ Constitutional and Legislative Affairs Committee (CLA), [Scrutiny of regulations under the European Union \(Withdrawal\) Act 2018: Progress report](#), February 2019

believe there are specific lessons to be learned. The main coronavirus restrictions regulations have been changed over 30 times, often in very complex ways. We have raised concerns about the confusion there has often been between what is law and what is guidance and the clarity citizens in Wales have about what is required of them.

13. We draw the following conclusions for consideration in the Sixth Senedd.

Conclusion 1. The Covid-19 pandemic has shown the importance of government being accurate in its messaging. When Government Ministers say a person ‘must’ or ‘should’ do something, this is generally understood by the public as being the law. While the Counsel General acknowledged that there is a “risk” of this happening, we believe it is a firm reality. This needs to be recognised and monitored in the Sixth Senedd.

Conclusion 2. Legislating for the Covid-19 pandemic has led to instances when the distinction between law and guidance has not always been clear. There are also instances where the guidance or messaging has not reflected the law entirely accurately. For example, while the law has permitted leaving home where there is a ‘reasonable excuse’, the guidance and messaging has often promoted the more onerous concept of ‘essential travel only’. Our successor Committee, and the Sixth Senedd more broadly, should be aware of these issues and monitor them accordingly.

Conclusion 3. The public health emergency caused by the Covid-19 pandemic has resulted in new, exceptional laws imposing restrictions on the rights and liberties of citizens and businesses in Wales. Therefore, it is vital to understand how these new laws are being enforced. The Counsel General told us that despite close collaboration with the Police, the Welsh Government does not have data on the number of incorrectly issued penalty notices or incorrectly pursued prosecutions in Wales. This highlights an inherent problem in the existing constitutional settlement, as noted by the Counsel General, that the Welsh Government, in certain circumstances, may create new offences but has little subsequent control over the largely reserved aspects of enforcement. We believe that, in the Sixth Senedd, it will be important to hear the views of the enforcement authorities that are required to enforce the laws on a day-to-day basis and find out what challenges they face.

Scrutiny of UK Government legislating in devolved areas

14. Legislation to be made by the Senedd benefits from being scrutinised by elected Members of the Senedd. The Senedd’s scrutiny procedures in relation to

primary legislation (Bills), enable engagement with Welsh citizens through Senedd Committees. In addition, it ensures accessibility to a bilingual Welsh statute book. Similarly, scrutiny of subordinate legislation made by the Welsh Ministers also benefits from being scrutinised in the Senedd.

15. Part Two of our report highlights the extent to which the Welsh Government has relied on the UK Government to legislate in devolved areas as a consequence of the UK's exit from the EU. We have scrutinised this activity by considering Welsh Government Legislative Consent Memoranda (LCMs), Statutory Instrument Consent Memoranda (SICMs) and Standing Order 30C Written Statements, which collectively document how UK Government Bills and subordinate legislation have been used to legislate in devolved areas.⁹

16. We are disappointed that the Welsh Government has chosen to use UK Bills rather than introduce its own primary legislation to legislate for Wales. Our reports on the LCMs related to the UK Government's Environment, Agriculture and Fisheries Bills highlight our broad concerns. In effect, the UK Parliament became responsible for scrutinising in detail policy that has been devolved to Wales for over 20 years. In addition, the opportunities to hear evidence from stakeholders and expert witnesses, and to test the Welsh Ministers on the basis of this evidence, were not available to the same extent for Senedd Committees. Nor were Members of the Senedd afforded the ability and opportunities to test and seek to influence legislation by tabling and voting on amendments as would have been possible with Welsh Government Bills.

17. We are particularly concerned at how some UK Government Bills have provided wide-ranging powers for the Welsh Ministers to develop future policy by means of subordinate legislation, again avoiding detailed legislative scrutiny in the Senedd.

18. Following our recent report on the Welsh Government's LCM on the Animal Welfare (Sentencing) Bill,¹⁰ we wrote to Lesley Griffiths MS, the Minister for Environment, Energy and Rural Affairs outlining our specific concerns regarding legislative activity within her portfolio.¹¹

19. While the Welsh Government has tabled legislative consent motions enabling the Senedd to reach decisions on whether to consent to UK

⁹ See Standing Orders 29, 30A and 30C

¹⁰ LJC Committee, [The Welsh Government's Legislative Consent Memorandum on the Animal Welfare \(Sentencing\) Bill](#), March 2021

¹¹ Correspondence: [23 March 2021](#)

Government Bills that legislate in devolved areas, it has not followed the same approach in respect of SICMs. In the majority of cases, the Welsh Government has not tabled the necessary motions that would enable the Senedd to reach decisions on whether to consent to UK Government subordinate legislation that amends primary legislation in devolved areas. This is despite correspondence from the Llywydd, Elin Jones MS, indicating that the Welsh Government has interpreted the Senedd's Standing Orders incorrectly.

20. It is not acceptable for the UK Government to amend primary legislation, within the competence of the Senedd, by means of subordinate legislation without the express consent of the Senedd.

21. Given that it is the Welsh Government that enters into discussions with the UK Government about using UK Government legislation to legislate in devolved areas, we believe the Welsh Government should table the relevant motion seeking the Senedd's consent to its approach. This applies equally in respect of LCMs and SICMs – neither the nature of the relevant legislative instrument used nor its content should override this basic point of principle.

Conclusion 4. In the Sixth Senedd, the Welsh Government should in all circumstances table motions to enable the Senedd to decide whether to consent to UK Government subordinate legislation that amends primary legislation within the competence of the Senedd. Our successor Committee should continue to make the case for this to become standard practice.

22. Part Two of our report also draws attention to the concerns we have identified during our scrutiny of Standing Order 30C Written Statements, which notify the Senedd when the Welsh Government has consented to the UK Government making subordinate legislation in devolved areas as a consequence of the *European Union (Withdrawal) Act 2018* (the 2018 Act) (to which the Senedd consented in May 2018).

23. Standing Order 30C applies only to regulations made under the 2018 Act. A number of our reports on LCMs concerning EU exit related UK Government Bills have called for similar procedures to apply to regulations made, under these Bills, by UK Ministers in devolved areas with the consent of the Welsh Ministers, but without success.¹²

¹² For example, CLA Committee, [The Welsh Government's Legislative Consent Memorandum on the Healthcare \(International Arrangements\) Bill](#), January 2019 and CLA Committee, [The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill](#), February 2019

24. In July 2020, we began the process of working with the Welsh Government to resurrect and expand a Protocol which had been agreed in October 2018.¹³ In doing so, we proposed that a revised Protocol could facilitate a commitment from the Welsh Government to abide by the principle of Standing Order 30C when making relevant regulations under the European Union (Withdrawal Agreement) Act 2020, and the Agriculture, Fisheries, Environment and Trade Bills once enacted.

25. Following an exchange of correspondence with the First Minister, Mark Drakeford MS¹⁴, in November 2020, the revised Protocol for the scrutiny of regulations arising from the UK's exit from the EU was agreed and published.

Conclusion 5. Our successor Committee should resurrect the Protocol (as revised) for the scrutiny of regulations arising from the UK's exit from the European Union for the purpose and duration of the Sixth Senedd and keep it under review.

Conclusion 6. Our successor Committee should monitor the effectiveness of Standing Order 30C, including whether it should apply to other subordinate legislation made under other UK Acts arising from the UK's exit from the European Union.

26. Many of the arguments advocated by the Welsh Government in permitting the UK Government to legislate on its behalf have not been persuasive. We acknowledge that the Welsh Government has needed to divert resources to respond to the Covid-19 pandemic, but our concerns first arose early in 2019.

27. In preparing this report, we discussed the Welsh Government's approach to legislating for EU exit since 2019 with the Counsel General and asked whether he considered that there have been any consequential effects on devolution as a result. In response he told us:

“...the fundamental principle that we have as a Government is that legislation about Wales should be made in Wales and should be reformed and amended in Wales, and that is possible, but then there

¹³ In recognising our significant role in the scrutiny of regulations made (or to be made) under the 2018 Act and to assist us in this work, a Protocol was developed and agreed between our Committee and the Welsh Government (see Part Two, Chapter 2).

¹⁴ Correspondence: 23 July 2020, 16 September 2020.

have been examples over the past period that were exceptional, of course.”¹⁵

28. In terms of capacity to legislate, the Counsel General drew attention to the challenges associated with the Covid-19 pandemic and noted particular challenges in the environment and rural affairs portfolio, stating that decisions had been made to recruit in that area.¹⁶

29. We remain concerned at the extent to which the UK Parliament and UK Government have been legislating in devolved areas. The approach becomes increasingly constitutionally irregular if the changes made to the Welsh statute book are substantial and significant.

Conclusion 7. Our successor Committee should monitor the extent to which the UK Government continues to legislate in devolved areas and hold the next Welsh Government to account to ensure that legislation about Wales within the legislative competence of the Senedd is made and amended in Wales by the Senedd and the Welsh Ministers.

The Sewel Convention

30. Our inquiry on Wales’ Changing Constitution has attempted to gain a better understanding of the UK Government’s approach to the Sewel Convention¹⁷ and how it operates in practice. This has assumed greater importance because legislation arising from the UK’s exit from the EU has brought about changes to the constitution of the UK without the consent of the devolved legislatures. The Senedd refused consent for both the *European Union (Withdrawal Agreement) Act 2019* (the EU Withdrawal Agreement Act 2019) and the *United Kingdom Internal Market Act 2020* (the UK Internal Market Act 2020) and it was not given sufficient time to consider legislative consent for the *European Union (Future Relationship) Act 2020* (the Future Relationship Act 2020).

31. It has become apparent that the UK and devolved Governments interpret the Sewel Convention differently. Moreover, the precise role of parliaments and governments within the consent process lacks clarity. This is perhaps a reflection that the Convention and its application derives from Lord Sewel’s contribution to

¹⁵ LJC Committee, RoP [38], 1 March 2021

¹⁶ LJC Committee, RoP [45-47], 1 March 2021

¹⁷ The Sewel Convention provides that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the Senedd

a House of Lords debate on the Scotland Bill in July 1998¹⁸ and has not been formalised or developed in substance since then,¹⁹ save for inclusion as a non-justiciable provision within the *Government of Wales Act 2006* (the 2006 Act) (and the *Scotland Act 1998*). In practice, dialogue around the application of the Convention invariably focuses on discussions between governments and the decisions of the devolved legislatures.

32. After referenda that led to the devolution of primary law making powers, any encroachment by the UK Government into devolved areas is constitutionally significant and the parameters allowing such action must be clear. Those parameters are not clear, and it is unsatisfactory that we are in a position where we are speculating about the interpretation of the Sewel Convention.

33. Our own correspondence with the Secretary of State for Wales has not provided the clarity we had hoped for and his most recent letter²⁰ has raised further doubts about whether the Sewel Convention can operate effectively in the future. We agree with the Counsel General when he told us:

“...if you can have a situation where the designation of the application of the principle is effectively entirely at the discretion of one party, and indeed... decided after the event, well, it doesn't seem to me remotely controversial to say that that is not a functioning convention. So, it's completely unacceptable that that is the basis on which it's proceeding, and I think it doesn't do anybody any service to pretend that that is a well-functioning convention when it plainly isn't.”²¹

34. We have therefore written to the Procedure Committee in the House of Commons highlighting our concerns as part of its inquiry into The procedure of the House of Commons and the territorial constitution.²²

Conclusion 8. It is critical that all parties find a shared understanding on the application of the Sewel Convention to which all executive and legislative arms of the UK can agree. Failure to reach such an understanding, or to reform the

¹⁸ House of Lords Debate, 21 July 1998, Vol 592 c 791

¹⁹ It was included in the *Devolution, Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee*, Cm 4444, October 1999 and is currently set out in paragraph 14 of the latest version from 2013

²⁰ Correspondence: 16 February 2021

²¹ LJC Committee, RoP [68], 1 March 2021

²² Correspondence: 30 March 2021

Sewel Convention, will render it obsolete and of little practical value, while at the same time building unnecessary friction between the governments of the UK.

The use of intergovernmental agreements

- 35.** A product of the UK Government legislating in devolved areas has been the use of intergovernmental agreements between the UK and Welsh Governments as a way of resolving disputes about the inclusion of certain provisions in UK Government Bills, which are then to be subject to the consent of the Senedd. We have raised concerns about these agreements in our reports on LCMs (see Part Two of this report).
- 36.** We disagree with the Counsel General that intergovernmental agreements are an effective tool to overcome disagreements about proposed primary legislation. While that argument may hold weight from a government's perspective, it cannot be a valid reason from the perspective of a parliament.
- 37.** The practical effect of such intergovernmental agreements is to take power away from the Senedd as the legislature and place it the hands of the Welsh Government. This is because disputed provisions are resolved between governments, side-lining the role the Senedd would normally have as part of the consent process.
- 38.** Where recent UK Government Bills have required the Senedd's consent and an intergovernmental agreement is relevant to that Bill, the Welsh Government has often failed to provide or agree them in time to enable them to be considered before the relevant legislative consent debate takes place. In the case of the debate on the motion to consent to the relevant provisions in the UK Government's Fisheries Bill, the intergovernmental agreement has still not been finalised or published some five months after the Senedd debate.
- 39.** There is also a danger that the use of intergovernmental agreements provides a perverse incentive for the UK Government not to include provisions in UK Government Bills, but instead to use such agreements as a matter of routine.
- 40.** Moreover, such intergovernmental agreements are not legally binding, could be subject to change without scrutiny by, or notification to, the Senedd, can become out of date and, as we have found in our scrutiny of Standing Order 30C Written Statements, different parties can interpret their meaning in different ways.
- 41.** As we have already indicated, the UK Government legislating in devolved areas bypasses detailed scrutiny by the Senedd. Using intergovernmental

agreements, in place of provisions in UK Government Bills that would be subject to the Senedd's consent, reinforces that problem.

42. One solution to resolving our concerns is for the Welsh Government to rely less on the UK Government legislating on its behalf, negating the need for intergovernmental agreements in the first place.

Conclusion 9. Our successor Committee should continue to monitor the use of intergovernmental agreements between the Welsh and UK Governments associated with UK Government Bills for which the Senedd's consent is sought. If the next Welsh Government persists in their use as a way of resolving disputes (including over matters of legislative competence), our successor Committee should seek a commitment from the next Welsh Government to present a finalised intergovernmental agreement in advance of any Senedd consent decision in respect of a UK Bill.

Conclusion 10. Our successor Committee should ensure that the next Welsh Government provides regular updates to the Senedd on the number of intergovernmental agreements relating to primary legislation in operation, how they are being used and when they are to be reviewed.

43. We believe it is important for the Senedd to be informed when the Welsh Government is making a legislative decision through a common framework as a result of an intergovernmental agreement.

44. The Welsh Government accepted the recommendation of the External Affairs and Additional Legislation Committee that it should identify where legislation relates to a common framework.²³ We have scrutinised a large volume of legislation in policy areas where common frameworks are planned. We regret that we have not been able to consider fully how the planned frameworks will interact with and affect the operation of that legislation.²⁴

Conclusion 11. We welcome the Welsh Government's commitment to identify where legislation relates to a common framework and our successor Committee should ensure that the Welsh Government adheres to that commitment.

²³ Correspondence: 23 January 2020

²⁴ See our July 2020 report on The Welsh Government's Legislative Consent Memorandum on the Environment Bill, the Welsh Government's response and the UK Government's September 2020 common frameworks analysis. See also External Affairs and Additional Legislation Committee, RoP, 11 January 2021.

Intergovernmental working

45. Early in the Fifth Senedd, we considered intergovernmental working in detail, publishing our report [UK Governance post-Brexit](#) in February 2018. In particular it set out to examine whether intergovernmental relationships were fit for purpose and whether they needed to change.

46. In our report, we said that the Welsh Government’s proposal for a UK Council of Ministers to replace the [Joint Ministerial Committee](#) has considerable merit and that it is “the most coherent, long-term solution to resolving concerns about inter-governmental relations.” We also said that an essential and pragmatic first step would be to strengthen the existing JMC structure but also recommended that, longer-term, it should be subject to fundamental reform.²⁵

47. In March 2018 the UK Government embarked on an intergovernmental relations review.²⁶ In addition the [Dunlop Review into UK Government Union capability](#) was announced on 4 July 2019.²⁷

48. As matters currently stand, our perception is that intergovernmental relationships are variable. They appear to have been functioning effectively from the Welsh Government’s perspective in relation to correcting the statute book as a result of leaving the EU. However, from a wider, more strategic perspective, they appear to have deteriorated, as evidenced by the apparent reluctance of the UK Government to engage on the development of its proposals to legislate in relation to the UK internal market and the failure to conclude the review of intergovernmental relations.

49. As such, events since the publication of our 2018 report, particularly in relation to the *UK Internal Market Act 2020*, highlight why the need for reform of the existing intergovernmental structures, with a robust, independent dispute resolution mechanism at their heart, is more urgent than ever. This will also be particularly important as disputes may emerge on the operation of common frameworks, particularly as there is likely to be more interaction between governments of the UK in devolved policy areas than was ever previously the case when these areas were subject to common EU rules. It was therefore reassuring

²⁵ Paragraphs 112-114, and recommendations 1 and 3

²⁶ Referred to in a [Joint Ministerial Committee communiqué](#) of 14 March 2018

²⁷ At the time this report was agreed by the Committee, the outcomes of these reviews had not been published. On 24 March 2021, the UK Government published a [progress update](#) on the intergovernmental review and the [outcome of the Dunlop Review](#). The Welsh Government issued a [statement](#) in response on the same day.

for the Counsel General to tell us that progress was being made in the area of disputes.²⁸

Conclusion 12. Our successor Committee should continue to monitor the effectiveness of intergovernmental workings and any developments following the publication of the intergovernmental relations review and the Dunlop Review.

50. Following negotiations with the Welsh Government in the autumn of 2018, an Inter-Institutional Relations Agreement (the Agreement) was formalised and noted by the Senedd in March 2019.²⁹ The Agreement represents the agreed position of the Fifth Senedd and the Welsh Government on the information that the Welsh Government will, where appropriate, provide to the Senedd with regard to its own participation in formal, ministerial level inter-governmental meetings, concordats, agreements and memorandums of understanding.³⁰

Conclusion 13. The next Senedd and our successor Committee may wish to consider whether the current Inter-Institutional Relations Agreement should be resurrected for the purpose and duration of the Sixth Senedd.

Interparliamentary working

51. Our report *UK Governance post-Brexit* also looked at how the parliaments of the UK should work together, suggesting a Speakers' Conference (comprising of the Speakers and Presiding Officers of UK legislatures) that would develop a framework for interparliamentary relations.

52. Our report also highlighted the benefits of the Interparliamentary Forum on Brexit, which was established following a recommendation in a report of the House of Lords European Committee,³¹ and attended by the Chair of this Committee. The Forum draws members from Committees of UK legislatures and is cross-party in nature. It has proved invaluable in sharing perspectives on broad constitutional matters and working to reach a consensus on improvements that are needed to existing arrangements. In March 2018, for example, the Forum issued a statement recognising “that the current system of inter-governmental

²⁸ LJC Committee, RoP [95], 1 March 2021

²⁹ Plenary, RoP, 6 March 2019

³⁰ In October 2020, the Welsh Government laid its first Annual Report, as required by the Agreement.

³¹ House of Lords, European Union Committee, Brexit: devolution, 4th Report of Session 2017-2019, 19 July 2017, HL Paper 9, paragraph 297

relations in the UK is not fit for purpose and that there is an urgent need for substantial reform...”.

53. In all, the Forum met eight times. While meetings have not continued during the Covid-19 pandemic, we would support the re-constitution of a similar body to maintain and strengthen the existing interparliamentary relationships. They are likely to be essential as the UK embarks on new challenges following its exit from the EU.

Conclusion 14. Our successor Committee should continue to seek opportunities to work with committees in other parliaments, thereby helping to build stronger interparliamentary relationships.

Justice in Wales

54. On 29 January 2020, our remit changed to include matters relating to justice in Wales. We began our [Making Justice work in Wales](#) inquiry in March 2020. Dr Sarah Nason of Bangor University has been our expert adviser on this work and the results of her research have informed our conclusions.³²

55. The [Commission on Justice in Wales](#) (the Thomas Commission) recommended that the Senedd should take a more proactive role in appropriate scrutiny of the operation of the justice system. Although much of the system is reserved, the Welsh Government has significant justice responsibilities.

56. The Wales Governance Centre’s 2019 report [Public Spending on the justice system for Wales](#) found that around 38% of spending on justice in Wales is funded by the Welsh Government or local authorities. However, despite this significant expenditure, the Welsh Government does not regularly report on its work on justice policy.

Conclusion 15. To increase transparency, we believe that the next Welsh Government should report annually to the Senedd on its work on justice matters. Subsequently, the responsible Minister should appear before our successor Committee to enable scrutiny of the report, before it is debated in Plenary.

57. The division of responsibility for justice policy between the UK Government and the Welsh Government is complex. This presents a challenge for scrutiny. We took an important step by holding a historic and insightful evidence session with

³² Dr Sarah Nason, [Justice in Wales](#), May 2020

the Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice in February 2021.³³

Conclusion 16. Our successor Committee should monitor discussions between the Welsh Government and the Ministry of Justice on justice matters. It should also establish an annual evidence session with the Lord Chancellor and Secretary of State for Justice.

58. The Thomas Commission recommended that the Senedd should make arrangements to monitor and review the process of reform of the justice system in Wales. We discussed the recommendations of the Thomas Commission with the First Minister, the Counsel General and the Lord Chancellor.³⁴ The Lord Chancellor told us that he was “keen to explore” certain aspects of the Thomas Commission recommendations.

Conclusion 17. Our successor Committee should continue to monitor the implementation of the Thomas Commission recommendations.

59. The Thomas Commission called for “clear and accountable leadership on justice in the Welsh Government”. Evidence we received suggests that leadership in the Welsh Government on justice remains unclear.

Conclusion 18. The Welsh Government’s justice responsibilities should be clearly identified and brought under the responsibility of a single Minister.

60. We held an inaugural evidence session with the President of the Welsh Tribunals, marking an important step forward for Senedd engagement with the judiciary.

Conclusion 19. Our successor Committee should establish an annual evidence session with the President of the Welsh Tribunals.

61. We also held an evidence session on the Law Commission’s consultation on the devolved tribunals in Wales.³⁵

Conclusion 20. Following the Law Commission’s consultation on the devolved tribunals in Wales, our successor Committee should monitor developments, and

³³ LJC Committee, [22 February 2021](#)

³⁴ LJC Committee, [12 October 2020](#) and 22 February 2021

³⁵ LJC Committee, 22 February 2021

redress mechanisms in future Welsh legislation, to consider whether there are opportunities to make greater use of devolved tribunals.

62. A lack of disaggregated data on justice in Wales presents a challenge for scrutiny and accountability. We pursued the matter with both the Welsh Government and the Ministry of Justice in correspondence.³⁶ The Counsel General told us that the Welsh Government was developing a justice ‘data dashboard’.

Conclusion 21. Our successor Committee should continue to press for the disaggregation of justice data in Wales and monitor the progress of the data dashboard.

63. We received evidence that understanding of the justice system among Members of the Senedd could be improved.

Conclusion 22. The Senedd Commission should consider how it may improve the training available to Senedd Members and their staff on the operation of the justice system, including on administrative justice and redress mechanisms.

64. We would like to have explored access to justice in greater depth because access to justice is central to the rule of law in a civilised and democratic society. The promotion of public legal education, the continuing impacts of legal aid reforms (and how to mitigate these) are likely to be of central importance in the coming years, as will be legal technology and how this can be harnessed to improve access to justice.

Conclusion 23. In undertaking scrutiny of legislation and policy relating to justice in Wales, our successor Committee should put access to justice at the heart of its consideration.

Challenges for the Sixth Senedd

65. Our assessment has focused on our experience of scrutiny in the Fifth Senedd and highlighted challenges that will carry over and continue into the Sixth Senedd.

Conclusion 24. Our successor Committee should continue to monitor, and advocate for, good legislative practice in the Sixth Senedd.

³⁶ Correspondence: [19 June 2020](#), [19 June 2020](#), [7 July 2020](#), [23 July 2020](#)

66. New challenges are also likely to arise, in particular in understanding the implications of the UK Internal Market Act 2020 and the Future Relationship Act 2020 for legislating in the Sixth Senedd.

67. Our report on The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill, highlights how the UK Internal Market Act 2020 will impact on legislation made in the Sixth Senedd. For example, while legislation made by the Senedd will be able to regulate goods and service providers in Wales, it may not necessarily be enforceable against goods or service providers from other parts of the UK if they fall within the scope of the Act.

68. Section 29 of the Future Relationship Act 2020 provides that domestic law is to have effect with the modifications that are required to implement The EU-UK Trade and Cooperation Agreement and the agreement on The EU-UK Security of Classified Information. It only applies to those provisions which are not implemented directly by any other mechanism in the Act or otherwise.

69. In evidence to us the Counsel General highlighted the problems of making the UK Internal Market Act 2020 a practical piece of legislation and also drew attention to the uncertainty created by section 29 of the Future Relationship Act 2020, a provision which he called constitutionally unsatisfactory.³⁷

70. The UK Internal Market Act 2020 will have a practical impact on the way in which legislation is made by the Senedd in future years. Chapter 3 in Part Two of this report summarises some of the key impacts that the new Senedd will need to consider at the earliest opportunity.

Conclusion 25. The Senedd and our successor Committee will need to consider the implications of the *United Kingdom Internal Market Act 2020* on how the Senedd makes laws, as detailed in Part Two, Chapter 3 of this report.

71. The UK Internal Market Act 2020 provided the Competition and Markets Authority (CMA) with the power to establish an Office for the Internal Market (OIM). The OIM will play an advisory function in relation to the operation of the internal market but will not have an adjudication role. We received a letter³⁸ from the Chief Executive of the CMA in March 2021 regarding the establishment and operation of the OIM.

³⁷ LJC Committee, RoP [53], 1 March 2021

³⁸ Correspondence: 2 March 2021

Conclusion 26. Our successor Committee should accept the invitation from the Competition and Markets Authority to engage with the new Office for the Internal Market as it is established and becomes operational.

72. Concerns about the UK's constitution will continue into the Sixth Senedd and careful consideration of developments will be needed.

Conclusion 27. As devolution approaches its 25th anniversary, major challenges are likely to arise for the UK and its constituent nations. As a result, there may be a need for Members of the Senedd to have a conversation with citizens in Wales about the constitutional future of our country. We believe our successor Committee would be well-placed to contribute significantly to that process.

Size and remit of the Committee

73. During the Fifth Senedd, the Committee's size has fluctuated between four to six Members. Based on our experience, we do not consider that there was any benefit obtained by the increase to six Members. We also do not consider that the Committee's size necessarily needs to reflect the overall composition of Senedd Members.

74. As we said in correspondence with the Business Committee³⁹, our Committee has traditionally worked in a non-partisan way and regularly reported on primary and secondary legislation without the Committee's composition reflecting the Senedd's party balance. This has, in our view, become one of the great strengths of the Committee and has resulted in improvements to legislation based on constitutional and legislative principle.

Conclusion 28. We believe that a membership of four experienced Members has served the Committee well and we can see no reason why this model should change. Given the nature of our remit and role, we have found that our responsibilities have been best discharged when our membership has comprised of experienced Senedd Members. This is something which we would encourage in the next Senedd as the membership of our successor Committee is chosen.

75. As Chapter 3 in Part Two of our report demonstrates, we have taken a close interest in the Welsh Government's approach to consolidating the statute book.

³⁹ Correspondence: [24 May 2018](#)

Conclusion 29. When determining the composition and remits of committees in the Sixth Senedd, we believe that it would be beneficial and logical if the responsibility for scrutinising annual reports laid in accordance with the Legislation (Wales) Act 2019, and for scrutinising consolidation Bills, were to fall to the same Senedd Committee, which would also therefore take on the wider role of evaluating the Welsh Government’s overall implementation of the Act.

Conclusion 30. If our successor Committee retains its existing remit, in addition to taking on a role in scrutinising consolidation Bills, we believe that greater resources will be required to support that work.

76. In a letter⁴⁰ to the Business Committee in May 2020, we supported the use of virtual meetings as a consequence of the Covid-19 pandemic. We believe the use of technology to enable virtual or hybrid meetings should be available as standard for Committees in the Sixth Senedd (post-pandemic). In particular, it may help Committees take evidence from a broader range of witnesses to help deliver effective scrutiny.

⁴⁰ Correspondence: [22 May 2020](#)

Part Two

A detailed analysis of
our scrutiny work
during the Fifth Senedd



2. Scrutiny of subordinate legislation

This Chapter considers our scrutiny of all subordinate legislation made by the Welsh Government.

Subordinate legislation – overall

- 77.** As highlighted in Part One, the scrutiny of subordinate legislation made, or to be made, by the Welsh Government is one of our core responsibilities.
- 78.** Standing Order 21.2 prescribes that we must consider all relevant subordinate legislation laid by the Welsh Government, scrutinise it against the specific grounds listed in the Standing Order and report to the Senedd within 20 days.
- 79.** Generally, the grounds for reporting under Standing Order 21.2 are matters that might call into question the legality or legal correctness of the legislation concerned. They are referred to as technical reporting points, although they sometimes relate to issues of legal principle as well as drafting issues.
- 80.** Standing Order 21.3 provides a discretionary power enabling us to draw the Senedd’s attention to subordinate legislation that raises matters that may be of interest to Senedd Members. These reporting points are referred to as merits reporting points.
- 81.** Senedd Commission lawyers assist us with our scrutiny role by analysing all relevant subordinate legislation and preparing draft reports for the Committee.
- 82.** All subordinate legislation laid before the Senedd and scrutinised by the Committee can be found on our [webpages](#) on the Senedd website.
- 83.** Most of the subordinate legislation considered in the Fifth Senedd has been in the form of regulations and orders (statutory instruments), but we have also considered codes of practice, statutory guidance and Ministerial directions.
- 84.** In its legacy report, our predecessor Committee in the Fourth Senedd highlighted problems with the adequacy of explanatory memoranda laid alongside subordinate legislation, and recommended that we, as the successor Committee, pay particular attention to such explanatory memoranda in the Fifth Senedd.
- 85.** One disappointing trend which we have highlighted during our consideration of subordinate legislation is a lack of information provided in

explanatory memoranda as regards the Welsh Government's assessment of any interference with human rights. This has been a particular issue with explanatory memoranda that has accompanied Covid-related subordinate legislation (see paragraph 91 below for further detail).

86. By the end of this Senedd, we will have reported on nearly 800 items of subordinate legislation.

87. A substantial amount of this subordinate legislation has related to the Covid-19 pandemic and the UK's exit from the European Union.

Subordinate legislation - Covid-19 pandemic

88. We considered our first Covid-related piece of subordinate legislation on 28 April 2020.⁴¹

89. In order to scrutinise Covid-related subordinate legislation (and other subordinate legislation) made by the Welsh Ministers, and unlike the majority of other Senedd committees, we continued to meet weekly during the Covid-19 pandemic, and even held two extraordinary meetings during the Senedd's 2020 summer recess period.

90. Up until the publication of this report, we have reported on 144 items of subordinate legislation related to Covid-19 (including 74 subject to the negative procedure, 61 to the made affirmative, 4 to the draft affirmative, and 5 to no procedure). This resulted in 383 reporting points (61 technical and 322 merits).

91. In particular, our merits scrutiny has drawn attention to the accessibility of the legislation, the use and accuracy of Welsh Government guidance, and matters relating to compatibility with human rights. On this latter point, we have regularly reported on what we consider to be inadequacies in the Welsh Government's reporting of its assessment of the extent to which any interference with human rights caused by subordinate legislation is justified and proportionate in pursuit of the legitimate aim of protecting public health.⁴²

92. As part of the response to the Covid-19 pandemic, we have also considered subordinate legislation the Welsh Ministers have made using powers to which no

⁴¹ See [SL\(5\)534 - The Health Protection \(Coronavirus Restrictions\) \(Wales\) \(Amendment\) Regulations 2020](#)

⁴² See, for example, the Committee's consideration of [SL\(5\)623 - The Coronavirus Act 2020 \(Residential Tenancies: Protection from Eviction\) \(Wales\) Regulations 2020](#)

Senedd procedure is attached and which, in some cases, do not even have to be laid before the Senedd. For example, the Welsh Ministers have made no subordinate legislation that modifies school curriculum requirements, and the approval of a class of place for treatment for the termination of pregnancy. This legislation has been made under various Acts including the *Coronavirus Act 2020*.

93. In June 2020, we took evidence⁴³ from the Minister for Health and Social Services, Vaughan Gething MS, about the Welsh Government's initial legislative approach to Covid-19, questioning him on matters relating to the rule of law, interference with human rights and the effectiveness and accessibility of Covid-related subordinate legislation.

94. We followed-up on some of these issues in an end of the Senedd scrutiny session on 1 March 2021 with the Counsel General, Jeremy Miles MS, during which we discussed the Welsh Government's overall approach to legislating in response to the Covid-19 pandemic.⁴⁴

Subordinate legislation - EU exit

95. In February 2018, we published our report Scrutiny of regulations made under the European Union (Withdrawal) Bill, which focused predominantly on amendments that we considered should be made to the Bill during its passage, at that time, through the House of Lords. In July 2018, we published a further report which considered more operational matters that related to the scrutiny of subordinate legislation that would be made under the European Union (Withdrawal) Act 2018 (the 2018 Act).

96. In recognising our significant role in the scrutiny of regulations made (or to be made) under the 2018 Act and to assist us in this work, in October 2018 a Protocol was developed and agreed between our Committee and the Welsh Government. The Protocol set out an understanding between us and the Welsh Government of the administrative arrangements for the scrutiny of regulations made by the Welsh Ministers under Part 1 of Schedule 2 to the 2018 Act, as recommended in our operational matters report.

⁴³ LJC Committee, 8 June 2020

⁴⁴ LJC Committee, 1 March 2021

97. In parallel, and as a consequence of an expanded role⁴⁵, the Business Committee considered and subsequently determined that our membership should be increased to six Members.⁴⁶

98. We considered the first piece of subordinate legislation to be made by the Welsh Ministers that related to the UK's exit from the European Union on 7 January 2019.⁴⁷ This began our consideration of a new category of statutory instrument - regulations made under the EU (Withdrawal) Act 2018 subject to sifting.

99. The 2018 Act provides UK Ministers and the Welsh Ministers with regulation-making powers to amend existing primary and secondary legislation. Paragraph 4 of Schedule 7 to the 2018 Act provides for a Senedd committee to sift certain regulations that the Welsh Ministers propose to make under the negative procedure known as proposed negative regulations. In October 2018, the Senedd's Standing Orders were amended to take account of the need for this sifting process,⁴⁸ and we became the 'sift Committee'. As the sift Committee, we considered the appropriate procedure to be followed, either negative or affirmative, using criteria set out in Standing Order 21.3C.

100. Details of the sifting process are set out in Schedule 7 to the 2018 Act and are replicated on our webpage. We also produced a guide to the scrutiny of regulations made under the 2018 Act, and published an explainer flowchart.

101. In February 2019, we published our report, Scrutiny of regulations under the European Union (Withdrawal) Act 2018: Progress report. The Progress report identified all EU exit related regulations in devolved areas considered by us up until the end of January 2019 (whether made, or proposed to be made, by the Welsh Ministers or UK Ministers).

102. Up until the publication of this report, we have scrutinised EU exit related subordinate legislation as follows:

- 40 proposed negatives, 3 of which we recommended for uplift and accepted by the Welsh Government;

⁴⁵ Correspondence: 9 May 2018, 24 May 2018

⁴⁶ Business Committee, minutes of the meeting of 26 June 2018

⁴⁷ pNeg(5)01 - The Elections (Wales) (Amendment) (EU Exit) Regulations 2018

⁴⁸ Plenary, RoP, 3 October 2018

- 175 items of subordinate legislation reported upon (including 124 subject to the negative procedure, 6 to the made affirmative and 28 to the draft affirmative).⁴⁹

Reviewing how subordinate legislation is scrutinised

103. The scrutiny of subordinate legislation has undoubtedly been challenging given the impact of the UK's exit from the EU and the Covid-19 pandemic. A particular challenge for the Senedd has been the scrutiny of Covid-19 regulations subject to the made affirmative procedure under the *Public Health (Control of Disease) Act 1984*. Under this procedure, regulations are made and come into force but cannot remain law unless approved by the Senedd within a certain time period (usually 28 or 40 days). We exchanged correspondence with the Business Committee about the scrutiny of regulations using this procedure in October 2020.⁵⁰

104. The Sixth Senedd may provide an opportunity for our successor Committee to review the approach to the scrutiny of subordinate legislation. Such a review, as well as looking at the different types of scrutiny procedure could also consider the accompanying Explanatory Memoranda and relevant impact assessments. Based on issues raised in our scrutiny reports, this might include for example how much detail to include in Explanatory Memoranda on human rights and equality matters.

⁴⁹ One statutory instrument – [SL\(5\)316](#) – was not considered by the Committee

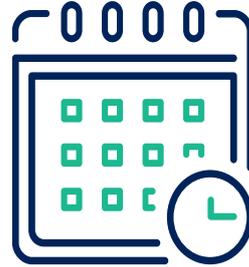
⁵⁰ Correspondence: [8 October 2020](#), [22 October 2020](#)

Legislation, Justice and Constitution Committee

Our work during the Fifth Senedd



74
COMMITTEE
REPORTS



164
COMMITTEE
MEETINGS

DURING THE FIFTH SENEDD THE COMMITTEE CONSIDERED

NEARLY
800



PIECES OF SUBORDINATE
LEGISLATION

PROPOSED NEGATIVE STATUTORY INSTRUMENTS **40**

39 STATUTORY INSTRUMENT
CONSENT MEMORANDA

LEGISLATIVE CONSENT
MEMORANDA



48



23
BILLS

218

STANDING ORDER 30C
WRITTEN STATEMENTS



3. Other Legislative Scrutiny

This Chapter considers our scrutiny of a range of other legislation scrutinised by the Committee.

Introduction

105. Throughout the Fifth Senedd, as well as subordinate legislation, we have also scrutinised:

- Bills introduced into the Senedd;
- Welsh Government **Legislative Consent Memoranda (LCMs)** for UK Government Bills that propose to legislate within the legislative competence of the Senedd;
- Welsh Government **Statutory Instrument Consent Memoranda (SICMs)** for UK Government regulations that amend primary legislation within the legislative competence of the Senedd;
- Welsh Government **Standing Order 30C Written Statements** that notify the Senedd that the Welsh Ministers have consented to a UK Minister making statutory instruments under the EU (Withdrawal) Act 2018, which contain provision within the legislative competence of the Senedd or the executive competence of the Welsh Ministers.

Scrutiny of Bills

General comments

106. Of the 23 Bills introduced into the Senedd, 20 were introduced by the Welsh Government, one by a backbench Member, one by a Committee and one by the Senedd Commission. Two of the Bills scrutinised by us were Welsh Government Emergency Bills, requiring reports to be turned around quickly.⁵¹

107. Our standard scrutiny of these Bills in line with our remit has focused on a number of specific issues:

⁵¹ See our reports relevant to the [Law Derived from the European Union \(Wales\) Act 2018](#) and [Welsh Elections \(Coronavirus\) Act 2021](#)

- matters relating to legislative competence including compatibility with human rights;⁵²
- the need for the legislation;
- the balance between the provisions on the face of the Bill and what is delegated to the Welsh Ministers to be made by subordinate legislation, and the procedure attached to each subordinate legislation making power;⁵³
- the need for consolidation (if applicable) and other matters related to the accessibility of the statute book;
- the overall quality of the legislation.

108. We made 171 recommendations in respect of the 23 Bills laid before the Senedd that we scrutinised. Many of our recommendations sought further explanation and clarification for the approach adopted in a Bill, usually by the relevant Member in Charge during the Stage 1 general principles debate. We also recommended regularly that the procedure attached to the making of subordinate legislation by the Welsh Ministers should be strengthened. We also considered and challenged the use of, and procedure attached to, Henry VIII powers in Bills (i.e. the use of subordinate legislation to amend primary legislation), recommending clarification around the reasons for their use and the use of the affirmative procedure where it did not apply.

Stage 1 scrutiny of Bills as the responsible committee

109. During the Fifth Senedd, and unusually for this Committee, we have been the responsible committee for the Stage 1 scrutiny of two Bills: the Legislation (Wales) Bill and the Senedd and Elections (Wales) Bill.⁵⁴

110. At the time we scrutinised these Bills, the Committee had six Members to reflect the political balance of the Senedd and in line with the composition of other Committees responsible for Stage 1 scrutiny (see discussion in paragraphs 73 to 75).

⁵² To be within the legislative competence of the Senedd, 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

⁵³ See Standing Order 21.7(ii)

⁵⁴ Stage 2 scrutiny was undertaken by a Committee of the Whole Senedd

111. We and our predecessor Committees have previously commented on how impenetrable laws are becoming and we support the need to simplify and clarify the Welsh statute book to make it more accessible and easier to understand. As such, we have taken a keen interest in the Welsh Government's plans for the consolidation and codification of Welsh law and the accompanying development of new Senedd procedures.

112. When introducing the Legislation (Wales) Bill to the Senedd, the Welsh Government said that the Bill, once enacted, intended to make Welsh law more accessible, clear and straightforward to use, by making provision about the interpretation and operation of Welsh legislation and by requiring the Counsel General and the Welsh Ministers to take steps to improve the accessibility of Welsh law. We welcomed the proposals in the Bill and agreed that the legislation did have the potential to contribute to the Welsh Government's aim of improving the accessibility of Welsh law.

113. As a piece of innovative legislation, we said in our Stage 1 report, that timely and robust evaluation will be critical to its success.⁵⁵ We also said that the Senedd's Business Committee should seek our views as it prepared new Standing Orders for consolidation Bills, codification and law reform Bills.⁵⁶ In July 2019, and following that recommendation, we accepted the Business Committee's invitation to comment and began our consideration of the draft Standing Orders for a Consolidation Bills procedure. Informed by our consideration of the Legislation (Wales) Bill and an evidence session with the Counsel General⁵⁷, we exchanged correspondence with the Business Committee setting out our views on the draft Standing Orders. The new Standing Order for a Consolidation Bills procedure was approved by the Senedd on 24 March 2021.

114. Our consideration of the Senedd and Elections (Wales) Bill coincided with our consideration of the Legislation (Wales) Bill.

115. Overall, we made 19 recommendations in our Stage 1 report on the Senedd and Elections (Wales) Bill, aimed mainly at improving the legislation and delivering it effectively, with some also focused on good legislative practice.

⁵⁵ See recommendations 6 and 10

⁵⁶ Recommendation 12

⁵⁷ LJC Committee, 18 November 2019

116. We did express some concern at the lack of fully developed provisions in the Bill.⁵⁸ We, and our predecessor Committee,⁵⁹ have been consistent in our call for Bills that can be reasonably considered to be fully developed at the point of introduction, rather than Members in Charge relying on amending stages to bring forward new and substantial provisions.

LCMs⁶⁰

117. During the Fifth Senedd, we have considered 48 LCMs and Supplementary LCMs relating to 32 UK Bills, and produced 33 reports.⁶¹ The increase in number, compared to the nine LCMs reported on by our predecessor Committee in the Fourth Assembly, can be linked to the UK's exit from the EU and the Welsh Government's use of UK Government Bills to correct the Welsh statute book as a result.

118. We have been surprised at both the approach adopted by the Welsh Government in some cases and some of the arguments it has used to justify its approach. We briefly highlight some of our concerns, which are not just related to EU exit related UK Government Bills:

- using UK Government Bills to legislate in policy areas such as agriculture, environment and fisheries that have been devolved for some 20 years, rather than using separate Welsh Bills⁶² or a multi-purpose EU exit Bill covering these policy areas;⁶³
- the use of UK Government Bills to delegate often broad powers to the Welsh Ministers to make regulations, with decision-making on the

⁵⁸ See our consideration of section 27 of the Senedd and Elections (Wales) Bill, as introduced, and recommendations 2, 16 and 17 of our Stage 1 report on the Bill.

⁵⁹ See Fourth Assembly, Constitutional and Legislative Affairs Committee, [Making Laws in Wales](#), October 2015

⁶⁰ Standing Order 29 requires the Welsh Government to lay a Legislative Consent Memorandum (LCM) when a UK Government Bill before the UK Parliament proposes to make provision in relation to Wales for any purpose within the legislative competence of the Senedd (or to modify that competence). The Senedd will then hold a debate, on a legislative consent motion, to decide whether consent should be given to that Bill.

⁶¹ Our reports are available on our [website](#)

⁶² See [reports](#) on relevant LCMs

⁶³ See discussion at paragraphs 44-50 in LJC Committee, [The Welsh Government's Legislative Consent Memorandum on the Environment Bill](#), July 2020

procedures that apply resting with the UK Parliament and not the Senedd;⁶⁴

- the use of intergovernmental agreements between governments instead of the inclusion of relevant provisions in a UK Bill that would be subject to the Senedd's consent;⁶⁵
- concerns that use of UK Government Bills is being justified on grounds of clarity and accessibility, an argument which not only lacks credibility in the context of devolution but is also inaccurate, as it can make Welsh legislation more complex to navigate;⁶⁶
- concerns that legislating on a Wales and England basis is seen as a default option and also means that legislation is not bilingual;⁶⁷
- the absence of appropriate sunset provisions in UK Government Bills;⁶⁸
- the reluctance of the Welsh Government to pursue amendments to UK Government Bills,⁶⁹ in one instance because of its perception of the UK Government's likely reaction,⁷⁰ a situation we find to be unacceptable;
- a wider concern that the Welsh Government is effectively by-passing legislative scrutiny in the Senedd, preventing committee engagement

⁶⁴ For example, CLA Committee, [The Welsh Government's Legislative Consent Memorandum on the Agriculture Bill](#), January 2019 and CLA Committee, [The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill](#), February 2019

⁶⁵ For example, CLA Committee, [The Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Agriculture Bill](#), June 2019 and LJC Committee, [The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill](#), May 2020

⁶⁶ For example, LJC Committee, [The Welsh Government's Legislative Consent Memorandum on the Environment Bill](#), July 2020 and LJC Committee, [The Welsh Government's Legislative Consent Memorandum on the Non-Domestic Rating \(Lists\) \(No. 2\) Bill](#), November 2020

⁶⁷ For example, CLA Committee, [The Welsh Government's Legislative Consent Memorandum on Animal Welfare \(Service Animals\) Bill](#), February 2019 and LJC Committee, [The Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Environment Bill](#), February 2021

⁶⁸ For example, LJC Committee, [The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill](#), May 2020 and LJC Committee, [The Welsh Government's Legislative Consent Memorandum on the Environment Bill](#), July 2020

⁶⁹ LJC Committee, [The Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Environment Bill](#), February 2021

⁷⁰ LJC Committee, [The Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Trade Bill](#), December 2020

with stakeholders on legislative proposals and reducing the ability of elected Senedd Members to challenge and influence the final shape of legislation in devolved areas.

SICMs⁷¹

119. During the Fifth Senedd, we considered 39 Statutory Instrument Consent Memoranda (SICMs). The increase in number compared to the nine considered in the Fourth Assembly can be attributed to the UK's exit from the EU and the Welsh Government's use of UK Government statutory instruments (invariably regulations) to correct the Welsh statute book as a result.

120. As mentioned in the previous Chapter, in February 2019, we published Scrutiny of regulations under the European Union (Withdrawal) Act 2018: Progress report. It highlighted concerns that the Welsh Government had not tabled any motions seeking the consent of the Senedd to the UK Government regulations that are the subject of SICMs in accordance with our view of how Standing Order 30A should operate.⁷² We said:

“We believe that all Brexit-related Statutory Instrument Consent Memorandums should be subject to a consent motion tabled by the Welsh Government. As matters currently stand, the Statutory Instrument Consent Memorandum process is being used as a means for the Welsh Ministers to provide consent by default.”⁷³

121. Since then the position has not changed significantly, with only four motions being forward out of a possible 39. This is despite us raising our concerns on multiple occasions:

- in correspondence with the First Minister during February and March 2019 following publication of the progress report;⁷⁴

⁷¹ Statutory instruments made by UK Ministers can, in certain circumstances, be subject to the consent of the Senedd. Standing Order 30A requires the Welsh Government to lay a memorandum (a statutory instrument consent memorandum or SICM) in relation to a statutory instrument laid before the UK Parliament by UK Ministers which makes provision amending primary legislation within the legislative competence of the Senedd.

⁷² See paragraphs 11-14 and paragraphs 25-29

⁷³ Paragraph 26

⁷⁴ Correspondence: 6 February 2019, 11 March 2019, 25 March 2019

- in correspondence with the Llywydd seeking her views and an interpretation of Standing Order 30A, which she subsequently provided;⁷⁵
- in correspondence with the First Minister in July and August 2019;⁷⁶
- in correspondence with the First Minister, following a letter from Ken Skates MS, the Minister for Economy and Transport, in December 2019 and an evidence session with the First Minister in January 2020;⁷⁷
- in correspondence with the First Minister in October and November 2020;⁷⁸
- in correspondence with the Llywydd.⁷⁹

Standing Order 30C Written Statements

122. Our report Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: operational matters made recommendations for changes to the Standing Orders relating to regulations made under the EU (Withdrawal) Act 2018.⁸⁰ Changes were subsequently proposed by the Business Committee in September 2018 and approved by the Senedd in October 2018.⁸¹

123. One of the changes involved the introduction of Standing Order 30C. Under sections 8 and 9 of the 2018 Act, UK Ministers are able to make regulations in devolved areas acting alone. However, under the terms of the Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks they can only do so with the consent of the Welsh Ministers. Such regulations made by UK Ministers are laid before the UK Parliament only. Standing Order 30C requires that for such regulations made or to be made by UK Ministers under the 2018 Act, the Welsh Government must lay a statement (Standing Order 30C Written Statement) notifying the Senedd of the

⁷⁵ Correspondence: 25 March 2019, 7 May 2019

⁷⁶ Correspondence: 11 July 2019, 30 July 2019, 23 August 2019

⁷⁷ Correspondence: 17 December 2019, 23 January 2020, 12 February 2020

⁷⁸ Correspondence: 23 October 2020, 4 November 2020

⁷⁹ Correspondence: 20 November 2020

⁸⁰ The Senedd consented to this Act, which made provision in devolved areas, on 15 May 2018

⁸¹ Plenary, RoP, 3 October 2018

regulations in question, normally within three working days of them being laid before the UK Parliament.⁸²

124. During the Fifth Senedd, we considered 218⁸³ Standing Order 30C Written Statements.⁸⁴

125. Where the regulations amend primary legislation, the Welsh Government must also lay a Statutory Instrument Consent Memorandum under Standing Order 30A.

126. In February 2019 our Scrutiny of regulations under the European Union (Withdrawal) Act 2018: Progress report highlighted a number of concerns with the interpretation of the application to the Intergovernmental Agreement and the quality of some of the Standing Order 30C Written Statements. The progress report also drew attention to the volume of legislation being made by UK Ministers in devolved areas and said:

“Moreover, the general approach being taken is also at odds with the Welsh Government asking for, and being given, the power to make correcting regulations, but then not using it all in respect of retained direct EU law. When the National Assembly agreed the Legislative Consent Memorandum on the 2018 Act, it seems to us that it did so, in part at least, on the basis that the Welsh Government had secured amendments to the Bill that gave the Welsh Ministers additional powers to make regulations. Now, the Welsh Ministers are not using those powers extensively... Instead, they are relying heavily on UK Ministers to make regulations that correct EU-derived domestic legislation in devolved areas, and they are relying completely on UK Ministers to make regulations that correct direct EU legislation in devolved areas.”⁸⁵

127. An exchange of correspondence with the First Minister covering aspects of the report followed its publication.⁸⁶

⁸² For more information see: CLA Committee, Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: A guide, January 2019

⁸³ 30 of which were linked to statutory instrument consent memoranda.

⁸⁴ One Standing Order 30C Written Statement - WS-30C(5)65 - was not considered by the Committee.

⁸⁵ Paragraph 21

⁸⁶ Correspondence: 6 February 2019, 11 March 2019, 25 March 2019

128. Our scrutiny of Standing Order 30C Written Statements highlighted an unintended consequence of the Welsh Government consenting to UK Ministers making regulations in devolved areas to correct the statute book as a result of EU exit. Many of those regulations created new functions; functions the Senedd would not be able to remove or modify without the consent of UK Ministers (by virtue of the restrictions in paragraphs 8 to 11 of Schedule 7B to the Government of Wales Act 2006). We reported on a proposed section 109 Order in Council that removed some, but not all, of those restrictions in January 2021, setting out in detail the background to the issues involved. The Order in Council has since been made and came into force on 11 March 2021.⁸⁷

129. Standing Order 30C applies only to regulations made under the 2018 Act. As mentioned in Part One, a number of our reports on LCMs concerning EU exit related UK Government Bills have called for similar procedures to apply to regulations made, under those Bills, by UK Ministers in devolved areas with the consent of the Welsh Ministers, but without success.⁸⁸

130. Part One of the report details how we worked with the Welsh Government to revise the Protocol (see paragraphs 24-25) to reflect some of our concerns.

Impact of the United Kingdom Internal Market Act 2020

131. The UK Internal Market Act 2020 will have a practical impact on the way in which legislation is made in the Senedd.

132. Summarised below are some of the key impacts that the new Senedd, its Business Committee and our successor Committee may wish to consider at the earliest opportunity.

- Whether the Welsh Government (and Senedd Members for private Member legislation) should be required to set out in the Explanatory Memorandum if a Bill's provisions come within the scope of the UK Internal Market Act 2020 and, if so, what practical effect the 2020 Act will have on the provisions contained in the Bill.

⁸⁷ The Government of Wales Act 2006 (Amendment) Order 2021

⁸⁸ For example, CLA Committee, The Welsh Government's Legislative Consent Memorandum on the Healthcare (International Arrangements) Bill, January 2019 and CLA Committee, The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill, February 2019

- If Regulatory Impact Assessments for legislation that falls within the scope of the Act should reflect the practical effects of the provisions of the UK Internal Market Act 2020 in any cost-benefit analysis.
- The UK Internal Market Act 2020 states that legislation that was in force the day before the main sections of the Act came into force will not come within its scope unless it is substantively changed. The Senedd may wish to be notified by the Welsh Government when it is amending existing legislation that comes within the scope of the 2020 Act if the Welsh Government consider it amounts to substantive change such that would bring the legislation within the scope of the 2020 Act.

133. The new Senedd and our successor Committee may also wish to consider how relevant legislation made by UK Ministers under the UK Internal Market Act 2020 should be drawn to the attention of the Senedd. Key matters which should be considered are as follows:

- When the Secretary of State wishes to use their delegated powers to amend the scope of Parts 1 and 2 of the UK Internal Market Act 2020, they are required to seek the consent of Ministers in the devolved Governments prior to making any such regulations. They are permitted to proceed if consent is not forthcoming within a month but must set out their reasons for doing so. The Senedd may wish to be notified by the Welsh Government when the UK Government asks the Welsh Government for its consent to change the scope of the 2020 Act and may wish for there to be a requirement to debate a motion on any changes proposed. Further, the Senedd may wish to be notified when the Welsh Government makes its final decision on consent.
- The Secretary of State is under a duty to review the use made of the amendment powers under Parts 1 and 2 of the UK Internal Market Act 2020 between three and five years after the Act is passed. The Secretary of State is required to consult the devolved governments when preparing this report. The Senedd may wish to be notified when the Welsh Government is consulted on the preparation of this report.

134. As explained in Part One, the UK Internal Market Act 2020 provided the Competition and Markets Authority (CMA) with the power to establish an Office for the Internal Market (OIM). There are a number of matters relating to the OIM which the new Senedd and our successor Committee may wish to address at the earliest opportunity:

- Whether the Welsh Government should be required to notify it when the Welsh Government requests advice or a report from the OIM under sections 35 or 36 of the UK Internal Market Act 2020 and to lay any such reports before the Senedd.
- Whether the Welsh Government should be required to inform the Senedd when it is notified that any other government has asked the OIM for advice on the detrimental effect of any Senedd legislation under section 36 of the UK Internal Market Act 2020.
- Whether the Senedd Commission should be required to notify Senedd Members if the OIM requests that it provides or produces information to inform any advisory or monitoring functions it completes.
- Whether the Senedd or a Senedd Committee should seek to maintain oversight of the OIM and the Secretary of State's review of the appropriateness of the CMA as the body responsible for the monitoring and advisory functions.
- In a statement on 17 December 2020, Paul Scully MP, the Parliamentary Under Secretary of State for Business, Energy & Industrial Strategy said that the UK Government agreed to have an annual meeting to review the operation of Parts 1 to 4 of the 2020 Act with the devolved governments, including the OIM's reports and new developments that might require the use of delegated powers, using intergovernmental structures. The Senedd may wish to consider whether the Welsh Government should be required to notify the Senedd of when such meetings take place and provide information on the outcome of any such meetings.

4. Wales' Changing Constitution

Approach and purpose of the inquiry

135. We started our inquiry on Wales' Changing Constitution in July 2019 in response to the UK's exit from the EU and its implications for the constitutional arrangements that apply to Wales. The terms of reference⁸⁹ were intentionally broad to allow us to be flexible in our approach and to ensure we could take account of emerging constitutional issues as the terms of the UK's exit from the EU became clearer.

136. While the outbreak of the Covid-19 pandemic has limited our intended approach, we have been able to collect evidence from a range of contributors through:

- a public consultation;⁹⁰
- evidence sessions with the First Minister⁹¹ and Counsel General;⁹²
- an evidence session with the Secretary of State for Wales;⁹³
- evidence sessions with constitutional experts.⁹⁴

137. It became clear to us that the Welsh constitution is being shaped by EU exit related UK legislation, disagreements over the application of the Sewel Convention, new processes for enabling UK Ministers to legislate in devolved areas, greater use of intergovernmental agreements and the development of common frameworks.

138. However, the introduction of the United Kingdom Internal Market Bill by the UK Government in September 2020 changed the dynamic of our consideration and more significantly, will have a lasting constitutional impact on the UK.

⁸⁹ Wales' Changing Constitution, Terms of reference

⁹⁰ Wales' Changing Constitution, Consultation

⁹¹ LJC Committee, 13 January 2020

⁹² LJC Committee, 16 September 2019

⁹³ LJC Committee, 9 March 2020

⁹⁴ LJC Committee, 30 September 2019 and 14 October 2019

139. In the following sections we identify some key themes that have emerged in relation to the:

- the Sewel Convention;
- intergovernmental agreements;
- intergovernmental working.

The Sewel Convention

The effectiveness of the Sewel Convention

140. The Sewel Convention is one of the key components of the existing constitutional framework. It provides that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the Senedd.

141. In our 2017 report, [The Welsh Government's Legislative Consent Memorandum on the European Union \(Withdrawal\) Bill](#), we noted that the Sewel Convention plays a fundamental role in the operation of the UK constitution and needed to be respected.⁹⁵

142. In evidence sessions as part of our inquiry, the First Minister⁹⁶ and Counsel General⁹⁷ acknowledged that until recently, the Sewel Convention had functioned as intended. Nevertheless, the Counsel General identified limitations with the Convention.⁹⁸ He said the “not normally” formulation potentially includes within it “a significant level of latitude” and that in his opinion “constitutional matters should not have that level of uncertainty at the heart of them”.⁹⁹ The First Minister also noted the Convention’s limitations, stating that it “provides an arbitrary and unilateral power to the UK Government.”¹⁰⁰

143. The First Minister noted that the Scottish Parliament’s denial of consent to the EU Withdrawal Bill in 2018 was “barely mentioned on the floor of the House of

⁹⁵ Paragraph 17

⁹⁶ LJC Committee, RoP [19], 13 January 2020

⁹⁷ LJC Committee, RoP [44], 16 September 2019

⁹⁸ LJC Committee, RoP [64], 16 September 2019

⁹⁹ LJC Committee, RoP [76], 16 September 2019

¹⁰⁰ LJC Committee, RoP [20], 13 January 2020

Commons, let alone given proper consideration” and that this had been corrosive.¹⁰¹

144. Professor Aileen McHarg suggested that the dispute over the EU Withdrawal Bill “revealed two fundamentally different understandings of what the Sewel Convention meant, and in particular what the word ‘normally’ meant”. In terms of the UK Government’s understanding of the convention Professor McHarg said:

“...they seem to understand what Sewel requires as being that they make an attempt to seek agreement, but, if agreement isn’t forthcoming and they regard that continued withholding of consent as unreasonable, then consent is not required and legislation can proceed without consent.”¹⁰²

145. Conversely, Professor McHarg said that, in the devolved governments’ view, “‘normally’ requires an overriding constitutional justification in order to legislate without consent”,¹⁰³ before highlighting the fact that there is no way of arbitrating between which is the correct understanding.¹⁰⁴

146. Following the UK General Election, on 19 December 2019, the UK Government introduced the European Union (Withdrawal Agreement) Bill (EU Withdrawal Agreement Bill). Subsequently, we published a report on The Welsh Government’s Legislative Consent Memorandum on the European Union (Withdrawal Agreement) Bill following an evidence session with the First Minister.¹⁰⁵ In our report we concluded that if the Senedd decides not to consent on the matters for which consent is required, and the UK Parliament nevertheless decides to proceed in the absence of consent, this will have significant adverse constitutional consequences for the future of the Sewel Convention and devolution.¹⁰⁶

147. On 21 January 2020, the Senedd voted against giving consent to the EU Withdrawal Agreement Bill,¹⁰⁷ mirroring decisions taken by the Scottish

¹⁰¹ LJC Committee, RoP [21], 13 January 2020

¹⁰² LJC Committee, RoP [125], 14 October 2019

¹⁰³ LJC Committee, RoP [125], 14 October 2019

¹⁰⁴ LJC Committee, RoP [126], 14 October 2019

¹⁰⁵ LJC Committee, 13 January 2020

¹⁰⁶ Conclusion 1

¹⁰⁷ Plenary, RoP, 21 January 2020

Parliament and Northern Ireland Executive. However, it was subsequently passed by the UK Parliament, receiving Royal Assent on 23 January 2020.

148. On 17 January 2020, the then Secretary of State for Exiting the European Union, the Rt Hon Steve Barclay MP, wrote to his counterpart Ministers in the devolved Governments outlining the UK Government's response to their concerns about the EU Withdrawal Agreement Bill. He said:

“The Sewel Convention holds that the UK Government should not normally press ahead with legislation without legislative consent motions from the devolved administrations but the circumstances of our departure from the European Union are specific, singular and exceptional.”¹⁰⁸

149. Following the evidence sessions with the Counsel General in September 2019 and the First Minister in January 2020, and the EU Withdrawal Agreement Bill becoming an Act, a statement from the Counsel General on 25 February 2020¹⁰⁹ suggested perhaps a softening in the Welsh Government's approach at that time to the application of the Sewel Convention. He acknowledged that the UK Government's decision to proceed with the EU Withdrawal Agreement Bill without the consent of the devolved legislatures is of significant concern, but added:

“...it would appear that the UK Government and ourselves believe it should be ring-fenced as a special case, and we now need to build on that.”¹¹⁰

150. The Counsel General told us that treating the EU Withdrawal Agreement Bill as a special case “was an attempt to ensure that there would be a limited impact with regard to the decision.”¹¹¹ Nevertheless he noted that the UK Government's actions in respect of that Bill did not meet their test for reform of the Sewel Convention,¹¹² but they were “small steps in the right direction”.¹¹³ He also

¹⁰⁸ Correspondence: [17 January 2020](#)

¹⁰⁹ Statement by the Welsh Government, [Legislation relating to leaving the EU](#), 25 February 2020 and Plenary, RoP, [25 February 2020](#)

¹¹⁰ Plenary, RoP [444], [25 February 2020](#)

¹¹¹ LJC Committee, RoP [76], [15 June 2020](#)

¹¹² See: Welsh Government, [Reforming our Union: shared governance in the UK](#), October 2019; LJC Committee, 16 September 2019; LJC Committee, RoP [18-32] and [40-44], 13 January 2020

¹¹³ LJC Committee, RoP [59], 15 June 2020

acknowledged that a lack of transparency remained around the meaning of “not normally”.¹¹⁴

151. In September 2020, the UK Government introduced the United Kingdom Internal Market Bill. The Welsh Government laid an LCM in respect of that Bill and we reported in November 2020.¹¹⁵ On 8 December 2020 the Senedd voted against giving consent to the United Kingdom Internal Market Bill,¹¹⁶ again mirroring decisions taken by the Scottish Parliament and Northern Ireland Executive. However, it was subsequently passed by the UK Parliament, receiving Royal Assent on 17 December 2020.

152. Many of the witnesses who provided evidence to us believed that the Sewel Convention needed to be, or could be, strengthened.¹¹⁷

The views of the UK Government on the Sewel Convention

153. During our inquiry we have attempted to gain a better understanding of the UK Government’s position and approach to the Sewel Convention.

154. On 9 March 2020, the Secretary of State for Wales, the Rt Hon Simon Hart MP set out his view of the ‘not normally’ construction in the Sewel Convention, saying it applies to “major exceptional circumstances... unlikely ever to be repeated again”.¹¹⁸

155. We also discussed with the Secretary of State for Wales the merits of making a decision in advance about whether a piece of legislation is ‘not normal’ before asking for legislative consent.¹¹⁹

156. When questioned about the UK Government’s decision that the situation regarding the EU Withdrawal Agreement Bill was ‘not normal’ the Secretary of State for Wales said:

“I think, in this particular instance, ‘not normal’ emerged as the theme as it became more obvious that the LCM wouldn’t get through this place, and indeed through the Scottish Parliament. So, I don’t think

¹¹⁴ LJC Committee, RoP [60, 66-74], 15 June 2020

¹¹⁵ LJC Committee, [The Welsh Government’s Legislative Consent Memorandum on the United Kingdom Internal Market Bill](#), November 2020

¹¹⁶ Plenary, RoP, [8 December 2020](#)

¹¹⁷ [Response WCC 01](#); [Response WCC 03](#); LJC Committee, 14 October 2019

¹¹⁸ LJC Committee, RoP [62], 9 March 2020

¹¹⁹ LJC Committee, RoP [66-69], 9 March 2020

there was a particular plan, to describe it as such, in order to soften the inevitable blow. I think, as we got into the process, it became obvious that that's what the decision of you and your colleagues was going to be... And there was a certain dialogue around this, by the way, with colleagues of yours, about how that was handled in order to keep Sewel intact and to make sure that the democratic mandate of UK Government was honoured at the same time as the democratic rights of this institution could play out as well, and that was quite a difficult balancing act.”¹²⁰

157. The Secretary of State for Wales said he did not believe that without some form of justiciability the Sewel Convention was fatally wounded. He added that:

“...the conversations I had... with... ministerial colleagues, in this building suggested to me that there was an ambition that we share in UK Gov to get back on course as far as the protocols of Sewel are concerned. There was no question in those conversations to me that it was dead and needed to be rebirthed in some other form.”¹²¹

158. In light of the Secretary of State for Wales' comments, we exchanged correspondence with him about the application of the Sewel Convention in relation to the United Kingdom Internal Market Bill.¹²²

159. In his letter of 16 February 2021, the Secretary of State for Wales said it was the UK Government's intention “from the very outset of the process to legislate for the Bill with the consent of all devolved legislatures” and that it had “followed the associated practices and procedures for seeking consent...” He added that:

“The convention applies in all circumstances where Parliament seeks to legislate on devolved matters and the UK government seeks consent on this basis. The convention recognises however that there are circumstances in which it may be necessary for Parliament to legislate irrespective of whether or not consent is obtained. The inclusion of the words ‘not normal’ within the convention acknowledges that Parliament is sovereign and therefore it is ultimately for Parliament whether to use its power to legislate in any such circumstances.

¹²⁰ LJC Committee, RoP [115], 9 March 2020

¹²¹ LJC Committee, RoP [64], 9 March 2020

¹²² Correspondence: [18 September 2020](#), [3 October 2020](#), [21 January 2021](#), [16 February 2021](#)

(...)

The UK Government deeply regrets that, despite efforts to find common ground, both the Senedd and the Scottish Parliament refused consent for the Bill. However, we sought consent in good faith and are confident that the legislation is more robust and more attuned to Welsh Government concerns in particular as a result.”

160. In his letter of 16 February 2021 the Secretary of State for Wales also stated that the UK Government made the decision to proceed without legislative consent “at the end of the process” and that this decision was “in line with the convention”. He added that the UK Government “remains firmly committed to the Sewel Convention” and that it “continues to work well”.

161. In attempting to gain an understanding of the convention, we have become concerned about certain statements made by the Secretary of State for Wales in and the Parliamentary Under-Secretary of State for Business, Energy & Industrial Strategy¹²³ about their interpretation of the Sewel Convention, including:

- that ‘not normal’ emerged as the theme as it became more obvious that the Senedd would refuse consent for the EU (Withdrawal Agreement) Bill;
- that legislating without consent for the United Kingdom Internal Market Bill was justified on the basis of the UK’s exit from the EU;
- that proceeding with the United Kingdom Internal Market Bill without consent was “in line with the convention”;
- that seeking consent “in good faith” is a relevant consideration in determining how to proceed with proposed legislation when consent is refused;
- the UK Government judging whether the concerns of the Welsh Government or Senedd have been addressed.

¹²³ [House of Commons Debate 17 December 2020 vol 686 col 41-42WS](#)

Intergovernmental agreements

162. In September 2019, the Counsel General drew attention to what he described as the “broader application” of the Sewel convention “which merits consideration and focus”:

“We manage to use the Sewel convention to build towards an inter-governmental agreement, for example, which we entered into with the UK Government around the time of the EU Withdrawal Act, and that has been a very useful template... for how we have sought, across a range of interactions with the UK Government, to build those relations or to argue for those relations to be built on the principle that action ought not to be normally taken without our consent in relation to devolved matters.”¹²⁴

163. The Counsel General identified that a particular risk with an intergovernmental agreement is that it “doesn’t have a basis in statute, so it is based on trust”.¹²⁵ The First Minister made a similar point, noting that any party to the agreement could withdraw. However, he said that there would be a “political” and “reputational price” for doing so, and, while acknowledging the positives and negatives of using intergovernmental agreements, considered that there is more to be gained from their use than there is to be lost.¹²⁶

164. The Welsh Government has used intergovernmental agreements on several occasions during the Fifth Senedd to resolve disputes with the UK Government over powers in EU exit legislation.¹²⁷ We have regularly raised concerns with the Welsh Government about the use of intergovernmental agreements, including that:

- the Welsh Ministers should not seek to resolve disputes over legislative consent by reaching non-binding intergovernmental agreements;¹²⁸

¹²⁴ LJC Committee, RoP [45], 16 September 2019

¹²⁵ LJC Committee, RoP [117], 16 September 2019

¹²⁶ LJC Committee, RoP [66-67], 13 January 2020

¹²⁷ See for example the summary provided in section 4.4 of Senedd Research, [Common frameworks, the UK internal market and international obligations: Overview Research Briefing](#), July 2020

¹²⁸ For example, CLA Committee, [The Welsh Government’s Supplementary Legislative Consent Memorandum \(Memorandum No 2\) on the Agriculture Bill](#), June 2019 and LJC Committee, [The Welsh Government’s Legislative Consent Memorandum on the Fisheries Bill](#), May 2020

- the Welsh Government has asked the Senedd to consent to legislation on the basis of an intergovernmental agreement that has not yet been reached;¹²⁹
- the Welsh Government has reached an agreement on geographical indicators in relation to a dispute over what is devolved without publishing the terms of that agreement.¹³⁰

165. We exchanged correspondence with the Welsh Government on the use of intergovernmental agreements during our inquiry.¹³¹ In his letter of 11 June 2020, the First Minister said that the recent increase in intergovernmental agreements is in part in response to the reality of the political circumstances. He also said that the Welsh Government’s starting point is that there should be appropriate provision on the face of UK Bills to delineate the exercise of functions by the governments of the UK in accordance with the devolution settlements.

166. The Counsel General indicated to us that he did not believe that the use of intergovernmental agreements is as a consequence of the undermining of the Sewel Convention. He recognised that that they were not a fully adequate alternative to provisions in Bills but thought that in the circumstances, they are “an effective tool for us to be able to use.”¹³²

167. The Counsel General also noted that the ability to share information relating to intergovernmental agreements on legislation is not always within the Welsh Government’s control.¹³³ The First Minister’s letter of 11 June 2020 also made this point and, in setting out some broader commitments he said:

“We will always aim... to present the finalised agreement [to the Senedd] in order to inform the debate about whether or not to provide legislative consent.”

¹²⁹ For the proposed Memorandum of Understanding on the *Fisheries Act 2020* – see Plenary, RoP [369-370], [6 October 2020](#) and [supporting documentation](#) for the debate on the legislative consent motion

¹³⁰ Welsh Government Written Statement, [The Agricultural Products, Food and Drink \(Amendment Etc.\) \(EU Exit\) Regulations 2020](#), 23 October 2020. See correspondence: [17 November 2020](#), [2 December 2020](#)

¹³¹ Correspondence: [18 October 2019](#), [27 November 2019](#), [23 January 2020](#), [12 February 2020](#), [11 June 2020](#)

¹³² LJC Committee, RoP [62], 15 June 2020

¹³³ LJC Committee, RoP [102], 15 June 2020

168. Professor Jo Hunt and Hedydd Phylip indicated that intergovernmental agreements are not reflected in the latest Devolution Guidance Note.¹³⁴ They added that an intergovernmental agreement is a “soft form of policy instrument” that “comes with concerns about its transparency, robustness and the strength of its guarantees.”¹³⁵

Intergovernmental working

169. Our first report in the Fifth Senedd on the [UK Government’s Wales Bill](#) highlighted a concern regarding the effectiveness of intergovernmental relations between the Welsh and UK Governments and how this had impacted on the development of the Bill. These concerns, together with a recognition that the UK’s exit from the EU would impact on the way in which the various governments and parliaments work together in the future, led us to begin an inquiry on [A stronger voice for Wales: engaging with Westminster and the devolved institutions](#).

170. Our subsequent report in February 2018 [UK governance post-Brexit](#) together with our [summary of evidence](#) considered intergovernmental working at length. We exchanged correspondence with the UK Government on related issues soon after.¹³⁶

171. Following on from recommendation 9 in the 2018 report, and as mentioned in Chapter 3, the Welsh Government and Committee formally agreed an [Inter-Institutional Relations Agreement](#). Information provided by the Welsh Government in line with that agreement is considered by the Committee and [published](#).

172. As part of our inquiry, we asked the Secretary of State for Wales and the Counsel General whether the current system for dispute resolution between the governments of the UK was fit for purpose.

173. The Secretary of State for Wales told us that he saw the existing forum for discussions between [Joint Ministerial Committee](#) (JMC) as “a dispute resolution body in its own right”.¹³⁷ He added that he had “a bit of a problem over the potential for some kind of independent arbiter ... who perhaps doesn’t possess

¹³⁴ [Devolution Guidance Note: Parliamentary and Assembly Primary Legislation Affecting Wales](#) [Last updated April 2018]

¹³⁵ [Response WCC 03](#)

¹³⁶ Correspondence: [26 April 2018, 10 May 2018](#)

¹³⁷ LJC Committee, RoP [36], 9 March 2020

that degree of democratic accountability.”¹³⁸ The Secretary of State for Wales went on to say that “the JMC is the right body for the disputes to be aired” and that the existing process is not “necessarily so flawed that it needs to be destroyed and reinvented.”¹³⁹

174. The Counsel General told us that there should be “a rules-based system ... that is equitable, transparent and fairly reached” and drew attention to the dispute resolution mechanism described in [Brexit and Devolution](#) from 2017.¹⁴⁰ He also stressed the need for greater independence advice to be brought into the system.¹⁴¹ The Counsel General added that it would be rational to have elements of this dispute resolution mechanism set out in statute but that the key stage at this point is for the four governments of the UK to agree a set of principles.¹⁴²

175. As part of our scrutiny of the UK Government’s consultation on its [proposals for legislating in relation to the internal market](#)¹⁴³ and the subsequent [United Kingdom Internal Market Bill](#),¹⁴⁴ it became apparent that the UK Government had not engaged with the Welsh Government in developing the proposals. We highlighted these concerns in our November 2020 report [The Welsh Government’s Legislative Consent Memorandum on the United Kingdom Internal Market Bill](#).

Future constitutional change

176. The impact of leaving the EU on the existing constitutional arrangements was highlighted in evidence we received.

177. Dr Andrew Blick noted that leaving the EU has helped to reveal the vulnerability of the devolved components of the UK system.¹⁴⁵

178. Professor Jo Hunt and Hedydd Phylip considered that leaving the EU will:

¹³⁸ LJC Committee, RoP [37], 9 March 2020

¹³⁹ LJC Committee, RoP [69], 9 March 2020

¹⁴⁰ LJC Committee, RoP [94], 15 June 2020

¹⁴¹ LJC Committee, RoP [95], 15 June 2020

¹⁴² LJC Committee, RoP [98], 15 June 2020

¹⁴³ We responded to the consultation exercise on [7 August 2020](#) and received a reply on [12 October 2020](#)

¹⁴⁴ We issued a statement outlining our concerns with the Bill on [24 September 2020](#).

¹⁴⁵ [Response WCC.02](#)

“...destabilise the existing generally hands-off approach from Westminster and Whitehall given the need to replace the governance structures and policies previously provided by the EU.”¹⁴⁶

179. The Constitution Reform Group noted that the need for a new constitutional settlement is even more urgent as a result of EU Exit.¹⁴⁷

180. The Welsh Government’s paper Reforming Our Union: Shared Governance in the UK argues that the UK should be seen as a voluntary association of nations, based not on parliamentary sovereignty but on popular sovereignty in each of its parts. The First Minister considered that the current constitutional arrangements are not fit for 2020 and are not sustainable.¹⁴⁸

181. The Secretary of State for Wales acknowledged that leaving the EU meant a shift from the historical relationship with the EU to a closer relationship between the UK and Welsh Governments, which he said “will be a test, I suspect, for all of us.”¹⁴⁹ He also said that constitutional reform should be a continual process rather than a specific task with a specific end point.¹⁵⁰

182. Our evidence sessions explored a range of constitutional issues including whether the UK should have a written constitution and the need for a constitutional convention, with a range of different opinions being expressed.¹⁵¹

¹⁴⁶ Response WCC 03

¹⁴⁷ LJC Committee, RoP [104-105], 30 September 2019

¹⁴⁸ LJC Committee, RoP [7], 13 January 2020

¹⁴⁹ LJC Committee, RoP [24], 9 March 2020

¹⁵⁰ LJC Committee, RoP [28], 9 March 2020

¹⁵¹ For example see LJC Committee, RoP, 14 October 2019

5. Making Justice work in Wales

Approach to our inquiry

183. As noted in Part One, in 29 January 2020 our remit changed to include matters relating to justice in Wales and we began our Making Justice work in Wales inquiry in March 2020.¹⁵² This followed the Senedd’s approval of a Welsh Government motion¹⁵³ to take forward the recommendations of the Commission on Justice in Wales (the ‘Thomas Commission’), whose report was published in October 2019.

184. To inform our inquiry, we commissioned an overview of justice in Wales from Dr Sarah Nason, Senior Lecturer in Administrative Law and Jurisprudence at Bangor University.¹⁵⁴

185. The outbreak of the Covid-19 pandemic also limited our intended approach to this inquiry. However, we have been able to collect a range of evidence, including:

- from a public consultation;¹⁵⁵
- oral evidence¹⁵⁶ from the First Minister and Counsel General and through correspondence with the First Minister on the Welsh Government’s Justice Transformation Work Programme;¹⁵⁷
- through correspondence with the First Minister¹⁵⁸ and the UK Government Ministry of Justice on data on access to justice;¹⁵⁹
- oral evidence¹⁶⁰ from and correspondence¹⁶¹ with the President of Welsh Tribunals;

¹⁵² Making Justice work in Wales, Terms of reference

¹⁵³ Plenary, RoP, 4 February 2020

¹⁵⁴ Dr Sarah Nason, Justice in Wales, May 2020

¹⁵⁵ Making Justice work in Wales, Consultation

¹⁵⁶ LJC Committee, 12 October 2020

¹⁵⁷ Correspondence: 22 October 2020, 26 November 2020

¹⁵⁸ Correspondence: 19 June 2020, 23 July 2020

¹⁵⁹ Correspondence: 19 June 2020, 7 July 2020

¹⁶⁰ LJC Committee, 13 July 2020

¹⁶¹ Correspondence: 22 July 2020, 7 September 2020

- oral evidence from the Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice.¹⁶²

186. In addition, as part of our inquiry, the Senedd’s Citizen Engagement Team gathered the views of legal practitioners across Wales. The Team arranged a series of virtual focus groups throughout September 2020 and produced a summary of the key themes.

Welsh Government responsibilities

187. Although much justice policy is reserved, the Welsh Government does have significant responsibilities for justice in Wales.

188. As we highlighted in Part One of the report, the Wales Governance Centre’s 2019 report Public Spending on the justice system in Wales in 2019 found that around 38% of spending on justice in Wales is funded by the Welsh Government or local authorities. However, the Welsh Government does not regularly report on its work on justice policy or disaggregate spending on justice in its budget or annual accounts.

189. The First Minister is responsible for justice policy, the Thomas Commission and tribunals in Wales.¹⁶³ The Counsel General’s responsibilities include oversight of the work of the Welsh Government Legal Services Department and Office of the Legislative Counsel and the accessibility of Welsh law.¹⁶⁴

190. In response to the Thomas Commission’s call to strengthen leadership on justice, the First Minister announced on 5 November 2019 that he would establish and chair a new Cabinet Sub-Committee on Justice.¹⁶⁵ The Sub-committee met in January, July and September 2020.

191. In her expert adviser report, Dr Nason noted concerns about leadership within the Welsh Government on justice issues. She said that “[w]ith the inception of the Cabinet Sub-Committee this is likely to have improved, but there is still a lack of awareness and perhaps even some lack of transparency, around how many people in Welsh Government are working on justice issues, what their roles are, and how they interact”.

¹⁶² LJC Committee, 22 February 2021

¹⁶³ Welsh Government, First Minister of Wales, Responsibilities [accessed 15 February 2021]

¹⁶⁴ Welsh Government, Counsel General, Responsibilities [accessed 15 February 2021]

¹⁶⁵ Plenary, RoP, 5 November 2019

192. These concerns were echoed by legal practitioners who participated in the virtual focus groups held by the Senedd’s Citizen Engagement Team, where most participants stated that they did not believe there was a clear figurehead for justice in Wales.¹⁶⁶

193. The First Minister and Counsel General updated us on the Welsh Government’s work on justice in an evidence session on 12 October 2020.¹⁶⁷

194. Following the evidence session, the First Minister wrote to us to share the Welsh Government’s justice transformation work programme. However, the First Minister cautioned that this work was subject to “very real operational constraints”, in part due to the Covid-19 pandemic and the end of the EU exit transition period.¹⁶⁸

195. In our evidence session on 12 October 2020, we also asked the Counsel General for his views on whether it was appropriate for there to be a Welsh Government annual report, and subsequent Senedd debate, on justice in Wales. The Counsel General said this was “certainly worthy of consideration” and that he would await any recommendations from the Committee.¹⁶⁹

196. In his letter to us of 26 November 2020, the First Minister said that the challenge of ensuring the public and the Senedd are aware of the Welsh Government’s work in the justice space “flows from the current division of responsibility between Wales and Westminster”. He also said that the Welsh Government would “explore if there are any ways in which we can improve the level of information we provide about justice expenditure”.¹⁷⁰

UK and Welsh Government responsibilities

197. The UK Government, the Welsh Government and a wide network of other bodies share responsibilities for the operation of the justice system in Wales. The Thomas Commission argued that the complexity of the system was unnecessary and does not effectively support the delivery of justice policy in its widest sense in Wales. Dr Nason reached similar conclusions in her expert advisor report for the Committee.

¹⁶⁶ LJC Committee, [Making Justice work in Wales – Summary note of engagement](#), October 2020

¹⁶⁷ LJC Committee, 12 October 2020

¹⁶⁸ Correspondence: [26 November 2020](#)

¹⁶⁹ LJC Committee, RoP [102], 12 October 2020

¹⁷⁰ Correspondence: [26 November 2020](#)

198. The Youth Justice Board, Prison Reform Trust, Children’s Commissioner for Wales, Welsh Chief Constables and Welsh Language Commissioner all identified a range of specific challenges in the intersection of devolved and reserved responsibilities in their written evidence to our inquiry.¹⁷¹ For example, the Children’s Commissioner for Wales drew attention to the complexities involved in supporting children who come into contact with the justice service due to the intersection of the devolved and non-devolved aspects of family law, and said that it is difficult to split a child’s life into devolved and non-devolved areas.¹⁷²

199. The Welsh Government has engaged with the UK Government and reserved bodies on justice through a range of formal structures.

200. During the Plenary debate on the Thomas Commission’s report, the First Minister told the Senedd that “two thirds of the [Thomas] Commission’s recommendations potentially require the co-operation of the UK Government to take them to implementation.”¹⁷³

201. As such, we asked the First Minister and Counsel General about cooperation with the UK Government on improving justice in Wales.

202. The First Minister said that he and the Counsel General had had a “very positive” meeting with the Lord Chancellor during 2020 and that the Lord Chancellor had “[made] it clear that he wanted detailed discussions on a number of the Thomas recommendations.”¹⁷⁴ The First Minister added that discussions with the Lord Chief Justice and UK Ministers had also been held.¹⁷⁵

203. The Counsel General said:

“I think the point that the Lord Chancellor has made previously, including in public speeches and so on, is that his concern isn’t so much around process, as it were, but around outcomes. I, myself, think that provides ground for optimism, because if we are focused laser-like on outcomes then we organise our arrangements in whatever way

¹⁷¹ [Making Justice work in Wales, Consultation](#)

¹⁷² [Response MJW.06](#)

¹⁷³ Plenary, RoP [424], [4 February 2020](#)

¹⁷⁴ LJC Committee, RoP [24], 12 October 2020

¹⁷⁵ LJC Committee, RoP [25], 12 October 2020

achieves the best set of outcomes, and I think that provides a constructive context for us to take these discussions forward.”¹⁷⁶

204. The Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice, gave evidence to the Committee on 22 February 2021.¹⁷⁷

205. The Lord Chancellor told us that what was already a productive and mature relationship between the Welsh and UK Governments has deepened and widened as a result of the challenges of the Covid-19 pandemic.¹⁷⁸

206. With regards to the report of the Thomas Commission, while stating that “a joint jurisdiction is a better approach”, the Lord Chancellor also said that there were aspects of the Thomas Commission’s recommendations that he was “frankly, keen to explore” because they “have the potential to improve justice outcomes in Wales”.¹⁷⁹

207. Research has identified challenges for Senedd scrutiny of intergovernmental work on the justice system. Dr Nason noted in her expert advisor report that responsibility for scrutiny of justice in Wales cuts across the responsibilities of different committees, both in the Senedd and at Westminster.

208. The Wales Governance Centre’s 2019 report [Justice at the Jagged Edge in Wales](#) noted a belief that Senedd committees were “often unsure about how their work [could] contribute to future policy”. The report also noted that there is a belief externally that Senedd committees are “unsure about the scope of their recommendations when providing oversight on policing and justice”.

209. One challenge for scrutiny and accountability is a lack of disaggregated data on justice in Wales. In her report for the Committee, Dr Nason concluded that such a lack of disaggregated data could hinder the development of innovative solutions. A lack of data was also highlighted as an issue by the Welsh Language Commissioner¹⁸⁰ and the Equality and Human Rights Commission¹⁸¹ in their written evidence to the Committee.

¹⁷⁶ LJC Committee, RoP [76], 12 October 2020

¹⁷⁷ LJC Committee, 22 February 2021

¹⁷⁸ LJC Committee, RoP [14], 22 February 2021

¹⁷⁹ LJC Committee, RoP [28-29] 22 February 2021

¹⁸⁰ [Response MJW.10](#)

¹⁸¹ [Response MJW.07](#)

210. We corresponded with the Welsh Government and the Ministry of Justice on data on access to justice in Wales in the summer of 2020.¹⁸²

211. The First Minister said that the Welsh Government agreed with the Thomas Commission that it is important to ensure that disaggregated statistical data on justice in Wales is as accessible as possible, and that the Welsh Government's Chief Statistician and the Chief Statistician for the Ministry of Justice discussed this on several occasions in 2019 and agreed on the need to identify ways of making the data available wherever it was possible.¹⁸³

212. As mentioned in Part One of the report, the Counsel General also told us that the Welsh Government was in the process of developing a dashboard of justice data in Wales and would keep the Senedd updated.¹⁸⁴

213. The Parliamentary Under-Secretary of State for Justice, Alex Chalk MP, told us that the disaggregation of Welsh data is a matter that the Ministry of Justice (MoJ) has been seeking to resolve for some time, particularly the challenges involved in categorising Welsh individuals in the justice system, but he was pleased to say that the MoJ has made considerable progress.¹⁸⁵

214. The Welsh Government's annual report on the Inter-Institutional Relations Agreement between the Senedd and the Welsh Government for the period April 2019 to March 2020 reports on formal intergovernmental relations under several headings.¹⁸⁶ However, 'Justice' is not among them, though the report does note that the Welsh Government argued for further powers over justice policy during this period.

215. We asked the First Minister how the Welsh Government would inform the Senedd of its engagement with the UK Government on justice matters. The First Minister said that the Welsh Government would "keep the Senedd informed through regular statements, debates, questions and... its own committee inquiries."¹⁸⁷

¹⁸² Correspondence: [19 June 2020](#), [19 June 2020](#), [7 July 2020](#), [23 July 2020](#)

¹⁸³ Correspondence: [23 July 2020](#)

¹⁸⁴ LJC Committee, RoP [73], 12 October 2020

¹⁸⁵ Correspondence: [7 July 2020](#)

¹⁸⁶ Welsh Government, [Inter-Institutional Relations Agreement between the Senedd and the Welsh Government, Annual Report 2019-2020](#), October 2020

¹⁸⁷ Correspondence: [26 November 2020](#)

216. The Lord Chancellor indicated to us that he looked forward to further engagement with our Committee and other Members of the Senedd in the months and years ahead.¹⁸⁸

Oversight of the justice system

217. The system of courts, tribunals and other bodies for resolving disputes in Wales is complex. Civil and administrative justice disputes are dealt with through the non-devolved county court, the Administrative Court in Wales, specialist devolved and non-devolved tribunals, and in other ways including via mediation or ombudsmen.

218. The Thomas Commission concluded there was a need for “a cohesive and coordinated system for all forms of dispute resolution” to make the system easier for the public to understand and use.

219. Dr Nason noted in her report for the Committee that the Senedd has “significant responsibility” to ensure that:

- administrative law develops in a clear, consistent and coherent manner;
- duties laid down are capable of performance by public bodies; and
- continuing post-legislative review of the impacts of new duties on public bodies, compliance rates and outcomes is conducted.

220. In her [briefing for the Senedd Research academic fellowship](#), Dr Nason also concluded that the Senedd should also take on responsibility for oversight of administrative justice in Wales and for developing an approach to scrutiny of redress mechanisms.

221. Evidence suggests that there are barriers to Senedd oversight of the justice system and scrutiny of redress mechanisms. For example, [Dr Nason’s research](#) on administrative justice highlights a lack of training for Senedd Members on administrative justice and redress mechanisms. Participants in the [focus groups](#) of legal professionals also raised concerns about limited engagement with the Senedd and Welsh Government during the legislative process.

¹⁸⁸ LJC Committee, RoP [78], 22 February 2021

222. The Thomas Commission noted that Welsh Bills passed by the Senedd made limited use of the Welsh Tribunals, instead often using the county court or the non-devolved tribunals.

223. We took evidence from the President of Welsh Tribunals – a first for a Senedd committee – on 13 July 2020.¹⁸⁹ We discussed the President’s annual reports for 2018-19 and 2019-20, including the President’s views on future reforms to the Welsh Tribunals, access to justice and the impact of the pandemic.

224. At the request of the Welsh Government, the Law Commission has now consulted on a set of provisional proposals for reform of the structure, procedures, appointments, appeals and complaints for the Welsh Tribunals. The consultation is intended to provide the evidence-base for a Welsh Tribunals Bill in the Sixth Senedd.

225. The Commissioner, Nicholas Paines QC, gave evidence to us on 22 February 2021, during which we discussed the Law Commission’s consultation and provisional proposals.¹⁹⁰

¹⁸⁹ LJC Committee, 13 July 2020

¹⁹⁰ LJC Committee, 22 February 2021